SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chandler* [2010] QCA 21
PARTIES:	**R** **v** **CHANDLER, Phillip John** (applicant)
FILE NO/S:	CA No 257 of 2009 SC No 1368 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2010
JUDGES:	Chief Justice and Keane JA and Douglas J 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 importing a commercial quantity of a border controlled precursor of a controlled drug with the intention that it be used to manufacture a controlled drug in contravention of s 307.11 of the *Criminal Code* 1995 (Cth) – where applicant collected three parcels containing approximately three kilograms of pseudoephedrine in total – where applicant pleaded guilty on an ex officio indictment – where applicant had a criminal history including convictions for minor drug offences – whether sentence manifestly excessive *Criminal Code* 1995 (Cth), s 307.11 *R v Jimson* [2009] QCA 183, cited *R v McAway* [2008] QCA 401, applied *R v Ruha, Ruha & Harris; ex parte Cth DPP*, [2010] QCA 10, applied *R v Tran* (2007) 172 A Crim R 436; [2007] QCA 221, cited *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: P E Smith for the applicant
G R Rice SC for the respondent

SOLICITORS: Buckland Criminal Lawyers for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree that the application should be refused for those reasons.

[2] **KEANE JA:** On 28 September 2009 the applicant pleaded guilty to one count of importing a commercial quantity of a border controlled precursor of a controlled drug with the intention that it be used to manufacture a controlled drug in contravention of s 307.11 of the *Criminal Code* 1995 (Cth). He was sentenced to five years imprisonment with a non-parole period of three years. It was declared that 187 days of pre-sentence custody was time served under the sentence.

[3] The applicant seeks leave to appeal against his sentence on the general ground that it was manifestly excessive. More particularly, it is said that an examination of comparable sentences shows that a head sentence of four years imprisonment with release after 33 per cent to 50 per cent was the proper sentence.

Circumstances of the offence

[4] In October 2007 two parcels from Thailand containing pseudoephedrine addressed to a post office box at Nambour operated by the applicant were intercepted by customs officers in Sydney. The parcels were reconstituted with white powder and were forwarded (after the insertion of a secret listening device) to the applicant's post office box in Nambour where they were collected by the applicant using an assumed name.

[5] Tape recorded conversations involving the applicant and his supplier in Thailand showed that he was aware that the parcels contained pseudoephedrine. He also made enquiries as to when more would be sent. Further, the conversation included the applicant referring to a third parcel which he said was either late or lost. The third parcel was received at the applicant's post office box on 15 October 2007. This parcel contained 942.4 grams of pure pseudoephedrine.

[6] The total pure weight of pseudoephedrine in the three parcels was between 2,799 grams and 2,988 grams and remnants of methylamphetamine. The applicant was found to have a laboratory adapted to the manufacture of methylamphetamine. It could have been used to produce 2 to 2.2 kilograms of pure methylamphetamine with a retail street value in its pure form of between $600,000 and $1.6 million.

[7] The applicant declined to be interviewed when he was arrested.

[8] The applicant pleaded guilty to the charge on an ex officio indictment. When he had served over six months in pre-sentence custody, he was allowed out on bail for 18 months on compassionate grounds. He was obliged to return to custody on being sentenced.

[9] The maximum penalty for the offence of importing a commercial quantity of pseudoephedrine is 25 years imprisonment with or without a fine. It is to be noted that this penalty is the same as that available under s 307.2 of the *Criminal Code* for

the offence of importing a marketable quantity of a border controlled drug. Section 314.6 of the *Criminal Code* provides that a "commercial quantity" of pseudoephedrine for the purposes of s 307.11 of the *Criminal Code* (Cth) is 1,200 grams.

The applicant's personal circumstances

[10] The applicant was 33 years old at the time of his offending and 35 years old at sentence. He has a criminal history which includes convictions for minor drug offences.

[11] The circumstances of the applicant's upbringing were unfortunate. His father died when he was five years old and his mother remarried when he was eight. Because of conflict with his step-father, he left home when he was 14 years old.

[12] The applicant lived on the streets for a while. He worked as a builder's labourer and fruit picker before starting his own business as a fisherman in 2001. Unfortunately, that business failed. When he was sentenced he was working on a farm owned by his fiancée's mother.

[13] A number of references in which people spoke well of the applicant were tendered to the court.

The sentence

[14] The learned sentencing judge noted that the potential damage to the Australian community by virtue of the applicant's offending was "very significant". Deterrence was an important consideration in sentencing the applicant.

[15] The learned sentencing judge identified the applicant's early plea of guilty as the significant point in mitigation of sentence.

The application

[16] In the course of argument below, there was discussion between the applicant's counsel and the learned sentencing judge as to whether or not a non-parole period of 60 to 66 per cent of the head sentence was to be regarded as "the norm" which should not be departed from save for good reason. The learned sentencing judge did not discuss this issue in his sentencing remarks. As is apparent, however, the non-parole period fixed by his Honour was 60 per cent of the head sentence.

[17] The discussion which occurred below arose from observations in this Court in *R v CAK & CAL; ex parte Cth DPP* as to the need for Queensland judges sentencing offenders for offences against Commonwealth legislation to have regard to the decisions of courts of the other States and Territories in similar cases. In relation to the approach to be adopted in respect of the non-parole period associated with such sentences, Atkinson J (Muir JA and Lyons J agreeing) said that:[1]

> "The norm for non-parole periods and periods required to be served before a recognizance release order for Commonwealth offences is generally considered to be after the offender has served 60 to 66 per cent of the head sentence … The precise figure may be outside this range as it is a matter of judicial discretion and is not necessarily capable of precise mathematical calculation … but that is the usual percentage of the sentence. A sentence that was well outside that range would have to have most unusual factors to justify it ..."

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1 [2009] QCA 23 at [18].

[18] In *R v Ruha, Ruha & Harris; ex parte Cth DPP*,[2] this Court reviewed extensively the authorities before and after *R v CAK & CAL* relating to the statutory sentencing scheme applicable to Commonwealth offences under the *Crimes Act* 1914 (Cth). At the conclusion of that examination, this Court summarised the position in the following terms:[3]

> "… Sentencing judges should take into account decisions which are sufficiently like the subject case to shed light on the proper sentence. That includes comparable decisions both in Queensland and in the other States and the Territories which shed light upon the proper orders, although sentencing judges should also take into account that both the head sentence and order for early release in such cases might have been influenced by inconsistent local sentencing practices which must be put to one side in sentencing for Commonwealth offences (It is not necessary in these appeals to consider the considerable complexities which may be thrown up in cases where it is necessary to impose sentences both for State and Commonwealth offences).
>
> In the end, the proportion which the period to be served in prison bears to the whole term is not itself a separate and distinct object of any part of the sentencing exercise. Rather, it is the result of the sentencing judge's discretionary determination of both the appropriate sentence of imprisonment and the appropriate terms of the recognizance release order after taking into account all of the circumstances of the offence, rather than by applying or making adjustments to any rule of thumb."

[19] The underlying value of equality under the law is best served by reference to the guidance afforded by authoritative sentences of this Court or of the Courts of other States and Territories which concern comparable cases.[4] In this way a sentencing judge may seek to achieve reasonable consistency in the overall sentence. In the light of the clarification afforded by the decision in *R v Ruha, Ruha & Harris; ex parte Cth DPP*, it can now be said that a sentencing judge should take into account comparable decisions of this State and of the other States and Territories bearing in mind that a non-parole period (which may reflect the influence of local sentencing practices influenced by local corrective services regimes) is an integral aspect of the sentence. Consequently, the issue for this Court in this case is whether the sentence which was imposed by the learned sentencing judge is manifestly excessive bearing in mind both the severity of the head sentence and the length of the non-parole period.

[20] There are no authoritative decisions on comparable cases in respect of the precise offence of importing a commercial quantity of a border controlled precursor of a controlled drug with the intention to manufacture a controlled drug. On behalf of the applicant, reference was made to *R v Ngo*.[5] In that case the offender was a courier of 21.4 kilograms of pseudoephedrine: he was sentenced to eight years imprisonment with a non-parole period of five years. The offender had a relevant criminal history. While it is true to say, as the applicant does, that the quantity of

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2 [2010] QCA 10.

3 [2010] QCA 10 at [56] – [57] (footnote in original).

4 *Wong v The Queen* (2001) 207 CLR 584 at 591; *R v Ruha, Ruha & Harris; ex parte Cth DPP* [2010] QCA 10 at [49].

5 Unreported, District Court of New South Wales, 19 September 2008.

pseudoephedrine involved was seven times greater than was imported by the applicant, the distinguishing feature is that the applicant acted as a principal in relation to the importation.

[21] Similarly, in relation to the case of *R v Ghani*,[6] a sentence of three years imprisonment with a non-parole period of one year was imposed on a courier who imported 1.62 kilograms of pseudoephedrine. The applicant in this case was a principal actor in the importation of raw materials for his own manufacturing operation. The applicant's criminality was far greater than that of the offender in *R v Ghani*.

[22] The applicant has also referred to *R v Assad*.[7] In that case the offender was sentenced to 18 months imprisonment with a non-parole period of 10 months in respect of 6.8 kilograms of pseudoephedrine. But that offender was convicted of the offence created by s 308.2(1) of the *Criminal Code* which attracts a maximum penalty of only two years imprisonment.

[23] The applicant also relies upon *R v Petras*[8] and *R v Seriban*.[9] The offenders in these cases imported 10 kilograms of pseudoephedrine. Petras received a sentence of 12 years imprisonment with a non-parole period of seven years. Servian, after a trial, received a sentence of 12 years and three months imprisonment with a non-parole period of seven years and 10 months. The applicant also referred to *R v Barry*[10] in which the offender, who was also involved in this importation, was sentenced to seven years imprisonment with a non-parole period of three years and six months. To the extent that the applicant seeks to argue that the sentences imposed in these cases somehow imply that the sentence imposed in this case in respect of a substantially smaller importation is excessive, that approach must be rejected. The idea that a sentencing judge is required to engage in the process of mathematical calibration which is implicit in this argument has consistently been rejected.[11]

[24] Of more assistance in the present case are the decisions of this Court in *R v Tran*[12] and *R v Jimson*.[13] In *R v Tran* a courier who imported 1,473 grams of heroin, who entered a plea of guilty to an ex officio indictment and who had no prior offences, was sentenced by this Court to 10 years imprisonment with a non-parole period of five years. In *R v Jimson* a courier who imported 1,686 grams of cocaine and made an early plea of guilty was sentenced to eight years imprisonment with a non-parole period of four years and six months. These decisions were concerned with the importation of drugs rather than their precursors, but the fact that the legislature has prescribed a maximum penalty of 25 years imprisonment as opposed to life imprisonment for the importation of drugs reflects the view (which is hardly surprising) that the level of criminality involved in the case of the importation of precursors with the intention of using them to make drugs is less serious, but not greatly less serious, than the importation of drugs. In the light of these decisions, it is, I think, impossible to maintain the argument that the sentence imposed in this case was excessive.

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6 Unreported, Mullins J, Supreme Court of Queensland, 13 December 2007.
7 Unreported, District Court of New South Wales, 26 March 2009.
8 Unreported, Angel ACJ, Supreme Court of the Northern Territory, 30 January 2009.
9 Unreported, Martin CJ, Supreme Court of the Northern Territory, 16 March 2009.
10 Unreported, Angel J, Supreme Court of the Northern Territory, 12 December 2008.
11 Cf *R v Dwyer* [2008] QCA 117.
12 [2007] QCA 221.
13 [2009] QCA 183.

[25] The considerations of general deterrence reflected in the maximum penalty of 25 years imprisonment have a strong claim on the sentencing discretion. That claim is so strong that it is not possible to say that the head sentence, considered by itself for a moment, was other than moderate. The quantity of pseudoephedrine imported by the applicant was in excess of twice the amount which is apt to attract a maximum sentence of 25 years imprisonment. Importantly, the applicant's motivation was purely commercial. In these circumstances, it is clear that condign punishment was called for. As McMurdo P said in *R v McAway*:[14]

> "Those engaging or contemplating engaging in significant trafficking in dangerous drugs … for commercial gain must understand that they are likely to be caught and when they are, any short-term gains made by them will be far outweighed by the penalties imposed by the courts."

[26] So far as the fixing of the non-parole period as an aspect of the total sentence is concerned, in *R v Ruha, Ruha & Harris; ex parte Cth DPP*, this Court said:[15]

> "… provisions for early release confer a benefit upon the offender but such provisions are made in the interests of the community; the non-parole period is the minimum period of imprisonment that justice requires the offender to serve; it mitigates the offender's punishment in favour of rehabilitation through conditional freedom after imprisonment for the minimum period; and relevant factors to be taken into account in determining the length of the non-parole period include the length of the head sentence and its position in the permissible range, the seriousness of the offence and the prospects of rehabilitation, and the need to ensure that the sentence reflects the criminality involved and does not lose the important significant effect of general deterrence.
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> Accordingly, and because the relevant factors and the relative differences in the weight to be afforded to each factor in the different aspects of the overall sentencing process may differ according to infinitely variable circumstances, there can be no 'mechanistic or formulaic' (See *R v Harkness* [2001] VSCA 87 per Callaway JA, quoting from his Honour's judgment in *R v Pope* (2000) 112 A Crim R 588 at [28]) approach which requires sentencing judges to ensure that the proportion which the pre-release period bears to the sentence of imprisonment must or must usually fall within a range which is substantially narrower than the whole period of the imprisonment, which is the range the statute expressly contemplates for recognizance release orders. The proportions commonly encountered in the decided cases should themselves be the results of application of conventional sentencing principles to the particular circumstances of each case …"

[27] The applicant is a mature man. His crime was committed for profit. He is not an addict. The sentence imposed on the applicant obliges him to spend a total of three years in custody before he becomes eligible for parole. In the light of the decisions in *R v Tran* and *R v Jimson*, to which reference has been made, it is clear that a

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14 [2008] QCA 401 at [25].

15 [2010] QCA 10 [46] – [47] (citation footnoted in original).

sentence involving a non-parole period of three years is not excessive bearing in mind the high level of criminality which falls to be punished. Especially is this so when the offender's mature age suggests that a shorter period of actual incarceration is unlikely to facilitate a more effective rehabilitation of the applicant and there is no evidence to the contrary.

Conclusion and order

[28] In my respectful opinion, the sentence imposed on the applicant was not manifestly excessive.

[29] The application for leave to appeal against sentence should be refused.

[30] **DOUGLAS J:** I agree with the reasons and the order proposed by Keane JA.