[2002] QCA 373

COURT OF APPEAL

DAVIES JA
WILLIAMS JA
JONES J

CA No 161 of 2002

THE QUEEN

v.

JODY KINGELTY

BRISBANE

..DATE 20/09/2002

JUDGMENT

MR P F RUTLEDGE (instructed by Director of Public Prosecutions (Queensland) for the Crown

APPELLANT conducted her own case

DAVIES JA: This is an application for extension of time within which to appeal against conviction and seek leave to appeal against sentence. The applicant was convicted on her own plea of guilty in the Supreme Court on 12 November 1999 of attempted murder on 26 January 1998. She was sentenced to eight years imprisonment and the learned sentencing judge made a declaration that the offence was a serious violent offence.

The applicant sought to appeal against her sentence and that application was dismissed by this Court on 26 May 2000. She did not appeal against her conviction.

This application was filed on 15 May 2002. Its main basis is that the applicant claims to have fresh material in the form of a statement from her co-accused with whom she was then living in a de facto relationship that she was involved in the commission of the offence only because he physically forced her to become involved and that he believed that she was worried for her own life because of his violent and threatening manner.

What is now said in this statement is inconsistent with the version which the applicant's counsel gave to the learned sentencing judge during the course of the sentence hearing.

It also appears from what was said at that hearing, and was not contradicted by the applicant's counsel at the time, that the applicant said to another person on the night before her co-offender Griffiths attempted to kill the complainant, that the complainant was "going down". And whilst it is true that the applicant, having accompanied Griffith to the complainant's home on the night in question, remained in the car while he went inside armed with a cane knife, the engine was apparently kept running and she was in the driver's seat prepared to drive him away. There was also evidence that a person in the vicinity heard a female voice from the direction of the vehicle call out, "I'm going to kill you."

The complainant was the applicant's former de facto husband and, shortly prior to the commission of the offence, they had had a serious argument about his failure to honour his obligations with respect to children of their relationship. The learned sentencing judge found, on the evidence presented to him, that the applicant's co-offender was doing her bidding and that she, in effect, urged him on. On the evidence before his Honour I think that those conclusions were justified.

It should be noted that the sentence hearing was nearly two years after the date of the offence and as I will mention shortly no attempt was made to correct the facts as I have set them out on the hearing of the applicant's application for leave to appeal against sentence in May 2000.

Other evidence presented to this Court showed that the relationship between the applicant and her co-offender had been a violent one, as indeed had the relationship between the applicant and the complainant. The applicant who appeared for herself on the application this morning has told us that she has been a victim of domestic violence since she was very young.

It also appeared from what was said to the Court on the sentence and hearing that the applicant was both alcohol and drug dependent and that she and the co-offender had consumed a substantial quantity of alcohol before the commission of this offence.

There are substantial difficulties in the way of success of this application. The first, so far as it relates to the application for leave to appeal against sentence, is that such an appeal has already been dismissed. There are numerous decisions of this Court to the effect that, in that event, the applicant's appeal rights to this Court are exhausted. Her only course would be to petition the Governor, pursuant to section 672A of the Criminal Code or to seek special leave to appeal to the High Court. See, for example, R v. Regazzoli [2001] QCA 482 where some of the previous decisions of this Court are referred to.

The other difficulty facing this applicant is the failure by her to satisfactorily explain why this evidence was not available earlier. There are difficulties, in my opinion, in

seeing why if the statement which she now tenders is true it could not have been obtained before the sentencing hearing on 12 November 1999.

The applicant's explanation of this before us is that she was frightened of her co-offender Griffith and because of her subjection to domestic violence over a long period she had been substantially affected by that domestic violence. These together she contended prevented her, in effect, from saying anything about the matter. This she says explains why she did not attempt to explain to her counsel on the sentence hearing what is now put forward as a basis for her application for an extension of time. She also said that she had no contact with her counsel on the application for leave to appeal against sentence on 26 May 2000.

I should also add that she failed to mention to a psychiatrist who interviewed her that she had been frightened of her co-offender and in effect what she now says to this Court. Looked at objectively there seems little or no prospects of success in an appeal against conviction.

On the other hand, it may be that there is some possibility that her story is true. It may be that because of her prolonged subjection to domestic violence and particularly her relationship with the co-offender that she was in such a state that she was unable to express what she now says to this Court. The grant of an extension of time would, at least,

involve legal aid to investigate whether there is any substance in an appeal which she now seeks to make. In those circumstances, I can't be satisfied that there is no prospect that the version which her co-offender now gives is true notwithstanding the evidence given by apparently independent witnesses. It may be, when investigated, that these witnesses either were not independent as the applicant says of the witness to whom her alleged statement was made on the night before the accident or simply misheard as she says of the witness who claims to have heard someone calling out at the time of the commission of the offence.

Accordingly, I think, although as appears from what I've said I have considerable doubt about this, that there is sufficient prospect of an appeal against conviction succeeding to justify an extension of time and I would therefore grant this application.

WILLIAMS JA: In August this year, for the first time the applicant raised the contention that she was so frightened of the co-offender that she pleaded guilty to the offence of attempted murder. This contention is raised for the first time nearly four years after the offence occurred and nearly three years after she was sentenced.

It is also more than two years since there was an unsuccessful appeal on the issue of sentence to this Court. I also note that she was interviewed by a psychiatrist on two occasions in August 1999 and gave a detailed account of the background to

the offence and discussed her relationship both with the complainant and her co-offender. There was no suggestion at that time of any duress with respect to her plea of guilty.

There are, in my view, circumstances surrounding the commission of the offence, revealed by the material in the record, which indicate that it is highly improbable that, at the time, she was affected by duress, that she was so frightened of the co-offender that she pleaded guilty to such a serious offence whilst knowing that she had a good defence.

There is, in my view, no satisfactory explanation of the inordinate delay in raising this issue now for the first time. At least since sentence on the 12th November 1999 she and the co-offender have been detained in separate institutions and it could not be said that there was any duress continuing throughout that lengthy period.

In my view, any appeal is without any prospects of success and in those circumstances I would refuse the application for an extension of time.

JONES J: I agree for the reasons uttered by Justice Davies that the application should be allowed.

DAVIES JA: The order of the Court, by majority, is to extend time within which to appeal against conviction until 15 May 2002.

Ms Kingelty, you should now approach legal aid to see if you can get help from them with respect to an appeal against conviction and you should really be guided by their advice as to whether in the end there is any real prospect of success after their investigation of such an appeal.
