[2018] QCA 232

COURT OF APPEAL

SOFRONOFF P
McMURDO JA
HENRY J

CA No 44 of 2018
SC No 703 of 2017
SC No 199 of 2018

THE QUEEN

v

VIDLER, Scott Andrew **Applicant**

BRISBANE

MONDAY, 24 SEPTEMBER 2018

JUDGMENT

McMURDO JA: On 15 February 2018, the applicant pleaded guilty to four offences charged on an indictment and 10 summary offences. Each was a drug offence, the most serious of which was trafficking in a dangerous drug over a period of about two years, seven months. For that offence he was sentenced to a term of 10 years imprisonment. A total of 500 days of presentence custody was declared as time already served, and a serious violent offence declaration was made. He was convicted but not further punished on the other charges. He seeks leave to appeal against that sentence on a ground which is expressed as follows:

> "The sentencing judge erred by failing to account, adequately or at all, the time that the applicant had spent in custody prior to sentence that cannot be declared as pre-sentence custody. As a consequence, the sentence was rendered manifestly excessive."

As the applicant's argument made clear, the sentence is challenged upon the basis that there was a specific error in the exercise of the judge's discretion, rather than an argument that some error must be inferred because of the manifest excess of the sentence. If a specific error is establish, and this court is of the view that a lower sentence should have been imposed, it will do so without the applicant having to demonstrate that his 10 year term is manifestly excessive.

The applicant was born in 1964, so that he was aged 49 to 51 at the time of his offending, and 53 when sentenced. He had some criminal history, but one which the sentencing judge described as "minor and essentially irrelevant".

The circumstances of his offending were uncontroversial and they were set out in a schedule of facts which was tendered by the prosecutor. Early on, the applicant was trafficking in cannabis, but for the final 15 months he was also trafficking in methylamphetamine. He was selling or sourcing drugs to sell almost daily, and often several times in a single day.

He sold at a wholesale level to street level dealers, of whom there were at least 15. Intercepted phone calls indicated his acquisition of at least a kilogram of methylamphetamine across 20 transactions in one two-month period. He had others assisting him. He was not part of a larger syndicate, but he was, in the sentencing judge's description, a "major player" in the distribution of methylamphetamine throughout southeast Queensland as well as interstate. Between January 2014 and August 2015 there were 57 deposits of unexplained funds to his bank account totalling more than $300,000.

He was the subject of a number of searches by police during the trafficking period. In August 2015 he was searched by police while in a stolen car, when he was in possession of one MDMA tablet and about $8,000 in cash. He was charged and granted bail. A few days later, police went to his home in response to a call for emergency assistance, after he was the target of a violent home invasion in which he was bound up and subjected to a protracted assault, and suffered serious knife injuries. Police then seized some methylamphetamine crystals, some smaller quantities of schedule 2 drugs, and $20,000 in cash. In the following month, he

was arrested at his home for failing to attend court, and he was found to be in possession of 10 tablets containing MDMA. And in May 2016, when he was arrested and charged at his home, he was found to be in possession of drug utensils, a small quantity of drugs, and about $8,000 in cash.

The sentencing judge accepted that the applicant was addicted to drugs, and that this partly explained his offending, but added that "no addiction to drugs could explain this level of serious wholesale trafficking in drugs".

The judge recorded that she had been referred to a number of comparative sentences, and that they indicated a range of 10 to 12 years for someone who has pleaded guilty for offending as serious as this by a mature offender. The judge said that because of the absence of any relevant criminal history, and the fact that this was an early plea of guilty, the applicant should be sentenced at the "lower end of that range".

The applicant was on remand for the subject offences from the date of his arrest on 10 May 2016. From 21 September 2017 he was also in custody on another charge, namely attempting to procure the commission of criminal acts, a charge that remained outstanding at the time of his sentence. Consequently, only the period until 21 September 2017, a total of 499 days, was able to be declared as presentence custody. From 21 September 2017 to 15 February 2018 (the day before the sentence) a further 148 days was spent in custody, but which could not be declared. The judge was referred to that period, and recognised it in her sentencing remarks when she said:

> "The only part of your imprisonment that is declarable is the 500 days from 10 May 2016 to 20 September 2017 and I will declare that as time spent in custody under this sentence *and take into account the extra time that you have spent that cannot be declared in determining what sentence to be impose upon you*." (Emphasis added.)

As Fraser JA noted in *R v Fabre*,[1] there are many decisions of this Court in which it has been held that, although it is not mandatory, it is generally desirable to take into account periods of presentence custody which are not declarable under s 159A of the *Penalties and Sentences*

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1 [2008] QCA 386 at [14].

Act 1992 (Qld) at the first opportunity. If an offender is subsequently acquitted of the other charge or charges, the necessity for an application to reopen the sentence will be avoided; and if the offender is subsequently convicted of the other charge or charges it would ordinarily "be simpler for the subsequent sentencing court to impose cumulative terms of imprisonment where that is warranted by the circumstances".[2]

In *R v Skedgwell*,[3] it was said that where a period of custody cannot be declared, the sentencing judge should "make it plain in the sentencing remarks whether and to what extent and in what manner, such an allowance is being made on account of a period of that custody." The judge here did say that some allowance was being made, but I accept that her Honour did not explain the way in which that was being done. While the statement in *Skedgwell* is an important guidance for sentencing judges, it does not prescribe a legal requirement, a noncompliance with which will necessarily involve an error in the exercise of the sentencing discretion.

It is submitted for the applicant that an analysis of what was said by the judge in her sentencing remarks after her reference to this period of custody which could not be declared reveals that her Honour did not in fact take into account that period. The argument emphasises that in saying the applicant should be sentenced at the lower end of a range of 10 to 12 years, the judge mentioned only the absence of a relevant criminal history and the early plea of guilty, to say nothing about this period of custody. That argument cannot be accepted. Only a little earlier in her sentencing remarks the judge clearly stated that she was taking into account this extra period. It cannot be inferred that she did not do so.

Consequently, the applicant's argument becomes her complaint that what is described as "full credit" was not given for this period of 148 days. Again, I am unable to accept that argument. The judge was not obliged to announce effectively two sentences, one which would be imposed apart from this period, and the other sentence, which would be imposed by bringing it into account. Although it would have been preferable for the judge to further explain the

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2 Ibid at [15].
3 [1999] 2 Qd R 97 at 100; [1998] QCA 93.

impact of this period of 148 days, it cannot be inferred that her Honour gave insufficient allowance for it. The point may be tested in this way. Absent this non-declarable period of pre-sentence custody, a sentence of, say, 10 and a half years would not have been beyond the sentencing range, so that the sentence of 10 years which was imposed in this case is not manifestly one which failed to give adequate allowance for the non-declarable period.

I should add that the applicant did not challenge the judge's view that comparable sentences indicated that it was open to her to impose a sentence in a range of 10 to 12 years. That view is supported by a number of cases which were cited for the applicant in this court, including *R v Feakes*,[4] *R v Galeano*,[5] *R v Johnson*,[6] and *R v McGinness*,[7] although it must be emphasised that the facts and circumstances of the particular case might warrant a sentence above or below that range in the case of a mature offender who has pleaded guilty to large-scale trafficking in a schedule 1 drug. I would refuse the application.

SOFRONOFF P: I agree.

HENRY J: I agree.

SOFRONOFF P: The order of the court is that the application is refused.

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4 [2009] QCA 376.
5 [2013] 2 Qd R 464; [2013] QCA 51.
6 [2014] QCA 79.
7 [2015] QCA 34.