SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lambert* [2019] QCA 219
PARTIES:	**R** **v** **LAMBERT, David Paul** (applicant)
FILE NO/S:	CA No 25 of 2019 SC No 1052 of 2018 SC No 1520 of 2018 SC No 1979 of 2018 SC No 1 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 9 January 2019 (Martin J)
DELIVERED ON:	18 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to three counts of unlawful possession of dangerous drugs contained in the first indictment – where the applicant pleaded guilty to a further four counts of unlawful possession of dangerous drugs, including a quantity of methylamphetamine in excess of 200 grams, and a substance, contained in the second indictment – where the second set of offences was committed within six months of the first offences and while the applicant was on bail – where the applicant possessed much greater quantities of dangerous drugs in the second set of offences than on the first occasion – where the learned sentencing judge accepted that the applicant possessed the dangerous drugs for commercial purposes – where the applicant was addicted to methylamphetamine – where the applicant's criminal history was limited to a number of traffic offences – where the applicant was sentenced to an effective head sentence of eight years and two months imprisonment – whether the sentence was manifestly excessive *R v Duong* (2015) 255 A Crim R 57; [2015] QCA 170,

considered
R v Richards [2017] QCA 299, distinguished
R v Shandiman (unreported, Henry J, Indictment No 61 of 2017, 19 July 2017), distinguished
R v Sorrento (unreported, Douglas J, 7 May 2009), distinguished
R v Ta [2018] QCA 342, considered
R v Tran [2014] QCA 90, considered

COUNSEL: The applicant appeared on his own behalf
D Balic for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Gotterson JA.

[2] **GOTTERSON JA:** On 9 January 2019, the applicant, David Paul Lambert, pleaded guilty in the Supreme Court at Brisbane to a number of indictable offences against s 9(1) and s 9A(1) *Drugs Misuse Act* 1986 (Qld) as well as other summary offences. On one indictment, it was alleged that on 4 September 2017 the applicant unlawfully possessed the following dangerous drugs:[1]

Count 1 — cannabis, 3,4-methylenedioxyamphetamine and 3,4-methylenedioxymethamphetamine;

Count 2 — a quantity of cocaine that exceeded 2.0 grams; and

Count 3 — a quantity of methylamphetamine that exceeded 2.0 grams

[3] The summary offences alleged against the applicant included that on this day he unlawfully possessed a pipe that he had used in connection with the smoking of a dangerous drug, a category M weapon, being a double edged throwing knife, and the dangerous drugs cannabis and cocaine; and that he possessed money reasonably suspected of being the proceeds of an offence under the *Drugs Misuse Act*, two spray cans reasonably suspected of having been used in connection with the commission of an offence under the *Drugs Misuse Act*, and digital scales, grinders and clip seal bags reasonably suspected of having been acquired for the purpose of committing an offence under the *Drugs Misuse Act*.[2]

[4] On the other indictment, it was alleged that on 6 March 2018, the applicant unlawfully possessed further dangerous drugs, namely:[3]

Count 1 — a quantity of methylamphetamine that exceeded 200 grams;

Count 2 — a quantity of cocaine that exceeded 2.0 grams;

---

1 AB 9-10.
2 AB 21-28.
3 AB 15-16.

Count 3	3,4-methylenedioxymethamphetamine, cannabis and diazepam; and
Count 4	the substance 4-hydroxybutanoic acid lactone

[5] The summary offences alleged against the applicant for this day included that he unlawfully possessed a pipe that he had used in connection with the smoking of a dangerous drug and a weapon, being a baton; and that he had in his possession a mobile phone reasonably suspected of having been acquired for the purpose of committing an offence under the *Drugs Misuse Act*, and money reasonably suspected of being the proceeds of an offence under the *Drugs Misuse Act*.[4]

[6] It is convenient to refer to the offences committed on 4 September 2017 as "the first set of offences" and to those committed on 6 March 2018 as "the second set of offences".

[7] The applicant was also sentenced on 9 January 2019. The effective head sentence was a term of imprisonment of eight years and two months. His parole eligibility date was fixed at 9 January 2021.

[8] On 19 February 2019, the applicant filed an application for leave to appeal to this Court against his sentence and an application for an extension of time.[5] On the following day, the time for filing his application for leave to appeal against sentence was extended to 20 February 2019 by order of the Court.[6]

Circumstances of the offending

[9] A Statement of Facts was tendered at the sentence hearing.[7] It disclosed the following facts for the two sets of offences.

[10] The first set occurred after midnight on 4 September 2017. The applicant was found by police in his car in the Pimpama area. After asking the applicant for his licence, the police observed that he was trying to hide something, and thereafter conducted a search of his car.

[11] As a result of the search, the police found $2,200 in cash, a double-edged knife, a glass smoking pipe, some mobile phones (which the applicant refused to unlock), as well as quantities of five different drugs. In particular, they found 23.43 grams of cannabis, a quantity of MDA and MDMA just over one gram, a total amount of 5.431 grams of pure cocaine packaged across clip seal bags, and a total amount of 6.442 grams of pure methylamphetamine packaged across 11 clip seal bags.

[12] The applicant admitted to possessing some of the cocaine and cannabis that had been found in an esky, but otherwise denied knowledge or ownership of the other illegal items found in the car. The police searched the applicant's house later that day and found another quantity of cannabis and the equipment resulting in the summary charges.

[13] The applicant was charged for the first set of offences and was granted bail.

---

4 AB 31-35.
5 AB 1-3; AB 4-6.
6 AB 7-8.
7 AB 59-64.

[14] Some six months later on 6 March 2018, the second set of offences occurred while the applicant was on bail. He was pulled over by police after he had been observed speeding on the Bruce Highway between Miriam Vale and Colosseum. He consented to a police search of his backpack. In it, police found a small container wrapped in a paper towel and rubber bands containing an odourless blue liquid, which the applicant said was mouth wash. Police also found $1,890 in cash in two bundles, cigarette papers and a mobile phone.

[15] The police formally detained the applicant and then carried out a search of his car. During this search, they found an extendable baton, empty clip seal bags and syringes, scales, a glass pipe and more of the odourless blue liquid. The liquid was, in fact, the substance gamma-butyrolactone. In all, just over 2 kilograms of it was found. The police also found clip seal bags containing drugs, including a total amount of 269.105 grams of pure methylamphetamine of high-grade purity, 47.783 grams of pure cocaine, 1.929 grams of MDMA and quantities of cannabis and diazepam. It was estimated that the average value of drugs in the applicant's possession on this occasion was $85,850.

[16] After the search, the applicant was charged and remanded in custody.

The applicant's personal circumstances

[17] At the time he committed the first set of offences, the applicant was 37 years old and had a history of offending that was limited to a number of traffic offences.

[18] The applicant's motivation for his offending was not explored during the sentence hearing. A letter tendered as an exhibit at the hearing,[8] written by the applicant's wife, explained that the applicant had been a hardworking man with a strong work ethic and had worked as a plasterer.

[19] As a consequence of "wear and tear" on his body because of his employment and other sporting injuries, the applicant underwent multiple knee reconstruction surgeries to repair damage to his knees. These surgeries and the recovery from them placed financial stress on the applicant and his family.

[20] It was within that context that the applicant apparently turned to the drug methylamphetamine as a means of pain management and as a "way to cope with the consequent pressures of family life". A crippling addiction soon followed.

The sentencing remarks

[21] In his remarks, the learned sentencing judge outlined the circumstances of the offending. His Honour described the first set of offences as "serious" and the second set as "even more serious" because it had been committed in such close proximity to when the applicant had been charged for the first set. He also noted it had not been contested that both sets of offences had an element of commerciality to them and accepted the drugs were held by the applicant for a commercial purpose.[9]

[22] The learned sentencing judge took into account the fact that the applicant had entered a timely plea. Reference was also made to the fact that the applicant had,

---

8 AB 70-71.

9 AB 55 ll3-32; AB 56 ll4-8.

prior to his offending, led an "ordinary, commendable life" with a history of employment.[10]

[23] Notwithstanding that there were these mitigatory factors in the applicant's favour, the learned sentencing judge considered that the fact that the applicant had continued to offend after he had been charged, by possessing substantial, large amounts of drugs was a matter that had to be reflected in the sentence he imposed.

[24] His Honour noted that he had been presented with a number of sentencing decisions. He observed that one of them, *R v Ta*,[11] suggested that sentences imposed for similar offending fell within the range of eight to 11 years.[12]

[25] In the course of passing sentence upon the applicant, the learned sentencing judge also made reference to the fact that after the second set of offending the applicant had served 309 days of non-declarable time in custody. His Honour took that into account in the following way:[13]

> "Had you not served 309 days in custody already, a period which I will take to be 10 months, I would have sentenced you to a period of nine years imprisonment on that first count and the second set of offences. What I am going to do, though, is to reduce that to eight years and two months, to take into account the time you have spent in custody.
>
> Now, with respect to parole, I can and I am going to fix a parole eligibility date which, had you not spent the time in custody would have been a period of about 33 months. But I take the 10 months off that, and arrive at about 23 months."

Submissions in the application

[26] The applicant's proposed ground of appeal is that his sentence is manifestly excessive.

[27] The applicant is self-represented. In written submissions, he submitted that a sentence of six years imprisonment should have been imposed. To support that submission, he provided the Court with a schedule of sentencing decisions. He contended that these decisions involved offenders who possessed, or trafficked in, similar amounts of schedule 1 drugs, and who were of similar age to him and had no criminal history. He maintained that in these decisions the offender received a "substantially shorter sentence than the applicant".[14]

[28] In his oral submissions, the applicant drew the Court's attention, in particular, to the sentence imposed by Henry J in *Shandiman*.[15] He noted that in that decision, the offender was a similar aged man to him with a "significant history of producing" and had been caught in possession of one kilogram of methylamphetamine.[16] The sentence imposed on that occasion was a term of six years imprisonment with a parole eligibility date fixed after two years.

---

10 AB 55 l38 – AB 56 l4.
11 [2018] QCA 342.
12 AB 56 ll12-15.
13 AB 56 ll20-28.
14 Applicant's Outline of Submissions pages 2-7.
15 *R v Shandiman* (19 July 2017, Henry J, Supreme Court at Mackay).
16 Appeal Transcript 1-6 ll14-23.

[29] In considering the applicant's submissions, it must be borne in mind that comparable decisions are not determinative of the sentence that ought to have been imposed in a given case, and instead provide a yardstick against which the sentence imposed can be examined.[17] Appellate intervention on the ground of manifest excessiveness is not warranted merely because the sentence imposed is markedly different from sentences imposed in other cases. Rather, it must be apparent that, having regard to all of the sentencing factors including sentences imposed for comparable offending, there has been some misapplication of principle in sentencing the offender.[18]

[30] With respect to the decisions referred to by the applicant, some significant points of distinction must be mentioned. In the first place, 11 of them involved offenders charged with trafficking offences[19] and one decision involved an offender charged with producing methylamphetamine.[20] I also note the offender in *Shandiman* had also been convicted on, and sentenced for, one count of trafficking in that proceeding. These decisions involved different offences and are therefore not truly comparable for present purposes.

[31] Secondly, of the decisions in the applicant's schedule that involved offenders charged solely with unlawful possession of dangerous drugs, only two involved offenders who possessed a quantity of methylamphetamine comparable to the quantity possessed by the applicant.

[32] In *Sorrento*,[21] Douglas J imposed a sentence of seven years imprisonment upon an offender who pleaded guilty to one count of possessing 335.479 grams of pure methylamphetamine. The offender was offered $5,000 to courier the methylamphetamine from Sydney to Brisbane to assist in the repayment of debts he had incurred. The offender had a criminal history, but had not previously been sentenced to a term of imprisonment before that occasion and had never been caught in possession of a comparable amount of drugs.

[33] The other decision, *R v Richards*,[22] involved a re-sentencing by this Court on a count of unlawful possession of a dangerous drug in excess of two grams, after a successful appeal against a trafficking conviction. The offender there had been found in possession of 176.6 grams of pure methylamphetamine within 1812 grams of substance in his vehicle. A sentence of imprisonment for four years was imposed. It was suspended after 20 months, to reflect reasons of parity and factors to do with the offender's overall character.

[34] The applicant's observation that the offenders in *Sorrento* and *Richards* received a lesser sentence than he did is correct. However, that their sentences were shorter does not compel a conclusion that his sentence is manifestly excessive. That is because those decisions do not have the unusual and aggravating feature of the

---

17 *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58 at [41].

18 *R v Pham* [2015] HCA 39; (2015) 256 CLR 550 at [28].

19 The applicant cited *R v Hennig* [2010] QCA 244; *R v Coleman* [2006] QCA 442; *R v Taiapa* [2008] QCA 204; *R v Cooney* [2008] QCA 414; *R v Christensen* [2002] QCA 13; *R v Le; ex parte A-G* [2000] QCA 392; *R v Taylor* [2006] QCA 459; *R v Barton* [2006] QCA 367; *R v Frith* [2017] QCA 143; *R v R Moran* (21 October 2016, Holmes CJ, Supreme Court at Townsville); *R v V Moran* (6 April 2005, Byrne J, Supreme Court at Brisbane).

20 *R v Campbell* [2002] QCA 109.

21 *R v Sorrento* (7 May 2009, Douglas J, Supreme Court at Brisbane).

22 [2017] QCA 299.

applicant's case, namely, that he committed two episodes of possession of dangerous drugs for commercial purposes within quite close proximity to one another. Worse still, on the second occasion, the applicant offended while he was on bail and possessed much greater quantities of dangerous drugs than on the first occasion, notably 269.105 grams of pure methylamphetamine and 47.783 grams of cocaine.

[35] I therefore do not consider that any of the decisions in the applicant's schedule support the proposition that his sentence is manifestly excessive.

[36] By contrast, the circumstances in the sentencing decisions cited by the respondent which are discussed in the following paragraphs, are broadly comparable. The sentence imposed in this case is compatible with the sentences imposed in those decisions, in my view.

[37] In *R v Tran*,[23] the offender who was in his early thirties pleaded guilty to, and was convicted of, unlawful possession of dangerous drugs on two occasions. The second offence was committed while that offender was on bail for the first. On the first occasion, that offender possessed 83.055 grams of pure heroin within 559.767 grams of powder, 123.718 grams of pure methylamphetamine within 280.872 grams of substance, and a vial of testosterone. On the second occasion, he possessed 131.755 grams of pure methylamphetamine, 0.054 grams of heroin, 6.742 grams of morphine, 9.266 grams of cocaine, 5 grams of cannabis and an unspecified amount of codeine. The offender was given an effective head sentence of 11 years and three months imprisonment.

[38] The respondent noted that the offender in *Tran*, unlike the applicant here, did not possess a quantity of dangerous drugs which exceeded 200 grams. Had he done so, the maximum penalty applicable would have increased from 20 to 25 years.[24] The higher sentence imposed on the offender in *Tran* is capable of being explained by that offender's much worse criminal history.

[39] The 27 year old offender in *R v Ta* pleaded guilty to possession of cocaine and methylamphetamine in amounts in excess of 200 grams and cannabis in an amount in excess of 500 grams. A search of his unit revealed about 28 kilograms of cannabis with a street value up to $457,000 and plastic bags containing the other drugs in a powdered form which together had a street value in excess of $260,000. This offending occurred when the offender was on probation for previous drug offending. He did not participate in a recorded interview with police and would not disclose the identity of the person for whom he was storing the drugs. The sentence was 11 years imprisonment with parole eligibility after four years. Leave to appeal it as manifestly excessive was refused.

[40] In *R v Duong*,[25] the 29 year old offender was tried and convicted. His conviction appeal failed and his sentence of nine years imprisonment with no recommendation for early release on parole was undisturbed on appeal. He had offended by unlawfully possessing 204.391 grams of pure methylamphetamine within 393.891 grams of substance which he intended to dispose of commercially. It was a case of

---

23 *R v Tran* [2014] QCA 90.

24 By operation of the *Drugs Misuse Regulation* 1987 (Qld) schedule 4 and *Drugs Misuse Act* 1986 (Qld) s 9(1)(a).

25 *R v Duong* [2015] QCA 170.

single instance offending. However, the offender in *Duong* had been convicted some years earlier of offences involving armed robbery and violence for which he had been sentenced to six years imprisonment.

[41] In summary, I am satisfied that the starting point of nine years imprisonment adopted by the learned sentencing judge was consistent with sentences for comparable offending. It balanced the seriousness of the applicant's repeat offending with his plea, his background of drug addiction and his limited history of offending.

[42] During the hearing of the application, the applicant was asked whether he also challenged his sentence on the basis of the parole eligibility date that was imposed.[26] I understood him to submit that the sentence was also manifestly excessive because the learned sentencing judge did not set a parole eligibility date at two years from the date of commencement, upon arrest, of his pre-sentence custody.

[43] As the sentencing remarks that I have extracted indicate, the learned sentencing judge did allow for the applicant's non-declarable time spent in custody when fixing both the sentence and the parole eligibility date. The allowance was generous in that it equalled the time actually spent in pre-sentence custody.

[44] The applicant appears to be submitting that it was an error for the parole eligibility date not to have been further accelerated. Were it to have been set as the applicant suggested, he would be eligible for parole considerably earlier than at the one third mark of his head sentence of eight years and two months; that is to say, considerably earlier than the point at which parole eligibility is typically fixed on a plea of guilty and in the absence of specific circumstances which warrant leniency.

[45] Accordingly, the sentence is not manifestly excessive by reason of the period fixed for parole eligibility.

[46] For these reasons, I conclude that the applicant's sentence is not in any respect manifestly excessive.

[47] By way of post-script, I note that the applicant ventured in his written submissions another basis upon which he claimed the sentencing discretion had miscarried. Although he did not seek leave to add another ground of appeal to his application, he submitted that the learned sentence judge failed to take into account the applicant's rehabilitation as a relevant factor.

[48] While the steps towards rehabilitation cited by the applicant are commendable, they all occurred after he was sentenced. They were therefore not available to be taken into account by the learned sentencing judge.

Disposition

[49] As the applicant's sole ground of appeal cannot succeed, leave to appeal against sentence must be refused.

Order

[50] I would propose the following order:

---

[26] Appeal Transcript 1-3 ll3-46.

1. Application for leave to appeal against sentence refused.

[51] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.