[2002] QCA 44

COURT OF APPEAL

McMURDO P
THOMAS JA
WILLIAMS JA

CA No 340 of 2001

THE QUEEN

v.

GEOFFREY THOMAS DACK Applicant

BRISBANE

..DATE 20/02/2002

JUDGMENT

20022002 T13/LZG14 M/T COA21/2002

THE PRESIDENT: This is an application for an extension of time within which to appeal against sentence. The applicant and his co-accused Real both pleaded guilty to charges of torture and robbery in company. The applicant was sentenced to an effective term of eight years' imprisonment with a recommendation for parole after three years. Real was sentenced to an effective term of imprisonment of six years with a recommendation for release on parole after serving two years.

Real successfully appealed against his sentence and an effective sentence of five years' imprisonment suspended after serving two years with an operational period of four years was substituted (see R v. Real [2001] QCA 422 CA No 92 of 2001, 5 October 2001).

The applicant claims the effect of Real's successful appeal has the result that there is a marked disparity between he and Real in that the applicant has little or no prospect of release from prison for some years despite his parole recommendation under the present parole regime whilst his co-accused is certain to be released after two years' imprisonment.

This disparity only came into existence upon Real's successful appeal, which was delivered towards the end of last year.

This application was filed on 30 November 2001. Although the applicant has given no sworn explanation for the delay this seems to be the primary cause for the delay in filing the application for leave to appeal.

The offences occurred in this way. Real befriended the complainant and they jointly hired a caravan in Gympie. About a week later the applicant met up with Real, who introduced him to the complainant. About 9 p.m. the three went to a hotel at Gympie to drink. The complainant became involved in a dispute and returned to the caravan. Later the applicant and Real joined him and a heated argument ensued resulting in the commission of these offences.

The details of the offences are set out in this Court's judgments in R v. Real at [8] to [14]. I will repeat only those necessary to outline the role of each offender and the seriousness of the offences. Real took the complainant's wallet and demanded his pin number. Unbeknown to Real the applicant took a knife from a cupboard; he cut the complainant's nose, causing extensive bleeding. The applicant then made threats and abusive comments towards the complainant, calling him a dog and causing the complainant to lick up his own blood. Joint acts of violence included burning the complainant with a lighted cigarette, hurting the complainant's ear with a fish hook and locking him in a

cupboard. The complainant was an asthma sufferer. The offenders forced his mouth open and sprayed in a large amount of asthma spray. Other acts of violence included threatening the complainant with a knife and cutting him on the back of the head, poking a pin into his left eye, tying his wrists with fishing line which was later burnt off, and threatening to maim or kill him if the pin provided was incorrect or if he complained to the authorities.

The complainant fortunately recovered from his physical injuries which included lacerations requiring suturing, welts, burns and a subconjunctival haemorrhage to his left eye. His psychological damage has not surprisingly lasted longer. He has had interrupted sleep patterns, a fear of living on his own and difficulty in personal relationships.

In Real, this Court held that there was no basis for distinguishing between the conduct of Real and this applicant during the offences, and I respectfully agree with that observation. After reviewing the cases of R v. Ambrose, CA No 5 of 1995 21 March 1995, R v. Burns [2000] QCA 201 CA No 399 of 1999, 30 May 2000 and R v. Brown [2000] QCA 110 CA No 379 of 1999, 4 April 2000, the Court concluded that the sentences imposed on Real and this applicant were "quite high" for conduct which was frightening for the complainant, did not continue for an extended period and did not produce any

lasting injuries.

The Court noted that Real was 26 years old whilst this applicant was 32 years old and that Real's criminal history, though extensive, was less serious than this applicant's. Real had not been sentenced to a term of imprisonment before his sentence on these offences. On the other hand, the applicant had an extensive criminal history.

I will set it out in some detail. It commenced at Queensland in 1993 with drug offences. Later that year the applicant was sentenced to an effective term of imprisonment of six months for a number of offences of violence, including serious assault on a police officer. He was convicted of wilful damage to property in 1994 and in 1995 of receiving and further drug offences. In 1997 he was convicted of more drug offences and of possession of implements of housebreaking. In 1998 he was convicted of still more drug offences but also, and more significantly, of an offence of serious assault for which he was sentenced to nine months' imprisonment. Later that year he was convicted of further property offences. On 25 July 2000 he was sentenced in the Gympie District Court to 18 months' imprisonment for a number of offences, including property offences and assault occasioning bodily harm whilst armed or pretending to be armed. He was on bail for those offences when he committed this offence. He had served four

months of that 18 months sentence when he was sentenced to these concurrent sentences.

In addition to his Queensland criminal history he has an extensive criminal history in Victoria commencing in 1982 when he was a child. This included many offences of dishonesty and violence, including robbery. His criminal history in Victoria continued as an adult and he was convicted of offences of dishonesty and offences of violence for which he was sentenced to terms of imprisonment for up to six months.

His criminal history is extensive and includes convictions for offences of violence.

The Court in Real concluded that parity considerations and the level of criminality in the conduct of the offenders required the head sentence to be reduced to five years' imprisonment suspended after serving two years with an operational period of four years.

With respect, the conclusion, that parity considerations warranted a more lenient approach to Real than this applicant because of this applicant's greater maturity and far more serious criminal history, was plainly correct.

The only question here then for this Court to determine is

whether this applicant's sentence in the light of Real's adjusted sentence and this Court's comments in Real was manifestly excessive.

It should be noted that the fact that this applicant's parole recommendation may not be acted upon by the Corrective Services authorities is not something which this Court can consider in determining whether the sentence is manifestly excessive.

The comparable sentences referred to earlier and the additional comparable sentences of Edwards [2001] QCA 366 CA No 173 of 2001, 5 September 2001, R v. Kelly, Baker and Perry [1991] CCA 198, CCA Nos 144, 155 & 147 of 1991, 27 August 1991, and R v. Coleman [1994] QCA 170, CA No 343 of 1995, 21 April 1994 suggest that, despite the seriousness of these offences and the applicant's bad criminal history, a head sentence of eight years' imprisonment for this applicant was manifestly excessive, bearing in mind his guilty plea.

The applicant has given some explanation for his delay in filing the application for leave to appeal against sentence, namely, that he became aware of his prospects of appeal only after his co-accused's sentence was reduced on appeal. A review of the comparable sentences indicates that the sentence imposed here was manifestly excessive. For those reasons I

would allow the application for an extension of time within which to apply for leave to appeal against sentence, allow the application for leave to appeal and allow the appeal to the extent of substituting a sentence of seven years' imprisonment for the eight years imposed at first instance. I would otherwise confirm the sentence imposed below.

THOMAS JA: I agree. I think that the head sentence of eight years was too high. I also think that the present situation under which Real, who was equally to blame, has a sentence of five years suspended after two years and the applicant has a sentence of eight years with the right to consideration of parole after three years certainly raises a question of parity. I do not think that the difference in antecedents justifies quite such a differential as presently exists. I therefore concur in the order which reduces the head sentence from eight years to seven years on both grounds. It seems to me that the Court of Appeal in Real's case left open the question whether its order opened up a question of parity and/or of excessiveness in the case of the present applicant. I agree with the orders that the President proposes.

WILLIAMS JA: I agree.

THE PRESIDENT: The orders are as I have outlined.
