

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kalaja* [2012] QCA 329

PARTIES: **R**
v
KALAJA, Daniel
(applicant)

FILE NO/S: CA No 196 of 2012
SC No 896 of 2011

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 20 November 2012

JUDGES: Holmes JA, Gotterson JA, Boddice J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted on pleas of guilty of numerous drug offences – where the most serious of those offences involved four counts of trafficking in the dangerous drugs cannabis, methylamphetamine; 3, 4 methylenedioxymethamphetamine and gamma-hydroxybutyric acid – where the effective sentence was 14 years imprisonment, with a serious violent offence declaration – where the trafficking in cannabis was said to have occurred over a period of almost three years – where the trafficking occurred notwithstanding the applicant having been charged with offences during the period of trafficking, and being granted bail – where sentencing judge accepted applicant was a user of drugs but did not accept the use of drugs amounted to that of an addict engaging in criminal conduct simply to feed an addiction – where applicant previously convicted of a number of drug offences 10 years earlier and sentenced to nine months imprisonment, wholly suspended for a period of two years – whether sentence manifestly excessive

Drugs Misuse Act 1986 (Qld), s 5(a), s 5(b), s 6(b), s 6(d),
s 7(1)(a), s 9(b), s 9(d), s 12

R v Markovski [2009] QCA 299, considered

R v Nabhan; R v Kostopoulos [2007] QCA 266, considered

R v Rodd; ex parte A-G (Qld) [2008] QCA 341, considered

COUNSEL: M J Byrne QC for the applicant
D L Meredith for the respondent

SOLICITORS: Peter Shields Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **HOLMES JA:** I agree with the reasons of Boddice J and the order he proposes.
- [2] **GOTTERSON JA:** I agree with the order proposed by Boddice J and with the reasons given by his Honour.
- [3] **BODDICE J:** The applicant seeks leave to appeal sentences of imprisonment imposed on 9 July 2012 in respect of numerous drug offences. The applicant pleaded guilty to the offences. A number of discrete sentences were imposed for each offence, with the periods of imprisonment to be served concurrently. The effective sentence was 14 years imprisonment, with a serious violent offence declaration.
- [4] The offences were committed on divers dates between 1 June 2007 and 29 April 2010. The most serious of those offences involved four counts of trafficking in dangerous drugs. The drugs were cannabis, methylamphetamine; 3, 4 methylenedioxymethamphetamine and gamma-hydroxybutyric acid. The trafficking in cannabis was said to have occurred over a period of almost three years, with the trafficking in the remaining drugs occurring at different times within that three year period. This trafficking occurred notwithstanding the applicant having been charged with offences within this period, and being granted bail.
- [5] The sentencing judge accepted the applicant had entered early pleas which had resulted in a substantial reduction of the cost society would have to bear had the matter gone to trial. The sentencing judge also accepted the applicant was a user of drugs, and had exhibited symptoms consistent with a polysubstance dependence disorder. However, the sentencing judge did not accept the applicant's use of drugs amounted to that of an addict engaging in criminal conduct simply to feed an addiction. The sentencing judge found the applicant was able to engage in complicated, detailed and continuing offences consistent with an ability to control himself. His involvement was described by the sentencing judge as "high level, lengthy and brazen, illegal conduct".
- [6] The applicant is 32 years of age. He was aged 27 to 29 years at the time of the commission of the offences. The applicant has previously been convicted of a number of offences. Most relevantly, he was convicted, in April 2002, for drug offences and sentenced to nine months imprisonment, wholly suspended for a period of two years.

- [7] The applicant contends that notwithstanding his prior history, and the lengthy period of trafficking in multiple drugs, the sentences imposed were manifestly excessive in all the circumstances. He relies, in support of that contention, on the decisions of this Court in *R v Markovski* [2009] QCA 299, *R v Rodd; ex parte A-G (Qld)* [2008] QCA 341 and *R v Kostopoulos* [2007] QCA 266.
- [8] The applicant contends his age, lower position in the drug trafficking business, polysubstance dependence, and demonstrated and prolonged efforts at rehabilitation place him in the category of an effective sentence to the lesser end of the range of 11 to 13 years identified in *Markovski* and *Rodd*.
- [9] In *Markovski*, concurrent terms of 15 years for two trafficking offences, one in cocaine and one in 3, 4 methylenedioxymethamphetamine, were not disturbed on appeal. The applicant was 47 to 48 years of age at the time of the offences, and had a criminal history of little relevance. He had engaged in trafficking at a very high level in wholesale amounts for over eight months.
- [10] In dismissing the application for leave to appeal, Keane JA (as his Honour then was) (with whose reasons Fraser JA and Jones J agreed) said at [53]:
“Decisions of this Court show that in cases of substantial trafficking at a relatively high level in the drug distribution network, a sentence between 11 and 13 years imprisonment is the appropriate range where the offender is entitled to the benefit of a plea of guilty.”
- [11] In *Rodd*, a sentence of nine years imprisonment on one count of trafficking in methylamphetamine for a period of just over two years was disturbed on an appeal by the Attorney-General. The respondent was aged 29 and 30 years at the time of the offences and had a prior criminal history “of no particular significance”. The respondent was sentenced as a principal in the trafficking business. He was found in possession of large amounts of cash and lived an extravagant lifestyle. He also used threats and violence to control the trafficking business.
- [12] In substituting a sentence of 10 years imprisonment (the sentence sought by the Attorney-General on the appeal), the Chief Justice (with whose reasons McMeekin J agreed) expressly recognised a sentence of 12 to 13 years imprisonment would not have been excessive having regard to the aggravating features, including the use of threats and violence in the trafficking business. In her reasons, White AJA endorsed the comment that a sentence of 12 to 13 years was not excessive in the circumstances.
- [13] In *Kostopoulos*, the applicant had been sentenced to 15 years imprisonment for controlling and financing a sophisticated and well-resourced trafficking operation at the highest level of drug trafficking. He had trafficked in cocaine, speed, ecstasy and GHB over a five month period. His completed sales were conservatively estimated as amounting to \$811,000. It was accepted he was motivated by profit. The applicant was aged 41 years and had a relevant criminal history, including being sentenced on two counts of possession of drugs. He used threats and violence in the operation of the business of drug trafficking.
- [14] In dismissing the appeal, Keane JA (as his Honour then was) (with whose reasons Williams and Jerrard JJA agreed) observed that even with a plea of guilty, a sentence in the order of 16 years was within the proper range for trafficking on the grand scale in question, especially as the criminal organisation had been conducted

whilst the applicant was subject to a suspended sentence for the previous drug convictions.

- [15] The circumstances in *Markovski* and *Rodd* clearly indicate a basis for those offenders being treated more leniently than the present applicant. In each case, the trafficking period was shorter and neither had any relevant prior history. The sentencing judge's observations that the factual circumstances in the present case were more akin to those in *Kostopoulos* was an accurate assessment of the differing factors in those decisions.
- [16] Although younger than *Kostopoulos*, the applicant was not a youthful offender. He also had a highly relevant prior criminal history. Further, although not a financier of the trafficking business, like *Kostopoulos*, the applicant was an integral part of it. His involvement in the unlawful trafficking in drugs extended over a three year period. It involved multiple drugs, in large quantities, for substantial monetary sums. There was, at least, \$600,000 in unsourced income. Much of the offending conduct occurred whilst the applicant was on bail for other offences. This seriously aggravating feature meant that but for the early pleas of guilty, the applicant could have expected to receive an effective sentence substantially in excess of the 14 years imprisonment imposed by the sentencing judge.
- [17] The sentence imposed on the applicant was less than that in *Kostopoulos*. This lesser sentence reflected the difference in the applicant's level of control, the early stage at which pleas were entered, and the existence of mitigating factors such as his drug dependence and the significant steps he had taken towards rehabilitation.
- [18] A consideration of the authorities, and the circumstances of the present case, establishes that whilst the effective sentence imposed on the applicant was at the high end, it was within the sentencing discretion.
- [19] The applicant has not established that the sentences imposed were manifestly excessive in the circumstances.
- [20] I would refuse the application for leave to appeal against sentence.