**[2019] QCA 88**

**COURT OF APPEAL**

**SOFRONOFF P**
**GOTTERSON JA**
**BODDICE J**

**CA No 331 of 2018**
**SC No 1120 of 2018**
**SC No 1652 of 2018**

**THE QUEEN**

**v**

**VELLA, Jodie** **Applicant**

**BRISBANE**

**FRIDAY, 17 MAY 2019**

**JUDGMENT**

**SOFRONOFF P:** Justice Boddice will give his reasons first in this matter.

**BODDICE J:** The applicant seeks leave to appeal an effective head sentence of four years imprisonment, with parole eligibility after serving a little under 16 months of actual custody, imposed on 13 November 2018. The sole ground of appeal, should leave be given, is that the sentence imposed was manifestly excessive.

On 13 November 2018, the applicant pleaded guilty to two counts of possessing a dangerous drug in excess of two grams, two counts of possessing a dangerous drug, one count of possessing dangerous drugs, two counts of unlawful possession of a weapon and one count of possessing things for use in connection with possessing dangerous drugs, all on indictment

1120 of 2018, and 11 summary charges, being two of possessing utensils or pipes for use, two of possessing property suspected of having been used in connection with the commission of a drug offence, one of contravening a direction or requirement of police, one of possessing tainted property, one of unlawful possession of weapons category A, B or M, three of receiving tainted property and one of driving a motor vehicle whilst having a relevant drug present in the blood or saliva.

In respect of each count of possessing a dangerous drug in excess of two grams, the applicant was sentenced to four years imprisonment. The applicant was sentenced to lesser concurrent periods of imprisonment for the remaining counts on the indictment, other than the count of possessing things for use in connection with possessing dangerous drugs. In respect of that count and each of the summary charges, the applicant was convicted but not further punished.

After allowing for 170 days in pre-sentence custody, which was declared as time served, the sentencing judge fixed the applicant's parole eligibility date at 13 September 2019. Accordingly, the applicant was required to serve just under one third of the four-year head sentence in actual custody before being eligible for parole.

The offending related to offences committed on three separate occasions in 2017. At the time of the commission of all offences, the applicant was subject to probation orders imposed earlier in 2017 for drug and other offences. The last two occasions of offending also occurred in circumstances where the applicant was subject to bail orders for the earlier offences.

The first occasion of offending was on 22 May 2017. Police intercepted a motor vehicle containing the applicant. A search of her handbag revealed three clipseal bags containing a substance weighing 5.07 grams, of which 2.605 grams was pure methylamphetamine. That was count 1 on the indictment. Police also found cash and, in a sunglasses case, two further clipseal bags containing nine grams of seed and 18 grams of cannabis plant material, count 2. Various drug paraphernalia located was the subject of summary charges.

The applicant was issued with an identifying particulars notice. She failed to comply with that notice, resulting in the summary charge of contravening a direction or requirement. The applicant was subsequently released on bail.

The second occasion of offending was on 19 July 2017, whilst the applicant was subject to that bail order. A search of the applicant's unit revealed a quantity of cannabis, the schedule 2 drugs alprazolam and clonazepam, count 3, together with a taser device, count 4, and a debit card and a set of digital scales, being two of the summary charges. The applicant admitted the drugs and weapons had been located in her bedroom. She claims she took the drug alprazolam for anxiety but was unable to provide a script. The applicant was again released on bail.

The third occasion of offending was on 1 October 2017, whilst the applicant was subject to both those bail orders. Police intercepted a motor vehicle driven by the applicant. The applicant, who appeared to be drug-affected, admitted the consumption of methylamphetamine. The applicant returned a positive reading, confirming the presence of methylamphetamine in her saliva – the driving offence. A search of the motor vehicle revealed a substance weighing 17.391 grams, which contained 11.609 grams of pure methylamphetamine, count 5. Also found in the motor vehicle was one gram of cannabis mixed with tobacco, count 6, a notebook containing names, numbers, electronic scales, metallic weights, being count 7, and a canister containing a form of antipersonnel substance similar to capsicum spray, count 8. Various other items were located, which were the subject of the remaining summary charges.

The sentencing judge specifically took into account the applicant's timely pleas of guilty, admissions to police, which were accepted to amount to cooperation, and steps towards rehabilitation, which were recognised to show some hope for the future. The sentencing judge took into account the applicant had become addicted to drugs and was a victim of domestic violence. The sentencing judge also took into account the applicant's significant past criminal history. The applicant, who was 47 years of age at the time of the offending,

had a past criminal history in New South Wales and Queensland. The New South Wales history contained multiple offences, including for dishonesty, violence and drugs. The applicant's Queensland history also contained numerous offences, particularly for drugs.

The sentencing judge referred to the serious aspects of the applicant's offending, namely, her possession of schedule 1 drugs, on two separate occasions, in excess of two grams, for a commercial purpose. A particular aggravating feature was the fact that she had committed the offences while subject to probation orders imposed on 25 January 2017 and 3 March 2017 and whilst on bail. The sentencing judge noted the applicant had been given the benefit of orders to try and break her cycle of drug offending and that her offending had shown an escalation, not a de-escalation, notwithstanding those opportunities.

The sentencing judge observed the sentence imposed must deter the applicant and others, noting that personal deterrence was a significant issue in the applicant's case. The sentencing judge also observed the applicant's counsel had rightly conceded that the applicant must serve a further period in actual custody, given her history of offending and the aggravating features.

After referring to the Crown's submissions that *R v Phillips* [2017] QCA 41 was a relevant comparable authority, the sentencing judge noted that the Crown submitted that the circumstances of that case were more serious. The sentencing judge observed the comparable authorities relied upon by the applicant's counsel of *R v Nguyen* [2016] QCA 57 and *R v Hesketh; Ex parte Attorney-General* [2004] QCA 313 did not have particular relevance to the applicant's offending, given her history and aggravating features and a lack of the ameliorating features involved in those cases.

Having regard to those distinguishing features, the sentencing judge found that the applicant's offending warranted a sentence in excess of three years, given the continuing nature of her offending, the commercial possessions and notwithstanding the mitigating factors in her favour, such as cooperation and some hope for rehabilitation in the future.

The applicant submits the sentence of imprisonment imposed, both by way of head sentence and time required to be served in actual custody, was manifestly excessive, having regard to

the mitigating factors in her favour and sentences imposed in what the applicant contends were comparable authorities. Further, the sentencing judge failed to have regard to her past circumstances, although the applicant did not "want to use her past as an excuse for her offending". Her pleas of guilty ought to have attracted an immediate Court ordered parole order, the applicant submitted.

The applicant contended that her counsel did not explain sufficiently the meaning of a bulk arraignment, that she had instructed counsel that the drugs the subject of count 3 had been prescribed by a physician and that the notebook relied upon as an indicia of commerciality referred to her drug debts and that she was not aware a further term of imprisonment was pending, as she had been told by her solicitors she would no longer serve time in custody.

Dealing with the applicant's contentions first, a contention that she did not understand the meaning of a bulk arraignment has no relevance to an appeal against sentence on the ground of manifest excess. The applicant's contention that she was not aware she was facing a further period of actual custody cannot be accepted. In the course of sentencing submissions, her counsel correctly conceded that the only appropriate sentence would be one which required her to serve further time in custody. Her contention that her pleas of guilty were entered in circumstances where she had given counsel instructions to contest commerciality also cannot be accepted. In the sentencing hearing, her counsel expressly conceded her possession of the drugs was for a commercial purpose. Each of these concessions occurred in her presence without any dissent on her part.

There is also no substance in the applicant's contention that the sentence of imprisonment imposed or the actual period required to be served in custody was manifestly excessive. The applicant had committed serious drug offence while subject to two probation orders imposed for drug offences. Those offences included being found in possession of over 11 grams pure methylamphetamine for a commercial purpose whilst on bail for the earlier count of possession of a dangerous drug in excess of two grams. The aggravating features of possessing, on two occasions, a substantial quantity of methylamphetamine for a commercial

purpose and of persistently reoffending while subject to orders for probation and whilst on bail amply supported a head sentence of four years imprisonment, even having regard to the applicant's mitigating factors.

The Court of Appeal authorities relied upon by the applicant are dated and distinguishable. *R v Christie* [2000] QCA 165, *R v Kennedy* [2000] QCA 140 and *R v Woods* [2004] QCA 204 concerned younger offenders, each of whom was specifically sentenced on the basis the possession was not for a commercial purpose. Sentences imposed for the possession of methylamphetamine in excess of the prescribed quantity for an offender's own person use provide no assistance in the determination of the appropriate sentence for a mature-age offender found in possession of a substantial quantity of methylamphetamine with a commercial purpose. First instance decisions are also of no assistance in determining whether the current sentence was manifestly excessive.

Whilst *R v Hesketh; Ex parte Attorney-General* [2004] QCA 116 concerned a mature offender found in possession of 57.347 grams pure methylamphetamine, that offender was the sole carer of a five year old child as well as caring for her elderly mother, who was in poor health. The sentence of imprisonment of two and a half years, suspended for an operational period of five years, was imposed after a successful Attorney-General's appeal. In the course of allowing that appeal, the Court expressly acknowledged the broad range of imprisonment for aggravated possession of dangerous drugs being "about two and a half years to about four years imprisonment", at [17].

The overall head sentence of four years imprisonment imposed on the applicant was in accord with that yardstick. As the sentencing judge rightly observed, the circumstance of *R v Phillips* were more serious. *R v Nguyen* also involved far more serious conduct and is plainly distinguishable.

Similarly, a sentence which required the applicant to serve approximately one-third of that overall head sentence in actual custody fell within an appropriate exercise of the sentencing discretion. There was no basis upon which the sentencing judge could properly conclude that

the 170 days served in custody to the date of sentence adequately reflected the period of actual custody to be served by the applicant.

The applicant has not demonstrated any error of principle on the part of the sentencing judge or any error in the exercise of the sentencing discretion. The sentences imposed were not manifestly excessive. I would order that the application for leave to appeal against sentence be refused.

**SOFRONOFF P:** I agree.

**GOTTERSON JA:** I also agree.

**SOFRONOFF P:** The application is dismissed.