SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hasnan* [2016] QCA 281
PARTIES:	**R** **v** **HASNAN, Haslinawatti Binti** (applicant)
FILE NO/S:	CA No 165 of 2016 SC No 49 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 20 May 2016
DELIVERED ON:	4 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2016
JUDGES:	Morrison and Philippides and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce further evidence is allowed in part.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted, by her own plea of guilty, of one count of importing a commercial quantity of a border controlled drug – where the applicant was sentenced to eight years and six months imprisonment with the non-parole period fixed at five years – where the applicant contended that the non-parole period was excessive – where the applicant's counsel at sentence had accepted that the sentence was appropriate – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – TO ADMIT NEW EVIDENCE – where the applicant sought to rely on further evidence of her father's medical condition, her divorce and family circumstances and her conduct in prison – where the respondent submitted that the further evidence was not

substantially different from that presented to the sentencing judge and, even if admitted, did not demonstrate that the sentence was manifestly excessive – whether leave should be granted to adduce the further evidence

Criminal Code (Qld), s 668E(3)

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v AAV [2014 QCA 343, cited
R v Agboti (2014) 246 A Crim R 72; [2014] QCA 280, considered
R v Calis [2013] QCA 165, cited
R v Flew [2008] QCA 290, cited
R v Hughes [2004] 1 Qd R 541; [2003] QCA 460, cited
R v Jimson [2009] QCA 183, considered
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Stokes [2016] QCA 157, cited
R v Tout [2012] QCA 296, cited
R v Wu, unreported, Supreme Court of Queensland, Ann Lyons J, SC No 323 of 2014, 2 September 2014, considered

COUNSEL: The applicant appeared on her own behalf
B J Power for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MORRISON JA:** I have read the draft reasons of Philippides and Philip McMurdo JJA. I agree with each set of reasons, and the orders proposed.

[2] **PHILIPPIDES JA:** The applicant was convicted on 11 November 2015, by her own plea of guilty, of one count of importing a commercial quantity of a border controlled drug and was sentenced on 20 May 2016. She was sentenced to eight years and six months imprisonment, with the non-parole period fixed at five years. A declaration was made as to pre-sentence custody from 1 January 2014 to 20 May 2016 (870 days). The applicant seeks leave to appeal against the sentence imposed.

Circumstances of the offending

[3] The background facts can be conveniently summarised as follows. On 1 January 2014, the applicant arrived in Brisbane International Airport from Hong Kong. The applicant, being a Malaysian national, filled in an incoming passenger card in Malaysian stating that she had nothing to declare. Her bag was x-rayed, following which she was spoken to by customs officials. She told the customs officials in English that she owned the suitcase in question, that she had packed it herself and was fully aware of its contents. When examined, the suitcase was found to be abnormally shallow and a presumptive test found that the bag contained a quantity of methylamphetamine.

[4] When asked why she had come to Australia and whether there were any arrangements to meet anyone, the applicant told customs officials that she had come to Australia for a holiday, that no one was coming to meet her and that she had

made no bookings for accommodation for her stay. When told by the customs officials that it was suspected that there were packages hidden in her suitcase, she stated that she did not know what they were and had purchased the bag in China. At that time, the applicant's mobile phone received three calls in approximately ten minutes. The applicant was directed by the customs officials not to answer the calls. The applicant was then cautioned with the assistance of a Malaysian interpreter and, on legal advice, the applicant declined to provide an interview to the AFP.

[5] When the packages secreted in the applicant's suitcase were examined, they were found to contain 1.2 kilograms of pure methylamphetamine in approximately one and a half kilograms of crystal substance. The potential street value of that amount of methylamphetamine was between one and three million dollars.

Personal circumstances

[6] The applicant was born in Malaysia on 12 December 1976. She was 37 years of age at the time of committing the offence and was 39 years of age at the time of sentence, with no criminal history. A psychological report of Mr Perros tendered in behalf of the applicant was not disputed. It outlined that the applicant had had a difficult life.

[7] The applicant had, at some time before her arrest, provided some assistance to Malaysian authorities, however, she had declined to do so with Australian authorities. The matter proceeded as a sentence on the basis of a plea with an agreed schedule of facts.

Submissions at sentence

[8] In contending that a term of imprisonment requiring actual custody should be imposed, the Crown relied upon the cases set out in a comparative sentence schedule that was tendered, with particular reference made to *R v Calis*,[1] *R v Agboti*[2] and *R v Jimson*.[3] The Crown accepted that the applicant had suffered personal difficulties which left her vulnerable to be preyed upon by others and becoming involved in drug smuggling, but submitted that these circumstances were shared by many of the offenders in comparable cases, such as *Jimson* and *Agboti*. As for the assistance provided to authorities, it was submitted that assistance was present as a feature of other cases in the schedule of comparatives. There was no additional assistance provided to Australian authorities. *Calis* was referred to as a case where a sentence of 10 years imprisonment was imposed (although after trial) on an offender who also had no criminal history for importing a similar quantity on an offender. *Jimson*, where a sentence of eight years imprisonment with a non-parole period of four years and six months, was distinguished as a case which concerned only a marketable quantity rather than a commercial quantity as was the case here.

[9] On behalf of the applicant, it was submitted that a sentence in the vicinity of eight years imprisonment should be imposed. Submissions were made as to mitigating circumstances and, in particular, as to Mr Perros' report. Counsel emphasised the applicant's impoverished situation and need to care for two daughters, along with her history of relationships in which she had suffered domestic violence and had a lack of financial support. Her counsel stated that the offending occurred in

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1 [2013] QCA 165.
2 [2014] QCA 280.
3 [2009] QCA 183.

circumstances where "she was desperate for money" and "was in a fragile state at the time". It was submitted that there was no suggestion that the applicant had any knowledge of the actual quantity that was imported. The applicant's counsel also tendered two letters from the Malaysian High Commission showing the applicant's cooperation with Malaysian authorities.

[10] When at the conclusion of submissions, the learned sentencing judge indicated his provisional view as to the appropriate sentence (being that which was imposed), the applicant's counsel indicated that he could not argue against such a sentence being an appropriate one.

Sentencing remarks

[11] The sentencing judge referred to the following matters in his sentencing remarks. The applicant had pleaded guilty in a timely way, had cooperated with the authorities and was remorseful for her actions. The importation had the potential to bring a large quantity of drugs into the country which, on the streets, would cause great misery. Deterrence was of paramount importance in drug importation cases. The applicant had had a difficult life and it was accepted that she undertook the importation due to her financial problems and the stress she was suffering. While those matters were to be taken into account, they could not overwhelm the need for deterrence.

[12] Balancing all the features of the case, including the quantity of the drugs imported, his Honour determined that the appropriate sentence in this case was one of eight years and six months imprisonment with a non-parole period of five years.

Grounds of appeal

[13] In support of the application to appeal against sentence, the applicant argued as a ground of appeal that the sentence was manifestly excessive. In her outline, the applicant did not take issue with the head sentence imposed, but contended that the sentence was manifestly excessive in imposing a non-parole period of five years. It was contended that a period of four years should have been imposed by way of a non-parole period.

[14] The applicant also sought to add a second ground of appeal that her sentence should be reconsidered due to certain matters in mitigation not being known to the learned sentencing judge. It is convenient to deal with that matter first.

Ground 2 – reconsideration of the sentence due to further material

[15] The respondent did not object to the applicant being given leave to amend her notice of appeal to add ground 2. The applicant also required leave to adduce further evidence as to the second ground.

[16] The second ground, as outlined in the applicant's outline, relied on three matters by way of further evidence:

- Firstly, "at the time of sentencing the Judge did not know that the applicant's father is terminal from severe heart condition";
- Secondly, that the applicant's ex-husband had "been able to use the fact that the applicant [was] in prison to obtain a divorce, to his advantage" and had

"absconded with their youngest daughter of 15 year [of age] to another country"; and

- Thirdly, the applicant "has been a model prisoner", and her time in prison has been rendered more difficult than for other prisoners due to language and cultural barriers and her separation from family.

[17] The applicant gave some further evidence orally as to these matters at the hearing before this court. She said her father's condition had worsened. The actual divorce appears to have been finalised after the sentencing. The further evidence relied upon by the applicant appears to have raised a combination of matters, some of which had occurred since the sentencing.

[18] It is clear that evidence concerning each of the three matters raised was before the sentencing judge, even if not precisely in the same terms. It was apparent from the psychologist's report that the applicant's father had "a cardiac history and [had] had a pacemaker fitted." While the applicant's evidence was that his condition had worsened, that was not inconsistent with the picture presented at sentence. As to the second matter raised, the psychologist's report went into some detail in relation to the applicant's personal circumstances, including a first marriage that ended in divorce. The unhappy state of the applicant's second marriage was also recorded, along with the fact that the husband had effectively deserted her and lived in Singapore. It seems that the divorce from the applicant's second husband occurred after the sentencing hearing but, in any event, it does not significantly add to the evidence before the sentencing judge as to the applicant's personal circumstances. As to the position of the applicant's parents and their ability to care for the applicant's daughters, the report noted that although the writer had not asked specifically, he inferred that "her parents would be unable to keep up mortgage repayments [on the applicant's house] and care for her daughters". The report also recorded that the applicant was separated from her family and missed her children. It also outlined that she had used her time in prison very effectively, through improving her English, learning sewing skills and working as a workshop leader.

[19] The respondent submitted, relying on *R v Maniadis*,[4] *R v Hughes*[5] and *R v AAV*,[6] that to the extent that matters came to pass after the sentence hearing (and did not in some other way reflect the state of events as at the time of sentence) this Court was unable to consider them, as an appeal under s 668E(3) of the *Criminal Code* (Qld) concerned the appropriateness of the sentence at the time it was imposed. Additionally, the respondent contended that the further evidence sought to be admitted was not substantially different from that presented to the sentencing judge and, even if admitted, did not demonstrate that the sentence imposed was manifestly excessive.

[20] In my view, it is appropriate to consider the evidence but, having done so, it is apparent that the nature of the matters raised concerning the poor health of the applicant's father and the situation of her unhappy second marriage were already before the sentencing judge. Even so, I am prepared to allow the application to adduce evidence but confined to those matters only. That evidence does not indicate that any miscarriage in the exercise of the sentencing discretion is established. In any

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4 [1997] 1 Qd R 593 at 596-597.
5 [2004] 1 Qd R 541 at 546.
6 [2014] QCA 343 at [21].

event, I also accept the respondent's alternative submission that, even allowing for the further evidence, it does not show that the sentence was manifestly excessive.

Ground 1 – manifestly excessive sentence

[21] In arguing that the sentence imposed was manifestly excessive, the applicant relied upon a comparison between her case and the decisions of *R v Agboti*[7] and *R v Wan Hao Wu*.[8]

[22] In *Agboti*, a sentence of nine years and six months imprisonment, with a non-parole period fixed at four years and six months, was imposed on appeal on a much younger (24 year old) offender with no previous convictions. The applicant principally relied upon the first instance decision of *R v Wu*. The sentence imposed there was ten years with a non-parole period of five years. The respondent argued that while the case had some similarities with the present case, there were two differences. One difference favoured the applicant, while the other did not. The first difference was that the offender in *Wu* carried a greater amount of pure methylamphetamine (3178.9 grams) than the applicant. The second difference was that the sentence in *Wu* proceeded on the basis that the applicant believed that she had been smuggling diamonds, but was guilty of the offence on the basis that her conduct had involved "a high degree of recklessness". Further, even if the sentence in *Wu* was closely comparable with the present case, that would not establish that the sentence was manifestly excessive. Pointing to a case where a lesser sentence has been imposed for comparative offending does not of itself establish that the sentence is manifestly excessive, in that it is outside the sentencing discretion.[9]

[23] I note that the sentence imposed was specifically accepted as being an appropriate exercise of discretion by the applicant's counsel on sentence. As the respondent submitted, this renders the applicant's task in establishing that the sentence was manifestly excessive difficult.[10]

[24] The respondent relied on the decisions of *Calis*, *Agboti* and *Jimson*, which were relied upon at first instance and to which reference has already been made, as comparatives that supported the sentences imposed in the present case. It was submitted that whilst the applicant's cooperation with the Malaysian authorities nearly six months after her arrest is a matter to be taken into account, her cooperation cannot be seen to have been of a high order. It was said that, in that respect alone, the applicant stood in a very different position from the offender in *Jimson* who gave immediate assistance to police to seek to apprehend the persons who were to receive the imported drugs. As to the decision of *Jimson* the respondent also emphasised, as it did at first instance, that while that case involved a person with similar antecedents to the applicant, it was distinguishable on the basis that the applicant there had imported a marketable quantity of a border controlled substance, rather than a commercial quantity as in this case.

[25] In the present case, the psychological report indicated that the applicant accepted a role as a "mule". In defence submissions at sentence, it was said that although the applicant initially thought that she was taking a promotional job that "obviously

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7 [2014] QCA 280.
8 Supreme Court of Queensland, 2 September 2014, Ann Lyons J.
9 *Hili v The Queen* (2010) 242 CLR 520 at 538-539 [58]-[59]; *R v Tout* [2012] QCA 296 at [8].
10 *R v Flew* [2008] QCA 290 at [28], [52]; *R v Stokes* [2016] QCA 157 at [15].

when she's spoken to at a later time, it wasn't". It was then submitted that she accepted the role because "she was desperate to improve her personal circumstances and her status in the community". Defence counsel also stated in submissions that the applicant knew what she was doing was wrong, but she did not know the "actual quantity" in the suitcase.

[26] In terms of the relevant facts of the present case, it is to be noted that the applicant did not provide any assistance to Australian authorities at the time of her apprehension. Even when told by customs officials that they believed there were packages hidden in her suitcase, the applicant gave answers that were not consistent with the explanation given at sentence as to her state of knowledge at that time. Further, as submitted by the respondent, from the fact that three calls were made to her phone at the time her bag was being inspected, it can be inferred that the applicant could have given assistance to the authorities at the time of her arrest about the arrangements for the delivery of the drugs, had she wished to do so. The amount of pure methylamphetamine imported was more than 450 grams above the commercial quantity threshold. The offending was of a very serious nature and a case where general deterrence loomed large. Notwithstanding the matters of mitigation in the applicant's favour, a consideration of the comparable cases indicates that the sentence imposed on the applicant was not manifestly excessive. Rather, it was one that was well within the sound exercise of the sentencing discretion.

Orders

[27] The orders are:

1. The application to adduce further evidence is allowed in part.

2. The application for leave to appeal against sentence should be refused.

[28] **PHILIP McMURDO JA:** The applicant sought to tender evidence which was not before the sentencing judge. That evidence could be relevant only if it proved a fact or circumstance existing at the date of the sentence, because the question in this court is whether "some other sentence … is warranted in law and should have been passed …".[11] The evidence as to the medical condition of the applicant's father is arguably of that kind, because it is evidence of subsequent events which reveal the seriousness of his condition at the time of the sentence. But the poor health of the applicant's father was within the evidence before the sentencing judge and the further evidence on this subject could not be significant for the outcome in this court. The evidence as to the applicant's second marriage might be considered to be admissible upon the same basis. But again it could not be considered significant to the outcome here. The evidence of the applicant's good behaviour in prison is clearly not something which could have any bearing upon what sentence should have been passed.[12] Therefore I would admit the further evidence as to the applicant's medical condition and the applicant's marriage but not admit the evidence of the applicant's behaviour in prison since the sentence.

[29] I agree with the reasons of Philippides JA for concluding that this sentence is not manifestly excessive and that the application for leave to appeal should be refused.

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11 *Criminal Code* s 668E(3).

12 *R v Maniadis* [1997] 1 Qd R 593, 596-597; *R v Hughes* [2004] 1 Qd R 541, 545-546; *R v AAV* [2014] QCA 343 at [21].