COURT OF APPEAL

de JERSEY CJ
DAVIES JA
FRYBERG J

CA No 451 of 1998

THE QUEEN

v.

SHOEBNA ANNE MOORE
Applicant

BRISBANE

..DATE 14/04/99

JUDGMENT

FRYBERG J: This is an application for leave to appeal against sentence. The applicant was convicted on six counts: one of aiding a person who was in lawful custody to escape from custody, two of stealing, two of unlawful use of a motor vehicle and one of unlawful use of a motor vehicle with a circumstance of aggravation.

The learned sentencing Judge in passing sentence imposed sentence in these terms:

> "The order I propose on each offence on the indictment before me is imprisonment for three years. Because of your extra cooperation in the administration of justice in calculating the global head sentence and global parole recommendation instead of a recommendation for consideration for parole after 12 months on that it will be after, in effect, nine months of such term. I activate in part the sentences of imprisonment partially suspended on 18 April 1997 and subject to the further order on 19 November 1997. I activate such in part, almost in full, and for each original offence you are sentenced to three years imprisonment such terms to be concurrent one with the other but the said concurrent three year term shall commence at the expiration of the deprivation of liberty on the three year terms on the indictment before me today. That is three years cumulative making an effective head sentence of six years imprisonment."

The reference to activating a sentence was a reference to the application before the Judge to activate suspended sentences imposed on the applicant at an earlier time. The notice of appeal brought before us appeals only against the sentence which was imposed and not against the orders activating the earlier sentences but counsel for the Crown very properly indicated that the Crown had no objection if it were proper to the Court making orders in relation to those suspended

sentences without the need for any amendment to the notice of application.

The most serious of the offences which the applicant committed was aiding the escape of Peter Lawrence Brennan. Brennan was a 30 year old man who has variously been described as the boyfriend or de facto of the applicant. When the relationship was established does not appear. The applicant was at the time of the offence only 20 years of age.

Brennan was at the time of the escape serving a nine year sentence for an armed robbery committed in 1991. He was sentenced in March 1992 and had therefore at the time of the offence served over six years, possibly seven years or so, of the sentence which had been imposed upon him. He had been re-classified so that he was permitted to work on the external perimeter of the prison.

The applicant on 30 April 1998 stole a car and knowing that Brennan would be working on the outside of the gaol went there to collect him. He was reluctant at first to go with her but she convinced him that he should go with her and he did so. He then spent the next two weeks at large with her. During the course of those two weeks a further two cars were stolen by them and again it seems that she was the primary force in that activity. She also stole the contents of two of those cars.

Eventually police located Brennan in a park at Greenslopes where the applicant was unconscious, having overdosed on heroin, and was in need of medical attention. When she recovered she was initially uncooperative with the police but later cooperated fully and admitted the extent of her involvement in criminal activities over the two week period, even to the extent of pointing out to the police some matters about which they could not otherwise have gained information.

She was born on 13 May 1977. Her first offence was committed in April 1995 when she was not yet 18. In the two and a half years from then until August 1997 she committed a further 20 offences. The most serious of those were those for which she was sentenced on 18 April 1997.

They fell into three groups. The first of the three groups consisted of an offence of stealing with actual violence whilst armed with an offensive weapon and in company. That offence was committed on 7 March 1996. For it, she was sentenced to imprisonment for five years, but an order was made suspending that imprisonment after 18 months for an operational period of five years.

At the time of the sentence, she had spent some nine months in custody so that effectively she had to serve another nine months before the suspension became effective.

The second group of offences dealt with on that day was headed by a charge of stealing with actual violence whilst in company, and related to events in June and July 1996.

For that group of offences, she was sentenced to imprisonment for four years. Again, the imprisonment to be suspended after 18 months was served and the time spent in custody of nine months had the result that she was entitled to be released

after a further nine months.

The third group of charges was a group of charges involving stealing and assault with intent to steal and use of actual violence and in relation to that group committed in April and June/July 1996, she was sentenced to imprisonment for 30 months and similar suspension orders were made as for the other two offences.

In September 1997, while in custody, she was convicted of an offence of possession of a prohibited article, an offence committed the preceding month, and was sentenced to two months' imprisonment cumulative with the existing term.

In November 1997, as a result of that breach, she was brought before Judge McMurdo (as Her Honour then was) in

the District Court, on what was called breach of a suspended sentence.

It is not altogether clear what proceedings were before Her Honour, but it seems that Her Honour dealt with the matter as though she were dealing only with the sentence imposed for the first of the three groups of offences to which I have referred, that is, the sentence which attracted a penalty of five years.

Her Honour ordered that the applicant serve a further four months of that suspended sentence to be served cumulatively, as necessarily followed, on the 18 months then being served, but concurrently with the sentence of two months imposed for possession of the prohibited article.

No question presently arises as to the proper ambit of that order.

The applicant was born in New Zealand and was educated to year 12 at Craigslea School in Brisbane. She was it seems, from what was put before Judge McMurdo, offered a place at an institution called the Queensland Academy for Sport, at the beginning of 1998. That was a factor which influenced Her Honour's decision. She also took into account the fact that the applicant's parents were separated while she was young, and the applicant had

become addicted to heroin at or near the end of her period in high school.

These matters were also taken into account by Judge Howell in the present case. His Honour began his sentencing remarks by observing that for one so young, the applicant has an appalling criminal history. One can only agree.

His Honour observed that she had certainly been given her chances and had certainly been dealt with at first most compassionately and then somewhat leniently. He said, You have shown in the clearest terms what you thought of those chances. You have certainly copped a snoot at the chances you were given."

After referring to the sentencing history of the applicant, and to the matters taken into consideration by Judge McMurdo, the learned sentencing Judge pointed out that the applicant had been out of gaol a mere six weeks or so when the offences the subject of the charges before him took place.

It is not clear whether His Honour gave much weight to the fact that the applicant was the instigator of the escape but it would seem from the sentence which he imposed that he did so.

His Honour rightly observed that the community views seriously escaping from gaol and anyone who assists in such an escape.

He took into account a number of mitigating factors, which should be the subject of proper consideration, namely a timely plea of guilty and cooperation in the administration of justice.

Whether His Honour was completely correct in the view which he took of the chances which had been afforded the applicant is not altogether clear.

Assuming she had a scholarship tenable in early 1998, as Judge McMurdo was told, it would seem that, despite her Honour's deliberate statement that her sentence was imposed to enable the applicant to take up that scholarship, the opportunity was not made available to her. Instead, the executive put in train steps to deport her from Australia.

No explanation was given to His Honour of why the applicant committed the offences, especially so soon after her release from gaol, but it may be that an inference can be drawn of that from the nature of the relationship which I have already described and the prospect of deportation.

The most serious consideration, it seems to me, in relation to this appeal, is the question of parity. Brennan was sentenced only a matter of days after the sentencing of the present applicant. For escaping from lawful custody and for his part in the unlawful use of the motor vehicles, three of the charges made against the applicant, he was sentenced to imprisonment for six months, such sentences to be concurrent with each other but cumulative on his other imprisonment.

When one compares that sentence with the sentence of three years imposed for the same offences on the applicant, it is difficult to see how parity has been maintained. Even when one has regard to the total criminality of the applicant's conduct and brings into account the additional charge of unlawful use of a motor vehicle for the purpose of aiding the escape and the two relatively small stealing charges, it is still difficult to see how a sentence of six times the sentence imposed upon Brennan can be maintained.

It is true that the applicant was the instigator of the escape, and Brennan was sentenced on that basis. However, it seems to me that even taking that matter into account, the sentence imposed on the applicant was manifestly excessive.

In reaching that conclusion, I have also taken into account a number of sentences imposed in somewhat

comparable circumstances by single Judges. Counsel for the Crown rightly acknowledged the difficulty of finding comparable cases in the Court of Appeal.

The fact that the sentence is manifestly excessive means that we ought to re-sentence the applicant ourselves.

In the circumstances, I think the appropriate sentence to impose for the charges the subject of the indictment is imprisonment for one year. That being so, it is unnecessary to distinguish between the various charges.

The imposition of a sentence of imprisonment for one year necessarily involves interference also with the order for parole made by the sentencing Judge below.

If we are not to change the substance of the order for activation of the suspended sentences, there is not a lot of flexibility available in relation to the question of parole.

The practical way of dealing with the reduction in sentence is, it seems to me, to allow the applicant to be released on parole immediately after the commencement of the term of imprisonment for the offences the subject of the indictment. It seems that there is no power to order parole in relation to the period of the suspended sentence.

There are some questions about the form of order which were made below which deserve mention. The learned sentencing Judge ordered that a global parole date be fixed after
27 months of imprisonment. It seems to me that nothing in section 157 of the Penalties and Sentences Act authorises the making of such an order.

The only relevant power to order parole seems to be that under section 157(2) of the Act, a power which can be exercised only in relation to the offences the subject of the indictment.

For that reason it is important that the suspended sentence should be served first if the applicant is to have the benefit of an early eligibility for parole. His Honour did not impose the orders which he made in that sequence but rather ordered that the suspended sentence be served second.

It would appear also that His Honour failed to appreciate the change in terminology which is necessary in relation to imposing cumulative sentences. He ordered that the cumulative sentence should commence at the expiration of the deprivation of liberty on the three year term on the indictment before him that day.

That terminology is a reflection of the wording of the now repealed section 20 of the Criminal Code. That

section was repealed in 1992 by the Penalties and Sentences Act and the appropriate terminology is to be found in section 156 of the latter Act.

The other matter to which attention should be drawn is the fact that His Honour appears not to have realised that the second and third of the suspended sentences had less than three years left to run. His purported sentences of three years in relation to those two sentences therefore cannot stand as counsel for the Crown rightly conceded before us.

It appears also that His Honour did not consider section 147 when he decided not to activate the whole of the balance of the first suspended sentence. However, the Crown has not appealed, so this decision should not be interfered with in any way detrimental to the applicant.

To deal with the situation which has arisen, I propose the following orders:

(a) Leave to appeal granted.

(b) Set aside the whole of the order of Howell DCJ made on 12 November 1998, except the declaration in relation to pre-sentence custody.

(c) In lieu thereof, order as follows:

(i) Order that the prisoner serve the whole of the balance of the suspended imprisonment in respect of the sentences of four years' imprisonment and 30 months' imprisonment imposed on 18 April 1997.

(ii) Order that the prisoner serve three years of the balance of the suspended imprisonment in respect of the sentence of five years' imprisonment imposed on 18 April 1997.

(iii) On each of the charges in the indictment, the prisoner is sentenced to imprisonment for one year, such imprisonment to start at the end of the balance period of imprisonment just referred to.

(iv) Recommend that the prisoner be eligible for release on parole after serving one day of that term.

THE CHIEF JUSTICE: I agree.

DAVIES JA: I agree.

THE CHIEF JUSTICE: The order is as indicated.
