[2002] QCA 222

COURT OF APPEAL

DAVIES JA
WHITE J
WILSON J

CA No 70 of 2002

THE QUEEN

v.

ROBERT KENNETH MILNER

BRISBANE

..DATE 21/06/2002

JUDGMENT
DAVIES JA: I will ask Justice White to deliver her reasons first.

WHITE J: The applicant, who appears on his own behalf, seeks leave to appeal against a sentence which was imposed upon him on the 25th of February 2002 in the District Court.

On the morning of the trial he was re-arraigned and pleaded guilty to three counts; two of unlawful possession of a vessel, a boat and trailer, with circumstance of aggravation, and one count of dishonestly obtaining $4,500. He was sentenced to three years' imprisonment on each count with a recommendation that he be eligible for post-prison community release after serving 15 months of that sentence.

He contends that the sentence was manifestly excessive in all of the circumstances. He contends that the sentencing Judge made errors with respect to important facts in his sentencing remarks which influenced the imposition of what he submits is a harsh sentence. He has provided extensive and, if I may say so, coherent written submissions and before us today confined himself to submissions on the cases that had been in the Crown's outline.

The applicant here as well as below has sought special consideration because of his personal circumstances.

It appears that by virtue of a pre-trial order the unlawful possession counts were to be tried separately from the fraud count. The applicant had been arraigned only in respect of the unlawful possession matters before the jury on the 25th of February. When he was re-arraigned it was in respect of all three charges. There is some suggestion that this was not expected by the applicant, however the record shows no demur at having the fraud charge put to him and his making a plea of

guilty in respect of it. Neither is there any discussion or concern about that plea subsequently in the record transcript.

The facts, so far as can be understood, in respect of count 1 are these. The owner purchased the boat in August 1997 for $7,900. The boat was stolen from his house on the night of the 6th/7th of May 1999. Insurance of $6,900 was paid out. On the 10th of May 1999 the boat, and on the 13th of May the trailer, were registered by the applicant with new identities. The identifying features of the boat were removed and/or changed and it was then sent to North Queensland to be sold by the applicant's father-in-law who was engaged in the business of selling boats.

The vessel was advertised by the father-in-law in June 1999 and was purchased by the complainant in count 2 for $4,500. When modifications were being done to the vessel on behalf of the purchaser he discovered that the vessel had been interfered with and reported it to the police, who seized the boat. The original owner, from whose possession it was stolen, was able to identify the vessel by reference to a number which had not been interfered with. The applicant claimed in his interview with police that he had purchased the boat on 9 May 1999 through the Caboolture Markets where it had been advertised for $3,500.

The second boat, the subject of count 3 was stolen from the owner's house on the 9th of May 1999. He had paid $13,000 for

it plus the cost of a new engine. Insurance of $13,800 was paid out. It had been registered with false particulars on the 11th of May 1999 by the applicant and the trailer on the 27th of May at the same registration office in Caboolture as the first boat.

After the first boat was identified as stolen police identified this vessel at the property of the applicant's father-in-law. The applicant claimed that he had purchased this boat again through Caboolture Markets' advertisement for $10,000 and that when it had been delivered to him it had no identification numbers on it. The applicant explained to police that he had financed the second purchase by taking out a second mortgage on his house, but police inquiries revealed that there was no second mortgage.

Mr Richards, who appeared on the applicant's behalf at trial told the sentencing Court that his client accepted the Crown case against him. Mr Milner contends that he was poorly represented at the sentence because his counsel had lack of opportunity to familiarise himself with some of the facts and therefore did not object when some issues were raised by his Honour. The applicant would appear to maintain his version that he gave to the police in his written submissions but he does concede that there were suspicious circumstances about the origins of the boats.

The applicant has a number of criticisms of observations made

by the sentencing Judge when pronouncing sentence. The Judge said that it was an overwhelming case against the applicant and that a reasonable conclusion would seem to be that he was in denial until the last moment. The applicant's response is that he accepted the recommendation of his counsel that he should plead guilty and that he was scared of being found guilty after a trial, thus serving more time in prison.

Whilst the sentencing Judge expressed considerable annoyance at the time that had been wasted by waiting until the last minute after the jury had been empanelled to change his plea and a day had been devoted to pre-trial argument about severance, nonetheless it is a clear principle of law and there is nothing to show that his Honour disregarded this principle, that no person obtains a greater sentence for failure to plead guilty. Rather, the provisions of the Penalties and Sentences Act requires a Court to take a guilty plea into account and that it may reduce the sentence that it would have imposed had the offender not pleaded guilty.

The sentencing Judge expressly took into account the plea of guilty but quite rightly noted that it was a late plea and this was reflected in a minor way in the recommendation for post-prison community based release after serving 15 months. At page 3 of his Honour's sentencing remarks he commented that the applicant was close to the stealing of the boats or was well known as one who could dispose of stolen property. The applicant objects to these inferences. It was unnecessary for

his Honour to speculate in that way but perhaps not an unfair or unreasonable inference. The plea of guilty reflects the acceptance by the applicant that he came by the boats dishonestly.

The applicant protested the sentencing Judge's statement that he told "a tissue of lies." The applicant contends that he cooperated with the police in seeking to find the people responsible for stealing the boats. His Honour was entitled to take whatever view of the facts that were placed before him and were not contested by the defence as they could reasonably bear. It is not surprising that his Honour was somewhat sceptical of the story that the applicant had told the police.

The applicant contends that he wished to retain one of the boats rather than, as the sentencing Judge commented, that he had sent them both north to be sold. The second boat, which the applicant says he sent to his father-in-law to look after but which he was going to retain and not sell, was found in his father-in-law's yard with other boats that were for sale.

It would make no difference to the applicant's criminal responsibility whether he wished to retain the boat himself or sell it and keep the proceeds.

His Honour has made some errors when referring to the applicant's previous convictions. He referred to a previous conviction on 16 February 1996 for unlawful possession of a

motor vehicle with intent between the 14th July and the 8th of October 1994. His Honour inferred from the file that the applicant had interfered with the identification marks of the motor vehicle in his possession. That vehicle had apparently been reported stolen for some months and had different identification numbers when seized by the police.

In all likelihood they had been swapped with those of a wrecked vehicle. His Honour suggested that the applicant had been responsible for that change in identity. This is not able to be established from a perusal of the record at pages 6 and 7 and it does not appear to be the basis upon which the applicant was sentenced at that time, but without the sentencing remarks in respect of that matter it is not possible to take it any further.

His Honour was also somewhat agitated by the separate hearings of dangerous driving on the 7th of October 1994 heard in the Caboolture Magistrates Court on the 18th of January 1995 and the unlawful possession which was heard in the District Court on the 16th of February 1996. They both arose out of the same events and indeed it was the dangerous driving by the applicant which caused him to be arrested after pursuit and which allowed the unlawful possession charge in respect of that motor vehicle to be brought.

I must confess that I have found that part of the sentencing remarks a little convoluted and it might suggest that his

Honour was speaking of two cars when there was only one. But a reading of the transcript does make fairly clear that his Honour's understanding was of one motor vehicle.

The applicant is most concerned about an observation made by the sentencing Judge at page 7 of his sentencing remarks,

> "The leniency of this sentence is further exemplified by the fact that on 3rd September 1997 you were also before the Court when you were dealt with out of the one incident for dangerous driving associated with a drink drive, the major offence, associated with that the failure to supply a specimen of breath."

These offences in fact occurred in May 1987 and the applicant was dealt with in the Brisbane Magistrates Court on the 3rd of September 1987. His Honour was making reference to that earlier group of offences when commenting on the leniency of the sentence imposed by the District Court in respect of the unlawful possession on the 16th of February 1996.

Although his Honour is recorded as having said 1997 there can be no doubt that this is either a slip of the tongue by his Honour or a wrong transcript of what his Honour said, because quite clearly it could not have been taken into account when sentencing in 1996 had the offences occurred in 1997.

Mr Milner contends that this error led to his Honour imposing what he contends is a harsh sentence. There is in my view no basis for supposing that these erroneous statements contributed to any error in his Honour's sentence when comparable sentences are examined.

The applicant also contends that his personal circumstances called for a lesser sentence. He and his wife have five children now aged between eight and 17. The youngest has multiple disabilities requiring special care. At the time of sentence the applicant's wife's grandmother lived with them for whom he received a carer's pension.

Although the applicant had a reasonably good employment history from some time prior to the offences it seems that he had been in receipt of unemployment benefits. It was noted before his Honour that his home was subject to a mortgage. Since incarceration the applicant has completed a cognitive skills program which from the report may have given him some insight into aspects of his personality which have led to his offending behaviour. Needless to say these materials were not before the sentencing Court.

The applicant has referred to cases where a lower sentence was imposed which he submits ought to allow his application to succeed. Kent, CA number 418 of 1999, decision of the 19th of June 2000 was a guilty plea. The applicant there was charged with unlawful possession of a Suzuki motor vehicle. He was sentenced to 18 months imprisonment suspended after four months. He had previous convictions for dishonesty some ten years earlier. The sentence was said to be on the high side.

In Walters CA No 342 of 2001 unreported decision of the 14th of March 2002 the offender had pleaded guilty to four counts

of unlawful possession of a motor vehicle and two counts of fraud. He was sentenced to three years imprisonment with a recommendation for parole after 12 months. The unlawful acts had led to significant losses for the owners of the property. He had previously served a sentence of two and a half years imprisonment suspended after three months for drug possession offences.

In the Court of Appeal Williams J noted that it was a light sentence and reference was made to the cases of Nomikos and Luff, CA Nos 98 and 102 of 1999, which I will mention in a moment.

The third case referred to was that of Witherington, CA No 176 of 2001 unreported decision of the 27th of September 2001. That was a guilty plea to four charges of unlawful use of a motor vehicle, stealing, break and enters and fraud. The applicant was sentenced to three years imprisonment to be suspended after 12 months with a three year operational period. She had a serious drug problem. The car offences appeared to be relatively unplanned. The damage to property associated with the break and enter offences was significant. Her personal circumstances of being the carer for four young children, no matter how poor a carer, would appear to have influenced what otherwise might be seen as a light sentence, although the Court did not so describe it.

The other case mentioned by the applicant is that of Wilson,

CA 165 of 2001, unreported decision of the 17th of October 2001. It is principally devoted to issues relating to an extension of time and is of little assistance.

The Crown has referred to a number of cases, including Nomikos and Luff. Nomikos went to trial on three counts of unlawful possession of motor vehicles. There was no cooperation with the police but she had no previous convictions. She was sentenced to a term of imprisonment of three years with a recommendation for parole after 12 months. Her co-accused, Luff, pleaded guilty to eight counts of unlawful possession of motor vehicles. He cooperated with police. He had a previous criminal history though little of it relevant to these offences. He was sentenced to four years imprisonment with a recommendation after 18 months. Parity was a factor mainly argued in that case and the sentences were held not to be excessive.

In Pittman, CA No 426 of 1998 the applicant pleaded guilty to five counts of unlawful possession of a motor vehicle. He had limited previous convictions and it was said that employees in his two businesses would lose their jobs were he to go to prison. He was sentenced to three years imprisonment with no recommendation.

Finally, in the case of Back, CA number 335 of 1997 the applicant went to trial on two counts of unlawful possession of motor vehicles and two counts of false pretences. He had

no previous convictions. He was sentenced to three years imprisonment suspended after 12 months with an operational period of three years.

There can be no doubt that his Honour took a poor view of the applicant and his past offending. There were significant similarities between the previous offence relating to unlawful possession in as much as there were no admissions as to altering the compliance plates and so on of the motor vehicle just as there were no admissions about interference here.

The head sentence imposed was that which was submitted as appropriate by both Crown and defence counsel. His Honour gave some recognition to what was a late plea in the recommendation. He appeared to give little or no weight to the applicant's family responsibilities. He correctly noted that it is often the family of an offender who suffers when the husband or wife is incarcerated but that will rarely be determinative of sentence.

Although in my view not a light sentence it was consistent with a number of previous sentences, did not fail to take into account relevant matters and was not unduly distracted by irrelevant issues and therefore in my view was not outside the range of the sound sentencing discretion. I would dismiss the application.

DAVIES JA: I agree.

WILSON J: I agree.

DAVIES JA: The application is dismissed.
