

SUPREME COURT OF QUEENSLAND

CITATION: *R v Feao* [2019] QCA 223

PARTIES: **R**
v
FEAO, Etuae
(applicant)

FILE NO/S: CA No 26 of 2019
SC No 1081 of 2015
SC No 716 of 2016

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 1 July 2016
(Boddice J)

DELIVERED EX TEMPORE ON: 21 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 21 October 2019

JUDGES: Fraser and McMurdo JJA and Mullins AJA

ORDER: **The application is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty to trafficking in schedule 1 dangerous drugs, possessing dangerous drugs, possessing dangerous drugs with a circumstance of aggravation, possessing anything used in the commission of a crime defined in Part 2 and eight summary charges – where the applicant was sentenced to a head sentence for the trafficking of six years’ imprisonment with a parole eligibility date set at 80 per cent of the six year sentence and concurrent sentences on the other counts on the indictment – where the application is made almost two years and seven months after the time to apply for leave to appeal against sentence expired – whether the sentence was manifestly excessive – whether the learned sentencing judge erred in law in failing to consider cumulative sentences which could result in an earlier parole eligibility date – whether it is in the interests of justice to grant the extension

Drugs Misuse Act 1986 (Qld), s 5(2)

R v Clark [\[2016\] QCA 173](#), cited

R v Derks [2011] QCA 295, distinguished
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, followed

COUNSEL: D J Walsh for the applicant
D Balic for the respondent

SOLICITORS: A W Bale & Son for the applicant
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **MULLINS AJA:** Mr Feao applies to extend the time to apply for leave to appeal against the sentences imposed on him on 1 July 2016 on the grounds the sentences were manifestly excessive. He had pleaded guilty to trafficking in schedule 1 dangerous drugs (count 1), possessing dangerous drugs (count 2), possessing dangerous drugs with a circumstance of aggravation (count 3), possessing anything used in the commission of a crime defined in Part 2 (count 4), and eight summary charges. He was sentenced to six years' imprisonment for the trafficking and sentences of two years' imprisonment for count 2, three years' imprisonment for count 3 and one year's imprisonment for count 4. All sentences are concurrent.
- [2] In respect of six of the summary offences, he was convicted and not further punished. In respect of two charges of drive without a licence, disqualified by court order, he was convicted and disqualified from holding or obtaining a driver's licence for three years. At the time of sentencing, section 5(2) of the *Drugs Misuse Act 1986* (the Act) required an offender to serve a minimum of 80 per cent of the term of imprisonment for the offence of trafficking before being eligible for parole, where a term of imprisonment that was neither suspended nor ordered to be served by way of intensive correction order was imposed for the offence. That has the result that Mr Feao must serve a minimum period of almost four years and 10 months in custody.
- [3] Counsel who appears for Mr Feao had been contacted by a friend of Mr Feao about conducting an appeal, and the application for extension was filed on 19 February 2019 after funds were deposited into the trust account of the solicitors who act for Mr Feao. The application is made almost two years and seven months after the time to apply for

leave to appeal against the sentence expired. The following summary is taken from the sentencing remarks.

- [4] There were two aspects of Mr Feao's involvement in the trafficking. The first was as a willing participant and an active associate in the business conducted by one Cosca, that involved trafficking large commercial quantities of dangerous drugs, particularly methylamphetamine. Mr Feao was involved in delivering drugs and collecting and delivering money, and was involved in significant supplies to the customer Walker of drugs worth significant amounts of money on a persistent and consistent basis.
- [5] The second aspect of the trafficking was in relation to two other people who were also involved in the commercial sale of drugs, and Mr Feao was heavily involved in those activities. There were large sums of money and large amounts of drugs with very high levels of purity found. The sentencing proceeded on the basis that Mr Feao was involved in the consistent and persistent trafficking in drugs for a period of a little over three months. Count 2 related to the possession of 0.113 grams of methylamphetamine that was detected within substance that had a purity of 76.5 per cent. Count 3 related to the possession of 114 grams of methylamphetamine, which was the pure amount, and there was a very high level of purity. Count 4 related to the possession of a mobile phone.
- [6] Mr Feao was born in 1989 and had a limited past criminal history. There were breaches of bail in relation to the bail given for the subject offences. Mr Feao had served some 66 days in pre-sentence custody, which was declared as time served in relation to the sentences. The learned sentencing judge accepted that Mr Feao had good prospects of rehabilitation and had taken steps to separate himself from his previous contacts and the drug industry. The sentencing judge accepted that Mr Feao was a user of drugs when he offended, but was not heavily addicted to drugs at that time.
- [7] The sentencing judge described the pleas of guilty as neither early nor timely, as they occurred when the matter was listed for trial to start the next week. He noted the pleas

resulted in a saving of time and money to the community, and was also satisfied there was evidence of genuine contrition for his circumstances. But for section 5(2) of the Act, the sentencing judge would probably have sentenced Mr Feao in the range of eight to nine years' imprisonment, but would have given an eligibility for parole date at less than 50 per cent of the sentence. On the basis that Mr Feao would be subject to the 80 per cent rule, the sentencing judge concluded the appropriate head sentence for the trafficking was one of six years' imprisonment.

- [8] It is submitted on behalf of Mr Feao that it is in the interests of justice for the court to grant the extension, as a global sentence was, in effect, imposed on the trafficking count to punish all Mr Feao's offending, when section 5(2) of the Act did not apply to the possession counts, and the non-parole period did not adequately account for Mr Feao's youth and prospects of rehabilitation. It is submitted that the manner in which the sentencing judge structured the sentence meant the 80 per cent rule was applied to the global sentence and not just the portion that applied to the trafficking, and this resulted in a sentence that was manifestly excessive.
- [9] It is submitted that notwithstanding that it was not advanced before the sentencing judge, it was open to the sentencing judge to fashion cumulative sentences, with a lesser sentence for the trafficking offence and cumulative sentences for the other offences, allowing an effective total sentence of eight years' imprisonment. That would result in section 5(2) of the Act applying to a shorter term of imprisonment for the trafficking of, say, four years imprisonment, with cumulative terms of one year's imprisonment for each of counts 2 and 4 and two years' imprisonment for count 3. The court would then set a parole eligibility date at 80 per cent of the sentence imposed for count 1, which would be after Mr Feao had served approximately three years and two months of the sentences.
- [10] It is, therefore, submitted that the sentencing judge erred in law in failing to consider cumulative sentences, which would result in an earlier date for eligibility for parole for

Mr Feao. Although the application for leave to appeal against sentence relies only on the ground of manifest excessiveness, the submissions made by Mr Feao also advanced the same argument as an error of law.

- [11] The principles to be applied in determining whether an extension of time should be granted are well settled in *R v Tait* [1999] 2 Qd R 667 at [5] where the court observed:

“that the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension.”

- [12] Even when the delay is long or inexcusable, the court should consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal is a viable one when it is feasible to do so. In considering Mr Feao’s prospects of successfully showing that the sentences imposed by the sentencing judge were manifestly excessive, it is a question of looking at the sentences that were imposed rather than starting from the position that there were other options available to the sentencing judge for structuring the sentence. It is the entire sentence and not merely the parole eligibility date that must be the focus of this consideration.

- [13] The approach the sentencing judge took to selecting the head sentence for the trafficking offence as lower than what otherwise be imposed to take account of the effect of section 5(2) of the Act conformed with the approach approved by the Court of Appeal in *R v Clark* [2016] QCA 173 at [5] and [68].

- [14] Mr Feao relies on the approach in *R v Derks* [2011] QCA 295, where the offender successfully appealed against a sentence of 13 years’ imprisonment imposed for the offence of manslaughter that was intended to be a global sentence for that offence and all other offences for which the offender was being sentenced.

- [15] As the sentence for an offence of manslaughter of 10 years’ imprisonment or more automatically includes a declaration the offender has been convicted of a serious violent offence, the effect of making the sentence for the offence of manslaughter one

that reflected the overall criminality of the offender was that he had to serve 80 per cent of that part of the sentence that could be attributed to the other offending. The sentence was reduced from 13 years to 11 years' imprisonment, and the sentence for two years that was imposed on another count was ordered to be served cumulatively on the sentence of 11 years imposed for the manslaughter. President McMurdo, with whom Justices White and Fryberg agreed, stated at [26]:

“When a judge is sentencing an offender who has committed a series of offences, particularly where the offending constitutes a single episode as here, it is often appropriate to impose a global sentence on the gravest offence to reflect the seriousness of all the offending. The advantage of this approach is that it avoids the possibility of inadvertent error which all too often flows from the unintended consequences on parole eligibility and release dates when sentences are made cumulative. Alternatively, a judge may impose a cumulative or a series of cumulative sentences. Either approach is acceptable provided that the ultimate sentence imposed for the offending is just.”

[16] Justice Fryberg observed in *Derks* at [44]:

“In circumstances where the operative sentence is for an offence the subject of an SVO declaration, it is a mistake to impose a global sentence reflecting non-declarable convictions unless the fact that those convictions are not declarable has been taken into account in reducing what would otherwise have been the global sentence.”

[17] The problem for Mr Feao is that at least counts 3 and 4 concerned offending that related to the trafficking. The sentencing judge had recited the fact of the possession of the large amounts of drugs as part of the description of Mr Feao's trafficking. The schedule of facts that the prosecution tendered before the sentencing judge described the mobile phone as the one used by Mr Feao in his interactions with Cosca and Walker. In those circumstances, the sentence for the offence of trafficking incorporated the criminality of Mr Feao in having possession of a mobile phone and a large quantity of drugs for the purpose of the trafficking.

[18] It is not apparent that the very small quantity of methylamphetamine of 0.113 grams was a particular of the trafficking, even though the prosecution's schedule of facts noted that commerciality was alleged in respect of the possession of this small quantity.

If it was a particular of the trafficking, then the sentence for the trafficking incorporated the criminality for that possession. If not, it was an offence of less seriousness than the trafficking to such a degree that it is difficult to see how it would have added to his criminality in a way that justified much, if any, increase in the global sentence for the trafficking.

[19] Unlike the offender in *Derks* who had a legitimate complaint about the increase in his manslaughter sentence to reflect his overall criminality for other offending for which he was being sentenced, Mr Feao's criminality for all accounts was substantially reflected by the conduct that related to the trafficking. There was, therefore, no error of law in the circumstances of this matter in the sentencing judge not considering cumulative sentences. The issue on any application for leave to appeal against sentence would, therefore, be whether the sentence of six years' imprisonment that was subject to a mandatory requirement to serve 80 per cent of the term in custody was manifestly excessive in the circumstances.

[20] The applicant does not complain about a starting point of eight years' imprisonment for the trafficking. The sentencing judge moderated the head sentence to take account of section 5(2) of the Act. Although the period of custody is a significant proportion of the head sentence, Mr Feao has the benefit of a reduced head sentence. There are not sufficient prospects of Mr Feao showing the overall sentence was manifestly excessive to justify an extension of time after such a long delay since he was sentenced. The application for extension should be refused.

[21] **FRASER JA:** I agree and would add only one remark. To the extent that the counts other than the trafficking count are in substance particulars of the trafficking count, it would be open for the applicant to contend that no additional punishment, even concurrent punishment, should have been imposed upon those other counts. But for the reasons given by my colleague, that would have no impact upon the custodial period to be served by the applicant. I agree in particular, for the reasons given by Justice

Mullins, that there are not sufficient prospects for the applicant to show that the overall sentence was manifestly excessive so as to justify an extension of time in these circumstances.

[22] **McMURDO JA:** I agree with the judgment of Justice Mullins and with the additional remarks of the presiding judge.

[23] **FRASER JA:** The order of the court is that the application is dismissed.