SUPREME COURT OF QUEENSLAND

CITATION:	*R v Denning* [2022] QCA 72
PARTIES:	**R** **v** **DENNING, Sean Owen** (applicant)
FILE NO/S:	CA No 269 of 2021 SC No 761 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 22 October 2021 (Martin J)
DELIVERED ON:	10 May 2022
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2022
JUDGES:	Sofronoff P and Bond JA and Boddice J
ORDER:	**Leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of trafficking in dangerous drugs and one count of possessing a thing used in connection with trafficking in a dangerous drug – where the applicant was sentenced to six years imprisonment with respect to the trafficking count – where the applicant was convicted and not further punished with respect to the second count – where the sentence imposed was to be served cumulatively on a five year, six month sentence imposed in 2017 – where parole eligibility was set at April 2024 – where the applicant has an extensive criminal history, including previous drug offences – where the period of trafficking commenced six weeks after the applicant was released on parole – where the trafficking was at wholesale level – where the applicant provided drugs on credit and where the applicant pursued outstanding drug debts with threats of violence – where the applicant submits that the sentencing judge erred in setting the parole eligibility date, being fixed at more than 50 per cent of the overall head sentence – whether the sentencing judge erred with respect to the fixing of the parole eligibility date – whether the sentence represented a sound exercise of discretion – whether the sentence properly reflected the criminality involved in serious drug offending – whether the sentence is manifestly excessive

R v Berns [2020] QCA 36, considered
R v Byrne [2020] QCA 173, considered
R v Neilson [2014] QCA 221, considered
R v Nunn [2019] QCA 100, considered

COUNSEL: S C Holt QC for the applicant
S J Bain for the respondent

SOLICITORS: Owens & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Boddice J and with the order proposed by his Honour.

[2] **BOND JA:** I agree with the reasons for judgment of Boddice J and with the order proposed by his Honour.

[3] **BODDICE J:** On 22 October 2021, the applicant pleaded guilty to one count of trafficking in dangerous drugs and one count of possessing a thing used in connection with trafficking in a dangerous drug.

[4] On the same date, the applicant was sentenced to six years imprisonment for the trafficking count and convicted and not further punished in respect of the remaining count. It was ordered that the sentence of imprisonment be served cumulatively on an effective head sentence of five years, six months imposed on 23 March 2017. It was further ordered that the applicant be eligible for parole on 22 April 2024.

[5] The applicant seeks leave to appeal his sentence. Should leave be granted, the applicant relies on two grounds. First, that the sentencing judge erred in fixing the parole eligibility date. Second, that the sentence imposed was manifestly excessive.

Background

[6] The applicant was born in 1981. He has an extensive past criminal history with multiple entries for drug and other offences. He has been the recipient of probation and community service orders and a suspended sentence. He breached those orders.

[7] On 23 March 2017, the applicant was sentenced to five years, six months imprisonment for acts intended to cause grievous bodily harm or transmit serious disease. A parole eligibility date was set at 23 September 2018.

[8] On 26 August 2019, the applicant was released on parole. By that stage, the applicant had served over three years and two months in custody.

Offences

[9] The applicant commenced trafficking in dangerous drugs some six weeks after his release on parole. For approximately four months, between 6 October 2019 and 15 February 2020, the applicant trafficked primarily in methylamphetamine although he also supplied gamma hydroxybutyrate acid.

[10] The applicant's trafficking involved supplying to at least 12 customers, some of whom were on-selling drugs to their own customers. The applicant engaged the

services of others to assist in the distribution of the drugs. The applicant sought out customers. On occasions, the applicant provided drugs on credit. The applicant pursued outstanding debts, making threats of violence in the event those debts remained unpaid.

Sentencing remarks

[11] The sentencing judge noted that the applicant had a criminal history containing entries for drug offences, property offences, weapons offences and offences of violence. Of considerable concern, his history included an entry in October 2013 for entering a dwelling with intent by breaking at night whilst armed in company and the entry in March 2017 for acts intended to cause grievous bodily harm and entering a dwelling with intent by breaking at night.

[12] The sentencing judge recorded that the trafficking was for about four months during which the applicant trafficked in wholesale amounts primarily of methylamphetamine but also was able to source and supply large amounts of gamma hydroxybutyrate acid. The aggravated circumstances of the trafficking included supplying methylamphetamine to at least 12 customers of whom seven at least were on-selling the drug. Further, his conduct, although in part to feed his own drug addiction, was commercially motivated. The applicant engaged the services of others; actively sought out large-scale sales; provided drugs on credit or in exchange for other rewards; and, engaged in threats of violence towards those who owed him debt. Concerningly, the trafficking count commenced one month and one week after the applicant was released on parole.

[13] The sentencing judge recorded that the applicant had now been in custody for 14 months since his arrest, with a further 11 months to serve on the earlier sentence and a requirement to serve a further ten months as a result of the cancellation of his parole. As such, the applicant would serve 21 months before any sentence imposed for this offending could commence.

[14] The sentencing judge recorded that the applicant had entered an early plea, which would be taken into account, and that the applicant had commenced using methylamphetamine in 2010 following which he had developed a serious addiction.

[15] After observing that there were a number of significant aggravating factors, including commencement of the trafficking so soon after entry into parole, the sentencing judge observed that a sentence in the order of seven to eight years would be appropriate in the ordinary course. Taking into account the time that the applicant had spent in custody and would spend in custody before commencement of the sentence, the sentence for trafficking was reduced to a period of six years imprisonment so as to recognise the need not to impose a crushing sentence. It was ordered that the sentence be served cumulatively.

[16] After taking into account one day of pre-sentence custody, which was not declared as time served, and the period of time that the applicant would have been in custody before commencement of the sentence, the sentencing judge set the applicant's parole eligibility date at 22 April 2014.

Applicant's submissions

[17] The applicant submits that the sentencing judge erred in setting the date for eligibility for parole in that he imposed a non-parole period of two and a half years

from the date of sentence rather than from the date the applicant had returned to custody. This error appeared to have been inadvertent, and had resulted in a parole eligibility date which was fixed at more than 50 per cent of the overall head sentence. The date was also substantially later than the prosecutor had submitted as being open.

[18] The applicant further submits that the sentence was manifestly excessive. A period of six years imprisonment, to be served cumulatively on the earlier sentence, resulted in an overall head sentence of 12 years and 10 months (allowing for the time to be served as a result of the cancellation of the parole) with an overall parole eligibility date fixed after serving six years and four months. Such a sentence was crushing in all of the circumstances.

Respondent's submissions

[19] The respondent submits that the sentencing judge did not err in fixing the parole eligibility date and the overall sentence imposed was not manifestly excessive.

[20] Whilst the prosecutor submitted that a parole eligibility date could be "after at least two years, on 20 October 2023", there was no reason to find that the sentencing judge misunderstood the sentencing submissions. The prosecutor had subsequently submitted that a parole date which saw the applicant serve at least three years before eligibility for parole would be appropriate in the circumstances.

[21] The respondent further submits that the head sentence of six years imprisonment, reduced from seven to eight years to allow for the cumulative effect, properly reflected the applicant's criminality and the mitigating factors, including his pleas of guilty. Such a sentence was consistent with the comparable yardsticks.[1]

[22] Further, the sentencing judge appropriately took into account the time that the applicant had served in custody and would serve in custody before commencement of the sentence, when fixing the parole eligibility date. The sentencing judge specifically acknowledged that the applicant would be required to serve additional time as a result of the cancellation of his parole.

Consideration

[23] A consideration of the sentencing remarks supports a conclusion that the parole eligibility date was fixed by the sentencing judge after a proper consideration of all of the relevant circumstances. There is no basis to conclude that it arose as a result of any misunderstanding of the sentencing submissions or through inadvertence.

[24] The sentencing judge specifically observed that the applicant had been in custody for 14 months, had a further 11 months to serve in respect of that sentence and would be required to serve a further 10 months as a result of the cancellation of his parole, such that he would serve 21 months before the commencement of any sentence imposed by the sentencing judge. The sentencing judge further recorded that by the time the sentence commenced, the applicant would have been in custody for nearly three years. The sentencing judge also expressly recorded that it was

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1 *R v Neilson* [2014] QCA 221; *R v Byrne* [2020] QCA 173; *R v Berns* [2020] QCA 36; *R v Nunn* [2019] QCA 100.

intended that the applicant serve two and a half years in custody from the date of sentence before any parole eligibility date.

[25] There is no substance to ground one.

[26] A consideration of the circumstances also supports a conclusion that a sentence of six years imprisonment, to be served cumulatively on the existing sentence of imprisonment fell well within a sound exercise of the sentencing discretion. As the sentencing judge rightly observed, the applicant's serious trafficking in more than one dangerous drug over a four month period throughout which the applicant was subject to parole would itself warrant a sentence in the order of seven to eight years imprisonment. A reduction in that sentence to six years imprisonment properly reflected the mitigating factors and the consequence of the imposition of a cumulative period of imprisonment.

[27] Once it is found that a cumulative period of six years imprisonment fell well within a sound exercise of the sentencing discretion, there is no basis to conclude that a requirement that the applicant serve a further two and a half years from the date of sentence before eligibility for parole was itself manifestly excessive. Such a requirement properly reflected the criminality involved in serious drug offending commenced weeks after release on parole for a serious offence of violence.

[28] Whilst a consequence of the setting of the parole eligibility date is that the applicant will serve more than 50 per cent of the overall sentence in actual custody, that consequence flows from engaging in serious criminal offending whilst on parole. Such a requirement did not constitute a crushing sentence. It also did not evidence any misapplication of sentencing principles.

[29] This ground is also not made out.

Conclusion

[30] As the applicant has not established any specific error or that the sentence imposed was manifestly excessive, leave to appeal should be refused.

Order

[31] I would order that leave to appeal be refused.