[2002] QCA 180

COURT OF APPEAL

McPHERSON JA
MACKENZIE J
ATKINSON J

CA No 40 of 2002

THE QUEEN

v.

JAY LESLIE BRISKEY

BRISBANE

..DATE 29/05/2002

JUDGMENT

ATKINSON J: This is an application for leave to appeal against sentence by Jay Leslie Briskey. The sentence imposed was 12 months' imprisonment, to be served as an intensive correction order. The offence for which that sentence was imposed was unlawful use of a motor vehicle.

In order to determine whether or not the sentence is manifestly excessive, it is necessary to look at the history of this matter.

The applicant was originally charged that on 16 July 1999 in Pittsworth in the State of Queensland, he unlawfully used a motor vehicle, namely, a Mercedes E320 Avangarde sedan motor vehicle without the consent of Lionel Ralph Douglas Moore, the person in lawful possession of it. Mr Moore is the applicant's stepfather.

On 20 December 1999, the applicant pleaded guilty on an ex officio indictment to that count of unlawful use of a motor vehicle. Two summary offences, being one count of driving whilst under the influence of liquor, and one count of driving without due care and attention, were dealt with at the same time.

On each count, he was sentenced to a period of probation of three years, 75 hours community service, and he was disqualified from holding or obtaining a driver's licence for a period of 12 months.

The sentencing Judge imposed a special condition that the applicant "shall, not might, be brought before me if you commit any indictable offence or any serious simple offence during the currency of the order".

The general requirements of a probation order are set out in section 93 of the Penalties and Sentences Act ("the Act"), and of a community service order, in section 103 of the Act. Additional requirements that may be contained in a probation order are set out in section 94 of the Act.

There does not appear to be any statutory authority for the additional requirement imposed by the learned sentencing Judge. The requirements of a community based order are all matters with which the person subject to the order must comply. These "special conditions" are requirements with which the person given a community based order is unable to comply, and that are outside his control, and therefore cannot be made a requirement of his community based order.

Section 123(1) of the Act makes it an offence to contravene a requirement of a community based order without reasonable excuse. Section 124 provides that, subject to sections 128 or 129, proceedings for an offence against section 123(1) may be brought in any Magistrates Court. Sections 128 and 129 deal with a summons or warrant for contravention of a single community based order, or for contravention of multiple orders made by Courts of different jurisdictions, respectively.

Section 126(1)(b) specifically makes reference to an offender who is in breach of a community service order made by a District Court who appears in the Supreme Court. Section 125(5), for example, provides that if an offender is subject to two or more community based orders that were made by courts of different jurisdictions, an order may be made that the offender be brought or appear before whichever of the courts is the court of highest jurisdiction.

A District Court Judge has no power to oust the jurisdiction of the Supreme Court in certain circumstances to deal with an offender who is in breach of section 123(1) of the Act.

These sections underline the lack of authority for a Judge to make the special condition made in this case by the sentencing Judge, although it is the usual case that, if practicable, contravention of a community based order is heard by the original sentencing Judge.

A Judge cannot, however, make a requirement of a community based order that is contrary to statute and should not make one that may cause practical difficulties. A Judge may retire or die or be unavailable, or a person may commit breaches of community based orders imposed by Courts of different jurisdiction.

Initially, the applicant complied appropriately with the community based orders imposed. It appears, although the

matter is not altogether free from doubt, that the applicant had completed all the community service he was required to complete under the order.

The Court report, dated 5 November 2001, which was before his Honour in the sentence which is under review, said of the applicant,

> "He was progressing quite well with his orders until he suffered clinical depression. He failed to take his medication as prescribed, as the offender was not aware of the level of his dysfunction. As antidepressive medication typically takes several months to achieve full effect, it is plausible that his lack of experience of the positive effects of the medication compounded his belief that he was not ill. It was during this time that the offender failed to attend interviews and community service, from May to October 2000."

The applicant then appeared before the same sentencing Judge in Toowoomba on 24 January 2001. His Honour's opening remarks were:

> "You have no idea how lucky you are that you are not going to gaol for six months today. The only reason you are not going to gaol is it would seem it is because of the farcical situation that has been allowed to develop, and I am not going to talk about that again."

His Honour did not explain what he meant by "the farcical situation". It appears that his Honour was probably referring to the fact that the applicant's failure to attend was not reported more promptly.

His Honour set aside the orders of 20 December 1999 and told the applicant that he was to be dealt with leniently, in that he was going to be ordered to serve a period of probation of

23 months and do 75 hours community service.

After imposing the usual requirements of probation and community service, the sentencing Judge on 24 January 2001 proceeded to impose similar special terms as had been imposed before, and then said to the applicant:

> "Now you have well and truly won the casket today. Very rarely would a person in such a situation as yourself who breaches my community based order not go straight to gaol. You know the reason you won the casket, and it does no credit to the legal system."

The applicant completed the further 75 hours of community service within seven weeks, and his supervisor reported that he was a good worker and responded well to supervision. He reported as directed after being placed on the subsequent probation order, and was referred to Centre Care Counselling.

The applicant was said by the Community Correctional Officer to be currently in receipt of a disability support pension for income support, and doing some casual painting and lawn mowing for his mother and stepfather to supplement his income.

On 1 and 2 September 2001, the applicant was in breach of section 123(1) of the Act when he committed two further summary offences which were dealt with in the Magistrates Court.

On the first occasion, he was found in possession of a small amount of marijuana. He was convicted and fined $400, in default, eight days' imprisonment. On the second occasion, he

was charged with the offence of drink driving. He was convicted and fined $700, in default, 21 days imprisonment.

The Community Correctional Officer said it was his opinion that the applicant was immature for his age, and lacked good decision-making skills. He lacked the benefit of having a supportive family who could advise him and help him through everyday issues. Whilst he had a caring mother, it was difficult for him to have regular contact with her, due to the ill feelings between himself and his stepfather.

The options available to a Court in this circumstance appear in section 126 of the Act. Where the Court is satisfied that there has been a breach of section 123(1) of the Act, then the Court may, in circumstances such as this, deal with the offender under subsection 2 and/or subsection 4.

Under subsection 2, the Court may, in addition to or instead of dealing with the offender under section 123(1), admonish and discharge the offender, or make orders for the payment of money. Under subsection 4, the Court may also deal with the offender for the offence for which the community based order was made in any way which it could deal with the offender if the offender had been convicted before it of the offence.

If it does so under subsection 4, then the Court must have regard to the making of the community based order and anything done to comply with the requirements of the order.

Pursuant to that subsection the Community Correctional Officer requested the Court to take into consideration that the offender had completed the 75 hours of community service which he had been ordered to complete. The officer did not express the view that the applicant was unable or unlikely to comply with a further probation order.

The learned sentencing Judge sentenced the applicant under Section 126 of the Act on 11 January 2002. That is the sentence that is the subject of this application. The sentence commences:

> "You are becoming a real problem, one might say a real nuisance. Everyone is trying to help you, particularly the probation officer and your mother. You seem to have a chip on each shoulder. Your attitude seems to be that everyone has got to look after you and it is everyone else's fault and such like."

There appears to be no basis in the material that was before the Court either in oral submissions or in exhibits which could form the basis of findings made in the last two sentences.

His Honour imposed a 12 month term of imprisonment to be served in the community by way of intensive correction order.

On this occasion, his Honour imposed what he called two special terms of the intensive correction order:

> "You shall, not might, be brought before the District Court to be sentenced for this offence if you commit any indictable offence or any serious simple offence such as disqualified driving during the currency of the order; and

> Further, you shall, not might, be brought before the District Court to be sentenced for this offence if you do not perform the community service adequately or at all."

This order did not have the defect of the previous order that the Judge purported to make it a requirement of the probationer that he be brought before him personally if in breach, but nevertheless to the extent that it does not comply with the Penalties and Sentences Act as referred to earlier that part of the order is not valid. That requirement of the intensive correction order imposed is invalid in its terms.

It does appear that there were errors in the exercise of the sentencing discretion. However, the ground of appeal is that the sentence was manifestly excessive.

The applicant was born on 3 August 1979 and so was a young man of 19 years of age when he committed the offences. He had only one previous court appearance where he was a co-accused with a group of other young men and convicted of wilful damage with no conviction recorded and so he lacked any serious criminal history.

Given the nature of the offence for which he was to be sentenced and his personal circumstances, a sentence of imprisonment for 12 months whether or not to be served in the community is in my view manifestly excessive.

A more appropriate sentence would be to discharge the orders imposed on 20 December 1999, 24 January 2001 and 11 January 2002 and impose in their stead a further period of probation for 12 months which probation order should contain the requirements set out in Section 93 of the Penalties and Sentences Act and no others.

McPHERSON JA: I agree.

MACKENZIE J: I agree with the outcome proposed by Justice Atkinson. The history of the matter has been set out in her reasons.

The reason why I have come to that conclusion is that the requirements of the Penalties and Sentences Act are that the extent to which the offender has complied with an order before its revocation is to be taken into account in resentencing and resentencing may be effected in any way which the Court could deal with the offender if he had just been convicted of the offence.

In the present case, the community service orders had been complied with and the probation orders breached. The intensive correction order, by statutory fiction, involves a term of imprisonment but served in the community. In fact a sentence of 12 months was imposed to be served by intensive correction order.

It is easy to understand the learned sentencing Judge's frustration with the apparent disregard of the orders imposed, but for a young man of 19 who when the original offence was committed, had only one previous conviction for a minor offence of wilful destruction, and having in mind the unusual facts of the unlawful use of the motor vehicle and the requirement under Section 121(2) that there had been at least partial compliance with the probation order, it is in my view outside the exercise of an appropriate sentencing discretion to impose the sentence imposed.

I therefore agree with what is proposed.

McPHERSON JA: Mr Weston, your client would, would he, consent to that order? He seems to have been prepared to undergo other orders of a similar kind.

MR WESTON: Yes. Instructions were taken from my client this morning about this, and my instructions are that he will consent to a further order of probation.

...

McPHERSON JA: The appeal is allowed and the orders made on 20 December 1999 and 24 January 2001 and 11 January 2002 are set aside.

...

McPHERSON JA: Instead, the applicant will be admitted to probation commencing on 11 January 2002 for a period of 12

months, such probation order to incorporate only the requirements or conditions specified in Section 93 of the Penalties and Sentences Act.

That will be the order of the Court.

...

MR COPLEY: I would suggest, your Honour, that he be directed that within say 48 hours of today's date he have to report to the Toowoomba office of the Community Correctional Service. Such reporting may in the first instance be made by telephone. Thereafter it's up to the discretion of the Community Correctional Officer.

McPHERSON JA: We will make an order to that effect as well.
