SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cooney* [2004] QCA 244
PARTIES:	**R** **v** **COONEY, Sean Lesley** (applicant)
FILE NO/S:	CA No 106 of 2004 SC No 463 of 2003 SC No 81 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	21 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2004
JUDGES:	McMurdo P, Williams JA and Mullins 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 – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OTHER OFFENCES – where applicant convicted of possession of a dangerous drug, cocaine, exceeding 200 grams – where entered guilty plea – where sentenced to eight and a half years imprisonment with recommendation for post-prison community based release after three and a half years – where applicant addicted to cocaine and couriered the drugs to cancel a debt to his supplier – whether sentence imposed was manifestly excessive *R v Chitty* [1990] 2 Qd R 431, distinguished *R v Glynn* [1990] CCA 66; CA No 28 of 1990, 10 April 1990, distinguished *R v McAnally* [2001] QCA 66; CA No 297 of 2000, 28

	February 2001, distinguished
COUNSEL:	A J Rafter SC for the applicant M J Copley for the appellant
SOLICITORS:	Howard Saggers for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded guilty on 22 March 2004 to one count of possession of a dangerous drug, cocaine, with a circumstance of aggravation that it exceeded 200 grams. He was sentenced to eight and a half years imprisonment with a recommendation for eligibility for post prison community based release after three and a half years. He contends that the sentence is manifestly excessive.

The maximum penalty for this offence is 25 years imprisonment.

The pertinent facts are as follows. On 9 May 2002 at Cairns International Airport an Australian customs officer intercepted the applicant who had flown domestically on an international carrier from Sydney to Cairns. He was travelling with another man, David Beattie, on airline tickets issued under false names. Customs dogs reacted to the applicant who was then detained and searched. He was carrying a large amount of cash in $100 notes which he estimated to customs officers at around $50,000. A scan of a novel and torch in his possession gave a positive result for the presence of cocaine but none was found. He was in possession of a New South Wales driver's licence in the name of Collins and a Northern Territory licence in the name of Robinson.

Both licences carried his photograph and he admitted the licences were false. He was eventually released without charge but the customs officers, hardly surprisingly, contacted police who then conducted their own surveillance.

Police followed the applicant to the Holiday Inn Hotel on The Esplanade at Cairns but lost contact.

Acting on other information, they located Beattie at another Cairns hotel. Police from the Cairns Drug Squad attended the hotel intending to search Beattie's hotel room. They saw the applicant at reception and spoke to him. He was carrying a black overnight case and some shopping bags. He became agitated and fled into a nearby stairwell, dropping the bags. Police found a block of white powder wrapped in plastic and tape. In another bag, they found screwdrivers, window cleaner, two rolls of tape, a Stanley knife, three pairs of rubber gloves, cleaning cloths and a roll of plastic wrap. The applicant was no longer in possession of the money seen by customs officers four hours earlier. He declined to be interviewed by police and denied knowing Beattie.

Beattie's room was searched and a bag containing $59,500 in cash was located. Beattie was later apprehended and found in possession of a false licence and false Medicare card. Beattie also declined to be interviewed.

The white powder found in the applicant's possession weighed 900.39 grams and contained 641.077 grams of pure cocaine, a

purity of 71.2 per cent. It was valued at $100,000 if sold in bulk and up to $900,000 if diluted to 35 per cent strength and sold in one gram packets.

The applicant was 30 at the time of the commission of the offence and 32 at sentence. He had some criminal history commencing when he was 15 years old. Of most significance, he had a conviction in 1993 for supplying a prohibited drug cannabis, for which he was sentenced to a minimum term of 12 months imprisonment.

A tendered medical report indicated that he had had a serious addiction to cocaine for the past two and a half years which had caused secondary physical effects including nose bleeds, nasal scabs and ulcers, common symptoms of cocaine abuse. He had had a troubled adolescence and was unhappy at home and at school and this was the background to his juvenile offending. After being sent to prison he made efforts to reform and was in steady work. He did, however, abuse alcohol and ultimately cocaine to overcome his frustrations with his personal relationships and life situation. Since his detention on this charge and whilst on bail he has sought medical assistance to overcome his addiction and has attended Narcotics Anonymous meetings. He has two daughters aged eight and six who are in the care of their mother, his estranged partner. He is concerned about her ability to provide adequately for the children.

Psychiatrist Dr Tran observed in another tendered report that the applicant now has some insight into his predicament and appears motivated to address the issues underlying his offending behaviour so that his prognosis is relatively favourable.

The applicant's counsel at sentence submitted that the applicant commenced using cocaine to alleviate his depression in mid 2001 and rapidly developed a dependence, with his usage escalating to seven to eight grams per day. At the time the applicant committed this offence he was unable to pay an $8,000 debt to his cocaine supplier and acted as a courier to cancel that debt. This was to be his only profit from the crime. He did not organise the escapade and merely provided the two photographs which were subsequently used in the false licences. He was given the $50,000 found on him by customs officers to purchase the drugs the subject of the charge. He purchased the drugs with that money. He knew nothing about the $59,500 located in Beattie's hotel room. He was not prepared to further co-operate with the authorities because of concerns for his family and his own safety.

Tendered references attested to the applicant's good work history as a heavy machinery mechanic, his efforts at rehabilitation whilst on bail and his commitment to his daughters. As his family reside interstate, his visits from them whilst he is in detention in Queensland will be infrequent.

The applicant contends that in all these circumstances a sentence of seven years imprisonment with a recommendation for eligibility for post prison community based release after two and a half years should have been imposed instead of the sentence which was imposed, relying on *R v Glynn* [1990] CCA 66; CA No 28 of 1990, 10 April 1990; *R v Chitty* [1990] 2 QdR 431 and *R v McAnally* [2001] QCA 66; CA No 297 of 2000, 28 February 2001.

Glynn pleaded guilty to acting as an intermediary between a supplier and distributor by offering to supply about two kilograms of high purity cocaine for $160,000. He was 59 years old and was acting for commercial gain. He was sentenced to four years imprisonment and contended that that sentence was excessive. This Court said that there was "simply no basis upon which it could be said that the sentence imposed was manifestly excessive, or even excessive."

Glynn's case is now over 14 years old and does not reflect the more recent increase in penalties imposed by courts on those who deal commercially in large quantities of prohibited addictive drugs. *Glynn* was nothing more than a clear statement by this Court that the lenient sentence imposed in that case was certainly not excessive.

McAnnally pleaded guilty to possession of 111 grams of white powder containing 67 grams of pure heroin and was sentenced to seven years imprisonment with a recommendation for parole after two and a half years, the sentence that the applicant

contends was appropriate here. The street value of the heroin was between $110,0000 and $220,000. He was 22 years old and a heroin addict. He had previous convictions for drug and property offences and committed the offence whilst on probation. The maximum penalty was 20 years imprisonment. This Court concluded, after reviewing comparable sentences, that the sentence could not be described as excessive.

McAnnally is also of limited use as a comparable sentence here. McAnnally was much younger than this applicant, the maximum penalty was less and it concerned a much smaller quantity of the different drug heroin.

Chitty was 33 years old and pleaded guilty to acting as a courier of 12 plastic bags containing 321 grams of impure cocaine containing 127 grams of pure cocaine. He had a similar conviction for possession of 230 grams of cocaine. The sentencing judge imposed a penalty of seven years imprisonment with an order that he not be eligible to be released on parole before the expiration of two and a half years.

This case is unquestionably more serious than *Chitty* because of the large amount of pure cocaine involved here, more than five times the amount in *Chitty*.

The sentence imposed in *Chitty*, from which there was no appeal, does not support the applicant's contention that the sentence imposed here requiring the applicant to spend a

further 12 months in prison before becoming eligible for parole, was manifestly excessive.

The sentence here of eight and a half years imprisonment with a recommendation for post-prison community based release after three and a half years adequately reflects both the applicant's serious criminal involvement in the insidious cocaine drug trade and also the moderation justified by his personal circumstances, his limited role in the offence as courier, his addiction, his efforts at and prospects of rehabilitation and his plea of guilty.

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

WILLIAMS JA: The material supports the submission that counsel for the respondent that the applicant was a determined and enthusiastic courier. Given the quantity of cocaine found in the applicant's possession, the sentence imposed was within range, and I agree with what's been said by the President, the application should be dismissed.

MULLINS J: I also agree.

THE PRESIDENT: The application for leave to appeal against sentence is refused.
