DISTRICT COURT OF QUEENSLAND

LOURY KC DCJ

DC No 1722/23

ALLENDE	**Applicant**
v	
QUEENSLAND POLICE SERVICE	**Respondent**

BRISBANE

WEDNESDAY, 1 NOVEMBER 2023

JUDGMENT

LOURY KC DCJ:

[1] The appellant pleaded guilty to four offences each committed on 30 January 2023. Those offences were one offence of possessing methylamphetamine; one offence of possessing cannabis; one offence of failing to take reasonable care and precaution in respect of a syringe or needle; and one offence of possessing a pipe that had been used in connection with the smoking of a dangerous drug.

[2] The circumstances of the offences were that a search warrant was executed at the appellant's home. She was found in possession of each of the items referred to in the above paragraph. There was a small amount of methylamphetamine, a small amount of cannabis, a glass pipe with burn marks, as well as a used syringe.

[3] Whilst the appellant did not make any admissions to the police who executed the search warrant, the appellant attended a police station on 4 April 2023 and admitted that she owned all of the items. It appears that a male companion who was present at the appellant's home at the time of the execution of the search warrant had been charged with some or all of the offences and the appellant wanted to make clear to the police that he had nothing to do with the items.

[4] Material tendered on the appellant's behalf established that the appellant was admitted to the Court Link program for four weeks from 5 May 2023. The report from her case manager stated that the appellant advised on 31 May 2023 that she wanted to finalise her court matters and exit the program. At the time of her engagement in the program, she identified accommodation to be her primary goal. She had also taken steps to address her mental health concerns by engaging with a general practitioner and obtaining a mental health care plan. She had also applied for payments from Centrelink. As the learned Magistrate commented, conspicuous by its absence, was any reference to what the appellant had done with respect to her drug misuse problem.

[5] The learned Magistrate was told by the appellant's legal representative that she was no longer using drugs. No material was tendered in support of that submission. The appellant was said to be motivated to not use drugs by her recent engagement as a carer for a family friend. Additionally, her father had received a cancer diagnosis and she wanted to provide support to him which would involve her travelling to Tweed Heads regularly.

[6] The appellant was sentenced to five months imprisonment in respect of each charge to be served concurrently. Those sentences were wholly suspended for an operational period of 12 months.

[7] The appellant has appealed her sentence on the ground that the sentence imposed was manifestly excessive. The outline relied upon by the appellant's legal representative in fact refers to three other asserted errors. Leave has been given for an amended notice of appeal to be filed adding those three grounds.

[8] The additional grounds are:

1. The Magistrate failed to consider s9(2)(a) of the *Penalties and Sentences Act* 1992;
2. The Magistrate failed to afford the appellant procedural fairness;
3. The Magistrate infringed the principles outlined in the *Penalties and Sentences Act* 1992 and in *Veen v The Queen (No 2)*.[1]

[9] As this is an appeal against the exercise of the sentencing discretion, this Court is empowered to intervene only if it is established that the learned Magistrate acted upon a wrong principle; mistook the facts; took into account irrelevant circumstances; failed to take into account relevant circumstances or imposed a sentence which was "unreasonable or plainly unjust" such as to demonstrate that the sentencing discretion miscarried even though no specific error can be identified.[2]

Ground 1

[10] Section 9(2)(a) of the *Penalties and Sentences Act* 1992 applied to the appellant's sentence. The learned Magistrate was required to have regard to the principles that

[1] [1988] 164 CLR 465
[2] *House v The King* 1936 55 CLR 499 at 505

a sentence of imprisonment should only be imposed as a last resort; and a sentence that allows the offender to stay in the community is preferable.

[11] The legal representative for the appellant at her sentence (not the same person who appeared for the appellant on this appeal) submitted, correctly, that the learned Magistrate's discretion was a broad one. He further submitted that the range within which an appropriate sentence could be imposed was between a monetary fine through to a short, suspended, term of imprisonment. Whilst the submissions were directed towards persuading the learned magistrate to impose a fine and not require the appellant to be supervised on a probation order, the legal representative made submissions directed towards persuading the magistrate not to impose a suspended term of imprisonment.

[12] The learned Magistrate was a very experienced magistrate.[3] In her sentencing remarks, she said to the appellant "if the only way [your drug use] can be stopped is by putting you in prison, that is what is going to happen". She considered whether it was appropriate to order the appellant be subject to a fourth probation order. She considered imposing a fine, and ultimately settled on a wholly suspended term of imprisonment as the appropriate sentence.

[13] Whilst the learned Magistrate did not specifically refer to section 9(1)(a) of the *Penalties and Sentences Act* 1992, it is clear from her remarks that she had regard to the principles. Indeed, she imposed a sentence that saw the appellant remain in the community.

Ground 2

[14] It is contended, in effect, that the learned Magistrate did not draw to the attention of the legal representative that she was considering imprisonment as the appropriate sentence, and as such, the legal representative did not have an opportunity to address her on that possibility.

[15] On two occasions during the course of submissions, the appellant's legal representative made submissions directed towards a suspended term of imprisonment. He conceded that such a sentence was within the appropriate range in which the appellant could be sentenced. He made a further submission as to such a sentence not being warranted in the circumstances, inferentially because of the low level of offending involved.

[16] It is perfectly clear that the appellant's legal representative had an opportunity to make fulsome submissions to the learned Magistrate about the appropriate penalty. He conceded a wholly suspended term of imprisonment was within range. He had every opportunity to make submissions in relation to that penalty. Indeed, he did make a submission as to why a suspended sentence ought not be imposed. It is perfectly clear that the legal representative contemplated the possibility of the imposition of a suspended sentence and made a submission directed towards that penalty.

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[3] She was appointed in 2000, more than 20 years ago.

[17] The appellant relies upon the decisions of *R v Kitson*[4] and *R v Cunningham*[5] in support of her contention. Those cases confirm that the principles of natural justice apply to sentencing. That is, adequate notice and an opportunity to be heard before any judicial order is pronounced, is required.

[18] *Kitson* involved a case where the postponement of the parole date beyond the mid-point of the sentence was imposed. That was an unusual result and not contemplated in the submissions of either party.

[19] *Cunningham* involved a case where, on being sentenced for assault occasioning bodily harm and wilful damage of a motor vehicle, the sentencing judge imposed a license disqualification, additional to other penalties imposed. The possibility of a license disqualification was not contemplated by either party and the sentencing judge had given no indication that he was minded to exercise the discretion vested in him by section 187 of the *Penalties and Sentences Act* 1992.

[20] Whilst the cases referred to make clear that the principles of natural justice apply to sentencing, the circumstances involved in each of those cases is vastly different to those that arise here. The appellant's own legal representative was alive to the possibility of a wholly suspended term of imprisonment being within the appropriate exercise of the sentencing discretion and made submissions directed towards that possibility. There is nothing in this ground of appeal.

Ground 3

[21] The appellant contends that the learned Magistrate placed too much weight on the appellant's criminal history. The appellant relies in support of her contention on a statement of principle in *Veen v The Queen (No 2)*[6] that:

> "…the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences…"(reference omitted)

[22] *Veen v The Queen (No 2)* 1988 164 CLR 465 was decided prior to the introduction of the *Penalties and Sentences Act* 1992 ("the Act"). Section 9(10) of the Act requires that in determining the appropriate sentence for an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to the nature of the previous conviction and its relevance to the current offence and the time that has elapsed since the conviction.

[23] In 2006, the appellant, who was then 26 years of age, was convicted of possessing dangerous drugs; possessing utensils or pipes and possessing property suspected of having been used in connection with the commission of a drug offence. She was fined $450. No conviction was regarded.

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[4] [2008] QCA 86
[5] [2005] QCA 321
[6] (1988) 164 CLR 465

[24] In 2008, when the appellant was 28 years of age, she was convicted of possessing dangerous drugs and fined $800. On a second occasion in 2008, and only 3 months later, she was convicted of two charges of possessing dangerous drugs and fined $600.

[25] There was then a significant gap in her criminal offending. She was convicted only of trespass and contravening a direction or requirement in 2016 and fined.

[26] In 2019, when the appellant was 38 years of age, she was convicted of possessing dangerous drugs; tainted property; utensils and property suspected of being used in connection with the commission of a drug offence. She was sentenced to probation for 18 months. No convictions were recorded. She was subsequently dealt with for a breach of that probation order and fined.

[27] In 2021, when the appellant was 40, she was convicted of two charges of possessing dangerous drugs; possessing utensils and obstructing police. Again, she was sentenced to probation for 18 months.

[28] On a second occasion in 2021, the appellant was sentenced in relation to drug offences; possessing suspected stolen property; breaking and entering premises; going armed to cause fear and public nuisance. Some of that offending had been committed whilst subject to the probation order imposed in 2019, including the drug offences. The appellant was sentenced to 6 months imprisonment with parole release after she had served one month in actual custody.

[29] She was sentenced on a third occasion in 2021 for contravening a non-contact order and possessing stolen property. Those offences were committed whilst the appellant was on parole. She was sentenced to 18 months' probation. She was subject to that probation order at the time she committed the drug offences, the subject of this appeal.

[30] On 20 December 2022, the appellant was again convicted of possessing drug utensils and property suspected of being used in connection with the commission of a drug offence. She was sentenced to a good behaviour bond for a period of 12 months. She was subject to that bond at the time of the commission of the drug offences the subject of this appeal.

[31] The appellant's previous convictions demonstrate that, since 2019, she has struggled with a drug misuse problem. She has been given numerous opportunities to assist her to overcome that problem. She has been sentenced to three probation orders and actual imprisonment and still, she continues to commit drug offences. Her previous convictions demonstrate the need for a sentence which acts as a personal deterrent to the appellant. They are therefore relevant to the offences before the learned Magistrate and each, at least from 2019, are properly treated as aggravating factors.

[32] In imposing sentence, the learned Magistrate said that the appellant had been fined a number of times in the past with ever-increasing amounts of fines. She considered that the probation orders seemed to have some sort of "small incremental movement towards stopping the use of illicit drugs." That was, it seems to me, to be a generous view to take of the appellant's attempts at rehabilitation.

[33] The probation orders imposed; the good behaviour order imposed; and, the term of actual imprisonment imposed; have all failed to deter the appellant from reoffending. There was very little before the Magistrate to indicate that the appellant was committed to her own rehabilitation.

[34] The learned Magistrate properly took into account the appellant's previous convictions in the way provided for in the *Penalties and Sentences Act* 1992.

Ground 4 – Manifest Excess

[35] The appellant has not referred me to any decisions which might serve as a yardstick to demonstrate that the sentence imposed was manifestly excessive. Even accepting the amounts of the drugs in the appellant's possession were unquantifiable, the appellant pleaded guilty to two charges of possessing different types of drugs and possession of utensils used for ingesting those drugs. The respondent has referred me to a decision of *Whyte v QPS,*[7] where an effective sentence of 5 months imprisonment with a parole release date after serving 3 months was imposed by a judge of the District Court on appeal. *Whyte* was convicted of possessing dangerous drugs and two charges of failing to take reasonable care and precautions with respect to syringes and failing to appear. The quantity of the drug involved was the contents of a syringe *Whyte* said contained a tablet of morphine.

[36] This case certainly does not establish that a wholly suspended five-month sentence of imprisonment was manifestly excessive. The maximum penalty for the offence of possessing a dangerous drug is 15 years imprisonment. Whilst the quantities of drugs that the appellant possessed were small, she fell to be sentenced by reference to that maximum penalty. The appellant's own legal representative conceded that such a sentence was within the exercise of the learned Magistrate's discretion.

[37] The penalty imposed was, in my view, well within the sound exercise of the sentencing discretion.

[38] Accordingly, the appeal is dismissed.

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[7] [2010] QDC 9