[2002] QCA 75

COURT OF APPEAL

McMURDO P
WILLIAMS JA
MUIR J

CA No 337 of 2001

THE QUEEN

v.

GRAHAM TRAVIS PAYNE

BRISBANE

..DATE 14/03/2002

JUDGMENT

MUIR J: The applicant seeks leave to appeal against a sentence of three years' imprisonment suspended after nine months with an operational period of five years imposed by a Judge of the District Court in Ipswich on 21 November 2001 for the following five offences to which the applicant pleaded guilty: Count 1 breaking, entering and stealing; Count 2 assisting one Gabriel Lacey who, to his knowledge, was guilty of the crime of unlawfully setting fire to two motor vehicles to enable her to escape punishment; Count 3 robbery whilst armed with a knife and syringe and in company; Count 4 entering premises with intent to commit an indictable offence.

The remaining offence, on a separate indictment, was robbery whilst armed and in company.

The proposed ground of appeal is that the sentence was manifestly excessive. The applicant, a single unemployed male with no previous criminal convictions, was 23 years of age at the time of the offences.

The circumstances relating to Counts 1 and 2 are as follows. On 27 June 2001, the applicant and a friend, Lacey, drove in the applicant's car to a shed in a suburb of Ipswich owned by a friend of the applicant. A wire fence surrounding the premises was pushed open by Lacey using the applicant's car and the padlock door of the shed was forced.

The applicant and Lacey took some tools from the shed. Lacey, annoyed at failing in an attempt to remove the wheels from one of the two vehicles in the shed, threw some paint onto the roof of one of the vehicles. The applicant indicated that it was time to leave whereupon Lacey said that she was going to "light up the vehicles" and proceeded to make good her threat.

They then left the premises and drove off in the applicant's car. The applicant handed most of the tools over to police when he voluntarily attended at a police station on 24 September 2001 and made a statement.

As for Count 3, the applicant and Lacey entered a service station convenience store at about 10.40 p.m. on 3 July 2001. They were both wearing woollen headwear and were further disguised by material wrapped around their heads. The applicant had purchased the headwear at Lacey's request earlier that day. He carried a knife whilst Lacey carried a syringe which had been filled, by Lacey, with the applicant's blood. The two with their respective weapons displayed, demanded that the console operator open the safe. He declined and the applicant and Lacey took the drawer of the till and some cigarettes and left. I should mention that Lacey retained all of the $465 taken from the service station.

Count 4 is relatively minor. On 24 September 2001, the applicant and Lacey broke into a garage looking for a piece of equipment for Lacey. They did not find what they were seeking

and left.

At 4.15 a.m. on 7 July 2001, Lacey and a person named Young entered a service station premises at Ipswich wearing masks. Young was armed with a knife and demanded money. The console operator of whom the demand was made threw an object at Young and Lacey. They were not distracted by this and the operator gave them a till containing $276.45 which they took away.

Police responding to a call from the operator, stopped a car driven by the applicant in which Young and Lacey were passengers. They found the stolen moneys, a knife and two masks. The applicant acknowledged to police that he saw Young and Lacey put on masks, go into the service station and come out. He then drove them away. Those are the facts relating to the count on the separate indictment.

Young, who had a previous criminal record, was sentenced to three years' imprisonment for the latter offence with a recommendation that he be considered eligible for parole after serving 12 months.

In a report dated 15 November 2001, a forensic psychologist expressed the opinion that tests administered by him to the applicant, "paint a picture of him as a simpleton with few friends who relies on the support of his parents and close friends. His low IQ renders him vulnerable to exploitation and suggestibility and has long-standing anxiety disorder and

presents a low risk of re-offending as long as he is supervised and engaged in lawful and appropriate activities."

He noted that the applicant had been assessed as meeting the criteria for a disability support pension. I observe that there is no suggestion that Young was of limited intellect.

The sentencing Judge accepted that Lacey was the main motivator in relation to the offences and that they were committed whilst he was under Lacey's influence. She also made reference in her sentencing remarks to his mild intellectual disability which made him vulnerable to exploitation.

Mr Guttridge, who appears for the applicant, submits that the sentences imposed were manifestly excessive having regard to a combination of the applicant's: (a) cooperation with authorities which included the voluntary disclosure of offences which may have remained unsolved without the applicant's confession; (b) lack of criminal history; (c) age and previous good character; (d) remorse demonstrated by his pleas of guilty and cooperation; and (e) limited intellect and susceptibility to influence and exploitation.

He also relies on the fact that the applicant acted under Lacey's influence and the unlikelihood of his re-offending. Mr Guttridge submits that the sentencing Judge misapprehended the extent of the applicant's intellectual disability and

that, in the circumstances, the sentence should not have included any period of actual custody.

All of the matters raised by Mr Guttridge have substance and are relevant to the exercise of the sentencing discretion. The first matter relied on is of limited significance in relation to the 7 July robbery, after which the respondent was apprehended by police in the circumstances mentioned earlier.

As Mr Guttridge points out however, the applicant may never have been charged with the other offences were it not for his confession. Confessions of that nature deserve particular recognition.

Ms Bain, who appears for the Crown, submits that, in the absence of such mitigating circumstances, a term of imprisonment of between five and eight years would have been warranted. She submits that sufficient allowance was made by the sentence imposed particularly as it was suspended after nine months.

...

(Another consideration taken into account by the trial judge was then discussed.)

MUIR J: As I have already said all of the matters relied on by Mr Gutteridge are significant in the exercise of the

sentencing discretion; some more so than others. When they are considered in combination it is difficult to resist the conclusion that insufficient regard was had to them.

I would allow the application for leave to appeal, set aside the sentence appealed against and substitute a sentence of two years' imprisonment suspended after six months with an operational period of three years.

THE PRESIDENT: I agree.

WILLIAMS JA: I agree.

THE PRESIDENT: The order is as outlined by Mr Justice Muir.
