SUPREME COURT OF QUEENSLAND

CITATION:	*R v Roberts* [2020] QCA 129
PARTIES:	**R** **v** **ROBERTS, Silvia** **(applicant)**
FILE NO/S:	CA No 319 of 2019 SC No 1082 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 26 September 2019 (Douglas J)
DELIVERED ON:	12 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2020
JUDGES:	Sofronoff P and McMurdo JA and Bradley J
ORDER:	**Leave to appeal be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after a trial in the face of a strong Crown case of one count of importing a marketable quantity of a border controlled drug, namely cocaine – where the applicant had over 400 grams of cocaine in her suitcase – where the applicant was sentenced to a term of imprisonment of nine years with a non-parole period of five years and six months – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant's fingerprints were found on the plastic bag material inside the containers and also on the sticky side of the tape with which the bags were wrapped – where there was no evidence of duress or addiction – where there was no evidence of payment for the offending – where the learned trial judge found that the applicant was something more than a courier but did not go further than that – where the applicant submits that the learned sentencing judge erred in sentencing the applicant on the basis that she was more than a courier – whether the learned sentencing judge erred in finding the applicant to be something more than a courier –

whether the sentencing discretion miscarried

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant went to trial in the face of a strong Crown case – where the applicant made limited admissions on the first day of the trial but witnesses had already made travel arrangements – where the applicant submits that the learned judge increased the sentence because the applicant went to trial in the face of a strong Crown case – whether the learned sentencing judge increased the sentence on this basis – whether the sentencing discretion miscarried

R v Aziz, Unreported, Douglas J, SC No 937 of 2011, 8 March 2013, cited
R v Boimah [2017] QCA 50, cited
R v Hughes [2016] QCA 14, cited
R v Jimson [2009] QCA 183, distinguished
R v Junior, Unreported, Ryan J, SC No 1695 of 2017, 11 April 2018, distinguished
R v Lindsay [2012] NSWCCA 124, distinguished
R v Neto [2016] QCA 217, distinguished
R v Onyebuchi; Ex parte Commonwealth Director of Public Prosecutions [2016] QCA 143, cited
R v Sutton [2013] QCA 151, cited

COUNSEL: A J Glynn QC for the applicant
D A Holliday for the respondent

SOLICITORS: John D Weller & Associates for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **SOFRONOFF P:** The applicant was found guilty by a jury of one count of importing a marketable quantity of a border controlled drug, namely cocaine. The trial judge, Douglas J, sentenced her to a term of imprisonment of nine years with a non-parole period of five years and six months. The applicant seeks leave to appeal against that sentence and would advance two grounds of appeal:

1. The sentence is manifestly excessive; and

2. The sentencing judge erred in sentencing the applicant upon the basis that she was more than a courier and on the basis that she had proceeded to trial in the face of a strong Crown case.

[2] At sentencing the applicant was aged 57. She was 55 years old when she committed the offence. She had travelled to Buenos Aires and, upon her return to Australia, her suitcase was examined and found to contain over 400 grams of cocaine. When questioned, she told police that a man called Jones had given her $10,000 to give to a man named Barbuto in Buenos Aires. She said that, in return for this favour, Jones had paid to upgrade the applicant's economy class plane ticket to business class.

[3] She told police that in Buenos Aires Barbuto gave her a substance to take back to Jones. This, she said, was "crystal, really fragile, glass, crystal, ceramic". Upon her return to Australia, authorities found two plastic containers. These containers contained six clip seal bags inside which was not the substance that the applicant had described. In fact the powder was 413.9 grams of cocaine. The bags themselves were wrapped in plastic and secured with tape. The applicant told police that she had been given the containers in the same condition in which police had found them. However, the applicant's fingerprints were on the plastic bag material inside the containers and also on the sticky side of the tape with which the bags were wrapped.

[4] The applicant had a previous minor conviction relating to drugs but it is common ground that that conviction is immaterial. She has been gainfully employed for some years and owns rental properties from which she gains income. She is not addicted to drugs and was under no duress to bring the cocaine into Australia. There was no evidence that anyone had paid the applicant anything to import the drug. The upgrade of the ticket was the only benefit that she admitted to having received but that, she said, was in return for taking the $10,000 to Barbuto. Personal references referred to at the sentencing hearing were to the effect that the offending was out of character. The applicant's entire involvement with the drugs that she was proven to have imported was, therefore, never explained. The cocaine had a retail value of over half a million dollars.

[5] The applicant did cooperate with the administration of justice to the extent that certain admissions were made on her behalf but, as the prosecutor pointed out at sentencing, these admissions were of limited utility because they were made on the morning on which the trial started and witnesses had already made travel arrangements by then.

[6] The maximum term of imprisonment for this offence is 25 years' imprisonment. Previous sentences were placed before his Honour by both parties. One of these was *R v Jimson*[1] in which the offender had imported 1.686 kilograms of cocaine. It is relevant to one of the proposed grounds of appeal to refer to his Honour's remarks about that case. Referring to the offender in *Jimson,* his Honour said:

> "She had expressed genuine remorse and entered an early guilty plea and was regarded as unlikely to reoffend in the sentence as a courier. She will also have been more isolated than many others in prison and was separated from her family in Malaysia. She was sentenced to eight years' imprisonment with a non-parole period of four years and six months.
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> As I have said, [the applicant's] offending is serious, not apparently driven by duress or financial pressure and where a trial was conducted in the face of what, to my assessment, was a strong Crown case."

[7] In *Lindsay*[2] the amount of actual cocaine was 352.1 grams. Lindsay had a lengthy criminal history for drug offences as well as offences of dishonesty. He pleaded guilty. He was motivated to commit the offence in order to get enough money to

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1 [2009] QCA 183.
2 [2012] NSWCCA 124.

pay off a substantial debt. Lindsay was sentenced to eight and a half years' imprisonment with a non-parole period of five and a half years.

[8] In *Neto*[3] a Brazilian national and resident had imported 712.3 grams of actual cocaine. The applicant was 25 years' old at the time of the offending. Neto was sentenced to a term of seven years and six months' imprisonment with a non-parole period of four years three months. His youth was a factor in mitigation.

[9] In *Junior*[4] the amount of actual cocaine was a third of the amount that the applicant imported in this case. He pleaded guilty and was sentenced to six years' imprisonment with a non-parole period of three years and three months.

[10] Other cases cited to his Honour were *Sutton*,[5] *Hughes*[6] and *Aziz*.[7] On this application, the applicant relies upon several other cases, including *Onyebuchi*[8] and *Boimah*.[9] The range of sentences represented by all of these cases is between five years and eight and a half years. The non-parole periods range from two years and six months to five years and six months. The net weight of drug imported ranges from 127.2 grams to 1,686.8 grams. In all of them the offender pleaded guilty. In those cases in which the sentences were lowest, there were mitigating factors present that were personal to the offender. In a case in which one of the longest sentences was imposed, *Onyebuchi*,[10] despite the guilty plea, the offender declined to furnish any information about the offending. The learned sentencing judge sentenced the offender upon the basis that he was more than a courier. His Honour was sceptical that the only benefit received was an admitted sum of $10,000.

[11] The problem for the applicant in this case is that she offered no mitigation at all after she had been caught smuggling a significant quantity of cocaine. This meant that personal deterrence was a factor in sentencing. In most importation cases in which an offender pleads guilty personal deterrence is not so important. Contrition is some evidence of insight and this insight into the wrongfulness of a crime implies a reduced likelihood of reoffending.

[12] It is in this connection that his Honour's remarks about the applicant's challenge to a strong Crown case can be considered. As the passage quoted shows, that observation was made in the context of distinguishing the applicant's case from a previous case that had been cited in which the offender had shown "genuine remorse". I would understand his Honour to have been making the point that the applicant's plea of not guilty in the face of a strong Crown case was a feature which distinguished her case from *Jimson*[11] because it showed an absence of any remorse or regret. His Honour did not say, and did not mean, that the applicant deserved to be punished more for pleading not guilty. His Honour meant that she deserved no mitigation of an otherwise appropriate sentence on account of remorse.

[13] The applicant also submits that his Honour sentenced the applicant on the basis of a finding that she was "more than a courier".

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3 [2016] QCA 217.
4 Unreported, Ryan J, SC No 1695 of 2017, 11 April 2018.
5 [2013] QCA 151.
6 [2016] QCA 14.
7 Unreported, Douglas J, SC No 937 of 2011, 8 March 2013.
8 [2016] QCA 143.
9 [2017] QCA 50.
10 *Supra*.
11 *Supra*.

[14] At sentence hearings involving offenders who have imported or trafficked in dangerous drugs, much is often heard about the distinctions between middle-men and principals and between mere couriers and others participating in the crime. Such labels can be useful shorthand provided that everybody understands the actual content of the label in the same way. However, a sentencing judge does not punish an offender for being a courier or a principal or a middle-man. A judge sentences an offender for committing the offence in circumstances that have been admitted or proved. The judge takes into account the moral culpability as evidenced by relevant circumstances.

[15] Sometimes the extent of moral culpability is a matter of controversy and sometimes an aspect of that controversy cannot be resolved. That was so in this case. Because the applicant denied guilt and offered no explanations for her actions, after she was found guilty her counsel was handicapped in his ability to make submissions in mitigation. However, he could point out to Douglas J that the prosecutor was not prepared to submit that the applicant was "something more than a courier". He submitted that the applicant's fingerprint on the packaging material did not prove that she was other than a courier.

[16] In his sentencing remarks, his Honour said that the applicant's involvement in the importation was "not particularly clear". After referring to the absence of any evidence of payment for the importation, his Honour referred to the prosecutor's submission that the evidence of fingerprints and the absence of evidence of any payment for the job of importation (which would suggest that the applicant was a courier paid for a single job) "suggest that [the applicant was] more than a courier" but, his Honour concluded, the prosecutor had accepted that the evidence went no further. His Honour said that that submission was correct. It follows that his Honour was not prepared to find that the applicant was "more than a courier" but he was also not prepared to find that the applicant was a *mere* courier. In my respectful opinion, that conclusion about the lack of evidence to support either finding was correct.

[17] These remarks by his Honour explain his Honour's statement later in the sentencing remarks that his Honour was "left with the likelihood that [the applicant was] more than a courier, but that the evidence tends to go no further than that". The applicant submits that his Honour was thereby making a finding that the applicant was "more than a courier" and that he sentenced her upon that basis but that the evidence did not justify that finding.

[18] That submission should be rejected. The statement was made after his Honour had considered and rejected defence counsel's submission that the ticket upgrade should be regarded as the consideration for the drug importation. I would read the words as a reference back to his Honour's earlier affirmative statement that the evidence on that subject raised no more than a suggestion, something that could not be acted upon.

[19] The sentence was a severe sentence. However, I do not accept that it was a sentence that lay beyond the bounds of a proper exercise of discretion. The maximum penalty for the offence is 25 years' imprisonment. The amount of cocaine in question was large. The mitigating factors were of little weight. All that could really be said for the applicant was that she was previously of good character. Otherwise, she exhibited a lack of cooperation with authorities, other than the

insignificant matter of trial admissions, and offered not the slightest evidence of any regret for having committed the crime.

[20] There is no reason to think that the sentencing discretion miscarried. Leave to appeal should be refused.

[21] **McMURDO JA:** I agree with Sofronoff P.

[22] **BRADLEY J:** I agree with the reasons for judgment of the President and the order his Honour proposes.