COURT OF APPEAL

HOLMES JA
FRASER JA
McMEEKIN J

CA No 226 of 2008

THE QUEEN

and

PATRICIA KAREN NIMMETT **Applicant**

BRISBANE

DATE 16/10/2008

JUDGMENT

HOLMES JA: I will ask Justice Fraser to give the first set of reasons.

FRASER JA: On 8 August 2008, the applicant was convicted on her pleas of guilty of four counts of perjury. On all counts the applicant was sentenced to imprisonment for 18 months concurrent and it was ordered that the applicant be released on parole on 8 December 2008, after serving four months of the sentence. The applicant seeks leave to appeal against that sentence.

On 10 December 2006, the applicant's de facto partner, Graham, raped, abducted and robbed Ms P. Graham was arrested and charged with that offence on 11 February 2007. He was given bail. The police, having spoken to the applicant about Graham's possible involvement in the offence, were evidently dissatisfied with the applicant's version of events and a Crime & Misconduct Commission hearing was arranged. In that hearing the applicant made four statements exculpatory of Graham, which founded the four charges of perjury against her.

On 8 September 2007 Graham committed offences against another two women. Police then came to Graham's and the applicant's house, searched the premises, and arrested Graham for those offences. Two days after that the applicant contacted police to make arrangements for a further recorded interview. That occurred on 12 September 2007 when the applicant made statements in effect admitting that her earlier statements in the investigative hearing were false, and she gave a truthful account which inculpated Graham in the offence he had committed on 10 December 2006.

In summary, the applicant gave evidence in the commission hearing that she had gone to bed that night with Graham and that to her knowledge he had remained in bed with her during most of the night, but she later admitted that Graham had not been there for much of the night; in the commission hearing, she gave an inaccurate description of the clothing Graham was wearing that night; and she gave evidence in the commission hearing that Graham denied having committed the rape on 10 December 2006 but she later told police that Graham admitted that he had been at the complainant's house and had given the applicant an implausible story denying involvement in the offence.

On 21 September 2007, the applicant was charged with perjury. On 23 September 2007, she provided police with a witness statement to be used against Graham which again contained a truthful account of the events and thus contained further admissions of her earlier perjury in the commission hearing.

At the sentence hearing the prosecutor relayed instructions from the officer who had arrested Graham to the effect that the applicant's evidence was "the icing on the cake"; and that it made what was "perhaps an equivocal circumstantial case" against Graham an overwhelming case and resulted in Graham's pleas of guilty to the subsequent offences.

The applicant was 34 years old at the time of her offences and 35 years old when sentenced. She gave the perjured evidence because Graham convinced her to give him an alibi. It was

not suggested that Graham threatened violence but the applicant's counsel did submit that Graham had overborne the applicant. He was said to be a very manipulative man.

The applicant had a criminal record mainly comprising relatively minor drug offences quite some time earlier. More recently, in July 2000 she was convicted of assaults occasioning bodily harm and given 12 months probation in the District Court. On 4 October 2007 in the Magistrates Court the applicant was found to have breached a community service order imposed on 7 August 2007 for unlicensed driving and she was resentenced to imprisonment for six weeks, wholly suspended for a period of six months. Then on 21 February 2008 the applicant was found again to have breached the suspended sentence and she was sentenced to imprisonment for six weeks.

In this Court, the applicant contends that insufficient weight was given to the applicant's voluntary confession of her earlier perjury at a time when she was not apparently the subject of a police investigation for perjury. This is an important factor. It is in the public interest that witnesses who have given false evidence at compulsive hearings retract that evidence and credit should be given for that. However the sentencing judge was alive to the importance of this factor. Her Honour said that it was in the applicant's favour that she had voluntarily retracted her false evidence; that the police would not have been able to charge her had she not decided to set the record straight; and that the fact that it was a voluntary retraction was certainly significant. In my opinion there is no reason for thinking that the sentencing judge did not appreciate that such conduct merited special leniency, see *AB v The Queen* [1999] HCA 46 at [113]; (1999) 198 CLR 111 at 155 per Hayne J.

Nor do I accept the applicant's contention that the sentencing judge gave insufficient weight to the applicant's willingness to assist the police in their investigation of Graham's offences as evidenced by her statement to police made on 23 September 2007 after she had been charged with perjury. The sentencing judge referred to that chronology and expressly took into account the applicant's cooperation with the police in fixing the early parole release date.

The applicant also contends that insufficient weight was given to the value of the applicant's cooperation in the prosecution of Graham. This was a curious contention in circumstances in which that cooperation should earlier have been reflected in truthful evidence by the applicant at the commission hearing. In any event the sentencing judge took into account that the applicant's recanting of her false testimony was a factor in Graham's decision to plead guilty.

There is no substance in the applicant's contention that insufficient weight was given to the applicant's plea of guilty and that she did not persist in thwarting the administration of justice.

It is submitted on behalf of the applicant that the sentencing judge erred by concluding that the applicant's false evidence "no doubt weakened the Crown case and gave Mr Graham some hope of acquittal in circumstances where the case would have been extremely strong without your evidence." That argument is not easy to reconcile with the submission made for the applicant at the sentence hearing that "if she had not given that evidence in a CMC hearing, there would still have been a strong circumstantial case against him. She gave that evidence and it might have weakened that circumstantial case." The view that the applicant's false evidence gave Graham "some hope of acquittal" was consistent with the suggested fact, taken into account in the applicant's favour, that the recanting by the applicant of her false testimony was a factor in Graham's decision to plead guilty.

The proposed grounds of appeal include that the commission hearing was an investigative hearing and did not finally affect the rights and liabilities of anyone and that the applicant's false evidence did not jeopardise the liberty or rights of anyone else. Those matters were not overlooked by the sentencing judge. Her Honour acted on the basis that it could not be said that the applicant's false testimony allowed Graham to remain in the community and thereby to commit his further offences, because he was already on bail at the time when the applicant gave her false evidence. Her Honour observed that this was not an aggravating factor in the case.

That is not to say that the applicant's offending was not serious. Commission hearings of the kind at which the applicant gave false evidence are authorised for investigations into "major crime", a term that includes indictable offences punishable on conviction by a term of imprisonment not less than 14 years: see *Crime and Misconduct Act* 2001 ss 25, 82, and the schedule. Section 190 of that Act obliges witnesses at such hearings to answer questions, subject only to a claim of legal professional privilege, and under Section 197(3)(b) answers are admissible in proceedings in which the answers are alleged to be false. Subsection 206(1) of the *Crime & Misconduct Act* applies to Commission hearings s 123 of the *Criminal Code* (which creates the offence of perjury). For that purpose the Commission hearing is deemed by subsection 206(2) to be a "judicial proceeding."

The offence of perjury under s 123 is punishable in the circumstances here by 14 years imprisonment. These legislative provisions clearly demonstrate that perjury at a commission hearing is a serious offence.

Another proposed ground of appeal is that the applicant did not derive any personal benefit from her false evidence. The sentencing judge was obviously aware of this factor.

Counsel for the applicant contends that the sentence that ought to have been imposed was 18 months imprisonment wholly suspended for a period of up to three years, or 18 months imprisonment with an immediate parole release order. We were referred to previous decisions of this Court concerning sentences for perjury: *R v Hunter* [2000] QCA 97, *R v Back* [1992] QCA 409, *R v Swift* [1999] QCA 94, *R v Osdermere* [1993] QCA 463, *R v Triantafillopoulas* [1999] QCA 335, *R v Johnston* [1990] CCA 49 CA 360 of '89, *R v Smith* [2000] QCA 390, *R v Hatch* [1995] QCA 391, *R v Evans* [1996] QCA 553, *R v Wood* [1991] CCA 278 CA 271 of '91 and *R v Pacey* [2005] QCA 203.

It is notable that in all those cases a term of imprisonment was imposed for the perjury offence.

Some of the cases are complicated by the imposition of concurrent terms for various offences including perjury or by considerations of totality where offenders were sentenced to long terms for other related offences. For example, in *Hatch*, the offender was sentenced to a term of one year's imprisonment for perjury, to be served cumulatively with other sentences including sentences of seven years imprisonment for serious drug offences with a recommendation that he be considered for parole after four years. But of the decisions cited to us the only one in which an offender may have received a more lenient sentence than the applicant is *Wood*. In that case, this Court refused an Attorney's appeal against the sentence of 12 months imprisonment with a recommendation that the offender be considered for parole after a period of three months. That was, however, a very unusual case. Wood gave false testimony at a civil trial aimed at inflating the value of her claim for damages for personal injuries, but she quickly admitted that in cross-examination. She then withdrew her claim altogether even though she apparently had a good claim to recover some damages. Her immediate remorse was evident, it persisted, and it was supported by medical evidence demonstrating her very significant suffering. The sentencing judge distinguished *Wood* for those reasons and in my respectful opinion was right to do so.

As Williams JA pointed out in *Pacey* at [29], a review of the authorities demonstrates that actual imprisonment has almost invariably been imposed for perjury even though in many instances the offender had no previous convictions and often there were other mitigating factors. This reflects the fact, mentioned in numerous decisions, that perjury is a very serious offence which strikes at the heart of the administration of justice. Sentences for this offence must take into account the importance of general deterrence.

In my opinion, all of the many factors that favoured particular leniency in the applicant's case were appropriately taken into account by the sentencing judge. The sentence of 18 months was at the low end of the range and it was within the sentencing judge's discretion to require the applicant to serve four months in actual custody.

The sentence was not manifestly excessive. I would refuse the application.

HOLMES JA: I agree with all Justice Fraser has said, including his conclusion.

I would simply add this observation. Mr East submitted that this matter should be regarded as in a distinct category of case involving these features: perjured evidence given in a coercive hearing by an accused who was a witness in that context, not a suspect and who cooperated subsequently. As a matter of public policy, he said, those features should be recognised by a sentence not involving actual custody in order to encourage others in the same position who might be minded to recant.

But the reality is that there are the differing policy interests which Justice Fraser has discussed to be balanced.

Generally speaking, a case with the features which Mr East lists might, of course, depending on its own facts, justifiably attract a sentence not involving actual custody, but the fact that such a sentence might in certain circumstances be open does not then dictate that the sentence in this case was outside the range of a proper exercise of discretion.

McMEEKIN J: I agree with what has been said by Justices Fraser and Holmes and with the order Justice Fraser proposes.

HOLMES JA: The application for leave to appeal against sentence is dismissed.

- - - - -