SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fahey* [2019] QCA 142
PARTIES:	**R** **v** **FAHEY, Justin David** (applicant)
FILE NO/S:	CA No 116 of 2019 SC No 114 of 2019 SC No 624 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 1 May 2019 (Bowskill J)
DELIVERED ON:	26 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2019
JUDGES:	Fraser JA and Applegarth and Bradley JJ
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to four years imprisonment, suspended after six months, for possession of approximately 22 grams of MDMA and approximately 12 grams of cocaine – where the applicant was also sentenced to lesser terms of imprisonment, to be served concurrently, for supply of MDMA, for possessing MDA and MDMA, and for various summary offences – whether the sentence was manifestly excessive *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, cited *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, cited *R v Dwyer* [2008] QCA 117, applied *R v Hesketh; Ex parte Attorney-General (Qld)* [2004] QCA 116, distinguished *R v Michalas* [2007] QCA 38, cited *R v Nguyen* [2015] QCA 205, cited *R v Pham* (2015) 256 CLR 550; [2015] HCA 39, cited *R v Summerlin* [2009] QCA 297, distinguished
COUNSEL:	B J Power for the applicant D I Balic for the respondent

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

[1] **FRASER JA:** The applicant pleaded guilty to various drug offences committed between June and October 2017. In the most serious offences the applicant supplied a dangerous drug by sending from Brisbane to Darwin a parcel which contained nearly 15 grams of pure MDMA in an overall quantity of nearly 27 grams of substance (count 4), he possessed dangerous drugs in excess of 2 grams in three bags containing a total pure weight of 22.77 grams of MDMA (count 5) and four clip-seal bags containing a total pure weight of 12.868 grams of cocaine (count 6), the drug in each case being possessed for a commercial purpose. In addition, the applicant supplied two tablets of MDMA (count 3), he possessed a tablet containing MDA and a tablet containing MDMA (count 8), and he committed various summary offences.

[2] On 1 May 2019 the applicant was convicted and sentenced to four years imprisonment, suspended after serving six months in actual custody, on counts 5 and 6, three years imprisonment with a parole release date after six months on count 4, lesser concurrent terms on counts 3 and 8 and upon some summary charges, and he was not further punished upon other summary charges.

[3] The applicant seeks leave to appeal against his sentence on the ground that it was manifestly excessive in all circumstances.

[4] The applicant was 23 when he offended and 25 when sentenced. He had no criminal history. After leaving school the applicant served in the Army between May 2012 and May 2018. A report by a psychiatrist referred to the applicant's description of developing anxiety, depression and alcohol use disorder in the context of the applicant having been bullied and bastardised in the Army; the applicant suffered from adjustment disorder with anxiety and depression, panic disorder, generalised anxiety disorder, and alcohol use disorder. He was treated by a general practitioner for low mood and anxiety and muscular skeletal conditions mostly acquired during his Army service. The sentencing judge accepted that difficulties the applicant experienced in the Army fed in to the applicant becoming involved in and ultimately addicted to the use of drugs and that the applicant to some extent self-medicated by using drugs.

[5] The sentencing judge also accepted that after the police intervention in October 2017 the applicant had taken some very significant steps to rehabilitate himself. There was objective evidence (regular urine tests) that he had stayed away from drugs, he had enrolled in a degree at university, and he had started counselling with a psychologist. Many people provided very favourable character references for the applicant. The sentencing judge took into account the applicant's plea of guilty as showing he had taken responsibility for his actions, assisted in the course of justice, and was remorseful. The sentencing judge also took into account that although count 4 was committed on 6 September 2017 the applicant was not charged with that offence until 29 July 2018.

[6] The sentencing judge observed that the appropriate sentence for the applicant was difficult because he was a young man of only 25, but not so young that the special

approach sometimes taken by the court is warranted, and because of the favourable evidence of the applicant's character and the steps he had taken to rehabilitate himself. The sentencing judge referred to the seriousness of the offences, reflected in the maximum penalties for supplying a dangerous drug of 20 years imprisonment and for the serious possession offences of 25 years imprisonment or 20 years imprisonment in the case of a drug dependant person. (The sentencing judge did not find that the applicant was drug dependent.)

[7] The sentencing judge characterised the combination of the offences in counts 4, 5 and 6 as serious offending and in fixing upon the effective head sentence of four years imprisonment took into account the combination of drugs, the quantity of drugs, and the serious nature of the supply. The sentencing judge concluded that the just and appropriate sentence in all the circumstances required the applicant to serve a short period of time in custody. A sentence that did not include a component of actual custody in the circumstances would not be appropriate given the very serious nature of the offences. The four year term on counts 5 and 6 suspended after six months and the three year term with release on parole after six months on count 4 reflected the applicant's need both for supervision of the parole authorities and for a suspended sentence hanging over his head.

[8] In support of the contention that the sentence of four years imprisonment requiring six months of actual custody is manifestly excessive, the applicant emphasises the matters in mitigation and submits that a sentence not exceeding three years with three months actual imprisonment is "consonant with the comparable cases" and "sufficient to achieve all the necessary goals of sentencing in the applicant's case". As the applicant acknowledged in oral submissions, that argument does not support the contention that the sentence is manifestly excessive; inconsistently with the High Court's analyses in *Hili v The Queen* (2010) 242 CLR 520, *Barbaro v The Queen* (2014) 253 CLR 58 and *R v Pham* (2015) 256 CLR 550, the argument treats past sentences as defining the limits of the sentencing discretion. As French CJ, Keane and Nettle JJ observed in *Pham* (at [27]), the range of sentences disclosed by an analysis of comparable cases is not necessarily the correct range or determinative of the limits of the sentencing discretion.

[9] Nor do the cases cited by the applicant as comparable sentencing decisions indicate that the applicant's sentence is manifestly excessive. The applicant relied upon four cases: *R v Hesketh; Ex parte Attorney-General (Qld)* [2004] QCA 116, *R v Nguyen* [2015] QCA 205, *R v Michalas* [2007] QCA 38, and *R v Summerlin* [2009] QCA 297. The applicant acknowledged that there were distinguishing factors in each case but submitted that, having regard to the mitigating factors in the applicant's case, a sentence with immediate release on parole was within the range of sentences which could have been imposed, the custodial period of six months was too severe, and a shorter period not exceeding three months should have been imposed.

[10] A proposition that three months actual imprisonment was within but six months imprisonment was outside the sentencing discretion must be a very difficult one to sustain both in the context of a head sentence of four years imprisonment and in the context of the applicant's submission that a three year head sentence is consonant with the comparable cases. The applicant's acknowledgment of the distinguishing circumstances in the cited cases and his attempt nonetheless to compare those circumstances with the applicant's different mitigating circumstances involves the approach, deprecated by Keane JA in *R v Dwyer* [2008] QCA 117 at [37], of

seeking to "grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence".

[11] In two of the cited cases, *Nguyen* and *Michalas*, the decisions were merely to refuse an application for leave to appeal on the ground that that the sentence was not manifestly excessive. Those decisions could not justify a proposition that a different sentence in a different case is manifestly excessive. *Summerlin* supplies no real guidance for the applicant's sentence because the offences in that case mainly concerned a schedule two drug rather than a schedule one drug and that offender was only 20 years of age. *Hesketh* does not support the applicant's contention that the sentence is manifestly excessive because of that offender's very different personal circumstances (in addition to her attempts at rehabilitation she cared for both a five year old child and an ailing mother) and she did not commit the range of offences committed by the applicant. In any event, the sentence imposed on appeal of two and a half years imprisonment suspended after nine months for an operational period of five years must be understood in the context of the remark by Williams JA indicating that in a different case the head sentence might have been about four years imprisonment.

[12] As the sentencing judge observed, this was a difficult sentence but in my opinion it was clearly open to her Honour to conclude that the variety and seriousness of the applicant's offending required a substantial term of imprisonment and a significant period of actual custody. The applicant's mental health challenges were appropriately taken into account but they could not reasonably be regarded as significantly reducing the applicant's culpability for the serious offences in counts 4, 5 and 6. In the circumstances of this case, and bearing in mind the maximum penalties, a four year head sentence is not excessive for that offending and the mitigating factors were not inadequately reflected in the provision for release from custody after six months. I conclude that the sentence was not outside the sentencing discretion.

[13] The application should be refused.

[14] **APPLEGARTH J:** I agree with the reasons of Fraser JA and the proposed order.

[15] **BRADLEY J:** I agree with the reasons for judgment of Fraser JA and the order proposed by his Honour.