[2019] QCA 231

COURT OF APPEAL

FRASER JA
McMURDO JA
HENRY J

CA No 111 of 2019
SC No 1082 of 2018

THE QUEEN

v

DINH, Tony Phat **Applicant**

BRISBANE

MONDAY, 28 OCTOBER 2019

JUDGMENT

FRASER JA: The applicant seeks leave to appeal against sentences imposed on 3 April 2019 for three counts of unlawful possession of a dangerous drug in a quantity exceeding two grams. The sentencing judge considered that the applicant's overall criminality merited an effective sentence of six and a half years' imprisonment, with parole eligibility after two years and eight months (being six months more than one-third of the term and seven months less than one-half of the term). The applicant had served 517 days (one year and five months), in pre-sentence custody which could not be declared to be time served under the sentence because of outstanding summary charges in the Magistrates Court. Making allowances for that period both in the term and in the period before parole eligibility, the sentencing judge imposed a head sentence on count 2 of five years imprisonment with parole eligibility on 2

June 2020 (being one year and two months after the date of sentence). The applicant was sentenced to concurrent terms of imprisonment of four years on count 1 and two years on count 3 with the same parole eligibility date.

The ground of the proposed appeal is that the sentence is manifestly excessive, "in that the applicant should have been sentenced to a substantially lesser term of imprisonment without parole or lesser penalty imposed."

I will summarise the circumstances of the offences. On 24 May 2017, police found at an apartment occupied by the applicant and in his car a total of five clear freezer bags containing a total weight of nearly 62 grams of white powder with varying levels of purity. The powder contained a total of 28.2 grams of pure heroin (count 1). The estimated value of the drug was about $11,000. Police also found separate amounts of cash totalling about $15,000, receipts for the purchase of cosmetics worth $1,794, and a valuable watch. The applicant was arrested. He did not participate in a recorded police interview. He was released on bail on 25 May 2017.

On 2 November 2017, police found under the floor mat in the front passenger foot well in the applicant's car a small freezer bag containing two clip-sealed bags of a white rock substance. Upon analysis, the substance was found to contain heroin, one bag having a purity of 65 per cent and the other of 21 per cent. The total calculated weight of pure heroin was 3.813 grams (count 3). The value of the drug was approximately $3,000. The applicant told the police he had never seen the white rock substance but stated that it was likely to be cocaine or heroin.

Upon a subsequent search, three clipseal bags were found secreted within a wall of the boot area. Two bags contained nearly one ounce and a third bag contained nearly two ounces of substance. Upon analysis, the substance was found to contain methylamphetamine with a purity of between 68 and 70 per cent. The total weight of pure methylamphetamine was 77.4 grams (count 2). The value of that methylamphetamine was approximately $22,000.

Police also found separate amounts of cash in the car. Upon a search of the applicant's bedroom in a unit, police found two money counting machines and three locked safes which,

upon being opened by locksmiths, were found to contain a third money counting machine and cash. The total amount of cash found in the car and the applicant's bedroom was about $5,007.65. He was arrested and remanded in custody. He did not participate in a recorded police interview.

The applicant does not challenge the findings by the sentencing judge that the applicant possessed the drugs for a commercial purpose. There was no indication that the applicant was a drug user or a drug addict, and it did not seem that the applicant committed his offending for anything other than commercial gain.

The maximum penalty for each offence is 25 years' imprisonment. The applicant was 29 when he committed these offences. He was unemployed at that time and no history of employment was put before the sentencing judge. He had a minor criminal history unrelated to drugs, and he had not previously been imprisoned. The applicant had the support of his parents. He did not show any remorse or cooperate with law enforcement agents. The sentencing judge referred to the aggravating features that the possession of the drugs was for a commercial purpose and the applicant was on bail for the first offence when he committed the second and third offences.

The sentencing judge observed that the applicant had entered a late plea of guilty, after the matter was set down for a trial due to commence in the week of the sentence, so to that extent after the Crown had prepared for a trial. I note that the sentence was imposed on a Wednesday, and the trial was in fact due to commence on the following Monday, which was a period of five days with the weekend intervening. Although counsel for the applicant submitted that this might involve a factual error, no particular emphasis was placed upon that, and obviously for good reason. For the reason articulated, the sentencing judge did not fix parole eligibility after a third of the term of imprisonment, which is what normally would happen in the case of an early plea of guilty.

In relation to count 1, amongst the sentencing decisions cited by the Crown the sentencing judge regarded the sentence of five and a half years' imprisonment, with parole eligibility

after one third, in *R v Luong* [2010] QCA 14 as being most comparable. That 39 year old offender entered an earlier plea of guilty but had a more extensive criminal history than the applicant. He was found in possession of 19 grams of pure heroin. This possession was for commercial purposes, although some of the heroin was for his personal use. He was an addict who had taken steps towards rehabilitation. The sentence was not disturbed on appeal, with the Court indicating that five to six years was warranted and the parole eligibility date was generous.

In relation to count 2, the sentencing judge referred to factors which distinguish the applicant's sentence from three cases: *R v Tran* [2014] QCA 90, *R v Hesketh; ex parte A–G (Qld)* [2004] QCA 116 and *R v Frith* [2017] QCA 143. The sentencing judge considered that a sentence of between five and six years' imprisonment for count 2 alone would be consistent with *R v Phillips* [2017] QCA 41. That offender pleaded guilty to two counts of possession of methylamphetamine: 3.941 grams of pure drug within 5.591 grams of substance and - after he had been arrested and charged with the earlier offence - 20.853 grams of pure drug within 27.667 grams of substance. In addition to some relatively minor offences, he was also charged with possession of 847 grams of cannabis. The drugs were possessed for a commercial purpose. The offender was 40 years old with a relevant criminal history. There were mitigating factors of a timely plea, the offending arose in the context of drug dependence, and the offender had made efforts to rehabilitate himself. The effective sentence of five years' imprisonment with a parole eligibility date after one-third of the term was held to be not manifestly excessive.

The applicant contends that a term of six years' imprisonment should have represented the notional starting point, with that term and parole eligibility after one-third of that term being reduced by the period of pre-sentence custody. Alternatively, the applicant contends that the parole eligibility date should be fixed after one-third of a notional term after six and a half years (on 2 January 2020 rather than 2 June 2020).

In oral argument, counsel for the applicant particularly emphasises the contention that the sentencing judge erred in treating the applicant's plea of guilty as a late plea. It plainly was a late plea. An indictment was presented on 1 August 2018. After changes of solicitors by the applicant and various mentions in the Court, on 21 December 2018, the matter was listed for trial in the sittings commencing 1 April 2019, with the trial to start not before 8 April 2019. The matter remained listed for trial at two further mentions until on 25 March 2019 the applicant told the Court that he intended to plead guilty. The applicant was arraigned and pleaded guilty to all three counts on 29 March 2019.

The applicant argues that an additional five months in the minimum custodial part of the sentence could not be justified in light of the absence of any material identifying the nature of the preparation or the existence of any inconvenience associated with the time the plea was entered. It is submitted to be difficult to conclude that the witnesses would have been inconvenienced to any great extent, because the witnesses in the Crown case were to be police officers, and it would not be necessary to confer with them about their evidence. These submissions do not justify appellate interference in the sentence. Upon this topic, the sentencing judge found that the applicant entered a late plea of guilty after the matter was set down for trial due to commence in the week of the sentence and, "to that extent", the Crown had prepared for a trial. The findings reflected an agreed chronology and a submission by the prosecutor that it was necessary for the Crown to prepare for trial. That submission was not challenged at the sentence hearing and it was consistent with the imminence of the trial when the applicant first indicated he would plead guilty.

The applicant relies upon the common practice of providing for eligibility for release on parole after about one-third of the term, where the accused enters a plea of guilty, such as is referred to in cases such as *R v Ungvari* [2010] QCA 134 and *R v PAA* [2006] QCA 56. Upon this topic, it is sufficient to summarise observations in *R v Robertson* [2008] QCA 164, approved in *R v Torrens* [2011] QCA 38, to which the respondent referred the Court; as a matter of principle, the just and appropriate sentence including the proportion which the period to be served in prison bears to the whole term, is to be fixed with reference to all of the

circumstances of the particular case, rather than by the application of some rule of thumb in a way that would unduly confine a sentencing judge's discretion. Considered in the context of the applicant's overall sentence, and particularly bearing in mind the absence of any significant mitigating factor beyond the applicant's late plea, the period before parole eligibility could not be regarded as indicative of error in the exercise of the sentencing discretion.

The applicant emphasises the aggravating circumstance in *Luong* that the offender, who was on a probation order when he committed his offending, was burdened by an extensive criminal history. Even so, a sentence of five years and six months' imprisonment with a parole eligibility date after one-third of that term by an offender who possessed a substantially smaller quantity of heroin, was an addict, had achieved some degree of rehabilitation, and had entered an early plea of guilty, is an indication of the appropriateness of the sentence of count 1 alone for the applicant, who entered a late plea and was not remorseful, in the order of five to six years imprisonment with parole eligibility beyond the one-third mark.

As the sentencing judge in this case considered, taking into account the significantly greater amount of methylamphetamine possessed by the applicant and that *Phillips* was an addict who had embarked upon rehabilitation, even though the applicant did not have that offender's extensive criminal history, the sentence in *Phillips* is consistent with a sentence of between five and six years' imprisonment for count 2 alone.

In light of these comparable sentencing decisions and the particular circumstances of this case, the overall sentence imposed upon the applicant could not be regarded as excessive.

I would refuse the application.

McMURDO JA: I agree.

HENRY J: I agree. I add this was not a matter in which the belated change of foreshadowed pleas could be attributed to amendment or discontinuance of charges or a material change in the facts alleged by the prosecution.

FRASER JA: The order of the Court is that the application be refused.