[2002] QCA 101

COURT OF APPEAL

McPHERSON JA
WHITE J
HOLMES J

CA No 35 of 2002

THE QUEEN

v.

PAUL DAVID BROOKER

BRISBANE

..DATE 20/03/2002

JUDGMENT

McPHERSON JA: The applicant pleaded guilty to count 1, possession of dangerous drugs namely cannabis sativa and methylamphetamine in a quantity exceeding two grams. In fact, it was an amount of over four grams. In respect of that offence he was sentenced to a term of six months' imprisonment. He also pleaded guilty to count 2, possession of instructions for producing a dangerous drug namely methylamphetamine. In respect of that offence he was sentenced to imprisonment for three months.

And he further pleaded guilty to a summary offence of possession of a utensil for use in connection with drugs. Again, the sentence in respect of that offence was imprisonment for three months. The sentences were to be served concurrently, producing, in the end, an effective sentence of six months imprisonment. It was specifically not contended that the sentence of six months was excessive, nor was it contended that a custodial sentence was inappropriate in the case.

What was submitted by Mr Nolan was that the applicant ought to have had his sentence suspended. Now, there were reasons, no doubt, both for and against such a course. The reasons for it were that the applicant has a family who were dependent on him, and at the time in question he had employment. One does not, of course, rush to interfere with a state of affairs like that.

On the other hand, the applicant had a not inconsiderable criminal record going back some time in the past for offences including, for example, three previous convictions for possession of cannabis, offences of dishonesty, and motor vehicle or traffic related offences. In the course of sustaining these convictions the applicant had been given the benefit of probation, which he breached, and also the benefit of community service orders in the past, as well as two suspended sentences both of which were also breached.

Indeed, the offence or offences the subject of this application for leave to appeal were committed during the currency of an operative period for the sentence which was suspended. That is the last entry on his criminal record. On 7 April 2001 he was dealt with for a number of traffic matters that do not appear on the criminal history. Those convictions or offences activated the suspended sentence in respect of that last entry. Hence, at the time the matter came before the learned Judge of the Supreme Court, resulting in the sentence in this matter, the suspended sentences had already been activated by the commission of or conviction for those subsequent offences.

Mr Nolan's submission is that it was because of this that the Judge somehow felt compelled to refuse to suspend the sentences that he was imposing, and in that way, I suppose, it would be said he wrongly bound his discretion. For my part, I can see no indication at all in what his Honour said on

imposing the sentence, or even in the course of argument if it were relevant, to suggest that his Honour acted in that way.

When an offender has already been given the benefit of more lenient forms of treatment, such as probation or suspended sentences, and has breached them, it becomes a serious question for a Judge whether he or she should offer further opportunities of the same kind to that offender. The obvious argument against it is that he or she may treat those privileges in much the same fashion as he has done in the past.

There is, as I have said, no suggestion in this instance that his Honour bound his discretion in that fashion. He approached the question of sentencing in this case in the conventional way, and, indeed, in the course of his sentencing remarks, he said this:

> "Notwithstanding the resource savings associated with the plea of guilty, in view of your prior criminal history, your age - you were 32 when the offences were committed - and despite the considerations that you have two young children and a job to go to, I consider that the appropriate sentence is a custodial one".

It was not, as I understood it, submitted here that a custodial sentence was inappropriate. In consequence, no error can be found in his Honour's reasoning or in his disposition of the matter now before us such as to suggest that we should intervene to set aside the sentence and impose some other form of punishment.

In the result, I would dismiss the application for leave to appeal against sentence.

WHITE J: Mr Nolan submitted for a two stage process when the sentencing Court is considering whether to impose a term of imprisonment on an offender. The first is to make the decision that such a penalty is appropriate in accordance with the principles dictated by section 9(2) of the Penalties and Sentences Act. The second stage, he submitted, is positively to consider whether to suspend, in part or entirely, a sentence of imprisonment.

Without passing conclusively on it I would mention that section 144(4) of the Penalties and Sentences Act, appearing in part 8 of that Act dealing with orders of suspended imprisonment, provides, in a sense, the opposite emphasis to that which Mr Nolan would have the Court accept. It provides,

> "A Court must not suspend a term of imprisonment if it is satisfied, having regard to the provisions of this Act, that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed".

I agree with the orders and reasons of the learned presiding Judge.

HOLMES J: I agree with both the reasons and the results arrived at by Mr Justice McPherson and Justice White.

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