[2002] QCA 252

COURT OF APPEAL

de JERSEY CJ
WILLIAMS JA
JERRARD JA

CA No 65 of 2002

THE QUEEN

v.

COSTICA POPA Appellant

BRISBANE

..DATE 22/07/2002

JUDGMENT

THE CHIEF JUSTICE: The appellant appeals against his conviction for the offence of carrying on the business of unlawful trafficking in the dangerous drug heroin in Cairns and elsewhere between the 1st of April 1999 and the 20th of January 2000.

He was imprisoned for 13 years, and also in a formal sense seeks leave to appeal against sentence - formal in that no ground is nominated.

The Crown case against the appellant was a mixture of direct and circumstantial evidence. The most potentially powerful incriminating evidence of a direct nature came from two witnesses recruited by the appellant to make sales.

Seicean was recruited in November 1999. The appellant provided him with heroin packaged in freezer-type plastic bags. They used a coffee grinder to powder the heroin, originally in rock form. They mixed it with salts and packaged it in 7-gram lots. They placed the heroin in jars which they concealed in the ground at various locations including Yorkeys Knob and Centennial Park. When a customer telephoned Seicean he would get the heroin from a jar, supply it and provide the money to the appellant. The price was $3,000 per 7-gram bag.

Seicean who worked under the name Dave gave evidence of regular sales to a number of people named Karen, Jacqui and Steve. The other recruit was Popescu. In May 1999 the

appellant recruited him to sell heroin over a period of a week. He in fact ended up selling over a period of three weeks. This heroin also came from jars buried in the ground.

Popescu operated from bushland behind what became the TAFE college at Cairns. He paid amounts totalling $40,000 over to the appellant in respect of that period. His customers were named Michael, Shaun, Kevin and Melinda.

The other direct evidence came from purchasers of the heroin. Three of them gave evidence. Karen Faust dealt with Dave in 1999. She sometimes recovered heroin from a hole in the ground and left money in its place. Although she said she did not purchase heroin directly from the appellant, she identified the appellant from a police photo board as one of the people with whom she was dealing.

Jacqueline McReaddie purchased in 1999 from Dave, Michael and Con. Con was the person the Crown presented as being the appellant. She purchased heroin over a few months at Barron River Bridge, Yorkeys Knob and Centennial Park. She selected the appellant from a photo board as one of the men with whom she dealt.

The third purchaser to give evidence, Russell James, gave evidence of 20 to 25 purchases over a few months for prices ranging from $500 to $2,000 per supply. He purchased from the appellant at the car park of the TAFE college.

The circumstantial case comprised a number of components. Perhaps the most significant was evidence that notwithstanding the appellant's not be in lawful employment and in fact drawing a Newstart allowance in amounts totalling $13,006 from 1st July 1998, he apparently had access to substantial moneys, sufficient to fund two return flights to Japan during the period covered by the indictment, to pay for his accommodation for December 1999 at a Yorkeys Knob resort for which he paid the $275 per week rent in cash, and repairs worth approximately $4,000 to his Toyota vehicle in December 1999 for which again he paid in cash.

Another piece of circumstantial evidence concerned the discovery of freezer-type plastic bags and, more distinctively, grey/silver sticking tape in a bag at two residences used in the relevant period by the appellant. The bags and the tape resembled that found in a jar recovered from one of the sites. Other evidence placed the appellant near the Barron River Bridge on an occasion during the relevant period, that being the location of some sales.

Finally there was evidence from Seicean that the appellant complained, at about the time of a cyclone which hit Yorkeys Knob, of losing a jar containing about $13,000. On 5th March 2000 a package containing approximately that amount of cash was found during a clean-up operation on Yorkeys Knob beach.

The learned judge directed the jury as to the need for careful assessment of the evidence, given that much of it came from

persons jointly involved in criminal activity. He also appropriately addressed the issue of incentive to implicate the appellant in order to attract favourable treatment in terms of penalty.

Through his grounds of appeal the appellant refers to "inconsistent testimony from convicted witnesses", contends that the trial judge failed to instruct the jury properly and asserts that the trial was prejudiced by media coverage.

In his outline of argument the appellant has particularised some 90 aspects of the evidence which he would say involved some discrepancy or other.

There was unsurprisingly inconsistency within the evidence of particular witnesses and between the testimony of one witness and another. They were the subject of cross-examination and formed a plank of defence counsel's address to the jury of which the judge reminded the jury when summing up.

The first ground of appeal, inconsistent testimony from convicted witnesses, should be approached as involving a contention that the conviction is therefore unsafe, necessitating our review of the case overall to determine whether the jury should reasonably have convicted the appellant.

Various arguable discrepancies emerged during the cross-examination of Seicean. The point was made for example that

in his statement to the police when dealing with his initial meeting with the appellant he did not state that he was to sell heroin, but as he responded when challenged about this at the trial, heroin was what it was "all about", as indeed subsequent events established.

Seicean was challenged on various other bases: that his statement referred to their grinding a 150-gram rock of heroin on one occasion only, that it referred to the appellant refilling the jars, that it did not mention his going to the beach on the 18th of January 2000 for the purpose of getting heroin for Karen.

The witness made various responses to those sorts of challenge. So far as they led to inconsistency between his statement and the rest of his evidence, the criticisms were pressed but they were ultimately for the jury to assess, and it could not be said, in the whole context, that they necessitated the rejection of the witness's evidence in its entirety or even in part, particularly significant parts. None of the points taken critically in relation to the evidence of Popescu appears to have significance.

As to the purchasers, the judge drew attention to the question of whether Faust's identification of the appellant should be regarded as sufficiently positive and he spoke of the element of uncertainty attending McReaddie's identification. His Honour instructed the jury appropriately on the need for care with the evidence of identification. That arguable weakness

in the identification of evidence of those witnesses did not necessitate its rejection. The purchaser James on the other hand knew the appellant and gave evidence of a number of meetings.

It is important to note that the significance of any weakness in the identification evidence of Faust and McReaddie tends to diminish in light of the judge's having directed the jury quite firmly that they could not convict unless satisfied beyond reasonable doubt of the important evidence of Seicean and Popescu.

This first ground of appeal by its terms raises also the issue of the reliability of the evidence of witnesses said to have been pressured into testifying. Seicean for example claimed that Detective Carrol told him in effect that unless he cooperated they would make sure he remained in gaol.

Faust claimed that she was offered what she called a letter of comfort and that after having been, as she put it, hammered for five hours, she gave her statement.

These allegations of pressure were denied by the police. James for his part said that he was told that if he told the truth it probably would not go as badly for him as otherwise. None of these witnesses suggested in evidence that their statement was false.

The circumstances to which I have referred were fully

ventilated before the jury. They did not mean that the jury should reasonably have acquitted.

Another issue, the significance of the police having suggested the name of the appellant to witnesses or having shown them Seicean's statement, was likewise a matter which potentially affected the jury's determination of whether they were satisfied of guilt beyond reasonable doubt - while not, either alone, or aggregated with other matters of criticism, necessitating an acquittal.

I consider I have sufficiently addressed the points taken in relation to the first ground. Others were matters of trivial detail.

Reviewing the whole of the case in light of this first ground, I would not consider the conviction unsafe. The evidence of Seicean and Popescu was powerfully incriminating and derived further support from the evidence of the purchasers.

The appellant did not give or call evidence. The summing-up was appropriate and replete with requisite warnings. In these circumstances the conviction should not be considered unsafe.

The second ground of appeal involved criticism of directions given by the judge to the jury. By and large the criticisms are, I consider, specious, as may shortly be illustrated.

The first of them concerns an obvious slip by the judge when

dealing with the standard of proof which he immediately corrected. He said this when summing up:

> "If after you've given careful consideration to the whole of the evidence - that if you have a reasonable doubt that the accused is guilty, then your proper verdict is - sorry, if - if you are satisfied beyond reasonable doubt that the accused is guilty, your proper verdict is simply that, that you find the accused guilty. If, on the other hand, you are not satisfied beyond a reasonable doubt, then equally it is your duty to find Mr Popa not guilty."

Secondly, dealing with the appellant's failure to give evidence the Judge said this:

> "There are some tactical advantages in not giving evidence. For example, Mrs Pearson had the right to address you last in the case. One obvious consequence of the decision not to give evidence in the trial is that whatever conclusion you draw from the evidence which is before you, the evidence remains unconvicted - uncontradicted by any evidence given by - by him."

Those observations correctly represented the position and the learned Judge was entitled to make them, particularly noting as I do that they followed an orthodox direction that no adverse inference could be drawn from the appellant's failure to give or call evidence. That direction was in these terms:

> "In this case, the accused has not given evidence. From the rule that I have just enunciated that the onus rests on - onus of proof rests on the prosecution in our system an accused person is not under any legal obligation to give evidence. So, while you've not heard Mr Popa give any evidence nor call any witnesses to speak about the facts of the case, that does not lead to any inference of guilt against him. The simple rule is that no inference can be drawn against him because he decided not to give evidence. It is simply a choice that he is entitled by law to make. Neither you nor I know why he decided not to give evidence. No provision is made in our system for any explanation to be given."

Many of the other criticisms involved a completely

unreasonable dissection of the summing-up. For example, his Honour's statement, "Has the prosecution established that there was being carried on the business of unlawfully trafficking in heroin?" was criticised for not mentioning the need to establish that it was the appellant who was the trafficker, a point abundantly covered, however, as one would expect, throughout the summing-up. The appellant takes the point that the Judge said in his summing-up that Faust's identification of the appellant was on videotape which was, in fact, unusable, but the Judge immediately corrected that when giving redirections. It is not necessary or desirable for me to traverse the other particular criticisms raised in relation to the summing-up. They were without substance and nitpicking in character.

The third ground of appeal concerns media coverage. In oral argument here today the appellant referred us to a newspaper report of the result of the committal. That of itself was not such, obviously enough, as to warrant not proceeding with the trial, and the point seems not to have been taken at the trial anyway, by experienced counsel who appeared for the appellant.

Anticipating this point which had not been particularised in the notice of appeal, counsel for the Crown referred to a point which has been mentioned here orally today by the appellant, and that was the fact that television coverage during the trial apparently showed a photograph of a jar which had not been seen by the jury and was not in evidence. Defence counsel sought no special direction in relation to

that news bulletin. The learned Judge properly directed the jury as to what did and did not comprise evidence and that they were confined to the evidence. There is, therefore, no substance in this ground.

The appellant sought to rely at the hearing of the appeal on affidavits by Bruce Woodbury and Michael Williams, both prisoners, to the effect that they first met the appellant after his incarceration following conviction. They were persons who, on the evidence of Russell James, were involved in his dealings with the appellant. The prerequisites for the admission of fresh evidence were plainly not established: notably, the dates of these two affidavits preceded the trial.

The complaint ventilated before us was that the appellant's counsel at the trial did not lead the evidence. But as appears from the affidavit of that counsel, Sandra Joyce Pearson, placed before the Court today, that evidence was not led for good forensic reasons. The point is plainly without significance, particularly when one has regard to the test as formulated in R v. Paddon [1999] 2 Queensland Reports 387 at 393. There could be no basis for any reasonable contention of flagrant incompetence in relation to the way this matter was handled here, if one has reasonable regard to the content of counsel's affidavit.

The appeal against conviction should, in my view, be dismissed. I turn to sentence.

When he committed the offence, the applicant was 32 to 33 years old and 35 years old when sentenced. The learned Judge regarded him as a wholesaler. He took him as having no significant prior history. He was entitled to no reduction, because there had been a trial.

The applicant, it should be observed on the evidence led at the trial, stood at the apex of a drug distribution network at the time in Cairns. The trafficking netted him substantial sums of money. He was motivated only by financial greed. The sentence of 13 years sits comfortably with the approach taken in other cases, notably Nguyen Court of Appeal 151 of 1999, Van Bi Tran 111 of 1996, Bujora [2001] Queensland Court of Appeal 310 and Bulciuman and others Nos 342 to 346 of 1996.

The learned Judge properly regarded Bujora, with whom the applicant had been working, sentenced to 12 years, as setting a relevant standard. A sentence of this order, that is 13 years, for a mature man who runs a heroin trafficking business over a substantial period, who recruits some operators and fosters the custom of vulnerable addicts, netting substantial sums of money, and driven only by a commercial motivation, was comfortably within range. I would refuse the application for leave to appeal against sentence.

WILLIAMS JA: I agree that the appeal against conviction should be dismissed for the reasons given by the learned Chief Justice. I also agree that the application for leave to

appeal against sentence should be refused for the reasons he gave.

I would add to the comparable cases referred to by the Chief Justice in his reasons a reference to the recent decision of this Court in R v. Dent [2002] QCA 247. It may well be that in that case a greater quantity of heroin was involved but Dent did not have a prior conviction for cultivating cannabis which this applicant did. In Dent a sentence of 14 years imprisonment was not interfered with. I agree with the orders proposed.

JERRARD JA: I agree with the reasons for judgment of the learned Chief Justice in respect of the appeal against conviction. I add that there were considerable circumstantial items of evidence adding force to the direct evidence of the witnesses who identified the appellant as being directly involved in carrying on the business of trafficking in heroin. Some examples will suffice in addition to those given in the judgment of the learned Chief Justice.

The witness Popescu who swore to having sold heroin for the appellant for a period of perhaps three weeks described having had a flat arranged for his residence in Harris Street in Cairns. He said that this was done by the appellant. There was evidence independent of that witness that a flat at unit number 1 at 23 Harris Street in Parramatta Park in the relevant area was rented during the relevant period by a man giving himself the name of Ilie Constantine.

The person so describing himself also described himself as being employed by Harris Brothers and giving his occupation as that of a plasterer. The appellant had been employed by that employer as a plasterer in the years 1995/1996 and no person by the name Ilie Constantine had ever worked for those employers. In addition, the person giving himself that name gave the name of Popescu as one of the referees for the renting.

There were other circumstantial details. These included the fact that the witness Seicean whose evidence was critical specifically described how he had been introduced by the appellant to other people who would buy heroin including a woman known to Seicean by the name Karen and another woman known by the name Jacqui. Mr Seicean's evidence was that he was introduced by the name Dave.

Each of those two women was called by the Crown. Each described having been convicted in trafficking in heroin and each described having purchased heroin from a man known to them as Dave and sold part of that heroin to support their own need. It was apparent from the Crown case that the person Dave was the man Seicean and the jury were entitled to conclude from the evidence each of those women gave that they were introduced to Seicean by the name Dave by a person whom they identified from photographs and the jury were entitled to conclude that that person was the appellant.

I agree with both of the observations of both the Chief Justice and of Justice Williams regarding the application for leave to appeal against sentence. I have nothing else to add.

THE CHIEF JUSTICE: The appeal against conviction is dismissed. The application for leave to appeal against sentence is refused. The collection of material which the appellant presented in the course of the argument should be marked "A" and placed with the papers.
