SUPREME COURT OF QUEENSLAND

CITATION:	*R v Munoz* [2012] QCA 269
PARTIES:	**R** **v** **MUNOZ, Andres Marcello** (applicant)
FILE NO/S:	CA No 61 of 2012 SC No 17 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2012
JUDGES:	Margaret McMurdo P, Gotterson JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own pleas of guilty of one count of trafficking in cocaine and one count of possession of cannabis sativa – where the sentencing judge ordered the applicant to serve seven years imprisonment on the count of trafficking and twelve months imprisonment to be served concurrently on the count of possession – where the sentencing judge did not set a parole eligibility date – whether the sentence was manifestly excessive in all the circumstances *Corrective Services Act* 2006 (Qld) *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, referred *R v Feakes* [2009] QCA 376, referred *R v Frame* [2009] QCA 9, referred *R v Hutchinson* [2010] QCA 22, referred *R v Kashton* [2005] QCA 70, considered *R v Matauaina* [2011] QCA 344, referred

COUNSEL:	M J Byrne QC for the appellant B J Merrin for the respondent
SOLICITORS:	Bernard Bradley and Associates for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with McMeekin J's reasons for refusing the application for leave to appeal against sentence.

[2] **GOTTERSON JA**: I agree with the order proposed by McMeekin J and with the reasons given by his Honour.

[3] **McMEEKIN J**: The applicant applies for leave to appeal his sentence contending that it was manifestly excessive.

[4] On 31 January 2012, following pleas of guilty entered on the first day of trial nearly a year before, the applicant was sentenced to seven years imprisonment in respect of trafficking in cocaine over a period of about five months and 12 months imprisonment for the possession of cannabis sativa for commercial purposes, the sentences to be served concurrently. No parole eligibility date was set and so the applicant will be eligible for parole after serving half of his sentence.[1]

[5] No complaint is made about the head sentence imposed. The application and proposed appeal is directed to the refusal of the learned sentencing judge to set a parole eligibility date. The submission made in the written outline was that the failure to set a parole eligibility date did not have regard to:

(a) the sentences imposed upon co-offenders;
(b) the mitigating features of the case.

[6] The complaint about parity is no longer pursued.

[7] Absent some specific error this Court can intervene only if the result embodied in the sentencing judge's orders was "unreasonable or plainly unjust": *Hili v The Queen* (2010) 242 CLR 520 at [58].

[8] An agreed schedule of facts was tendered. The prosecution case in respect of the trafficking charge was that four people were involved in a joint criminal enterprise, the 22 to 23 year old (at the time of offending) applicant, his 19 year old girlfriend, the applicant's father and a person described as an "employee" of the business, aged 18 to 19 at the time. The enterprise was a sophisticated one involving the importation and distribution of cocaine. The cocaine was imported from Chile concealed in various ways. The applicant and his girlfriend were involved in the day to day running of the business. Their tasks included finding houses to which the cocaine could be delivered, accepting delivery of the packages of cocaine and selling the cocaine.

[9] The applicant was sentenced on the basis that there were three such importations, only one being intercepted. The quantity intercepted was substantial – 193.5 grams. The level of purity of the one intercepted was high, in the order of 76 per cent. The

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1 Section 184(2) *Corrective Services Act* 2006 (Qld).

pure weight of cocaine was 147 grams. It was common ground at the sentence that the two packages that were not intercepted were of comparable purity and weighed in the order of 200 grams. The cocaine was "cut" and on sold on the Gold Coast and in Sydney. The number of people to whom the applicant and his girlfriend on sold could not be established but witnesses spoke of observing numerous transactions. Some transactions were of a wholesale nature. The applicant and his girlfriend received and shared 50 per cent of the proceeds of the operation. It was estimated that 190 grams of powder could have a street value up to $97,250.

[10] The mitigating features that were submitted to deserve some amelioration of the non parole period were that the applicant:

(a) had entered a plea of guilty;
(b) had left school at grade 5 and lived on the streets;
(c) was addicted to cocaine at the time of offending;
(d) had been of good behaviour when on remand;
(e) did not re-offend while on bail for 2 years or otherwise come to the attention of police;
(f) was remorseful;
(g) had a constructive and positive attitude for the future.

[11] As to the plea I observe that while the applicant did enter a plea of guilty and that had to be acknowledged in the sentence imposed the extent of the applicant's co-operation with the police was described by the sentencing judge as "minimal" and the applicant had pleaded only on the first day of trial in the face of an overwhelming prosecution case. Her Honour indicated that the plea itself did not necessarily indicate the presence of any remorse. Her Honour accurately remarked that "only a limited allowance can be made for a plea at that stage".[2]

[12] As to (c) while the sentencing judge accepted the submission as to addiction the evidence suggested that the applicant did not engage in this business solely to feed a habit. And the obvious feature of the case is that whatever the level of drug taking it was not so high as to prevent the applicant from successfully conducting a sophisticated operation.

[13] As to the matters in (d) to (g) above while plainly relevant they can only have limited weight. They provide some basis for thinking that the applicant was genuinely remorseful and that there are prospects of rehabilitation. Her Honour's comment that the applicant had "done everything [he] could possibly do" since his imprisonment and that she saw "indications of remorse and positive attitude" in his conduct before that imprisonment demonstrates that she was very much alive to these considerations.

[14] At sentence the prosecution contended that while a sentence of nine to ten years was in range a sentence of eight years with a parole eligibility date after serving three and a half to four years imprisonment would properly reflect the mitigating circumstances.

[15] The applicant's counsel at sentence, a very experienced counsel, submitted that seven years imprisonment would be appropriate "taking into account the plea of guilty, taking into account his rehabilitation, and that your Honour may give some

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[2] AR 62/15.

small – and I am not suggesting that it is overly warranted, some further recognition possibly by an earlier recommendation for parole than three and a half years for his medical condition and the effect that may have upon him or has had upon him in the past 12 months...".[3] That reliance on a medical condition was not pursued on the appeal.

[16] The tentativeness of the submission was understandable. The cases show that for a sophisticated operation of this type with significant potential profits and extending over five months a sentence greater than seven years imprisonment was very much open: see the analysis of several cases by McMurdo P in *R v Feakes* [2009] QCA 376 at [23]-[33]. One example will make the point - in *R v Kashton*[4] this Court concluded that Kashton's 10 year sentence was at "the bottom of the range for cases involving pleas of guilty to trafficking in schedule 1 drugs on a substantial scale".

[17] The applicant then has the considerable difficulty that his own counsel's submission was very much in line with the sentence imposed. As Keane JA observed in *R v Hutchinson,*[5] in circumstances where the sentence imposed largely reflects the defence submission below it is "very difficult to accept the contention that the sentence which was imposed is '**manifestly** excessive'."[6]

[18] So here.

[19] The applicant's submission takes as its starting point a false premise – that the seven year term of imprisonment imposed as the head sentence could not or should not have been longer. It was submitted that in setting the seven year term of imprisonment her Honour did not have regard to the various mitigating factors. I cannot accept that submission. It was pointed out that no express statement to that effect was made. But the manner in which the sentencing judge expressed herself was plainly a response to the arguments that were before her. Both prosecution and defence submissions were made on the basis that a term substantially longer than seven years was plainly open. It is quite evident that the fixing of the seven year period of imprisonment was intended to bring into account the various mitigating factors that the applicant identifies. There can be no complaint that her Honour overlooked any one of them as each of them was expressly mentioned by her. In my view she gave due weight to them.

[20] As mentioned above her Honour could have imposed a more substantial period of imprisonment and there could have been no criticism of her approach. Here the setting of a seven year head sentence brought into account all mitigating features.

[21] I would refuse the application.

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3 AR 53/40-50.

4 [2005] QCA 70.

5 [2010] QCA 22 at [18].

6 Emphasis added and to the same effect: *R v Frame* [2009] QCA 9 at [5]-[6]; *R v Matauaina* [2011] QCA 344 at [13].