

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Fitzgerald* [2015] QCA 93

PARTIES: **R**  
**v**  
**FITZGERALD, Chase Dillan**  
(applicant)

FILE NO/S: CA No 2 of 2015  
SC No 62 of 2014

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Townsville – Unreported, 27 November 2014

DELIVERED EX TEMPORE ON: 25 May 2015

DELIVERED AT: Cairns

HEARING DATE: 25 May 2015

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

ORDER: **The application for leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where the applicant was convicted and sentenced on his plea of guilty to one count of trafficking, three counts of supply and one count of possession – where the applicant was sentenced to seven years imprisonment on the trafficking count with a parole eligibility date fixed at three years – where the applicant received lesser sentences on the other charges, and all terms of imprisonment were to be served concurrently – where the applicant was charged in 2009 and was granted bail – where the applicant absconded for three and a half years – where the applicant had returned to Queensland and was preparing to surrender to the police when he was arrested – where the applicant had formed a relationship and had become the father of two children – where the applicant had not offended during the period of absconding, except for the offences resulting from his failure to appear – whether the sentence was manifestly excessive because insufficient weight was given to the prospect of rehabilitation, the aspect of rehabilitation and its impact on the parole eligibility date

*R v Alt* (2013) 236 A Crim R 486; [\[2013\] QCA 343](#), cited  
*R v Davis* [\[2012\] QCA 324](#), cited  
*R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63; [\[1995\] QCA 444](#), cited  
*R v Willoughby* [\[2009\] QCA 105](#), cited

COUNSEL: J Trevino for the applicant  
M Cowan QC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MORRISON JA:** On 27 November 2014 Mr Fitzgerald was convicted and sentenced on his plea of guilty to: one count of trafficking in 3,4-Methylenedioxymethamphetamine (MDMA or ecstasy) over a period between 1 December 2008 and 25 September 2009; three counts of supplying Methylamphetamine; and one count of possession of MDMA in excess of two grams.
- [2] He was sentenced to seven years imprisonment on the trafficking count. A parole eligibility date was fixed at three years. After taking into account 376 days in pre-sentence custody that set the date at 16 November 2016.
- [3] On the supply counts he received lesser sentences, one of two years and two of 18 months. On the possession count he received three years. All those terms were to be served concurrently with the trafficking sentence.
- [4] Mr Fitzgerald was charged with the offences in late 2009 and granted bail. He absconded, failing to appear on 20 May 2010, and remained at large until arrested on 16 November 2013. As it transpires he was living in New South Wales where he formed a relationship and became the father of two children, aged five and two at the date of sentencing.
- [5] In November 2013 he returned to Queensland and was preparing to surrender to police when arrested.
- [6] Mr Fitzgerald does not seek to challenge the head sentence of seven years for trafficking, or the sentences on the other counts. He only seeks to challenge the

setting of the parole eligibility date at three years, contending that the learned sentencing judge erred in failing to have regard to his rehabilitation.

- [7] The issue raised by the application is, therefore, was the sentence manifestly excessive because insufficient weight was given to the prospect of rehabilitation, the aspects of rehabilitation, and its impact on the parole eligibility date.

### **Background**

- [8] Mr Fitzgerald was about 20 years old when he committed the offences, and 26 at sentence. He had a criminal history in New South Wales that consisted of minor and irrelevant offences. His Queensland history consisted only of the failure to appear offences and breaches of bail as a result of his absconding.
- [9] The offences involved Mr Fitzgerald acting as a middleman, arranging several couriers to transport and supply large quantities of MDMA tablets, sometimes interstate. One courier was found in possession of about 5,000 tablets, telephone intercepts revealed sales of 3,000 or 4,000 ecstasy tablets being discussed, at prices of between \$10 and \$13 per tablet.
- [10] The supply counts involved Mr Fitzgerald selling large quantities of methylamphetamine, in one case a pound for \$26,000, and in another, half a pound for \$15,000.
- [11] Mr Fitzgerald participated in three police interviews. He explained that he was a middleman who organised large sales of 4,000 or 5,000 ecstasy tablets. In the first interview he said that he did not receive anything in return for his involvement, and that ecstasy pills found at his property did not belong him. He maintained that in his second interview. In the third interview he finally conceded that the pills were his. An analysis of financial records revealed un sourced income of \$56,154 for the period between 1 December 2008 and 4 July 2009.
- [12] There was no suggestion that Mr Fitzgerald was an addict. His involvement, then, was purely commercial.

**Submissions on the impact of rehabilitation**

[13] The question of rehabilitation was the subject of submissions by both the prosecutor and counsel for Mr Fitzgerald.

[14] For the prosecutor, it was submitted that there were no mitigating factors (necessarily including rehabilitation) arising from the delay in proceeding to sentence, because it was solely due to Mr Fitzgerald's absconding. *R v Willoughby*<sup>1</sup> was relied upon.

[15] Counsel for Mr Fitzgerald raised these matters relevant to the period after the offences:<sup>2</sup>

- Mr Fitzgerald had been mostly in New South Wales since he absconded;
- he had formed a relationship as a result of which he was the father of two children, aged five and two;
- he had returned to Queensland with the aim of giving himself up to police;
- he had not offended during that period of about three and a half years, except for those offences resulting from his failure to appear.

[16] Mr Fitzgerald's counsel ultimately submitted that the mitigating factors, including those listed above, should result in his only being required to serve one third of the sentence period in actual custody.<sup>3</sup>

**The sentencing judge's comments on mitigating factors including rehabilitation**

[17] The sentence followed immediately after the conclusion of the submissions from Mr Fitzgerald's counsel. His Honour noted the following features:

- Mr Fitzgerald had absconded but was now in a relationship;<sup>4</sup>
- he had returned to Queensland to surrender, which showed some maturity upon his part, and a preparedness to face up to the consequences of his actions;<sup>5</sup>

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<sup>1</sup> *R v Willoughby* [2009] QCA 105 at [45] and [48].

<sup>2</sup> AB 21.

<sup>3</sup> AB 23.

<sup>4</sup> AB 26.

- the lack of any relevant criminal history;
- the failure to make full and frank disclosures to police,<sup>6</sup> and cooperation limited to bringing the matter to court after the period of absconding;<sup>7</sup>
- the sentence had to take into account any reasonable prospect of rehabilitation, but general and personal deterrence, and denunciation, was called for.<sup>8</sup>

### **Discussion - the impact of delay and rehabilitation**

[18] There are a number of difficulties confronting Mr Fitzgerald's contention.

[19] First, there was a paucity of evidence of actual rehabilitation. It is well established that the onus of proving that delay should be taken into account in mitigation lies on the accused. As was said by this Court in *R v Davis*:<sup>9</sup>

“An accused seeking such mitigation on the basis of the first example given in *R v L* should place facts before the court which demonstrate that he or she has suffered a curtailment of liberty or an unjustified questioning of reputation or some damaging consequence of a state of uncertainty. One who seeks mitigation on the basis of the second example given in that case (damage to or interruption of a process of rehabilitation occurring during the period of the delay) must provide evidence of that rehabilitation.”

[20] Here all that was put forward was that during the three and a half years while absconding, Mr Fitzgerald formed a relationship, had two children and did not offend (except in his failure to comply with his bail conditions). That said little

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<sup>5</sup> AB 26, 27.

<sup>6</sup> AB 27.

<sup>7</sup> AB 26.

<sup>8</sup> AB 27.

<sup>9</sup> *R v Davis* [2012] QCA 324, at [37].

about genuine rehabilitation. Nothing was said about his circumstances or conduct in the community, and no character references were produced.

- [21] Further, nothing substantive was said about his employment or intentions over that time. Counsel's submissions to the learned sentencing judge seemed to suggest the Mr Fitzgerald was hiding and that he may not have been working because he couldn't safely do so in his own name.<sup>10</sup> However what was said about that was not clear, or compelling. Insofar as it reflected any prospects of rehabilitation, the evidence was equally scarce. It basically comes down to Mr Fitzgerald having established a partnership with a partner who might support him, developed some maturity by facing up to the circumstances confronting him, and had offered minor cooperation with the police. All those matters were before his Honour and mentioned by him.
- [22] Secondly, any benefit from such rehabilitation would be discounted because the delay which let it be achieved was caused solely by Mr Fitzgerald's absconding.
- [23] *R v L; ex parte Attorney-General (Qld)*<sup>11</sup> establishes that the lapse of time between commission of the offence and the imposition of sentence should ordinarily not be a mitigating factor unless the delay has resulted in some unfairness to the offender. One form of unfairness is where the offender's liberty may be curtailed, reputation called into question, or the offender is left in a state of uncertainty caused by a failure to prosecute the case quickly.
- [24] A second form of unfairness is where "the time between commission of the offence and sentence is sufficient to enable the court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress".<sup>12</sup> However, the impact of any such rehabilitation is discounted where the delay has been caused by the offender.<sup>13</sup>

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<sup>10</sup> AB 22.

<sup>11</sup> *R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63 at 66-67; [1995] QCA 444. (*R v L*).

<sup>12</sup> *R v L* at 66.

<sup>13</sup> *R v Alt* [2013] QCA 343 at [55] – [58].

[25] Thirdly, in *R v Willoughby*<sup>14</sup> this Court held that rehabilitation is of less relevance in cases of drug trafficking for the reason that the primary aspects of sentencing are punishment and deterrence, or denunciation and deterrence. The following passage was drawn to the attention of the sentencing judge:

“[48] An offender’s rehabilitation is of less relevance in cases of drug trafficking for the reason that the primary aspects of sentencing for such offences are punishment and deterrence, or denunciation and deterrence, as was noted in *R v Tilley; ex parte A-G* [1999] QCA 424, before going on to state that:

“... circumstances personal to the offender will ordinarily not weigh heavily in an accused’s favour... [though a] plea of guilty and its consequent saving of public resources should ... usually lead to a discernible amelioration in the penalty.”

I would add that protecting the public from the depredations upon it caused by extensive drug dealing is also important.

[49] This Court has pointed out in several cases that the penalty for trafficking in drugs must be such as to make the risk of engaging in the activity outweigh its rewards. If rehabilitation, measured by an offender’s good behaviour between arrest and sentence, results in a substantial reduction in penalty the balance between risk and reward will tilt in favour of reward.”

[26] Fourthly, the passages from the learned sentencing judge’s comments in relation to mitigating factors, referred to above in paragraph [17], demonstrate that his Honour gave weight to the factor of rehabilitation, such as they were. His Honour accepted that there was some cooperation in the sense that once Mr Fitzgerald had been arrested again in November 2013 he had cooperated in having the charges brought to court in a timely way, and he had pleaded guilty. But that was the limit of it, as he had been evasive in his interviews, and concealed the truth as to some important

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<sup>14</sup> *R v Willoughby* [2009] QCA 105, at [48]-[50].

facts until the third interview. Overriding that was the fact that he absconded and remained at large for three and a half years. Those matters meant that it was open to the learned sentencing judge to decline the approach that Mr Fitzgerald serve only one third of the sentenced in actual custody.

[27] Mr Fitzgerald was given a parole eligibility date fixed at less than the one half that would have been served had no date been specified. Thus he was given some credit for factors which included rehabilitation, and prospects of rehabilitation.

[28] I do not consider that it has been demonstrated that the sentencing judge erred.

### **Conclusion**

[29] I would refuse the application.

[30] **HOLMES JA:** I agree.

[31] **HENRY J:** I also agree.

[32] **HOLMES JA:** The application for leave to appeal against sentence is refused.