[2002] QCA 273

COURT OF APPEAL

McMURDO P
DAVIES JA
WILSON J

CA No 50 of 2002

THE QUEEN

v.

ERYK SEBASTIAN SOKOLOWSKI Applicant

BRISBANE

..DATE 29/07/2002

JUDGMENT

WILSON J: This is an application for leave to appeal against sentences imposed by a District Court Judge at Southport on 1st February 2002.

The applicant pleaded guilty to two sets of offences. The first set of offences were committed on 17 November 1999. They consisted of burglary, stealing and the unlawful use of a vessel. The head sentence imposed was six years with a recommendation for eligibility for parole after two and a half years.

The second set of offences were committed between 5th May and 30th December 2000. They involve the unlawful use of a motor vehicle and two counts of receiving. On each count the sentence was two years.

All of the sentences were intended to be concurrent. The sentencing Judge made a declaration of presentence custody of 42 days between 21 December 2001 and 1 February 2002.

The applicant was born in Poland on 3 August 1968. He had no criminal history at the time of these offences.

As to the first set of offences. He had part-time employment with the complainants as their gardener/home maintenance man at their home at Sovereign Island on the Gold Coast. That was part of an estate with a high level of security. Thus he was in a position of trust. He had access to their property without supervision and when they were not home.

Whilst they were at work he stole a 48 foot cruiser, valuable art work, including a Salvador Dali painting, expensive jewellery, valuable bank notes, coins, gemstones and computer equipment. Some of these he obtained by robbing a safe in the garage.

The complainants estimated the value of the property taken at between $2,000,000 and $3,000,000. They obtained an insurance payout on their boat in a sum of approximately $209,000 but that did not cover the $70,000 they had recently spent refurbishing it. They received no other insurance payout because of the circumstances in which the applicant had been given access to their house. None of the property has been recovered.

The applicant took the boat. He subsequently landed in Northern New South Wales in a dinghy. It is not known what became of the cruiser. He had a de facto wife on the Gold Coast. He left a note for her saying that he had gone to Europe to contact his 12 year old son from his previous marriage. Subsequently he had intermittent contacts with his de facto.

He travelled to various places, including Cairns and Noosa. He was apprehended in Noosa on 28 December 2000. He was then using a motor vehicle which had been reported stolen in Port Douglas on 6 May 2000. Police searched the motor vehicle and his premises and they found a Canadian driver's licence, a credit card, a health care card, a student card or wallet,

another driver's licence, a gold Visa card, all suspected of being stolen.

The applicant was interviewed by police. He said that he had drifted for four days being unable to restart the boat and then come ashore in a dinghy, and that he did not know what had happened to the boat. He said that he had committed the first set of offences because of a debt to the Polish mafia of $2,000,000, and that he had planned to sail to Vanuatu and pass the property over to cover his debt.

As to the property the subject of the second set of offences, he said that he had been given the car by someone called "Tom". It was suspected of being stolen and, therefore, he changed the registration plates. He admitted buying identification to create a false identity.

A colourful account of his background was put forward by his barrister to the sentencing Judge. It was not challenged by the prosecution. He had been in the Polish Army from which he had been discharged for disobeying an order to shoot civilians. He had developed a cocaine addiction while living in Poland and become involved with the mafia there.

In order to pay a drug debt of US$4,000, he agreed to become a courier for the mafia. He went to South America where he was to collect a cargo of cocaine, but apparently got scared and did not carry out the plan. The cargo was to be worth $2,000,000. He returned to Europe and was pursued by the

mafia. To escape them he came to Australia as an illegal immigrant. He continued to be pursued by them.

He had a wife in Poland and a child. He subsequently divorced that wife. He had a child by his Australian de facto.

As the sentencing Judge observed, two features stand out in this case - the very clear breach of trust towards the complainants who had employed the applicant and the very considerable amount of property stolen and apparently lost. At the time of the offences, the applicant was of mature years. The offences involved sophisticated planning, taking his employers' property and assuming a false identity to avoid detection.

According to a victim impact statement put before the sentencing Judge, the complainants had been forced to sell their home and other assets. Their health had suffered and they would be forced to remain in the workforce longer than they otherwise would have done.

Before the sentencing Judge the prosecution submitted that the range of head sentence was six to eight years and that there should be a recommendation with respect to parole to reflect the pleas of guilty. Defence counsel submitted that the head sentence should be four to six years.

On appeal, the applicant submitted that the range was four to five years suspended after 18 months to two and a half years,

and the respondent submitted that the sentence imposed below was correct.

The principal charge of burglary was brought under section 419 subsection (4) of the Criminal Code, namely, that the applicant was in the dwelling of another and committed an indictable offence in the dwelling. The maximum penalty for that offence was life imprisonment.

The applicant has submitted to this Court that the parole recommendation is ineffective. Because he is an illegal immigrant, he submitted, he will not be granted parole. The position seems to be that upon his release from this sentence, whenever that occurs, he is likely to be continued to be detained because of his immigration status. However, whether he is so detained and where he is detained are matters separate from the parole recommendation made by the sentencing Judge. I am not satisfied that these immigration matters have any bearing upon the parole recommendation or its effectiveness.

The applicant also asked this Court to take into account that he was receiving psychiatric treatment apparently at the time of the sentencing. However, there was no evidence of that below or before this Court.

It was submitted that the head sentence was manifestly excessive and the applicant referred to Joyce [1986] 1 Queensland Reports 47. In that case the Court of Criminal

Appeal indicated that the general level of sentencing for burglary was five years, but that the sentence could be expected to increase substantially where there was special features such as a bad criminal history including similar offences, that the offender was on parole or probation at the time of the offence, that the property involved was of considerable value or that there had been multiple offences.

Indeed, in that case, the offender was aged between 17 and 19 at the time of the offences which consisted of 50 counts of burglary and stealing, the property totalling over $408,000. Despite his young age, the Court of Criminal Appeal upheld a sentence of 10 years' imprisonment with hard labour.

Here there are the features of a gross breach of trust, preplanning, the weaving of an elaborate web of deceit, property of very considerable value and an offender of mature years. In my view, the sentence could not thought to be manifestly excessive.

There is one area in which, it seems, the sentence should be interfered with, and the respondent conceded this on appeal. The sentencing Judge made a declaration of presentence custody of 42 days between 21 December 2001 and 1 February 2002. The applicant should be given credit for an additional 141 days between 28 December 2000 and 17 May 2001.

In all the circumstances, I would allow the application for leave to appeal, allow the appeal, set aside the declaration

about presentence custody and substitute a declaration that a total of 183 days in presentence custody between 28 December and 17 May 2001 and between 21 December 2001 and 1 February 2002 should be deemed time served under the sentences. Otherwise I would affirm the sentences imposed below.

THE PRESIDENT: I agree.

DAVIES JA: I agree.

THE PRESIDENT: That is the order of the Court.
