SUPREME COURT OF QUEENSLAND

CITATION:	*R v Le* [2019] QCA 57
PARTIES:	**R** **v** **LE, Minh Gia-Hao Kevin** (applicant)
FILE NO/S:	CA No 346 of 2018 DC No 2167 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence – 10 December 2018 (O'Brien CJ DCJ)
DELIVERED ON:	9 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2019
JUDGES:	Philippides JA and Boddice and Bradley JJ
ORDERS:	**1. The application for leave to adduce evidence be refused.** **2. The application for leave to appeal be granted.** **3. The appeal against sentence be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where the applicant filed an application for leave to adduce evidence at the application for leave to appeal – where the evidence was a report by a clinical psychologist – where the applicant contended the new report went to his culpability for his offending – where a report by another psychologist was tendered at sentencing – whether the applicant should be allowed to adduce the new psychologist's report on appeal CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of possessing the dangerous drug cannabis in a quantity in excess of 500 grams – where the applicant was sentenced to two and a half years imprisonment, to be suspended after the applicant had served eight months imprisonment, for an operational period of three years –

where the applicant was relatively young, with no prior criminal history – where the offending was an isolated incident – whether the sentence was manifestly excessive

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v O'Shea [2011] QCA 18, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited

COUNSEL: G M McGuire for the applicant
P McCarthy for the respondent

SOLICITORS: Bosscher Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** For the reasons given by Boddice J, I agree with the orders proposed by his Honour.

[2] **BODDICE J:** On 22 October 2018, the applicant pleaded guilty to one count of possessing the dangerous drug cannabis in a quantity in excess of 500 grams. The cannabis was contained in two suitcases the applicant had brought with him as luggage when he flew from Brisbane to Sydney on 20 June 2018. The suitcases were found to contain a total of 76.05 pounds or 34.5 kilograms of cannabis.

[3] On 10 December 2018, the applicant was sentenced to imprisonment for a period of two and a half years. It was ordered that sentence be suspended, after the applicant had served eight months imprisonment, for an operational period of three years.

[4] On 19 December 2018, the applicant filed an application for leave to appeal against sentence. The sole ground, in the event leave be given, was that the sentence was manifestly excessive.

[5] On 13 March 2019, the applicant filed an application for leave to adduce evidence at the application for leave to appeal. The evidence was a report by Dr Hatzipetrou, a clinical psychologist. The applicant contended the report suggested the applicant was likely to have been affected by depression and anxiety at the time of the offending, factors which are likely to have impacted on his capacity for reasoning and judgment and thereby relevant to culpability for his offending.

Factual background

[6] The applicant was born on 7 September 1997. He had no previous criminal history.

[7] The applicant's plea of guilty was entered on the basis he possessed the cannabis with a commercial purpose and that he was a paid drug courier. At the sentence hearing it was submitted the cannabis could yield between $136,000 and $380,000, if sold in wholesale amounts.

[8] The Crown submitted the applicant's conduct involved brazen offending using a commercial flight to transfer this significant quantity of cannabis from interstate, with the applicant's motivation being quick money, as it was a lucrative opportunity. The Crown accepted the applicant was youthful and had entered an early plea of guilty. Notwithstanding those circumstances, the Crown submitted for a sentence of imprisonment in the order of four years.

[9] The defence submitted a head sentence in the order of two and half years be imposed, with either immediate release or release after serving up to eight months imprisonment. The defence relied upon the applicant's early plea of guilty, lack of criminal history, youthfulness and the contents of a psychologist's report and numerous references.

[10] In submitting for a head sentence of that order, the defence acknowledged the applicant chose to transport the drugs for profit. It was acknowledged the applicant expected to be paid some money for couriering the drugs. It was submitted the applicant was in financial difficulty at the time. His background was described as a young man who had responsibility thrust upon him at an early age, as his parents were absent. He was helping his grandmother raise his younger siblings. It was submitted that his grandmother was now quite unwell and the applicant had responsibilities as a carer.

[11] It was also submitted that at the time, the applicant was quite depressed and isolated from people. The psychologist's report relied upon at the sentencing hearing was provided by Carla Ferrari. In it, she opined that having regard to her psychometric assessment, the applicant's clinical presentation and the available collateral information, diagnoses of major depressive disorder, recurrent, moderate and generalised anxieties disorder were indicated, as was evidence of personality traits, although they were likely due to responses being artificially elevated in light of his current mental state.

[12] Ms Ferrari further opined that the applicant's offending behaviour appeared to be in contrast to his usual character and behaviour and that it seemed that depression and anxiety symptoms at the time affected his judgment, emotional regulation, ability to make rational decisions and to process information effectively and to evaluate future outcomes. Ms Ferrari opined the applicant was a low risk of further recidivism.

Sentencing remarks

[13] The sentencing judge acknowledged the applicant had pleaded guilty to an offence of possessing an aggravated quantity of cannabis which he had transported from Sydney to Brisbane as a paid courier. It was noted it was an isolated incident, although the amount of drug involved was significant, as was its value. The sentencing judge further observed the applicant was a relatively young man with no prior criminal history of any kind.

[14] The sentencing judge accepted the applicant was remorseful for his conduct which constituted a most significant error of judgment, for which there must be significant consequences. It was accepted the applicant, at the time of the offending, was in financial difficulties and subject to a degree of stress. The sentencing judge however noted that the applicant was not an unintelligent young man and there was no suggestion he was other than fully aware of what he was exposing himself to by his offending conduct. The sentencing judge observed the plea of guilty had occurred in the context of an overwhelming case.

[15] The sentencing judge noted the contents of the psychologist's report "which does tell me a good deal about you", as well as the contents of the references, all of

whom spoke well of the applicant.[1] The sentencing judge observed that notwithstanding those features, any sentence must have regard to factors beyond those personal to the applicant. There was a deterrent aspect. The sentencing judge accepted there was a legitimate distinction to be drawn between the offence of trafficking and an offence of possession, notwithstanding as part of a commercial operation.

[16] Weighing all of those matters, the sentencing judge imposed a sentence of two and half years imprisonment, with that sentence ordered to be suspended after the applicant had served eight months for an operational period of three years. Six days in presentence custody was declared as time served in respect of that sentence.

Applicant's submissions

[17] The applicant concedes the head sentence of two and half years was within the proper exercise of the court's discretion. However, it is submitted that requiring the applicant to serve actual custody rendered the overall sentence manifestly excessive. The applicant's youth, lack of criminal history and prospects of rehabilitation led to an inference that the imposition of a sentence, requiring actual custody, involved a failure to properly exercise the discretion at first instance.

[18] The applicant submits this conclusion particularly follows having regard to the report of Dr Hatzipetrou. It is submitted that report ought to be admitted as new evidence on the sentence appeal, as it will cause the Court to form the opinion that some other less severe sentence is warranted in law. Whilst the sentencing judge had a report under the hand of a psychologist, that report was based on a telephone conference and did not focus on the applicant's mental state at the time of the offending.

[19] The applicant submits Dr Hatzipetrou's report specifically considers the applicant's mental state at the time of the offence. Dr Hatzipetrou opines the applicant was likely to experience mental health problems in the period prior to his involvement in the offending behaviour. The applicant submits that having regard to that new evidence, the application for leave to appeal ought to be granted and the sentence varied to the extent that the period of imprisonment be suspended at the date of the hearing of the appeal.

Respondent's submissions

[20] The respondent submits that both the application to adduce new evidence and the application for leave to appeal ought to be refused. The report of Dr Hatzipetrou does not contain new evidence. Ms Ferrari not only interviewed the applicant, she undertook psychometric testing, the results of which were adopted by Dr Hatzipetrou in his report. In such circumstances, there would be no miscarriage caused by a refusal of the reception of the report of Dr Hatzipetrou.

[21] Further, there is no basis to conclude a sentence requiring a period of actual imprisonment, was manifestly excessive. The sentence coincided with the submissions made by the applicant's then counsel. It was imposed after the sentencing judge acknowledged both the aggravating and mitigating features in the applicant's

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1 Sentencing remarks 2-20.

conduct. Nothing in the sentencing remarks or in the sentence imposed supports a conclusion that there has been any misapplication of principle or any other error warranting intervention.

Discussion

[22] The applicant's criminal conduct involved a serious example of the offence of possession of the dangerous drug cannabis, in excess of 500 grams. The applicant transported over 34 kilograms of the dangerous drug cannabis from interstate. Whilst he did so as a courier, it was for financial reward. There were compelling reasons why any sentence should contain a significant deterrent effect.

[23] The mitigating factors in favour of the applicant, namely his youthfulness, lack of criminal history, obvious remorse, cooperation by his plea of guilty and personal circumstances were all acknowledged by the sentencing judge. Those personal circumstances included his sense of depression and isolation at the time of the offending impacting on his decision making processes.

[24] The opinions of Ms Ferrari were, in truth, no different to the opinion now expressed by Dr Hatzipetrou. Ms Ferrari expressly opined that precipitating and perpetuating factors in the applicant's involvement in the offence, included a deterioration of the mental health in the months prior to the offending. Further, that depression and anxiety symptoms affected his judgment, emotional regulation, ability to make rational decisions, process information effectively and to evaluate future outcomes, and the applicant's involvement in the offending was demonstrated as being directly related to his mental state and his desperation in regard to psychosocial circumstances during the period of criminal activity.

[25] The opinion expressed by Dr Hatzipetrou, if anything, was somewhat more guarded in that Dr Hatzipetrou opined that "Given his age and personal circumstances at the time of the offending, [the applicant's] capacity to monitor and regulate his emotional and behavioural responses to stressors appeared to be somewhat impaired".[2] Significantly, Dr Hatzipetrou noted that the previous depressive episodes experienced by the applicant were not sufficiently severe to impair his educational and vocational achievements or his maintenance of peer relationships.

[26] The opinions expressed by Dr Hatzipetrou do not constitute new evidence. They are no different to the opinions expressed in the material placed before the sentencing judge. There is no basis to conclude that the admission of that new evidence would cause this Court to form "the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed."[3] There is no basis to grant leave to admit that new evidence.

[27] A sentence of actual imprisonment was within the proper exercise of the sentencing discretion, notwithstanding the applicant's youthfulness and lack of prior criminal history, and other factors in his favour.

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2 Dr Hatzipetrou's report, p 13.

3 *R v O'Shea* [2011] QCA 18.

[28] Youthfulness is but one factor, albeit a very important factor. Its weight is to be accorded in the context of an acknowledgement that there is no single correct decision and sentencing judges are allowed a considerable degree of flexibility.[4]

[29] Appellate intervention on the ground of manifest excessiveness where, as here, there is no allegation of specific legal error, is only warranted if this Court is driven to conclude there must have been some misapplication of principle.[5] A consideration of the sentencing remarks supports a conclusion that there was no misapplication of principle in the imposition of a sentence of imprisonment requiring actual imprisonment.

[30] There was also nothing in the sentence itself which supports a conclusion that the sentencing judge erred in a way supportive of a conclusion there was an error warranting the intervention of this Court. A suspension after eight months was earlier than might otherwise have been ordered, having regard to the early plea of guilty. That early date is consistent with proper regard being afforded to the applicant's youthfulness.

[31] I would order:

1. The application for leave to adduce evidence be refused;

2. The application for leave to appeal be granted;

3. The appeal against sentence be dismissed.

[32] **BRADLEY J:** I agree with the reasons for judgment of Boddice J and the orders proposed by his Honour.

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4 *Markarian v The Queen* (2005) 228 CLR 357.

5 *R v Pham* [2015] HCA 39 at [28].