[2017] QCA 292

COURT OF APPEAL

GOTTERSON JA
MORRISON JA
HENRY J

CA No 158 of 2017
SC No 89 of 2016

THE QUEEN

v

TRAJKOV, Borce **Applicant**

BRISBANE

WEDNESDAY, 29 NOVEMBER 2017

JUDGMENT

HENRY J: The applicant pleaded guilty to trafficking, possession of methylamphetamine, possession of 3,4-methylenedioxyamphetamine, ("MDA"), possession of cannabis, possession of things used in connection with trafficking and a summary charge of possession of a restricted drug.

On the charges of trafficking and possession of cannabis, he was sentenced to concurrent sentences of three years' imprisonment and seven days' imprisonment respectively. He was

convicted but not further punished for the other offences. His head sentence of three years' imprisonment was suspended after 10 months for an operational period of four years.

The applicant, who appears for himself, seeks leave to appeal this apparently moderate sentence on the sole ground it was manifestly excessive. He does not complain about the head sentence of three years' imprisonment but submits the pre-suspension period in custody of only 10 months is too long and should instead be only five or six months.

The applicant was a 29 year old soldier when the police executed a search warrant on his Townsville home on 18 August 2015. They there found five clip-seal bags of methylamphetamine with a gross weight of 23.596 grams and a net weight of 17.154 grams, reflecting a purity of 72.7 per cent. The police also found 14 MDA tablets, two foils of cannabis, a set of digital scales, a quantity of new clip-seal bags and a mobile phone.

The applicant cooperated with the search and made some admissions. He stated he had received a quantity of 50 pills in one transaction and was selling those. He explained he had received a bag of ice which he was also gradually selling. He claimed he was supplying dangerous drugs for bikies in order to pay down a debt of $25,000, which a lady friend of his had incurred. He represented he was not personally receiving money for the drugs and rather, the money was being paid to the bikies he did not name. These assertions were not persisted with below, it having become obvious from deleted text messages recovered from his mobile phone that he was receiving money for the drugs he sold.

The text messages evidenced seven supplies or offers to supply during the trafficking period of 19 March 2015 to 19 August 2015. It is obvious from their content that there had been sales additional to those evidences by the mobile phone text messages. The seven text messages involved a total of four customers. Five of the texts were customer-initiated, commencing with inquiries such as, "Mate is asking if u got rocks" and "Hey, man, could I get five of them beers that I tried the other day my mate wants to try them." The text messages in the main involved

reference to the supply of MDMA tablets in street-level amounts for $30 each. Two of the text messages related to methylamphetamine.

The applicant's admissions during the search provided direct evidence of his intention to sell significant quantities of methylamphetamine and MDA found in his possession. However, even without those admissions, that intention was readily supported by inference from the pattern of dealing evidenced in the text messages in combination with the inherent commercial value of the large quantity of dangerous drugs found in his possession.

The prosecution below relied upon *R v Scott* [2006] QCA 76 and *R v Mullins* [2007] QCA 418 in support of its submission that a head sentence of three to four years' imprisonment was within range. The applicant's counsel below agreed with that, but urged the imposition of a head sentence of three years. The applicant complains his counsel below did not cite other comparable decisions but that was unremarkable given the range submitted for by the Crown was supported by authority. Indeed, the observations of Keane JA in *Scott* would have supported a submission a range of three to five years was appropriate.

In the wake of the prosecution's fair submission as to head sentence range below it is unsurprising defence counsel's submissions targeted the lower end of that range and went to minimising the period of actual custody the applicant would be required to serve. The applicant's counsel sought suspension after nine months, a quarter of the head sentence he targeted, having regard to the applicant's personal circumstances.

At the time of sentence, the applicant was a 31 year old married man without previous convictions. After completing year 12, he worked in the hospitality and banking industries before joining the Army in his early 20s. He was eventually posted to the Second Cavalry Regiment at Lavarack Barracks and promoted to the rank of Lance Corporal. He injured his lower back playing soccer in a work-related context in 2009. He experienced severe exacerbation of his back pain in 2015 and was found to be suffering from minor degeneration of his lower

three lumbar discs. He was then placed in a so-called rehabilitation platoon, resulting in him feeling isolated and socialising with persons entrenched in the drug culture.

The applicant's back injury led to him being assessed as medically unfit for military service. A Department of Veteran's Affairs impairment report, tendered at the time of sentence, noted the applicant has lumbar degenerative disc disease and suffers resting joint pain. A number of medical reports were tendered on sentence, confirming the applicant receives regular physiotherapy and specialist pain treatment to manage his back pain.

In 2016 the applicant was sent a separation notice proposing terminating his service in the Defence Force on medical grounds but his ensuing termination was an administrative termination as a result of the continuance of this criminal prosecution. This has deprived him of access to the ongoing financial and medical support he would otherwise have enjoyed in consequence of a medical discharge. As at the time of sentence the applicant was in receipt of an income stream from his superannuation provider in connection with his back injury.

The applicant is of Macedonian descent. His mother lives in Macedonia and suffers from a number of serious health problems. His father travels between Australia and Macedonia in order to take care of her.

The circumstances of the offending behaviour did not suggest the applicant had a drug problem, nor was a submission made to that effect below, although the applicant's counsel did tender documents from the Alcohol, Tobacco, and Other Drugs Service ("ATODS"), confirming four attendances in April and May of 2017, culminating in his case management being ceased by mutual agreement.

Reference material tendered on the applicant's behalf suggests that he is well regarded and supportive of others, and that his offending behaviour was out of character.

The learned sentencing judge took all the applicant's personal circumstances into account in passing sentence, placing particular emphasis upon the applicant's disability and the deprivation

of his entitlement as an ex-serviceman to financial and medical support. His Honour described that as a form of punishment.

His Honour also accepted the applicant had taken positive steps towards rehabilitation during a lengthy period on bail, had been reasonably cooperative with investigating police and had cooperated with the administration of justice through his plea of guilty. However, his Honour also noted the seriousness of the offending and that its five-month duration could not be passed off as youthful indiscretion.

The applicant referred this Court to four single-Judge decisions in support of his application, namely, *R v Young*, unreported decision of Boddice J, Supreme Court of Queensland, Brisbane, 24 September 2015; *R v Hobbs*, unreported decision of North J, Supreme Court of Queensland at Townsville, 9 May 2016; *R v Kolanowski*, unreported decision of North J, Supreme Court of Queensland at Townsville, 2 February 2017; and *R v Dunlop*, unreported decision of North J, Supreme Court of Queensland at Townsville, 17 May 2017 (his written submissions focused upon *Young* and *Dunlop*).

Single judge decisions are of little assistance where, as here, there exist authoritative decisions of this Court in generally comparable cases. In any event, the sentence in *Young* is of no assistance because only part of the reasons for sentence were published and the particular youth of the defendants in *Hobbs*, *Kolanowski*, and *Dunlop* was a material mitigating circumstance which is not present here.

The sole Court of Appeal decision referred to by the applicant was *R v Wilkinson* [2017] QCA 119. It was a more serious case than the present and involved a markedly longer sentence. The respondent's submissions referred to five somewhat more comparable decisions of this Court. In addition to *Scott* and *Mullins*, referred to below, the Respondent also relied upon *R v Blumke* [2015] QCA 264, *R v Thompson* [2016] QCA 196, and *R v Ritzau* [2017] QCA 17. There are inevitably distinctions between each of those cases and the present one. However, they support the conclusion a three year head sentence suspended after the service of less than one-third of that

time, namely, after 10 months, was a moderate sentence, comfortably within the sound exercise of the sentencing discretion.

The applicant advances a number of other miscellaneous complaints in his endeavour to secure release after serving only five or six months' actual custody. He submits that the learned sentencing judge did not give sufficient weight to the medical and financial information placed before him. That submission is unsustainable. His Honour referred to the applicant's medical disability, and the denial of financial and medical support in connection with it, as considerations mitigating penalty. That his Honour imposed a head sentence at the lower end of the appropriate range and suspended it after less than a third of the sentence has been served confirms those matters were given sufficient weight. It ought be noted on this point that the force of the applicant's medical condition as a mitigating circumstance did not fall for consideration in a vacuum. It was tempered by the fact the applicant well knew he had the condition when making his selfish choice to commence and continue his five-month long business of trafficking in dangerous drugs, by his own actions putting his veteran benefits and liberty at risk.

The applicant submits he is not receiving appropriate medication whilst he is incarcerated, with the consequence that the amount of time he must spend in custody is excessive. In substance this is a submission that the applicant's time in custody will be more onerous than would have been appreciated at the time of the sentence because of the alleged failure of the Department of Corrective Services to provide appropriate medication for the applicant. However, despite his submissions, the applicant made no application to tender evidence of such a failure.

The applicant submits he should have been sentenced on the basis that some of the methylamphetamine in his possession was possessed for personal use, a submission apparently premised on the fact, as now submitted by the applicant, that he attended upon ATODS in connection with his usage of methylamphetamine as well as cannabis. That information in mitigation was not advanced below, which is hardly surprising, given the applicant admitted to

police that he intended to sell the methylamphetamine he was caught with. Moreover, the fact that he took until one year and eight months post-arrest but only two months prior to his sentence to make his four attendances at ATODS does not bespeak offending motivated by a personal drug use problem. No attempt was made in this application to tender evidence the applicant in fact intended to consume a material proportion of the methylamphetamine. Moreover such an attempt would likely have failed given that, if true, it was information which was known to the applicant at the time of the sentence hearing and withheld, see *R v Maniadis* [1997] 1 Qd R 593, 597.

The applicant also submits his mother's health has taken a turn for a worse and "dementia is setting in." He expresses a desire to return to return to Macedonia "to spend a few months with her before the inevitable happens." Once again, no attempt has been made to tender evidence on this topic. In any event, whilst sad, it is not a development which would ordinarily ground a proper basis to vary a sentence on the ground the sentence imposed below was manifestly excessive.

The applicant's complaints are either irrelevant or without substance or both. His sentence is not manifestly excessive and his application for leave to appeal should be refused.

I would order: application for leave to appeal against sentence refused.

GOTTERSON JA: I agree.

MORRISON JA: I also agree.

GOTTERSON JA: The order of the Court is that the application for leave to appeal against sentence is refused.