[2002] QCA 108

COURT OF APPEAL

DAVIES JA
MUIR J
WILSON J

CA No 296 of 2001

THE QUEEN

v.

MARTIN WILLIAM DALTON Applicant

BRISBANE

..DATE 21/03/2002

JUDGMENT

WILSON J: This is an application for leave to appeal against sentence. The applicant pleaded guilty and was sentenced on seven counts of offences against the Drugs Misuse Act. They consisted of one count of trafficking in methylamphetamine and cocaine between 8 February and 26 March 1999; four counts of the supply of methylamphetamine on 9 February, 18 February, again on 18 February and 5 March 1999; one count of the supply of amphetamine and methylamphetamine on 11 February 1999 and one count of the supply of cocaine and methylamphetamine on 25 March 1999.

He was sentenced on 15 October 2001 to five years' imprisonment to be suspended after 18 months with an operational period of five years.

It should be noted at the outset that these offences were committed at the time when amphetamines and methylamphetamines were schedule 2 drugs. It was, nevertheless, a time when there was an increasing community awareness of the harm that those drugs can do. However, because the offences were committed before the rescheduling, he had to be sentenced having regard to the sentencing regime which then applied. But it can reasonably be expected that as cases come before the Courts of offences committed after the rescheduling, the level of penalty will rise.

The applicant is seeking leave to appeal on the ground that the sentence was manifestly excessive. It is submitted that

there was an error in the Judge's determining that he had no discretion to impose a wholly suspended term because authority dictated an actual term of imprisonment. It is further submitted that there was an error in failing to give any weight or sufficient weight to mitigating factors and, further, that the sentence imposed was outside the appropriate range.

The applicant was born on 21 November 1969, so that he was 29 at the time of the offences. He had a very minor criminal history. In August 1988, more than 10 years previously, he had been dealt with in a Magistrates Court for possession of marijuana and possession of a utensil. That resulted in probation for one year.

After these offences were committed, he was dealt with in a Magistrates Court for one charge of possession of heroin. He was given probation for 12 months and no conviction was recorded. He was also subsequently dealt with for an offence against the Bail Act.

Turning to the circumstances of the offences in question, the drugs were supplied to two undercover police operatives over a six-week period. In all, there were 3.565 grams of pure methylamphetamine, 0.029 grams of amphetamine, and 0.562 grams of cocaine. Moneys totalling $4,640 passed hands. There were six individual supplies for amounts ranging between $360 and $1,300. On two of those occasions, the methylamphetamine had

a high level of purity, 38.5 per cent and 39.8 per cent.

The applicant was charged with a co-accused, Thorn, who was an older man, who failed to appear on sentence. The total quantity supplied by them both was a little more than I have just set out, and the total money which passed hands was $5,458.

It was the applicant who actually handed over the drugs to the undercover operatives. They posed as persons who would themselves supply others with the drugs. Thorn was the source of the drugs and the receiver of the money. The applicant became involved in the supply of the drugs because of a drug debt to Thorn. Out of the entire operation the applicant received only $60. He has repaid half the moneys expended by the undercover police operatives.

There was a long unexplained delay in bringing the matters before the Court. His plea was properly treated as an early plea.

The applicant began smoking cannabis when he was aged 14. He progressed to amphetamines, ecstasy and cocaine. In 1996 he commenced using heroin. From July 1997 he sought professional assistance for his heroin problem. Like many heroin addicts, he had occasional relapses. At the time of these offences he was going through a period of relapse but he was nevertheless seeking and receiving professional treatment.

There was evidence of good family support. At the time of the sentence he was in gainful employment. He had two children from a former de facto relationship. They lived with their mother but he was providing maintenance and was a caring and loving father.

Before the sentencing Judge, the applicant's counsel submitted, first, that there ought to be a fully suspended sentence and, later, that a sentence of five years suspended after 18 months would be appropriate. The latter was what was in fact imposed. But be that as it may, the sentence was a heavy one, as the respondent concedes.

The first point is whether there was an error on the part of the sentencing Judge in determining that the authorities dictated a custodial term.

What he said must be considered in context. It was in the course of argument, and I think a fair reading of what his Honour said is that a wholly suspended term might theoretically be possible, but having regard to comparable sentences a custodial term was called for in the case of trafficking in drugs especially cocaine and amphetamines. I do not regard what his Honour said as, in itself, an error vitiating the sentencing process.

I move on then to a consideration of the comparable verdicts.

The first case is The Queen v. Crocker, Court of Appeal number 118 of 1999. That was not a trafficking case but a case of seven supplies of street grade amphetamines to an undercover agent over two months. $6,050 passed hands. The Court of Appeal observed that the appropriate range of sentence was 18 months to four years of imprisonment. There the offences had been committed whilst the applicant was on bail. He had a significant criminal history of other offences (gaming and prostitution offences). He was a 52 year old man. The sentencing process was complicated by the imposition of cumulative sentences. Three and a half years were imposed on the drugs charges.

The next case is The Queen v. Tony Vincent Bellino, Court of Appeal number 416 of 1998. That was a much more serious case and much more serious than the present circumstances. The applicant trafficked in ecstasy over two months. There were also four counts of the supply of ecstasy and one count of the supply of heroin. He was 29 years old with no prior convictions apart from an irrelevant drinking offence many years before. There were four transactions involving 600 ecstasy tablets and total payments of $22,400. While the level of personal gain was difficult to establish, it was taken not to be of a high order. However, there was proof of actual trafficking and of statements revealing an awareness of relevant aspects of the trade. There was a complete lack of care for the users of the drug. His sentence of eight years for trafficking was reduced by the Court of Appeal to six

years.

The next case to consider is Cuddy (1988) 37 Australian Criminal Reports 226, a decision of the Court of Criminal Appeal. That related to trafficking in methylamphetamines and possession of methylamphetamine. The applicant agreed to supply five weights for $500 obtaining a small profit. However, the evidence showed uninhibited activity in obtaining, selling and profiting in the drug. He was an addict. The profits were used, in part, to feed his habit and also pooled with an invalid pension and the earnings of his de facto for living expenses. The original sentence of four and a half years' imprisonment was reduced to three years with hard labour.

The Queen v. Neave, Court of Appeal number 186 of 1995, was a case of supply, not trafficking, there were six counts of the supply of methylamphetamines. The applicant was 43 years old with a substantial criminal history from 1974 including convictions for offences of dishonesty on 14 occasions, some of them, multiple offences. At the time of the sentencing he was already serving terms for stealing with actual violence and using violence, assault occasioning bodily harm and misappropriation of property. The supplies were to an undercover police operative. They involved .219 grams of methylamphetamine. The money that passed hands, $1080. He had also offered to supply a further quantity for $400. The sentence of two years nine months cumulative upon other

sentences, with a recommendation for parole two years from January 1995, was considered to be high but within range.

Finally there's the case of The Queen v. Fry, Court of Appeal Nos 397 of 1999 and 17 of 2000, a case against husband and wife of trafficking in amphetamines. The husband was sentenced to five years' imprisonment. That was a more serious case than the present, involving more amphetamines in quantity and number and the supply of the amphetamines to truck drivers.

Having reviewed all the circumstances of this case and those earlier decisions, I have come to the conclusion that five years was a manifestly excessive sentence. That is not to understate the seriousness of trafficking, and I think a custodial term was called for.

I would grant leave to appeal, set aside the sentence, I would substitute a sentence of three years' imprisonment suspended after 12 months with an operational period of three years.

That sentence is intended to be the sentence on the trafficking charge only. Below sentences were imposed also on the supply charges. The supplies being elements of the trafficking, there ought not to have been further sentences imposed.

DAVIES JA: I agree.

MUIR J: I agree.

DAVIES JA: The sentences are as indicated by Justice Wilson.
