SUPREME COURT OF QUEENSLAND

CITATION:	*R v Saunders* [2016] QCA 221
PARTIES:	**R** **v** **SAUNDERS, Craig Stanley** (applicant)
FILE NO/S:	CA No 128 of 2016 DC No 7 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 3 May 2016
DELIVERED ON:	6 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2016
JUDGES:	Margaret McMurdo P and Fraser JA and Daubney J Separate reasons for judgment of each member of the Court, Fraser JA and Daubney J concurring as to the orders made, Margaret McMurdo P dissenting
ORDERS:	**1. The application is refused.** **2. A warrant be issued for the applicant's arrest, such warrant to lie in the registry for 14 days.** **3. The parties have liberty to apply about order 2.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SETENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to supplying a dangerous drug – where the drugs supplied by the applicant caused the death of a person – where the applicant supplied drugs to a third party who then gave the drugs to the deceased – where the applicant was not present when the drugs were consumed – where the applicant co-operated fully with police when interviewed – where the applicant contended there was no evidence implicating him in the offence – where the sentencing judge took into account the applicant's co-operation, full admissions and early plea of guilty – whether the sentencing judge gave special leniency for the applicant's high level of co-operation – whether the sentence was manifestly excessive *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, considered *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, cited *R v Coutts* [2016] QCA 206, cited

R v Ellis (1986) 6 NSWLR 603, cited
R v Hauser [1999] QCA 345, cited
R v Shambayati [2016] QCA 121, cited
R v Tempelmeier (Unreported, Supreme Court of Queensland, Fryberg J, 25 March 2013), cited
R v Tout [2012] QCA 296, cited
Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21, cited
The Queen v Pham (2015) 90 ALJR 13; [2015] HCA 39, cited

COUNSEL: B H P Mumford for the applicant
J Robson for the respondent

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

[1] **MARGARET McMURDO P:** The applicant, Craig Saunders, pleaded guilty to supplying a dangerous drug, heroin, on 4 March 2015. He was sentenced to nine months imprisonment with parole release on 2 July 2016 that is, after having served two months. He has applied for leave to appeal against his sentence contending that the sentence was manifestly excessive and that judge failed to give any or special leniency to his co-operation in the administration of justice. The applicant was released on bail pending appeal on 10 June 2016 after serving 38 days imprisonment.

Antecedents

[2] He was 54 years old at the time of the offence and 56 at sentence. He had been sentenced on seven prior occasions for offences involving possessing or producing dangerous drugs and had been placed on probation in 1991, 1993, 2012 and 2013, sometimes breaching those community-based orders. In 2003 he was placed on a wholly suspended sentence for producing dangerous drugs. He also had convictions for offences of dishonesty. He had not been sentenced to actual terms of imprisonment and, as the prosecutor at sentence pointed out, he had no previous convictions for supplying a dangerous drug.

The facts of the offending

[3] The offending came to light in this way. On 4 March 2015 the body of Neil Collingburn was found in a toilet cubicle at a Gold Coast shopping centre. An ambulance was called but he was pronounced dead at 7.15 pm. A bag containing syringes, a sharps container and alcohol wipes were found next to him. A search of his mobile phone revealed that at about 5.15 pm he sent a text message to the applicant. Police later interviewed the applicant who gave a full and frank account in which he admitted that Nathan Bell contacted him, seeking heroin. The applicant initially refused but Bell persisted until the applicant relented. They met at a park behind the shopping centre; Bell was in the company of the deceased. Bell gave the applicant $120. The applicant then obtained two $60 bags of heroin and gave them to Bell. The applicant was not present when Bell and the deceased consumed the heroin.

The submissions of sentence

[4] The prosecutor stated that the applicant made a frank confession and entered an early guilty plea. An autopsy report noted that there was a receipt in the deceased's pocket

for "pharmacy medication" which was purchased on the day of his death at 4.33 pm by someone resembling the deceased and another male. The autopsy found that the deceased, who suffered from hepatitis C, had died from a heroin overdose and was a long term user of heroin, with a previous admission to hospital for a drug overdose. Anti-anxiety drugs were also detected in his blood. It was a relevant sentencing factor, the prosecutor submitted, that Mr Collingburn had died as a result of the heroin supplied by the applicant. He referred to *R v Hauser*[1] where a sentence of 12 months concurrent imprisonment was imposed and *R v Tempelmeier*,[2] where a sentence of 12 months imprisonment to be served by way of an intensive correction order was imposed. The prosecutor conceded that the chain of causation in the present case made the applicant further removed from the subsequent death than the offenders in those cases.

[5] Defence counsel stated that the applicant had been on a disability pension, since contracting hepatitis C some decades earlier. He began to use heroin when his brother was diagnosed with and ultimately died from cancer but he was never dependent on it. Defence counsel submitted that a short period of wholly suspended imprisonment or probation was appropriate. He emphasised that the deceased was a seasoned user of opioids and that, unlike in *Tempelmeier*, this was not a supply leading to the death of a very young person. He submitted that, despite the tragic consequences, the amount of drugs supplied was very small, (between 0.2 and 0.6 grams).

[6] In reply, the prosecutor explained that his case was that each supply was between 0.1 and 0.3 grams; the supplies were of a small quantity of drugs for $120, and as it was not possible for anyone to be certain of their quality or purity, the death of end-users was an inherent danger of this offending.

The sentencing judgment

[7] In sentencing, the judge took into account the early plea of guilty, that the applicant fully co-operated and made full admissions, had a lengthy criminal history for offences involving drugs and dishonesty, and had been given many past opportunities to reform. After referring to the facts of the case, his Honour noted that general deterrence was important. Supplying dangerous drugs was serious, as was obvious from the resulting death in this case. Whilst noting *Tempelmeier* and *Hauser*, the judge stated that it was for him to determine the sentence on the facts of this case. His Honour summarised defence counsel's submissions. The judge again emphasised that the case was serious as it involved a Schedule 1 drug which resulted in a death. This highlighted the risks of offences of this kind; general deterrence was crucial. But for the applicant's co-operation, the sentence, his Honour stated, would have been higher.

The contentions in this application

[8] The applicant contends that the judge gave insufficient weight to the fact that he confessed to the offending and that without this confession his criminal conduct would not have been known by the authorities, citing Hayne J's observations in *AB v The Queen*.[3] But for those admissions, the applicant emphasises, there was no evidence implicating him in the offence. Although defence counsel at sentence noted the applicant's co-operation and the judge took this into account, his Honour was not referred to, and did not himself refer to, the principle in *AB*. The applicant's co-operation

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1 [1999] QCA 345.

2 (Unreported, Supreme Court of Queensland, Fryberg J, 25 March 2013).

3 (1999) 198 CLR 111, [113].

in confessing to criminal conduct which would otherwise have been undiscovered warranted special leniency not reflected in the sentence. When that co-operation was considered in conjunction with the applicant's early plea of guilty and the small quantity of drugs supplied, not directly to the deceased, the applicant contends that the sentencing discretion miscarried in requiring him to serve a period of actual custody and the sentence was manifestly excessive. *Tempelmeier* and *Hauser* were more serious than this case in that the present applicant did not supply directly to the deceased. As the applicant has now served 38 days in custody, he contends that this Court should grant the application for leave to appeal, allow the appeal and re-exercise the sentencing discretion with a suspension or parole release after 38 days.

[9] The respondent accepts the concept of special leniency where an offender confesses to what was an unknown crime, as explained by Street CJ in *R v Ellis,*[4] Hayne J in *AB,* and McHugh J in *Ryan v The Queen*[5]. The respondent emphasises, however, McHugh J's observations in *Ryan*[6] that this was not "a rule to be quantitatively, rigidly or mechanically applied" and that the significance of the leniency to be given will depend on the facts and circumstances of each case. The respondent also emphasises Hayne J's observations in *Ryan*[7] that a sentencing judge's omission to make express reference to the principle does not demonstrate error in the absence of a conclusion that the sentence was excessive. The respondent contends that the applicant's co-operation was not as significant as in *Ellis, AB* and *Ryan*. The applicant was not confessing to an entirely unknown offence. He did not present himself to police; the deceased's mobile phone lead police to him. There were particular mitigating features in *Hauser* which, the respondent submits, were not present in this case. Tempelmeier was sentenced on the basis that imprisonment could be imposed only as a last resort, whereas, the respondent contends, that principle is no longer apposite in sentencing this applicant. The sentence imposed in this case, he contends, was not inconsistent with that imposed in those cases. The sentencing judge made appropriate allowance for the level of co-operation and did not err. The sentence was not manifestly excessive, even if a different judge may have imposed a lesser sentence.[8] Nor was it unreasonable or plainly unjust. The respondent contends that the application for leave to appeal should be refused.

Conclusion

[10] The respondent accepts, as the prosecution did at sentence, that this was a case where "the circumstances of the offence arise solely...as a result of what [the applicant] told police."[9] It is not suggested, for example, that the deceased's text message to the applicant, which led to police interviewing him, was sufficient to charge the applicant. Bell's admissions appear to have come after those of the applicant but it is not clear from the information before this Court whether Bell was contacted as a result of information provided by the applicant. Whilst Bell ultimately implicated the applicant in his statements to police, the respondent concedes that it would be difficult to convict the applicant on Bell's testimony as Bell had not been charged with any offences arising from this matter and could claim privilege against self-incrimination. It is true, as the respondent emphasises, that unlike in *Ellis, AB* and *Ryan,* the police in

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4 (1986) 6 NSWLR 603, 604.
5 (2001) 206 CLR 267.
6 Above, 272 [15].
7 Above, 312 [153].
8 *R v Tout* [2012] QCA 269, [8].
9 T1-3, AB 7, l 38 – l 39.

this case knew that someone must have supplied the deceased with the heroin which was the cause of his death. Nevertheless, the applicant's confession to police was the reason why police were able to charge him with this offence. The case was therefore one requiring special leniency because of his co-operation. Unfortunately, defence counsel at sentence did not emphasise that it was the applicant's confession to police which resulted in him being charged and was the only reliable evidence against him, or to the *AB* principle. As a result his Honour, unsurprisingly, made no reference to these specific facts or the *AB* principle in sentencing, although referring generally to his full co-operation and admissions.

[11] This does not mean there has been error if the sentence imposed appropriately reflects the high level of co-operation. This case was not as serious as *Tempelmeier*, where the offender, a mature man who directly supplied morphine to a 17 year old who died after ingesting it, was sentenced to a 12 month intensive correction order. It is true that a relevant sentencing principle in that case which is no longer apposite was that imprisonment was a last resort. Tempelmeier, however, was ordered to serve a term of imprisonment, although it was served in the community under an intensive correction order and not in a prison.[10] As the respondent contends, there were unusual features in *Hauser* not present in this case, but Hauser was sentenced to 12 months imprisonment concurrent with a term he was already serving and so was effectively not further punished for the supply of a dangerous drug to a person who died in his presence after ingesting it. In the present case the applicant was slightly more removed than in *Tempelmeier* and *Hauser* from the death he indirectly caused. Those cases are reasonably comparable to the present case, yet in neither *Tempelmeier* nor *Hauser* was the offender ordered to serve an actual period of imprisonment. It is true that the judge twice referred to the applicant's cooperation generally. But in light of the especially high level of co-operation without which he would not have been charged and to which the judge did not in terms refer, a sentence requiring him to spend two months in actual custody was manifestly excessive.

[12] The tragic death of Mr Collingburn is a grim reminder of the risk of supplying dangerous drugs like heroin to those who are often ill and frail and use them without medical supervision. The applicant had to be sentenced, however, on the basis that he supplied between 0.2 and 0.6 grams of heroin to Bell for $120, after being importuned to do so. Although he was not directly responsible for Mr Collingburn's death, this tragic circumstance is part of the factual matrix which should be taken into account in sentencing. It can be inferred that if the applicant made any profit, it was very modest. Although he was a mature man with a concerning criminal record, he had no prior history of supplying dangerous drugs and had not previously been sentenced to actual imprisonment. No two cases are identical but this case was no more serious than *Tempelmeier* or *Hauser*. Personal and general deterrence are relevant factors but, given the small amount of drugs supplied, the lack of any commercial element, and the mitigating features, particularly his guilty plea and high level of co-operation without which he was unlikely to have been convicted, a sentence requiring him to serve any term of actual imprisonment is unwarranted. He has, however, served 38 days in custody prior to being granted bail pending appeal and this should be reflected in the sentence.

[13] I would grant the application for leave to appeal, allow the appeal, and vary the sentence by ordering that the date the applicant be released on parole is 2 May 2016

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10 *Penalties and Sentences Act* 1992 (Qld) s 112, s 113.

instead of 2 July 2016. I would otherwise confirm the sentence imposed at first instance. I would also direct that he report to the Southport Parole Office within 48 hours from the date of this order.

[14] **FRASER JA:** I gratefully adopt [1] – [9] of the President's reasons.

[15] The prosecutor prefaced his submissions to the sentencing judge by stating that the circumstances of the offence arose solely as a result of what the applicant told police. The sentencing judge observed that it was a matter in the applicant's favour that he had "fully co-operated and made full admissions concerning this matter." In these circumstances, the fact that the sentencing judge did not reproduce or more extensively summarise the prosecutor's statement or cite decisions such as *AB v The Queen* (1999) 198 CLR 111 at [113] and *Ryan v The Queen* (2001) 206 CLR 267 does not justify a conclusion that the sentencing judge did not afford such degree of leniency on this account as the judge considered was appropriate. The circumstance that the parole release date was fixed after only two months of a nine month term is consistent with the sentencing judge having taken this relevant consideration into account at least in fixing the period of actual custody. It should be inferred that the sentencing judge did take this mitigating factor into account. What weight should be attributed to it in the sentence was a matter for the sentencing judge, subject only to the question whether the sentence as a whole is manifestly excessive: see *Ryan v The Queen* (2001) 206 CLR 267 at [153]; *R v Coutts* [2016] QCA 206

[16] A sentence is amenable to appellate correction on the ground that it is manifestly excessive only if, having regard to the relevant sentencing considerations and taking into account the degree to which the sentence differs from sentences imposed in comparable cases, the sentence is unreasonable or plainly unjust such as to justify the inference that there must have been a misapplication of principle: *Hili v The Queen* (2010) 242 CLR 520 at [58], *The Queen v Pham* (2015) 90 ALJR 13 at [28].

[17] In my respectful opinion the sentences imposed in the factually different cases cited as comparable sentencing decisions did not preclude the imposition of a short period of actual custody. The seriousness of the offence of supplying heroin must be taken into account. That only a small quantity was supplied and the applicant was not remunerated for the supply were relevant considerations but they did not exclude general deterrence as a sentencing consideration. Personal deterrence was a relevant sentencing consideration, particularly having regard to the applicant's mature age and the unfortunate fact that less severe sentences for the applicant's previous drug offences failed to deter him from committing this offence. In this context, and also taking into account the mitigating factors (notably including the applicant's high degree of co-operation with the authorities and his early plea of guilty) I am not persuaded that the sentence of nine months imprisonment with parole release after two months is so unduly severe as to be characterised as unreasonable or plainly unjust such as to evidence an error of principle.

[18] I conclude that the sentence was not manifestly excessive.

[19] Because the applicant is at liberty on appeal bail, it is appropriate that a warrant be issued for his arrest. That may occur notwithstanding that the parole release date fixed by the sentencing judge has passed; see *R v Shambayati* [2016] QCA 121. Because the parties did not make submissions upon this point, however, I would grant liberty to apply.

[20] I would refuse the application. I would also order that a warrant be issued for the applicant's arrest, such warrant to lie in the registry for 14 days, and that the parties have liberty to apply about that order.

[21] **DAUBNEY J:** In *Ryan v The Queen*[11], Hayne J said[12] (omitting citation):

> "The fact that the sentencing judge made no express reference to *R v Ellis* (to which he was referred in the course of the plea) and did not use an epithet like 'considerable' or 'significant' when referring to the credit he gave on this account does not demonstrate error. Error could be discerned only if it could be seen that the sentence imposed was excessive."

[22] The sentence hearing in this case proceeded on the basis of an initial express concession by the prosecutor that "the circumstances of the offence arise solely then as a result of what the defendant told police".[13] There is nothing to suggest that the learned sentencing judge did not fully appreciate that this was the basis on which the hearing was proceeding.

[23] The President has set out the facts of this matter. In short, it was a case of a mature man, with a relevant criminal history, engaging in the supply of a Schedule 1 drug, albeit in a small quantity. General deterrence was obviously a relevant factor, as was the question of personal deterrence. Also in the mix for consideration were the mitigating factors to which the President has referred, including the so-called "*AB* factor".

[24] When one has regard to all of these matters, and to the comparable cases to which the President has referred, I do not consider that it can be said that a head sentence of nine months (which was expressly moderated to take account of the applicant's co-operation) coupled with a requirement that he serve a short period of actual imprisonment can be seen as excessive. That is precisely the sentence which was imposed. I note also that the fixing of a parole release date after serving two months amounted to a requirement that the applicant serve less than 25 per cent of the head sentence.

[25] Accordingly, I do not consider that the sentence was infected by error. Nor do I consider that the sentence was manifestly excessive. I would refuse the application for leave to appeal against sentence. I agree with the orders proposed by Fraser JA.

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11 (2001) 206 CLR 267.
12 At [153].
13 AR 7, 37-39.