

SUPREME COURT OF QUEENSLAND

CITATION: *R v Jamieson* [2005] QCA 331

PARTIES: **R**
v
JAMIESON, Michael James
(applicant/appellant)

FILE NO/S: CA No 143 of 2005
SC No 559 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 September 2005

DELIVERED AT: Brisbane

HEARING DATE: 2 September 2005

JUDGES: McMurdo P, Jerrard and Keane 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
3. Set aside the sentence on each of counts 1 and 2
4. On count 1 substitute instead a sentence of three years imprisonment to run from 4 May 2005, that sentence to be suspended after the applicant has served six months of it, for an operational period of three years
5. On count 2 order that the applicant be sentenced to six months imprisonment, such term to commence on 4 May 2005, and then be released with his consent upon probation for three years, that probation order to contain the requirements specified in s 93 of the *Penalties and Sentences Act 1992 (Qld)*
6. Applicant's legal representatives to explain the matters in s 95 of that Act to the applicant in a way complying with s 95(2) thereof

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – applicant pleaded guilty

to possession of heroin with a circumstance of aggravation and possession of associated implements – concurrent sentences of five years and 12 months imprisonment imposed – recommendation for post-prison community based release after 15 months – applicant arrested in March 1998 for drug offences but not sentenced until May 2005 – delay partly explained by applicant absconding whilst on bail for drug offences – at time of arrest applicant still on parole as part of a sentence for armed robbery in 1991 – applicant had previously escaped from jail while serving armed robbery sentence and was later captured – sentencing delay partly explained by applicant’s application for a pardon in respect of the 1991 armed robbery offence after his co-accused told the Director of Public Prosecutions that the applicant was not involved in that robbery – overall effect of sentencing meant applicant would serve 13.5 years of imprisonment with a non-parole period of 10.25 years for one count of armed robbery, one count of escaping and one count of heroin possession – applicant has tested negative to drugs since 2001 and has two children – applicant also currently on remand for armed robberies allegedly committed in 1993 and 2001 – these charges not listed for trial until 2006 – whether in these particular circumstances the sentences imposed in May 2005 were manifestly excessive

Corrective Services Act 1988 (Qld) (repealed), s 190

Corrective Services Act 2000 (Qld), s 75, s 152

Penalties and Sentences Act 1992 (Qld), s 93, s 95

Psaila v Department of Corrective Services [2005] QCA 16;

Appeal No 11059 of 2004, 11 February 2005, cited

R v Convery, Hapeta & Jones, unreported, Court of Criminal Appeal, Qld, CA Nos 283, 285, and 290 of 1990, 26 April 1991, considered

R v Cutajar; ex parte A-G (Qld) [1995] QCA 570; (1995) 85 A Crim R 280

R v Nguyen & Truong [1994] QCA 389; [1995] 2 Qd R 285, considered

R v Trinh; ex parte A-G (Qld) [1996] QCA 448; CA No 350 of 1996, 19 November 1996, considered

COUNSEL: P E Smith for the applicant/appellant
M J Copley for the respondent

SOLICITORS: Compass Legal Solutions for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the orders proposed by Jerrard JA and with his reasons.

- [2] **JERRARD JA:** Michael Jamieson has applied for leave to appeal two sentences imposed on him on 4 May 2005, when he pleaded guilty to one count of possessing heroin, and one count of possessing implements associated with the use of heroin. He was sentenced to five years imprisonment on the heroin possession count, with a recommendation that he be considered eligible for post-prison community based release after he had served 15 months of that five years, and he was sentenced to a concurrent 12 month term of imprisonment on the charge of possessing implements. He contends that in the peculiar circumstances of his application, those sentences are manifestly excessive.
- [3] The appeal record shows that Mr Jamieson escaped from lawful custody on 19 September 1993, when he had served a little over one and a half years of a seven year sentence imposed on him on 19 February 1992 for an offence of armed robbery committed in 1991. He was at large as an escapee for two days short of three months, and was sentenced on 8 April 1994 to 18 months cumulative for that offence of escaping. The learned sentencing judge at that time calculated that had Mr Jamieson not escaped, his original seven year sentence would have had an end date of 19 February 1999, and he would have been eligible for parole on 19 August 1995. On that basis that learned judge calculated a new recommended parole date of 17 March 1996, taking into consideration the 18 months cumulative that that learned judge imposed as the sentence for escape.
- [4] Mr Jamieson was in fact paroled on 24 December 1996, and re-offended on that parole when he committed offences of unlawfully possessing heroin, and unlawfully possessing scales and other implements, committed on 12 March 1998. Those offences were the ones for which he was sentenced on 4 May 2005.
- [5] It does seem extraordinary that Mr Jamieson was dealt with in May 2005 for an offence for which he was arrested on 12 March 1998. The delay is only explained in part by the fact that he absconded on bail, and was not located until on or about 6 March 2001, when he was arrested and charged with two counts of robbery allegedly committed in 2001, and three counts of robbery allegedly committed in 1993, when he had been an escapee.
- [6] Mr Jamieson's parole had been cancelled on or about 25 March 1998, and the effect of that cancellation and s 190 of the *Corrective Services Act 1988 (Qld)* (repealed) was that none of the time during which he had been at large from 24 December 1996 until he was apprehended on 6 March 2001 counted as time served on his total sentence of eight and a half years. He had served about four years and seven months of that sentence when released on parole in December 1996, and accordingly had three years and 10 months of it left to serve. In fact he did serve the entirety of that time, having lost the opportunity of gaining remission of his sentence for good behaviour after 6 March 2001 by reason of that being abolished by the *Corrective Services Act 2000 (Qld)* (the "2000 Act"), in force from 1 July 2001. Because Mr Jamieson had been sentenced many years before 1 July 2001, the date the 2000 Act came into force, s 152 of that Act did not apply to him. If it had applied, his time at large until he offended on 12 March 1998 would have counted as time served. That it did not apply was settled in *Psaila v Department of Corrective Services* [2005] QCA 16. Section 75 of the 2000 Act would have excluded Mr Jamieson from any remission in any event, because during his period of imprisonment he had already been released on parole. Further, because of s 75(3), since he had been charged with an offence committed during his term of

imprisonment (the robberies committed in 1993), he could not be granted remission until after those charges were determined. Those have still not been heard, and are listed for trial in 2006.

- [7] Mr Jamieson was therefore required and obliged to serve the remainder of the 8.5 years, almost four years, on and from 6 March 2001. It is common ground that that 8.5 year sentence finally expired on 28 January 2005, with Mr Jamieson still in custody. Since then Mr Jamieson has been held on remand in respect of the charges of robbery allegedly occurring in 1993, the charges of robbery allegedly occurring in 2001, and the offences of possessing heroin and implements committed in 1998, to which he pleaded guilty and was sentenced on 4 May 2005.
- [8] The reason it has taken so long for those two drug offences to come on for hearing since March 2001 is further explained, but again only in part, by the fact that one of Mr Jamieson's co-offenders in the 1991 robbery, who had provided the evidence to be used by the prosecution against Mr Jamieson in the counts of robbery committed in 1993 – that co-offender in 1991 was Mr Jamieson's co-escapee in 1993 – has told the Director of Public Prosecutions that Mr Jamieson did not in fact commit the 1991 offence of robbery for which he was sentenced to seven years in 1992, although that co-offender has continued to allege that Mr Jamieson did participate in the 1993 robberies. The Director of Public Prosecutions has accepted that co-offender is a witness of truth regarding the 1993 offences. The fact that that co-offender gave that information to the Director of Public Prosecutions, namely that Mr Jamieson was innocent of the 1991 robbery, resulted in Mr Jamieson applying in 2004 for a pardon for the offence of robbery for which he was sentenced to seven years on 19 February 1992. It appears it was his understanding that if that pardon was successful, that would in some way negate the fact that he was on parole when he possessed heroin and implements in 1998. The logic of all that is very flawed, but it explains a portion of the seven year delay between his commission of the heroin offences and his being sentenced for them. Other matters have led to the rest of the delay. Some of that was caused by the robbery charges being listed for one combined trial, then later ordered to be tried in one trial of the 1993 charges and one separate trial of the 2001 charges; there is still to be heard an application for separate trials of each offender. Whatever the reasons, the time taken is a serious embarrassment to the criminal justice system, and is adversely affecting the sentencing process.
- [9] The circumstances of the offences of possessing heroin and implements are as follows. Mr Jamieson was detained by police officers who were conducting a mobile patrol, and those officers noticed that Mr Jamieson had puncture marks on his left arm and that his hands were shaking. A search of his vehicle located \$3,255 in cash, and a bag containing scissors, plastic freezer bags, and a set of electronic scales. The scissors and scales had white powder on them, which upon analysis was identified as heroin. Mr Jamieson, who had been detained under the *Drugs Misuse Act 1986 (Qld)* for the purposes of that search, remained in custody and was later found to have a plastic bag containing heroin concealed in his anus. There were 23.963 grams of 58 per cent purity, that is 14.020 grams of pure heroin. Mr Jamieson was 29 years old at that time, and is now the father of two children. He had a quite lengthy criminal history, having spent time in custody as a juvenile.
- [10] The circumstances of his apprehension with the heroin clearly point to that heroin being possessed for a commercial purpose. That conclusion can be drawn even

while accepting that at the time Mr Jamieson was addicted to heroin. The sentencing judge hearing this matter on 4 May 2005 was told that Mr Jamieson has since been able to wean himself off heroin whilst in prison after 6 March 2001, and that he only became addicted to it after being jailed in 1992. That fact that he has returned urine tests negative for evidence of the consumption of drugs from September 2003 until April 2005 demonstrates that, assuming that it was Mr Jamieson's urine that was analysed and not that of another prisoner, he has done very well in changing a critical circumstance of his life since being caught in possession of heroin for a commercial purpose in early 1998.

- [11] Had Mr Jamieson been sentenced in mid-2001 for the possession of that heroin and those implements, as he should have been, he would still have been obliged to serve nearly all of the four unserved years of the eight and half year sentence, and he could have expected a head sentence for possession of the heroin, if concurrent, in the order of another eight years. He was on parole, for armed robbery, after an earlier offence of escape, when he was caught with that heroin, and then he absconded on bail. Those are all circumstances making it unlikely a sentencing judge would have considered in mid-2001 that Mr Jamieson would have responded to an opportunity for positive rehabilitation of himself as a drug-dependent offender. In fact Mr Jamieson did, in prison, but that was hard to predict when he was caught in March 2001.
- [12] On this application, his counsel referred to the six year sentence imposed on the offender Convery, and the four year sentence imposed on the offender Jones, in *R v Convery, Hapeta & Jones CA* Nos 283, 285, and 290 of 1990; the six year term imposed on the offender Truong in *R v Nguyen & Truong* [1995] 2 Qd R 285; and the seven year term imposed in *R v Trinh; ex parte A-G (Qld)* [1996] QCA 448. Convery and Jones were sentenced for possession of less heroin than Mr Jamieson had, and had better personal circumstances. Truong had more heroin in his possession, but no prior convictions. Trinh was convicted of supplying more heroin, but had strong mitigating personal circumstances. Those sentences make a term of about eight years appropriate for Mr Jamieson, if sentenced when apprehended; he had no defence to the charges.
- [13] He could have expected a lesser sentence than that imposed on the offender in *R v Cutajar; ex parte A-G (Qld)* [1995] QCA 570, who had four prior convictions for the possession of heroin before being caught whilst on parole in possession with yet more of the substance, in an amount equivalent to that which Mr Jamieson possessed. Mr Cutajar was sentenced to 11 years jail. Returning to Mr Jamieson, had he been sentenced to eight years jail in mid-2001, he would by now be eligible for post-prison community based release. I do not think it just that he should serve longer in custody than would otherwise be appropriate, simply because of confused and wrong advice about the beneficial effect, on his punishment for possessing heroin in 1998, of a pardon for the 1991 robbery offence for which he was on parole when caught with that heroin. For whatever reason, he was in custody on remand on those drug charges for over four years. His robbery charges, for which separate trials will be held for the 1993 and 2001 offences, are now listed for trial in February and March 2006. That will mean he will have been five years on remand for the robbery charges. The further delays in those matters will continue to be an embarrassment, and cause more confusion and distortion of the appropriate sentences, if there are convictions.

- [14] The head sentence of five years imprisonment imposed in May 2005 is the equivalent of a nine year sentence imposed in mid-2001, with 5.25 years to be served before being eligible for any form of post-prison community based release. I think that is a harder sentence than was justified in the circumstances now known; further there is at least the possibility that Mr Jamieson, with his conviction for escaping, will not achieve an open security classification, and thus post-prison community based release, after he has served 15 months of that five year term. The overall effect of the sentence presently imposed is that he has been sentenced at different times to a total of 13.5 years, with a non-parole period of 10.25 years, for one count of armed robbery, one offence of escaping, and one offence of possessing heroin. That combination is manifestly excessive. He has been a very long time in prison now and the community is likely to gain a greater benefit from his being given a chance to live drug-free outside prison, than from his continued incarceration.
- [15] Because of his apparent success in ridding himself of a drug addiction, and because of the astounding delay which has occurred, I consider it appropriate to reduce the head sentence that was ordered on both counts, significantly reducing the sentence on count 1, the count of possessing heroin. I would consider it beneficial to Mr Jamieson to be on probation for a considerable period, and also beneficial for him to have a specified release date.
- [16] Accordingly, the orders that I would make are: (1) grant the application for leave to appeal; (2) allow the appeal; (3) to set aside the sentence on each of counts 1 and 2; (4) on count 1 substitute instead a sentence of three years imprisonment to run from 4 May 2005, that sentence to be suspended after Mr Jamieson has served six months of it, for an operational period of three years; (5) on count 2 order that he be sentenced to six months imprisonment, such term to commence on 4 May 2005, and then to be released with his consent upon probation for three years, that probation order to contain the requirements specified in s 93 of the *Penalties and Sentences Act* 1992 (Qld); and (6) that his legal representatives explain to Mr Jamieson the matters specified in s 95 of that Act in a way complying with s 95 (2) thereof.
- [17] **KEANE JA:** I agree with the reasons of Jerrard JA, and with the orders proposed by his Honour.