

SUPREME COURT OF QUEENSLAND

CITATION: *R v Ungvari* [2010] QCA 134

PARTIES: **R**
v
UNGVARI, Szabolcs
(applicant)

FILE NO/S: CA No 7 of 2010
SC No 378 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 4 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2010

JUDGES: McMurdo P, Muir and White JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Leave to appeal is granted.**
2. Appeal allowed to the extent of varying the parole eligibility date from 1 November 2012 to 26 April 2012.
3. Direct that the primary court order sheet be amended to change the starting date of the applicant's pre-sentence custody from 25 August 2008 to 24 August 2008.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE - where applicant pleaded guilty to one count of trafficking in methylamphetamine, eight counts of supply, two counts of possession, two counts of assaulting a police officer and twelve summary offences – where applicant's effective total sentence was eight years with eligibility for parole after three years and two months – whether totality principle should have dictated a lower sentence – whether recommendation for parole eligibility after three years and two months adequately reflected guilty plea – whether sentence manifestly excessive

Drugs Misuse Act 1986 (Qld), Part 2
Explosives Act 1999 (Qld)
Penalties and Sentences Act 1992 (Qld), s 4, s 13

R v Barton [2006] QCA 367, considered
R v Bellino (1999) 105 A Crim R 137; [1999] QCA 106,
 considered
R v Coleman [2006] QCA 442, considered
R v Corrigan [1994] 2 Qd R 415; [1993] QCA 417, cited
R v Ikin [2007] QCA 224, considered
R v McQuire & Porter (No 2) (2000) 110 A Crim R 348;
 [2000] QCA 40, followed
R v Taylor [2006] QCA 459, considered

COUNSEL: P E Smith for the applicant
 M B Lehane for the respondent

SOLICITORS: A W Bale & Son Solicitors for the applicant
 Director of Public Prosecutions (Queensland) for the
 respondent

- [1] **McMURDO P:** The application for leave to appeal against sentence should be granted and the appeal allowed to the extent of varying the parole eligibility date from 1 November 2012 to 26 April 2012. I agree with White JA's reasons and proposed orders.
- [2] **MUIR JA:** I agree with the reasons of White JA and with her proposed orders.
- [3] **WHITE JA:** The applicant has applied for leave to appeal against a sentence of eight years imprisonment with a parole eligibility date after serving three years and two months.
- [4] On 15 December 2009 the applicant pleaded guilty to one count of unlawfully trafficking in a dangerous drug between 28 January 2008 and 24 April 2008 at Brisbane, eight counts of supply of a dangerous drug, and one count of possession of a dangerous drug. In each case the dangerous drug was methylamphetamine.
- [5] The applicant also pleaded guilty on ex officio indictment to two counts of serious assault on police officers and one count of possession of methylamphetamine. The assaults occurred on 21 February 2008 and the possession on 13 May 2009.
- [6] The applicant was jointly charged with his father in respect of one of the counts of supply on the first indictment. The father also pleaded guilty to that count and two other counts of supply. The primary Judge adjourned the sentence to enable certain summary charges to be before the court.
- [7] On 18 December 2009 the applicant pleaded guilty to one charge of unlawful possession of cannabis sativa, one charge of possession of a category M9 weapon, one charge of possession of an electronic grinder reasonably suspected of having been used in connection with the commission of an offence defined in Part 2 of the *Drugs Misuse Act* 1986, one charge of possession of a mobile phone reasonably suspected of being tainted property, one charge of possession of a pipe used in connection with the smoking of a dangerous drug, one charge of possessing bullets without authority under the *Explosives Act* 1999 and one charge of failure to store small arms ammunition (bullets) appropriately. All of those offences occurred on 12 December 2006. He also pleaded guilty to one charge of possession of a sum of

money reasonably suspected of having been acquired for the purpose of committing an offence defined in Part 2 of the *Drugs Misuse Act* and one charge of possessing a glass water pipe and a set of weighing scales. Each of those offences occurred on 31 October 2007. He pleaded guilty to two charges of obstructing a police officer on 21 February 2008 (the same date as the serious assaults on the ex officio indictment) and one charge of possessing a sum of money reasonably suspected of being the proceeds of a crime on the same day.

- [8] The primary Judge imposed a sentence of seven and a half years imprisonment for the trafficking offence. He fixed the applicant's parole eligibility date as 1 November 2012 and declared 113 days as time already served, made up of the period of 110 days between 24 August 2008 and 12 December 2008 and three days from 15 December 2009 until 18 December 2009. His Honour did not impose penalties for the eight supplies of methylamphetamine as they constituted the evidence of trafficking. He did not impose a penalty for the unlawful possession of methylamphetamine on 21 February 2008. He imposed sentences of 18 months imprisonment for the two serious assaults on police to be served concurrently. His Honour imposed a cumulative sentence of six months for the 13 May 2009 unlawful possession of methylamphetamine. The applicant was convicted but not further punished with respect to all summary offences. The net result was one of eight years imprisonment with a recommendation for parole on 1 November 2012 which, when the 113 days of pre-sentence custody is included, is very close to parole eligibility after serving three years and two months.
- [9] When sentencing, the primary Judge stated that the applicant was in custody from 24 August 2008 until 12 December 2008. The endorsement on the court order records the dates as between 25 August 2008 and 12 December 2008. This administrative error should be corrected to reflect the correct date, that is, 24 August 2008.
- [10] The applicant contends that the sentence is manifestly excessive in all the circumstances including his plea of guilty. In his written outline Mr Smith, for the applicant, contended that the conduct which gave rise to a separate sentence in the Supreme Court on 24 April 2008, and the trafficking and the drug possession charges before the primary Judge on 15 and 18 December 2009 were all part of the same conduct and the totality principle should have dictated a lower sentence. He contended for a range of seven to seven and a half years as a head sentence, with a parole eligibility date after two years and two months. However, in making his oral submissions, Mr Smith focussed particularly upon the non-parole period as making the sentence excessive, in light of the guilty plea.
- [11] He submitted that the two months served in prison after the applicant's parole was suspended ought to have been taken into account. That incarceration was as a consequence of breaching his parole conditions granted in respect of other offences, albeit drug offences and probably in the same period of unlawful conduct.
- [12] The applicant was born on 23 March 1980 and was thus aged 29 years at the time of sentence and aged 27 and 29 at the time of the offences. He has a significant criminal history recorded as commencing in 1997. It includes some summary drug related offences which reflect his own drug dependency from about the age of 18/19 years and an assault on a police officer in 2004.

- [13] On 1 June 2006 the applicant was convicted in the Holland Park Magistrates Court of fraud and drug offences and was sentenced to a term of imprisonment of six months and two years probation. He was also dealt with for weapons offences with a fine on that date.
- [14] On 24 April 2008 he was convicted in the Supreme Court of possessing a Schedule 1 dangerous drug in excess of the Schedule 4 and of possessing a Schedule 2 drug. Both offences occurred on 12 December 2006, the same date as some of the summary offences for which he pleaded guilty in the proceedings the subject of this appeal. He was convicted and sentenced to a term of imprisonment of 18 months with a fixed parole release date of 24 August 2008. On 23 February 2007 the applicant had been re-sentenced for breach of a probation order and ordered to be subject to two years probation. He was, accordingly, subject to that probation order when all but the last of the indictable offences, that is the possession of methylamphetamine on 13 May 2009, occurred. When he committed the 13 May offence, he was on parole with respect to the offences dealt with on 24 April 2008.
- [15] The applicant was held on remand after 24 August 2008 (his parole release date) until he was granted bail in relation to these offences and was released on parole on 12 December 2008. On 15 May 2009 the applicant's parole was suspended (for the 13 May offending) and he was returned to custody until released again on parole on 10 July 2009.
- [16] The sentence proceeded by way of an agreed schedule of facts. The applicant was the target of a covert police operation in respect of his trafficking in methylamphetamine. A covert police officer was used during the operation for contact with the applicant. There are no charges of supply to any other person. The total amount of money paid by the covert police operative to the applicant was \$18,700. The total amount of pure methylamphetamine was 8.581 grams. The last supply charge in respect of the trafficking was on 2 April 2008. He was sentenced to a term of imprisonment on 24 April 2008 in the Supreme Court, as mentioned, in respect of other drug offences committed on 12 December 2006.
- [17] On 21 February 2008 at approximately 6.30pm, two police officers driving in an unmarked vehicle saw the applicant walking along the road with a companion. They stopped him and asked him what he had in his bag. In response, the applicant pulled out a large wad of money from the bag and told the police that they "weren't getting his money". The police advised him that he was being detained for a drug search and he tried to run off. One of the police officers caught him and a violent struggle ensued, during which he was twice sprayed with OC spray. The applicant grabbed one police officer by the throat and punched him three times to the face. The other police officer sustained a broken little finger and bruised ribs. Back-up police arrived and he was eventually restrained. During the struggle, silver duct tape containing 12 small clip seal bags of white powder weighing approximately 18.7 grams fell from his clothing. This powder contained 0.957 of a gram of pure methylamphetamine (8.512 gross weight). The amount of cash on the applicant was \$3,950 and, after a further search, \$2,100 was found in a paper bag. These offences were the subject of the ex officio indictment and the summary charges for that date.
- [18] In the afternoon of 13 May 2009 police arrested the applicant in relation to another matter. During a search the police located two tissues wrapped in rubber bands in

his underwear, which he admitted contained methylamphetamine. Inside the tissues, police located four clip seal plastic bags containing a brown crystal substance. Three of the bags contained approximately three grams of crystal and the fourth contained 0.373 of a gram. Analysis showed the total weight to be 10.070 grams with a pure weight of methylamphetamine of 0.497 grams. The applicant was on parole in respect of the 18 month term of imprisonment imposed in the Supreme Court on 24 April 2008 at the time of this offence.

- [19] The applicant declined to be interviewed in relation to the trafficking matters while he was in custody. At the committal proceedings on 11 December 2008, several police officers were cross-examined. The cross-examination occurred because the recordings of conversations between the covert police officer and the applicant, which formed part of the evidence on the supply counts, had not been provided to the defence prior to the committal hearing. The matter was listed for trial but after discussions between defence and the prosecution, an indication of a plea was given. The prosecutor conceded below that the committal hearing was, essentially, for the very limited forensic purpose of ascertaining the degree of commerciality involved in the transaction. The notification of an intention to plead guilty was several weeks before the trial.
- [20] The prosecutor conceded that while the applicant appeared to have a ready supply of drugs, the low-level purity suggested that he was a wholesaler at the low end of the scale and that the trafficking period was short, being slightly under four months. The prosecutor submitted for a term of imprisonment in the range of seven to eight years with a cumulative sentence for the ex officio indictment offences because although the possession count in May 2009 was for a small amount of methylamphetamine, the applicant was on bail at the time of the offence for other offences relating to methylamphetamine. The prosecutor also noted the aggravating circumstance of the vicious assaults on 21 February 2008 on police officers acting in the execution of their duty. His Honour was referred to *R v Ikin*¹ and *R v Barton*.² The prosecutor sought a parole eligibility date at about the one-third mark to reflect the plea of guilty.
- [21] Defence counsel below told the court that the applicant had come to Australia as a nine year old boy with his family from Romania. After completing his secondary education, he commenced studying for a Diploma of Business Management but was involved in a car accident in which his girlfriend died. He was charged with dangerous operation of a motor vehicle causing death.³ He himself suffered significant injuries, breaking his femur and pelvis. At the time, he was approaching 19 years and turned to drugs to cope with his emotional and physical difficulties. Notwithstanding those injuries, he was employed by his uncle between 2000 and 2007 to work as a painter. He has a daughter who was, at the time of sentence, aged four and a half.
- [22] When sentencing the applicant, the primary Judge noted that the applicant only stopped dealing in drugs on 24 April 2008 because he was sentenced to a term of imprisonment and, despite that, he arranged for his father to dispose of the unsold supplies of drugs whilst he was in prison. His Honour made extensive reference to the appalling effects of methylamphetamine and noted that the applicant had a long

¹ [2007] QCA 224.

² [2006] QCA 367.

³ He was fined \$2,000, and disqualified from driving for four years with no conviction recorded.

criminal history describing it as one of “violence, fraud, drug offences, breach of a fine option order, breach of bail conditions and breach of probation order ... a deplorable criminal history”.⁴ His Honour noted the offending while on bail and parole, and the applicant’s failure to participate in a police interview. While his Honour recognised the saving in assembling witnesses for a trial, he was not prepared to describe the plea as early and he noted that there was otherwise nothing to indicate a willingness to co-operate in the administration of justice. He described the plea as “some mitigating conduct” which would “be reflected in a parole eligibility date sooner than would otherwise have been the case”.⁵

- [23] In order to evaluate the submission that the sentence imposed was, overall, manifestly excessive, the comparable sentences advanced below and on this application need to be considered. In *Barton*,⁶ the offender pleaded guilty to one count of trafficking in methylamphetamine, seven counts of supply, one count of possessing a precursor drug and three summary offences. She was 24 years old with a minor criminal history. She sold methylamphetamine to an undercover police officer over a two month period on seven occasions. Her previous criminal history involved possession of utensils and failure to dispose of a needle and syringe and breach of a fine option order. She supplied 118.473 grams of powder containing 26.608 grams of pure methylamphetamine with an average purity of 22 per cent for \$14,700. She was sentenced to a term of imprisonment of seven years with a recommendation for release on parole after serving two years and three months. She had a long-standing drug problem from about the age of 16 but after the recent birth of her child, had made successful efforts at rehabilitation. Pathology reports demonstrated that she was drug free over a fairly lengthy period. The sentencing judge did not accept that she was trafficking in amphetamine solely to support her drug habit. Two of the counts had been committed after she had been charged with the summary offences. The head sentence of seven years was considered by the President, with whom Jerrard JA agreed (Mullins J dissenting), to be at the high end of the range but one that appropriately reflected the serious aspects of that applicant’s trafficking. Her Honour concluded that while the recommendation for parole eligibility after two years and three months (about one-third of the head sentence) adequately reflected many of the significant mitigating features including the plea of guilty, it did not adequately recognise the applicant’s “impressive and apparently successful efforts at rehabilitation since the birth of her baby daughter”.⁷ A parole eligibility date was recommended after serving 18 months of the sentence.
- [24] In *Taylor*,⁸ the applicant pleaded guilty to trafficking in cocaine, methylamphetamine, MDMA and MDA, arising from nine counts of supplying to an undercover police officer over approximately a four month period. There were two further supplies outside the trafficking period. He was paid a total of \$38,500 by the covert police operative. When police raided his residence, he was found to be in possession of some 49 tablets. He sold six ounces of cocaine in total to the undercover police officer, as well as MDA and MDMA tablets. Taylor had been able to obtain drugs at short notice and had sourced the drugs not only in Brisbane, but also admitted flying to Sydney to buy cocaine. He was sentenced to seven years

⁴ RB 53.

⁵ RB 56.

⁶ [2006] QCA 367.

⁷ Ibid at [15].

⁸ [2006] QCA 459.

and four months imprisonment on the trafficking count. He contended that the sentence was manifestly excessive because it was neither suspended nor was he given a parole eligibility release date at some point earlier than the statutory half-way mark. After he was arrested and granted bail, he made considerable attempts to rehabilitate himself and obtained employment. This Court concluded that insufficient weight had been given to his rehabilitation and fixed a parole eligibility date after serving two years and six months, that is, after serving one-third of the sentence.

[25] In *Coleman*,⁹ the applicant pleaded guilty to trafficking in methylamphetamine over a four and a half month period in 2005. He was sentenced to imprisonment for four years cumulative on an 18 months term of imprisonment imposed in the District Court for failing to provide necessities to his children. The sentencing judge recommended that he be eligible for parole effectively 13 months after commencing the four year term. He admitted that he distributed the drug in lots of up to 3.5 grams to between 15 to 20 people per day in the Mt Isa area. His profit was approximately \$1,500 per ounce and estimated conservatively at \$143,000. The sentence for failing to provide the necessities of life to his children had been wholly suspended when imposed, but a few months later he was sentenced for offences, including drug offences. He was sentenced to nine months imprisonment for these drug offences. As these offences breached the terms of the suspended sentence, he was subsequently ordered to serve the full term of the suspended sentence. He was said to be a drug addicted person who engaged in the distribution of drugs to fund his addiction. He had an extensive criminal history concerning drug matters and crimes of violence. He was described as a major supplier of methylamphetamine in the Mt Isa area. He pleaded guilty on ex officio indictment and co-operated with police about the extent of his drug dealing. The sentencing judge also took into account considerations of totality when setting the parole eligibility date. This Court concluded that the sentence was in no way excessive.

[26] The applicant in *Ikin*¹⁰ complained that his sentence of eight years imprisonment with a non-parole period of two years and eight months was manifestly excessive for the offence of trafficking in methylamphetamine over a period of some 18 months. He was in possession of 190 grams of powder comprising 22.659 grams of pure methylamphetamine. He told police that he had about 12 regular clients amongst 50 clients and that he obtained a profit of approximately \$7,000 over the trafficking period. He intended to use those funds to finance his next purchase and was in the business to “make some money”. He was a user but not an addict. The applicant’s co-operation with police led to the arrest and prosecution of about eight other persons. At the time of his arrest he was the subject of an intensive correction order in relation to drug charges. He was aged 31 and had a lengthy criminal history including, crimes of violence as well as other drug offences and an offence of dishonesty. He had resolved his drug use by the time of sentence and had obtained gainful employment. His application for leave to appeal against sentence, on the basis that it failed to sufficiently reflect his co-operation with the authorities, was refused.

[27] Mr Lehane (for the respondent) referred the Court to *R v Bellino*,¹¹ where the applicant pleaded guilty to trafficking in MDMA over a two month period and to

⁹ [2006] QCA 442.

¹⁰ [2007] QCA 224.

¹¹ [1999] QCA 106.

five counts of supply, including one of heroin. MDMA was a Schedule 2 drug. The applicant was paid \$22,400 for 600 ecstasy tablets. He was not a drug user or addict. His profit margin was low. He had given himself up when he heard police were looking for him. The applicant was sentenced to eight years imprisonment. This Court, after a review of comparable authorities, particularly *R v Chan*,¹² an appeal by the Attorney-General, concluded that the sentence imposed on Bellino was too high and substituted one of six years.

- [28] Mr Lehane submitted that all of the cases referred to by the applicant had more mitigating factors than the applicant's case.
- [29] There can be no complaint about a head sentence of seven and a half years for trafficking with the applicant's past drug history and his disregard for the conditions of his parole and bail. The primary Judge also regarded the assaults on the police officers during the trafficking period as serious offending (as they were). Although the sentences imposed for the assaults were concurrent, those offences added, overall, to the seriousness of the applicant's conduct. The primary Judge was entitled to regard the subsequent possession charge in May 2009 as sufficiently distant from the other offending to justify imposing a cumulative sentence. It seems, however, that his Honour took a view of the plea of guilty that did not suggest it should be recognised in any marked fashion. In *R v McQuire & Porter (No 2)*,¹³ Byrne J said of the late pleas of guilty in that case:

“Nonetheless, they were beneficial to the victims and to the public. Consistently with s 13 of the Act and sentencing principle, the pleas called for due recognition through a discounted sentence.”¹⁴

- [30] As a matter of general practice in this jurisdiction, the one-third mark of the sentence of imprisonment is seen as an appropriate starting point to recognise a plea of guilty. It may be adjusted up or down as the particular circumstances warrant. One-third of eight years is approximately two years and eight months. When the pre-sentence custody of 113 days is taken into account, a parole eligibility date order of 1 November 2012 means that the applicant will have served three years and approximately two months of the total sentence. That is, the applicant will be eligible for parole after serving just on 40 per cent of the sentence.
- [31] It is a positive obligation for a sentencing court to take into account a guilty plea and that the primary Judge did.¹⁵ A reduction may be made having regard to the time at which the offender pleaded guilty or informed the relevant law enforcement agency of his intention to plead guilty.¹⁶ A recommendation for consideration for early release on parole is included within the definition of “sentence” in s 4 of the *Penalties and Sentences Act 1992*.¹⁷ It is important in the overall administration of justice that offenders be encouraged to plead guilty by an appropriate reduction in the sentence which would have been imposed upon them had they elected to go to trial. Such a course frees resources which would otherwise be devoted to a trial including the availability of courtrooms, the cost of a full trial, and inconvenience to

¹² (1993) 67 A Crim R 545.

¹³ [2000] QCA 40.

¹⁴ Ibid at [107].

¹⁵ *Penalties and Sentences Act 1992*, s13.

¹⁶ *Penalties and Sentences Act 1992*, s 13(2)(a), (b).

¹⁷ *R v Corrigan* [1994] 2 Qd R 415.

witnesses. Although the parole eligibility recommendation is a matter for the sentencing court's discretion, the very modest discount made below for the plea of guilty suggests that his Honour took too unfavourable a view of it and thereby failed to accord the plea sufficient weight. An appropriate recognition would be parole eligibility after serving two years and eight months, taking into account the 113 days declared, which gives a parole eligibility date of 26 April 2012.

- [32] I would grant leave to appeal and allow the appeal to the extent of varying the parole eligibility date from 1 November 2012 to 26 April 2012. I direct that the primary court order sheet be amended to change the starting date of the applicant's pre-sentence custody from 25 August 2008 to 24 August 2008.