

SUPREME COURT OF QUEENSLAND

CITATION: *R v Knight* [2013] QCA 277

PARTIES: **R**
v
KNIGHT, Rodney Edward
(applicant/appellant)

FILE NO/S: CA No 90 of 2013
DC No 7 of 2013

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Rockhampton

DELIVERED ON: 27 September 2013

DELIVERED AT: Brisbane

HEARING DATE: 15 August 2013

JUDGES: Muir and Fraser JJA and Atkinson J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal granted.**
2. Appeal allowed.
3. Sentence varied only to the extent of directing that the federal sentence commences on 9 October 2016.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where applicant was serving a term of imprisonment for State offences at the time he was sentenced for federal offences – where the federal offences were six counts of procuring another person to obtain a financial advantage by deception and two counts of attempting the same – where applicant’s sentence was governed by s 19(1) *Crimes Act* 1914 (Cth) – where the sentences for the federal offences were ordered to commence upon expiration of applicant’s incarceration for the sentences imposed for the State offences – where applicant’s full time release date under the State offences was 9 October 2017 and parole eligibility date had already passed – where applicant argued that there was an ambiguity in the expression of the sentencing judge of the commencement date of the sentence – where the expression “expiration of incarceration” could either mean the full time release date or the date of a grant of parole if that were to occur – whether the sentencing judge erred in the exercise of the sentencing discretion as to the direction regarding when the federal sentence commenced

Corrective Services Act 2006 (Qld), s 194(1)
Crimes Act 1914 (Cth), s 19(1)
Penalties and Sentences Act 1992 (Qld), s 188

R v Dobie [2004] 2 Qd R 537, [\[2004\] QCA 140](#), cited

COUNSEL: J McInnes for the applicant/appellant
D T Murphy (*sol*) for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Commonwealth) for the respondent

- [1] **MUIR JA:** I agree with the reasons and proposed orders of Atkinson J.
- [2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Atkinson J. I agree with those reasons and with the orders proposed by her Honour.
- [3] **ATKINSON J:** The applicant, Rodney Edward Knight, was in prison serving a term of imprisonment for State offences when he committed six counts of procuring another person to obtain a financial advantage by deception and two counts of attempting the same ("the federal offences"). Those offences occurred when he caused the lodgement of false income tax returns in his name and the names of other prisoners which resulted in funds being paid by the Commonwealth into his or his ex-girlfriend's bank account. The monies were spent and distributed at his direction.
- [4] At the time he was sentenced on 14 February 2013 he was serving a sentence which had been imposed in the District Court at Maroochydore on 10 April 2008. On that date he was sentenced to nine and a half years imprisonment for robbery whilst armed or pretending to be armed with an offensive weapon or instrument in company with violence. He was sentenced to lesser concurrent terms for an offence of entering a dwelling with intent by breaking, two counts of attempted robbery with actual violence and overcoming resistance, two counts of stealing, unlawful use of motor vehicles, aircraft or vessels intended for use in an indictable offence, one count of dangerous operation of a vehicle, one count of failing to stop a motor vehicle and one count of possessing dangerous drugs, and one count of driving without a licence. His full time release date was 9 October 2017 and his parole eligibility date was 27 March 2011, a date which had already passed.
- [5] He was sentenced for the Commonwealth offences on 14 February 2013 and resentenced on 15 March 2013 under s 188 of the *Penalties and Sentences Act 1992 (Qld)* to correct an error in that sentence. The sentences imposed on 15 March 2013 were imprisonment for three years with a release after 12 months upon giving security by recognizance in the sum of \$500 on each of the counts of procuring another person to obtain a financial advantage by deception and imprisonment for two years with release after 12 months upon giving security by recognizance in the sum of \$500 on each of the counts of attempting to do the same. All sentences were ordered to commence upon expiration of his incarceration for the sentences imposed on 10 April 2008.
- [6] The applicant did not seek to appeal the sentences imposed but in his written submissions took issue with respect to the appropriate commencement date of the federal sentences. The grounds of appeal are:-

- (1) that the sentence was manifestly excessive insofar as it deferred the earliest release date until 9 October 2018;
- (2) that the sentencing judge erred in fashioning an order that failed to give effect to his intention which was that the federal sentence commenced when parole for the State offences was granted;
- (3) that the sentencing judge erred in setting a commencement date contingent on the occurrence of an uncertain event, that is the grant of State parole; and
- (4) the sentencing judge erred in failing to explain the terms of the recognizance release order.

The federal offences

- [7] The eight offences of which the applicant was convicted relate to false tax returns lodged with the Australian Taxation Office ("ATO") between 12 June 2009 and 2 March 2010. Counts 1 and 2 related to tax returns lodged in the applicant's name on 23 June 2009 (for the financial year 2008) and 20 July 2009 (for the financial year 2009). The applicant was a prisoner at the time and he had not been employed at any time by the employers listed on the 2008 or 2009 tax returns. The applicant received refunds of \$7,891.10 and \$7,728.49 which were paid into the account of a third party to which he had access.
- [8] A further six false tax returns for the 2009 financial year were lodged with the ATO in the name of other prisoners. Five were lodged in November 2009 and one in March 2010. Again the employment records referred to in those tax returns were completely false. In respect of those prisoners, refunds of \$9,018.89, \$9,018.89, \$10,287.63 were paid into the applicant's account and a further sum of \$9,111.46 was paid into the third party account to which he had access.
- [9] The amount actually received from the ATO was \$54,000.01. A further \$18,862.97 was the subject of the attempts. The applicant enlisted his then girlfriend to assist him in this fraud. It appears that she was not trying to gain from it but was doing as she was told because she was afraid of the applicant whom she knew to be a violent person. All money that was received had been dissipated.

The sentence imposed on the federal offences

- [10] On 14 February 2013 a judge of the District Court sentenced the applicant to three years imprisonment on six counts and two years imprisonment on two counts as referred to earlier. He fixed a single non-parole period of 12 months. Reparation of \$54,000 to the Commonwealth of Australia was ordered. His Honour said that all the sentences of imprisonment were to commence "on the expiration of his incarceration for the current term of imprisonment being served." Each sentence was to be served concurrently with the others. He explained the nature of parole as required.
- [11] In doing so his Honour took into account the nature of the offences including the fact that the offences took place over nine months, it was prolonged behaviour on his part and that he was in prison at the time. It was a planned and systematic fraud. His Honour noted offending of this nature is difficult to detect given that Australia's taxation system is effectively a self-assessment taxation system and so relies on the

- honesty of individual tax payers. His Honour observed that behaviour of this type has an adverse impact upon all tax payers of the country. He noted there was no reparation and that any reparation in the future was unlikely.
- [12] He also took into account the applicant's personal circumstances. He was 36 to 37 years of age at the time of the commission of the offences and was 40 years of age at the time of sentencing. He had a criminal history which his Honour described as appalling. There is much force in that finding.
- [13] His criminal history in New South Wales commenced in March 1991 when he was convicted for various serious traffic offences on many occasions. He was then convicted of breaking, entering and stealing in July 1992 and sentenced to a period of imprisonment. Further convictions of that type followed as did convictions relating to dishonest use of motor vehicles and other offences of stealing. Throughout that period he had a serious traffic history.
- [14] It appears that in 1996 the applicant moved to Queensland. He was first convicted in February 1997 in the Bundaberg District Court of offences that were committed in 1996 including assault occasioning bodily harm, break and enter a dwelling house with intent in the night time, stealing, stealing with actual violence whilst armed with an offensive weapon and demanding money with intent to steal. He was sentenced to five years imprisonment suspended after serving 12 months imprisonment.
- [15] In January 2000 he was again convicted and sentenced in the Bundaberg District Court for various offences of stealing and violence. Those offences were committed in breach of his suspended sentence. In June 2001 he was convicted and sentenced in the Bundaberg Magistrates Court for various drugs and weapons offences. In July 2001 he was convicted and sentenced in the Bundaberg Magistrates Court in respect of fraud and receiving offences.
- [16] In March 2003 the applicant was convicted and sentenced in the Bundaberg District Court for offences of attempted robbery with actual violence whilst armed with an offensive weapon, two counts of wilful damage, one count of assault occasioning bodily harm, two counts of common assault, one count of going armed so as to cause fear, one count of behaving in a disorderly manner, one count of assaulting a police officer, and one count of obstructing a police officer as well as another breach of suspended sentence. The applicant's next serious matter was when he was convicted and sentenced in May 2004 in the Bundaberg District Court for one count of robbery with actual violence and one count of robbery with actual violence whilst armed with an offensive weapon.
- [17] In August 2007 he was convicted and sentenced in the Gladstone Magistrates Court for assaults occasioning bodily harm, possession of controlled drugs and failing to properly dispose of a needle or syringe, possession of utensils or pipes, breach of a bail condition and failure to appear in accordance with his undertaking. In March 2008 he was convicted and sentenced in the Gladstone District Court on one count of robbery with actual violence whilst armed and in company which was committed on 19 March 2006 and for breach of suspended sentence. He was then sentenced on 10 April 2008 in the Maroochydore District Court to the sentences of nine and a half years imprisonment which he was serving at the time he committed the federal offences the sentences for which are the subject of this application for leave to appeal.

- [18] As mentioned earlier, the sentences imposed on 14 February 2013 were re-opened on 15 March 2013 under s 188 of the *Penalties and Sentences Act* to correct an error. The sentences imposed on 14 February 2013 were vacated. In their place, the following sentences were imposed. On counts 1, 2, 3, 4, 6 and 8, the applicant was ordered to be imprisoned for a period of three years and it was further ordered that he be released after serving 12 months of the term of imprisonment upon giving security by recognizance in the sum of \$500 conditional that he be of good behaviour for a period of two years. There was a similar order on counts 5 and 7 except that the period of imprisonment ordered was two years rather than three years. A reparation order was again made. Significantly for the purposes of this appeal, the following order was made as to the commencement of the federal sentences:

"All of the sentences of imprisonment imposed today are to commence upon the expiration of incarceration for the current sentences of imprisonment imposed on the offender (imposed upon the offender in the District Court at Maroochydore on 10/4/2008)."

The applicant's submissions

- [19] On the hearing of the application, the applicant handed up submissions confining his argument. Ground 4 was abandoned. So far as ground 1 is concerned, the applicant did not submit that the sentence, which it said the sentencing judge intended, was excessive. The real contention was a concern that this court clarify what was said to be an ambiguity in the expression of the sentencing judge of the commencement date of the sentence. The expression "expiration of incarceration" could either mean the full time release date or the date of a grant of parole if that were to occur. Where what was intended was that the federal sentence commence immediately after the grant of parole, if any, or at the end of the existing sentence if parole is never granted, then those should be the terms of the order.

Discussion

- [20] Because he was serving a sentence of imprisonment for State offences at the time he was sentenced for the federal offences, the applicant's sentence is governed by s 19(1) of the *Crimes Act* 1914 (Cth) which provides:

"(1) Where a person who is convicted of a federal offence or federal offences is at the time of that conviction or those convictions, serving, or subject to, one or more federal, State or Territory sentences, the court must, when imposing a federal sentence for that federal offence, or for each of those federal offences, by order direct when the federal sentence commences, but so that:

- (a) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and
- (b) if a non-parole period applies in respect of any State or Territory sentences - the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period."

- [21] The sentencing court in such a case **must** direct when the federal sentences commence. There are two restrictions in the *Crimes Act* on the commencement date. The federal sentence cannot be imposed to commence later than the end of

the term of imprisonment which the offender is serving when he is sentenced. If a non-parole period applies to the sentence which is being served, which date has not yet been reached when the federal sentence is imposed, then the federal sentence commences immediately upon the end of the non-parole period.

- [22] The sentencing judge in this case could not direct that the sentence commence at the end of the non-parole period as that date had already passed: see *R v Dobie*.¹ Instead his Honour chose a date which is on the interpretation urged by both parties to the appeal in accordance with the intention of the judge, presently uncertain. It was presumably meant to be either the date on which he was granted parole which date is unknown and depends upon a decision of the Queensland Parole Board or the end of his term of imprisonment, being 9 October 2017.
- [23] It is open to doubt that a sentencing judge may direct a sentence to commence on a date that is uncertain or that is dependant upon a decision of a State administrative body. However there is a more fundamental problem with the starting date of the sentence if it is ordered to commence on the date he is granted parole.
- [24] Section 194(1) of the *Corrective Services Act 2006* (Qld) provides for the types of parole order that may be granted by a parole board. It provides that a parole board may, by a parole order:
- "(a) **release** any prisoner on parole, if the board is satisfied that exceptional circumstances exist in relation to the prisoner;
or
(b) **release** an eligible prisoner on parole. (emphasis added)"
- [25] A prisoner who is granted a parole order must, in its terms, be **released** on parole. There is no provision for a prisoner to be granted parole in order to commence a sentence of imprisonment. It is not possible to be simultaneously released from prison on parole and commence a period of actual imprisonment in custody in prison.
- [26] It appears therefore that the date on which the applicant was to be granted parole, apart from its uncertainty, could not be the time for the commencement of his federal sentence.
- [27] There was therefore an error in the exercise of the sentencing discretion as to the direction regarding when the federal sentence commenced. It falls to this court to exercise that discretion afresh. It appears to be consistent with the intention of the sentencing judge to ameliorate the effect of the federal sentence imposed to commence it, if possible, before the end of the applicant's term of imprisonment. This can in my view be achieved by ordering that the federal sentence commences on 9 October 2016, that is one year prior to the end of his term of imprisonment under the State sentence. The sentence should otherwise remain as it is so that he is released on recognizance for a period of two years on 9 October 2017, which is the date when his term of imprisonment for the State offences ends.

Orders:

1. Application for leave to appeal granted.
2. Appeal allowed.
3. Sentence varied only to the extent of directing that the federal sentence commences on 9 October 2016.

¹ [2004] QCA 140.