[2002] QCA 186

COURT OF APPEAL

McPHERSON JA
MACKENZIE J
ATKINSON J

CA No 281 of 2001

THE QUEEN

v.

TERRY IRVING Appellant

BRISBANE

..DATE 31/05/2002

JUDGMENT

MACKENZIE J: The appellant was convicted of possession of heroin exceeding two grams and possession of cannabis sativa. He appealed against conviction and sentence. At the outset the ground that the verdict was unsafe and unsatisfactory was abandoned.

The drugs were found during a police search of a room at the Townsville Casino that he shared with a woman named Sorrensen and a man named Luhrman. When the warrant was executed the appellant was not present, but he arrived while the search was being conducted. The police found the drugs in a suitcase which contained personal items belonging to the appellant.

The Crown relied, in the alternative, on actual possession of the drugs found in the bag or guilt by virtue of section 57C of the Drugs Misuse Act as occupier of the room. Special verdicts were obtained as to the basis of the conviction. In each instance the jury found actual possession.

With respect to the second ground of appeal against conviction, the thrust of it was that the failure to call Luhrman to give evidence, so that he was available for cross-examination as to certain matters which the appellant thought might be favourable to him, was relied on as a substantial miscarriage of justice.

However, as the argument developed on that ground, and issues were raised as to whether the ground of appeal really involved

an allegation of incompetence of his legal advisers, Mr O'Gorman advised the Court that, in the event that it was thought necessary to adjourn the hearing for the purpose of obtaining material appropriate to such an application, he had express written instructions to abandon that ground of appeal as well and, on being advised by the Court that the Court was of a view that would otherwise necessitate an adjournment, he indicated to the Court that in compliance with his instructions he abandoned the second ground of appeal against conviction as well. The appeal against conviction therefore should be dismissed.

With regard to the application for leave to appeal against sentence, it was submitted that the sentence of three years' imprisonment for the heroin count was manifestly excessive. The offence was possession of heroin with a circumstance of aggravation that the quantity exceeded two grams. The quantity was 2.446 in five packets of 65 to 69 per cent purity.

The applicant was sentenced on the footing that there was a commercial purpose in his possession of the drug and on the basis that the quantity was not insignificant although not as large as sometimes found. It was accepted that there may also have been some element of experimentation with heroin on his part since he had only one prior conviction for possession of cannabis.

It was said that the conclusion that there was a commercial purpose was strengthened by the surrounding circumstances, that is to say the activities of his associates with whom he shared the rooms for a couple of days at the Casino. It was, however, accepted that indicia such as scales, money and documents evidencing sales were not found.

It was submitted that the sentencing Judge erred in finding a commercial purpose. In addition to the aspects already mentioned, the decision was reached after a trial which generally confers an advantage that hearing a recitation of facts following a plea of guilty does not. In my opinion the finding that there was a commercial purpose was one to which the sentencing Judge could properly come in all of the circumstances.

As a general proposition, a sentence of three years is not uncommon for this level of commercial possession. However it was submitted on behalf of the applicant that if that level of sentence was not manifestly excessive, the sentence imposed was at the highest end of the range of sentences which might be imposed for an offence of this kind and that having regard to the applicant's prior criminal history and the significant conviction-free period prior to the offence the sentence imposed was excessive in that it wrongly sought to characterise the applicant as an offender comparable with offenders appropriately sentenced at the highest end of the range.

The authorities are, of course, many and varied and there are wide ranges of sentences to be found depending very much on the circumstances. However we were particularly referred to The Queen against Johanesson and McLachlan [2001] QCA 406 where it appears to have been accepted by the majority that a range of 12 months to three years was supported by decisions of the Court of Appeal for possession of quantities in excess of two grams of this kind.

In my opinion, notwithstanding what has been put before us by Mr O'Gorman, it cannot be said that there is support for the proposition that the sentence imposed was, in the circumstances, manifestly excessive and I would therefore refuse leave to appeal against sentence as well as dismissing the appeal against conviction.

McPHERSON JA: I agree.

ATKINSON J: I agree. While in my view the sentence was high, I agree with Justice Mackenzie that it could not be said in the circumstances to be manifestly excessive.

McPHERSON JA: The order of the Court is that the appeal against conviction is dismissed. The application for leave to appeal against sentence is also dismissed.
