[2016] QCA 98

COURT OF APPEAL

GOTTERSON JA
PHILIP McMURDO JA
DOUGLAS J

CA No 296 of 2015
SC No 640 of 2014
SC No 390 of 2015
SC No 951 of 2015
SC No 957 of 2015

THE QUEEN

v

WILSON, Jessica Lee **Applicant**

BRISBANE

FRIDAY, 15 APRIL 2016

JUDGMENT

PHILIP McMURDO JA: On 2 December 2015, the applicant was sentenced to various terms of imprisonment for offences upon two indictments and for a number of summary offences. She had pleaded guilty to each charge. She received concurrent terms of imprisonment for the charges upon the indictments and no further punishment on the summary charges. The longest of the terms imposed was one of six years for an offence of trafficking in methylamphetamine, MDMA and cannabis, between 21 July 2013 and 15 January 2014. She was sentenced for a further offence of trafficking in methylamphetamine in the period from 3 January 2015 to 9 February 2015, for which she received a term of 20 months, with an order pursuant to

subsection (2) of section 5 of the *Drugs Misuse Act* that she not be released until 80 per cent of that term had been served.

There were also two offences for the possession of drugs for which she received concurrent terms of one year. A period of 275 days from 2 March 2015 until 1 December 2015 was declared as pre-sentence custody. The parole eligibility date was fixed at 1 March 2018, effectively at the halfway mark of her six-year term. She applies for leave to appeal against that sentence upon the ground that it is manifestly excessive. The applicant was 27 years old when sentenced and 25 or 26 when the offences were committed. She had some criminal history, all of which could be attributed to her longstanding drug addiction, in particular an addiction to methylamphetamine, but none of which was of particular significance. She had not received a custodial sentence.

On 14 January 2014, she was found to be in possession of a crystalline substance which she then admitted was methylamphetamine and a powder which she then admitted was ecstasy. She admitted that the drugs were hers and that they were for personal use or for resale. Possession of these drugs were the offences for which she received the concurrent one year terms. The applicant's telephone was then examined by police. It revealed almost 1,100 text messages relating to the supply of drugs. The first of these messages had been received by the applicant on 31 July 2013 and the period of trafficking was thereby defined. The messages revealed that the applicant bought drugs from two primary sources and that she had two people selling drugs for her on a regular basis. The sentencing judge described her trafficking as of a relatively low level but noted that she was supplying other dealers as well as users.

His Honour said that the frequency of her wholesale business had increased over the period. She was supplying drugs on credit and, on occasions, had accepted stolen goods in exchange for methylamphetamine, and, on one occasion, had agreed to supply that drug in exchange for a firearm. An analysis of these messages showed that during this period she supplied, or offered to supply, drugs on at least 83 occasions, arranging the sale of 60 grams of methylamphetamine, about half a kilogram of cannabis and an unknown number of ecstasy pills. Her primary source

of income was profit from this business. His Honour noted that the picture presented by the text messages was incomplete, but it did reveal what he described as the existence of an already functioning drug operation at the time of the first message.

After being interviewed by police, on 14 January 2014, she was given a notice to appear. Beginning with an incident in July 2014, there followed several occasions on which she was found by police to be committing various offences which became the summary charges. The second trafficking offence came to light when she was detained by police on 8 February 2015. A mobile phone in her handbag, upon examination, recorded more than 500 drug-related messages from 4 January 2015, from which it appeared that she had sold drugs to at least 20 people and that she had two sources. The text messages suggested to the sentencing judge that there had been some trafficking which went beyond the subject – that the subject of the text messages found on this phone. Again, she'd been selling on credit and accepting items such as jewellery and a mobile phone in exchange for drugs.

The level of her trafficking was similar to that in her previous offence. This second period of trafficking occurred whilst the applicant was on bail and had been given notices to appear in respect of a number of offences. The sentencing judge remarked that this was a circumstance tending against leniency. His Honour referred to a number of mitigating circumstances: her pleas of guilty; her heavy drug dependence, in particular, her addiction to methylamphetamine; and that she had a young child whose care and company would be missed in prison. His Honour remarked that:

> "Totality considerations intrude, especially in relation to the sentence that needs to be imposed in relation to the second period of trafficking."

He noted also that the second trafficking offence was subject to the operation of subsection (2) of section 5, by which she would have to serve 80 per cent of the term for that offence. His Honour started with the consideration of the appropriate head sentence, for the first trafficking count, absent the consideration of the second trafficking, and said that the first count would warrant a head sentence of five years. He said that the second period of trafficking would warrant a term of four years, but for considerations of totality, that should be reduced. But on

the other hand, his Honour said, as concurrent sentences would be imposed in respect of all of the offences, it was necessary to assess the overall criminality of her conduct. And having done so, his Honour imposed the six-year term for the first trafficking count.

The applicant's argument does not criticise his Honour's methodology. The criticism is that his Honour started the head sentence of five years for the first trafficking count, which was too high and which resulted in the term of six years being manifestly excessive. It is argued that his Honour should have started with a term of three to four years for that count, which, adjusted for the reasons given by his Honour, would have resulted in a term of five years and a parole eligibility date after two and a-half years. In the applicant's argument, it is said that cases such as *R v Mikula* and *R v Blumke* would have supported a sentence of four years for the first trafficking count absent the second count.

For the respondent, it is submitted that each of those cases was less serious than the present, and reference was made to other decisions of this court to which I will come. In *Mikula*, the applicant was a man in his early 20s, with a minor criminal history who had pleaded guilty to trafficking in dangerous drugs over a nine-month period for which he was sentenced to a term of four years, suspended after serving 16 months, with an operational of four years. His application with leave to appeal against that sentence was refused, the court holding that it was not manifestly excessive.

The respondent suggests that *Mikula* was less serious for the fact that he was younger than the present applicant and that he was sentenced on the basis of a demonstrated rehabilitation of his addiction. But the difference in age was not significant for present purposes. Although there was the fact of his demonstrated rehabilitation over two years from the offending, Mikula was found to have been certainly trafficking for a commercial reward, but he was described as a street-level dealer. The applicant's submissions referred to a statement made by the President at paragraph 32 of her reasons in *Mikula*, that:

> "A review of the cases relied on by the parties as comparable suggests the appropriate range in this case was a head sentence of between three and four years with parole eligibility at or slightly earlier than one third."

That, of course, was a statement of the range for that case. The present question is whether the sentence here was outside the range for this case. In *Blumke*, the applicant was sentenced to four years' imprisonment, suspended after one year, with an operational period of four years for trafficking in drugs, including methylamphetamine and MDMA. The trafficking was for a period of about 10 weeks, involving transactions mainly at street level. He was in his early twenties at the time. The sentencing judge accepted that he'd turn his life around after being apprehended. He unsuccessfully argued that the sentence was manifestly excessive. Neither of those cases provides any significant support for the present applicant's argument. Each had circumstances which made it somewhat less serious than the present case: the level of trafficking and the offender's rehabilitation. More fundamentally, each of these cases involved a conclusion that a four-year sentence was not manifestly excessive. It did not involve a conclusion that in that case a sentence of five years would have been excessive, subject, of course, to the comment made by the President in *Mikula*.

Of more relevance are decisions where this court has resentenced an offender or where it has upheld a sentence as high as that which is now criticised. The respondent's argument refers to several cases in the latter category where a term of five years was imposed for drug trafficking, *McAway*, *Challacombe*, *McMahon* and *Oldfield*.

In *McAway* the applicant was 19 and 20 years old at the time of her offending and had no prior convictions. She trafficked in MDMA and MDEA for about six months. Her parole was recommended after 18 months. It should be noted that she was not an addict.

In *Challacombe*, again, the sentence was a term of five years with eligibility for parole after serving 18 months. His trafficking was described as being as at a "relatively low level" involving about 1,000 ecstasy tablets and two bags of methylamphetamine with a turnover of between 24,000 and $30,000 over a period of four to five months for a modest product. He had four regular customers. He was 21 and 22 years of age at the time of the offending, had a good work history and references. He was not an addict.

McMahon was a relatively older offender, being 37 and 38 when trafficking in methylamphetamine and cannabis over an 11-month period with about 70 occasions of supply. He was then on probation for other drug offences. His sentence of five years was suspended after two years.

In *Oldfield* the applicant was 28 when trafficking over a period of two and a half months in methylamphetamine and MDMA. These cases sufficiently indicate that in the present case his Honour's starting point of the term of five years for the first trafficking offence before considering the impact of the second offence was open to him.

In the applicant's favour it can be said that the head sentence in each of those cases was affected by orders for suspension or parole eligibility at less than the half way mark and, in that way, it was a lighter sentence. But, overall, these cases sufficiently indicate that a term of five years with parole eligibility at the halfway mark would have been open to the sentencing judge, absent the second trafficking count.

The second count, although, effectively, a continuation of the applicant's drug relating offending, warranted some further punishment as the applicant's argument accepts. It was legitimate for his Honour to reason as he did by increasing the head sentence on the first trafficking count.

In my conclusion, the sentence imposed was not manifestly excessive and I would refuse the application for leave to appeal.

GOTTERSON JA: I agree.

DOUGLAS J: I agree.

GOTTERSON JA: The order of the court is that the application for leave to appeal against sentence is refused.