

COURT OF APPEAL

JERRARD JA
HOLMES JA
HELMAN J

CA No 171 of 2006

THE QUEEN

v.

CHRISTOPHER ALAN GILL

(Applicant)

BRISBANE

..DATE 30/11/2006

JUDGMENT

JERRARD JA: This matter was listed as an appeal against conviction and sentence and the grounds of appeal resemble those of an appeal against conviction. It is in truth an application for leave to appeal against sentencing orders made on the 16th of June 2006 in the District Court in Brisbane.

The relevant orders activated in part partially suspended sentences, and ordered that Mr Gill serve nine months of those partially activated sentences, with that sentence taking effect as and from 16 June 2006. Mr Gill argues that the result worked by those orders is a manifestly excessive sentence. To understand his argument it is necessary to grasp some of the history of Mr Gill's offending and being sentenced.

Ignoring some earlier convictions for driving a motor vehicle with a BAC of over 0.05 per cent, and for breaching a domestic violence restraining order on 19th of March 1996, Mr Gill's first convictions relevant to this application were incurred in the Brisbane District Court on the 4th of June 1999.

On that date he was sentenced for offences he had committed on the 28th of October 1995, those being two offences of wilful damage, one of breaking and entering a dwelling house with intent, and one of indecent assault with circumstances of aggravation.

The effect of the sentences imposed on that day, as amended by a decision of this Court, was that he was sentenced to three-

and-a-half years imprisonment to be suspended after he had served six months for an operational period of three-and-a-half years. That means that the operational period expired on the 4th of December 2002.

The delay in sentencing Mr Gill for those offences he committed in 1995 is partly explained by the sentencing remarks made by the learned Judge on the 4th of June 1999, which record that Mr Gill's case had been referred to the Mental Health Tribunal, and that Mr Gill had been affected to some extent by prescription drugs in the conduct encompassed by the offences to which he had pleaded.

The sentencing remarks record that the Judge accepted that Mr Gill had no memory of the commission of those offences and that the victim was his former partner. On the 6th of September 1999 he was dealt with in the Wynnnum Magistrates Court for an offence of serious assault on a police officer committed on the 29th of October 1995, and that was presumably committed either at or shortly after the time of his arrest on the other charges.

The next series of offences for which he was dealt with were offences of entering or being in premises and committing an indictable offence, committed between the 6th of November 2001 and of the 28th of November 2001; assault occasioning bodily harm committed on the 28th of August 2001; an offence of dishonestly gaining a benefit or advantage committed on the 24th of November 2001; breach of a domestic violence

restraining order on the 1st of February 2002; breach of a domestic violence restraining order committed on the 3rd of February 2002; breach of a domestic violence restraining order committed on the 11th of February 2002; unlawful stalking with a circumstance of aggravation committed between 28 January and 29 February 2002; and attempted rape committed on the 9th of February 2002.

The appeal record reveals that Mr Gill was taken into custody on the 28th of February 2002, and he has remained in custody ever since. He was sentenced on the 3rd of September 2002 in the Cleveland Magistrates Court for those offences committed in 2001 and in early 2002 other than the offences of stalking and of attempted rape.

The effect of the sentences imposed on the 3rd of September 2002, after a successful appeal by Mr Gill to the District Court held on the 7th of April 2003, was that he was sentenced to nine months imprisonment for one of the offences of breaching a domestic violence restraining order, and to shorter terms of imprisonment on all the other counts.

Because he was also held in custody on the charges of attempted rape and unlawful stalking, the time he had spent in custody between the 28th of February 2002 and the 3rd of September 2002 could not be declared by the sentencing Magistrate as time already served in respect of that nine month sentence, or the other shorter sentences.

Mr Gill was next before the District Court on the 10th of April 2003 when he was dealt with for having breached the operational period of the suspended sentence imposed on the 4th of June 1999. The convictions which had breached that operational period did not, of course, include the offences of unlawful stalking and attempted rape, which were still to be dealt with.

They did include all of those to which he had pleaded guilty in the Cleveland Magistrates Court on the 3rd of September 2002. The learned District Court Judge dealing with the matter on 10 April 2003 activated 15 months of the suspended three year term and declared that the time spent in custody, which was by then 277 days on the information give to the Judge, was time already served.

The result of those orders was that Mr Gill, whose full-time release date after the sentences imposed on the 3rd of September 2002 had been the 3rd of June 2003, now had a full-time release date, taking into account the time declared to be already served, of on or about the 27th of November 2003. By that date he would have served a total of 21 months of the three and a-half years imposed on the 4th of June 1999, but mostly suspended as at that date.

On the 2nd of December 2003 Mr Gill reappeared in the Brisbane District Court, when he pleaded guilty to the offences of stalking with a circumstance of aggravation and attempted rape. It appears that the victim was a different woman from

the one he attacked in 1995, because the sentencing remarks of the later date include the following:

"It would appear that you have a propensity to engage in inappropriate behaviour with persons with whom you have been in a relationship and these persons find your behaviour to be very distressing. On this occasion you had a short-term relationship with a lady which she terminated and you clearly would not accept her termination. This resulted in a period of stalking extending over a period of about one month. It is set out in detail in the statement that has been placed before me.

There was one incident of attempted rape. You asked to be admitted to her residence to use the toilet, which may well have been a subterfuge on your part. She fell asleep. She woke up. You were on top of her. You were attempting to have sexual intercourse with her and she yelled 'No'. You continued your attempts. She continued to say 'No' and ultimately you desisted."

The learned Judge sentencing Mr Gill on the 2nd of December 2003 imposed imprisonment of two years for the stalking offence, and three years for the attempted rape; and recommended that Mr Gill be eligible for parole after he had served 12 months. The effect of those orders were that Mr Gill now had a full-time release date of the 2nd of December 2006 and a recommended release date of the 2nd of December 2004.

By the time those orders were imposed he had been in custody for nearly two years in respect of the offences committed in 2001 and in 2002. He remained in custody on remand between 28 November 2003 and the 2nd of December 2003.

The Judge who sentenced him on the 2nd of December 2003 was told by the prosecutor, wrongly, that the offences of stalking

and attempted rape did not breach the operational period of the suspended sentences imposed on 4 June 1999. They did breach it because the operational period expired nearly 10 months after those offences were committed.

Mr Gill next appeared in the Richland Magistrate's Court on the 6th of December 2005 when he was convicted, but not further punished, on a charge of having breached an order made under the Domestic and Family Violence Protection Act. The date of the offence was between the 9th and 12th of April 2005, and it appears that Mr Gill committed that offence by telephone. That is because he has never been granted parole.

His written outline of argument complains that his parole applications have simply been lost, and he asserts to this court that he has not been refused parole. The sentencing orders which bring his matter before this court, made on the 16th of June 2006, appear to have resulted from the hearing of an application which Mr Gill had brought under section 188 of the Penalties and Sentences Act 1992, seeking to reopen the sentencing proceeding of the 10th of April 2003 in respect of the 277 days declared already served.

As I follow what happened, and Mr Gill's argument, the point had been taken, perhaps by officers within the Correctional Services system, that the learned sentencing Judge who partly activated the partly suspended sentences on the 10th of April 2003, had actually lacked the power to declare that the 277 days was time already served.

That was simply because Mr Gill had also been held in custody up to the 10th of April 2003 on the offences of stalking and attempted rape, as well as on all the other offences. The fact that declaration had been made on the 10th of April 2003 had also meant that the Judge who sentenced him on the 2nd of December 2003 for stalking and attempted rape did not declare any time already served.

It appears that on the hearing of Mr Gill's application in June 2006, brought for whatever reason that seemed sensible at the time to Mr Gill, and brought for a reopening of the sentence hearing that had been held a little over three years earlier, the prosecution caused or persuaded the learned sentencing Judge to deal with Mr Gill for the breach of the operational period of the suspended sentences imposed on the 4th of June 1999, consisting of his convictions for the offences of stalking and attempted rape committed in February 2002.

The learned sentencing Judge was satisfied in June 2006 that an error had been made by the learned Judge in declaring the 277 days in April 2003 as time already served, and ultimately the learned Judge set aside those orders that had been made on the 10th of April 2003. The Judge, in lieu of ordering as had originally been done that 15 months be activated, ordered that 218 days, being 15 months less 227, be activated. That was the manner in which the learned Judge dealt with Mr Gill's application.

Then there was the application by the prosecution. The learned Judge was entitled, and indeed obliged, to hear that application, simply because of the provisions of the Penalties and Sentences Act.

The application by the prosecution resulted in an order by the learned Judge activating nine months of the remainder of the suspended sentence; which was either 21 months in the view of the learned Judge, or perhaps, if another view be taken, 21 months plus 227 days, and the learned Judge ordered that that nine months, which Mr Gill would start serving as and from the 16th of June 2006, be served concurrently with the remainder of the three years that Mr Gill was then serving.

The effect of all this is that Mr Gill has now been in custody for almost five years because of the offences he committed in late 2001 and early 2002. He has been dealt with in both April 2003 and June 2006 for breaching the same suspended sentence imposed in June 1999.

At the time the first breach proceedings were heard in April 2003 he had served almost the whole of the nine months imposed in early September 2002 for the breaching offences. He therefore got a sentence which was cumulative in effect. When he was later sentenced in December 2003 for stalking and attempted rape, it was an error by the Crown in that proceeding that resulted in his ultimately being dealt with for a second time in June 2006 for having breached that 1999 suspended sentence.

When he was dealt with in December 2003 he had already served a sentence intended to be imposed on the first breach hearing, namely 15 months less 227 days declared already served, because that sentence had expired in November 2003.

As Mr Gill's written submission somewhat mournfully observed, he had been sentenced on the 16th of June 2006 to a further nine months for a breach of a suspended sentence imposed some 11 years after those original offences were committed, more than seven years after the original three and a half year sentence was given on the 4th of June 1999, and more than three and a half years after the operational period finished on the 3rd of December 2002.

In the circumstances, I am persuaded that the overall result of what has happened, which included a failure to have all of his matters dealt with by the one Judge at the one time, is a sentence imposed on the 16th of June 2006 which is manifestly excessive in its operation.

That operation results in part from the fact that Mr Gill has not been given parole and had accordingly been in custody for nearly four and a-half years by June 2006. It is unlikely that any sentence imposed on him, had he pleaded guilty to all matters in the latter part of 2002, would have been intended to keep him in custody for longer than four and a-half years.

I observe that is particularly so because of the recommendation made in December 2003 that he be considered for

parole after 12 months. A sentence for attempted rape, made cumulative in December 2003 on the whole of the activated three years, would, in all likelihood, have been modified and unlikely to have resulted in a total sentence of more than five years.

Accordingly, I would order that the orders and sentences made on the 16th of June 2006 be set aside and, in lieu thereof, order as follows: that the orders originally made on the 10th of April 2003 be re-opened, and that it be ordered instead that the whole of the suspended three years of the sentence imposed on the 4th of June 1999 be activated, and that that order take effect as and from the 10th April 2003, as varied today.

(I add that the intent of the order I have just announced is that Mr Gill will have served by now all of that activated term of imprisonment, and he will be entitled to regain his freedom when he completes serving the sentence of three years' imprisonment imposed on the 2nd of December 2003). Finally, I order that the orders I have just pronounced take effect as and from Friday, the 1st of December 2006. That is tomorrow, Mr Gill.

HOLMES JA: I agree.

HELMAN J: I agree.

JERRARD JA: Those will be the orders of the Court.
