Supreme Court of Queensland - Court of Appeal

R v. Dobie [2010] QCA 34 (26 February 2010)

Last Updated: 1 March 2010

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dobie* [2010] QCA 34
PARTIES:	**R**
	v
	DOBIE, Keith William
	(applicant)
FILE NO/S:	CA No 338 of 2009
	DC No 1221 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	26 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2010
JUDGE:	Chief Justice and Holmes and Muir JJA
	Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE AND CONVICTION –

	APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where applicant pleaded guilty to trafficking in persons (counts 1 and 2), dealing in the proceeds of crime in an amount exceeding $10,000 (count 3) and presenting a false document (counts 4 to 7) – where applicant applied for an extension of time to appeal against his convictions for all offences – whether a prior appeal against conviction for counts 1 and 2 deprived the Court of jurisdiction to hear a further appeal on those counts – whether applicant's pleas of guilty could be set aside – whether a miscarriage of justice occurred
	Criminal Code Act 1995 (Cth), s 11.2(1), s 271.2(2B),
	s 400.6(1)
	Migration Act 1958 (Cth), s 234(1)(a)
	Liberti v R (1991) 55 Crim R 120, cited
	Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, applied
	R v MAM [2005] QCA 323, cited
	R v Nudd [2007] QCA 40, cited
	R v Pettigrew [1997] 1 Qd R 601, [1996] QCA 235, cited
	R v Senior [2005] QCA 21, cited
COUNSEL:	The applicant appeared on his own behalf
	G R Rice SC for the respondent
SOLICITORS:	The applicant appeared on his own behalf
	Director of Public Prosecutions (Commonwealth) for the respondent

[1] CHIEF JUSTICE: I have had the advantage of reading the reasons for judgment of Muir JA. I agree that the application should be refused, for those reasons.

[2] HOLMES JA: I agree with the reasons of Muir JA and the order he proposes.

[3] MUIR JA: The applicant pleaded guilty to the offences on a seven count indictment and was sentenced in the District Court on 23 December 2008 to: four years imprisonment for each of counts 1 and 2 (trafficking in persons)[1], 12 months imprisonment for count 3 (dealing in proceeds of crime in an amount exceeding $10,000)[2] and for each of counts 4 to 7 inclusive (presenting a false document)[3]. The terms of imprisonment imposed for

counts 1 to 5 inclusive were ordered to be served concurrently but the concurrent sentences for counts 6 and 7 were ordered to be served cumulatively on the sentences for counts 1 and 2.

[4] On or prior to 20 October 2008 the applicant had pleaded guilty to all counts on the indictment other than counts 1 and 2. At the commencement of his trial on that day he pleaded not guilty to counts 1 and 2. The learned Crown prosecutor opened the prosecution case and the Court adjourned until 2.30pm. When the Court resumed the applicant was re-arraigned at his counsel's request on all seven counts and pleaded guilty.

[5] More than a year after his sentencing on pleas of guilty, the applicant applies for an extension of time within which to appeal against his convictions for all offences.

[6] There are other proceedings which are relevant to his application.

[7] On 5 January 2009 the applicant filed an application for leave to appeal against the sentences imposed on all counts. On the hearing of that application on 7 July 2009, the applicant's counsel sought to argue that the convictions on counts 1 and 2 should be set aside, despite there being no appeal against conviction on foot and no previous application to set aside the applicant's guilty pleas.

[8] An application for an extension of time within which to appeal against his convictions on counts 1 and 2 and his application for leave to appeal against the sentences imposed for all offences was heard on 30 September 2009. At the hearing, the applicant's counsel expressly abandoned reliance on the applicant's assertions that he was pressured and threatened and that he had pleaded guilty without a full appreciation of the charges.

[9] On 18 December 2009 this Court granted the applicant's application for extension of time within which to appeal against his convictions for counts 1 and 2 but dismissed the appeals. The application for leave to appeal against his sentences was refused.

[10] As the applicant's appeal against conviction for counts 1 and 2 was heard and determined on the merits, the applicant's right of appeal against such convictions has been exhausted and the Court has no jurisdiction to entertain a further appeal.[4]

[11] Before the applicant could succeed on an appeal in respect of counts 3 – 7, he would need leave to withdraw his pleas of guilty.

[12] The circumstances in which a plea of guilty may be set aside are explored in the reasons of Dawson J in Meissner v The Queen[5] where his Honour pointed out that guilty pleas may be entered for reasons which "extend beyond that person's belief in his guilt", such as "the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty". His Honour continued:

"The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred."

[13] Brennan, Toohey and McHugh JJ said in their joint reasons in Meissner:[6]

"A court will act on a plea of guilty when it is entered in open court by a person who is of

full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."

[14] The applicant's case in respect of counts 4, 5, 6 and 7 appears to be that as the statement of facts relied on by the prosecutor on sentencing shows that the applicant was in Australia at the times the offences were said to have been committed, the applicant could not have committed them. The statement of facts does not attempt to state the applicant's location at all relevant times but even if the statement of facts did place the applicant in Australia at relevant times, it would not follow that he could not have committed the offences. The count 4 – 7 offences were all alleged to have been committed in breach of s 234(1)(a) of the Migration Act 1958 (Cth) and s 11.2(1) of the Criminal Code Act 1995 (Cth). Section 11.2(1) provides:

"A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly."

[15] The statement of facts before the sentencing judge detailed the acts relied on by the prosecution. Those facts showed that the applicant had either performed the alleged acts himself or by an agent, or that he had aided, counselled or procured such acts: the presentation to a relevant person of a false document or false documents.

[16] In the case of counts 6 and 7, the only counts for which sentences cumulative on the sentences for counts 1 and 2 were imposed, the prosecution relied on a nine page email with a number of attachments sent by the applicant to the Department of Immigration and Multicultural Affairs in Bangkok. The applicant's argument does not suggest that the email and attachments were not sent by him or that the attachments did not include documents which were false in relevant respects.

[17] In relation to count 3, the applicant does not appear to dispute that he dealt with "money, valued at $10,000 or more that was proceeds of crime or believing the money to be proceeds of crime". His point seems to be the irrelevant one that his related outgoings exceeded the proceeds of prostitutions received by him.

[18] In support of his application the applicant filed an affidavit in which he asserted that he pleaded guilty, mainly because he was told something by the prosecution about his sentencing. What was said, when and by whom, was not identified.

[19] Plainly, the sentencing judge was not bound by anything the prosecution may have said to the applicant, who was then legally represented, about a possible sentence and the material discloses no basis on which it could be concluded that the prosecution's conduct was misleading or improper in any way.

[20] A file note prepared by a Crown prosecutor referred to a discussion between the prosecutor and the applicant's legal representative in which the prosecutor recorded what he had told the applicant's solicitor about a possible sentence. It was to the effect that a "lesser offender" involved in slightly more serious offending than that of the appellant had been sentenced in an earlier case to "4 years/2 years after a trial" and that if the applicant pleaded guilty to all charges he could be expected to be sentenced to a term less than this but because of his bad criminal history "the discount may not be too significant – a time to serve component of 12 to 18 months".

[21] The file note records that after this discussion the applicant's solicitor again approached the prosecutor and asked what the Crown's position was on sentence if the applicant was sentenced on counts 3 to 7 only. The prosecutor said that he "had not researched the comparables" on that issue but gave an estimate of six to 12 months with the qualification that there was an aggravating feature of the applicant's conduct which "would come out in court". The applicant's solicitor confirmed that he would not hold the prosecutor to the estimate. A discussion between the solicitor and the applicant then took place in the applicant's presence: the applicant saying "he did not particularly care about the estimate and that he wanted Judge Clare to decide the sentence". It is noteworthy that the applicant did not contend in his 2009 appeal that his guilty pleas were based on any representation concerning sentencing.

[22] The applicant pleaded guilty to all seven offences. He appealed against his convictions for counts 1 and 2 unsuccessfully and was refused leave to appeal against his sentences after his case was fully presented and considered. He now wants to appeal against all of his convictions. In the circumstances it is plainly no easy task for the applicant to demonstrate, as he must, that a miscarriage of justice has occurred. The applicant's pleas of guilty were made in open court. It is not suggested that they were not made on legal advice in the exercise of the applicant's free choice. The statement of agreed facts, agreed or acquiesced in by the applicant's counsel on the sentencing hearing, provided a factual foundation for the pleas. No basis for the withdrawal of the pleas has been made out and even without considering the "high public interest in the finality of legal proceedings",[7] the applicant has not succeeded in discharging the onus which he bears.

[23] For these reasons, I would order that the application be refused.

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[1] s 271.2(2B) *Criminal Code Act* 1995 (Cth).

[2] s 400.6(1) of the *Criminal Code Act* 1995 (Cth).

[3] s 234(1)(a) *Migration Act* 1958 (Cth) and s 11.2(1) of the *Criminal Code Act* 1995 (Cth).

[4] *R v Pettigrew* [1996] QCA 235; [1997] 1 Qd R 601 at 606; *R v MAM* [2005] QCA 323; *R v Senior* [2005] QCA 21 and *R v Nudd* [2007] QCA 40.

[5] [1995] HCA 41; (1995) 184 CLR 132 at 157.

[6] *Meissner v The Queen (Supra)* at 141.

[7] *Liberti v R* (1991) 55 Crim R 120 at 122.
