

38/12; [2012] VSCA 245

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

***LUCAS v THE QUEEN***

**Maxwell P and Redlich JA**

**10 September, 1 October 2012**

**SENTENCING – THEFT OF TRUCK AND VARIOUS ITEMS FROM THE TRUCK – LEAVE TO APPEAL AGAINST SENTENCE – FRESH EVIDENCE OF APPLICANT’S MENTAL STATE WHICH SUPPORTED DELUSIONAL BELIEF AS TO CLAIM OF RIGHT – NEGATION OF *MENS REA* OF OFFENCE – PROVISIONAL DIAGNOSIS AVAILABLE AT TIME OF SENTENCING – FRESH EVIDENCE ADMITTED BUT NOT SO AS TO CONTROVERT JURY VERDICT – MORAL CULPABILITY OF APPLICANT SIGNIFICANTLY REDUCED – WHETHER LESSER SENTENCE SHOULD BE IMPOSED.**

L. was found guilty of theft of a truck and various items from it. L. was sentenced by the County Court judge to a total of four years and six months' imprisonment with a minimum of three years. On appeal, it was submitted that further evidence of L's mental state should be considered by the Appeal Court.

**HELD: Leave to appeal granted. Appeal allowed. L. sentenced to be imprisoned for three years and six months with a non-parole period of two years and three months.**

1. The additional psychiatric evidence enabled the Court of Appeal to find that L. did have a delusional disorder and that there was a causal association between that disorder and the commission of the offences. The state of the evidence at the time of the plea did not enable the sentencing judge to make such finding. The existence of this delusional disorder reduced L.'s moral culpability in a significant way and bore upon the extent to which he was an appropriate vehicle for the application of the principle of general deterrence.

*Verdins v R* [2007] VSCA 102; (2007) 16 VR 269; (2007) 169 A Crim R 581, applied.

2. In proposing a new sentence, the following matters were taken into account. Firstly, treatment for delusional disorders is often not particularly fruitful given the lack of insight inherent in the disorder and the general non-responsiveness to anti-psychotic medication. Secondly, L. will continue to pose a risk to the community until he has received some effective treatment for this disorder. Thirdly, L.'s conduct caused severe financial loss to the victim and his family and ensuing pain and suffering, including hospitalisation of the victim's wife due to the resultant anxiety.

**MAXWELL P:**

1. I have had the advantage of reading in draft the reasons for judgment of Redlich JA. I would allow the appeal and resentence the applicant as his Honour proposes, for the reasons which his Honour gives.

2. As his Honour has explained, the appeal has succeeded because of the fresh evidence obtained, subsequent to the sentencing at first instance, regarding the applicant's mental state at the time of the offending. It is important to record that the initiative to seek additional evidence came from Victoria Legal Aid. As counsel for the applicant explained at the appeal hearing, this was done because of lingering disquiet at VLA that the question of the applicant's impaired mental functioning had not been definitively resolved. VLA is to be commended for its diligent pursuit of its client's interests, which has resulted in his succeeding in this appeal.

**REDLICH JA:**

3. The applicant was convicted by a jury on one count of theft of a Volvo prime mover and concrete pump and one count of theft of various items from the truck. The applicant was sentenced to four years and six months for the theft of the motor vehicle; and six months for the theft of the other sundry items. The sentences were ordered to be served concurrently, thus making a total effective sentence of four years and six months. A non-parole period of three years was ordered.

4. The applicant seeks leave to appeal against his sentence. He relies upon fresh evidence to establish the true position of the applicant's mental state at the time of the commission of the offence and at the time of sentencing.

5. The facts surrounding the offending are briefly as follows. In 2007, Mr Jason Loftus, decided to sell his prime mover and concrete pump. He advertised the vehicle and pump for \$450,000 in a trade magazine. The applicant was one of the people who responded to the advertisement. Discussions between the two ensued; the applicant proposed purchasing the truck, whilst still allowing Mr Loftus to operate it. Mr Loftus approached the applicant's accountant to discuss the proposals further. The applicant's accountant ejected Mr Loftus from his office, when the applicant's name was mentioned. Mr Loftus then informed the applicant that he no longer wished to pursue any business dealings with him.

6. No written contract or agreement was ever drawn up or finalised regarding the sale of the truck and concrete pump. It should also be noted that no verbal agreement was ever finalised in relation to the proposed sale. Mr Loftus continued to work and operate the truck. On 22 August 2007, he was returning home from a job, when he stopped in Campbellfield for some food. When Mr Loftus returned after his meal, the truck was gone. He contacted the National Australia Bank to see if the truck had been repossessed, and then the police to report it stolen.

7. The applicant on 18 July 2007 had purchased key blanks and the key code for the truck from CMV Truck and Bus Pty Ltd, by representing himself as the new owner of the truck. The applicant then used the key code to have keys made for the truck at Aus Lock and Safe Pty Ltd and informed a Mr McAuliffe that he had paid a considerable amount of money for the truck and was entitled to repossess it. The applicant gave one of the keys to Mr McAuliffe and told him to repossess the truck if he saw it.

8. Mr McAuliffe saw the truck parked at Campbellfield on 22 August. He used the key the applicant had given him to unlock the truck and drive it away. Mr McAuliffe parked the truck at the rear of his premises, effectively concealing it. The stolen truck remained at Campbellfield until 25 October 2007. Victoria Police executed a search warrant at Mr McAuliffe's premises and the applicant was arrested.

9. Mr Loftus contacted the applicant on 24 and 28 August and asked him if he knew anything about the truck's whereabouts. The applicant disavowed any knowledge of the truck but said he would let him know if he heard anything. He did not disclose that he had taken the truck and secreted it at premises at Campbellfield. Over the following one or two months, the applicant removed various items from the truck including tools, a hose, a television, a Karcher pressure washer, a barbecue and toolbox.

10. During a police interview the applicant lied extensively in relation to involvement with the truck. He told the police that he had acted under a claim of right. He admitted causing the truck to be repossessed but claimed he was entitled to do so because he had entered a contract with Mr Loftus and made payments in relation to the vehicle. He told the investigators that he had paid \$40,000. He claimed to have signed an automatic deduction slip for money to be taken from his account to pay the National Australia Bank for the truck. Both Mr Loftus and a National Australia Bank officer gave evidence at the trial that no such automatic deduction slip was received by the bank and that no money had been paid to Mr Loftus.

11. The applicant further told investigators that he had been informed by an unknown police officer at the Broadmeadows police station that he was able to pick up the pump so long as it had no damage. He claimed that he had picked up the pump with a key which had been provided by Mr Loftus when he paid Mr Loftus the \$40,000 deposit. He maintained that he had been told by a police officer that he could take the truck provided he left a business card and a note saying that he was in possession of the pump. He claimed that he did that. There was no evidence that the applicant left a business card or note.

12. The applicant further maintained that because he was going to sign on as a director of Mr Loftus's company, he would be liable for all debts and outstanding amounts owed by the company and, because he had signed a direct debit, the NAB regarded him as responsible for the truck. He claimed that he took possession of the truck in order to reclaim the money he had given Loftus. He further told investigators that he had a telephone conversation with Loftus who was screaming and yelling at him and knew that he had the truck because he had left a note. He repeated his claim that he had a legal right to obtain the truck because he had been given the

key for the truck. He told the police that one has to have the original key for the truck as keys cannot be copied.

13. In sentencing the applicant, his Honour understandably described much of the applicant's account to the police as 'patently false' and that the record of interview confirmed that the applicant was a 'glib and practised liar'. His Honour further observed that though the applicant had not given evidence at his trial, the jury's verdict clearly indicated that they rejected the version which he had given the police beyond reasonable doubt.

14. The sentencing judge found that the applicant exhibited no remorse and had limited prospects for rehabilitation, in light of the applicant's prior offences for dishonesty. A psychiatric report to examine the applicant's mental state was ordered by the Judge. The psychiatrist, Dr Glowinski, concluded that the applicant was not suffering from a major psychiatric disorder such as schizophrenia but expressed the view that the applicant may be suffering from a delusional disorder with grandiose and persecutory features. The psychiatrist noted that delusional disorders are notoriously difficult to diagnose and are often only diagnosed when a collateral history is provided.

15. In sentencing the applicant, his Honour took into account that psychiatric report which identified the possibility that the applicant suffered from a delusional disorder with grandiose and persecutory features. During the course of the plea in mitigation his Honour emphasised the tentative nature of the expert opinion and inquired of the applicant's counsel whether he wished his Honour to seek a further report. That invitation was declined. As a result, his Honour said during the plea that he would be unable to find that the applicant had a delusional disorder but would take into account the possibility that delusional and persecutory features may have been present. In his sentencing remarks his Honour referred to the fact that the jury's verdict confirmed that they were satisfied beyond reasonable doubt that the applicant knew he had no legal right to take the truck and pump. His Honour stated that he had taken into account that the applicant 'might actually believe some of the things you say to be true, even if they are not.'

16. Following the applicant's sentence, Victoria Legal Aid provided the psychiatrist who had provided the initial report with material that had not previously been made available to him. He was given the sentencing remarks of Judge Nixon, who had sentenced the applicant on one count of obtaining a financial advantage by deception in August 2004. A psychologist had given evidence in the course of the plea hearing before Judge Nixon, that though the applicant did not present with a serious acute psychiatric disorder, he had what might popularly be thought of as a sort of 'Walter Mitty situation position'. Judge Nixon observed that the applicant had 'engaged in a charade by acting as you did and it appears you still believe your own charade'. He was sentenced to 18 months' imprisonment with 12 months of that sentence suspended for two years.

17. The psychiatrist was also provided with a character reference that had been relied upon during the plea, in which the witness referred to the applicant's 'alter ego Walter Mitty'. It appeared to Dr Glowinski, that this additional material described a psychiatric condition namely 'delusional disorder – grandiose type'. He said that a delusional disorder is an uncommon psychiatric disorder which is difficult to diagnose because the delusions are non-bizarre in content. Referring to his previous report and with the additional information, Dr Glowinski stated that he was of the opinion that the applicant was likely under the influence of delusional beliefs that he was the rightful owner of the concrete truck at the time of the offending. Dr Glowinski stated that the applicant's protestations of his treatment by the court and his maintenance of his innocence even after conviction were consistent with this contention. Dr Glowinski stated as follows:

I believe there was a causal association between his delusional disorder and the commission of the offences. Mr Lucas was likely therefore to be impaired in his ability to exercise appropriate judgment, think clearly and to make calm and rational decisions with relation to his conduct. I also think that the delusional disorder obscured Mr Lucas's intent with regard to the commission of the offences.

18. The applicant now submits that this fresh evidence of the applicant's mental state should be considered by this court.

19. The Crown maintained in its written case that the applicant's mental health was thoroughly canvassed during the plea as a matter in mitigation. The Judge was alive to the issues concerning

the applicant's mental status and directly referred to Dr Glowinski's report in his sentencing remarks. The sentence imposed was tempered by these considerations.<sup>[1]</sup> In its written submission, the Crown disputed that the further report constituted fresh evidence as it has been explained by this Court in *R v Nguyen*.<sup>[2]</sup> It submitted that the additional report shed no new light on the true significance of facts in existence at the time of sentence and did not constitute cogent evidence of any causal link between the applicant's mental condition and the offending.

20. At the oral hearing, senior counsel with his customary fairness, did not persist with these submissions conceding, rightly in my view, that the further report did constitute fresh evidence. But it was contended, as counsel for the applicant also recognised, that the content of the report in effect controverted the jury verdict, as it suggested that the applicant was suffering from a delusional disorder which led him to believe that he had a claim of right. That, it was submitted, was inconsistent with a finding by the jury beyond reasonable doubt that the applicant had no such belief.

21. The principle is not in issue that neither the sentencing judge nor this Court could utilise the evidence so as to controvert the jury's verdict. The verdict necessarily meant that the jury had found that the applicant did not believe that he had a claim of right to the truck or pump. But evidence which at its highest may have been sufficient to support a defence of mental impairment, had it been relied upon at the trial, may also be relied upon to establish a mental state which falls short of mental impairment but establishes a mental disorder which satisfies the conditions stated in *Verdins*.<sup>[3]</sup> The Crown did not seek to question the weight which we may attach to the psychiatrist's opinion that the disorder impaired the applicant's ability to exercise appropriate judgment and make calm and rational decisions, and that it impinged upon his intent at the time of the offences.

22. Consequently, the additional psychiatric evidence enables this Court to find that the applicant did have a delusional disorder and that there was a causal association between that disorder and the commission of the offences. The state of the evidence at the time of the plea did not enable the sentencing judge to make such finding. In my opinion, the existence of this delusional disorder reduced the applicant's moral culpability in a significant way and bore upon the extent to which the applicant was an appropriate vehicle for the application of the principle of general deterrence.<sup>[4]</sup>

23. I would grant the applicant leave to appeal and allow the appeal. In proposing a new sentence, I have taken the following matters into account. Firstly, as Dr Glowinski reports, treatment for delusional disorders is often not particularly fruitful given the lack of insight inherent in the disorder and the general non-responsiveness to anti-psychotic medication. Secondly, the applicant will continue to pose a risk to the community until he has received some effective treatment for this disorder. Thirdly, the applicant's conduct caused severe financial loss to the victim and his family and ensuing pain and suffering, including hospitalisation of the victim's wife due to the resultant anxiety.

24. I therefore propose that the applicant be sentenced to three years and six months' imprisonment on count 1 and three months' imprisonment on count 2. I would order that the appellant serve a non-parole period of two years and three months.

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<sup>[1]</sup> Reasons [28].

<sup>[2]</sup> [2006] VSCA 184.

<sup>[3]</sup> *Verdins v R* [2007] VSCA 102; (2007) 16 VR 269; (2007) 169 A Crim R 581.

<sup>[4]</sup> Ibid 272–275.

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APPEARANCES: For the applicant Lucas: Mr M Dempsey, counsel. Victoria Legal Aid. For the Crown: Mr PB Kidd SC, counsel. Mr C Hyland, Solicitor for Public Prosecutions.

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