[2018] QCA 9

COURT OF APPEAL

SOFRONOFF P
MORRISON JA
PHILIPPIDES JA

CA No 229 of 2017
DC No 730 of 2017

THE QUEEN

v

KLEIMEYER, Matthew Dale **Applicant**

BRISBANE

TUESDAY, 13 FEBRUARY 2018

JUDGMENT

SOFRONOFF P: The applicant was in his late twenties and thirties when he committed the offences for which he was sentenced. Between July 2012 and January 2015, he committed 35 offences with which he was charged on indictment. There were also three summary offences for which he was sentenced, but it is not necessary to refer to these further.

Of the 35 offences, 23 related to actual supply of dangerous drugs. Twelve constituted an offer to supply. Of the 35 offences, 26 related to the supply of cannabis, two related to the supply of ecstasy, and seven of the other supplies related to drugs that could not be identified on the evidence led by the prosecution. The quantities of drugs supplied were not large. They were supplied in each case to the applicant's flatmate. The applicant charged for each

such supply, but the amounts that he received were relatively small, and it was not suggested that he was making any profit.

References to his good character were tendered. He had no previous criminal history. It was submitted on his behalf that since he was charged, he has ceased using drugs and that urinalysis testing supported that submission. The learned sentencing judge accepted that that was so. The applicant had married and others whose evidence was led on sentence spoke of him as a man of good character. The learned sentencing judge, Lynch DCJ, accepted that the applicant constituted a low risk of reoffending. His Honour also accepted that the applicant's plea of guilty was indicative of real remorse on his part.

His Honour was aware, as was submitted on behalf of the applicant, that the applicant's conviction for the offences to which he had pleaded guilty, if convictions were recorded, would have an effect upon his intended career in commercial aviation. At the time that he committed the latest of these offences the applicant was studying to achieve his goal of obtaining a university degree in aviation.

His Honour imposed a sentence of 12 months imprisonment in respect of each of counts 1 to 35. All of the sentences were to be served concurrently. All of the sentences were to be suspended immediately for an operational period of two years. In respect of the summary offences, the applicant was convicted but not further punished. All of the convictions were recorded.

It was submitted on this application that his Honour appeared to be unaware that one of the options that was open to him upon the facts of this case was a community-based order. That submission was based upon a submission made at first instance by the prosecutor that the applicant's counsel had not referred to any authority that would support such an order. His Honour identified as a crucial question before him whether a period of imprisonment should be imposed. His Honour qualified that issue by saying that the period under contemplation was one which would not require actual custody. In the result, after referring to matters in mitigation of sentence, to which I have already referred, his Honour said this:

> "You should understand that if this were commercial dealing in dangerous drugs, you would be actually heading off to prison. It seems to me that imposing a community-based order would not recognise sufficiently the seriousness of the offending. It is an unfortunate consequence of imposing a period of imprisonment, albeit one that I intend to wholly suspend, that a conviction must be recorded. That is the case, inevitably, to recognise the seriousness of the offending."

The question on this application for leave to appeal is whether his Honour was right to conclude that, having regard to the nature of the offending, the discretion should be exercised by imposing a period of imprisonment, albeit one that was suspended forthwith.

I have said that the supply was one by the applicant to his flatmate. Describing it in this way may suggest that it was a wholly social arrangement; however, the agreed facts show that this would not be a correct characterisation of what was happening. The evidence was led of text messages that were exchanged between the applicant and his customer. It is sufficient, in order to give a flavour of the relationship between the applicant and this customer for his drugs, to cite three such instances.

The applicant texted:

> "Hey man, how's the study coming along. I've got a big day out tomorrow and was wondering if your up for buying another stash today? Hypothetically, I can hold your share till your done studying if ya like."

To which his friend replied:

> "Nah sorry dude, low in funds atm."

The applicant texted:

> "Yo might be able to get on for you if you're still chasing green man…"

Reply:

> "Sweet, a quarter?"

The applicant texted:

> "Yep I'll look into it…"

The applicant texted:

> "It's on for tomorrow. Any chance you can put 100 in my account tonight? I'm assuming the quality reflects the price…"

Reply:

> "Transferred."

The customer:

> "Got green I can buy off ya."

The applicant texted:

> "I'm actually trying to get on now, would you be able to pick up tonight?"

The customer:

> "Sweet. Yes, I can pick up tonight."

The applicant:

> "Did ya want the whole q? 90$."

The answer:

> "Yes, $90."

It follows that the antecedent and continuing relationship between the applicant and his customer may have been social but their transactions were entirely commercial, albeit, there was no evidence of profit. This was not, like some of the cases to which the Court was referred, a case in which spontaneous instances of supply in social circumstances were the subject of charges and in respect of which it was possible to say that the offending was based upon an impetus derived from a wholly social situation.

In *R v McPherson* [1994] QCA 198, the applicant was dating a young woman aged sixteen-and-a-half years old. He supplied her LSD on two occasions and showed her how to use it. On a subsequent occasion, he supplied her with cannabis and showed her how to consume it. There was a supply to her 13 year old sister as well. It was submitted on his behalf that if he were given a custodial sentence, his business would fail. He was sentenced to three years probation and 240 hours of community service, a sentence that was not disturbed by the Court of Appeal.

In *R v Waite* [2017] QCA 270, Ms Waite supplied methylamphetamine to her friends at what was referred to as a hens' night. She gave the remainder of these drugs to her sister and brother-in-law. She had a minor criminal history, and the sentence was a penalty of $1,500 and a recorded conviction. On appeal, the question was whether the conviction should or should not have been imposed. The sentence was left undisturbed.

In *R v Pratt* [2008] QCA 402, the applicant purchased methylamphetamine for herself and for a friend. She was 25 and studying to be a nurse. There was an obvious effect upon her career by reason of being convicted. She was sentenced to 18 months probation and 100 hours of community service. In *R v Pickering* [2016] QCA 231, the applicant was a mature man aged about 50. He and another man gave a small quantity of cocaine to two women he had met at a party. He was sentenced to three years probation, and a conviction was recorded.

We were also referred to an assault case, *R v Charles* [2013] QCA 362. Ms Charles had been convicted of causing grievous bodily harm. She had no criminal history and the assault of which she was guilty, with its ensuing consequences, occurred as a result of what can be described as a road rage incident, in which the complainant was partly to blame. Ms Charles was a licensed pilot and the consequence of the recording of the conviction upon her career would have been immediate and serious. No mention was made of this effect of the conviction when she was first sentenced. On appeal, it was held that the discretion had miscarried as a result, and the Court set aside the sentences that had been imposed and imposed instead a sentence of 20 hours community service in respect of a count of wilful damage and a sentence of 240 hours of community service in respect of the count of causing unlawful grievous bodily harm.

The position in the present case is entirely different. The applicant is a person who is studying for his degree in aviation but who, while so studying, imperilled that very career by using drugs himself and supplying them to his flatmate. The risk to his possible future career was the risk that he took. This was not an instance like *Charles*, in which events erupted suddenly and in respect of which the offence was committed impetuously. This was a calculated course of conduct which, as can be seen from the nature of the evidence of the transactions, constituted the applicant his friend's dealer in these drugs.

The consequence of this analysis is that it cannot be said that Lynch DCJ was wrong in characterising this as a serious course of offending which justified the imposition of a period of imprisonment even though that period of imprisonment was to be suspended immediately. Nor was his Honour wrong in considering that the nature of the offending was such that a conviction should be recorded. In the case of the applicant himself, it can be said that there are many things in his favour and nothing, apart from the seriousness of the offence, that can be said against him. It must be remembered, however, that one of the factors influencing a sentencing judge is the need to deter others from this kind of offending. As Justice Fraser said in *R v Holmes* [2008] QCA 259 at [22]:

> "Denouncing (the offence of supplying drugs), deterring offenders and others from engaging in it and protecting the community remain important factors in these cases. Those who possess these drugs and those who sell them must know that they risk being sentenced to a term of imprisonment in appropriate cases."

The present is such a case. It is true that the recording of the conviction is apt to impinge upon the applicant's career, but that is the nature of convictions. They do impinge upon people's lives, and indeed, convictions are recorded in order to mark the very fact that a person has committed a very serious offence. In those circumstances, I would refuse leave to appeal.

MORRISON JA: I agree.

PHILIPPIDES JA: I also agree.