[2000] QCA 126

COURT OF APPEAL

McMURDO P
DAVIES JA
HELMAN J

[R v Best]

CA No 408 of 1999

THE QUEEN

v.

GRAHAM DOUGLAS BEST Applicant

BRISBANE

..DATE 11/04/2000

JUDGMENT

HELMAN J: On 4 November last year, the applicant came before the Supreme Court in Brisbane charged with six offences against the Drugs Misuse Act 1986: one count of trafficking in the dangerous drug heroin, two counts of unlawfully supplying heroin, one count of unlawfully possessing heroin with a circumstance of aggravation, one count of unlawfully possessing the dangerous drug cannabis sativa, and one count of unlawfully possessing the dangerous drug methylamphetamine. To each count the applicant pleaded guilty.

For trafficking his Honour sentenced the applicant to imprisonment for eight years and recommended that he be considered for parole after serving three years. For unlawfully supplying heroin and unlawfully possessing it, his Honour noted the applicant's pleas of guilty but, mindful of the principle explained by the High Court in Pearce v. The Queen [1998] 194 C.L.R. 610, he imposed no additional penalty. For each of the two other offences, concurrent sentences of imprisonment for one month were imposed.

The applicant's trafficking came to light after a police investigation which began in June 1998. Video surveillance in the Brunswick Street Mall and approaches to the applicant by an undercover police officer

confirmed information that the applicant was trafficking in heroin there. The charges of unlawfully supplying and unlawfully possessing heroin arose from the undercover police officer's dealings with the applicant.

Further evidence came from an interview of the applicant and from a search of his home. He is a computer expert. It was found that he kept records of his trafficking in a diary and on his computer. His possession of cannabis sativa and methylamphetamine was discovered on and following the search.

The applicant's complaint concerns the sentence of imprisonment for eight years which he asserts is manifestly excessive.

The applicant was born on 17 March 1950. He has what the Crown Prosecutor before his Honour referred to as a "minor" criminal history consisting of offences committed in this state and in New South Wales. There were no drug offences in Queensland and nothing is recorded in Queensland after 1969. At the time of the commission of the offences dealt with by his Honour, the applicant was addicted to heroin but when sentenced was no longer taking it and was on a methadone program. His Honour accepted that his trafficking was "addiction-driven".

The penalty his Honour imposed was a severe one and quite rightly so in view of the gravity of the offence. The applicant was not a naive and impressionable youth but a mature man described by members of his family as "very intelligent and focused" and "very clever and extremely knowledgable on a variety of subjects". He had been a university lecturer for ten years. He should have been well aware of the consequences of committing offences involving illicit drugs, having been dealt with for three such offences - admittedly minor - in February 1993 in a Local Court in New South Wales. As his Honour observed, the applicant's was "a quite significant business, although ... not at a level that appeared to deal in large quantities of heroin." But because of the quantity of heroin involved overall and the method of operation, his Honour concluded that it was a serious offence.

The applicant had recorded purchases from May to July 1998 of nearly 110 grams of heroin for $38,000. He had sold nearly 56 grams in 230 transactions over a period of approximately six weeks. His records revealed a gross profit of $10,533 from selling the 56 grams to his customers. He may have used some of the remainder himself but had he sold it his gross profit would have increased to $19,418.

The applicant made a timely plea of guilty. His addiction to heroin had apparently driven him to traffic in it. He became addicted to heroin in about 1996 after losing his job in Sydney. That misfortune had caused him to become depressed, as he had been some years before when his marriage failed.

On behalf of the applicant, it was argued that the learned judge's sentencing discretion miscarried because his Honour failed to give sufficient weight to a number of aspects of the case. They were: that the applicant is a mature man with a limited criminal history, that he enjoys the support of his family, that he resided with his elderly parents who are both in poor health and he was primarily responsible for their care, that he cooperated with the authorities, that he entered a timely plea of guilty, and that he had, prior to 1996, a solid work history in the computer and information technology industry.

We were referred to a number of previous cases in which sentences for trafficking were considered. As might have been expected, the sentences in those cases were in some instances different from that imposed on the applicant, according to the circumstances of the cases. What is,

however, clear from the cases is that the sentence complained about was within the range for the offence of trafficking in heroin. Indeed, in The Queen v. Sean Richard Pascoe, CA number 184 of 1997, an unreported decision of the Court of Appeal dated 22 July 1997, McPherson J.A. (with whom Pincus J.A. and Williams J. agreed) said, when speaking of a sentence of imprisonment for eight years for trafficking, that the sentence was within the range for the offence of trafficking in heroin. Given that that is so and bearing in mind that one of the important purposes for which sentences may be imposed on an offender is to deter the offender or other persons from committing the same or a similar offence as provided in s.9(1) of the Penalties and Sentences Act 1992, I am not persuaded that his Honour's sentencing discretion miscarried. I am not persuaded that, giving proper weight to the factors relied upon by the applicant, the case calls for the intervention of this Court.

Accordingly, I should refuse the application.

THE PRESIDENT: I agree. When the mitigating and rather pathetic circumstances of this case are considered, in my view, the sentence was at the higher end of the appropriate range but for the reasons given by Mr Justice

Helman it cannot be said to be manifestly excessive.

I too would refuse the application.

DAVIES JA: I also agree. This is a particularly sad case. A mature man, apparently leading a decent and productive life, after a series of personal reversals, becoming himself addicted to heroin and this in turn leading to his offending.

No doubt in the applicant's interests, and it may ultimately have proved to have been in the interests of the community as a whole, the applicant would be better off under some program which would attack his drug dependence.

On the other hand, there are two reasons which, in my opinion, required a substantial term of imprisonment to be imposed. One is that the trafficking in this case was substantial, yielding enough income to sustain not only the applicant's drug addiction but a comfortable lifestyle as well, and the second is the importance in these cases of general deterrence, particularly so where there is trafficking of a substantial degree such as outlined in the reasons for judgment of Mr Justice Helman, whether of a retail or a wholesale kind.

On the whole, nevertheless, the sentence seems to me to be rather high when one compares it with the cases of Woods and Clark referred to by Mr Moynihan. On the other hand when comparison is made with cases such as Pascoe referred to by Mr Justice Helman, Tho Le and Sebez referred to by Mrs Clare, although, as I say, the sentence seems to me to be rather high, it was not in my view manifestly excessive.

I agree with the orders proposed by Mr Justice Helman.

THE PRESIDENT: The order is the application for leave to appeal against sentence is refused.