IN THE COURT OF APPEAL [1996] QCA 510

SUPREME COURT OF QUEENSLAND

C.A. No. 382 of 1996

Brisbane

[R. v. Holton]

THE QUEEN

v.

WAYNE DARCY HOLTON
(Applicant)

Pincus JA
Thomas J
Dowsett J

Judgment delivered 10 December 1996

Separate concurring reasons for judgment of each member of the Court.

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED

CATCHWORDS: **CRIMINAL LAW - SENTENCE - General sentencing level for burglary - Special aggravating factors - Whether sentence manifestly excessive - Observations on R v Joyce [1986] 1 Qd.R. 47.**

Pre-sentence custody - Whether "the offender was held in custody in relation to the proceedings for the offence and for no other reason" - s161 *Penalties & Sentences Act* 1992 - R v. Wishart and Jenkins [1994] 2 Qd.R. 421.

Counsel: Mr S. Hamlyn-Harris for the Applicant
Mr B.G. Campbell for the Respondent

Solicitors: Legal Aid Office for the Applicant.
Queensland Department of Public Prosecutions for the Respondent.

Hearing Date: 13 November 1996

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 10 December 1996

I have read the reasons of Thomas J. and agree, substantially for the reasons his Honour gives, that the application should be refused. I particularly agree with what is said in those reasons about Joyce [1986] 1 Qd.R. 47. In recent years at least, Joyce has not been regarded as a decision of much assistance in sentencing for burglary, insofar as it says that the general level of sentencing for burglary should be about 5 years with "substantial increases" for various circumstances; that does not accord with Queensland sentencing practice. Most offences of breaking and entering appear to be committed by young offenders and it is not uncommon for such offences, particular when unaccompanied by any aggravating factors, to attract considerably lighter sentences than Joyce recommends.

Any suggestion that the general level of penalties may ever be driven too high is now quite out of fashion; this has perhaps contributed to the outcome mentioned in the recent 1995/1996 report of the Queensland Corrective Services Commission to the Minister, the Honourable Russell Cooper MLA. The report includes:

> "The Commission has continued this year, as it has since 1993, to respond to an unprecedented growth in prisoner numbers. The reasons for this increase are still poorly understood but the impact on correctional service systems, accommodation and staff are obvious." (p. 4)
>
> "Queensland has the dubious distinction of having by far the fastest growing imprisonment rate in Australia. Since the 1992/93 financial year, Queensland's imprisonment rate has grown from 89 per 100,000 of adult population to 124. To illustrate the seriousness of this costly statistic, the imprisonment rate of Victoria is only 70 per 100,000 of adult population and has been around this figure for many years." (P. 6).

All that having been said, I have been unable to reach the conclusion that the sentence imposed in the present case was manifestly excessive. At first sight it seems high, but the circumstances attending the commission of the offence as set out in the reasons of Thomas J, were so appalling that it is impossible to grant the application.

REASONS FOR JUDGMENT - THOMAS J

Judgment delivered 10 December 1996

The applicant was sentenced in the Supreme Court on one count of burglary and another count of being in possession of a motor vehicle with intent to permanently deprive. He seeks leave to appeal against sentences of six years' imprisonment on each count (concurrent) with a recommendation for parole after two years and nine months. His Honour also declared a period totalling 229 days as having already been served by reason of pre-sentence custody.

The applicant was aged forty-seven and had a considerable criminal history of property

offences, repeated unlawful uses of motor vehicles, and one escape from custody. He has been to prison on eight separate occasions for offences of dishonesty.

The victim of these offences was Mrs Walter, a divorced woman, fifty-three years old, whose occupation was described as cleaning lady. She lived in a Housing Commission unit at Highgate Hill. She was murdered on the night of the applicant's burglary. This presumably happened not long after the applicant had taken most of her worldly goods and disappeared in her motor vehicle. Her body was found by the police a week later. The applicant was charged with her murder and acquitted by a jury. The Crown acknowledged that it could not be suggested that the applicant had any criminal responsibility for Mrs Walter's death, and His Honour acted on that footing.

Mrs Walter had a number of male friends who used to visit her at her unit. The applicant claimed to have met her less than a month before the day in question, and to have formed a relationship with her, seeing her several times a week. On Sunday, 27 August 1995 he said that Mr Walter phoned him and asked him to come over, and that he did so at around 12.30 p.m. They spent the afternoon and evening together, drank some liquor and went to bed at about 9 or 10 p.m. and had sexual relations. He said they went to sleep and that later in the night he woke up, probably about 1 a.m., went to the toilet, came back and tried to wake Mrs Walter up. He suggested that she was intoxicated and he could not wake her. He then went into the lounge and "tried to work out what was going on". He decided to rob her. He said that the subject of stealing from her had "come up" from time to time when talking to his flat mates, and when sitting there that night he decided to carry this out.

What followed was a ransacking of her unit and the taking of most of her possessions of any value. He collected many items, loading them into Mrs Walter's car. While doing this he says he left the front door open and when he left at about 2 a.m. or 3 a.m. he was not sure whether he locked the front door. He recalls leaving the security door open. When he left, Mrs Walter was still alive.

The list of items taken tells its own sad story. These are too lengthy to set out here, but it is as well to mention a few. He took her Yamaha organ, her microwave oven, her television set,

her stereo system, her vacuum cleaner, her diamond rings, a considerable number of items of jewellery (at least twenty-five items), watches, Sunbeam iron, Arlec torch, ornaments, files, binoculars, thirty-five compact disks, her hair-drier, her esky, her hedge-cutters, her address-book, ornaments and many more of her possessions including her car.

He drove away with these items in her vehicle, and very quickly (the same day) commenced delivering the items of property to a colleague named McKenzie at Beachmere to dispose of the property for him. On the following day, after hearing that the police had been investigating the property, he left Brisbane in Mrs Walter's car and went to Newcastle. He was arrested by police in Sydney on 12 September 1995.

The applicant, when apprehended expressed remorse that Mrs Walter was dead, saying "she did not deserve that", but expressed no remorse in respect of the robbery.

All the property was recovered.

The applicant's conduct was utterly shameful and, although the word may be old-fashioned, dastardly. The deceased no doubt trusted him and bore him some affection. His response was to use her callously and shamefully. The learned sentencing judge observed that when questioned by the police about the alleged murder he willingly disclosed his involvement in what he called "the robbery" but not so as to betray even a skerrick of remorse for having committed it, and further observed that no remorse has been suggested now. Other relevant factors are that the applicant is a persistent offender, and that the crime has the marks of deliberate professional work, particularly in the speedy disposition of the stolen items to a receiver. It is to be inferred that he intended to take away from her all the things which she had collected and valued in her life.

In the course of arriving at a sentence, the learned sentencing judge referred to R v. Joyce [1986] 1 Qd.R. 47, 50, as some basis for a sentence of five years for burglary "without special factors". His Honour considered that "special factors" aggravated the sentence in the present matter, in particular (i) the applicant's bad criminal history including offences of dishonesty attracting terms of imprisonment; (ii) the substantial nature of the property stolen; (iii) the brazenness and betrayal of trust; (iv) the lack of remorse; (v) the professional intention of the

applicant in relation to disposal of the property. His Honour then imposed a sentence of six years, and granted a slight benefit in the recommendation for parole, having regard to the fact that the applicant had acknowledged his guilt of these particular offences from the start, and had, after his acquittal of murder, pleaded guilty to these offences upon an ex officio indictment.

I do not think that Joyce's case has been regarded in this court as fixing a general sentencing level for burglary, or as being a benchmark for upward or downward adjustment. The end question in the present case is whether the sentence actually imposed is manifestly excessive.

It is true that there are many decisions, of which Joyce is one, which enable comparisons to be made which assist in indicating an appropriate level for sentences in particular cases. Counsel for the applicant referred to a number of such cases including Berry (CA 1 of 1989), Karolak (CA 326 of 1989), Mancktelow (CA 346 of 1989), Morris (CA 378 of 1989) and Kingston-Kerr (CA 259 of 1991). However none of those cases approaches the present one in terms of seriousness. It should hardly be necessary to say that circumstances alter cases. In outrageous cases, precedents and analogues are very difficult and usually impossible to find, and routine cases are just not relevant. Moreover, to take two of the cases referred to in argument (Mancktelow above, and Kothe, CA 213 of 1985, 8 October 1985) sentences of four years were upheld or imposed in circumstances which were on the whole less serious and despicable than the present.

I therefore see nothing in the sentence here imposed that is inconsistent with decided cases, sentencing patterns or fair punishment for the particular crime. The main point made on appeal, of excessive reliance upon Joyce, does not assist the applicant unless in the end the actual sentence was inappropriate. Another point made on behalf of the applicant is that he did not physically break in, but that of course was simply the consequence of the fact that he was in a position to abuse a trust, and he took full advantage of it. Additional factors such as his early admission and plea, the recovery of the property by the police, and the circumstance that it was not part of a multiple series of offences are all relevant, but they do not detract from the serious aspects which have earlier been mentioned to such an extent as to render the sentence

inappropriate.

It should be mentioned that there has been an irregularity in the making of a declaration that the period of the applicant's imprisonment from 24 December 1995 to 8 August 1996 is to be regarded as time served under this sentence. Such a declaration should be made only if "the offender was held in custody in relation to the proceedings for the offence and for no other reason" (*Penalties & Sentences Act* s.161(1)). In the present case the applicant was arrested on 12 September 1995, and until 23 December 1995 was in custody on other matters. From 24 December 1995 to 8 August 1996 (a period of 229 days) he was in custody, but this was primarily if not solely the result of the murder charge. Upon presentation of the indictment for murder, it was indicated that the Crown would not be proceeding with the burglary charge. It was re-enlivened only after the acquittal of murder.

Plainly these circumstances do not satisfy the requirement of s.161(1). Prior to the introduction of the *Penalties & Sentences Act* 1992 the courts in this state framed sentences to take into account pre-sentence custody. The various techniques by which this was done, and some of the difficulties involved are discussed in R v. Wishart and Jenkins [1994] 2 Qd.R. 421, 428. There was always a grey area when pre-sentence custody could be seen to be attributable to causes other than detention on the charges for which the offender was to be sentenced. For example if an offender was taken back into custody because he breached the conditions of bail, the period thereafter spent in custody would not normally be regarded as a period for which the offender was entitled to any credit. On the other hand, if an offender was held in custody on a variety of charges, and the offence for which he fell to be sentenced might fairly be regarded as a concurrent cause of his detention, a credit would be allowed, but of course only once.

Sections 158 and 161 of the *Penalties & Sentences Act* did not manage to reproduce the untrammelled discretion which had previously existed. The rigidity in s.161(1) of the requirement that the offender be held in custody in relation to the proceedings for the offence and for no other reason creates difficulties, as the present case illustrates. However the former jurisdiction and discretion is retained when the court "otherwise orders" under s.161(1).

Whilst it may be arguable in the present case that the applicant would not necessarily

have been given full credit for the stated pre-sentence custody if the old method had been used (i.e. the method described in paragraphs 1 on page 426 and 430 of Wishart and Jenkins above), one would have expected substantial allowance to be made for it. In granting full discount under the method prescribed in s.161(3) the only potential error is one in favour of the applicant.

I therefore see no reason to alter the form of the order notwithstanding the error that has been mentioned.

I would refuse the application.

REASONS FOR JUDGMENT - DOWSETT J.

Judgment delivered 10 December 1996

I agree with the orders proposed by Mr Justice Thomas and with his Honour's reasons.