SUPREME COURT OF QUEENSLAND

CITATION:	*R v Allen* [2018] QCA 126
PARTIES:	**R** **v** **ALLEN, John William** (applicant)
FILE NO/S:	CA No 22 of 2018 SC No 97 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Townsville – Date of Sentence: 8 September 2017 (Holmes CJ)
DELIVERED ON:	19 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2018
JUDGES:	Fraser and Gotterson JJA and Henry J
ORDER:	**The application for an extension of time in which to apply for leave to appeal against sentence is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant pleaded guilty to trafficking in the dangerous drug methylamphetamine over a nine and a half month period – where the applicant was sentenced to four years' imprisonment – where the applicant filed an application for leave to appeal four months out of time – where the applicant explained his delay on being self-represented, unaware of his rights and contacting Legal Aid directly before the Christmas-New Year office closure – whether the applicant had established a good reason for the delay in applying for leave to appeal – whether it was in the interests of justice to grant the extension of time CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to trafficking in the dangerous drug methylamphetamine over a nine and a half month period – where the applicant was sentenced to four years' imprisonment – where the applicant had a minor criminal history including offending while on bail – where the applicant has health issues – where the applicant is

liable to deportation to New Zealand once the custodial part of his sentence has been served – where the applicant emphasised at the hearing that he was seeking a lower sentence on compassionate grounds – where the applicant had attempted to vacate the plea – whether the sentence was manifestly excessive

R v Blumke [2015] QCA 264, cited
R v C'Ward [2014] QCA 15, cited
R v Mikula [2015] QCA 102, cited

COUNSEL: The applicant appeared on his own behalf
D Kovac for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** The applicant, John William Allen, was sentenced in the Supreme Court at Townsville on 8 September 2017. The offence of which he had been convicted was one of trafficking in the dangerous drug methylamphetamine over a nine and a half month period between the beginning of November 2014 and mid-August 2015. The conviction followed upon a plea of guilty to the offence in March 2017. The delay in sentencing arose principally from an unsuccessful attempt by the applicant to vacate the guilty plea.

[3] The applicant was sentenced to four years' imprisonment. His parole eligibility date was fixed at 7 March 2019. The learned sentenced judge also ordered that documents from the Townsville Hospital, Exhibit 4, be brought to the attention of the Chief Executive of the Department of Corrective Services so that any further necessary medical treatment for the applicant could be attended to.

[4] The applicant represented himself at sentence. On 3 February 2018, and some four months out of time, he filed in this Court a Form 26 application for leave to appeal against sentence. There is one ground of appeal set out in the document, namely, that his sentence is manifestly excessive. At the same time, the applicant also filed an application for an extension of time within which to apply for leave to appeal his sentence. He is acting for himself on these applications.

[5] The applicant has informed the court by unsworn material that he did not know that he had an avenue of appeal against the sentence until a fellow prisoner informed him of that in late November or December 2017. He telephoned Legal Aid just before Christmas. After the Christmas – New Year office closure, he spoke to a Legal Aid lawyer via a video link about an appeal on 24 January 2018. He had an interview with the lawyer on 2 February 2018. She assisted him with the necessary forms. The completed forms were filed some 11 days later. I am satisfied that the applicant has, in these circumstances, given an adequate explanation for his delay.

[6] However, in an application for an extension of time, the applicant bears the onus on all issues. As this Court has held in *R v Tait*,[1] there are two central issues in an application of this kind. The first is whether there is good reason for the delay. As I have said, the applicant has discharged the onus on that issue.

[7] The second issue is whether it is in the interests of justice to grant the extension of time. It is in the interests of justice that an applicant in the position of Mr Allen not suffer a miscarriage of justice. Thus, the task for him is to satisfy the Court that he has a viable case that he has suffered a miscarriage of justice by reason of his sentence being manifestly excessive. I now turn to consider whether he has discharged the onus on this issue.

[8] The circumstances of the applicant's offending were that he sold the schedule 1 drug, methylamphetamine, to over 20 customers on at least 70 occasions during the nine and half month period of trafficking. He sold at street level, in weights ranging from 0.1 gram to 3.5 grams. The transactions were initially sporadic but became more regular over time to a point where he was undertaking multiple transactions per week.

[9] The transactions were recorded on the applicant's Apple iPhone. It was found by police at his premises on 18 August 2015. Also then found were scales, clip seal bags and a written price list with prices on it ranging from $500 for .5 of a gram, five points, and $3,500 for 7 grams. The applicant was a self-proclaimed cannabis user. He appears not to have trafficked in methylamphetamine to sustain a habit in using that drug. Nor does he appear to have generated significant wealth from the trafficking.

[10] The applicant was 51 years old at the time of the offending and 54 years old at sentence. He had a relatively minor record of offending prior to the subject trafficking. However, as the learned sentencing judge noted, he did offend on two occasions while on bail for this offence. In January 2016, he committed offences of unlawful possession of a weapon and possession of dangerous drugs and associated utensils for which he was convicted and fined in the Townsville Magistrates Court in May 2016. Later, in November 2016, the applicant committed several dangerous drug and associated utensil possession offences for which he was convicted and fined in April 2017, again in the Townsville Magistrates Court.

[11] By occupation, the applicant is a fitter and turner. He worked in and out of the mining industry on a fairly consistent basis. He has a steady partner but suffers from indifferent health. At the time of sentence, he probably required further scans to determine appropriate treatment.

[12] The learned sentencing judge had regard for the circumstances of the offending and the applicant's personal circumstances as I have noted them. Her Honour observed that it would be difficult to say that he was entirely remorseful because, as the application to vacate the plea suggested, he did not seem to acknowledge fully his responsibility for the trafficking. Nevertheless, her Honour took into account the assistance in the administration of justice that arose from the avoidance of the necessity for a trial.

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1 [1999] 2 Qd R 667 at 668.

[13] In support of his submission that the sentence is manifestly excessive, the applicant has referred to five separate matters. One is that his sentence is unduly excessive when compared with other sentences for comparable offending. I shall return to that matter once I have dealt with the others.

[14] Firstly, the applicant contends that the learned sentencing judge acted under a factual misapprehension when she said that he offended while on bail. This contention is ill-founded. Material before this Court shows clearly that he did so offend, as I have detailed. In passing, I note that her Honour had regard for that offending as indicative of limited remorse. She did not take its criminality into account in fashioning the sentence.

[15] Secondly, the applicant suggests that summary charges arising out of the police intervention at his premises on 18 August 2015 "were dismissed and never prosecuted". However, evidence before this Court reveals that an offence of failing to properly dispose of a needle and a syringe and an offence of possession of utensils used in relation to drug offending, both of which were alleged to have been committed on 18 August 2015, were dealt with in the Townsville Magistrates Court on 18 September 2017, some nine days after the sentence for trafficking was imposed in the Supreme Court. On that occasion, convictions of both charges were recorded, but no further punishment was imposed.

[16] Next, the applicant refers to his medical condition and age. He suffers from epileptic fits and, he says, needs constant medical attention. That need, he further says, is not adequately catered for in prison. The applicant's age and medical condition are matters that the learned sentencing judge did take into account. The order she made with respect to the exhibit is indicative of that. I would add that issues that the applicant feels that he now has in detention, arising from his medical condition, are ones that are appropriately taken up with the prison authorities. They are not relevant to a consideration of whether his sentence is manifestly excessive.

[17] The fourth of these matters is that the applicant notes that, notwithstanding that he has lived in Australia since 1981, he is liable to deportation to New Zealand once the custodial part of his sentence has been served. However, there was no submission, let alone evidence, before the learned sentencing judge, that deportation would result in hardship for the applicant warranting mitigation in his sentence. Without such evidence, her Honour could not have taken liability to deportation into account in any meaningful way.[2]

[18] I now turn to the sentencing decisions to which the applicant has referred as comparables. There are four of them. None of them is a decision of this Court. Three of them, *R v Gray*, *R v Josey* and *R v Lucas*, involves sentences for drug possession offences, in which a fine or immediate parole was imposed by the sentencing judge. They are of no relevance here. The applicant wishes to appeal a sentence for the much more serious offence of drug trafficking.

[19] The other sentence is *R v Lamb*, imposed in 2016. Little detail is given by the applicant of that offending. Apparently, the offender was found in possession of 1.75 grams of methylamphetamine, a small quantity of MDMA and 8 grams of cannabis. He faced 23 counts of supply and one count of trafficking. He was sentenced to three years' imprisonment suspended after six months.

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2 *R v UE* [2016] QCA 58 at [16].

[20] The sentence in *Lamb* is, in itself, quite insufficient to give reason to think that the applicant's sentence is manifestly excessive. How long Lamb trafficked, any prior record of offending and his personal circumstances are all undisclosed in the applicant's submission.

[21] In the course of sentencing submissions in the applicant's case, reference was made by the prosecutor to a number of decisions of this Court relating to sentences imposed for drug trafficking. The learned sentencing judge obviously had regard to them. They are also relied on by the respondent in this application. In each of them, the offender pleaded guilty. It is sufficient for present purposes to give brief details of those matters.

[22] In *R v Mikula*,[3] the offender, who at the time was in his early twenties, trafficked in dangerous drugs over a nine month period. His diary contained names of 17 customers and recorded sales ranging from $50 to five figure amounts. He was trafficking for commercial reward. As well as the trafficking offence, he pleaded guilty to a range of drug, utensils and weapons possession offences. He had a minor criminal history. Since the offending, he had given up personal drug use. He had excellent work references and had shown that he had rehabilitated himself. For the trafficking, he was sentenced to four years' imprisonment, suspended after 16 months. He was convicted, but not further punished for the other offences. His application for leave to appeal against the sentence on the ground that it was manifestly excessive, was refused.

[23] The offender in *R v Blumke*[4] trafficked over a 10 week period, primarily at street level, in methylamphetamine, MDMA, cannabis and pyrovalerone. As the same time, he was sentenced for six offences of supplying a dangerous drug. This offender was aged 27 years when he offended. He had a number of prior convictions for minor drug offences. His offending resulted from a loss of employment and breakdown of a relationship. Since the offending, he had obtained employment and removed himself from drug community influence. He, too, was sentenced to four years' imprisonment on the trafficking count with concurrent sentences of 18 months for the supply counts. The sentences were suspended after 12 months. His application for leave to appeal against the sentence as manifestly excessive, was also refused.

[24] In *R v C'Ward*,[5] the offender trafficked over a period of six and half months in methylamphetamine, ecstasy and cannabis. He sold at both retail and intermediate levels. A search of his premises discovered $6,000 in cash, bags, scales, tick sheets and telephone contacts which referred to amounts of up to $15,000. He was prepared to threaten violence to enforce drug debts owed to him. This offender was in his mid-forties when he offended. He had not re-offended during his almost two years on bail. He had encouraging prospects of rehabilitation and demonstrated insight into the harm that his trafficking had caused others. He was sentenced to five years' imprisonment with parole eligibility after 20 months. His application for an extension of time to appeal against sentence was refused.

[25] It is well settled that to establish that a sentence is manifestly excessive, it is insufficient to show it to be markedly different from sentences in other cases. What

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3 [2015] QCA 102.
4 [2015] QCA 264.
5 [2014] QCA 15.

must be established is that there must have been a misapplication of principle by the sentencing judge or that the sentence is "unreasonable or plainly unjust".[6]

[26] Here, the applicant's offending was broadly comparable with that of the offenders in the sentencing decisions of this Court to which I have referred. The sentences imposed in those cases were of four to five years. The period to be served before suspension or eligibility for parole was influenced by personal circumstances including remorse, an area in which, regrettably, this applicant had not distinguished himself at sentence.

[27] I would add that at the hearing of this application, the applicant emphasised that he was really seeking a lower sentence on compassionate grounds relating principally to his mother's terminal illness, his sister's very recent death and financial hardships he and his partner have suffered. Unfortunately for the applicant, these are not factors which show that the sentence as imposed was manifestly excessive.

[28] For those reasons, I consider that the applicant does not have any real prospect of establishing that his sentence is manifestly excessive. It follows that his application for an extension of time in which to apply for leave to appeal against sentence must be refused.

[29] **HENRY J:** I agree with the reasons of Gotterson JA and agree the application should be refused.

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6 *R v Tout* [2012] QCA 296 at [8].