

SUPREME COURT OF QUEENSLAND

CITATION: *R v Ganley; R v Ganley* [2013] QCA 380

PARTIES: **R**
v
GANLEY, Dwayne Frank
(applicant)

R
v
GANLEY, Wayne John
(applicant)

FILE NO/S: CA No 231 of 2012
CA No 250 of 2012
SC No 38 of 2010
SC No 986 of 2011
SC No 436 of 2012
SC No 438 of 2012

DIVISION: Court of Appeal

PROCEEDING: Sentence Applications

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 30 August 2013

JUDGES: Muir and Fraser JJA and Margaret Wilson J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The applications are refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant, Dwayne Frank Ganley, pleaded guilty to various counts of supplying a dangerous drug, possessing a dangerous drug and possession of a thing used in connection with supplying a dangerous drug – where the applicant was sentenced to concurrent terms of four years imprisonment with parole eligibility after 18 months – where the applicant was involved in his brother’s trafficking business along with his father, Wayne John Ganley, but the Crown was unable to ascertain the extent of the applicant’s involvement – where the offences to which the applicant pleaded guilty spanned two

indictments – where the applicant committed the second series of offences whilst on bail for the first series of offences – where the applicant was aged between 28 and 29 years at the time of the offending – where the applicant had a relevant criminal history – where the applicant contended that the sentencing judge erred in fixing a parole eligibility date two months after he had served one third of the term of imprisonment – whether setting the applicant’s parole eligibility date after one third of the term of imprisonment rendered the sentence manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant, Wayne John Ganley, pleaded guilty to one count of trafficking in the dangerous drugs methylamphetamine, MDMA and MDA from 1 January 2010 to 18 February 2010, possessing a thing in connection with trafficking in dangerous drugs and a summary weapons offence – where the applicant was sentenced to four years imprisonment for trafficking with parole eligibility after 18 months – where the applicant was aged 54 years at the time of offending, had a minor criminal history and made efforts at rehabilitation – where the applicant contended that insufficient weight was given to his partner’s medical condition and that the sentencing judge incorrectly characterised the extent of his involvement in his son’s trafficking business – where the applicant argued the sentencing judge erred in imposing a parole eligibility date after he had served one third of the term of imprisonment – whether the sentence imposed was manifestly excessive

R v D’Arrigo; ex parte A-G (Qld) [2004] QCA 399, cited

R v Edwards (1996) 90 A Crim R 510, considered

R v Haddad [2009] QCA 143, cited

R v MP [2004] QCA 170, cited

R v Tilley (1991) 53 A Crim R 1, cited

R v Whiting [2013] QCA 18, considered

R v Wirth (1976) 14 SASR 291, considered

COUNSEL: K C Kelso for the applicant, Dwayne Frank Ganley
M C Chowdhury for the applicant, Wayne John Ganley
P J McCarthy for the respondent

SOLICITORS: A W Bale & Son for the applicant, Dwayne Frank Ganley
Chelsea Emery & Associates for the applicant, Wayne John Ganley
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that each application should be refused for the reasons given by Fraser JA.

- [2] **FRASER JA:** The applicant Dwayne Ganley was sentenced on 29 August 2012 to concurrent terms of imprisonment of four years with a parole eligibility date on 28 February 2014 after 18 months for offences to which he pleaded guilty, which may be summarised as follows:

Indictment 38/2010	Offence	Date of Offence
Counts 2-4	Supplying a dangerous drug (x3) (3,4-methylenedioxymethamphetamine)	09 October 2008
Count 5	Possessing the same dangerous drug in excess of 2.0 grams	09 October 2008
Count 6	Possessing a thing used in connection with supplying a dangerous drug	09 October 2008
Count 7	Possession of dangerous drugs (methylamphetamine and cannabis sativa)	09 October 2008
Indictment 436/2012		
Counts 1-5	Supplying a dangerous drug (x5) (Methylamphetamine; 3,4-methylenedioxymethamphetamine; 3,4-methylenedioxyamphetamine. In the case of count 2 the supply was of the first and third of those drugs and also cocaine)	22 January 2010 26 January 2010 06 February 2010 13 February 2010 13 February 2010
Count 6	Possessing a dangerous drug (Methylamphetamine; 3,4-methylenedioxymethamphetamine; 3,4-methylenedioxyamphetamine)	15 February 2010
Count 7	Possessing a thing used in connection with supplying a dangerous drug	17 February 2010

- [3] The applicant Wayne Ganley pleaded guilty and was sentenced to imprisonment for four years for one count of trafficking in the dangerous drugs methylamphetamine, 3,4-methylenedioxymethamphetamine (MDMA), 3,4-methylenedioxyamphetamine (MDA) between 1 January and 18 February 2010. He was sentenced to a concurrent term of imprisonment of one year for one count of possessing a thing used in connection with trafficking in dangerous drugs on 17 February 2010, and he was convicted and not further punished under s 651 of the *Criminal Code* for unlawful possession of weapons on 17 February 2010. The sentencing judge again fixed 28 February 2014 as the parole eligibility date.
- [4] The applicants have applied for leave to appeal against their sentences.

Circumstances of the offences and the applicants' personal circumstances

- [5] As a result of a police investigation in the Sunshine Coast region between November 2009 and February 2010 the police identified various people who were involved in the distribution of dangerous drugs MDMA, cocaine, and cannabis sativa. The head of one drug syndicate was identified as Anthony Ganley. He and the applicant Dwayne Ganley are the applicant Wayne Ganley's sons. The different ways in which the applicants were involved in Anthony Ganley's commercial drug trafficking enterprise were set out in schedules which were tendered at the sentence hearing.

- [6] Wayne Ganley's role was described as follows:
"He was effectively the storeman of the drugs and episodically participated as a consultant, encouraging Anthony Ganley in the continued supplies. On one occasion he counselled Anthony Ganley on profit making and use of runners to avoid detection by police. He ensured the profitability of the operation by consistently offering to supply Anthony Ganley with more drugs to supply as part of his business and encouraging Anthony Ganley to continue supplying drugs despite slow periods and after coming to the attention of police. He would also, on occasion, collect money from Anthony Ganley."
- [7] Details of Wayne Ganley's conduct are set out in the schedule. It includes examples of his possession of drugs and his encouragement of Anthony Ganley in the trafficking enterprise. There are references to conversations in which Wayne Ganley told Anthony Ganley that Wayne Ganley had various "things" for him, which the schedule identifies as the dangerous drugs. On 28 January 2010 Wayne Ganley supplied Anthony Ganley with pills that had been buried in Wayne Ganley's backyard. After the police stopped Anthony Ganley's car on a road after he had left Wayne Ganley's house, police eventually found these drugs in a clipseal plastic bag on the ground under the driver's side of the car. The bag contained 492 tablets in three clipseal bags containing in all 10 clipseal bags of about 50 tablet lots. There was a total calculated weight of methylamphetamine of .441 grams and a total calculated weight of MDA of less than .149 grams. Wayne Ganley went to the scene and gave police his telephone number. The schedule records that even after this occasion he continued to encourage Anthony Ganley in his trafficking enterprise in various subsequent conversations.
- [8] When police executed a search warrant at Wayne Ganley's house on 17 February 2010 they found paperwork and a mobile phone that had been used in connection with his trafficking offence (count 2). They also found a rifle with a magazine and scope, as well as ammunition and shotgun cartridges (the summary weapons offence).
- [9] Wayne Ganley was 54 years old at the time of his offending and 56 years old when he was sentenced. He had a criminal record involving minor offences for which he had been fined, including one offence committed in January 2004 of possessing the dangerous drug (cannabis) for which no conviction was recorded and he was fined \$800. References tendered at the sentence hearing indicated that Wayne Ganley had been employed by the same company between 2006 and late August 2012, was well regarded by his employer, participated in random drug testing evaluations, and had not shown affiliation with drugs whilst in that employment. His partner was ill. A medical report referred to her history of chronic renal failure and hypertension and noted that about six months earlier (that is, in about February 2012) she developed severe cardiomyopathy with a flare up of her diabetes and renal failure. She could stay at home with support and needed regular medical appointments. She required assistance with housekeeping, shopping and other matters preferably by a live-in support person. She had an uncertain prognosis, might take a turn for the worse "suddenly", and potentially required speedy assistance. More details of her condition were given in a letter she wrote and in a hospital emergency department report.

- [10] The sentencing judge summarised Wayne Ganley's conduct overall in the following terms:
- “Wayne Ganley, you were effectively the storeman of much of the drugs sold by your son in his business. It is said that you episodically participated as a consultant, which is a rather grand way of indicating that you also, from time to time, gave advice to your son as to how he might conduct the business, including methods for avoiding detection by the police. You contributed to the profitability of the operation by offering to supply your son with more drugs as occasion arose, and you would, at times, collect drug money.”
- [11] The sentencing judge subsequently referred to Wayne Ganley's offending as “mainly warehousing and encouragement and assistance that you gave to your son”. After observing that he, like Anthony Ganley, had a criminal history which included drug offending, the sentencing judge observed that the most important consideration in mitigation was his “late plea of guilty”. The sentencing judge noted that Wayne Ganley had a female partner who was in a “delicate state of health” and might be disadvantaged by his incarceration, but observed that little allowance could be made for that circumstance in view of the nature and extent of Wayne Ganley's offending.
- [12] Dwayne Ganley is Anthony Ganley's older brother. In relation to the offences he committed on 9 October 2008 (indictment 38/2010), police intercepted him in his car on the Bruce Highway near the Glasshouse Mountains; he was then in possession of 160 tablets containing about eight grams of MDMA in the total weight of the tablets of nearly 44 grams (count 5). Police found a mobile phone containing numerous messages relating to the supply of MDMA, and during a subsequent search of Dwayne Ganley's home police found digital scales and cipseal bags used in the supply of MDMA (count 6). Text messages evidenced a proposed sale of 30 ecstasy tablets for \$500 cash (count 2), a proposed sale of 100 MDMA tablets (count 3), and a proposed sale of 34 MDMA tablets (count 4). These proposed sales were to different buyers. Those were to occur at the same meeting place on the evening of the day of the police interception. Police also found a bottle containing .019 grams of methylamphetamine in about 20 grams of liquid and a small amount of cannabis sativa (count 7).
- [13] In relation to indictment 436/2012, the schedule of facts states that Dwayne Ganley knew of Anthony Ganley's trafficking business. During the relevant period Dwayne Ganley “episodically engaged in moving and collecting money and drugs in conjunction with their father, Wayne Ganley”. Dwayne Ganley also sourced and supplied drugs himself and at times stored drugs at his house. He was involved in a commercial enterprise but the Crown was unable to ascertain with precision the extent of his involvement and the benefit or profit he derived.
- [14] On 22 January 2010 Dwayne Ganley offered to supply Anthony Ganley with a 50 pack of “more things” which he had previously supplied, Anthony asked Dwayne to organise more, and Dwayne Ganley confirmed that he could source them and would co-ordinate the collection of the drug with Wayne Ganley: this was a reference to methylamphetamine, MDA and MDMA (count 1). On 26 January 2010 Dwayne Ganley stored .194 grams of methylamphetamine plus 40 tablets, containing a total calculated weight of cocaine of .04 grams, a total calculated weight of methylamphetamine of .026 grams, and a total calculated weight of MDA of less than .008 grams. Anthony Ganley collected the tablets from Dwayne

Ganley, who was aware that the drugs would be on-sold and he was also involved in subsequent discussions with Anthony Ganley to collect the money (count 2). On 6 February 2010, at Dwayne Ganley's request Anthony Ganley supplied to him for on-supply to others sufficient methylamphetamine, MDA and MDMA for four people (count 3). On 13 February 2010 Wayne Ganley attempted to purchase three and a half ounces of the same drugs through Anthony Ganley with a view to making a profit of \$1,200 from the sale of 3,000 caps (count 4). On the same day Dwayne Ganley referred a customer to Anthony Ganley for the supply of the same drugs (count 5). On 15 February 2010, Dwayne Ganley had 500 tablets of the same drugs in his possession and discussed the different sales techniques which would yield the most profit for the weekend (count 6). On the same day police executed a search warrant at Dwayne Ganley's house and found mobile phones, a laptop computer and a quantity of paperwork for use in the commission of drug offences (count 7). Dwayne Ganley committed the offences in indictment 436/2012 whilst he was on bail in respect of the offences in indictment 38/2010.

- [15] Dwayne Ganley was 28 years old when he committed the first series of offences and 29 years old when he committed the second series of offences. He was 31 years old when sentenced. He had a criminal history which commenced in 1998. In addition to convictions for relatively minor drug offences for which he was given fines, his history included property related offences for which he had been given probation (in February 1999), a wholly suspended term of imprisonment of nine months (February 2000), nine months imprisonment (May 2001), a wholly suspended term of one year imprisonment (September 2003) and two years and six months imprisonment to be served concurrently with the activated term of the previous suspended sentence of imprisonment (25 November 2004).
- [16] The sentencing judge referred to Dwayne Ganley's offending and described him as having a "more unattractive criminal history" than either his father Wayne Ganley or his brother Anthony Ganley.

Application by Wayne Ganley

- [17] Wayne Ganley argued that the appropriate head sentence was three and a half years imprisonment and that a parole eligibility date should have been set after one third of that term (14 months). He relied upon the following grounds of appeal:
1. The sentence is manifestly excessive.
 2. The sentencing judge failed to accept that his plea of guilty was an early plea notwithstanding that the indictment to which he pleaded guilty was only presented at the commencement of the sentence hearing on 28 August 2012.
 3. The sentencing judge's determination that Wayne Ganley was the effective warehouseman of much of the drugs sold by Anthony Ganley was not supported by the particulars of agreed facts and might have led the sentencing judge into error.
- [18] Wayne Ganley did not develop any argument in support of ground 2. At the sentence hearing Wayne Ganley's counsel accepted that his plea was not a timely one¹ after the sentencing judge observed that he had not offered to plead guilty to trafficking over any period in relation to any dangerous drugs after an indictment presented in December 2011 charged him with trafficking in the dangerous drugs methylamphetamine, MDMA, MDA, cocaine and cannabis during a longer period than that to which he ultimately pleaded guilty on 28 August 2012.

¹ Record p 76, with reference to p 73.

- [19] In relation to the third ground of appeal, Wayne Ganley contended that he was merely the warehouseman of only some of the drugs, the ecstasy tablets, and he was not involved in the trafficking of a much wider range of drugs, including cocaine and cannabis. The sentencing judge clearly understood that Wayne Ganley's role did not extend to all of the drugs in which Anthony Ganley trafficked, having at the commencement of the sentencing remarks identified the particular dangerous drugs in which Wayne Ganley trafficked between 1 January and 18 February 2010. During the hearing the sentencing judge asked the prosecutor whether or not Wayne Ganley was involved in "all the drugs...methylamphetamine, MDA, MDMA", to which the prosecutor responded that he was not involved in cannabis or cocaine but essentially was involved in the "pill aspect of the enterprise".² In the sentencing remarks, the sentencing judge referred to each of those dangerous drugs, including the cocaine and cannabis, when describing the charge of unlawful trafficking and dangerous drugs to which Anthony Ganley pleaded guilty. In the context of the sentencing remarks as a whole, the sentencing judge's reference to Wayne Ganley having been "effectively the storeman of much of the drugs sold by his son in his business" did not convey a view that Wayne Ganley was involved in storing cannabis or cocaine. The sentencing judge did not make the mistake asserted in ground 3.
- [20] Wayne Ganley argued that insufficient weight was given to his partner's serious medical condition. He accepted that his partner's medical condition did not provide a major mitigating feature for his conduct, but he submitted that in circumstances in which her medical condition was serious and she depended heavily upon him for getting to medical appointments and for general assistance, more credit should have been given for her medical condition. As the respondent submitted, the authorities show that hardship to a spouse, family or friends is generally not regarded as justifying substantial mitigation in a sentence for a serious offence, particularly a serious offence for which a substantial period of imprisonment inevitably must be imposed: see, for example, *R v Whiting* [2013] QCA 18 at [12], referring to *R v Tilley* (1991) 53 A Crim R 1 at 3-4, 6; *R v MP* [2004] QCA 170 at 3; *R v Wirth* (1976) 14 SASR 291 at 296; *R v D'Arrigo; ex parte Attorney-General of Queensland* [2004] QCA 399 at 5-6; *R v Haddad* [2009] QCA 143. In *Edwards* (1996) 90 A Crim R 510 at 515-517, (in a passage referred to with approval by Chesterman J, with whose reasons McMurdo P and Atkinson J agreed, in *R v MP*), Gleeson CJ quoted Wells J's statement in *R v Wirth*:
- "Hardship to spouse, family, and friends, is the tragic, but inevitable consequence of almost every conviction and penalty recorded in a criminal court ... It seems ... that courts would often do less than their clear duty ... if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other points of view were justified, would be likely to cause to those near and dear to prisoners."³
- [21] Having regard to the seriousness of the offending the sentencing judge was right to make only little allowance for the illnesses of Wayne Ganley's partner.
- [22] In support of the ground of appeal that the sentence was manifestly excessive Wayne Ganley referred to the short period of offending, the absence of evidence

² Record pp 58-59.

³ (1976) 14 SASR 291 at 296.

that he received significant profits as a result of his offending, the relatively minor nature of his criminal history, and his efforts at rehabilitation since the offending. It was submitted that it was significant that Wayne Ganley had not re-offended in the two and a half years after he was arrested before he was sentenced. There is no reason to consider that the sentencing judge overlooked any of these matters.

[23] The maximum penalty for the offence of trafficking in a dangerous drug of which Wayne Ganley was convicted is 25 years imprisonment. Counsel were not able to find a closely comparable sentencing decision, but the respondent relied upon a decision referred to at the sentence hearing by the prosecutor, *R v Prior* [2010] QCA 53. Prior pleaded guilty to trafficking in cannabis for a period of about five months, possession of cannabis greater than the prescribed amount, possession of cannabis, possession of property reasonably suspected of being the proceeds of a drug offence, and possession of utensils. On appeal he was re-sentenced to four years imprisonment with parole eligibility after 10 months. Prior was described as a “warehouseman” of very large amounts of cannabis on at least eight occasions over five months. He held the cannabis overnight in his home until it was collected by another offender. Wayne Ganley emphasised that Prior dealt with large amounts of cash which were given to another offender to be taken interstate and that he was found in possession of \$110,000. That was submitted to reveal the substantial extent of the criminal enterprise in that case. On the other hand, the drug was a Schedule 2 drug (trafficking in which carried a maximum penalty of 20 years imprisonment, rather than the 25 years for Wayne Ganley’s offence), Prior was paid a total of no more than \$4,800, he settled a pecuniary penalty claim for \$3,850 which he paid to the Crown using a credit card, his criminal record included only a minor and irrelevant conviction, he pleaded guilty in a timely way, and he provided police with a full account of his involvement in his offence.

[24] It also must be borne in mind that Wayne Ganley did not act only as a warehouseman of the drugs. The agreed facts include statements that he “episodically participated as a consultant, encouraging Anthony Ganley in the continued supplies” and once “counselled Anthony Ganley on profit making and use of runners to avoid detection by police”. The sentence in *Prior* of four years imprisonment with parole eligibility after 10 months is consistent with the view that Wayne Ganley’s sentence of four years imprisonment with parole eligibility after 18 months is not manifestly excessive. That parole eligibility date is two months after he will have served one third of the four year term. Whilst the fixing of a parole eligibility date at the one third mark of a sentence of imprisonment is a common practice in this jurisdiction (see, for example, *R v Ungvari* [2010] QCA 134 at [30] (White JA)) the mere fact that the sentencing judge fixed the parole eligibility date two months later than the one third mark does not of itself evidence error in the exercise of the sentencing discretion: see *R v Torrens* [2011] QCA 38 at [24]-[26], referring to *R v PAA* [2006] QCA 56 at [14] and *R v Robertson* [2008] QCA 164 at [2]-[6].

[25] The sentence was not manifestly excessive.

Application by Dwayne Ganley

[26] The grounds of Dwayne Ganley’s proposed appeal are:

1. The sentencing judge erred by failing to treat his pleas of guilty as early pleas.

2. The sentencing judge erred by treating him in the same way as his co-accused Wayne Ganley who was charged with trafficking and was not drug affected.
 3. The sentence is manifestly excessive.
- [27] Dwayne Ganley conceded that the head sentence of four years imprisonment was appropriate in the circumstances of his offending but contended that the sentencing judge erred in fixing the parole eligibility date.
- [28] In relation to the first ground of appeal, Dwayne Ganley's contention that the sentencing judge erred in treating him as having pleaded guilty late was based upon the procedural history of indictment 38/2010. On 28 August 2012 the prosecutor entered a nolle prosequi on count 1 of indictment 38/2010, which charged Dwayne Ganley with carrying on the business of unlawfully trafficking in a dangerous drug. Dwayne Ganley argued that his plea was not late because it came on the heels of the Crown's abandonment of the trafficking charge. The argument overlooked these facts: although indictment 38/2010 was presented on 22 January 2010, the applicant did not plead guilty to counts 2, 5 and 7 until 16 December 2011; on that occasion Dwayne Ganley pleaded not guilty to counts 3, 4 and 6 (in addition to his plea of not guilty to the trafficking charge in count 1); the matter had been listed for trial; and pleas of guilty to counts 3, 4 and 6 were not entered until 28 August 2012.
- [29] At the sentence hearing Dwayne Ganley's counsel informed the sentencing judge that about two months earlier Dwayne Ganley had offered to plead guilty to the three supply counts if the prosecution did not proceed with the charge of trafficking; there followed negotiations which led to the trafficking charge being dropped. The sentencing judge pointed out in the course of submissions⁴ that this did not amount to a plea of guilty or an offer to plead guilty to the supply charges such as to justify a conclusion that the pleas were timely. Dwayne Ganley might have had good forensic reasons for not entering earlier pleas of guilty to the charges of supplying a dangerous drug. The prosecutor could then have relied upon the admission of those offences as particulars of the trafficking charge. Nevertheless, the fact is that each of Dwayne Ganley's pleas of guilty to the counts in this indictment were late.
- [30] The second ground of appeal refers to a comparison between the sentence imposed upon Dwayne Ganley and the sentence imposed on Wayne Ganley, but Dwayne Ganley's submissions instead focussed upon a comparison between his sentence and the sentence imposed upon Anthony Ganley. His point was that Anthony Ganley, who pleaded guilty to trafficking between 1 November 2009 and 18 February 2010, was given a parole eligibility date after one third of his sentence of seven and a half years imprisonment, whereas Dwayne Ganley's parole eligibility date required him to serve two months more than one third of his sentence of imprisonment before becoming eligible for parole. The sentences are not comparable. There is first the marked difference in the length of the sentences of imprisonment. It was open to the sentencing judge to consider in Dwayne Ganley's case that 16 months imprisonment was insufficient as the minimum appropriate custodial period for his offending. As the sentencing judge pointed out, Dwayne Ganley committed the second series of offences whilst he was on bail for the first series of offences and Dwayne Ganley had a worse criminal history. Dwayne Ganley submitted that reference to observations made by the sentencing judge in the course of argument

⁴ Record p 78.

demonstrated that the latter factor was taken into account in the head sentence. The observations did not make that clear. In any event those observations were not the reasons for the sentence; their evident purpose was to direct counsel's attention to issues upon which submissions might be considered by the sentencing judge.

- [31] The comparison between Dwayne Ganley's sentence and Anthony Ganley's sentence does not show any error in the former's parole eligibility date. Nor does a comparison with Wayne Ganley's sentence indicate any error in the exercise of the sentencing discretion.

Proposed orders

- [32] I would order that each application be refused.
- [33] **MARGARET WILSON J:** I have read the reasons for judgment of Fraser JA. I agree that each application should be refused, for the reasons given by his Honour.