[1997] QCA 071

COURT OF APPEAL

DAVIES JA
AMBROSE J
WHITE J

CA No 563 of 1996

THE QUEEN

v.

RUSSELL JOHN COLLINS — Applicant

BRISBANE

..DATE 18/03/97

JUDGMENT

180397 T15/SJ3 M/T COA42/97

DAVIES JA: The applicant pleaded guilty in the District Court on 6 December last to five counts, one of escaping lawful custody, one of attempted armed robbery, one of grievous bodily harm, one of unlawful wounding and one of stealing. The first of these was committed on 19 August 1995. The others were committed on 8 October 1995.

The applicant was sentenced to four years imprisonment for the offence of escaping lawful custody, 12 years imprisonment in respect of each of the offences of attempted armed robbery and grievous bodily harm, three years imprisonment for the unlawful wounding offence and 12 months imprisonment in respect of the stealing offences. All sentences were concurrent. The learned sentencing Judge then imposed a non-parole period of nine years.

The applicant is 33 years of age, having been born on 22 November 1963. At the time these offences were committed he was serving a life sentence for murder imposed in 1987, that offence having been committed in 1986. Two years earlier he committed offences of breaking and entering with intent, armed robbery with actual violence, unlawful use of a motor vehicle and deprivation of liberty. However, he was not sentenced for those offences until July 1990 when he was sentenced to six years imprisonment concurrent with his life sentence.

In the meantime, in February 1990, he was convicted and sentenced to 18 months imprisonment for escaping lawful

custody in July 1988. In October 1990 he was sentenced to a further 18 months imprisonment for the offence of wilful and unlawful destruction of property apparently in prison. He again escaped from prison on 19 August 1995 and, as I have said, the most serious of these offences was committed whilst he was at large. He was returned to custody on 10 October 1995.

Something should be said about the most serious of these offences. That is, those which were committed on 8 October 1995. On that day the applicant went to a property 17 kilometres from Theodore owned by Mr and Mrs Hewitt who were respectively aged 66 and 62. The applicant had previously worked for the Hewitts and had parted with them on good terms. He arrived at the property wearing dark clothes and a balaclava. He stole a rifle from a vehicle on the property and approached the patio of the house.

Mrs Hewitt, who heard a noise, came outside whereupon he pointed the gun at her and ordered her back inside. She called to her husband who came to her assistance. There was a short scuffle between the applicant and Mr Hewitt and the latter was soon overpowered by the applicant and finished on the ground. Whilst Mr Hewitt was on the ground the applicant repeatedly kicked him in the body, face and head, jumped on his legs a number of times and stomped on his face and head. Mrs Hewitt tried to stop the applicant but the applicant drew a knife and cut Mrs Hewitt severely on the hand. He then left

the property.

Mrs Hewitt suffered a wound to her right hand which required seven stitches. Her husband's injuries were much more serious. He had extensive facial bruising, tread marks on his face, an open wound, soreness of his chest and other parts of his body and a fracture to his knee joint. His leg was immobilised in a brace and it appears that he will have a permanent disability to his leg.

When first apprehended the applicant gave a false name and a false account and there were a number of further prevarications by him before he finally made admissions to the police implicating himself in these offences and ultimately identifying himself as the escapee.

There is very little in my view that can be said on the applicant's behalf. However, it was said in the submissions made on his behalf here that it had been put to the learned sentencing Judge and uncontradicted that he was being harassed in prison and that this led to his escape, that he was hungry and thirsty and in a poor state when he reached the property of his victims and that his intention was originally only to take some food. However, even if one accepts all of this it cannot either explain or excuse his vicious and cowardly assault on an elderly man and his wife. The learned sentencing Judge was justified, in my view, in describing him as a violent and dangerous man and one in respect of whom

careful consideration ought to be given before he is released on parole.

As an example of his dangerous personality the learned sentencing Judge mentioned that he told the police during the course of his period at large he intended to call on one person, apparently his uncle, who had given evidence against him at his earlier trial in order to, as he put it, "stir him up".

It was conceded on the applicant's behalf both in the written submissions and in oral argument by Mrs McGinness that a head sentence of 12 years, although at the high end of the appropriate range for offences of this kind, could not be considered manifestly excessive having regard to the applicant's criminal history. However, it was submitted that when account is taken of his plea of guilty that sentence should be reduced, it was said, to one of nine years. I cannot see any justification for that submission.

He did not give up through any sense of remorse and indeed when first interviewed told a false story and indeed he told a false story on the second occasion on which he was interviewed and as I have already said it was only after some continuing discussion over some time that he finally admitted his full involvement and that he was the person who had escaped from prison. It is true, of course, that some allowance should always be made for the fact that a plea of guilty has avoided

the time and expense of a trial and in this case the effect that that trial might have on two elderly people who had already suffered at the applicant's hands.

When one looks at the total sentence imposed on the applicant, having regard to the sentence he is already serving for murder, in my view, sufficient allowance has been made for those factors. The learned sentencing Judge was faced with a difficult problem caused by the fact that a sentence cannot be imposed cumulatively upon a life sentence for murder although the latter would ordinarily result in the convicted person becoming eligible for parole. Had the applicant been sentenced for other than a term of imprisonment for life the sentences imposed in this case would have been imposed cumulatively upon those which he was then serving and that in fact was conceded by Mrs McGinness for the applicant.

This could have ensured that there would have been an effective punishment imposed on the applicant for these offences. However, the learned sentencing Judge was informed that the applicant would be eligible for release on parole in respect of his life sentence on 30 July 2002. If he was eligible for parole at the midpoint of the sentences imposed here, as would ordinarily be the case in the absence of a recommendation in consequence of section 166 of the Corrective Services Act, the result would be that he would serve only approximately an additional four months actual imprisonment for these offences before being entitled to apply for parole. That does not mean, of course, that he would have been

entitled to parole at that time and Mrs McGinness submits, in effect, that questions of that kind can appropriately be dealt with by the relevant parole authorities.

So of course they can but it does not follow that the learned sentencing Judge or this Court cannot also impose a sentence which would appropriately deal with those matters. Be that as it may it was these unusual circumstances which caused the learned sentencing Judge to make the non-parole period one of nine years. It was submitted by Mrs McGinness that that could not be done. No case directly in point was cited nor was it submitted that there was any statutory prohibition upon the learned sentencing Judge from imposing the sentence or a sentence of the kind which in fact he did.

Mrs McGinness however referred to the case of Taikmaskis (1986) 19 A.Crim.R. 383, a decision of the Court of Criminal Appeal of Victoria in 1986. It was conceded that that case was not directly in point and it certainly is not. It was concerned with the question of whether a cumulative sentence may be imposed either actually or in effect on a life sentence. I say in effect because the question was argued also whether it could be imposed upon another sentence which had been imposed the effect of which would be, however, to impose it cumulatively upon the life sentence.

That question is not in dispute here. It is also true that there were factual matters which arose in that case which

arise here but it is plain from what I have said, I think, that the question in issue in that case was quite different from that which is in issue here.

We are therefore left with no authority to guide us and no statutory prohibition, as I have said, upon the learned sentencing Judge from doing what in fact he did.

There is no doubt that it must be unusual circumstances which justify a Court having regard to the provisions of section 166 of the Corrective Services Act and generally the current statutory regime in fixing a non-parole period longer than the halfway point of the sentence. However, in my opinion, those unusual circumstances are present here. There must be and there must be seen to be an effective sentence imposed for the offences committed here. By that I mean amongst other things one which is an effective deterrent to the applicant and to other like-minded persons in a similar position. The course which the learned sentencing Judge took was a course which enabled such an effective sentence to be imposed. For those reasons I would refuse the application.

AMBROSE J: I agree with what the learned presiding Judge has said but wish simply to comment that on the facts of the case the learned sentencing Judge was able to make an order which would in fact act as some deterrent to persons serving a life sentence from committing other offences in the belief that punishment would have no effect on their parole eligibility for the life sentence. His Honour said in making observations

along these lines that:

> "It is important that a sentence be imposed in this case such that it not be seen as a joke either by you or by other persons already serving long terms of imprisonment and who may be minded to escape from custody and commit further serious crimes in the belief that those crimes will have no effect on the date on which they are ultimately released from custody."

Now, it does not mean, of course, that a person who commits a serious offence while serving a life sentence will automatically be released from custody when he becomes eligible to apply for parole under section 166(1)(a) of the Corrective Services Act.

Looking at the facts of this case if this offence had been committed - or these offences for which he was sentenced - had been committed by the applicant at an earlier stage of his imprisonment which commenced in June 1987, so that he was sentenced perhaps 10 years before his eligibility arose under section 166(1)(a) of the Corrective Services Act it would really not have been possible for the sentencing Judge on these offences to have imposed any sentence which would have had effect to postpone his eligibility for release from custody under the life sentence imposed after serving 13 years of that sentence.

On the facts of this case it happens that because the sentences were imposed eight years before he became eligible to apply for parole in respect of the life sentence imposed upon him in June 1987 there was available to the learned sentencing Judge the option which he exercised and which in my

view it was permissible for him to exercise. In my view, however, the comments that His Honour made in imposing sentence that in the absence of making the sort of order he made in this case there was no detriment that could be held out to persons serving life sentences by way of punishment to refrain from committing offences that might only attract five or 10 years imprisonment if served concurrently so that their eligibility for parole on those sentences would arise prior to their eligibility for parole under the life sentence imposed. There is just no real way of deterring the commission of offences by such prisoners.

In my view, this situation arises because of what I think is really a casus omissus in the legislation. Section 157(2) of the Penalties and Sentences Act allows a Judge or a sentencing Court to make a recommendation for release on parole before or subsequent to the service of 50 per cent of the sentence imposed. Section 157(3) contemplates a fresh recommendation for parole being made where there are a number of cumulative sentences for specific periods of time imposed. But there is nothing that I can see in the Penalties and Sentences Act or under the Corrective Services Act which could justify a sentencing Judge when imposing a penalty for an offence committed, for example while in custody or by somebody who has escaped from custody, making any recommendation that would have any effect to extend the period of eligibility under section 166(1)(a) of the Corrective Services Act.

In my view consideration ought be given by the legislature to addressing that problem so that not merely does a sentencing Judge have power under section 157(3) to make a fresh recommendation for parole in the case of sentences other than life sentences but also power to make a recommendation with respect to the statutory eligibility for parole given with respect to a life sentence under section 166(1)(a) of the Corrective Services Act.

In the absence of such a power it happens that on the facts of this case the learned sentencing Judge was able to use section 157(2) to impose a meaningful sentence on the applicant. Subject to those observations I simply agree with the order proposed by the learned presiding Judge.

WHITE J: I agree with the orders proposed and would also support the opinion of Mr Justice Ambrose that some consideration might be given to importing the provisions of section 157 relating to cumulative sentences and fresh parole dates to situations where a prisoner serving a life sentence is found guilty of a subsequent sentence.

DAVIES JA: The orders are as I have indicated.
