

SUPREME COURT OF QUEENSLAND

CITATION: *R v Seabrook* [2004] QCA 210

PARTIES: **R**
v
SEABROOK, Nicholas
(applicant/appellant)

FILE NO/S: CA No 21 of 2004
SC No 540 of 2003
SC No 6 of 2004
SC No 20 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 21 June 2004

DELIVERED AT: Brisbane

HEARING DATE: 21 June 2004

JUDGES: McPherson, Williams and Jerrard JJA
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 only of deleting the provision that the applicant be eligible for post prison community based release after 12 months, and inserting in lieu thereof an order that the sentence be suspended after serving 12 months with an operational period of four years
3. A warrant is to issue for the applicant's arrest, which warrant is to lie in the Registry for seven days

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted of trafficking in cannabis, possession of cannabis and two counts of possession of methylamphetamine – where sentenced to three and a half years imprisonment with a recommendation for release on parole after 12 months – where applicant spent time at Logan

House and completed courses and had restrictions on his liberty there – whether learned sentencing judge adequately took mitigating factors into account – whether sentence manifestly excessive

R v Haygarth [1995] QCA 403; CA No 220 of 1995, 28 July 1995, cited

R v Whyte [2003] QCA 56; CA No 429 of 2002, 20 February 2003, cited

COUNSEL: C F C Wilson for the applicant/appellant
P Rutledge for the respondent

SOLICITORS: Bell Miller for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The applicant pleaded guilty on 2 February 2004 to an ex officio indictment alleging a series of drug-related offences committed between 31 December 2001 and 1 May 2003.

The first was that of trafficking in cannabis during that period; second was possession of cannabis on 30 April 2003; and third was two counts of possession of methylamphetamine on 30 April 2003.

He was sentenced to three and a half years' imprisonment with a recommendation for release on parole after 12 months with respect to the trafficking charge, and given sentences of six months concurrent on the other charges. He was given credit for 183 days spent in presentence custody.

He was also dealt with on that occasion with respect to a number of summary offences. Nothing more need be said about them, other than that one involved the possession of a firearm on 3 March 2003.

It should also be noted that he was released on bail pending appeal, that order being made on 6 February 2004.

The material placed before the sentencing Judge established that the applicant was interviewed by police on 3 March 2003 after a search warrant had been executed which resulted in the applicant being found in possession of a firearm. No drugs were located on that occasion, but in the course of the interview the applicant admitted to trafficking between January 2002 and November 2002. Statements made by him to police on that occasion referred to sales to approximately 10 people a day.

He also referred to making a profit of between \$500 and \$1,000 per week with a weekly turnover of \$3,000 ranging up to \$6,000. It seems clear that those figures did not relate to each and every week but they do give an indication of the extent of the significant trading in cannabis.

The applicant was charged on 3 March 2003 and released on bail. It appears he returned to trafficking almost immediately. On 30 April 2003, police executed a search warrant on his residence and there a quantity of drugs and paraphernalia associated with drug trafficking were located. Police found a large clip sealed bag containing seven small clip sealed bags of cannabis. They also located another clip sealed bag containing five small clip sealed bags of cannabis and another bag containing cannabis. The total weight of

cannabis in those bags was 44.5 grams. The fact that the cannabis was largely parcelled into small clip sealed bags was clear evidence of intended use for sale.

Police also located two clip sealed bags in the refrigerator and one clip sealed bag in a drawer under the sink, each bag containing powder. On analysis, that was found to contain methylamphetamine. The total weight of the powder was 5.484 grams containing .223 gram pure methylamphetamine.

There was then another bag located containing four pink tablets. On analysis, they were found to contain methylene dioxyethylamphetamine, commonly known as MDMA. The sample weight there was 1.075 grams with pure drug content of .336 of a gram. The police also located a sheet of paper which recorded names, weights and dollar amounts.

The seriousness of the applicant's criminal conduct is established by the fact that he resumed trafficking immediately after his arrest and bail. The learned sentencing Judge was told that the then sales of cannabis were designed to support his amphetamine drug use.

The applicant is a young man born on 22 December 1981, making him aged about 21 when the offences occurred. He had a previous drug conviction in the Magistrates Court on 29 June 1999, and also had two convictions for possessing property suspected of being stolen.

No complaint was made with the head sentence of three and a half years' imprisonment. The primary submission by counsel for the applicant is that the learned sentencing Judge failed to give appropriate weight to the factors of mitigation present in this case.

It was also said that the learned sentencing Judge erred in remarking in the course of his sentence that the applicant's turnover was of the order of hundreds of thousands of dollars. It is clear from the statements made by the applicant to the police that he had made a clear profit of at least \$20,000, and on those figures it is not unrealistic to speak in terms of a total turnover in excess of \$100,000.

The remark by the learned sentencing Judge was a generalisation which may have contained an element of overstatement, but that does not, in my view, vitiate the sentence.

An attack was also made on the learned sentencing Judge's comment that, "It is notorious that many offences are motivated by the need to buy drugs." Again, I do not find that to be erroneous. The learned sentencing Judge was merely observing what is apparent to all Judges who sit in the Courts in this State imposing sentences for property-related offences. In a significant number of those cases, the reason advanced for the conduct is that it was done in order to finance a drug habit.

In this Court, counsel for the applicant submitted that the applicant's cooperation with the authorities, his age, and his proven attempts at rehabilitation to which I will refer in a moment, were such that a greater discounting should have been made from the head sentence of three and a half years.

The most significant of those considerations, in my view, is the fact that after spending 183 days in custody, for which he was given credit, the applicant was released on bail on 30 October 2003 on condition that he attend at Logan House and undertake the courses offered there by way of drug rehabilitation. He spent three months at Logan House whilst on bail. That did involve a degree of restriction of his freedom and that must be borne in mind. It is also to his credit that he satisfactorily passed their courses and those courses are of the type that ordinarily a person serving a custodial sentence would have to undertake before becoming eligible for release on parole. He was discharged from Logan House a day or two before sentence.

In my view, the head sentence imposed was clearly within range, and release on parole after 12 months would also appear to be within range. That can be established by a consideration of the decisions of this Court in *R v Haygarth*, CA No 220 of 1995; and *R v Whyte*, CA No 429 of 2002.

In my view, the learned sentencing Judge did refer to and give due weight to all relevant mitigating factors in arriving at the sentence that he imposed. But, in my view, bearing in

mind that the applicant has successfully completed the courses at Logan House and was under the restrictions on his liberty associated with that, there should be some more certainty in the sentence rather than merely recommending eligibility for parole after serving 12 months. In my view, that certainty can be introduced by ordering that the head sentence be suspended after serving 12 months with an operational period of four years.

I would, therefore, grant leave to appeal and allow the appeal to the extent only of deleting the provision that the applicant be eligible to apply for parole after 12 months, and inserting in lieu thereof an order that the sentence be suspended after serving 12 months with an operational period of four years.

As the applicant is currently on bail, it is necessary that a warrant issue for his arrest and I would so order.

McPHERSON JA: I agree.

JERRARD JA: I agree.

McPHERSON JA: The application and appeal are allowed and the sentences varied in the manner stated by Justice Williams.

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McPHERSON JA: A warrant must issue for the applicant's arrest which warrant is to lie in the Registry for seven days.