[2016] QCA 60

COURT OF APPEAL

MORRISON JA
BODDICE J
BURNS J

CA No 258 of 2015
SC No 41 of 2015
SC No 68 of 2015

THE QUEEN

v

WATKINS, Daniel Patrick **Applicant**

BRISBANE

TUESDAY, 15 MARCH 2016

JUDGMENT

BURNS J: On 25 September 2015, the applicant, Daniel Patrick Watkins, pleaded guilty to 41 separate offences in the Supreme Court at Townsville, the most serious of which was possession of over six grams of the Schedule 1 drug, methylamphetamine. He was sentenced to an effective head term of three years' imprisonment, with 10 July 2016 fixed as the date for his release on parole. He contends that his sentence was manifestly excessive in all of the circumstances, and seeks leave to appeal on that ground.

The sentences

The indictment to which the applicant pleaded guilty contained three counts. Count 1 was possession of methylamphetamine in a quantity exceeding two grams. Count 2 was possession

of cannabis. Count 3 was possession of a category R weapon within the meaning of the *Weapons Act* 1990 (Qld), namely, a taser. Each of those offences was committed on 8 January 2014.

In addition, the applicant was dealt with for 38 summary offences committed over a 17 month period between 8 January 2014 and 18 May 2015. Ten of those offences related to the possession of dangerous drugs or drug accoutrements, five for contravening the terms of a domestic violence order, five for breaching the conditions of his bail, two for possession in a public place of, respectively, a trident spear and a machete and one for the unauthorised possession of ammunition. As well, there were numerous driving offences, including driving under the influence of a drug, unlicensed driving and two charges of dangerous operation of a motor vehicle.

On Count 1, the applicant was sentenced to imprisonment for three years, on Count 2, to imprisonment for two months, and on Count 3, to imprisonment for five months. With respect to the summary offences, the most significant sentences were 12-month terms of imprisonment which were imposed for the dangerous operation of a motor vehicle offences, the unlicensed driving offence and two of the domestic violence order contraventions. Lesser terms of imprisonment were imposed with respect to a number of the other summary offences and, as to the balance, the applicant was convicted and not further punished. He was also disqualified from holding or obtaining a driver's licence for periods ranging from six months to two years and the operation of the domestic violence order was extended to 1 July 2017.

All terms of imprisonment were ordered to be served concurrently, with 56 days of pre-sentence custody declared to be time already served under them. It was further ordered that the applicant be released on parole on 10 July 2016.

The circumstances of the offending

The indictable offences came to light when police intercepted a motor vehicle that the applicant was driving. On searching the vehicle, three clip-seal plastic bags containing a white crystalline substance weighing, in total, 10.258 grams were discovered. Subsequent scientific analysis revealed that this substance contained 6.46 grams of pure methylamphetamine (Count 1). The

purity of the methylamphetamine in the bags ranged from 44.1 per cent to 75.8 per cent. It was not alleged or found that the applicant had possession of the methylamphetamine for a commercial purpose. Cannabis weighing one gram was also located, and that constituted Count 2, and the taser, the subject of Count 3, was also found by police on the search.

As to the summary offences, it is sufficient for present purposes to refer only to the convictions for dangerous operation of a motor vehicle and the convictions for breach of the domestic violence order.

The first of the dangerous operation offences was committed on 10 August 2014. The applicant was observed by police to be driving in an erratic manner, accelerating and then slowing down. He failed to yield when police directed him to pull over, and then sped away at speeds in excess of 100 kilometres per hour. At least one other motorist was forced to take evasive action before the police abandoned their pursuit in the interests of public safety.

The second dangerous operation offence occurred on 25 December 2014, when the applicant drove his vehicle at a man who was visiting a neighbour. He pursued the man in the vehicle when the man tried to run away. Eventually the man made it to a house. The applicant drove up to the house, challenged the man to a fight and threatened to return, before driving away.

The five contraventions of the domestic violence order were constituted by the applicant attending at his former partner's residence, threatening her, damaging her property and setting a piece of furniture alight on her patio. Four of these contraventions occurred in October 2014 and the fifth on 16 May 2015, shortly before the applicant was taken into custody.

Antecedents

The applicant was born in 1977. He was aged 36 years at the time of the offences on indictment and 38 at the time of sentence. He has an unenviable criminal history stretching back to 1996, including over 30 prior convictions for drug offences, 11 prior convictions for property offences, six prior convictions for offences of violence, two prior convictions for breach of domestic violence orders and two prior convictions for weapons offences. His traffic history is

also extensive. He has previously been disqualified from driving on six occasions, and his licence has otherwise been suspended on many more occasions.

Mr Watkins has been a long-term drug user. The medical evidence before the Court recorded a 20 year history of intravenous use of amphetamines. This had, in turn, contributed to the development of heart disease that resulted in a number of heart attacks and further required the applicant to undergo a number of surgical procedures, including the insertion of stents.

It was submitted by the applicant's counsel in the court below that the applicant at the time of these offences was also affected by the stress of the breakdown of his relationship with his former partner and by the feature that his father was terminally ill and dying. It was also that the applicant suffered from sleep apnoea and that, since 2013 to 2014, he engaged in the heavy use of methylamphetamine to keep himself awake. In this Court, the applicant submitted in writing that he did this because he feared dying from this condition. It was also submitted by the applicant in this Court that, since he has been in custody, he has not had the benefit of a CPAP (Continuous Positive Airway Pressure) machine to assist his breathing while asleep. He also asserts that he now suffers from diabetes.

The sentencing remarks

When sentencing the applicant, the sentencing judge noted that the offending involved the repetition of much of the same conduct that was revealed in the applicant's criminal history. There were not, his Honour considered, any realistic prospects of rehabilitation. His Honour also observed that the most relevant sentencing objectives were protection of the public, denunciation and general deterrence. The applicant was also noted to have persistently offended whilst on bail and on related Court orders.

The sentencing judge considered a submission made by prosecuting counsel that cumulative sentences of imprisonment might be imposed for some of the summary offences, but his Honour decided against that course. Instead, the approach favoured by the sentencing judge was to impose what his Honour described as a "high head sentence, taking into account the overall criminality and seriousness of [the applicant's] offending over time". This was an approach

that the applicant's counsel had urged on his Honour. Otherwise, his Honour considered that a non-parole period of 15 months was appropriate in all of the circumstances of this case.

So far as the declaration of pre-sentence custody was concerned, the sentencing judge noted that the applicant had been in custody since 18 May 2015, a period of 130 days, and that all save for 18 days of that period related to other offences. There were also earlier periods of custody in late 2014, 15 days, and in early 2015, 23 days, that were referrable solely to the offences for which the applicant was being dealt with. Nonetheless, the sentencing judge took into account the whole of the 130 days the applicant had been held in custody since 18 May 2015 and then added it to the earlier periods that were referrable to the offences to which the applicant pleaded guilty; a total of 168 days. The way in which this was done was to backdate the notional commencement of the non-parole period by that period, that is, 168 days, to 10 April 2015. The parole release date was then fixed as the date which was 15 months from 10 April 2015, that is, 10 July 2016. Furthermore, his Honour also made a declaration of pre-sentence custody with respect to the 56 days that were declarable, and this will have the effect of bringing forward the full-time expiry date for the sentence on Count 1 by the same period. It is to be observed that the approach his Honour took in each of these respects was discussed with counsel during the course of submissions and expressly agreed to by the applicant's counsel. It was, in any event, an approach that very much favoured the applicant.

The applicant's arguments

In the written submissions filed in support of this application, the applicant advanced three principal complaints: first, that the sentencing judge failed to have proper regard to the existence of his medical conditions and the feature that those conditions might make his incarceration more burdensome than in the case of an offender who is not so afflicted; secondly, that the 168 days of pre-sentence custody did not appear to have been taken into account by his Honour; and, thirdly, that the date fixed for his release on parole made the overall sentence manifestly excessive.

Medical conditions

I deal first with the contention that the sentencing judge failed to properly take into account the applicant's medical conditions. That contention must be rejected.

In the court below, it was submitted that the applicant suffered from coronary artery disease and coronary myopathy. The surgical procedures that the applicant had undergone were detailed by his counsel. In support of those submissions, a report from the applicant's treating cardiologist dated 10 September 2015 was tendered along with relevant extracts from the clinical notes of the Townsville Hospital where the applicant underwent surgery and other treatment for his heart disease. The notes reveal that his treatment was complicated by the use of amphetamines, benzodiazepams, cannabinoids and opiates, which were noted to be present on analysis on 7 July 2014, as well as intermittent failures to take his prescribed medications. Despite this, the cardiologist reported that the applicant was stable from a cardiac point of view, although the impact incarceration would have on his conditions was considered to be uncertain. Be that as it may, the material to which I just referred was the subject of detailed submissions from the applicant's counsel, and it was expressly referred to in his Honour's sentencing remarks. It cannot be said that the applicant's cardiac conditions were not taken into account by the sentencing judge.

The submission was also made in the Court below that the applicant suffers from sleep apnoea, but it was not submitted that the applicant had been experiencing any particular difficulty in consequence of that condition whilst in custody. No submission was made about diabetes. Neither condition was, in any event, the subject of any medical evidence before the Court. Nor were any submissions made to the sentencing judge to the effect now made in writing that his sleep apnoea is causing him particular distress. In this regard, it is noteworthy that, when sentenced, the applicant had been in continuous custody since 18 May 2015. If there was substance to the complaints now made by the applicant, one would have expected them to have been raised with his counsel, an experienced practitioner in this area, and then relayed to the sentencing judge in submissions. The applicant's complaints about sleep apnoea and diabetes otherwise remain unsupported by any medical evidence.

The sentencing judge cannot be criticised for failing to have regard to factors that were not drawn to his attention. There was nothing advanced at the sentencing hearing to support the conclusion that the applicant was at any serious risk of imprisonment having a gravely adverse

effect on his health – see *R v Pope & Attorney-General of Queensland* [1996] QCA 318 – or that he would not receive appropriate medical care whilst in prison – see *R v Irlam; ex parte A-G* [2002] QCA 235. The case for the existence of either circumstance is, in any event, not persuasive.

Time served

I deal next with the applicant's complaint that the period of 160 days of pre-sentence custody did not appear to have been taken into account by the sentencing judge. For the reasons I have already expressed, that period was, in fact, fully taken into account by the sentencing judge, and 56 days of it was formally declared. There is no merit in this complaint.

Manifestly excessive

Lastly, I deal with the applicant's complaint that the date fixed for his release on parole made the overall sentence manifestly excessive.

It is clear from the sentencing remarks that the approach the sentencing judge took was to impose a sentence on Count 1 that reflected the applicant's overall criminality. His Honour determined that an effective head sentence of three years' imprisonment with parole fixed at the 15-month mark was appropriate to reflect the seriousness of the offending and, at the same time, take account of the applicant's plea of guilty and the other mitigating circumstances that were present in this case. The sentence was further ameliorated for these reasons by the selection of a backdated commencement date for the non-parole period.

The applicant urges this Court to adjust the sentence so that it becomes "a standard 3 years with a 12 month Court-ordered parole". The Court will only do so where it is positively demonstrated that there has been an error in principle or where the sentence imposed is unreasonable or plainly unjust. See *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520. Neither has been demonstrated here.

The applicant was found in possession of a substantial quantity of methylamphetamine. Although no element of commerciality attached to that possession, decisions of the Court such as *R v Armstrong* [2005] QCA 116, *R v Hillier* [2007] QCA 279, *R v Pearce* [2010] QCA 338

and *R v Warren* [2014] QCA 175 support the sentence that was imposed for Count 1 when regard is had to the applicant's age, his extensive criminal history, the absence of any realistic prospects of rehabilitation and the significant additional offending over a 17-month period which was also taken into account. Indeed, as prosecuting counsel submitted, consecutive terms of imprisonment may well have been imposed with respect to some of the summary offences for which the applicant was sentenced and, had the sentencing Judge taken that approach, the overall effective sentence may have been higher. If sentenced only for the aggravated possession of methylamphetamine, that is, Count 1, then on the authority of the decisions of this Court to which I have referred, a lesser head sentence might have been called for, but the factors I've just mentioned, not the least of which was the significant additional offending, justified the head sentence that was actually imposed in this case.

The real gist of the applicant's complaints is founded on the misconception that he is being required to serve 15 months before his release on parole. In reality, he was entitled to the declaration of pre-sentence custody that was, in fact, made (56 days) and no more. However, the sentencing judge went further to credit the applicant with an additional 112 days which was not declarable. It cannot be said that the learned sentencing Judge erred in the fixing of the non-parole period.

Conclusion

In my opinion, the application for leave to appeal must be refused.

MORRISON JA: I agree.

BODDICE J: I agree.

MORRISON JA: The orders of the Court are that the application for leave to appeal is refused.