[2012] QCA 253

COURT OF APPEAL

FRASER JA
McMEEKIN J
HENRY J

CA No 175 of 2012
DC No 124 of 2012

THE QUEEN

v

BCI **Applicant**

BRISBANE

DATE 19/09/2012

JUDGMENT

FRASER JA: The applicant, who was aged 16 at the time of the offences and 17 at the time of sentence, was convicted in the Childrens Court on his pleas of guilty of burglary and stealing, breaking and entering premises and stealing, unlawfully using a motor vehicle, stealing and arson. On the first and last counts, he was sentenced to concurrent terms of 12 months detention with an order for release after serving 60 per cent of that period. He was given concurrent terms of six months detention on the other counts. The issue in his application for leave to appeal against sentence concerns only the order for release. He contends that the order should have provided for his release after serving 50 per cent of the 12 months detention rather than after serving 60 per cent of that period.

The applicant and an adult co-offender entered the house of the complainants in the first count through an unlocked door. They stole property from the house and they also stole property

from a car belonging to the complainants' son. The co-offender subsequently drove the applicant away in the complainants' car. At the urging of co-offenders, the applicant participated in setting fire to the complainants' car, which was worth $54,000, to destroy their fingerprints. Police had another source of information that the applicant was a passenger in that car, but the prosecutor accepted that the most serious charges, burglary and stealing and arson, were based upon the applicant's admissions to police.

At the sentence hearing the prosecutor submitted that the range was in the order of 12 to 18 months for the arson offence, referred to possible sentences, including 18 months detention with a pre-release period of 70 per cent, and noted that such a sentence would require the applicant to serve 12.6 months before release. The applicant's counsel submitted that the pre-release period should be 50 per cent of the sentence which the sentencing judge deemed appropriate, and that an appropriate head sentence was in the order of 12 months.

The sentencing judge accepted that the applicant was not the main culprit. He did not drive the car, burn the car, or receive any stolen property. The sentencing judge also accepted that the applicant's admissions to police both revealed his own offending in the serious charges and identified other offenders, and that the applicant's cooperation with the police led to some aggression against him. The sentencing judge considered that a period of detention was required because of the applicant's age, criminal history, seriousness of the offences and breaching of previous orders. The applicant had a previous criminal history which included property offences, such as burglary, entering premises with intent, and unlawful use of a motor vehicle. He was subject to a probation order imposed about five months before these offences and a community service order imposed less than a month before these offences.

In this Court the applicant did not challenge the 12 months detention imposed for the most serious offences, but contended that the sentencing judge should have reduced the pre-release period to 50 per cent of the period of detention. He argued that the reduction to 60 per cent attributed insufficient weight to the applicant's very high degree of cooperation with the

authorities in the context of the other relevant circumstances. The applicant argued that the insufficiency of the reduction in the pre-release period led to the sentence being manifestly excessive. It was submitted that the fact that the Crown would not have been able to prosecute the applicant for the offences of burglary and arson but for his admissions amounted to a "special circumstance" within the meaning of s 227(2) of the *Youth Justice Act* 1992 which warranted a more significant reduction of the pre-release period. Reference was made to Justice Hayne's observation in *AB v The Queen* (1999) 198 CLR 111 at 155, that an offender who confessed to what was an unknown crime merited "special leniency." The applicant pointed out that a reduction from 60 per cent to 50 per cent in the pre-release period would amount to about five weeks of detention which the applicant would not be required to serve, a period which was submitted to be not insignificant for a young offender.

Section 227(1) of the *Youth Justice Act* provides that a child sentenced to serve a period of detention must be released from detention after serving 70 per cent of the period unless a Court makes an order under s 227(2). Section 227(2) provides that a Court "may order a child to be released from detention after serving 50 % or more, and less than 70 % of a period of detention if it considers that there are special circumstances, for example, to ensure parity of sentence with that imposed on a person involved in the same or related offence." That provision does not make the reduction from 70 per cent mandatory in any circumstances. It confers a discretion which is exercisable if there are special circumstances: see *R v S* [2003] QCA 107.

In exercising the sentencing discretion, including the discretion under s 227(2), the sentencing judge took into account the circumstances which the applicant now emphasises, particularly in the remarks that the applicant's admissions to the police brought his own offending fully to light as well as nominating the others, that this had led to some aggression from some of the applicant's mates, and that the applicant had been summonsed to be a witness at a trial in the week following the sentence hearing. The sentencing judge noted that the applicant's counsel argued that the case should be regarded as so special that the sentencing judge should order

that the applicant be released after 50 per cent of his sentence but was prepared to accept that submission only "to some degree". The sentencing judge went on to observe that he was sentencing the applicant at the bottom of the appropriate range of 12 to 18 months and that he had almost not reduced the pre-release period from 70 per cent at all because the sentence was so low. The view that the sentence was at the bottom of the range is supported by the authorities including *R v AL* [2003] QCA 189.

The sentencing judge went on to explain that the reduction of the pre-release period to 60 per cent was referable to the unusual circumstances that the applicant had been summonsed to appear as a witness in the following week and had to face that situation. It was within the sentencing discretion to structure the sentence in that way.

Despite the mitigating factors stressed by the applicant, and particularly having regard to the seriousness of these offences, the applicant's criminal history, the ineffectiveness of various kinds of orders on previous occasions to deter the applicant from offending, and the fact that the applicant offended whilst subject to community based orders, the sentencing judge could have imposed a substantially longer period of detention, perhaps coupled with an order for release after serving 50 per cent of the period of detention, as the minimum appropriate sentence. By way of example, a head sentence of 15 months detention would have required the applicant to serve 7.5 months in detention if the pre-release period was fixed at 50 per cent. The sentence imposed requires the applicant to serve 7.2 months of the 12 month period of detention before release. Viewing the sentence as a whole, as it must be viewed, the sentence was not manifestly excessive.

The application should be refused.

McMEEKIN J: I agree that the application should be refused for the reasons explained by Justice Fraser.

HENRY J: I also agree.

FRASER JA: The order of the Court is that the application should be refused. The Court is grateful for the assistance provided pro bono by Mr Weston.