[2002] QCA 253

COURT OF APPEAL

de JERSEY CJ
WILLIAMS JA
JERRARD JA

CA No 18 of 2002

THE QUEEN

v.

B Applicant

BRISBANE

..DATE 22/07/2002

JUDGMENT

THE CHIEF JUSTICE: The applicant seeks leave to appeal against the sentence of five and a half years' imprisonment with eligibility for post-prison community based release, what used to be called parole, after 27 months, that penalty having been imposed in the District Court on 13 December 2001 by way of re-sentencing under section 188 of the Penalties and Sentences Act 1992.

The re-sentencing arose because of the applicant's failure to cooperate with law enforcement agencies contrary to an undertaking given under section 13A of the Act. The applicant gave that undertaking in respect of proceedings against one "X" for armed robbery. The robbery occurred on 27 March 2000 at a dental surgery at Burleigh. The applicant and another man "R", while armed, entered the surgery, menaced staff and stole money.

In May 2000 the applicant provided investigating police officers with a signed statement implicating "X" as the driver of the vehicle in which they went to and from the surgery. In that statement the applicant also implicated "X" in the planning of the offence. The applicant pleaded guilty to his involvement in the District Court on 9 February 2001. He had previously signed the section 13A undertaking to cooperate and give evidence against his co-accused "X" in accordance with information provided to the police in his statement.

The learned sentencing Judge imposed a sentence of four years imprisonment upon the applicant with eligibility for parole

recommended after 18 months, the Judge stating that but for the undertaking he would have imprisoned the applicant for five and a half years. Concurrent sentences for other offences need not presently be considered.

At the committal hearing on 27 February 2001 in relation to "X", the applicant, called by the prosecution, nominated "X" as the driver of the vehicle but excluded "X" from foreknowledge of the crime intended by the applicant and "R". The only evidence from the applicant implicating "X", on my assessment, was "X"'s preparedness to drive the others from the scene of the crime, but as the applicant put it he had no other option.

The learned Judge, re-sentencing the applicant on 13 December 2001, took the view that the applicant had wholly failed to cooperate with the authorities contrary to his undertaking and accordingly imposed the five and a half year head sentence indicated at the original sentencing. Before the Judge who carried out that re-sentencing the applicant offered as the "reasonable excuse" for his not having cooperated, in terms of section 188 subsection 2, paragraph B, fear of physical assault by way of retribution within the prison should he by evidence incriminate "X".

But it is, at least in part, the preparedness of a person in the applicant's position to cooperate in that way notwithstanding jeopardy of that nature which underpins the statutorily encouraged reduction in penalty which the

applicant secured on 9 February 2001. His having resiled from his undertaking, it would be insupportable were the applicant nevertheless to retain the benefit of that reduction.

On 9 February 2001 the applicant implicitly asserted the courage and decency to incriminate "X" notwithstanding fear for his own safety. He secured his benefit in sentence. Come the time to honour his undertaking he sheltered behind the very fear which he was on 9 February prepared to put aside. That retreat cannot amount to reasonable excuse for his breaching the undertaking yet retaining the benefit of the reduced sentence.

I would endorse the approach taken in comparable situations under the Commonwealth Crimes Act in Parsons 1992 74 Australian Criminal Reports 172 at 176 and Haunga 2001 Victoria Supreme Court of Appeal 73 paragraph 12. The learned re-sentencing Judge's finding that the applicant had completely failed to cooperate in terms of section 188 subsection 4, paragraph A, was justified, as was the sentence he accordingly imposed.

Before us today the applicant said that he was content to live with his five and a half year head term, but asked the Court to suspend his sentence after the 27 months, the subject of the recommendation in relation to parole. It would be beyond jurisdiction for this Court to interfere in that way, even were we disposed to interfere, for the reason that the head sentence exceeds five years. In my view the application

should be refused.

WILLIAMS JA: I agree.

JERRARD JA: I agree with the judgment of the Chief Justice. I add that "B" is a very young man to be caught between the horns of the dilemma that he was facing. However, it was one entirely of his own making. It very likely reflected his own immaturity but that did not provide him with a reasonable excuse.

He has in part resolved the dilemma he faced by simply not giving evidence which was intentionally adverse to "X". That was a choice he made. That being so he is not entitled to the benefit of the undertaking he made but did not keep. It was not said on this application that the sentence of five and a half years was manifestly excessive in the circumstance that "B" did not assist in the prosecution of any co-offender.

The sentence imposed by Judge Newton fairly reflected "B"'s youth and his timely plea of guilt and it is up to "B" to satisfy the appropriate authorities that it is safe for the community that he be released into it. I am satisfied that no error has been shown in the reasons for judgment of the learned sentencing Judge as to matters of relevant sentencing principle or as to any matter of fact, and in those circumstances I agree that the application for leave to appeal must be dismissed.

THE CHIEF JUSTICE: The application is refused.
