SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harris* [2009] QCA 370
PARTIES:	**R** **v** **HARRIS, Simone Cianna** (applicant)
FILE NO/S:	CA No 207 of 2009 SC No 577 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2009
JUDGES:	McMurdo P and Atkinson and A Lyons JJ 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 – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant plead guilty to attempting to present a marketable quantity of unlawfully purchased border controlled drugs, namely cocaine – where applicant sentenced to seven years imprisonment – where non-parole period fixed at four years – where 195 days of pre-sentence custody was declared at the time of sentence – whether requirement that the applicant serve 57 per cent of the seven year sentence unjust in all the circumstances – whether the sentence fell outside the appropriate range – whether sentence manifestly excessive *Criminal Code Act* 1995 (Cth), s 307.6(1) *R v Flew* [2008] QCA 290, considered *R v Jimson* [2009] QCA 183, considered *R v Mokoena* [2009] QCA 36, considered *R v Oprea* [2009] QCA 184, considered *R v Tran* (2007) 172 A Crim R 436; [2007] QCA 221, considered

COUNSEL: The applicant appeared on her own behalf
G R Rice for the respondent

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

[1] **McMURDO P:** For the reasons given by A Lyons J, the applicant has failed to demonstrate that the sentence imposed was manifestly excessive. It was precisely that asked for by her counsel at sentence and was appropriately less than the sentence imposed on her co-offender, Oprea. The application for leave to appeal against sentence must be refused.

[2] **ATKINSON J:** I agree with the order proposed by A Lyons J and with her Honour's reasons.

[3] **A LYONS J**: The applicant seeks leave to appeal against a sentence of seven years imprisonment with a non-parole period fixed at four years. One hundred and ninety-five days of pre-sentence custody was declared to be time served. That sentence was imposed in respect of one count of attempting to possess a marketable quantity of a border controlled drug, namely cocaine (s 307.6(1) *Criminal Code Act* 1995 (Cth)).

The circumstances surrounding the offence

[4] An agreed statement of facts was tendered at the hearing which outlined that on 7 March 2007 Customs staff in Sydney intercepted an Australia Post registered mail item which had been sent from Costa Rica and was addressed to Daiana Grimes of 235 Jefferson Lane, Palm Beach, Queensland.

[5] An investigation of the package revealed that it contained four boxes of confectionery and within each box were 14 or 15 chocolates. Also in each box was a package wrapped in adhesive tape, which contained clear plastic bags. The content of the plastic bags was determined to be cocaine. Australian Federal police then replaced the cocaine with an inert substance and inserted a listening device. The analysis of the cocaine showed a purity of 74 per cent, with a total weight of 1,489.7 grams of cocaine.

[6] Telephone intercepts indicate that on 14 March 2007 the applicant had a conversation with Constantin Oprea, her co-accused. During those conversations there is a discussion about registering a car in the applicant's name with an indication that it would be her car. On that day at 10.23 am, a Federal police officer posing as an Australia Post delivery driver delivered the intercepted package to the address at Palm Beach. The package was accepted by the applicant's flatmate, Bradford, who signed for the package in the name of Johnson. A recording device in the package indicated that when the package was delivered Bradford had told the driver that the recipient of the parcel, "Daiana Grimes" was asleep. Bradford took the package inside and had a discussion with the applicant in which Bradford asked if "that was it" and if it was the "bodgey name".

[7] In those recorded discussions with Bradford the applicant indicated, "this here is supposed to wipe out my bill". She then discussed how accepting the package "for him" would wipe out her debt. She then stated that she had to "ring the fat bastard"

and tell him that it had the name "Daiana Grimes" on it. At 10.27 am the applicant attempted to call Oprea, but was unsuccessful. The surveillance device in the package recorded the applicant stating, "I don't owe 19 hundred anymore," and also, "he will try to reneg[e] on that". The applicant is also recorded having a conversation with another person about how the package was delivered and about picking up the car. She stated: "all I know is that my debt is wiped with this guy". The conversations also indicated that the applicant did not know how the package was going to arrive, but that the truck had just pulled up.

[8] The applicant then attempted to telephone Oprea on seven occasions between 3.00 pm and 4.08 pm but was unsuccessful. Finally, at 4.09 pm the applicant got through to Oprea and they had a conversation about the fact that, "this truck pulls up out the front … and drops off a Christmas present". The applicant had then stated, "that's set up and the Christmas present is here". The applicant and Oprea then discussed picking up the car. Oprea states that, "the car is at a gas station at Worongary" and that it has been paid for. In the recorded conversation between Bradford and the applicant, Bradford comments that the package "must be worth a quid" and the applicant states, "He said to me you won't have to worry about money when this parcel comes Sammy".

[9] At 5.01 pm Oprea called the applicant and arranged for Oprea to pick up the parcel. At 5.05 pm Oprea arrived in a car outside the Jefferson Lane premises and sounded the horn. Shortly afterwards the applicant left the premises carrying a package and placed it in the boot of the Commodore. She then entered the car by the passenger door.

[10] The applicant and Oprea drove to the Worongary Caltex Service Station and parked next to a grey coloured Ford Falcon. Shortly afterwards, she and Oprea embraced and they each drive off in separate cars. Oprea proceeded from the garage to a residential address at Crestmead, where he met the person for whom the drug was intended and delivered the package. Later that day the applicant was recorded saying that her boss had bought her a car that day.

[11] The value of the cocaine if sold on a wholesale basis was $750,000 to $850,000 and if sold on a retail basis was worth approximately $2 million.

Trial history

[12] A two day committal was conducted and a joint trial of the applicant and Oprea was scheduled for 10 June 2008. The applicant failed to appear at the commencement of the trial and a warrant was issued. The trial against Oprea proceeded, however the jury was unable to reach a verdict. Oprea was subsequently convicted after a second trial. He was sentenced to 10 years imprisonment with a non-parole period of six years and six months. His application for leave to appeal his sentence was dismissed by the Court of Appeal (*R v Oprea*[1]).

Criminal history

[13] At the time of the scheduled trial the applicant had absconded to Melbourne. During that time in Melbourne, she committed offences of possessing and uttering counterfeit money, obtaining property by deception and attempting to obtain property by deception. For those offences she was sentenced to three months imprisonment on 24 March 2009.

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1 [2009] QCA 184.

[14] The applicant has a criminal history prior to this offending which relates mainly to drug and stealing offences as follows:

- 7 December 1995: receiving and false pretences. The penalty imposed was community service of 80 hours.
- 27 July 2004: possession of dangerous drugs, stealing, fraud. The sentence imposed was probation of 18 months.
- 19 April 2006: soliciting for prostitution. A fine of $300 was imposed.
- 25 September 2007: unauthorised dealing in shop goods. A fine of $150 was imposed.

The submissions on sentence

[15] The Commonwealth Prosecutor made reference to a schedule of comparable cases which referred to the decisions of *R v Tran,*[2] *R v Oprea,*[3] *R v Mokoena*[4] *and R v Jimson*[5]. The prosecutor submitted that the applicant's role was "something akin to a post box" and that whilst there was some planning on her part in terms of arranging the delivery there was nothing to suggest a greater involvement or that she had funded the offence. He pointed out that Oprea in fact was the one "directing" the applicant. He submitted that whilst the applicant should be afforded some discount in relation to her plea, the discount would be at the very lower end of the range. The prosecutor placed particular reliance on the decision of *R v Jimson* which involved the delivery of a suitcase of cocaine into Australia where the courier was given USD$1,500 in return. He ultimately submitted that a head sentence of between eight and nine years with a non-parole period of five to five and a-half years was appropriate, in the circumstances.

[16] In his submissions, defence counsel referred to the applicant's longstanding heroin addiction and the fact that all she really received was the forgiveness of a debt and a second-hand Falcon. He also stressed that while the applicant knew that there were drugs involved, she did not know the quantities and only had to guess the type of drug. Counsel relied on the applicant's lesser culpability and referred to the fact that none of the comparable sentences referred to by the Crown actually involved a person who was purely a post box, who had no actual involvement in the transportation. Counsel submitted that the appropriate head sentence would in fact be seven years. Counsel also submitted that normally parole is at half time, but acknowledged that was varied with Commonwealth offences. He submitted, therefore, that the appropriate time for penalty would be after four years instead of three and a-half and that would reflect the plea of guilty.

The sentence imposed

[17] In coming to an appropriate penalty, the learned sentencing judge acknowledged the plea of guilty but indicated that it was not a particularly early plea and that the applicant had absconded at the time of trial. He recognised however, that one of the reasons for the applicant absconding was the pressure which was being put on her by Oprea at the time of the trial. His Honour indicated that whilst the applicant did not know the identity of the drug she did know that the package that she received contained a drug. She was also aware that she was going to receive the package

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2 (2007) 172 A Crim R 436.
3 [2009] QCA 184.
4 [2009] QCA 36.
5 [2009] QCA 183.

because she had put arrangements in place with Oprea. His Honour also noted that in exchange for her participation in the delivery of the package, the applicant's debt to Oprea was going to be wiped out and she was to receive the second-hand Ford.

[18] In coming to a determination as to the appropriate head sentence, his Honour relevantly commenced by considering the sentence that was imposed on Oprea after trial, which was a sentence of 10 years imprisonment, with a non-parole period of six years and six months. It is clear from the sentencing remarks that his Honour took into account the fact that Oprea was sentenced on the basis that he was a courier and that he had a criminal history which included prior convictions for supplying a drug.

[19] In determining the penalty to be imposed on the applicant, his Honour noted that she was not, in fact, a courier but, rather, she was a "minion" in the sense that she was merely a post box. Reference was then made to a similar decision of *R v Jimson*, who was a courier who had bought cocaine into Australia but had provided assistance with a controlled delivery. He was sentenced to eight years imprisonment with a non-parole period of four years and six months. A subsequent appeal against sentence was dismissed. In coming to his determination, his Honour considered that one of the major considerations was the question of deterrence. His Honour considered that it was a question of general deterrence and that whilst the applicant's role was important, it was not at the upper end of the importation of this drug and its distribution. His Honour also acknowledged that the applicant had been a heroin addict since her early 20s. He considered that the applicant was, "a cog but nevertheless an important cog in the wheel. The quantity involved is relatively high and while the nature of the drug is to be taken into account it is not a matter of overwhelming importance".

[20] His Honour also considered that the applicant had no involvement in planning or funding of the offence and that her role was simply to receive the drugs and pass them on. He stated that it was clear that she was to receive a Ford Falcon of uncertain value in exchange and have a small debt excused. Whilst there was no assistance to investigating authorities, his Honour took the plea of guilty into account and indicated that she should be given a discount for the plea. His Honour then concluded that the appropriate way to proceed was to achieve some relativity with the sentence imposed on Oprea. He considered that had the matter gone to trial and the applicant been found guilty, he would have sentenced her to eight years imprisonment in light of the 10 year sentence imposed on Oprea. His Honour concluded that the appropriate sentence was seven years with a non-parole period of four years, given the guilty plea.

The grounds of appeal

[21] The basis of the applicant's appeal is that the sentence imposed was manifestly excessive. In her outline, the applicant argues that a period of six years imprisonment should have been imposed with a non-parole period of three years. Alternatively, she argues that if a period of imprisonment of seven years was imposed, she should be given parole at 50 per cent of the period of that sentence, namely three and a half years.

[22] In her outline, the applicant relies on the fact that she was being bullied by Oprea to incriminate herself and clear him. The sentencing Judge took this into account. The

applicant also indicates that at no stage was she ever going to take her matter to trial, although she had participated in a committal. She indicates that at all times she was going to plead guilty. Whilst this may have been the applicant's intention, there was absolutely no indication in the material before the court that there was an early indication of a plea of guilty. In particular, the applicant's flight at the commencement of her trial is not indicative of an early plea of guilty.

[23] The applicant acknowledges that the sentence imposed was in fact the sentence asked for by her counsel. She complains however, that she was unaware that her counsel was going to submit seven years with a four year non-parole period as the sentence.

[24] The applicant is also adamant that her role was quite different to that of Oprea and that she was neither a courier nor a transporter, but simply a post box. The applicant submits that all information was kept from her and that she was not a trusted "in-the-know person," but simply someone who was used by Oprea. She also indicates that she was not asked to assist police because police knew full well that she knew nothing. It was therefore impossible for her to be of any assistance to the authorities.

[25] The applicant also seeks to distinguish the factual circumstances in the two cases of *Mokoena*[6] and *Jimson*[7] relied on by the Crown because she was not a courier or someone who actually conveyed the drugs. The applicant states:

> "Another man has cocaine sent to my address, not his own, uses me like a puppet & I feel as though I've been sentenced as a courier, which I am clearly not.
> My criminal history shows my pattern of heroin addiction & to my disgust & shame led me to make such a stupid decision in allowing a man I hardly knew (8 months) to use me & trick me into such a big crime. Something I would have never done on my own."

[26] The applicant refers to two unnamed cases she is aware of where a woman was charged with temporary possession of drugs and was sentenced to six years imprisonment with a non-parole period of 19 months, and a 2007 decision where two brothers were arrested and charged with temporary possession and a period of imprisonment of five years with a non-parole period of two and a half years was imposed. References to those decisions are not available.

Was the sentence manifestly excessive?

[27] In my view, the head sentence of seven years which was imposed was appropriate in the circumstances of the case. Setting a sentence at this level sufficiently indicated the seriousness of the offence and appropriately referred to the fact that, had the matter gone to trial and she had been found guilty, a period of imprisonment of eight years would have been imposed.

[28] A sentence of seven years gave some discount for the fact that it was a plea of guilty, but not an early plea of guilty as did the setting of the non parole period at four years. I consider that setting a sentence at this point also reflected the differences in the relative roles played by Oprea and the applicant, but also

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6 *R v Mokoena* [2009] QCA 36.
7 [2009] QCA 183.

acknowledged that whilst the applicant's role was more limited it was still an integral part of the operation. As Keane JA said in *Oprea*[8]

> "As to the proposition that the sentence was manifestly excessive because of a failure to recognise the applicant's limited role in the offence, it seems to me, with respect, that to so describe the applicant's role is to fail to give adequate recognition to the fact that he was a necessary part of an international network engaged in the importation of cocaine. The cocaine in question had a retail street value of about $2 million. That much is known about the applicant's offending. It is enough to establish that the applicant's offending was integral to the importation of a large amount of cocaine from an overseas source. The gravity of the offence and the importance of the applicant's role is in no way diminished because the applicant played his part in the importation only locally and because the remuneration, if any, received by the applicant is unknown."

[29] The applicant is also concerned that by setting a non-parole period of 4 years, she is required to serve 57 per cent of the head sentence, rather than 50 per cent. However, the applicant acknowledged that at the sentencing hearing, her counsel had conceded that this was a Commonwealth offence and that the usual requirement of the setting of parole at the halfway period does not apply.

[30] I note in particular that the applicant's counsel had, in fact, submitted that setting the period of parole at four years, would in fact, reflect her early plea of guilty but also take into account the Commonwealth sentencing regime. This issue was also comprehensively dealt with in *Oprea*[9] by McMurdo P who stated;

> "This Court recognised in *R v Tran* that, when sentencing federal offenders, Queensland courts can take into account comparable sentences imposed by other Australian intermediate courts of appeal. *Tran* cautioned, however, that Queensland sentencing courts must be careful to ensure when considering interstate sentences that they are comparing like with like. State courts in sentencing federal offenders tend to be influenced by the sentencing regimes apposite in that state. It is, for example, common in federal sentencing in states other than Queensland, for offences involving the importation of drugs for a parole release date to be set after 60 to 65 per cent, even where the offender has pleaded guilty and cooperated with the authorities. See, for example, *Okeke v R* and *Serrette v R*. By contrast, ordinarily when Queensland offenders are sentenced, a parole eligibility date is not set after the half way point unless there is a compelling reason to delay it. This is to encourage the rehabilitation of offenders: *R v Griinke*, *R v Whelan*, *R v Hundric* and *R v Torrens*."

[31] In all of the circumstances, the sentence imposed did take into account comparable sentences, particularly the sentence of the co-accused Oprea, as well as the Commonwealth sentencing regime. The sentence was clearly appropriate and was not manifestly excessive, particularly taking into account the principles set out in *R v Flew*[10]. As was the case in that decision, the sentence which was imposed by the learned sentencing judge was, in fact, the sentence contended for by the

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8 *R v Oprea* [2009] QCA 184 at [29].

9 *R v Oprea* [2009] QCA 184 at [16].

10 [2008] QCA 290.

applicant's counsel at the hearing. There are no exceptional circumstances in this case to warrant relieving the applicant from the responsibility of the conduct of her case at the sentencing hearing. Accordingly, I would therefore refuse the application for leave to appeal.