

COURT OF APPEAL

McMURDO P
DAVIES JA
BYRNE J

CA No 33 of 2001

THE QUEEN

v.

LESLIE McINTYRE

BRISBANE

..DATE 27/02/2002

JUDGMENT

THE PRESIDENT: The applicant pleaded guilty to one count of trafficking in heroin, three counts of possession of heroin and six counts of supplying heroin. She was sentenced on the offence of trafficking to 11 years imprisonment with a recommendation for release on parole after three and a-half years. No sentence was imposed on the remaining counts which were particulars of the offence of trafficking.

The applicant now appears on her own behalf although she has adopted in her outline many of the helpful written submissions prepared by Mr Devereux of the Public Defender's Office who was to appear for her when this matter was last before the Court. The matter was then adjourned to allow this applicant to place in affidavit form any complaints she wished to maintain against her barrister at sentence to give the prosecution an opportunity to meet those claims.

She has not complied with these directions and has indicated to the Court that she is now no longer pursuing her complaints against her barrister at sentence. Her central grievance is that the sentence imposed upon her was manifestly excessive.

On 31 July 2000 in Cairns the applicant pleaded guilty to three counts of possession of a dangerous drug and two counts of supplying a dangerous drug but not guilty to the remaining counts. The indictment was amended to change the commencement date of the trafficking from 1 January 1995 to 1 January 1994.

The jury which had been empanelled was discharged and the trial was adjourned to 3 August 2000 when the applicant pleaded guilty to the amended count 1. The learned sentencing Judge ordered a presentence and psychiatric report. It seems the prosecution case was that the applicant was more involved in the trafficking than the applicant was willing to concede.

The sentencing proceeding recommenced on 16 November 2000 in Brisbane when the co-accused, Susan-Maree Kapper, gave evidence in the prosecution case. Kapper had prepared a statement about the appellant's involvement in these offences from surveillance tapes. Kapper said that from early 1994 when she lived in Kuranda she and her partner, William Ogden, a former partner of the applicant and father of her first child, brought heroin from the applicant on a daily basis for \$100. The applicant was due to have a baby and asked Kapper to take over her heroin business. Kapper sold four grams of heroin and bought a mobile phone. The applicant referred buyers to Kapper who would sell them heroin which she purchased from the applicant at \$800 a gram, on-selling it for \$1,000 a gram. She also used some of the heroin for her own use. Kapper met the applicant's source of heroin, Glen Evans and Annalise Mackieivicz, and dealt directly with them from shortly before Christmas 1994. By early 1995 the applicant was not involved in the heroin business. Kapper used a flat paid for with the proceeds of the heroin dealing to conduct her trade for a period but, fearing a police raid, reverted to

selling from motor vehicles.

Although the applicant withdrew from selling heroin for a period in 1995, video tape surveillance records her speaking on numerous occasions to Kapper about the applicant's sale of heroin to others in March 1995.

In the presentence report the applicant emphasised to the writer that she disputed many of Kapper's claims about her involvement. She claimed that she was only selling drugs for a short period of time to those other than her friends and acquaintances.

The applicant comes from a loving and supportive family. She has two children, one in tertiary education and one in early primary. She was introduced to drugs in her high school years and first used heroin when she was 19 years old. She has had a good work history but in more recent times has worked as an escort to support her drug use. For the past 13 years she has been in a relationship with Phillip Ives.

The presentence report states that the applicant lacks insight into her actions and emphasises that it would be of benefit to the applicant and her family, especially her children, for her to rejoin the community on a long parole period. She appears to be genuinely committed to her rehabilitation.

The applicant submits that the learned sentencing Judge sentenced the applicant on an incorrect understanding of the facts, namely, that she was obtaining heroin from a source other than Mackieivicz and Evans.

The applicant's barrister at sentence conceded that the applicant purchased some heroin in Brisbane in April, inferentially from someone other than Mackieivicz or Evans, but submitted that this was an opportunistic, once-off purchase. Kapper, who was not cross-examined by the applicant's barrister, gave evidence that the applicant had, on a number of occasions, obtained heroin from a source other than the co-accused, Mackieivicz and Evans. His Honour's comments, during the course of argument, that the applicant was in two changes, seek of command, were not repeated in his sentencing remarks where he merely said, "It is also clear to me that you obtained drugs from a source other than Mackieivicz and Evans." That fact was accepted by the applicant's barrister at sentence.

His Honour did not err in deciding the factual basis of the sentence. The applicant complains about a number of comments made by the Judge during counsel's submissions at sentence. There is no need to conclude here that this discussion with counsel formed any part of the Judge's reasons for sentence.

The applicant next contends the Judge should not have accepted Kapper's evidence as to the applicant's involvement in the heroin trade. As I have noted, the applicant has now abandoned her submission that her barrister at sentence overbore her and persuaded her not to give evidence which could have contradicted Ms Kapper's evidence.

The difficulty for the applicant is that Kapper's evidence was unchallenged in cross-examination or by other evidence. It is likely that the Judge, nevertheless, treated the evidence of Kapper with caution because of her self evident interest in lessening her own role and exaggerating that of the applicant. The Judge was entitled to act on Kapper's evidence to the extent that he did in his sentencing remarks.

The applicant's primary submission is that the sentence is manifestly excessive, taking into account the sentences imposed on co-accused.

The applicant was aged 44 at sentence and 38 and 39 years old at the time of the offences. She was first convicted in 1987 in the Townsville Magistrates Court for minor offences of dishonesty. Between 1989 and 1996 she was convicted or dealt with in the Magistrates Court for nine offences of possession of a dangerous drug. Fines were imposed.

She has not been convicted of any offences since 1996 and has

apparently not committed further offences since her arrest on these charges. The committal in this matter was by way of tendered statements only and she eventually pleaded guilty once the indictment was amended to reflect the dates of her activity.

It is often problematic when co-offenders in drug operations are not sentenced by the same Judge or upon an agreed set of facts. Co-offenders have an obvious interest in doing all they can to lessen their personal responsibility and to increase that of their co-offenders. In this case the prosecution is unable to specify the amount of white powder or pure heroin, the subject of the trafficking count, to which the applicant pleaded guilty.

The evidence is clear that the applicant supplied a significant quantity of white powder to Kapper from Evans and Mackieivicz. On at least one occasion she obtained heroin and supplied it to others from a different source than Evans and Mackieivicz. She assisted Kapper to take over her role as dealer for Evans and Mackieivicz. She continued to both assist Kapper and to supply others directly after she handed the business to Kapper.

She was an addict involved in this insidious business not only to feed her heroin habit but also for profit although she certainly does not seem to have amassed any wealth. She has

hepatitis B and C. References tendered say that she is a loving mother and her younger daughter is especially distressed by her mother's imprisonment. These factors are very sad.

It is necessary to examine the sentences imposed on the co-accused. Mackieivicz [2000] QCA 171, CA No 437 of 1999, 10 May 2000, pleaded guilty to trafficking in heroin. She was 37 years old and, like this applicant, had only minor previous convictions. The plea of guilty was also a late one. She was actively working as a wholesale distributor of heroin, supplying to a street dealer for four months. Some \$360,000 in gross sales were achieved. She was in a de facto relationship with the co-offender, Evans, who had been supplying four grams of heroin for \$800 a gram on a daily basis for a much longer period to Kapper. In February 1995 Evans was admitted to hospital for a heart condition and the applicant took over this daily supply of heroin to Kapper. Mackieivicz, unlike this appellant, committed further drug offences whilst on bail. Like this applicant she had health problems. She too was making creditable efforts at rehabilitation. She had one minor prior drug conviction and some subsequent drug convictions. Mackieivicz was sentenced to nine years' imprisonment with a recommendation for parole after two years but she was sentenced as a trafficker only over the four month period when Evans was hospitalised and ill.

Evans [1998] QCA 73, CA No 487 of 1997, 28 April 1998, was found guilty after a trial and sentenced to 12 years' imprisonment with a recommendation for parole after four years. He was 36 years old and had minor prior drug convictions. The sum of \$400,000 changed hands during his five months of supplying Kapper. He had major health problems which, it seems, were recognised in the early parole recommendation. This Court found his sentence was not manifestly excessive.

Kapper pleaded guilty and was extensively cooperative with the police, giving evidence against Evans at his trial and, as we have heard, evidence on this applicant's sentence. Kapper was sentenced to 12 years' imprisonment with a recommendation for parole after three years. On the sketchy details before this Court Kapper's sentence seems high compared to that imposed on her suppliers, Evans and Mackieivicz, although it must be said, she was involved in the supply of heroin for a lengthy period and a large amount of money was involved.

Kapper's partner, Ogden, pleaded guilty to trafficking and was sentenced to nine years' imprisonment with a recommendation for parole after two years. It seems he was less involved than Kapper but gave her assistance.

Fairness suggests that this applicant should have received no

heavier sentence than Mackieivicz who was her primary supplier of heroin but, of course, Mackieivicz was sentenced on the basis of her trafficking only over a four month period.

On the other hand Kapper, who like this applicant who was further down the chain than Mackieivicz and who cooperated very extensively with the authorities, received a heavier head sentence and less favourable recommendation for parole than Mackieivicz. It is true that Kapper was a more active dealer than this applicant. \$400,000 worth of heroin changed hands through her. At times she was also running Mackieivicz and Evans' part of the business.

It is difficult to maintain parity in cases of multiple co-accused sentenced by different Courts on different factual bases. Mackieivicz's sentence was lenient but the sentences imposed upon Kapper, Evans and Ogden support the sentence imposed on this applicant. Her sentence is also within the appropriate range for offending of this type.

Overall, it cannot be said that the sentence imposed on this applicant was so disparate when compared to the sentences imposed on all the other co-accused as to engender a justifiable sense of grievance in the applicant, *Lowe v. R* (1984) 154 CLR 606. I would refuse the application.

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DAVIES JA: I agree.

BYRNE J: I agree.

THE PRESIDENT: The order is the application is refused.
