[2002] QCA 80

COURT OF APPEAL

McPHERSON JA
MUIR J
PHILIPPIDES J

CA No 362 of 2001

THE QUEEN

v.

ANDREW DALMAZIO (Respondent)

and

ATTORNEY-GENERAL OF QUEENSLAND (Appellant)

BRISBANE

..DATE 15/03/2002

JUDGMENT

McPHERSON JA: This is an appeal by the Attorney-General on the ground of inadequacy of the sentence imposed on the respondent upon a conviction on pleas of guilty in the District Court at Southport.

In respect of the first five of the offences on the indictment, the sentence imposed was imprisonment for one year suspended for a year with an operational period of two years. That sentence was imposed in respect of each of the following offences: dangerous operation of a vehicle causing grievous bodily harm, burglary, stealing, wilful damage, going armed so as to cause fear.

The remaining two counts on the indictment were, first, possession of a dangerous drug and, secondly, unlicensed driving. In respect of those two offences the penalty imposed was imprisonment for six months suspended for two years with an operational period of one year and, in the case of the unlicensed driving offence, an additional penalty of disqualification from holding a driver's licence for 12 months.

All of those sentences were to be served concurrently. However, the effective sentence that resulted from that process was one of 12 months' imprisonment, but suspended for an operational period of two years together with the disqualification I have mentioned. In the result, the respondent was not under that sentence obliged to serve a term

of imprisonment unless of course he offended again during the period of suspension.

The appeal by the Attorney is based essentially on the fact that his Honour gave too much weight to factors which he thought went in mitigation. The circumstances of the offences, or the major ones, can be summarised as follows.

First, in relation to count 1, the offence was that of dangerous operation of a vehicle causing bodily harm which was committed on 29 September 1999 at Helensvale. The respondent was informed by the police by telephone that they were searching his home. He thereupon went there and drove down the driveway and into the garage accelerating towards a police officer who was in that area. He ran over the officer's foot, hit his knee and caused a back injury, which resulted in permanent impairment to the extent of 5 per cent of his overall bodily function.

The respondent was unlicensed at the time as his New South Wales licence had been cancelled in 1990. He was allowed bail on that offence and while enjoying that privilege he drove on the Gold Coast Highway on 20 November 2001.

He evidently had a difference with a driver of another car. The respondent drove his car at speed behind that other car driven by a man named Mr Rodney Wood. Mr Wood, in an effort to discourage him from doing this, tapped his breaks and so

reduced his speed. The respondent responded to that by verbally abusing Wood and his passenger, and then drove up to the left-hand side of Wood's vehicle at traffic lights and parked or stopped in front of him in such a way as to prevent Wood from driving away.

The respondent then struck Wood's car with a piece of bamboo causing the damage that was the subject of count 4 in the indictment. Not content with this, on an occasion three days later, the driver of that other car, that is, Mr Wood, was leaving his home at Labrador when the respondent drove by him and pointed threateningly at him. The respondent then returned to the scene of Wood's house, parked some four to five metres away and pointed a sawn-off shot gun at him before driving away. The respondent before us has been disposed to dispute the facts of this offence on appeal. He did not do so in the Court below, where he was represented, and, of course, also present, so that he heard what was being said and he did not, in any way, attempt to correct or give instructions to correct the facts.

According to sentencing procedure, which was adopted on sentencing in this case, his failure to take steps to correct what he now says was inaccurate has the consequence that he is taken to have accepted those facts. I do not, in any event, see any reason for doubting them, and no evidence to the contrary has been placed before us.

The offence to which I have referred, that is to say, the pointing of the sawn-off shot gun at Wood or at his house was the subject of count 5 of going armed to cause fear. The next offence, or series of offences, was charged as having taken place between 8 and 23 November 2001 at the Ocean Blue Resort. That was a hotel, or some similar establishment, at which the respondent was a resident. While he was there he broke into two different units rented by others, and stole a mobile phone from one and a wallet apparently containing some $300 in value from the other. He also stole from the hotel a vacuum cleaner after having been given the key to the storage and laundry room where it was kept. That was the subject of count 2 the burglary charge.

On 24 November 2001 the respondent was intercepted driving without a licence in the course of arresting him for the other offences to which I have referred here. During that arrest the police found him in possession of two rolled marijuana cigarettes. Those two matters are the subject of counts 6 and 7, the possession and the unlicensed driving charges in the indictment.

The personal circumstances of the applicant are that he was aged 34 at the time of the first of these offences and 36 at the time of the other offences and the sentencing. He was born on 23 February 1965. He has a not insubstantial prior criminal record. Most of it occurred in New South Wales, some of it when he was quite young.

His first recorded conviction before us was sustained at the age of 18 years for stealing and he was most recently convicted there of a breach of bail undertaking. That was apparently in November 2001.

His other prior convictions include seven counts of stealing, two of wilful damage, two of assault, two of malicious injury, two of resisting arrest, three of fraud- related offences, some six or so of driving while disqualified or unlicensed, and, perhaps significantly for what we are concerned with in this matter, driving with intent to menace.

He has undergone a number of periods of imprisonment, although most of them were short term, and he has received at least one period of probation. He seems not to have fulfilled his obligations under that order, but instead came to Queensland, where he committed the offences with which we are concerned.

By occupation he was originally a hairdresser after leaving school. He completed his five year apprenticeship successfully and worked at that occupation for an undisclosed period. He then worked with his father on various building sites as a carpenter or assistant carpenter over a period of about five years.

He is currently licensed as a crowd controller or security officer. He has, or has had, a small business called In-House

Security, which he has run for that period of about five years.

When one comes to look at the seriousness of certainly the first and the fifth of the charges in the indictment it becomes quite apparent that the Judge's sentence, in this case, was as the Attorney-General contends manifestly inadequate. That one should receive merely a suspended sentence for the offence of causing grievous bodily harm by the dangerous operation of a motor vehicle strikes me as extraordinary.

The maximum sentence for that offence is seven years' imprisonment and for the offence of going armed so as to cause fear it is two years' imprisonment, which on one view of the general sentencing tariff might be thought to be somewhat low. However that may be, the infliction of permanent injury on a person, and in particular on a policeman, makes the offence in the first count one that, particularly having regard to the applicant's prior criminal record, can result in only one consequence, which is that he must serve a term of imprisonment.

Viewing the matter overall in the light of the number of offences involved, I would have expected a sentence of about three years imprisonment to be imposed in respect of the first offence, taking into account also the other offences committed, the prior criminal record of the applicant, and so

on. However, having regard to the pleas of guilty in this case, to which we must give full effect, I would be disposed to reduce the penalty in respect of the major offence to one of imprisonment for two years. In the result, the course I would propose is that the appeal be allowed and the sentence on count 1 be varied by increasing it to imprisonment for two years; in respect of all offences, the sentence should be varied to remove the suspension of the term that the learned Judge imposed.

The appeal should be allowed, the sentence on count 1 set aside, and, in lieu, a sentence of imprisonment for two years should be imposed. In respect of each of the other offences, the sentence should be varied by removing the provision for its suspension after one year.

The disqualification from holding a driver's licence imposed in respect of count 6 will, of course, stand. That is the sentence I propose.

MUIR J: I agree. The sentence imposed below reflects neither the serious nature of the offences particularly that of dangerous driving causing grievous bodily harm nor the respondent's prior criminal history.

PHILIPPIDES J: I agree with the reasons of Justice McPherson and the orders proposed by him.

McPHERSON JA: Very well then. The order and sentences will be as I stated them.
