

SUPREME COURT OF QUEENSLAND

CITATION: *R v McMahon* [2003] QCA 369

PARTIES: **R**
v
McMAHON, Andrew James
(applicant)

FILE NO/S: CA No 199 of 2003
SC No 564 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 27 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 27 August 2003

JUDGES: McMurdo P, Dutney and Philippides J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence refused**

CATCHWORDS: CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – where applicant pleaded guilty to trafficking dangerous drug and sentenced to five years imprisonment suspended after two years, with an operational period of five years – where applicant in process of promising rehabilitation – whether learned primary judge took into account all mitigating factors

R v Witherspoon [2003] QCA 58; CA No 366 of 2002, 20 February 2003, applied

COUNSEL: The applicant appeared on his own behalf
M J Copley for the respondent

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

THE PRESIDENT: The applicant pleaded guilty to trafficking in a dangerous drug, namely methylamphetamine and cannabis sativa, on 13 June 2003. He was sentenced to five years' imprisonment, suspended after two years, with an operational period of five years. He contends that the sentence was manifestly excessive.

He was 40 at sentence and between 37 and 38 over the 11 month offending period. He had some criminal history for drug offences and offences of dishonesty, but had not before been imprisoned. As Mr Copley for the respondent pointed out today, an aggravating feature was that the applicant was on probation at the time of this offence for other drug offences. To his credit, the applicant pleaded guilty at an early stage and the committal proceedings were conducted fully by way of tendered statements without cross-examination.

The charge of trafficking was based mainly on documents found in his possession when his home was searched by police on 14 November 2001. Two people who had been supplied drugs by the applicant, also gave statements to police.

Eleven days later, police located the applicant and arrested him. He was found in possession of other documents, which further indicated his involvement in trafficking and a small amount of cannabis was found on him.

The applicant declined to be formally interviewed. The documents included a list of debts owed to the applicant from

17 people, for amounts ranging from \$20 to \$550. One list totalled \$2,475 and another \$1,900. The material also included lists of property apparently received by the applicant, in exchange for drugs. One of the applicant's clients was a 17 year old youth, who swapped a camera for one gram of methylamphetamine and then on three or four other occasions, exchanged cannabis sativa for methylamphetamine. On another occasion, the youth committed a house breaking and stole jewellery, some of which he swapped with the applicant for \$20, two and a half grams of cannabis sativa and two grams of methylamphetamine and also clear a \$140 debt. The youth regularly thereafter swapped property for cannabis or methylamphetamine and sometimes would buy these drugs on credit. He bought drugs from the applicant on 30 to 35 occasions and paid \$50 for two and a half points of methylamphetamine and up to \$280 for a gram and a half of that drug.

A 22 year old man stated that the applicant supplied him with methylamphetamine on 18 to 19 occasions. He paid \$50 for two points. He was also supplied on two or three occasions with cannabis sativa.

A third person told police that the applicant supplied him on 24 occasions with methylamphetamine.

Whilst the Prosecutor conceded it was difficult to put an accurate value on the enterprise, the applicant's trafficking

was substantial and the Prosecutor submitted at sentence, that an appropriate penalty was one of seven years' imprisonment.

The applicant's counsel at sentence emphasised that the applicant and his partner were addicted to amphetamine and were sharing their residence with other drug users at the time of the offending. He kept records of his sales, because he was so affected by drugs he could not otherwise keep track of them. He purchased his own drugs on credit and would sell them to meet his own habit and that of his partner. The stolen property he received was passed on to his supplier for drugs. Other people in the house were also selling drugs, but he acknowledged that he was responsible for the sales placed before the Court by the Prosecutor. Every few weeks he would purchase about \$2,000 worth of speed and cannabis, some of which he would keep for his own use. He purchased on credit and he sold the remainder to pay for the purchased drugs. Because of his drug abuse he was not able to successfully handle his affairs and became more and more heavily in debt to his supplier, so that although he was dealing in substantial amounts of drugs and money, he was not accumulating any significant profits. His counsel submitted that the trafficking in amphetamine and cannabis, was at the lower end of the range.

Psychological reports set out the applicant's family background. His upbringing was somewhat disadvantaged and dysfunctional, but he was fortunate to have a hard working mother, who struggled to provide for him and his siblings.

After completing year 11, he was accepted into the West Australian Police Force, but was dismissed after three and a half years, because of his use of marijuana. He then completed a Bachelor of Arts Degree and Social Science at the Curtin University of Technology in 1990. His work history includes 14 months in the Australian Army and eight years in the Army Reserve. When he was 26 in 1989, at the end of a lengthy personal relationship, he turned to drugs and by 1995 had become a daily user of heroin. In 1998 he took part in a methadone program for 12 months and has not used heroin since. Unfortunately, that did not end his drug abuse and after the ending of a second relationship in 2000, he turned to amphetamines to mask his depression and loss of purpose. He ceased using all drugs about 12 months prior to sentence, when he and his partner made a commitment to rehabilitation. He has been diagnosed as having Hepatitis C and the writer of the report also diagnosed him as Substance Dependent (Amphetamines and Cannabis) with Full Sustained Remission, based on his advice that for more than 12 months, he had abstained from drug usage.

A number of outstanding references were tendered on behalf of the applicant, attesting to his good work ethic and his rehabilitation, which it seems he and his wife have undertaken, together with considerable assistance, from their family, church and associated groups. He and his partner at the time of the commission of the offence, were married on 3 May 2003.

For most of the period of the offending, methylamphetamine was a Schedule 2 drug. As the Courts have become more cognisant of the serious consequences, individually and to the community, of methylamphetamine abuse, sentences for its supply and trafficking have steadily increased. The legislature has also recognised this in more recently categorising methylamphetamine as a Schedule 1 drug. The maximum penalty for the offence has been, since 21 September 2001, life imprisonment, although the relevant maximum penalty here was only 20 years' imprisonment.

The applicant's counsel at sentence, submitted that a sentence between three to five years' imprisonment was appropriate, suspended after a period.

The learned primary Judge accepted that there were significant mitigating factors in this case, including the early plea of guilty and what seems to be a genuine case of rehabilitation. Her Honour was, however, understandably concerned at the level of amphetamine dealing undertaken by the applicant and that it included the sale of the drug to a 17 year old youth, often in return for stolen property. Her Honour also accepted that the trafficking was undertaken because of the applicant's drug addiction and to supply his partner with the drug for her addiction.

The applicant, who appears for himself today, emphasises that he had not used drugs for over 12 months before his sentence and has stayed out of trouble. During this time he reported

to the police as part of his bail conditions and made huge changes in his life, which included regular church attendance, weekly drug counselling, moving away from old associates, making new friends, marrying and obtaining honest employment. He also emphasises that he was selling the drugs, not for truly commercial reasons, but to support his own drug habit.

The sentence imposed here is supported by the judgment of this Court in *R v Witherspoon* [2003] QCA 58; CA No 366 of 2002, 20 February 2003.

The applicant is a mature man, who has not made the most of the modest advantages he was given earlier in his life. His involvement in the despicable business of trafficking in methylamphetamine over an 11 month period, during which he supplied drugs to a 17 year old youth, sometimes in return for stolen property, warranted a firm deterrent sentence.

Despite the very significant mitigating factors here, it cannot be said the sentence was manifestly excessive. The applicant is to be commended for his efforts at rehabilitation, which, if they are maintained upon his release from prison on the suspension of his sentence, will mean he has the prospect of a rewarding and fulfilling life ahead. If he does not, his future is bleak.

I should mention that the applicant did not press heavily his contention that sentence was manifestly excessive and indicated to the Court that his inquiries in prison suggested

that his sentence was a fair one. That assessment is in fact right.

I would refuse the application for leave to appeal against sentence.

DUTNEY J: I agree.

PHILIPPIDES J: I also agree.

THE PRESIDENT: That is the order of the Court.

