

SUPREME COURT OF QUEENSLAND

CITATION: *R v Luong* [2010] QCA 14

PARTIES: **R**
v
LUONG, Minh Xuan
(applicant)

FILE NO/S: CA No 267 of 2009
SC No 302 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 2 February 2010

JUDGES: Keane, Muir and Fraser JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence refused**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted on a guilty plea of unlawful possession of heroin in a quantity exceeding two grams in contravention of s 9(b) of the *Drugs Misuse Act* 1986 (Qld) – where applicant sentenced to five years and six months imprisonment – where applicant had been a heroin user for about 10 years – where applicant had prior criminal history involving possession of heroin – whether sentence manifestly excessive

Drugs Misuse Act 1986 (Qld), s 9(b)(i)

R v Morrison [1999] 1 Qd R 397; [\[1998\] QCA 162](#), cited
R v Phan [2008] 2 Qd R 485; [\[2008\] QCA 258](#), cited

COUNSEL: A Boe with P Morreau for the applicant
M Lehane for the respondent

SOLICITORS: Boe Williams for the applicant
Director of Public Prosecutions for the respondent

- [1] **KEANE JA:** On 25 September 2009 the applicant was convicted on his own plea of one count of unlawful possession of the dangerous drug heroin in a quantity exceeding two grams in contravention of s 9(b) of the *Drugs Misuse Act 1986* (Qld). He was sentenced to five years and six months imprisonment. A period of 195 days of pre-sentence custody was declared as time already served under this sentence. A parole eligibility date was fixed at 14 January 2011 (ie after serving 22 months of his sentence in actual custody taking into account time already served).
- [2] By the applicant's amended application, the applicant seeks leave to appeal against his sentence on the grounds:
- "1. The sentencing judge erred in his characterisation of the applicant's antecedents;
 2. The sentencing judge failed to adequately reduce the sentence having regard to s 13 of the *Penalties and Sentences Act 1992*;
 3. The sentencing judge failed to adequately give regard to s 9(b)(i) of the *Drugs Misuse Act 1986*; and
 4. The sentence imposed was manifestly excessive."
- [3] I will discuss the arguments agitated by the applicant in support of these grounds after first summarising the circumstance of the offending, the applicant's personal circumstances and the approach of the learned sentencing judge.

The circumstances of the offending

- [4] On 15 November 2007 police searched the applicant's car and found five packages of white crystalline powder which proved to contain heroin. There was a total of 139.465 grams of powder containing just under 19 grams of pure heroin. The applicant told police that he had the heroin "on tick" and that it was worth \$20,000. He did not reveal how, or from whom, he had obtained the heroin.
- [5] Before the learned sentencing judge it was conceded on the applicant's behalf that the applicant had possession of the heroin for commercial purposes. The learned sentencing judge accepted that the applicant intended to use some of the drug himself.

The applicant's personal circumstances

- [6] The applicant was 39 years old at the time of this offence. He was 41 years old when he was sentenced. He had been a user of heroin for about 10 years. At the time of this offence the applicant was subject to a probationary order for a drug related offence. That probation order was made on 23 January 2006. This circumstance, and indeed the applicant's criminal history generally, is a cause for some concern.
- [7] In 2001 the applicant was convicted on a charge of possessing heroin. He was fined \$1,000. In 2003 he was again convicted of possession of heroin. On this occasion he was sentenced to two weeks imprisonment to be served concurrently with a term of imprisonment for an offence of personal violence involving the discharge of a gun at a car in which he believed a person associated with his estranged wife was riding. For the offence of personal violence he was sentenced to three years imprisonment with parole eligibility after one year.

- [8] On 23 January 2006 the applicant was convicted of offences relating to the possession of drug related utensils in July 2005. He was sentenced to six months imprisonment and concurrent probation for two years. In January 2007 he was again convicted of similar drug related offences. On that occasion he was fined and his probation was continued. He was also convicted of possession of heroin for which he was fined.
- [9] After the applicant's arrest for the offence of present concern, he was released on bail in April 2008. In August 2008 he was charged with the offence of possession for which he was sentenced on 12 November 2008. He was sentenced to 56 days imprisonment. A sum of \$10,000 which was found in the boot of his car on the same occasion that he was found in possession of the heroin was forfeited to the Crown.
- [10] The applicant was taken into custody but was released on bail again in October 2008. While on bail after April 2008 the applicant was subject to weekly testing for drugs until he was sentenced. He passed those tests save for a period between July and October 2008 when traces of opiates, methylamphetamine and amphetamine were detected.
- [11] The applicant arrived in Australia as a refugee when he was 18 years old. His father died shortly afterwards and he took on the role of supporting his mother and siblings. A report by a psychologist recorded that the applicant's life took a downward turn in 1999 when his marriage ended and he became estranged from his daughter. Shortly before this, he started using heroin which led to his becoming addicted to the drug. He had been in a relationship with his new wife for about six months prior to March 2009 when he remarried. The applicant has undertaken counselling in respect of his addiction and obtained gainful employment.

The sentence hearing

- [12] It was submitted to the learned sentencing judge by the Crown that a head sentence of between five and six years imprisonment should be imposed.
- [13] It was submitted on the applicant's behalf to the learned sentencing judge that the applicant had "turned his life around". His Honour was sceptical of this submission indicating that he was not inclined to give the hearsay account in the psychologist's report the weight which he would have given to evidence directly from the applicant. His Honour accepted, however, that the applicant had ceased using heroin and that this has led to "a substantial change" in his life. It must be said here that his Honour may have been generous to the applicant in concluding that he had ceased using illicit drugs. As I have said, the test results which were put into evidence showed that the applicant was using illicit drugs at times between July and October 2008.
- [14] His Honour noted that the applicant's current employer speaks well of his hard work, honesty and responsibility.
- [15] The learned sentencing judge expressly took into account in mitigation the applicant's early plea of guilty. His Honour expressly referred to the fact that the plea of guilty was made at the committal proceedings.
- [16] His Honour said that he was obliged to take into account considerations of personal and general deterrence as well as the need for denunciation, in imposing sentence on

the applicant. His Honour made it clear in this regard that he gave little weight to the consideration that the applicant's imprisonment would have an adverse impact on the applicant's new family.

- [17] Importantly, so far as the arguments agitated in this Court are concerned, the learned sentencing judge said:

"At the time of your offending you were on probation. That magnifies the seriousness of your offending. Your criminal history shows that you have had involvement in heroin for a long time and have not managed, at least, until recently to rid yourself of that involvement.

In 2001 you were convicted on a charge of possessing it and fined \$1,000. In 2003 you were again convicted and you were sentenced to two weeks' imprisonment to be served concurrently with other imprisonment which you were then serving for offences of intentionally committing acts intended to cause grievous bodily harm, conduct involving weapon in a public place, possession of a weapon under the Weapons Act. That is unlawful possession of a weapon under the Weapons Act.

Those charges arose out of an attempt by you or out of your conduct in firing a weapon at a car containing a person who you thought was associated with your wife from whom you had become estranged about 1999. For those offences you were sentenced to imprisonment for three years with a parole recommendation after one year in April 2002.

You did not learn from that imprisonment for in January 2006 you were convicted of offences committed in July 2005 involving utensils and property for the use of drugs and failure to use care in relation to a syringe and, again, unlawful possession of a weapon. On those charges you were convicted and sentenced to six months' imprisonment and concurrent probation for two years.

It was that probation which you were on when you committed the present offences but the present offence was not the first breach of that probation order. On the 10th of January 2007 you were convicted of possession of utensils, possession of property suspected of having been acquired for the purpose of committing a drug offence, two charges, and failure to take reasonable care and precautions in respect of syringe or needle.

You were convicted and fined. The probation order was continued. On the same day you were convicted of possessing heroin and further fined. All of those fines have been paid in full.

On the 12th of November 2008 you were again convicted in the Magistrates Court of possessing heroin and sentenced to 56 days' imprisonment. On one of those occasions you were found in possession of a sum of money in excess of \$10,000 and that sum \$10,000 was forfeited to the Crown, presumably as the proceeds of drugs. You have therefore been knowingly involved in heroin on a commercial basis for a number of years."

The application to this Court

- [18] The applicant seizes upon the last sentence in this passage contending that the learned sentencing judge erred in sentencing the applicant on the footing that he had been "knowingly involved in heroin on a commercial basis for a number of years". It is said that the applicant's antecedents related solely to his personal use of heroin, not its commercial exploitation by him. But while the manner in which his Honour expressed himself was somewhat awkward, it is clear that his Honour was not purporting to sentence the applicant on the basis that he was a serial offender. Rather, his Honour was making the point that the applicant had been involved in the use of heroin for some years and that involvement included a commercial aspect.
- [19] Having regard to the quantity of heroin, the commercial nature of the applicant's offending, his mature age, and his criminal history, a sentence of imprisonment for between five and six years was well warranted, quite apart from any reference to the August 2008 offence. Even if allowance is made for the applicant's own addiction to drugs, a sentence of five and a half years imprisonment was within the range said to be proper by this Court in *R v Phan*¹ for an offence of this nature by an offender of mature age with a substantial criminal history. Significantly, in this regard, in *R v Morrison*,² a sentence of imprisonment of five years was imposed, with parole after 18 months on a drug addicted offender with a criminal history who pleaded guilty to possession of 22 grams of heroin and 0.3 grams of cocaine. The offender in *R v Morrison* had provided the names of his suppliers of drugs to the police and so was entitled to special consideration for his cooperation with the authorities. This Court upheld that sentence. Similarly, in *R v Nardozzi*,³ this Court upheld a sentence of five years imprisonment for the possession of 6.077 grams of heroin. The offender in that case was also a heroin addict.
- [20] The applicant contends that the learned sentencing judge failed to give recognition to the extent of the applicant's addiction as required by s 9(b)(i) of the *Drugs Misuse Act* which provides for a maximum sentence of 20 years imprisonment (as opposed to a maximum of 25 years imprisonment) if the offender was a "drug dependent person" when the offence was committed. It is true that express reference was not made by Counsel for the Crown or the applicant or by the learned sentencing judge to this provision of the *Drugs Misuse Act*, but the fact of the applicant's addiction at the time of his offence was common ground. It is inconceivable that the sentencing process miscarried on the basis that his Honour proceeded on the footing that the maximum penalty was 25 years imprisonment. As I have noted, the range of sentences suggested by the earlier decisions of this Court referred to above is applicable to cases where the offender was an addict at the time of his offending and is entitled to the benefit of a plea of guilty.
- [21] The applicant also contends that the learned sentencing judge did not give sufficient recognition to the applicant's rehabilitation as a factor relevant to sentence. It is clear, however, from the learned sentencing judge's observations that his Honour did recognise that the applicant had achieved some degree of rehabilitation. In truth, as I have noted his Honour was unduly generous in his view of the extent of that rehabilitation. The learned sentencing judge was obliged to take rehabilitation into account, as his Honour recognised; but the extent to which this factor should

¹ [2008] QCA 258 esp at [33].

² [1999] 1 Qd R 397.

³ [1994] QCA 259.

affect the sentence ultimately imposed on the applicant was a matter to be weighed in the exercise of his Honour's discretion against the seriousness of the offence, the circumstances of aggravation attending its commission and the applicant's troubling criminal history. I am unable to see that his Honour erred in striking the appropriate balance.

- [22] As to the applicant's complaint that he received insufficient credit for his cooperation with the authorities, it is clear that his Honour gave the applicant a substantial benefit in return for his plea of guilty by fixing parole eligibility after one-third of the sentence had been served in actual custody. If the applicant had proceeded to trial he could not have expected to be eligible for parole until he had served half of his sentence in custody. It should be emphasised here that the applicant provided no information as to the identity of his supplier or suppliers. And, so far as the value of his plea of guilty is concerned, it must be borne in mind that he was caught "red-handed". The utilitarian value of the applicant's plea of guilty must be recognised, but it must also be recognised that this value was quite modest.
- [23] On the applicant's behalf, leave was sought to rely upon further evidence contained in two affidavits. One was an affidavit by the applicant which was said to contain an explanation of the circumstances of the present offence. Objection was taken to this affidavit. The tender was rejected on the basis that, to the extent that it added nothing to the facts which were common ground at the sentencing hearing, there was no utility in this Court receiving the affidavit; and to the extent that the affidavit contained material which sought to put the circumstances of the applicant's possession of such a large quantity of heroin in a more favourable light, there was no reason why the applicant should be allowed to depart from the conduct of his case at first instance.
- [24] The second affidavit which the applicant sought to tender was an affidavit of Andrew O'Brien which exhibited correspondence and other material relevant to the sentence on 12 November 2008. This material was said to show that the applicant consented to the forfeiture of the \$10,000 on the footing that he made no claim to the money rather than as a concession that it was tainted by association with drug dealing. In my respectful opinion, no good reason has been shown as to why the applicant should be allowed to supplement the case he was content to make below. Even if it be accepted that, as the applicant contends, the \$10,000 found in the boot of his car wrapped in newspaper was not connected with the heroin found in his possession, the undisputed circumstances of the offence for which the applicant was being sentenced meant that a sentence of imprisonment in the range between five and six years was proper.

Conclusion and orders

- [25] The sentence was not manifestly excessive. Nor was the sentence affected by any specific error on the part of the learned sentencing judge.
- [26] The application for leave to appeal against sentence should be refused.
- [27] **MUIR JA:** I agree with the reasons and proposed order of Keane JA.
- [28] **FRASER JA:** I agree with the reasons for judgment of Keane JA and the order proposed by his Honour.