[2018] QCA 263

COURT OF APPEAL

PHILIPPIDES JA
McMURDO JA
DAVIS J

CA No 140 of 2018
SC No 1322 of 2017

THE QUEEN

v

BRUNNING, Emily Ann **Applicant**

BRISBANE

TUESDAY, 9 OCTOBER 2018

JUDGMENT

DAVIS J: The applicant seeks leave to appeal against sentences imposed upon her in the Trial Division. An indictment was presented containing six counts. A nolle prosequi was entered in relation to three counts and the applicant pleaded guilty to one count of possession of a dangerous drug, methylamphetamine, with a circumstance of aggravation: that the quantity exceeded two grams; that was count 1. She also pleaded guilty to one count of possession of a relevant substance, 4-hydroxybutanoic acid, commonly called "GBL". That was count 5 on the indictment.

The applicant also pleaded guilty to one count of being in possession of three mobile telephones and four clip-seal bags, being things possessed for use in connection with the

commission of the crime of supplying a dangerous drug. The applicant, though, was not convicted of any counts of supply.

All three offences to which she pleaded guilty were committed on 16 July 2016. The applicant was sentenced on 9 March 2018, having pleaded guilty on 6 March 2018. On count 1, the applicant was sentenced to a term of imprisonment of two years and two months. On the other two counts, she was convicted but not further punished.

The applicant spent 45 days in pre-sentence custody which could not be declared as time served on the sentences imposed, as the applicant was being held on remand on other charges. The learned sentencing judge did, though, take the pre-sentence custody into account when assessing sentence.

22 January 2019 was set as the date that the applicant is eligible for parole. That date is eight months from the date of the sentence. Taking into account time served, the effect of the sentences is that the applicant will serve about nine and a half months before being eligible for parole.

A date was set for parole eligibility rather than for release on parole as the commission of the current offences breached an existing parole order. It is not contested on appeal that, pursuant to s 160D of the *Penalties and Sentences Act* 1992 (Qld), as the offences were committed on parole the effect of the conviction was to cancel that parole automatically with the result that a parole release date could not be set. Any parole order would have to be the setting of an eligibility date. See *R v Bliss* [2015] QCA 53 and *R v Hall* [2018] QSC 101.

All three offences arose from the one episode. Police intercepted a motor vehicle driven by a male person in which the applicant was travelling as a passenger. The applicant asserted that the car was hers, she having bought it for $500. A search of the vehicle was conducted. In the car was the GBL which was the subject of count 5.

The applicant was arrested and taken to the Mount Ommaney Police Station where she denied having anything concealed upon her person. She was then searched and the methylamphetamine,

the subject of count 1, was located on her, as were a number of empty clip-seal bags. Three mobile telephones were seized which were analysed and contained drug-related messages. The bags and the telephones were the subject of count 6.

The substances were subsequently analysed. The substance which was the subject of count 1 weighed 6.762 grams with a calculated weight of methylamphetamine of 5.098 grams, giving a purity of 75.4 per cent. The agreed street value of the methylamphetamine was between $2,028 and $13,524, depending largely on how it was sold. The substance which was the subject of count 5 was analysed and found to contain 95.142 grams of GBL.

The applicant's first complaint is that her barrister failed to challenge matters stated in the agreed statement of facts. No objection was taken to the statement of facts which was tendered by the prosecutor as an agreed statement. There is no basis shown as to why the learned sentencing judge could not act on the agreed statement of facts, nor why this Court should now not accept what is there stated.

Further, the major factual challenge which the applicant wishes to make is to the finding that there is a commercial aspect to the offending. The applicant referred to other cases, such as *R v Harrison* [2018] QCA 94 and *R v Armstrong* [2005] QCA 116, being cases where the sentencing judge held that the possession was for personal not commercial purposes.

Here there was ample evidence upon which the learned primary judge was entitled to draw the conclusion that the possession was for commercial purposes. In particular, there was a considerable amount of methylamphetamine. Its purity was relatively high, it was quite valuable and the applicant was in possession of clip-seal bags and telephones.

In relation to the clip-seal bags and the telephones, they were the subject of the plea to count 6. Given the acceptance by the applicant by that plea that the mobile telephones and clip-seal bags were possessed for use in connection with the commission of the crime of supplying a dangerous drug, it was inevitable that her Honour would find that the offences which were counts 1 and 5 were committed for a commercial purpose.

The next complaint arises from the following passage in the sentencing remarks. Her Honour said this, quote:

> "Well, you have had – you have had a lot of warning and you have spent considerable time in jail. And that does not seem that has acted as a proper deterrent to you. People are not sent to jail because Judges enjoy sending them to jail. In fact, it is one of the worst parts of our job, but it is a necessary part of our job because the community has an expectation that crimes such as these are denounced and the sentences that are imposed serve as a deterrence, both to other people and to you.
>
> You have an aggravating feature in terms of the sentence I have got to impose upon you that you are on parole when the offending took place. You have also committed further offences since that time which all involved either breaching bail conditions or are drug related. They indicated that you have a significant drug problem."

The applicant submits that it was an error to take into account some of the offences committed after the offences the subject of this appeal. The applicant submits that her Honour fell into error and this led to the sentences being the subject of a parole eligibility date rather than a suspended sentence which would, of course, give certainty of release.

The current offences were committed on 16 July 2016. The applicant's criminal history shows entries on 18 April 2017 in the Brisbane Magistrates Court, 11 January 2018 in the Cleveland Magistrates Court, 3 March 2018 in the Brisbane Magistrates Court and 15 March 2018 in the Richlands Magistrates Court. In all cases, the applicant was convicted for drug-related summary offences. All these convictions were recorded before the present sentences were imposed.

Her Honour was right that the applicant has committed further offences since the ones the subject of this application. What can be seen is that her Honour's conclusion was that those and other offences, to quote her Honour, "…indicate that you seem to have a significant drug problem".

Her Honour did not take the subsequent offences as being aggravated factors of the subject offences. Her Honour considered whether to partially suspend the sentence or set a parole eligibility date. In that respect, her Honour said:

> "Your counsel has submitted that the range of sentences is between 12 or 24 months. Your counsel, while he has submitted that a suspended sentence should be considered by the court, has conceded the fact that the court could rightly consider it is not appropriate given your offending history. I'm afraid to say that in your case that is the conclusion I come to. Your offending and your continued offending is such that a suspended sentence in your case would not be appropriate."

There is, with respect, no error demonstrated in her Honour's decision to decline to impose a suspended sentence but, instead, to set a parole eligibility date.

Lastly, the applicant submits that the sentence is manifestly excessive. She makes this submission in reliance upon decisions of this Court in *R v Fabre* [2008] QCA 386, *R v Duggan* [2004] QCA 442 and *R v Watkins* [2016] QCA 60.

The applicant was 43 at the time of the offending. She has a long history of drug offending. She was the subject of a parole order at the time of the commission of the offences. The drugs were possessed for a commercial purpose. The methamphetamine, in particular, was significant both in quantity and value.

Her Honour took into account the applicant's remorse and cooperation with the administration of justice shown by her early plea of guilty and her efforts towards rehabilitation while in custody. The sentence is not manifestly excessive. The application should be dismissed.

PHILIPPIDES JA: I agree.

McMURDO JA: I agree.

PHILIPPIDES JA: The order of the Court is that the application is dismissed. Thank you.