SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davis* [2015] QCA 139
PARTIES:	**R** **v** **DAVIS, Anthony Lewis Wipere** (applicant)
FILE NO/S:	CA No 301 of 2014 DC No 1731 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Unreported, 3 November 2014
DELIVERED ON:	31 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2015
JUDGE:	Gotterson JA and Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal sentence.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the defendant pleaded guilty to one count of unlawfully supplying a dangerous drug to a person in a correctional facility – where at the time the offending took place the applicant was serving a sentence of imprisonment – where that term of imprisonment was in relation to offences committed while on parole – where the applicant was sentenced to 16 months imprisonment with a parole eligibility date set at eight and a half months from the date of sentence – whether the sentence gave effect to totality issues – whether the sentence was manifestly excessive *Corrective Services Act* 2006 (Qld), s 209, s 211 *Drugs Misuse Act* 1986 (Qld), s 6 *Penalties and Sentences Act* 1992 (Qld), s 9, s 156A *R v Baxter* [2010] QCA 235, considered *R v Cole* [1998] QCA 205, distinguished *R v Leighton* [2014] QCA 169, considered *R v Ramsay* [2010] QCA 276, followed *R v Reardon* [2006] QCA 225, distinguished

COUNSEL:	S G Bain for the applicant B J Power for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Martin J and with the reasons given by his Honour.

[2] **ATKINSON J**: I have had the advantage of reading the reasons of Martin J. I agree with the orders proposed for the reasons given.

[3] **MARTIN J:** The applicant pleaded guilty in the District Court at Brisbane on 3 November 2014 to the indictable offence of unlawfully supplying a dangerous drug to a person in a correctional facility (Section 6(1)(e) and 6(2)(d), *Drugs Misuse Act* 1986). He was sentenced to 16 months imprisonment with a parole eligibility date of 13 July 2015, that is, about eight and a half months after the sentencing date. The applicant seeks leave to appeal on the ground that the sentence was manifestly excessive.

[4] The applicant has an extensive criminal history and was, at the time of the offence, serving a sentence at Woodford Correctional Centre. In February 2011, the applicant had been convicted of a number of offences and sentenced to an intensive drug rehabilitation order. In July 2012 that rehabilitation order was vacated and, in lieu, the applicant was sentenced to imprisonment for three years and nine months with a parole eligibility date of 19 November 2012. He was released on parole but committed a number of other offences after that release. For those offences he was sentenced in July 2013 to a cumulative sentence of 12 months imprisonment with a parole eligibility date of 1 September 2013. His full time release date was then 13 September 2016.

[5] The offending took place while the applicant was serving a sentence of imprisonment. That has two immediate consequences. The first is that the period of time for which he has been incarcerated cannot be declared as time served under the sentence under appeal because he was serving sentences for other convictions at the time.

[6] Secondly, it brings into play s 156A of the *Penalties and Sentences Act* 1992. That section relevantly provides:

> "(1) This section applies if an offender—
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> (a) is convicted of an offence—
>
> (i) against a provision mentioned in schedule 1;
>
> … and
>
> (b) committed the offence while—
>
> (i) a prisoner serving a term of imprisonment; or
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> …
>
> (2) A sentence of imprisonment imposed for the offence must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve."

[7] The offence to which the applicant pleaded guilty is an offence contained within schedule 1 to the *Penalties and Sentences Act* 1992.

[8] Two other pieces of legislation should be mentioned. Section 209 of the *Corrective Services Act* 2006 provides:

> "(1) A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the order."

[9] The effect of cancellation of a prisoner's parole order is set out in s 211. So far as is relevant, it provides:

> "(1) This section applies if a prisoner's parole order is cancelled—
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> …
>
> (f) under section 209 because the prisoner was sentenced to another term of imprisonment for an offence committed, in Queensland or elsewhere, during the period of the parole order.
>
> (2) The time for which the prisoner was released on parole before one of the following events happens counts as time served under the prisoner's period of imprisonment—
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> …
> (c) the prisoner committed the offence mentioned in subsection (1)(f).
> …"

Circumstances of the offences

[10] A schedule of agreed facts formed the basis upon which the applicant was sentenced. The applicant had, between 31 August 2013 and 15 September 2013, engaged in attempts to arrange for himself to be supplied with a pharmaceutical product which contained buprenorphine, a Schedule 2 drug under the *Drugs Misuse Act* 1986. It was agreed that he was to be sentenced on the basis that he engaged in acts preparatory to the supply of a dangerous drug to a person in a correctional centre.

[11] The applicant made a number of telephone calls from prison to his girlfriend to arrange for him to be supplied with a pharmaceutical product containing buprenorphine. The conversations between him and his girlfriend referred to the drugs as "things". The manner in which this type of drug is contained is usually on a film. Over a two week period the applicant told his girlfriend: how to wrap each film, that they were to be placed in an envelope and when he needed them to be provided. There were conversations in which his girlfriend said that she was attempting to gather more films and that she had 10 available and, on another occasion, had 14 available. The applicant spoke to her of making money by selling these drugs and said that he thought he could make at least $1,500.

The applicant's antecedents

[12] The applicant was born in 1982, which meant he was 31 at the time of offending and 32 at the time of sentencing. His criminal history in Queensland commences in the Childrens Court in 1997. He has, since then, been convicted of numerous drug offences, offences of dishonesty, offences involving violence and weapons offences.

On a number of occasions he was sentenced to probation and breached those orders. As is noted above, he was provided with the opportunity of a non-custodial sentence by way of an intensive drug rehabilitation order which he also breached.

The sentencing

[13] The learned sentencing judge took into account the following matters:

- The type of drug sought to be brought into the jail was not as serious as some others.
- The purpose of bringing it into the jail was to obtain a commercial reward.
- A matter that exacerbates the circumstances was that the applicant had been in custody, had been released on parole, was brought back into custody when the parole was suspended and then, within a few months, committed this offence while in prison.
- Most of the rehabilitative type sentences that have been afforded him have failed.
- His parole has been suspended and any sentence which is imposed must be cumulative upon the sentences now being served.
- The applicant had been in custody for some time. He had been charged with the offences more than 12 months before the sentencing and the learned trial judge noted that "whilst I cannot make an order reflecting or giving you credit for the time that you've been in custody, it is, I think, a proper matter to take into account."
- The offence is a serious one which compounds the usual problems arising from the use of illicit drugs in that, first, it would disrupt the proper discipline which must be kept within the prison environment and, secondly, it must frustrate the attempts to rehabilitate those who have drug problems.
- While the applicant's plea was not an early one, it was taken into account.

[14] The learned sentencing judge concluded by saying this:

> "I take the view that, for this offence, the appropriate head sentence would ordinarily be one of two years imprisonment. I intend to reflect the plea of guilty by reducing that head sentence to one of 16 months, and I also intend to reflect the plea, and the other matters, and particularly the time you've actually been in custody, by fixing your parole eligibility date at a date much earlier than ordinarily would be the case. The order I make is that you be imprisoned for 16 months. That sentence to be cumulative upon all other sentences that you're now serving. I fix your parole eligibility date as the 13th of July next year, 2015."

Case for the applicant

[15] The applicant submitted that the learned sentencing judge had failed to properly take into account the period of time which the applicant had served as a result of breaching his parole. Ms Bain, who appeared for the applicant, referred the court to

the obiter comments of Henry J in *R v Leighton*.[1] His Honour made specific reference to a prisoner being arrested for new offences while on parole and being returned to custody to serve out the balance of an existing sentence. His Honour emphasised that the duration of the applicant's continuing period of incarceration remained a relevant circumstance to consider in arriving at a punishment that was, as is required by s 9(1)(a) of the *Penalties and Sentences Act* 1992, "just in all the circumstances".

[16] In the same case, McMurdo P (with whom Gotterson JA and Henry J agreed) spoke of the requirement to ensure that the total period of imprisonment, both at full time discharge and at the eligibility date for release on parole, was not crushing. In that case, though, the periods of imprisonment were much greater than in this case.

[17] The requirement of taking into account the effect of the cumulative sentence is well known and was emphasised in *R v Baxter*[2] where Mullins J (with whom McMurdo P and Chesterman JA agreed) said with respect to s 156A of the *Penalties and Sentences Act* 1992 that:

> "[23] …Despite the mandatory requirement of that provision, any sentencing for offences committed during a parole period must still take account of the overall effect of the sentences: ... The same approach must apply to the sentencing of the applicant for the offences committed whilst on parole, after he completed serving the sentence in custody for which he had been on parole."

[18] The gist of the applicant's case was that a two year head sentence, referred to by the learned sentencing judge, was too high to be the starting point for the calculation of the sentence.

Comparable sentences

[19] We were referred to a number of sentences of single judges and two cases from this Court: *R v Cole*[3] and *R v Reardon*.[4] Both of those cases concerned the supply of drugs from a person outside the jail. Each of them concerned the supply to an inmate and none of them concerned a person who had committed the offence while on parole, let alone while imprisoned.

[20] The decision in *R v Ramsay*[5] illustrates that a substantial cumulative sentence, combined with an eligibility for parole delayed until after serving 16 months beyond the end date of an earlier term of imprisonment, would not be disturbed. The offences in *Ramsay* were quite different and the sentences much longer – the aggregate sentence was nine years. Of that combined sentence of nine years, the applicant was required to serve at least five years and three months before becoming eligible for parole. In those circumstances the offences had been committed when Ramsay was only 19 – he was 22 at the time of the new sentence. The applicant in *Ramsay* was much younger than the present applicant, his criminal history was much less and he had better prospects of rehabilitation. Even so, it was held that requiring Ramsay to serve 16 months past the full expiration date of his earlier sentence was in fact favourable treatment of him and had provided sufficient recognition of his "high level of cooperation"[6].

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1 [2014] QCA 169.
2 [2010] QCA 235.
3 [1998] QCA 205.
4 [2006] QCA 225.
5 [2010] QCA 276.
6 Ibid at [21].

[21] The offence of seeking to import drugs into prison by a person who is incarcerated in that prison is very serious. As the learned sentencing judge quite rightly pointed out, this offence serves to disrupt discipline and tends to frustrate attempts to rehabilitate others with drug problems. The purpose for importing these drugs into the jail was not for the applicant to use but to achieve a commercial profit.

Did the sentencing judge err with respect to the time served?

[22] The applicant submits that the learned sentencing judge erred by failing to take into account the period of time he had had to serve by having breached parole. On the contrary, it is clear that the his Honour did take it into account when he said: "whilst I cannot make an order reflecting or giving you credit for the time that you've been in custody, it is, I think, a proper matter to take into account."

Was the sentence excessive?

[23] In the circumstances referred to above, the effect of the sentence was that the applicant would be eligible for parole more than a year before the sentence imposed on this charge would begin.

[24] The reduction of the notional head sentence from two years to 16 months was not an artificial reduction in circumstances where eligibility for parole arose one year and two months before the previous full time discharge date and two years and six months before the new full time discharge date. The reduction from two years to 16 months also meant that, if parole was granted, the applicant would spend less time on parole.

[25] In this case, given the applicant's lengthy criminal history and the seriousness of the offence, the learned sentencing judge did not impose a sentence which was manifestly excessive.

ORDER

[26] I would grant the application for leave to appeal but dismiss the appeal.