SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nguyen* [2002] QCA 478
PARTIES:	**R** **v** **NGUYEN, Phillip** (applicant)
FILE NOS:	CA No 133 of 2002 SC No 514 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2002
JUDGES:	McPherson JA, Helman and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal allowed to the extent of adding to the head sentence a recommendation that the appellant be considered eligible for post-prison community-based release after having served three years.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant pleaded guilty to trafficking in heroin and other drug-related offences – where applicant twenty-one years old when offences committed – where involvement in drug trade for personal use and to provide for living expenses – whether sentence without recommendation for post-prison community-based release was manifestly excessive CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – CO-OFFENDERS –

DISCRIMINATION BETWEEN CO-OFFENDERS – where large discrepancy between sentences of applicant and co-offender – where applicant had greater involvement in drug trafficking than co-offender – whether parity in sentences

Drugs Misuse Act 1986 (Qld), s 5

Lowe v The Queen (1984) 154 CLR 606, referred to
R v Cox (1991) 55 ACrimR 396, referred to
R v Giang [1997] QCA 371, CA No 313 of 1997, 24 September 1997, considered

COUNSEL: C L Morgan for the applicant
K M McGinness for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I agree with the reasons Helman J has given for allowing this appeal and varying the sentence by adding a recommendation for parole after the applicant has served three years of the sentence imposed.

[2] **HELMAN J:** On 15 April 2002 the applicant and his *de facto* wife Kelly Ann Roozendaal came before a judge of this court in Brisbane charged, in the case of the applicant, with three counts of offences under the *Drugs Misuse Act* 1986, and, in the case of Roozendaal, with one such offence. Each was charged on the first count with carrying on the business of unlawfully trafficking in heroin and other dangerous drugs between 1 September 2000 and 12 March 2001 at the Gold Coast, Queensland. In addition, the applicant was charged with unlawfully having possession of the dangerous drug 3,4-methylenedioxymethamphetamine, the popular name of which is 'ecstasy', and with possessing property, $18,650, obtained from the commission of an offence defined in s.5 of the *Drugs Misuse Act* knowing the property to have been so obtained. It was alleged that each of the latter two offences was committed on 12 February 2001 at Woodridge, Queensland.

[3] The applicant pleaded guilty to the offences alleged against him and Roozendaal pleaded guilty to that alleged against her. The learned judge sentenced each to imprisonment. The applicant was sent to prison for nine years for trafficking and for two years for each of the other two offences alleged against him. Roozendaal was sentenced to imprisonment for six years for trafficking, but her Honour added a recommendation that she be considered eligible for post-prison community-based release after serving two years. No such recommendation was made in the case of the applicant, who seeks leave to appeal against his sentence, asserting that it was manifestly excessive. His complaint focussed of course on the sentence for trafficking.

[4] The applicant was born on 15 March 1979 and so was twenty-one years old when the offences were committed and twenty-three when he was sentenced. Roozendaal was younger: she was born on 21 July 1981 and so was nineteen years old when she was trafficking in the drugs. He had one minor prior conviction: on

25 March 1998 he was convicted in the Southport Magistrates Court of 'receiving' and was fined $300. She had no prior convictions. The two trafficked chiefly in heroin and ecstasy, but also in other amphetamines. The evidence against them was gathered covertly by the Australian Federal Police by tape recording telephone conversations and by means of a listening device placed in their bedroom. They sold heroin to regular and to casual customers. There were hundreds of transactions over the six months in question. The sales of heroin were retail sales in small quantities, chiefly a quarter of a gram for $100. Roozendaal took an active part in the trafficking in heroin, but was not so actively involved in the trafficking in ecstasy although she knew of it and encouraged the applicant to do so. On 12 February 2001 the applicant was arrested and charged with the two possession offences, but he and Roozendaal continued to traffick in heroin after that. They were both heroin users and engaged in the drug trade partly to satisfy their own cravings but also to make money for living expenses. The applicant had a network of customers and access to sources of supply. Neither co-operated with the investigating police officers after they were arrested.

[5] Her Honour observed that Roozendaal was actively involved in the heroin trade, but that the applicant had played a more prominent part that she had and that the ecstasy trade was conducted mainly by the applicant. The heroin side of the business was at the retail or street level, whereas the trade in ecstasy was both wholesale and retail. In sentencing Roozendaal her Honour placed some emphasis on the steps that Roozendaal had made while in pre-sentence custody (which was 400 days for both applicant and Roozendaal) to overcome her addiction to drugs and so to rehabilitate herself. Her Honour mentioned that Roozendaal had no prior convictions, but described the applicant's only prior conviction as 'very minor'.

[6] There were, in my view, two points of substance in the argument Ms Morgan advanced on behalf of the applicant. The first was that insufficient weight was given to the youth of the applicant. While conceding that comparable cases reveal a sentence of imprisonment for nine years fell within the range applicable to a case like this, Ms Morgan pointed out that, with one exception, the offenders in those cases were considerably older than the applicant. Placed before us were the reasons for judgment in *R v Legradi* (CA No 469 of 1993), *R v Sebez* (CA No 100 of 1994), *R v Tho Le* (CA No 291 of 1995), *R v Giang* [1997] QCA 371, CA No 313 of 1997, 24 September 1997, *R v Watt* (CA No 344 of 1997), *R v Popovici* (CA No 350 of 1998), *R v Lam* (CA No 166 of 1999), *R v Dang* (CA No 239 of 1999) and *R v Best* (CA No 408 of 1999). Each of those offenders was sentenced for unlawful trafficking and all were in their thirties or forties, with the exception of Tho Le who was twenty-nine years old, but still therefore considerably older than the applicant, and Giang who was twenty-two years old. We had the advantage of seeing a schedule of sentences imposed in unlawful trafficking cases which was before her Honour and which appeared in the appeal book. Some of the cases in the schedule were those I have already referred to, but in addition there were *R v Scaunasu and Voros* (CA No 3168 of 1993), *R v Runcan* (1993) 70 ACrimR 222, and *R v Garlagiu* (CA No 329 of 1998). The ages of Scaunasu and Voros are not recorded, but Runcan is recorded as being forty-two years old and Garlagiu as being forty-seven years old.

[7] The range of sentences revealed in those cases was from imprisonment for seven years to imprisonment for twelve years. It is also relevant that some of those older

offenders were accorded some leniency in that recommendations for early consideration of parole were made. For instance, each of Legradi who was forty-five years old, Sebez who was thirty-one years old, and Popovici who was forty, was sentenced to imprisonment for nine years with a recommendation that he be considered for parole after three years. Best, who was in his late forties was sentenced to imprisonment for eight years with a recommendation that he be considered for parole after having served three years. Giang's sentence, however, of imprisonment for eight years with no recommendation for early consideration of parole was not thought to warrant the intervention of this court. That might suggest that an argument that the sentence imposed on the applicant was manifestly excessive would be difficult to sustain since the applicant and Giang were both in their very early twenties. There is a distinguishing feature, however, in Giang's case: he was not an addict and his motives for trafficking unlawfully were purely commercial, whereas those of the applicant were to feed his habit as well as to provide for living expenses. Notwithstanding that distinction, had it not been for another feature of the case I should have come to the conclusion that although the applicant's sentence was severe it could not be said to be manifestly excessive.

[8] The applicant's second point of substance is the obvious one arising from the discrepancy between his sentence and Roozendaal's. Not only did she get a head sentence which was two-thirds of his sentence, but she also had the benefit of a recommendation that she be considered eligible for post-prison community-based release after serving only two years. That recommendation could result in her serving less than half the time in actual custody the applicant must serve. It is a very large discrepancy even though, clearly enough, he deserved a harsher sentence than she did. His greater involvement in the trafficking in heroin and ecstasy and her subsidiary role is the obvious and most important point of distinction, while his slight seniority in age, his previous conviction compared with her previously unsullied record are of no real moment. Her Honour gave, it appears, considerable weight to Roozendaal's efforts at rehabilitation, while apparently giving little or no weight to the applicant's efforts in that direction - though it must be said that his efforts appear to have been less energetic than hers. But giving all of those matters their due weight, I conclude that the discrepancy offends the principle that there must be parity in sentencing, and so is such as to give rise to a justifiable sense of grievance in the applicant, or, to put it another way, to give the appearance that justice has not been done: see *Lowe v The Queen* (1984) 154 CLR 606 at p.610 per Gibbs C.J. I am mindful of the words of Thomas J., with whom Byrne J. agreed, in *R v Cox* (1991) 55 ACrimR 396 at p.401 that it by no means follows that an appeal court will interfere in such a case, 'especially when the consequence of reducing the higher sentence will be two inappropriately low sentences instead of one'. If, however, the applicant were to have added to his sentence a recommendation that he be considered for post-prison community-based release after serving three years of his sentence I do not believe that the undesirable result Thomas J. referred to would follow. That is because, as I have mentioned, in other trafficking cases in which the offenders were older than the applicant such a recommendation was made when a sentence of imprisonment for nine years was imposed.

[9] I should add that Mrs McGinness, for the Crown, based her argument for this court's refraining from intervention chiefly on the volume of the applicant's trafficking: though the applicant supplied the drugs only in small quantities there were very many instances of his supplying them. Roozendaal's involvement was

less than his but it remains true that she was a willing participant with him in his trafficking enterprise, so that although she was entitled to be treated more leniently than he the size of the business does not overcome the difficulty posed by the large discrepancy between the sentences.

[10] With those matters in mind and with respect to her Honour, I should grant the applicant leave to appeal against his sentence and allow his appeal - but only to the extent of adding to the head sentence imposed by her Honour a recommendation that he be considered eligible for post-prison community-based release after he has served three years of his sentence.

[11] **JONES J:** I have had the advantage of reading the reasons of Helman J in draft form. I agree with those reasons and the orders he proposes.