SUPREME COURT OF QUEENSLAND

CITATION:	*R v Phillips* [2017] QCA 41
PARTIES:	**R** **v** **PHILLIPS, Benjamin** (applicant)
FILE NO/S:	CA No 242 of 2016 SC No 150 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 28 June 2016
DELIVERED ON:	17 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2017
JUDGES:	Fraser and Philippides JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – TIME FOR AN APPLICATION AND EXTENSION THEREOF – where the applicant entered pleas of guilty to two counts of possession of methylamphetamine, one count of possession of cannabis exceeding 500 grams and one count of possession of cannabis – where an overall sentence of five years was imposed with a one-third non-parole period – where the applicant was aged 40 years – where the applicant had relevant criminal history and had committed offences whilst released on bail – where the applicant entered a timely plea – where the applicant had made efforts at rehabilitation – where the applicant required long-term and close supervision – where it was not contested at sentence that there was commercial motivation behind the offending – where the applicant contested on appeal that the possession of the drugs was a personal possession – where the applicant seeks an extension of time to file an application for leave to appeal against sentence – where the applicant suffered from depression – where the applicant thought his lawyers would lodge an appeal on his behalf – whether there is adequate explanation for the delay – whether it is in the interests of justice to grant the extension *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54,

cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
R v Gordon; Ex parte Director of Public Prosecutions (Cth) [2011] 1 Qd R 429; [2009] QCA 209, cited
R v GV [2006] QCA 394, cited
R v Hesketh; ex parte Attorney-General (Qld) [2004] QCA 116, considered
R v Hoad [2005] QCA 92, cited
R v McLaughlin [1997] QCA 473, considered
R v Morrison [1999] 1 Qd R 397; [1998] QCA 162, considered
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied

COUNSEL: The applicant appeared on his own behalf
D R Kinsella for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading in draft the reasons of Philippides JA. My additional reasons concern only two submissions made by the respondent.

[2] First, the respondent submitted, with reference to *Attorney-General (Qld) v Adair*,[1] that "an obvious error in the judgment below is not alone sufficient to justify the grant of an extension of time in the absence of an adequate explanation for delay".[2] That was a case in which the Attorney-General sought an extension of time to appeal with a view to seeking an increase in sentence. The observation upon which the respondent relied was quoted in *R v Gordon; Ex parte Director of Public Prosecutions (Cth)*,[3] which again concerned an application by the executive for an extension of time to appeal with a view to the sentence being increased. Keane JA referred to authorities indicating "that an individual should be exposed to the prejudice of double jeopardy only for good reason, and this will usually require a satisfactory explanation for the delay, and will usually not be shown merely by an error in the sentencing process". That consideration is absent in a case, such as the present, in which a sentenced person applies for an extension of time within which to seek leave to appeal against sentence. Whilst the absence of an adequate explanation for delay in such a case may militate against the grant of an extension of time – perhaps decisively in particular cases – the established principle was expressed in *R v GV*:[4]

> "Even if no satisfactory explanation for delay is given, an application to extend time may be granted if the applicant can demonstrate that to refuse it would result in a miscarriage of justice [See *R v Lewis* [2006] QCA 121 at [3] per McMurdo P]. In order to decide whether or not there is an adequate explanation and whether or not to refuse leave to extend time would result in a miscarriage of justice, it is necessary to look at the circumstances of the case."

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1 [1997] QCA 185 at p2.
2 Reasons of Philippides JA, paragraph 11.
3 [2009] QCA 209 at [34].
4 [2006] QCA 394 (Jerrard JA, Jones and Atkinson JJ) at [3].

[3] The respondent also submitted that the sentence imposed upon the applicant of five years imprisonment with parole eligibility after one third of that period was not unreasonably or plainly unjust "when measured against the authorities, being more or less comparable". The respondent relied upon four cases: *R v Hesketh; ex parte Attorney-General (Qld)*,[5] *R v Stuck*,[6] *R v McLaughlin*[7] and *R v Morrison*.[8]

[4] In *Hesketh* the Court resentenced an offender upon an Attorney General's appeal to two and a half years imprisonment, suspended after nine months imprisonment (taking into account imprisonment already served under an intensive correction order), for an operational period of five years. That offender pleaded guilty to possession of methylamphetamine in a quantity exceeding two grams. The total weight of pure methylamphetamine was a little more than 57 grams. That was more than twice the total weight of pure methylamphetamine possessed by the applicant in both of his similar offences. Importantly, however, the sentence imposed upon the applicant took into account his criminality, not just in one offence of possession of methylamphetamine exceeding two grams, but also in the count of possession of cannabis exceeding 500 grams, another count of possession of cannabis, and, most significantly, a second count of possession of methylamphetamine exceeding two grams. The applicant's commission of the second offence of possession of methamphetamine exceeding two grams occurred whilst he was on bail for the first such offence and it also involved an escalation in his offending, the amount possessed on that occasion being some five times greater than the amount possessed in the first such offence. Williams JA (McPherson JA and Holmes J agreeing) observed that the range of imprisonment for an offence such as that in *Hesketh* was from about two and a half years to about four years, but that certain mitigating matters, particularly that offender's attempts at rehabilitation and her being the carer of a five year old child and the offender's 75 year old mother who was in poor health warranted keeping the custodial sentence to a minimum.[9] *Hesketh* therefore does not indicate that the applicant's sentence is excessive.

[5] In *Stuck* the Court refused an application for leave to appeal against an effective sentence of imprisonment of four years suspended after 18 months for an operational period of four years. That sentence reflected the offender's criminality in various counts of possession of a variety of dangerous drugs, the total quantity of which substantially exceeded the total quantity of methylamphetamine possessed by the applicant in his offences; but that offender was aged only 25 at the time of the offending, he had no prior convictions, he did not commit any of his offences whilst on bail, and his offences were all committed on one occasion. Fryberg J (with whose reasons Keane JA agreed) observed of comparable cases in which two and a half years imprisonment with suspension or parole eligibility between eight and 12 months had been imposed that they "may indicate the bottom of a range of sentences ordinarily imposed on pleas of guilty to possession of ecstasy for commercial purposes, but they certainly do not indicate a top or even a starting point in such cases". The refusal of the application for leave to appeal in *Stuck* also does not indicate that the applicant's sentence is excessive.

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5 [2004] QCA 116.
6 [2008] QCA 165.
7 [1997] QCA 473.
8 [1998] QCA 162.
9 [2004] QCA 116 at [7], [16], and [17].

[6] *McLaughlin* has some similarities with the present case. That offender was a persistent drug offender (his lengthy criminal history apparently being referable to his drug addiction) and he committed some offences whilst he was on bail for earlier offences. He committed more offences than the applicant: four counts of possessing cannabis sativa, four counts of possessing methylamphetamine, one count of possessing methylamphetamine exceeding two grams, and one count of possessing things for use in connection with the production of methylamphetamine. He was given an effective sentence of four years imprisonment. That sentence was made cumulative upon two years imprisonment for a prior offence of receiving stolen property; all but three months of that sentence originally was suspended but that suspended sentence was accelerated in consequence of the offender's commission of the drug offences. Helman J (Macrossan CJ and Thomas J agreeing) considered two features of the case demonstrated that the sentences complained of were not excessive, namely, that offender's extensive criminal history and the fact that his later offences were committed whilst he was on bail for the earlier ones. Those features appear also in the present case. On the other hand, that offender was given credit for significant mitigating factors which are not available to the present applicant. That offender was drug free after being in custody although he was addicted to drugs when he committed the offences. The drugs were for his personal use. (In the applicant's case, the sentencing judge found that on both occasions the methylamphetamine "was destined for commercial exploitation, at least in large measure".) It was also relevant in *McLaughlin* to have regard to the "totality principle", under which a sentence made cumulatively upon a pre-existing sentence may be moderated to ensure that the overall period of imprisonment is appropriate for the totality of the offending. Furthermore, Helman J referred with apparent approval to the sentencing judge's remark that "had it not been for [the applicant's timely plea] and perhaps one or two other things in your favour, I would have been inclined to impose a term of five years imprisonment, even bearing in mind the totality principle." With these matters in mind, *McLaughlin* supplies some support for the sentence imposed upon the applicant.

[7] In *Morrison* the offender pleaded guilty to unlawfully possessing heroin, the quantity of which exceeded two grams, and unlawful possession of cocaine. The calculated weight of heroin in the substance he possessed was 21.845 grams and the calculated weight of the cocaine in powder was .303 grams. He had been a heroin addict on and off for about 20 years and had prior drug convictions. There was evidence that his relapse into offending occurred as a result of him learning of his mother's terminal illness, he had made serious attempts to obtain treatment to break his dependency, and urine screening since his arrests proved negative. He was undergoing programs to rehabilitate himself from drug use. Because of some unusual factual circumstances, the sentencing judge's decision that the offender possessed the heroin for a commercial purpose was overturned on appeal, so that the offender was resentenced on the footing that he possessed the heroin only for his personal use. Other significant factors were that there was an early plea of guilty, the offender supplied the names of some of those from whom he purchased drugs, and he had not previously served a significant sentence of imprisonment. A sentence of ten years imprisonment with a recommendation for parole after three and a half years was overturned and replaced by a sentence of five years imprisonment with a recommendation for eligibility for parole after 18 months. The usefulness of *Morrison* in the present case is limited by its age and quite different circumstances, but it too supplies some support for the applicant's sentence.

[8] For the reasons given by Philippides JA, and these additional reasons, I respectfully agree that the application should be refused.

[9] **PHILIPPIDES JA: The application** The applicant was sentenced on 28 June 2016 for four drug offences, namely, two counts of possession of methylamphetamine exceeding two grams (counts 1 and 3); one count of possession of cannabis exceeding 500 grams (count 2); and one count of possession of cannabis (count 4). An overall sentence of five years was imposed in respect of count 3, with lesser sentences for the remaining offences. A parole eligibility date of 17 February 2018 was ordered, effectively 20 months or the one-third mark.

[10] The applicant seeks an extension of time in which to seek leave to appeal against the sentence which he contends was manifestly excessive. That application requires the consideration of two questions: firstly, whether there is good reason for the delay and, secondly, whether it would be in the interests of justice to grant the extension.[10] As stated in *R v GV*,[11] a failure to satisfy the first question is not fatal to the exercise of the discretion in relation to the second limb.[12] As to the respondent's contention in reliance on *R v Gordon; Ex parte Director of Public Prosecutions (Cth)*,[13] that an obvious error in the judgment below is not alone sufficient to justify the grant of extension of time in the absence of an adequate explanation for delay, I agree with what Fraser JA has written.

The sentence imposed at first instance

[11] The circumstances of the offending were as follows. On 14 September 2014, police executed a search warrant at an apartment rented by the applicant. They located 5.591 grams of methylamphetamine (comprising 3.941 grams of pure methylamphetamine) (count 1) and 847 grams of cannabis (count 2). They also located clip seal bags and monies amounting to $11,000. At the time, the applicant denied knowledge of the methylamphetamine and cannabis and did not participate in a record of interview. On 30 December 2014, some three months after being arrested and charged for that drug offending, the applicant was involved in a motor vehicle accident. Police attending the accident noticed extensive damage to the vehicle. The applicant appeared to be affected by an intoxicating substance. A later examination of the vehicle by police resulted in the locating of a toiletries bag that contained 27.667 grams of methylamphetamine, the calculated pure weight of which was 20.853 grams (count 3); six grams of cannabis (count 4); a glass smoking pipe; and a cardboard box containing $19,900.

[12] Count 4 proceeded on the basis that it was accepted that the possession was a personal possession. The sentencing judge, however, remarked that "on two separate occasions in a period of less than four months, [the applicant] was in possession of both first and second schedule drugs and about $30,000 in cash" and that "[t]he methylamphetamine on both occasions was destined for commercial exploitation, at least in large measure".

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10 *R v Tait* [1999] 2 Qd R 667 at 668 and *Puschenjak v Wade* [2002] QCA 190 at [4].
11 [2006] QCA 394.
12 See *R v GV* [2006] QCA 394 at [3].
13 [2009] QCA 209 at [34].

[13] The applicant was aged 40 at the time of the offending. His criminal history commenced in 1993 for like offending, accumulating a further four relevant entries pertaining to the possession or supply of the dangerous drugs ecstasy and methylamphetamine. His history also revealed that the applicant had offended in respect of the drug offences whilst on bail for the subject offences. The history was outlined by the sentencing judge as follows:

> "[Your criminal history] begins with convictions in respect of the possession of amphetamines and cannabis offences committed when you were aged 18 or just 19. You were admitted to probation and therefore afforded an opportunity for supervision, which was directed towards making you a worthwhile member of the community and someone who might be persuaded to give up illicit substances. It was not to be.
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> In November 2002, you supplied a hundred ecstasy tablets in New South Wales. In that State, you were ordered to be imprisoned for three years, commencing in May 2003. A non-parole period of one year and three months was fixed. Presumably you served at least that period in custody. It might have been expected that that time in custody would persuade you to give away illicit substances. It did not. In 2009, and then again in 2010, in New South Wales, you were convicted of drug offences. In October 2009, you committed offences in Queensland in connection with a small quantity of ecstasy tablets and methylamphetamine. On 2nd November 2010, in the Supreme Court at Mackay, you were fined in respect of that offending.
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> The offences with which I am concerned took place in separate episodes on 14th September and in December 2014. It is a circumstance tending against leniency, that whilst on bail in respect of the charges with which I am concerned, you committed further drug offences. In the Mackay Magistrates Court on 20th April last year, you were fined in respect of the possession of utensils or pipes for a drug-related purposed and for failing to properly dispose of a needle and syringe. In the Proserpine Magistrates Court, on 23rd November last year, you were dealt with in respect of possession of methyl amphetamine and cannabis and ordered into drug diversion. And a suspended sentence that had earlier been imposed in respect of breach bail conditions had its operation period extended.
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> The drug offending continued.
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> On 23rd March this year, you were dealt with in the Proserpine Magistrates Court in respect of the possession of cannabis and admitted to immediate parole.
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> Your criminal history, both before the offending with which I'm concerned and afterwards, is a matter which emphasises the importance of a sentence which gives appropriate effect to the consideration of personal deterrence."

[14] In addition to referring to the applicant's criminal history and observing that the applicant had committed like offences whilst on bail for the subject offences, the

sentencing judge also had regard to the mitigating factors of a timely plea that the offending arose in the context of drug dependence and the applicant's efforts at recent rehabilitation, which highlighted the need for long-term and close supervision. Further, in imposing sentence, his Honour took into account the commercial motivation behind the offending and that both personal and general deterrence were called for. His Honour took the approach that the overall criminality involved in the offending should be reflected in the sentence imposed for count 3.

The question of delay

[15] The application was filed on 6 September 2016, one month and nine days out of time. The grounds offered for the delay are that the applicant was suffering from depression and thought that his lawyers would be lodging the appeal on his behalf. Further, the applicant gave evidence that he was mistaken as to the commencement of the expiration of appeal period. He gave evidence that he mistakenly understood that the appeal period commenced on the finalisation of further charges in the Magistrate's Court. Those charges were finalised on 23 August 2016. The applicant contacted Legal Aid on the following day and was given assistance with lodging the appeal form.

[16] In the circumstances of this case, and given the relatively short delay, I would not refuse leave on the basis of delay, if the sentence application were otherwise viable.

The interest of justice

[17] In my view, it is not in the interests of justice that the application be granted, having regard to the lack of merit of an appeal on the basis that the sentence imposed was manifestly excessive. Accordingly, the matter is not an appropriate case for the granting of an extension. My reasons for this conclusion can be stated quite briefly.

[18] The applicant's arguments that the drugs ought to have been found to have been for personal recreational use is unmeritorious, given the lack of contest at sentence, as well as the quantity of the drugs combined with the possession of a considerable quantity of money. As the sentencing judge remarked there were "ample grounds" for the prosecution's contention that the methylamphetamine and cannabis located on 14 September 2014 were possessed with a commercial purpose. The same applied to the possession on 30 December 2014. It was correct to characterise the offending as the commercial possession of the dangerous drugs methylamphetamine and cannabis on two occasions over a period of about four months. The applicant possessed a total of 33.258 grams of methylamphetamine (at 24.794 grams pure) and 853 grams of cannabis and a substantial amount of money.

[19] Nor is there any merit in the argument that the sentencing judge failed to properly consider the ameliorating effect of the timely plea, the applicant's drug dependence and efforts at rehabilitation. In oral submissions, the applicant made complaints against his legal representative of a generalised nature. These included the failure to mention the availability of a rehabilitation facility to accommodate him and the benefits of entering a plea. The applicant's oral submissions also included a complaint that the applicant's depression was not considered by the sentencing judge and prevented the applicant from instructing his legal representatives properly, although there is no evidence as to what further instructions would have been given. None of the matters mentioned causes me to consider that there are prospects of success in

an appeal. The applicant's condition as a drug dependent person was specifically referred to by the sentencing judge. Further, as the respondent submitted, an examination of the sentencing remarks reveal not only an accommodation of the issue of rehabilitation but its future facilitation. That is demonstrated by the imposition of a parole eligibility date that was before the statutory halfway point.

[20] The applicant's contention was that a sentence of three years' imprisonment with parole after one year, or two years' imprisonment with parole of eight months ought to have been imposed. The role of this Court is not to substitute its own view of an appropriate sentence but to ascertain whether there was error in the sentence imposed.

[21] As the respondent submitted, the applicant was to be sentenced as a 40 year old, with a relevant criminal history, for the possession of a not insignificant quantity of a schedule 1 drug along with significant sums of money. Furthermore, the conduct pertained to two episodes over a period of almost four months and the applicant had continued to commit similar offences whilst released on bail for the subject offences.

[22] The sentencing judge's imposition of a head sentence of five years could not be said to inappropriately reflect the overall criminality.[14] The applicant did not rely on any specific authorities in maintaining that the sentence was manifestly excessive. The applicant had been sentenced consistently with the comparable authorities of *R v Hesketh; ex parte Attorney-General (Qld)*,[15] *R v Stuck*,[16] *R v McLaughlin*[17] and *R v Morrison*,[18] as relied on by the respondent. The applicant did not have the compelling mitigating factors in *Hesketh*, including the efforts at rehabilitation and that the offender was the carer of a five year old child and an ailing mother, that warranted a custodial sentence being kept to a minimum. *Stuck*, which concerned a much younger offender than the applicant, and *McLaughlin* and *Morrison*, although old authorities, do not suggest the sentence imposed was not within the sentencing discretion. The parole eligibility date takes account of the matters in mitigation such as the plea of guilty together with antecedent matters by the imposition of a parole eligibility at the one-third mark and was well within the sentencing discretion.[19]

[23] The applicant's possession of a significant quantity of pure schedule 1 drug on two occasions over a period of almost four months called for an appropriately deterrent sentence, bearing in mind the period of the offending, including the persistence in like offending whilst subject to bail and the commercial nature of the possession, including the possession of not insignificant sums of money. As the respondent submitted, a deterrent sentence was needed to highlight that profit from such illegal and anti-social conduct is not worth the resulting gaol sentence. There was also a need for personal deterrence given the applicant's history of drug use and continued drug use whilst on bail. It was not a mitigatory factor that the applicant was celebrating his birthday, as the applicant submitted in oral submissions.

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14 See *R v Nagy* [2004] 1 Qd R 63.
15 [2004] QCA 116.
16 [2008] QCA 165.
17 [1997] QCA 473.
18 [1998] QCA 162.
19 *R v Hoad* [2005] QCA 52 at 9.

[24] The sentencing remarks demonstrated a careful balancing exercise of the guiding principles in sentencing and matters relevant to the process. The sentence imposed cannot be said to be "unreasonable or plainly unjust".[20] There exists no manifest error or misapplication of principle.[21] The sentence imposed was within the appropriate range and is not manifestly excessive. An assessment of the strength of the applicant's appeal results in the conclusion that there are no reasonable prospects of success. Accordingly, the application should be refused.

[25] **BODDICE J:** I have read the separate reasons given by Fraser JA and Philippides JA. I agree, for the reasons given by Philippides JA, and the additional reasons given by Fraser JA, that the application should be refused.

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20 *House v The King* (1936) 55 CLR 499 at 505; *Dinsdale v The Queen* (2000) 202 CLR 321 at [6].

21 *House v The King* (1936) 55 CLR 499 at 505.