[2002] QCA 71

COURT OF APPEAL

DAVIES JA
MUIR J
PHILIPPIDES J

CA No 300 of 2001

THE QUEEN

v.

VIVIENNE MAVIS HAMLET Applicant

BRISBANE

..DATE 13/03/2002

JUDGMENT

DAVIES JA: The applicant pleaded guilty in the Supreme Court on 18 October 2001 to trafficking in heroin between 23 June 1998 and 29 June 2000, receiving property obtained from trafficking on 9 July 1999 and supplying heroin on 12 October 1999. She was sentenced, it appears, to a global sentence of nine years imprisonment for these offences. She seeks leave to appeal against that sentence on the ground that it was manifestly excessive.

The applicant is 37 years of age and until recently was a heroin addict. She commenced heroin use when she was 17 years of age and it appears that, shortly after this, her criminal history commenced. In 1984 she was convicted of possession of property suspected of being stolen. In 1985 she was convicted of stealing and of suffering premises to be used in connection with the smoking of a dangerous drug and of obstructing police. In 1988 she was before the Court on three occasions. On the first she was convicted on two charges of receiving. On the second she was convicted of stealing and assault occasioning bodily harm and on the third she was convicted of possession of a utensil used in connection with the administration of a dangerous drug and attempted possession of a dangerous drug.

There is then no evidence of her having committed any crime between October 1988 and September 1994. It was said on her behalf below that at the beginning of this period she met her current de facto husband and sought admission to a methadone program. The relationship with her de facto was a

stable one until he also became addicted to heroin and it appears that in 1995 and 1997 she was convicted of producing a dangerous drug and of supplying dangerous drugs. Then on 24 June 1998 she was found in possession of heroin for which she was convicted and sentenced in the Magistrates Court in September that year. On 12 October 1998 she was again found to be in possession of heroin for which she was sentenced again in the Magistrates Court on 14 December 1998. Heroin was again found in her possession on 17 December 1999 for which she was sentenced to an intensive correction order in the Supreme Court on 30 October 2000. And again on 14 February 2000 she was found to have $3,000 in cash in her possession and a quantity of heroin and she was sentenced for that offence in the Magistrates Court on 20 November 2000.

That comprised the totality of the applicant's previous convictions when she came to be sentenced in respect of the current offences. For those convictions she had only once been sentenced to imprisonment. That was for the offence of possession on 17 December 1999 for which the Supreme Court imposed a sentence of 12 months imprisonment to be served by way of an intensive correction order.

The evidence from which it may be inferred that the applicant trafficked in heroin between 23 June 1998 and 29 June 2000 is the evidence of possession of heroin on 24 June 1998, 12 October 1998, 17 December 1998 and 14 February 2000 referred to earlier; evidence from neighbours that about

12 vehicles came to the applicant's premises each day over a substantial period; evidence that about 173 cars were counted attending the applicant's house during a seven day period; evidence that an amount of about $50,000 was found in her possession or control and which had no other explanation for it other than it had been obtained from trafficking; and the evidence of the supply count the subject of these proceedings. It was conceded on the applicant's behalf rightly that this was adequate evidence of trafficking over this period and of course she pleaded guilty to that offence.

The first basis which Mr Crowley has for asserting that the sentence imposed was manifestly excessive is that the commission of the offences on 24 June 1998, 12 October 1998, 17 December 1998 and 14 February 2000 were relied on as circumstances to prove the offence of trafficking; that the applicant had already been convicted and sentenced for these offences; and that this was contrary to s 16 of the Criminal Code.

In my opinion that submission is misconceived. To punish the applicant for trafficking is not to punish her additionally for the offences of possession for which she had already been sentenced. It is no more than to use those offences as circumstances together with other much stronger evidence to prove that she was trafficking. The submission must therefore be rejected.

The position is otherwise with respect to supplying heroin on 12 October 1999 and receiving property obtained from trafficking on 9 July 1999. These offences were not merely circumstances which proved trafficking but one of the acts in each case which constituted the trafficking. It was therefore wrong for his Honour to sentence the applicant for those offences and for the offence of trafficking. That alone would not affect the correctness of the sentence which his Honour otherwise imposed but it does mean that, because his Honour should not have sentenced for those offences, this Court is in a position where it must resentence the applicant.

No matter how much sympathy one might have for drug addicts or for the sad circumstances of this particular applicant, it must be remembered that she was not trafficking merely to feed her own drug habit. She was selling heroin in substantial amounts over a very long period of time and received large amounts of money in total which went well beyond her needs to sustain her own drug habit.

Moreover, not only did she continue her conduct notwithstanding her previous convictions for being found in possession of heroin; she also continued trafficking after she had been charged and was put on bail.

It appears from his Honour's sentencing remarks that he thought that a sentence of 12 years imprisonment was an appropriate starting point for the imposition of the

sentence he was about to impose. He then reduced it to nine years imprisonment for a number of mitigating factors including the applicant's plea of guilty. There is in addition, of course, a substantial mitigating factor to which Mr Crowley for the applicant referred today, which was her genuine attempt since her conviction to overcome her drug dependency.

There appear to be some prospects of success in this respect. It does appear that she has been drug free since July 2000 and when a psychologist Ms Bendall saw her in October 2001 she had for the previous 10 months been on a methadone program at the Nambour Hospital on which she had been progressing at least uneventfully. Ms Bendall expressed the opinion that the applicant was a person committed to her own rehabilitation and that she had broken all connections with people whom she considered could sway her from her desire to totally abstain from heroin and that she was currently focused on providing a healthy lifestyle for herself and her son.

There is also a report from a community corrections officer which again expresses some optimism, as much I suppose as one can express in cases of this kind, about the applicant's prospects of rehabilitation. The officer said that the applicant displayed a high level of motivation in regards to making positive changes to her lifestyle. He also said that she had a real insight into the nature and consequences of her behaviour.

The cases of heroin trafficking which this Court has considered in recent years show, in my opinion, that a sentence in the range of 10 to 12 years was an appropriate starting point with which to consider this sentence, before one considers the mitigating factors to which I have referred. I refer to that respect to the four cases which were relied on by the respondent, R v. Lam CA No 166 of 1999, 30 July 1999; R v. Le CA No 41 of 2001, 24 July 2001; R v. Bujora CA No 78 of 2001, 2 August 2001 and R v. Do CA No 342 of 1999, 14 April 2000. I should say however that none of these cases is closely comparable to this and it is not necessary for that reason to discuss any of them further.

The question then is what is an appropriate reduction of a sentence in that range for the mitigating factors to which I have referred, the early plea of guilty and in particular the prospects which the applicant has of ridding herself of her drug addiction. I would be reasonably confident that if she can be successful in that respect that her prospects are good so far as rehabilitation from criminal offences is concerned.

When one has regard to those factors and, in addition, the particular circumstances of this particular applicant, she is in a family situation, she has a young 11 year old boy whose care she is charged with and whom she has been looking after, my view is that the learned sentencing Judge paid insufficient regard to the mitigating factors. When one

does pay regard to the mitigating factors to which I have referred an appropriate sentence should have been a sentence of seven years imprisonment.

I would accordingly grant the application, allow the appeal, sentence the applicant on the trafficking account to seven years imprisonment and impose no sentence on either of the other offences.

MUIR J: I agree.

PHILIPPIDES J: I agree.

DAVIES JA: The orders are as I have indicated.

...
