SUPREME COURT OF QUEENSLAND

CITATION:	*R v Geissa* [2004] QCA 402
PARTIES:	**R** v **GEISSA, Andrea Giordano** (applicant)
FILE NO/S:	CA No 263 of 2004 SC No 432 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	27 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2004
JUDGES:	McPherson and Davies JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal against sentence allowed only to the extent of setting aside the order that the sentence be suspended after the applicant has served 15 months and order that it be suspended after he serves nine months with an operational period of three years**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where the applicant pleaded guilty to six drug offences including supplying and possessing heroin and receiving money from the supply of heroin - where the applicant was sentenced to two and a half years imprisonment, suspended after 15 months for an operational period of three years - where the applicant seeks leave to appeal against that sentence - where it was accepted that the drugs in his possession were substantially for the applicant's own use but that he was a low level dealer in order to support his own habit - whether the learned sentencing judge made the correct allowance for the period of pre-sentence custody in determining when the

	sentence should be suspended - whether the application for leave to appeal should be granted and the appeal allowed
	R v Phillips [1993] QCA 427; CA No 191 of 1993, 25 October 1993, cited
	R v Ross [1995] QCA 134; CA No 24 of 1995, 7 April 1995, cited
	R v Williams [1994] QCA 296; CA No 156 of 1994, 16 August 1994, cited
COUNSEL:	A W Moynihan for applicant
	R G Martin for respondent
SOLICITORS:	Legal Aid Queensland for applicant
	Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The applicant pleaded guilty on 26 July this year to six offences; two of supplying the dangerous drug heroin, three of possession of heroin and one of receipt of money obtained from supplying heroin. He was sentenced on the same day to two and a half years imprisonment, suspended after 15 months for an operational period of three years. He seeks leave to appeal against that sentence.

The two counts of supply, one of the counts of possession and the count of receipt of money obtained from supply were committed on 25 October 2002; the second count of possession was committed on 6 November 2002; and the third count of possession was committed on 5 August 2003.

The applicant, who is a heroin addict, was 24 at the time of the earliest of those offences and 25 at the time of the sentence. On four previous occasions he was fined for being in possession of dangerous drugs but no conviction was recorded. He also has a much earlier offence for fraud, again

with no conviction recorded. He has not previously been sent to prison.

The offences of 25 October 2002 occurred when a covert police officer arranged to buy $100 worth of heroin from the applicant. The officer observed the applicant make a similar sale to another person. He was arrested before the sale with the police officer could take place and admitted to bail.

On 6 November 2002 police raided his room at a motel and found him sitting at a table with 10 foils of heroin. The total was 1.157 grams with a purity of about 30 per cent. He was again admitted to bail.

Then on 5 August 2003 he was found with three bags of heroin containing 3.152 grams of powder of a purity of 19 per cent.

It was accepted by the respondent before the learned sentencing judge that the heroin in the applicant's possession on each of the occasions I have just mentioned were substantially for the applicant's own use but that he was a low level dealer in order to support his own habit. At the time of the commission of the first of these offences the applicant had recently completed a period of probation of 12 months imposed for his last offence of possession. The later offences were committed, as I have already mentioned, whilst the applicant was on bail.

By the time of his sentence the applicant had spent 182 days in pre-sentence custody, largely in consequence of these offences but also in consequence of a charge of dangerous operation of his motor vehicle. This latter fact prevented the period from being declared to be time served under the sentence. However the learned sentencing judge rightly allowed for it in the sentence which he imposed.
His Honour thought that the appropriate sentence was one of three years imprisonment but reduced it to two and a half years to allow for this period in custody.

Two criticisms of the total sentence imposed by his Honour were made by Mr Moynihan for the applicant. The first was that a notional sentence of three years imprisonment was outside the appropriate range.

The second was that, although the learned sentencing judge made allowance for the period in custody in the sentence which he imposed, he did not make allowance for it when fixing the time at which the sentence was to be suspended. The result of the latter error, it was submitted, was that the applicant will be required to serve 21 months of an effective three years sentence.

Mr Martin for the respondent submits that the notional sentence of three years was within the permissible range, in reliance on *Babiker* [1995] QCA 174. In fact, he submits that in reliance on that case the sentence could have been as much as four years. Babiker was a 38 year old with an extensive

history for heroin and other drug offences. At the time of the commission of the offences in question he was serving a suspended six months sentence for drug offences.

The offences in question were four of supply of heroin and two of possession of heroin. One of the latter offences was committed whilst the applicant was on bail in respect of the others.

The sentence of three which was imposed in that case was held by this Court not to be manifestly excessive. However when comparing that case with this the following points need to be noted. First, a suspended sentence of six months imprisonment was ordered to be served concurrently with a sentence of three years. Secondly, the offences of supply in that case appear to have a more serious character than those here. On one of them the applicant approached a police officer, encouraging him to buy "rock heroin", saying that the officer could make a good profit if he were to cut it. And the heroin which was supplied by Babiker appeared to be of a much higher grade, between 40 and 50 per cent, than that supplied by the applicant here. Thirdly, the criminal history of the applicant in that case appeared to be more serious than that of the applicant here. Nevertheless I do not think that that case, or the general level of comparable sentences, shows that a notional sentence of three years in this case was manifestly excessive. See also, for example, *R v Ross* [1995] QCA 134; *R v Williams* [1994] QCA 296; and *R v Phillips* [1993] QCA 427. I would therefore not disturb it.

However I think that there is more substance in the submission that the learned sentencing judge should have made allowance for the period of pre-sentence custody in fixing the period at which the applicant's sentence should be suspended. If one were to take a notional head sentence of three years commencing six months before the imposition of the sentences imposed here, that would have required, in order to permit release at the half-way mark, that the sentence be suspended 12 months after the imposition of these sentences. His Honour's sentence will not suspend the sentence until 15 months after that date. In addition, I think that some allowance should have been made in the order for suspension for the applicant's pleas of guilty.

I would therefore grant the application and allow the appeal only to the extent of setting aside the order that the sentence be suspended after the applicant has served 15 months and order that it be suspended after he serve nine months with an operational period of three years.

McPHERSON JA: I agree.

FRYBERG J: I agree.

McPHERSON JA: The application is allowed and the sentence is varied in accordance with what has been said by Justice Davies.
