# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Fisher* [2021] QCA 28 |
| PARTIES: | **R**<br>**v**<br>**FISHER, John Gavin**<br>(applicant) |
| FILE NO/S: | CA No 156 of 2020<br>SC No 536 of 2020 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane – Date of Sentence: 16 July 2020 (Lyons SJA) |
| DELIVERED EX TEMPORE ON: | 24 February 2021 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 February 2021 |
| JUDGES: | Holmes CJ and Morrison and Mullins JJA |
| 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 the applicant was sentenced to five years imprisonment, suspended after 18 months, on one count of trafficking methylamphetamine, to be served concurrently with a six month term of imprisonment imposed in respect of one count of supplying cannabis – where the sentencing judge found that the applicant acted as a "go-fer" for his superiors in a drug trafficking business – where the applicant contends that the requirement to serve 18 months of actual imprisonment rendered the sentence manifestly excessive – where the applicant contends that he should have been sentenced on the basis that his culpability was equivalent to that of a street-level dealer – whether the sentencing judge had appropriate regard to the applicant's attempts at rehabilitation and the effects of imprisonment given his disabilities – whether the sentence was manifestly excessive<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant contends that the sentence imposed was disproportionate to that imposed on another operative in the |

same drug trafficking business for which the offender worked – where that defendant was sentenced to five years imprisonment from the date of sentence with parole eligibility set after eight months – where that defendant had already spent 12 months in custody and was only 25 years old at the time of offending – whether the sentence was out of parity with that imposed on that defendant

*R v Baker* [2011] QCA 104, distinguished
*R v Casagrande* [2009] QCA 1, distinguished
*R v Engellenner* [2012] QCA 6, distinguished
*R v Field* [2017] QCA 188, distinguished
*R v Mikula* [2015] QCA 102, distinguished
*R v Skeli* [2017] QCA 191, distinguished

COUNSEL: S McGhie (*sol*) for the applicant
N Needham for the respondent

SOLICITORS: Richardson McGhie for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The applicant seeks leave to appeal against a sentence of five years imprisonment, suspended after 18 months, on a count of trafficking in methylamphetamine over a seven month period. He was sentenced to a concurrent term of six months imprisonment in respect of one count of supplying cannabis.

[2] The applicant worked for a man named Cowan who headed a syndicate trafficking methylamphetamine in Mackay and Southeast Queensland. Cowan had a number of employees, including, as well as the applicant, a man named Mitchell Gough. Cowan supplied those employees with methylamphetamine which they distributed to a customer base of about 20 people. Police were able to identify 1,853 communications between the applicant and Cowan in the course of his employment. He was said to have assisted Cowan by carrying out tasks several times a week for him. Those tasks included supply of methylamphetamine to customers, usually in ounce amounts; collection of drugs for Cowan; collection of drug debts on his behalf; acting as his driver as he conducted his business; and, on one occasion, at his request, sampling methylamphetamine to test its quality. The sentencing Judge found that he had been remunerated with drugs and small payments for tasks performed.

[3] In relation to the applicant's debt collecting role, he and Cowan discussed the use of threats and violence on at least four occasions. On one of those occasions, the applicant agreed that while collecting a drug debt from a female customer, he would snatch her phone from her in order to delete Cowan's number. On another, the applicant congratulated Cowan on having assaulted a female customer. In subsequent conversations with Cowan, the applicant confirmed that he had relayed a message to a defaulting and frightened customer that Cowan would "punch his face in". In another instance, the applicant threatened a customer from whom he was to collect money with violence, although there were children at the house; and, despite that fact, he and Cowan discussed by telephone Cowan's coming to the house to fight the residents.

[4] The applicant was between 45 and 46 years old during this period. He had a minor criminal history containing two charges of possession dangerous drugs in 2014 and 2018, and an unlawful possession of a motor vehicle in 2018, all dealt with in the Magistrates Court by way of fine without any conviction being recorded.

[5] The applicant's counsel at sentence explained that he had worked as a plumber but had lost his business through an addiction over some years to methylamphetamine. His lifestyle had led him to develop Type 2 diabetes, which had resulted in the amputation of his left leg below the knee and two toes on his right foot. He had become homeless and was now living with his elderly parents, who were in ill health and for whom he was carer. He had worked as a labourer for Cowan in panel beating and spray painting for cash and the supply of methylamphetamine, a role which had evolved into his working for Cowan in his drug business.

[6] The applicant's counsel tendered six clear drug screens over a six-month period leading up to sentence and a letter from the applicant's general practitioner advocating that he be given community service because of his health needs. The doctor asserted that the applicant had not used methylamphetamine since early 2019, but that confidence does not seem to have been based on any drug test prior to January 2020. His counsel submitted that he was now being treated by a psychiatrist and prescribed antidepressants, and that, having given up drugs, he had been able to manage his blood sugars so that he was in good health. A custodial term would be difficult for him because moving around on concrete floors in crowded situations was difficult as a result of his leg amputation. Counsel accepted that the appropriate sentence might fall between five and eight years, but advocated a sentence which would allow for a very early suspension, or possibility of an immediate suspension, of it.

[7] The learned sentencing judge recounted the facts, noting that there was no evidence of substantial monetary reward, as opposed to small cash payments and remuneration with drugs. The applicant's role was essentially that of a "go-fer" for Cowan. She accepted that the applicant's life had been ruined by drugs but that he was currently drug free and that he had, as a result of his poor health, significant mobility issues. Despite the mitigating factors, the sentence required actual custody to reflect the need for denunciation, but suspension of the five year sentence after 18 months provided the applicant with some certainty of release.

[8] The proposed Notice of Appeal raises as grounds that the sentence was manifestly excessive and out of parity with that imposed on Gough, and that the sentencing Judge gave inadequate consideration to the applicant's rehabilitation and the significance of imprisonment given his disabilities. The grounds which concern the applicant's rehabilitation and the effect of imprisonment on his disabilities are purely matters of weight, not *House v The King* matters justifying an appeal against an exercise of discretion.

[9] The applicant did not cavil with the head sentence of five years imprisonment, although contending that it was at the upper end of an available range, but maintained that the requirement to serve 18 months of actual imprisonment rendered the sentence manifestly excessive. Perhaps a little inconsistently with the avowed acceptance of the head sentence, the applicant contended that he should have been sentenced on the basis that his culpability was equivalent to that of a street-level dealer. In that context, reference was made to a number of cases: *R v*

*Mikula* [2015] QCA 102; *R v Casagrande* [2009] QCA 1; *R v Engellenner* [2012] QCA 6 and *R v Baker* [2011] QCA 104. None of those cases was, in my view, comparable. Firstly, all involved young people in their teenage years or early 20s who had pleaded guilty to offences which involved street-level dealing at a low level, attracting sentences of between three and four years imprisonment. Their youth was, in each case, a powerful matter in mitigation. The applicant, self-evidently, does not have that factor in his case. Secondly, I am not convinced, in any event, that it is correct to equate his culpability with that of a street-level dealer. His work for Cowan involved a variety of activities which facilitated the operation of a significant drug trafficking business, and the willingness to contemplate or threaten violence suggests a relatively hardened offender.

[10] In addition, the applicant relied on the cases of *R v Field* [2017] QCA 188 and *R v Skeli* [2017] QCA 191 as involving offenders who received similar sentences but whose offending, he maintained, was worse. The applicant in *Field* received five years and six months imprisonment with parole eligibility after 18 months on a count of trafficking in methylamphetamine over a five month period, which it was found he did with others for profit and to support his severe addiction. There had been a gap of three years between his arrest and sentence during which he had exhibited rehabilitation. In fact, his sentence does not seem particularly out of proportion to the applicant's, but, in any event, it would be of little assistance even if it were. This court refused leave to appeal on the basis that it was not manifestly excessive, so it gives no guidance as to whether the sentence was unduly lenient or at the upper end of appropriate sentencing for the offending.

[11] Similarly, the remaining authority, *R v Skeli*, is of little assistance. The applicant there had been sentenced to five years imprisonment for trafficking in a total sentence of five and a half years imprisonment for that and other offences with parole eligibility after two years. He was a young offender in a similar "go-fer" role to the applicant here. Mr McGhie, for the applicant, made the point that he had a worse criminal history, including for violence. But again, this was a case in which the result provides no guidepost for sentencing. The court refused an application for an extension of time within which to seek leave to appeal on the basis that the five year sentence for trafficking was not manifestly excessive.

[12] None of the authorities referred to lead to a conclusion that the applicant's sentence was manifestly excessive. In relation to the particular factors of the applicant's rehabilitation and the effect of imprisonment in light of his diabetes and limb loss, I have already noted that an argument that inadequate consideration was given to them cannot support an independent appeal ground. So far as their significance to the sentencing exercise is concerned, the evidence of rehabilitation was not particularly powerful, being largely confined to the applicant's abstinence from drug use and presumably from further offending. The evidence that his disabilities would cause particular hardship in prison was very limited, being articulated as his difficulties with hard floors and crowds. There was no reason to suppose that his diabetes could not be properly managed in custody or that the difficulties consequent on the loss of his leg and toes would be very much greater in custody than they obviously would be elsewhere.

[13] In any event, the learned sentencing judge gave appropriate regard to both the disabilities and the rehabilitation in setting the custodial period slightly below the one-third period often set in recognition of mitigating factors and, most

significantly, in ensuring that the applicant would be released on that date. The sentence was not manifestly excessive.

[14] As to the parity argument, Mitchell Gough was sentenced some months before the applicant. He had been employed by Cowan to sell methylamphetamine and collect drug debts, and of some concern was the fact that when apprehended by police, he was in possession of a sawn-off shotgun. He was 25 years old at the time of his offending and had a criminal history, most of which consisted of minor matters dealt with in the Magistrates Court, but which included an unlawful wounding as a party, for which a District Court Judge had imposed a 15 month sentence with immediate parole release. Subsequently, he had been dealt with on two occasions in the Magistrates Court, in each case for unlawful use of a motor vehicle and drug charges, on the first occasion receiving probation and on the second a sentence of imprisonment, largely suspended. The significance of those matters was that Gough was on parole, probation, bail and a suspended sentence at various times during his period of offending.

[15] The judge sentencing Gough inferred that his reward from Cowan was methylamphetamine to feed his addiction and some money towards living expenses. He had some references, which the sentencing Judge described as "impressive". He had already served 12 months imprisonment, which seems to have been a combination of an invoked suspended sentence and further sentences imposed in the Magistrates Court for offences which his Honour described as "part and parcel of the trafficking offence". Applying the totality principle, the sentencing Judge took that period of imprisonment into account in reducing Gough's sentence and parole eligibility period by 12 months. He was sentenced to five years imprisonment from the date of sentence with eligibility for parole after he had served a further eight months in addition to the 12 months already served.

[16] There were features in Gough's case which might have suggested a higher sentence than five years, in particular the fact that he committed his offending on probation, bail, parole, and a suspended sentence. Against that, though, he had already spent 12 months in custody so that he effectively received a significantly higher sentence than the applicant, of six years imprisonment, with a slightly longer proportion of it required to be served in custody than entailed in the applicant's sentence, and, importantly, without the advantage of any certainty of release. In addition, he was a young man, only 25 at the time of offending, attracting the considerations of immaturity and better prospects of rehabilitation than ordinarily attach to a middle-aged offender, such as the applicant.

[17] The applicant could have no justifiable sense of grievance as a result of Gough's sentence. Given the balancing considerations, Gough's sentence was not disproportionate to that imposed on the applicant. For those reasons, I would refuse the application for leave to appeal against sentence.

[18] **MORRISON JA:** I agree.

[19] **MULLINS JA:** I agree.

[20] **HOLMES CJ:** The application for leave to appeal against sentence is refused.