[2002] QCA 144

COURT OF APPEAL

DAVIES JA
WILLIAMS JA
FRYBERG J

CA No 27 of 2002

THE QUEEN

v.

ROHAN MARK TILLEY Respondent

and

ATTORNEY-GENERAL OF QUEENSLAND Appellant

BRISBANE

..DATE 19/04/2002

JUDGMENT

DAVIES JA: This is an Attorney-General's appeal against an effective sentence of eight years imprisonment with a declaration that the offender was a serious violent offender for four counts of armed robbery, five of armed robbery with personal violence, one of fraud and one of wounding.

A sentence was imposed in the District Court upon the respondent's plea of guilty on 21 December 2001 and the offences were committed between 9 December 2000 and 27 December 2000. At the time of commission of these offences the respondent was 34 years of age and was 35 at the time of sentence.

The respondent has a criminal history which includes a substantial number of minor offences. He has however two convictions which are relevant in different ways to the appropriate sentence in this case. The first is a conviction in South Australia on 8 November 1990 on five counts of rape involving two victims. He was there sentenced to a term of 11 years 11 months. He was apparently legally at large in respect of those offences, and not on parole, at the time of the commission of the subject offences. These offences are relevant because they are his only prior offences involving violence, and for that reason should be taken into account in the consideration of the appropriate sentence.

The other relevant conviction is one on 18 September 2000 in the District Court at Brisbane for offences of receiving

property obtained by a crime and attempting to dishonestly obtain property for another in respect to which he was sentenced to two years probation. He had served only three months of that probation when he committed the subject offences.

These offences were, in substance, nine robberies committed over 11 days. They were committed on convenience stores and service stations. On each occasion the respondent was armed with a knife or a screwdriver. On five of them he used personal violence and in one of those the victim was injured when he grabbed the respondent's knife to stop himself being hurt and suffered quite serious injuries to his hand.

On each occasion the respondent's behaviour and language was threatening including, in some cases, the making of death threats. Pre-planning was involved, including obscuring the number plates of the getaway vehicle, wearing a stocking mask and having an accomplice check the target store for the presence of other customers before he robbed it. Two of his offences were committed against the same target store.

Unsurprisingly a number of the complainants, one of whom was 68 years of age, others of whom were quite young, appear to have suffered some psychological damage as a result of the respondent's conduct, although it is unclear how much. No victim impact statements were put before the Court. The robberies in all yielded only a little over $4000, none of

which appears to have been recovered.

The respondent is a heroin addict and the motive for the robberies was to obtain money to purchase heroin. The learned sentencing judge said in sentencing the respondent that he had had a medical condition from a young age, and from that he inferred that the heroin addiction had stemmed. Consequently he thought it proper to take into account this history and concluded that he was not in the same category as a heroin user who did not have this background and who uses heroin merely for his own pleasure.

His Honour's finding in this respect appears to be based on a report of a psychologist who obtained a medical history from the respondent. It is true that the psychologist had some other documents before him, but the report is based substantially on what the respondent told him. It recorded that, at the age of eight, the respondent suffered damage to his upper spine in a fall and that this had caused permanent disability and intermittent pain ever since. The report said that this, in conjunction with emotional and psychological duress, resulted in his use of illicit drugs to assist in the pain management as well as coping with emotional stress. It appears from this report that the use of illicit drugs commenced some time after 1996. This history does not appear to be entirely consistent with a report from the QEII hospital health service to which the respondent was referred for assessment of his heroin dependence on 12 October 1998. That

report recorded that the respondent had a history of chronic low back pain since 1992 to 1993 and that he had first used morphine tablets for six years but had reported minimal heroin use about four years previously; that is, presumably, in 1994. He had been registered on a methadone program in September 1996. However, not too much should be made of these apparent inconsistencies. Histories taken in medical reports are often for various reasons inaccurate. I think it should now be accepted, as his Honour did, that the commencement of his heroin use was in some way to alleviate his back pain and emotional problems and that his dependency followed. His Honour was therefore correct in treating this as a relevant matter, although in my view it was not of great significance. On the other hand the appellant is correct in pointing out that the respondent's rape convictions proved him to have been a violent offender before he appears to have become addicted to heroin.

Two other mitigating factors relied on by the trial judge in imposing the sentence which he did are the degree of the respondent's cooperation with the police and his prospects of rehabilitation.

As to the extent of the respondent's cooperation, his Honour described it as "of a very high order". There was a difference, to which his Honour pointed, between the Crown and the defence in relation to this. However the difference does not appear to have been a substantial difference and it is

true it seems on the evidence that some of the respondent's convictions were the result only of confessions which he made. However, for some of the convictions there was plainly evidence to convict him before he had made any confessions.

His Honour's somewhat optimistic view of the respondent's prospects of rehabilitation appears also to be based on the psychologist's report to which I have referred, and also apparently on the respondent's exemplary conduct since he has been in prison. It may be fair to say that if he can remain drug free his prospects of rehabilitation are reasonable. But the prospects of a heroin addict ridding himself of his addiction are never statistically high and there is nothing in the psychologist's report which would indicate that he is exceptional in this respect. On the contrary, by the end of 2001, he had been addicted to heroin since, at the latest, 1998, and that might lead one to think that he has found it difficult to overcome his addiction. Moreover it appears that he had previously attempted to overcome this addiction, having gone on a methadone program which appears to have failed, and as was pointed out by Mr Martin in this Court, he committed these offences whilst he was on probation. Consequently, I would be a little more sceptical about the respondent's prospects of rehabilitation than his Honour was, and as was pointed out during the course of argument, the psychologist's report which appears in other ways to be very favourably slanted towards the respondent was somewhat circumspect in that respect.

The respondent's counsel submitted to the learned primary judge that the appropriate sentence was six to seven years imprisonment with a declaration that the offences of armed robbery were serious violent offences. The appellant's counsel submitted for a range of 12 to 15 years before taking into account the mitigating factors and, with those, that it could not be less than 10 years imprisonment. His Honour plainly adopted a sentence at the lower end of that very wide range.

A number of cases were referred to us as comparable. R v. Matthewson [2001] QCA 4 was referred to us by both sides and is at least in some respects closely comparable. There, the applicant was sentenced in respect of eight offences of armed robbery, two of which were aggravated because they were committed in company. There was also one offence of attempted armed robbery in company. For those he was sentenced to 10 years imprisonment. There were other less serious offences for which he was also sentenced but for lesser terms. The robberies like those here were committed mainly on convenience stores. As in this case a knife was used. The applicant there also pleaded guilty at the earliest opportunity and he made full admissions, although they did not extend to naming all of those with whom he had associated in committing offences. The offences in R v. Matthewson were also committed within a short time of release from prison and some were committed whilst on bail. Similar sentences to R v. Matthewson were imposed in two other decisions which came to

this Court and they were R v. McDonald [2001] QCA 238 and Crossley (1999) 106 A Crim R 80.

Then in 2002, this Court decided R v. Keating [2002] QCA 19 upon which the respondent represented by Mr Moynihan relied in submitting that the sentence imposed in this case was appropriate or at least within range. Keating was a much younger man, 23 years of age, a transsexual with a serious heroin addiction. His offences, which consisted of seven armed robberies and two of attempted robbery, were committed with the aid of a syringe apparently filled with blood. They yielded about $5000 or so and like these offences here, they were committed over a short period. Sentences of eight years imprisonment were imposed in respect of the robbery and armed robbery offences by the sentencing Judge. The victims were mostly young people and they were understandably, as were the victims here, psychologically affected by the robbery.

This case is different from R v. Keating in two respects, as Mr Martin pointed out. First is that there was no actual physical injury inflicted, although threatening words were used on various occasions, and the second is that although the applicant in that case was described as having a fairly lengthy criminal history, it was one involving minor offences only, certainly none involving violence. This Court in that case said that the appropriate range of sentences in such a case was between eight and 10 years, although as the Court recognised, some cases suggested that a higher sentence was

possible, and they went on to refer to R v. Matthewson, R v. McDonald and Crossley as supporting sentences in the range of 10 years and perhaps more, even after an early plea of guilty.

R v. Keating is of some significance, because it is in the end a sentence imposed by this Court, because the Court did in fact interfere because of a matter, which is not relevant here, to reduce the sentence for a period which had previously been served which had not been taken into account by the learned sentencing Judge.

This case in my opinion is closer to those in R v. Matthewson, R v. McDonald and Crossley than it is to R v. Keating and it is a case in which, in my view, a sentence of 10 years imposed after allowing for the mitigating factors to which I have referred would have been at about the bottom end of the range. For that reason it seems to me that a sentence of eight years imprisonment was manifestly inadequate.

I would for that reason allow the appeal and set aside the sentence imposed below and substitute in lieu a sentence of 10 years imprisonment for each of the armed robberies. I would leave the sentences which were imposed by the learned primary judge in respect of the other offences.

There was also a declaration as to time and custody which I would also leave.

WILLIAMS JA: There are four features of this case which in my view indicate that a sentence of 10 years' imprisonment for the offences of armed robbery and armed robbery with personal violence was appropriate. Those features are:

(1) The criminal history of the respondent including a conviction for five rapes, for which a sentence of 11 years' imprisonment was imposed;

(2) The number of serious offences committed over a short period of time;

(3) Actual injury was inflicted on one occasion; and

(4) That on the 18th September 2000, the respondent had been placed on probation for a period of three years and the first of the armed robberies in question took place on 9 December 2000.

In my view, the circumstances of this case make it comparable with the decisions of this Court in Matthewson CA 226 of 2000, McDonald, CA 46 of 2001 and Crossley (1999) 106 Australian Criminal Reports 80.

In my view the decision in Keating, 2002 QCA19 can be distinguished because of the age of the offender there, his less significant criminal history and the fact that no actual physical violence was used in any of the offences.

I agree with what has been said by Justice Davies and I would order that the appeal be allowed to the extent of substituting imprisonment for 10 years with respect to the sentences for armed robbery and armed robbery with personal violence. Otherwise the orders of the sentencing Judge, including the declarations, should stand.

FRYBERG J: I agree with the reasons for judgment of both of my colleagues. I would add only that on 8 September 2000 when the respondent was given probation by Judge Healy on other offences, his Honour said that he thought every assistance should be given to the respondent because he was in the process of addressing a serious drug problem. It seems that that attempt was a failure.

DAVIES JA: The orders are:

> Appeal allowed;
>
> The sentence in respect of the four armed robberies and the five armed robberies with personal violence are set aside and in lieu, in respect of each of those sentences, a sentence of 10 years' imprisonment is imposed with a declaration in each case that the offence is a serious violent offence;
>
> The declaration in relation to count 7 is set aside.

The sentences imposed below in respect of the other offences remain, as does the declaration with respect to time and custody.

...
