SUPREME COURT OF QUEENSLAND

CITATION:	*R v Duggan* [2004] QCA 442
PARTIES:	**R** **v** **DUGGAN, Brian John** (applicant)
FILE NO/S:	CA No 308 of 2004 SC No 292 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	18 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2004
JUDGES:	McPherson and Williams JJA and Philippides J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT – SENTENCE – where applicant sentenced to two and a half years' imprisonment suspended after 12 months with operational period of three years for aggravated possession of Schedule 1 drugs and possession of Schedule 2 drugs – where possession for personal use and sharing with associates – where applicant 50 years of age at sentencing with prior criminal history of trafficking - whether sentence manifestly excessive *Duncan v The Queen* (1983) 47 ALR 746, cited *R v Bell* [1982] Qd R 216, cited *R v Brockfield* [1993] QCA 348; CA No 229 of 1993, 21 September 1993 ,cited *R v Hogon* (1987) 30 A Crim R 399, cited *R v Law; ex parte Attorney-General* [1996] 2 Qd R 63, cited *R v Miceli* (1997) 94 A Crim R 327, cited *R v Molina* (1984) 13 A Crim R 76, cited
COUNSEL:	A J Kimmins for the applicant

R G Martin for the respondent

SOLICITORS: Jacobson Mahony Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

PHILIPPIDES J: The applicant seeks leave to appeal against sentences imposed on 6th September 2004 in relation to drug offences. The applicant was convicted on his plea to two counts of aggravating possession of a schedule 1 drug, namely cocaine and methylamphetamine, for which he was sentenced to concurrent terms of two and a half years imprisonment, suspended after 12 months for an operational period of three years. The applicant was also convicted on his plea to one count of possession of schedule 2 drugs, MDMA, cannabis and ketamine and sentenced to 12 months imprisonment, suspended after four months for an operational period of 18 months.

The drugs in question were discovered as a result of police executing a search warrant at the applicant's house on 15 August 2002. The quantities of the drugs found were 5.157 grams of cocaine in 10.625 grams of powder with a purity of 41 per cent, 1.3 grams of cannabis, 0.047 grams of MDMA, 2.087 grams of methylamphetamine in 2.664 grams of powder with a purity of 80 per cent, and traces of ketamine.

The applicant contends that the sentences imposed were manifestly excessive and it is submitted that the appropriate sentence would, in the circumstances of this case, have been one of 18 months imprisonment, wholly suspended for an operational period in the vicinity of five years, or a fine.

It is also submitted that given that the applicant has been in prison since 6 September 2004, that is for two and a half months, that a further appropriate order of this Court would be, the suspension of a period of imprisonment after the time that has already been served.

An issue at sentencing was whether there was a commercial element in the possession. The learned sentencing Judge was not satisfied that a commercial purpose had been proved. There was no evidence of scales or cutting agents and the applicant gave an explanation for the presence of clip seal bags found on the premises and said that he had been self-medicating with drugs for a back complaint. His Honour was not prepared on the evidence to go beyond a finding that the drugs were not wholly for the applicant's own use, did extend the finding to one that they were shared with associates to gain a measure of social approbation.

In imposing the sentences his Honour had regard to the applicant's age, he was 50 years of age, the fact that schedule 1 drugs were involved and the quantity of those drugs. His Honour also considered the applicant's criminal history, being convictions in 1995 for trafficking methylamphetamine, supplying cocaine, methylamphetamine and cannabis and possession of methylamphetamine and cannabis for which he was sentenced, in effect, to four years imprisonment. His Honour also took into account his plea and submissions as to the so called "crossroads" cases. In this regard, his Honour was referred to cases such as *R v Molina* (1984) 13 A

Crim R 76, *R v Hogon* (1987) 30 A Crim R 399, *R v Bell* [1982] Qd R 216, *Duncan v the Queen* (1983) 47 ALR 746.

On behalf of the applicant it was submitted that his Honour had regard to the quantity of the drugs involved as being determinative of whether a custodial sentence was to be served and that this resulted in the sentencing discretion miscarrying.

The relevant portion of his Honour sentencing remarks are as follows:

> "The thing that counts against a prisoner, in my view, is the recent conviction for trafficking and commercial possession of the same drugs as are charged today, in the main. There is also the quantity of the drugs which is significantly above in the case of the cocaine and above, in the case of the methylamphetamine, the scheduled amounts.
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> The issue of whether the prisoner should be allowed to continue in a non-custodial environment so that he can continue in a business in the building industry has been canvassed at some length. The unpalatable conclusion I think is, however, that some period must be served in custody. I think that there are grounds for thinking that it would be inappropriate for a non-custodial sentence for possession of these drugs and the quantities found to be imposed.
>
> I have considered […] the “crossroads” cases principle that Mr Kimmins has referred to but I am not persuaded that they can outweigh what I have said."

It is plainly appropriate that his Honour had regard to the quantity of the drugs involved and his Honour was entitled to consider that as a matter of significance as to sentence to be imposed, notwithstanding that the sentences proceeded on the basis that his Honour found that there was no commercial aspect proven.

It is also clear from the sentencing remarks that his Honour did not consider the issue of the quantity to be alone determinative of the question of whether a custodial sentence ought to be imposed. On the contrary, it was clearly only a matter, together with other factors, which persuaded his Honour to exercise his discretion as he did. There is therefore no substance to that submission.

Nor am I able to accept the submission made that the learned sentencing Judge placed undue weight on the applicant's prior convictions. In this regard it was emphasised on behalf of the applicant that a period of some nine years had lapsed between the commission of the prior offences and the present offences. It is said that his Honour was incorrect in referring to them as "recent". Nevertheless, it remains that the prior convictions were important matters to be considered, given that they included one of trafficking and that they largely related to the same drugs.

Two further related matters were raised on the applicant's behalf. It was submitted that the learned trial Judge erred in failing to conclude that the applicant had rehabilitated himself sufficiently since the commission of the offence, such that this was a case within the so called "crossroads" cases. There was a period of two years between the commission of the offences and the sentence and the applicant had demonstrated a significant work ethic during this period between the prior offences and the sentence.

In particular, he had shown determined efforts to advance his business in the building industry. It is also said, on the applicant's behalf, that the applicant's conduct during this period afforded the Court a unique opportunity to observe the lengths that the applicant went to rehabilitate himself.

However, his Honour's sentencing remarks, which I have quoted, demonstrate that his Honour had regard to this issue, which was urged as justifying a non custodial sentence, but was not persuaded that those considerations outweighed the considerations pointing to the appropriateness of a custodial sentence. That was a determination which was within his Honour's sentencing discretion.

Finally, it was submitted that the fact of the delay in the matter progressing to sentence such that it was "hanging over his head" was a matter that called for a substantial reduction in penalty. Reliance in this regard was placed on *R v Law ex parte Attorney-General* [1996] 2 Qd R 63, *R v Brockfield* [1993] QCA 348, *R v Miceli* (1997) 94 A Crim R 327.

The learned sentencing Judge did remark on the length of the delay of some 11 months in progressing this matter. The indictment was presented on 8 August 2003 and an early plea was entered, the matter was initially listed for sentence on 15 October 2003, but was adjourned because the issue of commerciality remained unresolved. The delay was a matter which his Honour expressly referred to as one which ought not to be held against the applicant and there is nothing to

indicate that his Honour did not have due regard to it in moderating the custodial aspect of the sentence imposed by suspending it in the manner in which his Honour did.

The applicant is to be commended for his significant efforts at rehabilitation during the period prior to sentence. However, whilst recognising the mitigating circumstances in the present case and that a more lenient sentence may also have been within the sentencing discretion, it cannot be said that the sentences imposed were manifestly excessive, or that his Honour proceeded on an incorrect application of sentencing principles.

Two single Judge decisions of *O'Connell* and *Gilbert* where non custodial sentences were imposed for possession of a schedule 1 drug, in a quantity exceeding the specified amount, were referred to before this Court. However, those cases are clearly distinguishable on their facts, particularly in respect to the situation concerning prior convictions.

In the circumstances I would refuse the application for leave to appeal against sentence.

McPHERSON JA: I agree.

WILLIAMS JA: I agree.

McPHERSON JA: The application for leave to appeal is refused.
