[2020] QCA 123

COURT OF APPEAL

SOFRONOFF P
McMURDO JA
MULLINS JA

CA No 293 of 2019
DC No 239 of 2019
DC No 292 of 2019

THE QUEEN

v

THOMPSON, Ashley **Applicant**

BRISBANE

MONDAY, 8 JUNE 2020

JUDGMENT

[1] **SOFRONOFF P:** The applicant seeks an extension of time within which to seek leave to appeal against his sentence. On 17 May 2019 he pleaded guilty to one count of producing a dangerous drug, MDA, as well as to a summary charge of possessing property suspected of having been used in connection with the offence. The summary charge can be ignored. His application for an extension of time was filed on 5 November 2019.

[2] Judge Muir sentenced the applicant having regard to the agreed fact that the applicant had assisted four cooks of MDA in producing between eight and a half and nine kilograms of the drug. This was worth about $180,000, but there was no evidence that

the applicant shared in the profits. The amount he was paid, if any, for helping was not known, but it was accepted that this was a commercially motivated crime on his part and that this was large scale production.

[3] Her Honour took into account several facts that mitigated the offending, but they are not material to this application. The applicant's counsel submitted that a sentence of between four and five years' imprisonment would be open and that there should be parole eligibility at a few months less than one third of the period of imprisonment. Judge Muir sentenced the applicant to five years' imprisonment, with parole eligibility after he had served three months less than one third of that sentence.

[4] That is to say, her Honour acceded to the applicant's counsel's submissions. The applicant now seeks an extension of time. If an extension is granted and if leave to appeal is also granted, he would wish to tender evidence that the sentence be set aside, because he pleaded guilty upon a false factual basis, that is to say, he pleaded guilty upon a factual basis to which he had not agreed.

[5] He has tendered two affidavits in this application in which he says that it was not true that he was involved in producing about nine kilograms of MDA. He says that he told this to his lawyers. His solicitor and barrister have each furnished affidavits, but it is not necessary to have regard to them in order to decide this application.

[6] The applicant says that his solicitor, Mr Hannay, and his barrister, Mr Harrison, never gave him a copy of the agreed statement of facts that was later tendered at sentencing and in which the relevant allegations appear. However, the applicant admits that he saw a copy of an email from his counsel to the prosecutor in which his counsel submitted that although the applicant had assisted in production on one occasion when the drug was being produced but on two of the charged occasions he was merely present, and on the fourth occasion he was showing someone a place in which precursor chemicals had been stored for the purposes of production.

[7] The quantity alleged by the Crown to have been produced was between eight and a half to nine kilograms of MDA. This was not disputed, although defence counsel submitted that the production was small scale. The thrust of the email to which the applicant referred from his counsel to the prosecutor was, rather, that the Crown should drop the trafficking charge, which was the most serious of the charges contemplated, and that the applicant denied supplying drugs, and that the period of production of drugs should be reduced.

[8] Sometime later, the applicant saw the prosecutor's email in response. The prosecutor said that they would consider dropping the trafficking charge. This was later done. The prosecutor continued to maintain that the quantity produced was between eight and a half and nine kilograms. To his solicitor's question about how much was produced, the applicant said that he was not present for the final production and that there was never any discussion of large amounts of drugs.

[9] The applicant told Mr Harrison that the quantity alleged was not correct. Mr Harrison said that it was possible to cross-examine the witnesses who allege the quantities involved, but Mr Harrison told the applicant that doing so would be counterproductive and of no use. In his affidavit, the applicant admits his guilt, but says that he was never involved in any final production of MDA, let alone eight and a half to nine kilograms. He admits that he collected some of the products for the production and was present on occasions.

[10] The applicant says that he is appealing because he was sentenced based on a set of facts which he did not agree with and was not aware of until the day of sentencing. The applicant admits that he heard the prosecutor tell the sentencing judge that the drug quantity was between eight and a half and nine kilograms.

[11] The sentencing transcript shows that when the agreed statement of facts was handed up, the applicant's counsel told Judge Muir that the statement had been agreed. The prosecutor immediately told the judge that her Honour would see that the applicant was

involved in large-scale commercial production of MDA. The prosecutor then outlined that the applicant had assisted four cooks of the drug and they produced between eight and a half and nine kilograms of the drug. He had arranged to get the precursor materials. He acted as a lab assistant.

[12] The applicant says in his affidavit that he heard these matters, but that he was shocked. He did not try to correct these agreed facts. He tried to get the attention of his solicitor, but was unable to do so. However, he did correct one fact on sentence. During submissions by the applicant's counsel, there was the following exchange:

> "MR HARRISON: … He's always been in full-time employment. He has qualifications as an apprentice – sorry, as an electrician and a refrigeration electrician.
>
> DEFENDANT: Mechanic.
>
> MR HARRISON: Mechanic. I apologise. So, essentially, did a dual apprenticeship when he finished school."

[13] However, he did not rise to correct his counsel's earlier statement that the agreed statement of facts was indeed agreed. After arriving in prison after being sentenced, the applicant says he spoke to his wife and mother. He says he told them that he had pleaded guilty upon a false factual basis. In mid-July he asked his brother to retain a new solicitor, but on 25 July 2019 he spoke to Mr Hannay again. They discussed the accomplice informant's statement, which contained the incriminating allegations.

[14] A short time later, the applicant received a letter from Mr Hannay about a proposed sentence appeal. He did not respond. There was another short conversation between them on 6 August 2019. In late August or early September, the applicant retained his new solicitor, Mr Grant. On 2 October, the applicant conferred with Mr Grant and gave him what he said were initial instructions regarding an appeal. In the second week of October, he sent a letter containing instructions for his affidavits. The application was filed on 5 November 2019.

[15] On the applicant's own evidence, there is no justification to extend time to apply for leave to appeal. The applicant pleaded guilty and was sentenced in full knowledge of

the factual basis put before the judge. He knew before the day he pleaded guilty that the prosecution had not withdrawn the allegation about the quantity of drugs.

[16] His counsel had advised him against challenging those facts by cross-examination of the witnesses whose evidence provided them. He advised that that course would be counterproductive and of no use. The applicant did not reject that advice and gave no instructions to challenge the facts. After sentencing, he did not raise the error with his solicitor or anybody else until, it seems, he provided his factual instructions to Mr Grant almost five months later, although he raised complaints with his solicitor about the injustice of the sentence.

[17] It follows that there was no irregularity in his pleading guilty or in his sentencing that could justify an extension of time. The applicant pleaded guilty knowing what was alleged against him and after accepting advice not to challenge the facts. An appeal could not possibly succeed. The delay in applying for leave to appeal has also not been satisfactorily explained, but that is not the central problem. I would refuse an extension of time.

[18] **McMURDO JA:** I agree.

[19] **MULLINS JA:** I agree.

[20] **SOFRONOFF P:** The order of the Court is that the application for an extension of time is refused.