[2002] QCA 29

COURT OF APPEAL

de JERSEY CJ
WILLIAMS JA
DOUGLAS J

CA No 130 of 2001

THE QUEEN

v.

SCOTT WILLIAM DAVIES Applicant

BRISBANE

..DATE 15/02/2002

JUDGMENT

THE CHIEF JUSTICE: The applicant pleaded guilty in the District Court to three offences committed at Townsville on 22 November 1998: entering premises with intent to commit an indictable offence, common assault and the unlawful use of a motor vehicle.

The offences were committed in the following circumstances. The applicant and another man referred to only by the Christian name James went together to the home of one Michael Lafferty. Lafferty owed the applicant approximately $2000. The applicant's purpose was to obtain payment. Lafferty was not home. His de facto wife Ms Pery was present. Ms Pery told the applicant that he should come back later. The applicant knew that Lafferty owned a motor cycle. He told Ms Pery in substance that he was intending to take the cycle as security for payment of the debt.

Against Ms Pery's protests, the applicant, together with the person James, removed the cycle from the garage. There was a scuffle in which the applicant assaulted Ms Pery. The person James alone then drove the cycle from the premises. The applicant did not see it again. It was located in badly damaged condition in bushland the following month.

According to information put before the learned sentencing Judge, Lafferty purchased the cycle in wrecked condition in 1997, paying $2500 for it. He spent approximately $4500 repairing it. The retail market value in late 1998 of such a

cycle, being a 1994 X600 Honda Enduro, was approximately $5000. After recovering the wrecked cycle, Lafferty sold it for $1500.

The learned Judge ordered under section 35 subsection 1 paragraph c of the Penalties & Sentences Act that the applicant pay $3500 compensation to Lafferty within 18 months. The application for leave to appeal against sentence relates only to that order. The Judge calculated the amount of $3500 by adding the purchase price of $2500 and the amount of $4500 spent on repairs, then subtracting the amount recovered, $1500, and the $2000 concededly owing to the applicant.

When the application last came before the Court on 5 November 2001, the Court was provided with a written statement by the applicant and a supporting statement from his mother. The applicant indicated that he did not wish to be heard further. Because the Court considered that Lafferty should be afforded an opportunity to be heard in respect of any proposed expunging of the compensation order or reduction in its amount, the application had then to be adjourned. Lafferty had since indicated that he, likewise, does not wish to be heard further.

There was on that last occasion, in addition, limited material from Lafferty which suggested that the amount ordered in respect of compensation had in fact been a matter of agreement between the Prosecutor and defence counsel who appeared before

the learned Judge. The Court then also considered that aspect should be explored with counsel before the determination of the application.

Material has not been forthcoming from the Prosecutor despite requests, though the then defence counsel, Mr Lynham, has sworn an affidavit countering Lafferty's claim of agreement. The way the matter was argued before the sentencing Judge was completely inconsistent with any suggestion of the amount having been agreed.

The application should therefore proceed today, albeit that only the Director of Public Prosecutions is represented in person before the Court. We have, needless to say, carefully considered all of the written material.

The submissions made to the learned sentencing Judge covered both the question whether any compensation should be ordered, and if so, as to the amount. As to the former matter, raised in the context of Ferrari (1997) 2 Queensland Reports 472 and Schemmell v. Pomeroy (1989) 50 South Australian State Reports 450, the Judge took the view that even though the damage to the cycle was the direct result of the actions of James, it would not have occurred but for the earlier taking of the cycle in which the applicant was immediately involved.

The damaging of the cycle, he considered, was a foreseeable consequence of the taking and James' driving off in all the

circumstances of the case. The feature that the applicant was the prime participant in the taking of the cycle from the garage, precedent to James' driving it from the house and damaging it, is sufficient to distinguish this case from Ferrari, and to justify the ordering of compensation.

The amount of the compensation ordered is however excessive to an extent warranting adjustment. The Court cannot reliably approach the assessment of compensation in a case like this on a purely arithmetical, precise basis. For a start, some of the amounts put before the Judge were said to be approximate. In addition, what is in this case fair compensation should to a degree reflect the circumstance that the applicant was not personally involved in the damaging of the vehicle even though the basis for ordering compensation against him has in law been established.

The most reliable approach is to work from $5000 as the established market value of such a cycle and deduct the amount recovered, $1500, and $2000 as the approximate amount of the offsetting debt. Some consideration may be allowed for the circumstance that the cycle was apparently restored with some elaborateness, suggesting the particular cycle may have been worth more than $5000, but on the other hand, some reduction should be contemplated to reflect the applicant's not having been directly responsible for the damaging of the vehicle.

The amount which should fairly have been ordered in respect of

compensation on the basis of this necessarily imprecise approach should in my view be set at $2000. The difference between that amount and the amount actually ordered, $3500, is sufficient to warrant adjustment on appeal.

I would allow the application for leave to appeal against sentence to the extent of varying the order made with respect to compensation by deleting the amount of $3500 and substituting the amount of $2000.

The orders made in the District Court on 30 April 2001 should in all other respects remain unaltered.

WILLIAMS JA: I agree.

DOUGLAS J: I agree.

THE CHIEF JUSTICE: Orders as I have indicated.
