[2002] QCA 289

COURT OF APPEAL

DAVIES JA
JERRARD JA
MACKENZIE J

CA No 335 of 2002

THE QUEEN

v.

JAMIE FREDERICK RICHARD ROSTRON Applicant

BRISBANE

..DATE 07/08/2002

JUDGMENT

JERRARD JA: On 21 June 2000 Benjamin Lee Pengally was in lawful occupation of a unit in Townsville. In the early hours of that day he, a male person, Mr Kenna and a woman Erin Wallman were in Mr Pengally's unit watching television. The appellant Jamie Frederick Rostron arrived there between 2 a.m. and 2.30 a.m. in the company of three police officers.

Mr Rostron had been involved in a dispute with Mr Kenna earlier that evening and the visit apparently related to that dispute. It had nothing at all to do with Mr Pengally. After some conversation between Mr Kenna, the police officers and Mr Rostron, Mr Rostron and the police left. Somewhere between 3 and 3.30 a.m. Mr Rostron returned to the block of units in which Mr Pengally lived, parked his vehicle in the driveway and entered Mr Pengally's unit. He picked up a mobile telephone and a scuffle then ensued between Mr Rostron and Mr Kenna.

The two combatant parties ended up outside the unit and Mr Rostron eventually threw the mobile phone away towards the front entrance of the driveway. Mr Pengally, who had merely been a spectator, walked out, picked up that mobile telephone and began to return towards his unit carrying it. Mr Rostron, who had ended his scuffle, had been reversing his motor vehicle out of the driveway. He ceased that manoeuvre, then drove his vehicle forward. It struck Mr Pengally, throwing him into a red Commodore motor vehicle parked in a garage and Mr Rostron's vehicle struck that Commodore as well.

Mr Pengally suffered severe injuries including a comminuted midshaft fracture to his right femur, and a closed fracture to his right fibula. The first fracture was an open fracture. He received hospital treatment and was discharged after seven days. It appears that he will not have any permanent disability.

On 12 September 2001 Mr Rostron pleaded guilty to a charge of dangerous operation of a motor vehicle causing grievous bodily harm to Mr Pengally and a further charge of having wilfully and unlawfully damaged the Commodore motor car. He also pleaded guilty to three unassociated charges of having had unlawful carnal knowledge in 1997 of "M", a girl then under the age of 16 years.

He had begun a sexual relationship with her on 31 January 1997 when she was 15 and a half and he was 26. The relationship between them developed into one resembling that of a de facto husband and wife, with Mr Rostron staying with her in her family's home. They had a child born in March 1998 and lived together intermittently until mid-March 2000.

On 4 December 1997 Mr Rostron had been found guilty of wilful and unlawful damage to property in the night-time and of stealing. Those offences occurred on 29 November 1996. No conviction was recorded. On 30 June 1999 he was found guilty of an offence of indecent treatment of a child under the age of 16 years and that offence was committed on 9 June 1998. He was placed on probation for two years and was therefore on

probation at the time he committed the offences of dangerous operation of a motor vehicle and wilful damage to property. He had no other criminal convictions.

The learned Judge of the District Courts sentenced Mr Rostron to three years' imprisonment on the charge of dangerous operation of a motor vehicle causing grievous bodily harm, 12 months' imprisonment in respect of the offence of wilful damage and six months' imprisonment in respect of the offences of unlawful carnal knowledge. All sentences were ordered to be served concurrently. He disqualified Mr Rostron from holding or obtaining a driver's licence for a period of three years.

Mr Rostron was granted leave to file a late application for leave to appeal against those sentences arguing in it that they are all manifestly excessive in the circumstances. However, the effective appeal is against the sentence imposed for dangerous operation of a motor vehicle.

The learned Judge described the offence of dangerous operation causing grievous bodily harm as the most serious of the offences for which Mr Rostron has been sentenced and as a serious case of such driving. The Judge had confirmed with counsel for the Crown that, as submitted by counsel for Mr Rostron, the plea of guilty had been accepted by the Crown on the basis that Mr Rostron had been guilty of what his counsel described as criminal negligence, rather than of deliberately causing harm.

Having clarified to that extent the basis of the plea of guilty, the learned Judge quite correctly observed that to drive in the general direction of other people is grossly irresponsible and the Judge observed that the case was rather one of reckless driving. It was not a case of mere momentary inattention.

The learned Judge specifically referred to the matter of Mr Rostron being on probation, and to the fact that he had pleaded guilty. The Judge observed that ordinarily the offences of unlawful carnal knowledge, to which a plea of guilty had been entered, would not result in an imposition of a custodial sentence in the circumstances of that case, but since imprisonment was warranted on the other matters it would result in sentences of imprisonment for unlawful carnal knowledge as well.

The submissions on sentence for the offence of dangerous operation of a motor vehicle causing grievous bodily harm made by counsel for the prosecution had included the submission that the appropriate sentence would be one in the vicinity of three years' imprisonment. Counsel for Mr Rostron expressly agreed with that submission describing it as:

> "Both candid and accurate so far as the sentencing patterns both at this level, and from the pronouncement of the Court of Appeal, in relation to these offences."

Later in submissions by counsel for Mr Rostron counsel observed that:

> "I do not in any way shape or form cavil with my friend's expression of three years taking into account all aspects

> of mitigation."

Ordinarily those submissions by his own counsel would make it very difficult for Mr Rostron in this Court to succeed in his argument that the sentence of three years' imprisonment for that offence of dangerous driving was manifestly excessive. What his counsel urges on the application for leave to appeal that sentence before this Court is that a sentence imposed by this Court on 15 May 2000, on an appeal by the Attorney-General, reveals now that the sentence imposed then on Mr Rostron was too severe. That later sentence was in a matter of The Queen v. Dalmazio [2002] QCA 80.

In that matter the Attorney-General had appealed against the sentence of imprisonment for one year, suspended it appears for two years. That sentence had been imposed in respect of a number of offences which included dangerous operation of a motor vehicle causing grievous bodily harm, burglary, stealing, wilful damage and going armed so as to cause fear.

The offence of dangerous driving causing grievous bodily harm that had been committed by Mr Dalmazio was committed on 29 September 1999 at Helensvale. Mr Dalmazio had been informed by telephone by police officers that they were searching his home. I quote from the judgment:

> "He thereafter went there and drove down the driveway and into the garage accelerating towards a police officer who was in that area. He ran over the officer's foot, his knee and caused a back injury which resulted in permanent impairment to the extent of 5 per cent of his overall bodily function. The respondent was unlicensed at the time."

While still on bail on that charge Mr Dalmazio was driving on the Gold Coast Highway on 20 November 2001 some two years later and became involved in a disagreement with a driver of another car. He verbally abused that driver and a passenger in that other driver's vehicle, then caused that other vehicle to stop at traffic lights and struck the other vehicle with a piece of bamboo, causing the damage the subject of the count of wilful damage. Three days later he visited the home of the driver of that other vehicle, drove by while pointing threatenly at the homeowner, then returned to that other person's home, parked outside it, and pointed a sawn-off shotgun at the other driver before driving away. That was the basis of the charge of going armed so as to cause fear.

He was also convicted on his pleas of guilty of having committed offences of dishonesty between 8th and 23rd November 2001. He was a resident in that period at the Ocean Blue Resort and while there broke into two different units rented by other people, stealing a mobile telephone from one and a wallet containing $300 from the other. He also stole a vacuum cleaner from the resort itself after having been given a key to a storage and laundry room where that vacuum cleaner was kept. Those matters were the basis of the charges of burglary and stealing for which he was also sentenced.

He was intercepted on 24 November 2001 whilst driving without a licence, at which time he was arrested for the other offences last described. He was found to be in possession of two rolled marijuana cigarettes. He was sentenced to terms of

suspended imprisonment by the same sentencing Judge for those offences as well.

He was 34 at the time of the first of those offences, 36 at the time of the rest of them and when he was sentenced. His prior convictions included seven counts of stealing, two of wilful damage, two of assault, two of malicious injury, two of resisting arrest, three of fraud related offences and six or more of driving whilst disqualified or unlicensed. He also had a conviction for driving with intent to menace. He had previously served periods of imprisonment, mostly short.

The judgment of this Court was delivered by McPherson JA who observed that viewing the matter overall in the light of the number of offences involved, he would have expected a sentence of about three years' imprisonment to be imposed in respect of the offence of dangerous operation of a vehicle causing grievous bodily harm, taking into account the other offences committed, the prior criminal history of that applicant and the other relevant matters.

However, in the view of McPherson JA, having regard to the plea of guilty, the penalty in respect of the major offences should be reduced to imprisonment for two years. In the result the appeal by the Attorney was allowed and the sentence on count 1 set aside and in lieu thereof a sentence of imprisonment for two years was imposed. In respect of all other offences the various sentences imposed were varied by removing the provision for suspension of those sentences.

In my opinion the offence of dangerous operation causing grievous bodily harm committed by Mr Dalmazio is difficult to distinguish from the offence of dangerous operation causing grievous bodily harm committed by Mr Rostron. Both involved causing injury by driving a motor vehicle in a manner which was reckless at the very least and causing injury to others whose presence was known to the offender, when the only "offence" committed by those others was that they were there. Both offences showed an arrogant and intemperate disregard for the welfare of those other persons who were injured. Neither offender was affected by alcohol at the time. Both involved a relatively short period of driving, albeit not momentary inattention. Mr Dalmazio had a far more significant criminal history than Mr Rostron did, and the other offences for which Mr Dalmazio was being sentenced exhibited indiscriminately aggressive and dishonest behaviour whereas the other offences for which Mr Rostron was being sentenced exhibited exploitative behaviour rather than dishonesty or deliberate aggression.

In the matter of The Queen v. Conquest, CA No 395 of 1995, Macrossan CJ and McPherson JA each remarked upon the need for Courts to endeavour to maintain consistency in sentencing offenders. It is the case that this Court, when allowing an appeal by The Attorney-General against a sentence, exercises a degree of moderation when re-sentencing an offender. See, for example, the comments of de Jersey CJ in The Queen v. Hays, ex parte Attorney-General [1999] QCA 443. Those remarks are to this effect:

> "This Court approaches Attorney's appeals recognising that when offenders leave the sentencing Court they have a reasonably settled expectation that their matter has been effectively disposed of and so revised sentences imposed following successful Attorney's appeals are often more moderate than should have been imposed in the sentencing Court itself."

One may safely assume that McPherson JA was aware of the practice of this Court on an appeal by the Attorney-General against the sentence. Even so, that makes the two year sentence imposed on Mr Dalmazio appear inconsistent with the three year sentence imposed on Mr Rostron in the absence of any other alleviating order.

Accordingly I consider that, to maintain consistency in the sentencing pattern, this Court should allow the appeal by Mr Rostron to this effect, that it order that the appeal be allowed and vary the sentence imposed for dangerous operation of a motor vehicle by an order that Mr Rostron be considered eligible for post-prison community based release after he has served 12 months of the three year term of imprisonment.

DAVIES JA: I agree.

MACKENZIE J: I agree.

DAVIES JA: The orders are as indicated by Justice Jerrard.
