# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *R v Hogan* [2015] QCA 151 |
| PARTIES: | **R**<br>**v**<br>**HOGAN, Matthew Steven**<br>(applicant) |
| FILE NO/S: | CA No 31 of 2015<br>DC No 145 of 2014<br>DC No 146 of 2014 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Beenleigh |
| DELIVERED ON: | 21 August 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 August 2015 |
| JUDGE: | Fraser JA and Ann Lyons and North JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Application for leave to appeal against sentence is granted.**<br>**2. Appeal is allowed.**<br>**3. Sentence imposed in the District Court with respect to count 1 on Indictment 146 of 2014 is varied by reducing the period of imprisonment to three years suspended after nine months with an operational period of three years.**<br>**4. Sentences imposed in the District Court with respect to counts 1, 2 and 3 on Indictment 145 of 2014 are varied by ordering that the term of imprisonment of 12 months is suspended after nine months with an operational period of 12 months.**<br>**5. Sentences imposed in the District Court are otherwise confirmed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to three counts of supplying a dangerous drug, one count of possessing a dangerous drug, one count of possessing property obtained from supplying |

a dangerous drug and one count of grievous bodily harm – where the applicant was sentenced to concurrent periods of imprisonment of 12 months in relation to the three counts of supplying a dangerous drug, six months in relation to the count of possessing a dangerous drug, nine months in relation to the count of possessing property obtained from supplying a dangerous drug and four years suspended after 12 months with an operational period of five years in relation to the count of grievous bodily harm – where the applicant forced open the complainant's mouth and placed two or three small tablets in the back of the complainant's throat – where the applicant poured water into the complainant's mouth, causing the complainant to swallow the pills with the water – where the complainant experienced neuroleptic malignant syndrome – where the applicant was young at the time of the sentencing hearing – where the applicant had an irrelevant previous criminal history – where there was no malice in the applicant's conduct – where the applicant did not use a weapon – where there was no sustained attack on the complainant – where the complainant manifested a desire for illegal substances – where the applicant had a good work history – where the applicant had strong prospects of rehabilitation – whether the learned sentencing judge sufficiently took into account the applicant's personal mitigating factors at the sentencing hearing – whether the sentences imposed were manifestly excessive

*R v Amituanai* (1995) 78 A Crim R 588; [1995] QCA 80, distinguished
*R v Betts* [2011] QCA 244, considered
*R v Brand* [2006] QCA 525, followed
*R v Clarke* [2012] QCA 318, considered
*R v DAS* [2009] QCA 74, considered

COUNSEL: D R Wilson for the applicant
D Nardone for the respondent

SOLICITORS: Rostron Carlyle Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Ann Lyons J and the orders proposed by her Honour.

[2] **ANN LYONS J:** On 4 March 2015, the applicant pleaded guilty to five counts on Indictment 145 of 2014 and one count on Indictment 146 of 2014.

[3] Counts 1, 2 and 3 of Indictment 145 of 2014 charged him with supplying, on or about 4 August 2012, a schedule 1 dangerous drug, namely 3-4 methylenedioxymethamphetamine (MDMA). Count 4 charged him with possession, on or about 5 August 2012, of the dangerous drugs methylamphetamine, 3-4 methylenedioxymethamphetamine and paramethoxymethamphetamine. Count 5 on that indictment charged him with

possession, on or about 5 August 2012, of money from supplying a dangerous drug knowing it to have been obtained from the supply.

[4] On counts 1, 2 and 3 on that indictment, he was sentenced to 12 months imprisonment. On count 4, he was sentenced to a concurrent period of six months imprisonment, and on count 5, he was sentenced to a concurrent period of nine months imprisonment.

[5] Count 1 on Indictment 146 of 2014 charged him with doing grievous bodily harm to Joshua Mark Ruggeri on 5 August 2012. He was sentenced to a concurrent period of four years imprisonment suspended after 12 months with an operational period of five years in relation to that count on the indictment.

**Grounds of appeal**

[6] The applicant now seeks leave to appeal against those sentences on the basis that they are manifestly excessive in all of the circumstances.

[7] Leave was granted at the hearing of the appeal for the applicant to tender new evidence in the form of an affidavit from the applicant which swore that the delay in the prosecution of the matter was not in any way the fault of the applicant. It would seem clear that the material indicates that he was first interviewed on 6 August 2012 in relation to the alleged offences which took place on 4 and 5 August 2012. He had been admitted to hospital in the early hours of the morning on 5 August 2012 due to a drug overdose. When he was interviewed in the hospital, he provided information and his personal details to police. When he was released from the hospital, and at the time of his arrest on 14 March 2013, he was residing at his parents' home.

[8] The applicant swears that at no time during the period between August 2012 and March 2013 was he contacted by police or requested to come to the police station by either telephone or mail. He went to Bali in February 2013 for a holiday with his girlfriend for a period of three and a half weeks. Whilst he was away, he became aware that police had come to his home and were told that he was on a holiday in Bali but would be returning soon. On his return from Bali, he was arrested at the Brisbane Airport. The applicant swears that at no time did he attempt to flee the country or avoid contact with police.

**The circumstances of the offences**

[9] The sentencing hearing proceeded on the basis of an agreed Schedule of Facts.[1] The Schedule of Facts indicated that the applicant and the complainant were acquaintances and had been introduced two months prior to the offences. The complainant, who was 21 years old at the time, and the applicant, who was 23 years old at the time, had met up on about six occasions prior to the evening in question. In relation to the count of grievous bodily harm, it was clear that in the early hours of 5 August 2012 the complainant had returned to his home with a female friend after a night out. During the evening, he had taken a Valium tablet, snorted a line of what he believed to be MDMA powder and consumed a number of alcoholic drinks. At around 5.30 am, the complainant was woken by a phone call from the applicant who stated that he was on his way. Sometime later, the complainant was woken by the applicant who was standing at the door of his bedroom. He then "approached the complainant, forced open the complainant's mouth and placed two or three small tablets at the back of the

1 ARB, 41-44.

complainant's throat. The defendant [the applicant] then poured water into the complainant's mouth, causing the complainant to swallow the pills with the water".[2]

[10] One of the tablets became stuck in his throat and he unsuccessfully attempted to regurgitate them. Both the applicant and the complainant became increasingly unwell and an ambulance was called. The applicant and the complainant were found to be experiencing tachycardia, profuse sweating, muscular tremors and dilated pupils. They were both transported to the Logan Hospital in a critical condition. The complainant was unresponsive with a Glasgow Coma Scale reading of 5 and was stabilised and transported to the Greenslopes Hospital for further treatment. He was discharged four days later on 9 August 2012.

[11] He was diagnosed by Consultant Physician Dr Peter Kortlucke as experiencing a "polypharmacy overdose of a combination of unknown drugs" resulting in "probable neuroleptic malignant syndrome".[3] Neuroleptic malignant syndrome is an adverse reaction associated with psychoactive drugs which can result in muscle rigidity and increased core temperature with a degree of rhabdomyolysis or muscle breakdown. Dr Kortlucke stated that such a syndrome "could have, without treatment, resulted in death from [the] inability to protect the airway and asphyxiation, hyperthermic induced brain injury or renal failure from the rhabdomyolysis".[4] The major treatments provided to the complainant in hospital were sedation, ventilation, intubation and IV fluids to flush the kidneys.

[12] In relation to the five counts on Indictment 145 of 2014, a number of witnesses at the residence were questioned by police and indicated that the applicant had attended the residence on the night of 5 August 2012 with a number of ecstasy tablets. The applicant consumed some of the tablets himself and sold some to other persons at the residence. Count 1 related to the supply of approximately 10 ecstasy tablets from the applicant on the night of 4 August 2012. Count 2 related to the purchase of a light blue coloured tablet, and count 3 related to the money that was found in the applicant's clothing. Police had seized $310 and a number of clipseal bags containing over 90 small coloured tablets altogether.

**The sentencing hearing**

[13] The applicant was 26 years of age at the time of sentence and had been 23 at the time of the offences. The learned sentencing judge was referred to a number of decisions including *R v DAS*,[5] *R v Betts*,[6] *R v Clarke*[7] as well as two of his own unreported decisions *R v Brandon Peter Hilan*,[8] and *R v Kylie Rebecca Austin*.[9]

[14] As the learned sentencing judge acknowledged, none of those decisions, were of a great deal of assistance given the circumstances were so varied.[10]

[15] In *R v DAS*, the applicant had pleaded guilty to grievous bodily harm in circumstances where he had failed in his duty to obtain medical treatment for his daughter at an

---

2 ARB, 41.
3 ARB, 45.
4 ARB, 46.
5 [2009] QCA 74.
6 [2011] QCA 244.
7 [2012] QCA 318.
8 Unreported, Dearden DCJ, DC No 351 of 2013 at Beenleigh, 24 July 2014.
9 Unreported, Dearden DCJ, DC No 59 of 2014 at Beenleigh, 27 October 2014.
10 ARB, 36.

appropriate time. He received a sentence of three years imprisonment with a parole release date after serving six months where there was a late plea of guilty on the morning of the pre-trial recording of the complainant's evidence. The complainant was 11 years old at the time of the relevant events and the applicant was involved in the promotion and distribution of a dietary supplement. The applicant was treating the complainant for a number of illnesses with the dietary supplement. She suffered an acquired injury as a result of various infections that were not treated because the applicant essentially considered that the dietary supplement was sufficient. In that case, the complainant was in a coma for almost a year and required extensive rehabilitation. She was never able to walk again and was living with foster parents who had to assist with her hygiene and daily needs.

[16] The applicant in that case was 43 years old and had a previous criminal history which included convictions of armed robbery, for which he had been sentenced to six years imprisonment, as well as drug and domestic violence offences. He had also suffered a serious head trauma in a work accident and the psychologist report indicated that the injury had a negative influence on his executive functioning which resulted in impaired capacity and decision-making. Ultimately, the Court of Appeal did not consider that the sentence imposed was excessive in the circumstances.

[17] The second decision of *R v Betts* involved an applicant who had seriously and permanently injured a friend during a golf game. The applicant had vented his anger and frustration during the golf game without regard to the risk of inflicting injury on those in the golfing party. He became increasingly frustrated and ultimately in a fit of rage threw his club which struck the complainant on the side of his head causing catastrophic brain injury. As a result of the brain injury, the complainant's executive functioning was severely impaired. The Court agreed with the sentencing judge that the degree of negligence was high, even though he had not deliberately intended to hurt the complainant. The applicant was 26 years old at the time of the offence and 27 years old at the time of sentence. He had been in full time employment and his only criminal history related to minor drug matters, a charge of wilful damage and some traffic matters. Despite the catastrophic injuries, the Court did not interfere with a sentence of two years imprisonment suspended after six months with an operational period of two years.

[18] In *R v Clarke*, the applicant sought leave to appeal against sentences of two and a half years imprisonment suspended after nine months with an operational period of three years in relation to pleas of guilty to one count of grievous bodily harm and one count of assault occasioning bodily harm for which he was sentenced to a further period of imprisonment of six months. The sentences were to be served concurrently. The applicant had not contended that the head sentences were excessive, but rather the requirement that he serve nine months imprisonment was manifestly excessive. Both of the offences arose out of the one incident. The offence of grievous bodily harm involved the applicant punching the complainant about six times on the left side of the face. The offence of assault occasioning bodily harm involved the applicant punching the complainant in the ribs whilst he was on the ground. As a result of the blows, the complainant suffered a fractured left orbital eye socket with bone displacement as well as double vision and displacement of the eyeball. The offences had occurred against the backdrop of a breakdown of the marriage of the complainant and the applicant's sister. In that decision, the Court referred to the decision of *R v Brand*[11] where Williams JA had said:

---

11 [2006] QCA 525, [15].

> "…the appropriate sentence for the offence of grievous bodily harm will vary significantly and that relevant factors will include the nature of the injuries sustained, the age of the offender, the criminal history of the offender, whether or not a weapon was used, whether the offence was established by one blow or whether there was a sustained attack on the complainant."

[19] In *R v Clarke*, the Court held that the applicant was a mature man with no previous criminal history, a good work history and was otherwise of good character. The Court accepted that the offences occurred in circumstances of significant stressors upon the applicant. He had pleaded guilty, he was remorseful and had strong prospects of rehabilitation. Balancing the need for deterrence against the substantial prospects of rehabilitation, the Court ultimately held that the requirement that the applicant serve nine months of the two and a half year sentence in custody was manifestly excessive. It was held that the offences involved a spontaneous attack rather than a calculated course of conduct and no weapon was used. It was considered that a sentence requiring the applicant to serve nine months imprisonment was excessive in all of the circumstances. The Court of Appeal ordered his immediate release given he had served 71 days in custody which was considered to be a substantial period for a person with no criminal history.

**Were the sentences manifestly excessive?**

[20] The sentences imposed in relation to the five counts on Indictment 145 of 2014 were not the subject of argument by the applicant.

[21] The main argument was addressed to the sentence imposed in relation to the one count of grievous bodily harm on Indictment 146 of 2014. As this Court stated in *R v Amituanai*,[12] a wide range of sentencing options have been utilised in grievous bodily harm cases. That decision, although somewhat dated, outlined a number of decisions involving young men, who in a variety of circumstances, had inflicted serious injuries, including permanent physical injuries, on others many of whom were innocent bystanders. They had received sentences ranging from community service, to fines, to periods of imprisonment ranging from eighteen months to three years with indications that a period of between seven months and one year was required to be served in custody. They were, however, all cases where there was actual physical violence.

[22] As this Court indicated in *R v Brand*, the relevant factors include not only the nature of the injuries but the age of the offender, the criminal history, whether a weapon was used and whether there was a sustained attack on the complainant. Here, there was no weapon, the attack was not sustained and the complainant had indicated a desire for similar substances earlier in the evening. There was clearly a gross error of judgment. However, the applicant had pleaded guilty at a late stage. Significantly, there was no malice in any of his conduct and absolutely no intention to cause any injury. The learned sentencing judge accepted that there was no malice. His Honour, however, considered that his conduct was extraordinarily stupid and was a deliberate act. His Honour considered it was extraordinarily serious and was essentially criminally negligent conduct that very nearly resulted in the death of the complainant as well as his own death.

[23] The applicant was still young at the time of sentence and had a limited criminal history which was not a relevant criminal history to the offences. He had been convicted of dangerous operation of a motor vehicle whilst adversely affected by an intoxicating substance in 2007. For this offence, he was fined $900 and disqualified

---

12 (1995) 78 A Crim R 588; [1995] QCA 80.

from driving for seven months. In 2011, he was fined $400 in relation to committing a public nuisance/assaulting or obstructing a police officer and was convicted of a breach of bail with no conviction recorded in June 2014.

[24] It would seem very clear that the applicant was not thinking clearly at the time, given he had consumed drugs. The complainant had purchased drugs earlier in the evening and had clearly manifested a desire for illegal substances including MDMA. Significantly, the applicant had a good work history, both before and after the offences, and he was well on the way to rehabilitation at the time of the sentencing hearing. He had gained further employment and had been in that employment for almost two years. He was well regarded by his employer. He had good references and clear urine drug screens. Whilst general deterrence loomed large, the applicant's rehabilitation was a significant factor which also needed to be taken into account.

[25] There is no doubt that the learned sentencing judge did adopt a very thoughtful and careful consideration of the competing issues and did take into account the applicant's own injury, his relative youth, his largely irrelevant criminal history and the steps towards rehabilitation. His Honour, however, considered that the seriousness of the offending highlighted the need for general deterrence and imposed a sentence of four years suspended after 12 months with an operational period of five years in relation to the most serious charge of grievous bodily harm.

[26] Whilst I accept that the sentences to which his Honour had been referred were not exactly similar to this case, they all involved serious physical harm with some element of forethought. None of those sentences attracted a period of imprisonment of more than three years. I consider that despite balancing all of those factors, the sentence of four years which his Honour imposed was manifestly excessive in the circumstances. I do not consider that such a sentence sufficiently took into account the fact that no malice was involved, no weapon was used, the applicant's irrelevant criminal history, the complainant's prior drug seeking behaviour and the fact that it was a one-off incident. Even after taking into account the drug charges, which were the subject of Indictment 145 of 2014, I do not consider that a head sentence in the order of four years was appropriate.

[27] It is also clear that the charges had been subject to significant delay in that whilst the offences had occurred in August 2012, the applicant was not arrested until March 2013. The sentencing hearing did not occur until two years later in March 2015. This is despite the fact that the applicant was spoken to by police at the hospital and provided his details on the morning after the incident. Whilst the applicant's mother was contacted at his home address, it would appear that he was not spoken to until he was arrested at the Brisbane Airport some seven months later. Whilst the applicant's affidavit in this regard has been taken into account, it would not seem to me that there is a suggestion in the sentencing remarks that the delay may have been due to some fault on the part of the applicant. In any event, it is clear that was not the case. An argument that the delay was somehow due to the fault of the prosecution and should be taken into account was not advanced at the sentencing hearing and will not be taken into account here.

[28] However, whilst the sentencing judge noted that the applicant was to be sentenced in relation to events which had occurred quite some time previously, it would seem to me that his Honour did not sufficiently take into account the significant rehabilitation which had occurred in the meantime. I consider that the requirement that the applicant

serve 12 months in actual custody did not adequately reflect the applicant's proven rehabilitation in the more than two and a half years since the incident in question.

[29] Accordingly, I consider that a sentence of four years and the requirement that he serve 12 months in actual custody did not sufficiently take into account his personal mitigating factors and was manifestly excessive in all the circumstances. In re-exercising the sentencing discretion, I would impose a sentence of three years imprisonment suspended after nine months with an operational period of three years in respect of count 1 on Indictment 146 of 2014.

[30] The sentences imposed with respect to counts 4 and 5 on Indictment 145 of 2014 are not to be interfered with. It is, however, appropriate in the circumstances to vary the sentences imposed with respect to counts 1, 2 and 3 on that indictment by suspending the term of imprisonment of 12 months after nine months with an operational period of 12 months.

**Orders**

[31] I would make the following orders:

1. Application for leave to appeal against sentence is granted.
2. Appeal is allowed.
3. Sentence imposed in the District Court with respect to count 1 on Indictment 146 of 2014 is varied by reducing the period of imprisonment to three years suspended after nine months with an operational period of three years.
4. Sentences imposed in the District Court with respect to counts 1, 2 and 3 on Indictment 145 of 2014 are varied by ordering that the term of imprisonment of 12 months is suspended after nine months with an operational period of 12 months.
5. Sentences imposed in the District Court are otherwise confirmed.

[32] **NORTH J:** I agree with the reasons of Ann Lyons J and the orders proposed by her Honour.