SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maya & Kennedy* [2012] QCA 123
PARTIES:	**R** **v** **MAYA, Jenny Maritso Romero** (applicant) **R** **v** **KENNEDY, Geoffrey** (applicant)
FILE NO/S:	CA No 253 of 2011 CA No 261 of 2011 SC No 684 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2012
JUDGES:	Muir JA and P Lyons and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Applications for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – where the applicants were convicted on two counts each of attempting to possess marketable quantities of unlawfully imported border controlled drugs – where the applicants were sentenced to 11 years' imprisonment with non-parole periods of seven years – whether the sentencing judge made insufficient allowance for the co-operation shown in the conduct of the trial – whether the sentencing judge erred in sentencing the applicant Maya on the basis that she was equally responsible for the criminality of the joint enterprise – whether the sentences imposed were manifestly excessive *Criminal Code* 1995 (Cth), s 314.1 *R v Burling & Gill* [2011] QCA 51, followed *R v Davies* [2007] QCA 416, distinguished *R v Oprea* [2009] QCA 184, cited *R v Shahrokhey-Zadeh* [2006] QCA 4, cited *R v Tran* (2007) 172 A Crim R 436; [2007] QCA 221, cited

COUNSEL: P E Smith, with K M Hillard, for the applicant Maya
M J Byrne QC for the applicant Kennedy
P C Floyd for the respondent

SOLICITORS: A W Bale & Son for the applicant Maya
Peter Shields Lawyers for the applicant Kennedy
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA:** I agree that the applications for leave to appeal against sentence should be refused for the reasons given by Dalton J.

[2] **PETER LYONS J:** I agree with the reasons of Dalton J and with the orders proposed by her Honour.

[3] **DALTON J:** Both applicants apply for leave to appeal against sentences imposed upon them after they were convicted by a jury on two counts each of attempting to possess marketable quantities of unlawfully imported border controlled drugs. The drug involved was cocaine. They were each sentenced to concurrent terms of 11 years' imprisonment with non-parole periods of seven years. Both applicants argue that the sentences imposed were manifestly excessive. Both say that the sentencing judge made insufficient allowance for the co-operation which they showed in the conduct of the trial. The applicant Maya says that in addition, the sentencing judge erred in imposing the same sentence upon her as he did on her de facto husband, because she had a distinctly lesser part in organising the importation of cocaine.

[4] Neither applicant pleaded guilty. Both ran the defence of duress at trial: Kennedy gave evidence that a threat had been made to the life of Maya's step-father if the applicants did not participate in the importation of cocaine. Clearly enough, the jury did not accept that defence. The judge below sentenced on the basis that there had been no threat made to Maya's step-father. That factual basis was consistent with the jury's verdict and no challenge is made to it on appeal.

[5] At the time of the offences Kennedy was aged 50 and Maya 27. Neither had any criminal history. Maya was a Colombian national. She met Kennedy when she was 21 and he was travelling in Colombia. She spoke Spanish and English. He spoke only English.

[6] The applicants took part in a scheme to import drugs from Colombia. They lived in New Zealand. They travelled to the Gold Coast in order to receive the drugs once the drugs arrived in Australia. The drugs were dispatched from South America in two separate consignments hidden in hydraulic rams. The amount of drug involved was 1.865 kilograms, a marketable quantity. The upper limit of a marketable quantity, as defined, is two kilograms: *Criminal Code* 1995 (Cth), s 314.1. The maximum penalty for the offences is 25 years' imprisonment.

[7] The applicants' role was more than just to receive the drugs passively. They made elaborate arrangements to book various different apartments and motels, and for the delivery of the parcels containing the drugs from one unattended rented address to another by courier. Kennedy gave evidence at trial. He admitted that he thought of, and made these arrangements, which were designed to avoid detection – (AB 195, 207-9, 210-211, 213). He used false names to book the accommodation, and when

dealing with the couriers. His evidence was that he did these things independently of anyone in Colombia (AB 195, 209).

[8] It was Kennedy who attended to these tasks rather than Maya: this was his evidence, and in recordings and intercepted conversations, it is he who speaks to the staff at motels and couriers. Nonetheless, the whole tenor of his evidence is that Maya was well aware of these arrangements. Further, it is clear that she performed tasks calculated to advance the importation separately to him, for example speaking to the Colombians, as he could not speak Spanish. Kennedy's evidence was to the effect that while they may have performed separate tasks, the conduct as a whole was something they undertook together. In giving evidence Kennedy often used the words "we" or "us" when answering questions as to what he did, eg., at AB 187, 193, 195, 198, 204, 205, 210. Often those answers referred to conversations in Spanish which were had between Maya and associates in Colombia. One passage which illustrates how the two were working closely together in the whole enterprise, and how Kennedy's use of language reflects that, is at AB 209:

> "When you rented that apartment, the Surf Parade Resort in the name of Bob Jones, did you give the details of that back to be passed on to Victor [in Colombia]?-- For the address?
> Yes?-- Yes, we did.
> So that he knew where to send it?-- Yes. That was the arrangement, yes.
> All right. That was – that was something that came entirely from you, that is where it was going to be addressed to was entirely your idea?-- Of course, we had to supply an address so he could send it to that place, yes.
> Yes?-- Yes, it come from me, yes." (my underlining)

[9] That high degree of co-operation and the joint nature of the enterprise is also evident in the substance of the intercepted calls between Kennedy and Maya. They both knew of the arrangements and participated in them. During the time that the first delivery was made, Maya waited at the address the courier was sent to, and Kennedy waited in his car, outside the address from which the packages were collected by the courier. Kennedy did not intend to meet with the courier, but to follow him, anonymously, in his car, to be sure the delivery was made to the correct address. In fact Kennedy lost the courier, almost before he set off. During the hour it took for the delivery to be made, Kennedy made several worried calls to Maya. In them he gives her directions about things such as getting the money ($20) ready to pay the courier and, when he decides the delay may be indicative of trouble, to wait outside the unit, rather than inside it. I do not interpret these directions as showing that Kennedy was in charge of the enterprise and Maya was obeying him. Rather they are indicative of Kennedy's anxiety at the delay. Several times during these conversations Maya tells Kennedy to calm down and her response to his directions about waiting outside the unit is to indicate she thinks he is over-reacting. She appears more self-possessed than he does. When they have more conversations later that afternoon, waiting for the second packages to arrive, Kennedy again rings Maya unnecessarily, I interpret, from anxiety. At one point she tells him his calling is "annoying". The intercepted phone calls indicate that the two were dealing with each other as equals.

[10] The applicants used three mobile phones in false names; Kennedy used two and Maya, the other. Through Maya, they were in regular contact with the persons

sending the drugs from Colombia. Maya seems to at least attempt to discuss price with those sending the drugs to Australia. In their rented unit on the Gold Coast Kennedy had ready tools (including a hacksaw and an angle grinder) which could have been used to cut open the hydraulic rams which contained the drugs. He denied that the tools were for this purpose, he said they belonged to his daughter, but offered no reason as to why they were in the unit. It was open to the sentencing judge to take the view that the tools were to open the hydraulic rams, and he did.

[11] Kennedy took the boxes which contained the rams apart and drove some distance to dispose of them in bins remote from the unit where he and Maya were staying.

[12] There are indications in the intercepted telephone conversations that the applicants were to deal with the drugs once they were received. In one conversation Kennedy says to Maya, when waiting for the second packages to arrive, "I'll wait for about quarter of an hour I suppose I want to go make those other things up and get them separated anyway." Maya says, "what are you going to where going to do" and Kennedy replies, "oh I'll go along the beach and do it so no one can see … and then I'll come back 'cause we'll have to go out for tea tonight … ."

[13] In another conversation Maya says:

> "No he ask me how much he pays for at least half I said right now right now out of the whole group that we have we have split the groups into four little groups so I have one one group of the groups. I don't know how much I have but I saying the groups and I didn't in the way I say at least my at least half right now in my hand with in a few days hoping that the next that its only twenty … unless the twenty for the distribution is waiting through customs."

Kennedy replies, "I am going to have to organise that for today."

[14] The conversations were somewhat cryptic, but the sentencing judge was of the view that they showed that the applicants were to "deal with [the drugs] prior to the next step towards their commercial disposition into the drug using community" (AB 364). That factual basis for sentencing was open on the evidence and was not challenged on appeal.

[15] As well, there are indications in the telephone conversations that the applicants were contemplating whether or not they would agree to take part in distribution of the drugs. There is a discussion about flying south to a very busy destination and whether or not that would be worth it, given that "that will take some time and we are here paying rent and quite expensive and all that".

[16] The applicants spent over $4,000 on apartments, motels and couriers. There was no evidence as to what commercial benefit the applicants were to receive for their part in the operation. Kennedy denied any financial reward. The sentencing judge took the view that they had a commercial motive having regard to all the evidence, including their expenditure of money and their attempted discussion of price in intercepted telephone conversations. No appeal point is taken in relation to that.

[17] On appeal, counsel for the applicants relied upon the fact that the applicants made admissions at the trial. Counsel for Kennedy also pointed out that trial counsel chose not to cross-examine many Crown witnesses, and limited his cross-examination, when it did occur, to points necessary to establish the defence of

duress. The trial lasted five days. Counsel for Maya submitted that without admissions, it would have lasted two weeks. Counsel for Kennedy said that if the trial had been solely limited to his client's issues, the trial would have lasted no more than a day and a half.

[18] Thirty separate admissions were made. When regard is had to the substance of what was admitted, most, if not all, admissions are of matters which the Crown could have proved independently in any event. Having said that, it can also be seen that some of the matters would have been time-consuming and expensive to prove: eg., the packages containing drugs were posted from Buenos Aires and intercepted in Germany, and the prosecutor acknowledged on the sentence that without the admissions it would have been necessary for some German witnesses to give evidence at the trial (AB 361). The case was originally listed for two weeks but, after admissions were made, was re-listed for five days. The prosecutor acknowledged those matters on sentence, but pointed out that the admissions were made relatively late before trial (AB 361).

Comparable Decisions

[19] In *R v Shahrokhey-Zadeh*,[1] this Court refused to interfere with a sentence of 12 years with a non-parole period of six years. The applicant in that case organised the importation of just over four kilograms of cocaine from Chile. He used another person to act as his courier. The amount of drug was just over twice the commercial quantity of cocaine for the purposes of the *Criminal Code* 1995 (Cth), s 314.1. The maximum penalty for that offence, having regard to the amount of cocaine involved, was life imprisonment. The applicant in that case was 21 years old at the time of offending. He had no criminal history and placed before the Court a great many references, showing many admirable character traits. The applicant did not co-operate and ran a trial based on a story, obviously rejected by the jury, that he was involved in the marketing of sound equipment, rather than drugs.

[20] While the applicants here are both older than the applicant in *Shahrokhey-Zadeh*, their importation was of less than half the quantity of drug involved; a marketable quantity, rather than a commercial quantity, within the meaning of the *Criminal Code* (Cth). The maximum penalty for the offence in this case was therefore 25 years, not life. As well, while they did not plead guilty, the applicants in this case did exhibit some co-operation in the trial of the matter.

[21] In *R v Davies*,[2] this Court allowed an appeal against sentence and imposed a period of imprisonment of seven years with a non-parole period of two years. The applicant Davies was 34 years old with no criminal history. He was charged, like the current applicants, with attempting to possess cocaine. The amount of drug was 2.2 kilograms. That the amount of cocaine in that case was over two kilograms meant that it was a commercial, rather than marketable, quantity, so that the maximum penalty was life imprisonment. In that respect, Davies was involved in more serious conduct than the applicants in this case. On the other hand, Davies pleaded guilty to an *ex officio* indictment at the earliest possible opportunity. Davies took part in lengthy records of interview with police and made truthful admissions. By the time of sentence there was evidence that the applicant Davies had committed to rehabilitation: he was attending drug counselling sessions and

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1 [2006] QCA 4.
2 [2007] QCA 416.

provided the sentencing Court with the results of urine testing. Davies' involvement with drugs was out of character, he had otherwise lived a decent, hard-working life. He became involved in drugs at a time when he was under considerable financial pressure. The only involvement proved on the part of the applicant Davies was limited: involvement on the day that drugs were collected, after having been delivered from South America.

[22] Overall the criminal conduct of the applicant Davies in importing cocaine from South America was much less than that of the current applicants. Davies was involved with only slightly more drug, but, crucially, drug which pushed him into the commercial, rather than marketable, category. He was deserving of credit for his co-operation with police and early plea. There were obviously also personal circumstances in the matter of *Davies* which inclined the Court to leniency.

[23] In the case of *R v Tran*,[3] this Court allowed an appeal against sentence and imposed a sentence of 10 years' imprisonment with a non-parole period of five years. *Tran* was a case where the applicant had imported a marketable quantity of heroin. Tran was a courier. He had no criminal record and was 41 years old at the time of the offence. He was sent to Vietnam and arrived back in Australia with just over 1.4 kilograms of heroin in his baggage. Tran made full admissions in a formal record of interview that same day and pleaded guilty on presentation of an *ex officio* indictment.

[24] In *Tran*, Atkinson J made a very thorough analysis of comparative cases from various States of Australia, and made important comments as to the need to endeavour to ensure consistency across Australia when sentencing.

[25] The offending in *Tran* involved heroin rather than cocaine. However, the quantity of heroin was just below the upper limit of a commercial quantity, just as the quantity of cocaine was here.[4] In both this case and *Tran*, the maximum penalty for the offence was 25 years' imprisonment. Tran's involvement was that of a courier, whereas the applicants here did more than that. Further, as is evident in the judgments of Keane JA and Atkinson J in *Tran*, the reduction in the head sentence and non-parole period in *Tran* was due to the discount for co-operation with the administration of justice shown by Tran. It was significantly greater than that shown by the applicants in this case.

[26] In *R v Oprea*,[5] this Court refused leave to appeal from a sentence of 10 years with a non-parole period of 6.5 years in relation to the offence of attempting to possess 1.5 kilograms of cocaine. The applicant Oprea was found guilty after a three day trial, which was shortened because of admissions he made. Oprea was a 45 year old man with a criminal history, including a drug history. However, he had no criminal conviction for 15 years preceding the offence for which he was dealt with. Cocaine was posted from South America. It was a marketable quantity. Oprea was a courier who acted on a commercial basis.

[27] Oprea did not give any information about the network he was involved in or his part in that network, and the Court of Appeal noted that in those circumstances it could

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3 [2007] QCA 221.

4 Section 314.1 of the *Criminal Code* 1995 (Cth) provides that, with respect to heroin, two grams is trafficable; 250 grams is marketable, and 1.5 kilograms is commercial. In respect of cocaine, two grams is trafficable; 250 grams is marketable, and two kilograms is commercial.

5 [2009] QCA 184.

not give him the benefit of mitigation given to offenders, for example like Tran.[6] Nonetheless, the President in her dissenting judgment did note that Oprea did co-operate with the authorities in the way the trial was conducted by admitting facts. Those facts are set out at [20] of the Court of Appeal judgment. They are less extensive admissions than those made in this case. In *Oprea*, the President noted that there was nothing before the Court as to how much time and resources had been saved because of the admissions made. However, she stated a general principle that:

> "Those charged with criminal offences should be encouraged to admit non-contentious matters at trial, thereby saving the prosecuting authorities the trouble and expense of proving them. This can be achieved by giving an appropriate discount, if convicted, at sentence. Any discount will depend on the extent of the resulting savings to the authorities and the community. … [The making of admissions] is a matter deserving of some specific, modest mitigating benefit in the sentence subsequently imposed."[7]

[28] In the case of *R v Burling & Gill*,[8] this Court refused to interfere with sentences of 12 years' imprisonment with a non-parole period at seven years and three months, and nine years' imprisonment with a non-parole period at five years and six months respectively. The offences were importing a commercial quantity of ecstasy. The amount of drug involved was considerable – 80,000 ecstasy tablets weighing 26 kilos and containing 5.2 kilos of pure MDMA. That was more than 10 times the commercial quantity under the *Criminal Code* (Cth). The maximum penalty for the offence was life imprisonment. The conduct involved was in this respect significantly more serious than the conduct in this case.

[29] The importation involved three people. It was accepted that the most criminal of the three was a man named Dehghani. He was Burling's de facto husband and is described as a domineering and overbearing man with "a particularly nasty disposition" – [9]. It was said that Dehghani expected Burling to fall in with his plans, but he did not coerce her. Burling's role was described in the Court of Appeal as "substantial and voluntary" – [9]. Burling recruited Gill, who played a lesser role in the operation. Burling was 39 at the time of the offending and Gill was 42. Burling travelled with Dehghani to the United Kingdom. Dehghani there secured the drugs. He was to organise their distribution in Australia. Burling and Dehghani vacuum sealed them, and secreted them in boxes, which they posted to Gill. Burling used her previous name. Gill accepted and retained the boxes for a reward of between $20,000 and $30,000 for the first delivery. There were four boxes, and it is not entirely clear whether there were to be two or four deliveries. The Court of Appeal recognised that she must have realised she had received a large quantity of drugs – [11].

[30] Dehghani pleaded guilty and was entitled to an unusual amount of mitigation because he promised to co-operate in the prosecution of his co-offenders pursuant to s 21E of the *Crimes Act* 1914 (Cth). He was sentenced to a term of 10 years and 10 months. But for the exceptional circumstances in mitigation he would have been sentenced to a period of 15 years' imprisonment with a non-parole period of nine years.

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6 Above, [30].
7 Above, [21].
8 [2011] QCA 51.

[31] Neither Burling nor Gill had any previous convictions. Neither Burling nor Gill showed remorse or co-operation with the authorities and neither had the mitigating benefit of an early plea of guilty – [13]. Both had families who would suffer from the fact of their imprisonment.

Disposition

[32] The sentencing judge made no distinction between the two applicants on sentence. Whilst acknowledging that Maya was younger, he found that at age 27 she was to be sentenced on the basis that she was of mature years. Counsel for Maya on appeal conceded that he could not make a submission that Maya was dominated by Kennedy. Nonetheless, he pointed to her comparative youth and the fact that they had been together since she was 21 and he 44. He also submitted that Maya played a lesser role in the attempted importation. The sentencing judge accepted that Kennedy did more than Maya, but found that it was a joint enterprise and that Maya encouraged Kennedy when his nerve was faltering.

[33] If authority is needed, *R v Burling & Gill* is authority for the proposition that when sentencing one offender who is part of a joint enterprise involving illegal drugs, finding the offender's role and level of criminality is fundamental to the assessment of criminality of that offender, and thus the sentencing process – [14].

[34] In this case I cannot see that the sentencing judge was incorrect to sentence Maya on the basis that she was equally responsible for the criminality of the joint enterprise. As discussed above, Kennedy and Maya performed separate roles in importing the cocaine and in attempting to gain possession of it. Kennedy appeared to be more active at times, because he telephoned Maya when anxious. On analysis, these calls do not show that he was dominating or controlling Maya. It was Kennedy's phone which was intercepted, not Maya's, and Kennedy, and not Maya, gave evidence. For those reasons there was more evidence of Kennedy doing and saying things connected with the importation. In fact, numerically, on the evidence, Kennedy did undertake more separate tasks than Maya, such as disposing of the packaging. Nonetheless, it seems to me the sentencing judge was quite entitled to regard their roles as equal ones in a joint enterprise. They clearly worked closely together as partners to achieve a result.

[35] In *Oprea*, McMurdo P spoke of the need to make a specific, modest, allowance to defendants who made admissions which shorten trials, see the extract above. Keane JA also acknowledged in that case that co-operation of this type, to the extent that it had a real, useful impact in shortening a trial, was to be taken into account, [25] – [28]. In this case the sentencing judge expressed the view that allowance was made for the effect admissions made by the applicants had on shortening the trial time (AB 362), although he did not specify what reduction was made.

[36] In my view the sentences imposed on the applicants were at the high end of the range. However, having regard particularly to *Tran* and *Oprea* it could not be said that they were manifestly excessive. In my view, the offending in this case was worse than that in *Tran* because Tran was only a courier. Tran also received a substantial discount because he co-operated fully and, pleaded guilty to an *ex officio* indictment. In both these important respects the applicants' case is less favourable. The facts of *Oprea* are very comparable to those here, and in two respects Oprea was in a better position than the applicants: he was only a courier, and the amount of drug involved was less. I would refuse the applications for leave to appeal against sentence.