

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Miller* [2013] QCA 346

PARTIES: **R**  
**v**  
**MILLER, Antony Dwayne**  
(applicant)

FILE NO/S: CA No 95 of 2013  
SC No 409 of 2012

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 November 2013

DELIVERED AT: Brisbane

HEARING DATE: 7 November 2013

JUDGES: Muir and Morrison JJA and Boddice J  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Leave to appeal is 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 a number of drug-related offences including trafficking, possession and supplying – where the applicant’s parole eligibility was fixed at one-third of an eight year head sentence – where the applicant’s co-offender was given a parole eligibility date less than the applicant whilst receiving the same head sentence – where the applicant contends his parole eligibility date was manifestly excessive in the circumstances – where the applicant contends the sentencing Judge did not give proper weight to his early pleas, his long standing addiction and efforts of rehabilitation, and the principle of parity – where a distinction could be drawn between the circumstances of the offenders – whether the parole eligibility date was manifestly excessive in the circumstances

*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited  
*R v Boyd* [2013] QCA 335, distinguished  
*R v Dwyer* [2008] QCA 117, cited

**COUNSEL:** The applicant appeared on his own behalf  
B G Campbell for the respondent

**SOLICITORS:** The applicant appeared on his own behalf  
Director of Public Prosecutions (Queensland) for the  
respondent

- [1] **MUIR JA:** I agree that leave to appeal should be refused for the reasons given by Boddice J.
- [2] **MORRISON JA:** I agree with the reasons of Boddice J and the order proposed by his Honour.
- [3] **BODDICE J:** On 26 March 2013, the applicant pleaded guilty to one count of trafficking in dangerous drugs, two counts of possessing dangerous drugs specified in Schedule 1, one count of possessing a Schedule 1 drug in a quantity greater than Schedule 3, but less than Schedule 4, when not a drug dependent person, six counts of supplying a dangerous drug, and one count of possessing anything used in the commission of a crime. The applicant was sentenced to eight years imprisonment on the trafficking count, and lesser concurrent terms of imprisonment on the remaining counts. The applicant's parole eligibility date was fixed at one-third of the head sentence, being two years and eight months.
- [4] The applicant seeks leave to appeal the sentences on the ground they were manifestly excessive. The applicant does not contend the head sentence of eight years was manifestly excessive. The applicant contends the fixing of a parole eligibility date at one-third of the head sentence was manifestly excessive in the circumstances, having regard to sentences imposed on co-offenders, and having regard to the principle of parity.

### **Background**

- [5] The applicant was born on 8 May 1984. He was aged 24 to 27 at the time of the offending, and 28 at the time of sentence. The applicant has a long standing drug addiction. This addiction commenced in his teens and continued throughout and during the period of his offending.
- [6] The applicant has an extensive criminal history. He has previously been sentenced to a variety of orders, including probation and a suspended sentence. He has also previously been sentenced to a period of actual imprisonment.

### **Offences**

- [7] According to the Agreed Schedule of Facts, the applicant sold methylamphetamine, MDMA, gamma-hydroxybutyric acid (GHB) and cocaine to multiple customers over an eight month period between July 2010 and March 2011. Intercepted calls identified sales to some 39 clients. These sales included the supply of drugs to covert police on a number of occasions, and in significant quantities. It was agreed the applicant's involvement was for profit, and that the business turned over tens of thousands of dollars.
- [8] At the sentence hearing, the prosecutor sought a head sentence of eight to nine years, whilst defence counsel contended a head sentence of no more than eight years was appropriate in the circumstances.

- [9] In contending for the higher head sentence, the prosecutor observed there had been a committal hearing, including cross-examination of a co-offender, with the matter subsequently being listed for trial. When there was initial contemplation of a sentence, there was to be a contest as to the facts, although the sentence ultimately proceeded without that contest. The prosecutor further contended the applicant's involvement, whilst as a street level trafficker for most drugs, was significant. There was also a basis to distinguish between the applicant's co-offenders, having regard to the level of co-operation, and their criminal histories.
- [10] In submitting a lower head sentence was appropriate, defence counsel relied on the applicant's rehabilitation, his long standing drug addiction, relative youthfulness and remorse. Defence counsel also relied on the sentence imposed on the applicant's co-offenders.

### **Sentences**

- [11] The sentencing Judge found the applicant was a significant dealer in drugs during the period, selling a variety of different drugs to numerous people including, in the case of GHB, selling quantities consistent with a wholesale level. The sentencing Judge found the applicant had a "shocking" criminal history, including committing offences after the offences the subject of the sentence.
- [12] The sentencing Judge found the applicant's plea of guilty could not be considered an early plea, but acknowledged the plea reduced the sentence that would otherwise be imposed on the applicant. The sentencing Judge noted that whilst the applicant's co-offender, Dahtler, had received a parole eligibility date fixed at two years, he had significant factors in his favour, including a lack of relevant criminal history.

### **Applicant's submissions**

- [13] The applicant submits the sentencing Judge gave insufficient weight to various mitigating factors when determining the applicant's parole eligibility date. The pleas of guilty ought properly to have been found to be early pleas, as they were entered at the first reasonable opportunity, and were therefore indicative of remorse and an acceptance of responsibility. Further, there was a lack of parity in the sentences when compared to the sentence imposed on Glen Dahtler, a co-offender. Dahtler was accepted by the sentencing Judge to be higher up the chain than the applicant, and to be selling drugs at a wholesale level for commercial gain, but was given a parole eligibility date significantly less than the applicant whilst receiving the same head sentence as the applicant.
- [14] The applicant also submits the sentencing Judge failed to give proper weight to the circumstance that the applicant's reason for trafficking was to acquire drugs for his own personal use, having regard to his long standing addiction, rather than a commercial purpose. The sentencing Judge also gave insufficient weight to the applicant's substantial efforts to rehabilitate himself, and to the applicant's co-operation with authorities.

### **Respondent's submissions**

- [15] The respondent submits the sentencing Judge gave due and proper consideration to the circumstances of the applicant's offending, his pleas of guilty and his efforts at rehabilitation. The sentencing Judge expressly had regard to the pleas of guilty, the applicant's efforts towards rehabilitation, and took those matters into account on the sentence.

- [16] The respondent submits the applicant was properly sentenced on the basis there was a commercial element to his involvement in the drug industry. Further, his pleas of guilty were properly not considered as early pleas having regard to the circumstances in which those pleas were entered by the applicant.
- [17] Finally, the respondent submits the sentences imposed on the applicant's co-offenders did not raise issues of parity. Further, there was a proper basis to distinguish between the applicant's position and that of his co-offenders. They were not co-accused, one provided substantial assistance, and the other co-offender's offending did not involve the same size customer base and occurred in circumstances where the co-offender had a very limited criminal history, had obtained substantial progress in rehabilitation, and had not subsequently offended.

### **Consideration**

- [18] The applicant concedes the head sentence of eight years was within range. That concession is properly made having regard to the basis upon which the applicant entered pleas of guilty to very serious drug offences. The applicant was involved in selling numerous types of drugs to many clients over an eight month period, for commercial gain. He was not a youthful first time offender. He had a lengthy criminal history.
- [19] Whilst the setting of a longer parole eligibility date to that of Dahtler, in circumstances where both received the same head sentence, may appear to raise issues of parity, a consideration of the circumstances of the applicant, and of Dahtler, establishes there were proper bases for the sentencing Judge to draw a distinction.
- [20] First, the applicant had a far more extensive criminal history, including having previously been sentenced to a period of actual imprisonment. Second, Dahtler's prospects of rehabilitation were significantly greater, having not reoffended since being charged with his offences. These factors were properly considered by the sentencing Judge in the exercise of her sentencing discretion.
- [21] The sentencing Judge also properly considered the applicant's pleas of guilty. Those pleas were given due weight by fixing the parole eligibility date at one-third of the head sentence. Such a parole eligibility date is in accord with proper sentencing principles.
- [22] The fact a high weight was placed on Dahtler's very significant steps towards rehabilitation when he was sentenced does not mean the sentencing Judge placed insufficient weight on the applicant's own attempts at rehabilitation. Judges have much flexibility in sentencing.<sup>1</sup> A sentence is imposed having regard to many varied factors, in the context of proper sentencing principles. Sentencing does not involve a grading approach, by close comparison of aggravating and mitigating factors. Such a process involves "the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process".<sup>2</sup>

### **Conclusion**

- [23] The failure to fix a parole eligibility date at a period less than one-third does not evidence a failure to have due and proper regard to those factors relevantly to be considered in the sentencing discretion. A parole eligibility date fixed at one-third

<sup>1</sup> *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

<sup>2</sup> *R v Dwyer* [2008] QCA 117 at [37].

of the head sentence is entirely consistent with due recognition being given to the applicant's pleas of guilty, and his steps towards rehabilitation.<sup>3</sup>

- [24] The applicant has not established the sentences imposed were manifestly excessive. I would refuse leave to appeal.

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<sup>3</sup> cf *R v Boyd* [2013] QCA 335.