[2017] QCA 212

COURT OF APPEAL

FRASER JA
McMURDO JA
MULLINS J

CA No 100 of 2017
SC No 1125 of 2016

THE QUEEN

v

FORD, Dylan Phillip **Applicant**

BRISBANE

FRIDAY, 22 SEPTEMBER 2017

JUDGMENT

McMURDO JA: On 28 April 2017, the applicant was sentenced, having pleaded guilty, for 18 drug offences. He was sentenced to various concurrent terms of imprisonment, the longest being a term of five years for an offence of trafficking in methylamphetamine and MDMA. Some of the offences were against the *Criminal Code* (Cth), the longest being three years and two months for the importation of a marketable quantity of MDMA. On the State offences his parole eligibility date was fixed at 24 December 2018. The same date was fixed as the end of his non-parole period for the Commonwealth offences.

He applies for leave to appeal against some of those sentences, on the ground that they are manifestly excessive. On the applicant's case, he should be re-sentenced to the same period of imprisonment, but with a reduction of the time which he must spend in custody from about 20 months to 15 months.

The trafficking offence was committed between 19 July 2013 and 21 August 2014. The other offences were committed at various times within that period. He was aged 21 or 22 when the offences were committed and was 24 when sentenced. He had some criminal history. There were offences of entering premises with an intent to commit an indictable offence, the possession of utensils or pipes and the possession of a knife in a public place. But he had not received a custodial sentence previously.

The facts of the offences were agreed to be those within a schedule which was tendered by the prosecutor. The applicant's offending was identified by police conducting a wider investigation into the trafficking and importation of MDMA, which led police in August 2014, to execute a search warrant at the applicant's address, where they found drugs and drug related paraphernalia. The applicant was then taken to a police station where, in a recorded interview, he admitted to trafficking in dangerous drugs for approximately one year. He admitted to having purchased drugs on the online black market called "Silk Road". He told police that he had made six to eight orders in total. He said that some of the drugs which he had ordered had never arrived. That was consistent with the admitted facts in relation to some of the Commonwealth offences, in which he had imported drugs which did not reach him because they were intercepted by Australian Customs and Border Protection. There were nine such transactions, so that the applicant's statement that he had made six to eight orders in total was inaccurate.

The applicant told police that he had about 10 customers, the majority of whom were his friends. He would normally sell in "grams", selling a gram for about $200, from which he derived about $100 of profit. He told police that he had also used a "fair bit" of the drugs for himself. He said

that he had sold drugs "to pay the bills and also be able to have fun on weekends." He said he had worked as a labourer "on and off". He made further statements suggesting that he had made profits of the order of $300.00 per week.

The sentencing judge described the quantities of drugs which the applicant had imported as "enormous." His Honour referred to the nine grams of pure MDMA and 10 grams of pure methylamphetamine which were found when police searched the house. He said that count 17 on the indictment, the importation of a marketable quantity of MDMA, was "particularly serious". He remarked that whilst that importation had not resulted in an actual delivery of the drugs, the quantity imported was some 20 grams of pure MDMA. The judge said that these quantities indicated the level of operation in which the applicant had been engaged.

More than two and half years had passed between the detection of these offences and the sentence hearing. An indictment was presented in July 2015 and a sentence hearing was scheduled for December 2015. But after a change of legal representation, the applicant sought to have his police interview excluded. When that application was to be heard last September, a fresh indictment was presented and the applicant pleaded guilty to all counts. Then in December last, the Crown was advised that the applicant wished to apply to vacate his pleas of guilty. But he did not do so and was eventually sentenced on 28 April 2017. The judge said that this history took "much of the shine off the cooperation and remorse" shown by his pleas of guilty. However, his Honour said, his pleas ultimately had saved the community the time and cost of a trial, which would have been lengthy, and accepted that the applicant was truly remorseful.

During his long period on bail, the judge said, the applicant had taken whatever steps he could have taken to turn his life around. There were drug analysis results showing that he was no longer using drugs. There was a psychologist's report, which the judge said, suggested the applicant had taken steps to address the issues of the applicant's past which had led to his offending.

Whilst on bail, the applicant had started his own business and he was in a stable and supportive relationship with a young woman who was in regular employment and who was also a tertiary student.

In his sentencing reasons, the judge said that the conduct in which the applicant had engaged would justify a head sentence of the order of six years, but that taking into account the applicant's young age, his personal circumstances and all of the mitigating circumstances, the appropriate "overall head sentence" was one of five years' imprisonment, which would be imposed on the trafficking count. His Honour said that the offending was so serious that the applicant should be required to serve a "significant period in actual custody", which the judge acknowledged would be hard for the applicant, but that it was required by the consideration of general deterrence.

On the Commonwealth offences, the judge said that a non-parole period would be fixed at lower than what he said was normal for Commonwealth offences, having regard particularly to the applicant's young age.

The argument for the applicant is that the period of time which he must spend in custody is excessive, having regard to his age and his commendable rehabilitation. It is also argued that the scale of the trafficking was only revealed by the applicant's own admissions. But as to that, it was also revealed by the quantities of drugs found in the importations which were intercepted by Customs.

The applicant's argument cited three cases in this Court. The first was *R v Reid*,[1] in which this Court refused leave to appeal against a sentence of five years and nine months for trafficking in methylamphetamine over a period of 52 days. That applicant had about 14 customers and was the head of a group of three traffickers. Her sentence of five years and nine months was made cumulative upon a sentence of 12 months for unlicensed driving. Her level of trafficking was undoubtedly higher than that of the present applicant, although the period was much shorter than

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1 [2013] QCA 190.

in his case. The outcome in that case is not significant for the present one. The offending may have been more serious, but both the head sentence and the non-parole period were longer. And of course the sentence which was imposed did not necessarily represent the maximum which could have been imposed in that case.

The second case cited by the applicant is *R v Connolly*.[2] That applicant had trafficked in methylamphetamine, MDMA and cannabis and had also committed offences of supplying dangerous drugs. Concurrent terms were imposed, the highest being one of four years, suspended after 12 months, for the trafficking offence. That sentence was varied so that it would be suspended after six months' imprisonment. That sentence was set aside because of a specific error rather than on the alternative ground, which was that it was manifestly excessive. The applicant there was only 19 at the time that he trafficked, which was for only about four months. The present case involves a period of trafficking of 13 months.

The third case is *R v Barton*.[3] That applicant had been sentenced to one count of trafficking in methylamphetamine and other drug offences. She received a seven year term for the trafficking with a recommendation that she be eligible for parole after two years and three months. She was 24 at the time of the offences and 26 at sentence. Her sentence was varied in this Court by recommending that she be eligible for parole after serving 18 months. She had trafficked over a period of six months, during which she had supplied, amongst others, an undercover agent with drugs for which she received about $14,000. She had taken some steps towards rehabilitation before she was sentenced and her recommendation for parole was varied for that reason.

This applicant's case presented substantial mitigating factors: his young age, his guilty plea, his remorse, his very difficult childhood and his impressive avoidance of drug use and further offending during the long period between his apprehension and his sentence. General deterrence

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2 [2016] QCA 132.
3 [2006] QCA 367.

was an important consideration. But it was necessary for the sentence to be fixed with a proper regard for the weight of those mitigating factors.

It was open to the sentencing judge to impose a lighter sentence. It may also be said that a sentence could have been imposed which was lighter than that now suggested by the applicant's argument. But the question is whether that sentence which was imposed is of such as scale that it indicates that there was some error in the exercise of the sentencing discretion. In my conclusion, that is not demonstrated. The sentence was not manifestly excessive.

However, there is one respect in which the orders made should be varied. Count 7 on the indictment was an offence of the importation of a border controlled drug, namely methylamphetamine, contrary to s 307.4(1) of the *Criminal Code* (Cth). Counts 3 to 10, other than count 7, were also importation offences. But they were offences against s 307.3 for which the maximum penalty was 10 years. Unfortunately, it was not pointed out to the judge that the maximum penalty for an offence against s 307.4(1) was two years. Concurrent terms of two years were imposed for each of counts 3 to 10. The sentence for count 7 should be set aside and a term of six months substituted.

I would order as follows:

1. Grant leave to appeal.

2. Set aside the sentence imposed for count 7 on the indictment.

3. Substitute a sentence for that count of six months' imprisonment.

4. Otherwise dismiss the appeal.

FRASER JA: I agree.

MULLINS J: I agree.

FRASER JA: The orders of the Court are those pronounced by Justice McMurdo. Call the next matter.