SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pevitt* [2016] QCA 49
PARTIES:	**R** **v** **PEVITT, Andrea Leslie** (applicant)
FILE NO/S:	CA No 66 of 2015 SC No 478 of 2013 SC No 250 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 7 April 2015
DELIVERED ON:	4 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2015
JUDGES:	Gotterson and Philippides and Philip McMurdo JJA 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 these sentences be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced upon her pleas of guilty to concurrent terms of imprisonment of five years for one count of trafficking in heroin and eighteen months for each of two counts of supplying heroin – where the applicant was further sentenced to concurrent terms of six months and eighteen months imprisonment on her pleas of guilty to five counts of dishonesty offences – where the sentences for the dishonesty offences were to be served cumulatively upon the sentences for the drug offences – where the applicant contends the sentencing judge erred in applying the parity principle because although he accepted the applicant was a street-level dealer, he failed to consider the sentences imposed upon two other street-level dealers supplied by the same supplier – where the applicant further contends the sentencing judge failed to employ the parity principle by not considering if the totality of the sentences imposed corresponded with the overall criminality of the applicant's offending – whether the sentences are manifestly excessive

R v Cottle-Pilides [2006] QCA 72, distinguished
R v Donald [2000] QCA 399, considered
R v Jobsz [2013] QCA 5, distinguished

COUNSEL: J Crawford for the applicant (pro bono)
D C Boyle for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Philip McMurdo JA and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** I agree that the application for leave to appeal against the sentences imposed on the applicant should be refused for the reasons stated by Philip McMurdo JA.

[3] **PHILIP McMURDO JA:** On 7 April 2015, the applicant was sentenced to various terms of imprisonment upon two indictments. She had pleaded guilty to each of the offences. She received in total a period of imprisonment of six and a half years with a parole eligibility date after approximately 30 months. She applies for leave to appeal against her sentences on the grounds that they were manifestly excessive.

[4] One of the indictments contained three counts: one of trafficking in heroin and other drugs (between 16 April 2012 and 31 May 2012) and two of supplying heroin on 29 May 2012. She was sentenced to five years' imprisonment for the trafficking offence and terms of 18 months for each of the other offences. The three terms are to be served concurrently. A total of 276 days of pre-sentence custody was declared.

[5] The other indictment alleged five offences occurring in the period from April to June 2014, whilst the applicant was on bail for the drug charges. There was an offence of stealing some items from a supermarket for which the term imposed was six months. There was an offence of receiving tainted property which was found within that part of the house belonging to the mother of the applicant's then partner where the applicant and her partner lived. The agreed schedule of facts contained a description of that property as including many items of jewellery, watches and iPods. For that offence she received a sentence of 18 months. There was an offence of entering a dwelling house and stealing passports, jewellery, cameras and other items for which she was sentenced to 18 months' imprisonment. There was an offence of dishonestly using another's credit card and a further offence of attempting to do so, for which she received terms of six months. All of the sentences imposed upon this indictment were to be served concurrently, but cumulatively upon the terms of the drug offences. Consequently her effective cumulative sentence was 18 months.

[6] The parole eligibility date was fixed at 20 December 2016. Considering the period of pre-sentence custody, this meant that she would become eligible for parole after serving a little under 30 months of a period of 78 months.

[7] The period of her trafficking was about six weeks. The applicant was a dealer at street level and motivated only by her need to meet her own addiction to heroin. The sentencing judge remarked that there was no reason to suppose that the business was profitable other than that it raised enough money to support her own addiction.

[8] His Honour was referred to a sentence imposed upon a man called Ainsworth, who was one of the applicant's suppliers. Ainsworth was sentenced to a term of seven years for trafficking in a period from 6 March 2012 to 29 May 2012. In the course of submissions his Honour accepted that Ainsworth's sentence was relevant and said that because Ainsworth was a trafficker on a larger scale, the sentence to be imposed on the applicant for her trafficking could not exceed six years.

[9] The applicant had a lengthy criminal history which reflected her longstanding drug addiction. But she had not been to jail for any longer period than 33 days. She was 30 years of age at the time of the drug offences and 33 when sentenced. His Honour noted that the drug offences were committed whilst she was on probation. His Honour said that he took into account her plea of guilty although that plea to the drug offences was late, so that she would not receive credit to the same extent that she would have had with an early plea.

[10] The applicant is the mother of three young children, the youngest being born whilst she was on remand for these matters. At the time of the sentence hearing, that child was living with the applicant's mother who was caring for the child with the support of the applicant's sister. The older children were living with their father's parents. The sentencing judge was informed that their father was in prison.

[11] At the sentencing hearing the applicant's separation from her children, as a result of her imprisonment, was apparently relied upon in two ways. The applicant would suffer her own distress from that separation and the children would be disadvantaged by not being in the care of their mother. As to that second matter, in the course of submissions his Honour expressed some doubt as to whether the children would be worse off than being in the care of the applicant if she could not manage her drug addiction. Ultimately this factor was not referred to in the sentencing judge's reasons but it appears from the transcript of the hearing that his Honour did consider this submission but was unpersuaded by it. In his reasons, his Honour referred to a report by a psychologist which was tendered by the applicant's counsel which referred to the difficulty the applicant would experience in coping with her addiction upon release. His Honour said that "it is to be hoped, for the sake of your children, three of them, all young, that you can find the strength of character and the professional assistance that will enable you to stay away from drugs". It appears then that his Honour was left in doubt as to whether the children would be disadvantaged by their mother's absence and for that reason at least, the sentence was not significantly affected by this factor.

[12] As for the dishonesty offences, his Honour recorded that the applicant's plea of guilty had been an early plea. He noted, adversely to the applicant, that she had been on bail in respect of the drug offences at the time of these other offences. His Honour commented that the applicant's role in the burglary and stealing offence had not been as substantial as that of her partner and that apparently she had not herself entered the premises. He noted also that the items the subject of the receiving count were found where the applicant was then living with that man.

[13] His Honour did not give reasons for his conclusion that the terms for these offences should be cumulative. The applicant's then counsel had conceded that it was open to his Honour to do so. In the course of submissions his Honour appeared to accept that the applicant's drug dependency had been "at the heart of all of the offending". In his reasons, when stating that there would be cumulative sentences imposed for the dishonesty offences, his Honour said "that engages totality considerations to which I have given effect."

[14] It was open to the sentencing judge to impose cumulative terms for the offences of dishonesty, in the circumstances where the applicant was then on bail and the dishonesty offences were committed some years after the drug offences. Of course each set of offences had the same ultimate explanation in the applicant's drug addiction. But some of the dishonesty offences were relatively serious and a distinct punishment for them was within the proper exercise of the sentencing discretion.

[15] The sole ground for the application is that the sentences were manifestly excessive. But Ms Crawford, who assisted the court and the applicant by appearing upon a *pro bono* basis, submitted that there were several indications of errors by the sentencing judge beyond that which was said to appear from the scale of the sentences.

[16] One indication was said to be that his Honour did not apply the parity principle, by not having regard to the sentences imposed upon two dealers who, at the same time, were also being supplied by Ainsworth. The respondent's counsel accepts that these sentences were relevant but that they do not demonstrate the disparity for which the applicant contends.

[17] One of these other offenders, whom I will call A, had trafficked for a period of about three months. He was sentenced to four and a half years with a parole eligibility after nine months. However, he had offered substantial co-operation. As appears from the sentencing remarks in the case of Ainsworth, A had been sentenced with the benefit of the operation of s 13A of the *Penalties and Sentences Act* 1992 (Qld).

[18] The other offender, a man named Brittenden, had trafficked for a period of only three weeks. He had no significant criminal history and only two convictions for possession of drugs where no conviction had been recorded. He was a heroin addict who had taken steps towards his own rehabilitation. He was sentenced to four and a half years' imprisonment with parole eligibility fixed at 12 months.

[19] It appears that the sentencing judge in the present case fixed the parole eligibility date by aggregating one-third of the cumulative sentences of 18 months with about 24 months, being 40 per cent of the five year term. For present purposes then, the five year sentence may be assessed as one with a non-parole period of two years. Clearly that is a heavier sentence than either A or Brittenden received. But there were factors in their cases which did not exist in the applicant's case. A's sentence had relatively little present relevance because of the effect of s 13A. Brittenden had no significant criminal history and had made progress towards rehabilitation. These sentences were not mentioned by his Honour and it would appear that he did not consider them. But it also appears that he was not asked to do so and no proper criticism can be made for his not doing so. Having regard to the different circumstances of those other offenders, it cannot be accepted that the sentence here was inconsistent with the proper application of the parity principle.

[20] It was argued for the applicant that his Honour, whilst adverting to the totality principle, failed to employ it. Criticism was made of his Honour's reasoning for not first determining the sentences which would be appropriate before considering whether the totality of the period corresponded with the overall criminality of the applicant's conduct. Whilst his Honour did not reveal his reasoning in that way, the ultimate question is whether the outcome was manifestly excessive.

[21] From the transcript of the hearing it appears that the submissions were focussed more on the drug offending than the appropriate penalties for the other offences. As I have

noted, his Honour characterised the applicant's participation in the burglary offence as less serious than that of her de facto partner. That indicated also her relative culpability for the receiving offence. His Honour was not assisted with any information as to whether her de facto partner had been sentenced for the offences of receiving and burglary in which it appeared that he was a co-offender. After the hearing of the present application, the respondent has provided a record of the criminal history of this man, from which it appears that he was sentenced in the Magistrates Court on 27 March 2015 (about a week prior to the applicant's sentence hearing) for a number of receiving offences within the period of the applicant's offence. On those charges he received concurrent terms of 12 months' imprisonment. At the same time he was sentenced on a number of other offences of dishonesty, for which he received concurrent terms. But there is no record of his being sentenced for the offence of burglary. Whilst it would have been preferable for the sentencing judge to have been given this information about an apparent co-offender, the information which this court now has is insufficient for a conclusion that the applicant's sentences for these offences were excessive upon the parity principle.

[22] At the sentencing hearing, the prosecutor cited four decisions of this court which were said to be comparable cases for the offence of drug trafficking and said that the most relevant of them was *R v Cottle-Pilides*,[1] where this court did not disturb a sentence of six years with parole eligibility after two years for trafficking in heroin. That offender pleaded guilty although the President remarked that the guilty plea was the extent of her co-operation with the authorities. Like the present applicant, she had an extensive criminal history, all of which was explained by her drug addiction and she had had the benefit of several lenient sentences on that account. But her history included an offence of robbery with violence and attempted armed robbery (for which she had received probation and a wholly suspended imprisonment). Importantly her trafficking was over a period of five months as compared with six weeks in the present case. Allowing for those differences, that case suggests that the sentence of five years which was imposed here was open.

[23] More recently in *R v Jobsz*,[2] this court set aside a sentence of four and a half years, suspended after 16 months, and substituted a sentence of four years, suspended after 12 months, for trafficking in cocaine and MDMA. The court resentenced that applicant because of a specific error by the sentencing judge in that he did not impose separate penalties for each of the offences for which that applicant was being sentenced. The duration of that trafficking was described as a "shortish period".[3] It does not appear that the scale of his trafficking was less than that of the present applicant. That applicant was a drug addict. de Jersey CJ (with whom White and Gotterson JJA agreed) said that a sentence of four years suspended after one year would recognise the applicant's plea of guilty, his lack of any criminal history and "his encouraging response to efforts at rehabilitation voluntarily taken."[4] Clearly there were mitigating circumstances in that case which did not exist here.

[24] Apart from any allowance to be made upon the totality principle, a sentence of five years with a parole eligibility after two years, in my view, would have been heavy but within range.

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1 [2006] QCA 72.
2 [2013] QCA 5.
3 Ibid, [12].
4 Ibid, [15].

[25] On the dishonesty offences, the prosecutor cited *R v Donald*.[5] This court there refused leave to appeal against a sentence of three years to be suspended after 18 months, for offences of housebreaking and entering a dwelling. That applicant had what was described as a "very substantial prior criminal history covering a period of eight years involving many offences of dishonesty and offences like those for which he was sentenced on this occasion."[6] It must be said that the present applicant's history is no less serious. That applicant was a drug addict. The Chief Justice (with whom Pincus and Thomas JJA agreed) said that "the three year term was at least mid-range for house-breaking by an offender with this prior record"[7] and that suspending the sentence only after one half of the term did not make the sentence manifestly excessive or fail to reflect the significance of the pleas of guilty.

[26] In the present case, apart from questions of totality, the sentence that was imposed for the dishonesty offences would have been light, apart from considerations of totality. In my view the terms of 18 months with parole eligibility after six months represent some allowance in the applicant's favour for the fact that those sentences would have to be served cumulatively upon the sentences for the drug offences.

[27] Ultimately the question is whether in totality, the orders which were made resulted in punishment which is so clearly excessive that it indicates an error by the sentencing judge. The overall period of six and a half years' imprisonment, in my view, does represent something less than the total of the sentences which might have been imposed but for the totality principle. A greater allowance might have been made in this case. But I am not persuaded that this period, with an eligibility for parole after the expiry of a little less than 40 per cent of it, is so excessive as to make any of the sentences manifestly excessive.

[28] I would order that the application for leave to appeal against these sentences be refused.

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5 [2000] QCA 399.
6 Ibid, 2.
7 Ibid.