[2002] QCA 41

COURT OF APPEAL

DAVIES JA
McPHERSON JA
BYRNE J

CA No 292 of 2001

THE QUEEN

v.

GRAEME CHARLES CARNEY

BRISBANE

..DATE 20/02/2002

JUDGMENT

20022002 T4-5/JAP22 M/T COA 1/2002

McPHERSON JA: The applicant, who appears before the Court in person, pleaded guilty to three counts of defrauding the Commonwealth and one of obtaining property from the Commonwealth by deception contrary to the Crimes Act 1914 (Cth). He also pleaded guilty to seven counts of fraud and one of attempted fraud contrary to the Criminal Code. In addition, he pleaded guilty to three offences of failing to file tax returns and to three breaches of the Bail Act.

It is convenient to dispose of the last of those offences separately simply in order to focus on the wider purposes of this application. The sentence imposed in respect of each of them was imprisonment for 14 days. Under the Bail Act they must be cumulative each upon the other and also upon the sentences for the other offences. The applicant now says that on each of these occasions when he breached the conditions of his bail his failure to appear or to appear on time was due to the fault or mistake of his solicitor and that this was not explained to the learned sentencing Judge.

The fact is, however, that the applicant not only pleaded guilty to each of these three offences, but was present when his counsel made submissions about them to the Judge on sentencing. If there was anything to be said in mitigation, that was the time for it to be said and for the applicant to give instructions to ensure that it was said. Nothing of that kind was done. The case is not one where on appeal the Judge

can be said to have been wrong in imposing the sentences he did. If there is any substance in what the applicant now says, he should have brought it to the attention of the Judge at the sentence hearing. The Judge could not have taken it into account unless it was brought to his attention.

In respect of the Commonwealth offences, the applicant was sentenced to imprisonment for three years for the first count of defrauding the Commonwealth, and for three terms each of 18 months on the further two counts of defrauding the Commonwealth and the offence of obtaining property from the Commonwealth by deception. All of these four sentences were ordered to be served concurrently; but in respect of the first of them his Honour ordered that the applicant be released on recognisance after serving 18 months of the three year sentence imposed. Thus, for all four Commonwealth offences the period to be served by the applicant was designed to be 18 months in all.

There were eight State offences under the Criminal Code. The first four involved fraud or attempted fraud on the Suncorp Metway Bank. The remaining four were frauds committed on other businesses in Cairns or Mossman. The sentences imposed were imprisonment for two years in respect of each of the first four offences, and 12 months in respect of each of the second group of four offences, all to be served concurrently. That produced an effective sentence of two years as to which

the applicant has the prospect of being considered for parole at the statutory halfway mark. Overall, therefore, he has prospects of being released from prison in respect of all of these sentences after serving the concurrent period of 18 months under the Commonwealth sentences.

I now proceed to consider the sentences in the light of the particular offences for which they were imposed. They all arose directly or indirectly out of the failure of the applicant's business as a builder after he moved to north Queensland from Victoria in or before 1995. The first Commonwealth fraud offence involved what has been called PPS tax, meaning by that, it seems, Prescribed Payment Sums. As a building contractor the applicant became indebted to a total of some 29 subcontractors for work they had done over a period of time. He was required by law to deduct sums of tax from the amount so owing, which he did, and to remit those amounts to the Commonwealth, which he did not do, although he told the subcontractors, or some of them, that he had in fact done so. He concealed his default from the Commonwealth by making false statements about it in his own income tax returns. The total amount involved was some $96,921.00 and the offence was committed over the period between about January 1994 and October 1997.

The figure of $96,921.00 was the amount stated by counsel who prosecuted for the Commonwealth in his submission at the

sentencing hearing. At that hearing, the figure was not disputed by counsel for the applicant, but the applicant now says it should have been $45,000 and not $96,000. The difference of $50,000 is said to be accounted for by credits to which he claimed to be entitled for PPS tax paid by head-contractors on his behalf, which would or could have been applied in reduction of the amount of $96,921.00 that he failed to remit. Nothing of that kind was suggested at the sentencing hearing, where the total of $96,000 was accepted on both sides. Once again, the applicant is now, it would seem, attempting on appeal wholly or partly to resile from his pleas of guilty made in open Court by relying on a matter that was not raised at the hearing below. He has made no application to call fresh or new evidence or to set aside his guilty pleas, and, if he sought to do so, it seems to me to be extremely unlikely that he would succeed in satisfying the fairly stringent tests that the law imposes in order to do so.

The remaining three Commonwealth offences consisted of what are described as false claims made by the applicant on Centrelink. They involved his obtaining by deception from the Commonwealth a series of Centrelink payments, consisting of Job Search or New Start allowances and the like, amounting in total to some $12,000. They were obtained by falsely answering questions on some three or more occasions between January 1997 and July 2001 without disclosing income he was receiving at the time. Those constituted the other offences

of defrauding the Commonwealth and of obtaining property by deception, for which the applicant was sentenced to concurrent terms of 18 months imprisonment.

The applicant's complaint about this matter is that he says now that he had arrangements in place with Centrelink to repay the indebtedness gradually over a period of time, and that an amount of $500 had already been paid back in this way. The fact is, however, that if a person obtains money to which he is not entitled he becomes legally liable to pay it back without any agreement on his part to do so. If he is obtaining it in a way that involves the commission of a criminal offence, he becomes liable to criminal conviction and punishment as well. Agreeing to pay it back does not save him from that consequence. The applicant was therefore properly sentenced for fraud and for obtaining property by deception, even if, having been found out, he had agreed to repay the sum of $12,000, which he was bound to do in any event. Concurrent sentences of 18 months each for these three offences cannot properly be regarded as excessive, especially having regard to the total amount involved and the period over which the offences were committed. As well as that, it is evident that his Honour decided, as he was entitled to do, to show his disapproval of the overall criminality of the applicant's conduct by the particular sentence he imposed on the first Commonwealth offence. The other sentences for those offences therefore added nothing more to the duration of the head

sentence imposed on him for the first offence.

The other major series of offences were the State offences comprising a total of seven counts of dishonestly obtaining money or property and another of attempting to do so. The first three were committed against the Suncorp Metway Bank in March, May and June 2000. What the applicant did in those instances was to draw cheques on his own account at another bank and deposit them to the credit of an account with Suncorp Metway. Inevitably, the cheques were later dishonoured for lack of funds in his own account; but, by the time the credit entry with Suncorp Metway was reversed, he had already drawn the money out of that account. By this means he succeeded on three occasions in obtaining amounts totalling $32,000, which gave rise to three of the counts of dishonestly obtaining money from that source. When he tried it again on a fourth occasion, the process was intercepted, which is what gave rise to the count of attempting to obtain money dishonestly.

The other four State offences of this kind were perpetrated on business people in Cairns and Mossman between January and March 2001. They involved obtaining furniture from Super A Mart, tyres from Central Tyres in Mossman, and fuel from a petrol station in Clifton. In each instance the applicant paid for it with a cheque which was dishonoured as he must have known it would be. In the other instance (count 7) he received a genuine cheque in favour of himself or his business

for $1,700 which he altered to $4,700, and so obtained an extra $3,000 to which he had no right. The total involved in all of these transactions came to $37,934.

As to the State offences, the applicant in his written outline says that these "desperate measures" were resorted to when two named builders went bankrupt owing him almost $40,000. Subcontractors began harassing him and his family for payment, and his tools, plant and equipment were stolen.
The $32,000 fraudulently obtained from the Bank was, he says, used only to pay "people and suppliers". As regards dishonoured cheques given to the business people beginning with $2,000 to Super A Mart for furniture in January 2001, he told those to whom the cheques had been given that he would honour them as soon as the Sheraton Resort paid him a sum that was owing to him. On the expectation that the Sheraton Resort cheque would be credited to his bank account by a certain date, he says he drew cheques which were then dishonoured because the Sheraton Resort cheque was not forthcoming as he says it should have been. When that or another Sheraton Resort cheque was not provided as promised, he "in desperation" changed the amount of a cheque he had received from another source from $1,700 to $4,700.

The applicant's explanation is, in part at least, yet another attempt to provide explanations for his conduct that involves a repudiation of his pleas of guilty to those offences. For

reasons already given, it is too late for that now. His real problem is that his own debtors did not pay him (in an amount said at the hearing to be about $150,000), and he committed these offences against the Commonwealth, Suncorp Metway and the others in an effort to keep his business going and to pay his own creditors. That may explain, but it does not excuse, his conduct. It is not a defence to charges of committing criminal offences that one is owed money by others who do not pay. If it were a defence, everybody would rely upon it.

One has a natural and genuine sympathy for someone whose hard work is not paid on time or at all; but the applicant cannot use it to escape punishment for his criminal offences. In any event, the sentencing Judge was not unsympathetic to him. He said he gave the applicant credit for his pleas of guilty, and for his previous good character and productive life, by making his sentence somewhat shorter than it would otherwise have been; that is, three years instead of three and a half years that he would otherwise have imposed. As already noticed, his Honour also made a recognisance release order to take effect after half of the overall term of three years imprisonment had been served. The applicant takes umbrage at the sentencing Judge's description of his fraudulent conduct as "persistent". However, when account is taken of the fact that the offences cover a period from January 1994 to March 2001, and that they consisted of a variety of acts of deception of different kinds

during that period perpetrated on a number of different people or entities, it is difficult to see what there is to complain about in that description.

The applicant submits that the head sentence should be reduced to two years and the release date to six months on the ground that the sentence is out of proportion to the overall criminality of the applicant's conduct. I am unable to agree with this suggestion. His Honour was, I consider, justified in regarding the applicant's offending conduct as systematic or, as he described it, persistent.

The overall sentence is, to my mind, not excessive having regard to other sentences involving frauds on the Commonwealth and others in amounts of about the same size. In the result, in my opinion, the application for leave to appeal against sentence should be dismissed.

DAVIES JA: I agree.

BYRNE J: I agree.

McPHERSON JA: The order is the application for leave to appeal against sentence is dismissed.

MR RAFTER: Would your Honour mind if I just clarified one point that emerged in the course of your Honour's reasons for perhaps Mr Carney's benefit. I think in giving your Honour's

reasons your Honour mentioned a part of the applicant's written submissions at page 4 relating to the $50,000 that he had himself paid to the Tax Department or something of that nature.

McPHERSON JA: Yes.

MR RAFTER: And the way in which he put that in the written submission was that the $96,000 odd should have been reduced by $50,000. Now, the point was mentioned below by the Crown Prosecutor at page 21, but it was put in this way that he had credits with the Tax Department as a result of moneys due to him from head contractors having deducted from such amounts PPS payments and being remitted to the Tax Department so he'd built up a credit of $50,000. That didn't affect the $96,000 in the sense of the charge of defrauding the Commonwealth. What it would do, of course, if he was being pursued through the civil Courts for a judgment he'd be entitled to set-off the $50,000 that had been deducted.

McPHERSON JA: Yes. I had the impression from reading from what Mr Henry or perhaps it was from what the applicant said, that he somehow had a personal tax credit which he was entitled to call upon, but that's not so, I gather.

MR RAFTER: Well, the way the Judge seemed to put it at page 21 about line 20 was this - and the Prosecutor said this was his understanding of it. There were head contractors, if you like, deducting PPS payments from the remuneration owed to him and they were remitted to the Taxation Officer. The Prosecutor said, "That's my understanding of it". And I don't think there was any elaboration of that from the defence counsel.

McPHERSON JA: I don't know what the system is, whether in those circumstances you could set those credits, as they would be, I guess-----

MR RAFTER: Well, the Prosecutor below was content to accept that but maintained the position, of course, that the applicant's own crime of failing to remit was in the sum of $96,000. That wasn't contested. So I just thought I should clarify that in case there's some confusion with-----

McPHERSON JA: Thanks. I probably won't alter the reasons, but-----

MR RAFTER: No.

McPHERSON JA: -----take account of what you've said. One of the problems that the applicant seems to have had is the notion that if he could come to an arrangement with the tax people about paying things he was not then going to be

prosecuted, but that's not so. One has a civil liability and a criminal responsibility arising out of the same acts. Thank you for that, Mr Rafter.

McPHERSON JA: The order of the Court will be as I have stated. The application for leave to appeal against sentence is dismissed.
