

SUPREME COURT OF QUEENSLAND

CITATION: *R v Chung* [2018] QCA 161

PARTIES: **R**
v
CHUNG, David
(applicant)

FILE NO/S: CA No 238 of 2017
SC No 1221 of 2016

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 20 September 2017 (Martin J)

DELIVERED ON: 10 July 2018

DELIVERED AT: Brisbane

HEARING DATE: 6 March 2018

JUDGES: Fraser and Gotterson and Morrison JJA

ORDER: **The application is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to one count of trafficking in cocaine and MDMA over a period of 20 months and two counts of supplying cocaine – where on the trafficking charge he was sentenced to six years’ imprisonment and on the remaining two charges he was sentenced to six months’ imprisonment – where the applicant had no prior criminal history – where the applicant was one of five couriers in a sophisticated drug trafficking operation – where the learned sentencing judge found that the applicant had become engaged “in the management area” of that operation – where another courier who had been engaged to a much lesser extent in the trafficking had received a sentence of four years, suspended after 14 months – whether the sentence was manifestly excessive

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Burrell [2013] QCA 41, cited
R v Challacombe [2009] QCA 314, cited
R v Cooney; ex parte Attorney-General (Qld) [2008] QCA 414, cited
R v Keenan [2007] QCA 411, cited
R v Manning [2007] QCA 145, cited

R v Munoz [\[2012\] QCA 269](#), cited

COUNSEL: C F C Wilson for the applicant
S Dennis for the respondent

SOLICITORS: Rostron Carlyle Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.
- [2] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.
- [3] **MORRISON JA:** Mr Chung was convicted and pleaded guilty to three counts of drug offending:
- (a) Count 1 – trafficking in cocaine and MDMA¹ over a period of more than 20 months between 1 June 2013 and 18 February 2015;
 - (b) Count 2 – supplying cocaine on 23 February 2012; and
 - (c) Count 3 – supplying cocaine on 21 July 2012.
- [4] On the trafficking charge he was sentenced to six years’ imprisonment. Nine days of pre-sentence custody was declared as time served and the parole eligibility date was fixed at 10 September 2019 (after serving two years). On each of counts 2 and 3, the sentence was six months’ imprisonment with the nine days of pre-sentence custody declared as time served.
- [5] Mr Chung challenges the sentence imposed upon him as being manifestly excessive.

Circumstances of the offending

- [6] An agreed schedule of facts was tendered at the sentencing hearing. It revealed that police were investigating a drug trafficking operation operated by one Lai in north Brisbane. One of the couriers in that business was a person called TOC. The operation was run from a restaurant at Aspley and Lai was solely in charge, directing employees, setting the prices, communicating with customers, and obtaining drugs from unknown sources.
- [7] The operation was split into two parts. One side was a delivery service which involved couriers delivering drugs to customers all over Brisbane and up to the Sunshine Coast. That side focussed on supplying cocaine, but also on occasions MDMA. The couriers involved in that side were TOC, Mr Chung and three others.
- [8] The operation worked this way. Customers would call a designated drug phone which was passed between couriers, depending on who was working. At the start of their shift the courier would be given the drug phone and a packet of cigarettes containing packets of cocaine in one gram lots. The phone would normally be returned to Lai or Mr Chung at the end of the night, along with the money made and leftover drugs.

¹ 3,4-methylenedioxymethamphetamine.

- [9] The cocaine was only sold in one-gram lots for \$300 each, no matter how many were purchased at the one time. The couriers would then be paid a 10 per cent commission of \$30 per gram sold. The drug phone usage was investigated when it was intercepted. For the 31 day period between 4 December 2014 and 3 January 2015 there were at least 114 particularised supplies, totalling at least 257 grams of cocaine and 20 pills of MDMA. When the phone was seized it had listed contact details for 126 customers.
- [10] When ordering drugs customers would ask for “drinks” or “beers”, which signified cocaine or pills. For MDMA they would refer to “pills” or “rounds”, or for a general meeting about drugs they would ask for a “catch up”.
- [11] The other side of Lai’s trafficking business was run from the restaurant, where customers would attend and pick up drugs directly from Lai. That side of the business related to a large variety of drugs. When police searched Lai’s home and the restaurant they found cocaine, MDMA, methylamphetamine, cannabis and steroids. Lai would also sometimes meet customers in the area around his home and the restaurant in order to provide them with drugs. On that side of the operation Lai had direct contact with customers. The couriers were not involved in that side, and there was only limited evidence implicating Mr Chung in that part of the operation.
- [12] In respect of the trafficking itself, the case against Mr Chung was supported by telephone intercepts of Lai’s phone, visual surveillance and the evidence of three witnesses.
- [13] The evidence from a customer, BBB, and the courier, TOC, indicates that early on Mr Chung’s role was as a courier. BBB said that Mr Chung delivered drugs to him from mid-2013 until mid-2014. During that time he would see Mr Chung on average twice a month for drugs.
- [14] Around September 2014 Mr Chung took a step backwards from the delivery of drugs, due to the impending birth of his child. After that he took on “more of a support role, delivering drugs to the couriers and collecting the money from them, moving the drug phone between the couriers depending on who was working and arranging couriers to work”.²
- [15] Another courier, OCK, commenced in around November 2014. He said that Mr Chung instructed him how to act as a courier, and provided him with the phone. OCK said that the phone already had 50 to 60 customers in it. Mr Chung told him that he had set the phone up and got all the customers himself. He said he had been offered \$20,000 just for the phone. Mr Chung also told him that he had made \$150,000 in one year.
- [16] Courier OCK would usually deliver 10 bags at a time and on one occasion Mr Chung provided him with more bags. The most that OCK delivered on one single drive was 20 bags.
- [17] Recovered drug messages on the phone showed conversations between customers and Mr Chung, making arrangements to deliver drugs. There were a number of intercepts between OCK and Lai, referring to Mr Chung having a role in assisting the couriers. That role was delivering drugs to the couriers, collecting money from them, and moving the phone between them. Telephone intercepts also showed

² Appeal Book (AB) 33.

Mr Chung arranging for which courier would work when. On those “shifts” Mr Chung arranged for the delivery of the phone to the relevant working courier.

- [18] In the period after September 2014 the intercepts revealed Mr Chung was supplying drugs to customers himself and meeting couriers at various locations in order to deliver drugs to them so that they could supply customers.
- [19] On counts 2 and 3, the agreed facts were that intercepted messages showed Mr Chung supplying drugs back to 23 February 2012 and on 27 July 2012.

Mr Chung’s antecedents

- [20] Mr Chung was born on 24 October 1984, and thus 28 to 30 at the time of the offences, and 32 at the time of sentence. He had no criminal history.
- [21] Without objection Mr Chung’s Counsel informed the court of further details in relation to his background. He had been married for three years, and divorced in February 2017. His two year old son resided with his ex-wife. By way of education he completed his schooling, graduating in 2001. Since school he had completed various certificates in information technology, retail management, computer systems and computer systems engineering.
- [22] He had been employed from September 2015 until the sentencing hearing with a particular company. His role was as the procurement and logistics manager. Prior to that he had worked in sales and procurement for a different company, and before that again with a multimedia technology company in various positions between 2001 and 2009.
- [23] Lai was Mr Chung’s cousin. He offered Mr Chung a position working at the restaurant outside of work hours, to make some more money for general day-to-day expenses. After some time he was told by Lai about the drug sales, and offered a position as a courier.
- [24] His instructions were that he was a user of cocaine and, to a lesser extent, MDMA. He was paid in a combination of cash and cocaine for his own use. His instructions about the comment to the courier, OCK (that he had once made \$150,000 in one year) were that it was “puffery” or “pure bravado”. It was submitted that there was no evidence of him living a lavish lifestyle.
- [25] A number of documents were tendered on Mr Chung’s behalf. One exhibit consisted of four clean urine test certificates,³ and a number of references.⁴
- [26] The references included the following:
- (a) from the CEO of the company which employed him between 2009 and 2014, who described him as very hard working with a positive attitude, loyal and trustworthy; he was described as being careful and responsible with his money, and a decent, hardworking young family man;⁵
 - (b) from a director of the company who had employed Mr Chung since 2015; this described him as truly remorseful and taking full accountability for his actions; it was said that his work ethic and commitment to delivering on his word were truly appreciated and admired by the director and other

³ Exhibit 4.

⁴ Exhibit 5.

⁵ AB 63.

employees; it was said that his position with that company was “critical to the success of the organisation”; the director said the company would “endeavour to maintain [Mr Chung’s] position regardless of the court’s decision”;⁶

- (c) similar things were said by the production manager of the same company; they included the proposal to promote Mr Chung to Procurement Manager, unless he was unable to accept that because of the court sentence;⁷
- (d) the chief financial controller of the same company described Mr Chung as a modest, hardworking young family man who was remorseful;⁸
- (e) the CEO of the company which had employed him between 2009 and 2014 also gave a reference, describing him as direct and honest, committed, determined and positive;⁹
- (f) a family acquaintance who had known him since 2003 described Mr Chung as having an unwavering commitment to support his son and family despite the hurdles presented by the offences; he was described as having the strength to continue to exert a positive outlook;¹⁰
- (g) the brother of that acquaintance (who also worked with Mr Chung) gave a character reference describing Mr Chung’s qualities as a conscientious employee, and that the offending was, according to that person, out of character; and that providing for his family was a priority for Mr Chung.¹¹

Approach of the learned sentencing judge

- [27] The learned sentencing judge noted at the outset that Mr Chung had no criminal history and had entered a plea of guilty to each count which meant that the cost of a trial was avoided, albeit that they were not early pleas.¹²
- [28] His Honour reviewed the circumstances surrounding the offending, noting that Mr Chung was one of about five couriers in a sophisticated drug trafficking operation. It was noted that Mr Chung had not created the operation, but he was part of it. His Honour also noted that in respect of the 114 supplies of drugs in the 31 day period between December 2014 and January 2015, one could not know precisely how involved Mr Chung was at what time.
- [29] The learned sentencing judge referred to the period prior to when Mr Chung’s child was born, noting that he had taken a step back from the delivery of drugs and once his child was born, took on more of a support role delivering drugs to couriers, collecting money from them and moving the drug phone between them.
- [30] The learned sentencing judge adverted to a number of matters as relevant to the sentence he imposed, including:¹³
 - (a) although Mr Chung was said to be a cocaine and MDMA user, it was not said that he was using the drug distribution work to feed an addiction; however, he did receive payment in both cash and drugs;

⁶ AB 64.

⁷ AB 65.

⁸ AB 66.

⁹ AB 67.

¹⁰ AB 68.

¹¹ AB 69.

¹² AB 26.

¹³ AB 26-27.

- (b) the drug tests revealed that from 22 March 2017 Mr Chung had not had illicit drugs in his system;
- (c) the statements by employers and people who knew him, which were “all strongly in your favour” and which referred to his “deep remorse”, as well as the fact that this was out of his ordinary behaviour;
- (d) that it was a lengthy episode of trafficking when Mr Chung was engaged in a sophisticated operation;
- (e) Mr Chung participated in a “determined and quite serious approach to the business of trafficking”;
- (f) Mr Chung’s conduct was “at the lower end of the scale of criminality”, however Mr Chung became “engaged in the management area when [he] returned to the trafficking after September 2014”;
- (g) the references were impressive and Mr Chung had made efforts at rehabilitation;
- (h) another courier had been engaged to a much lesser extent in the trafficking, had a much lower level of criminality, exhibited greater co-operation and was only involved for three and a half months; the relevant comparative sentence which had been imposed on that courier was four years, suspended after 14 months;
- (i) in the light of that sentence, which was for trafficking over a much lesser period than that of Mr Chung, the learned sentencing judge could not accede to a sentence which was suspended or partly suspended;
- (j) however, given the promising signs of rehabilitation, the sentence to be imposed would be lower than that suggested by the Crown; and
- (k) the need for general deterrence required that a sentence of imprisonment be imposed, consistently with other sentences for like offences.

Submissions by Mr Chung

- [31] On behalf of Mr Chung it was submitted that insufficient weight had been given to:
- (a) his personal circumstances, particularly his lack of criminal history; and
 - (b) his guilty pleas, demonstrated drug abstinence and references.
- [32] It was also contended that the finding that Mr Chung became engaged “in the management area” was placing him in a higher role than the facts permitted. It was contended that he was really no more than an intermediary, in a role more analogous to courier than management.
- [33] It was submitted that too much weight had been placed on the indicative sentence imposed on the other courier. The submission was that it appeared that the learned sentencing judge considered the other indicative sentence as preventing a head sentence of five years for Mr Chung. There was no parity with the sentence imposed on the other courier.

- [34] Various comparable decisions were referred to including *R v Munoz*,¹⁴ *R v Burrell*,¹⁵ *R v Keenan*,¹⁶ *R v Challacombe*,¹⁷ and *R v Manning*.¹⁸ In addition, the submissions referred to *R v Cooney; ex parte Attorney-General (Qld)*¹⁹ which, it was said, supported the imposition of no more than a five year term for Mr Chung.
- [35] For the Crown it was submitted that the learned sentencing judge had duly recognised all relevant matters in respect of the sentence. The Crown Prosecutor had submitted that a sentence in the order of seven to eight years was appropriate, and therefore the sentence imposed was, as suggested by his Honour, in response to the promising signs of rehabilitation and lower than that suggested by the Crown.
- [36] Specifically, it was submitted that the learned sentencing judge did not mischaracterise Mr Chung's role after the birth of his child, nor did he place too much weight on the sentence imposed on the other courier.

Discussion

- [37] A sentence is not established to be manifestly excessive merely if the sentence is markedly different from other sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust".²⁰ In *R v Pham*²¹ it was stated:

"Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."²²

- [38] I do not accept the submission that the learned sentencing judge placed insufficient weight on Mr Chung's personal circumstances and lack of criminal history. Both of those matters were given some emphasis in the sentencing remarks, and his Honour made it clear that he had read the references which were tendered.²³ During the course of the sentencing remarks the learned trial judge referred to the "impressive references" and accepted that they indicated deep remorse and that Mr Chung had "made efforts at rehabilitation".
- [39] To be balanced against that, however, was the fact that Mr Chung had engaged in a long period (more than 20 months) of trafficking in two dangerous drugs, namely cocaine and MDMA. There was no suggestion that he desisted of his own accord

¹⁴ [2012] QCA 269.

¹⁵ [2013] QCA 41.

¹⁶ [2007] QCA 411.

¹⁷ [2009] QCA 314.

¹⁸ [2007] QCA 145.

¹⁹ [2008] QCA 414.

²⁰ *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [58] and [59]. See also *R v Tout* [2012] QCA 296 at [8].

²¹ (2015) 256 CLR 550; [2015] HCA 39.

²² (2015) 256 CLR 550 at [28]; citations omitted; referring to *Wong v The Queen* (2001) 207 CLR 584 at [58] and *Barbaro v The Queen* (2014) 253 CLR 38 at [61].

²³ AB 20 line 46.

and, at least to some extent, the trafficking was carried out for a commercial purpose.

- [40] Further, the learned sentencing judge expressly took into account the guilty pleas, demonstrated drug abstinence and the references. The latter was said to be “all strongly in your favour”, recording “deep remorse”, and the fact that this was out of the ordinary behaviour.²⁴
- [41] In my view, the learned sentencing judge did not mischaracterise Mr Chung’s role in the period after his child was born. His Honour recorded it as “a step back from the delivery of drugs”²⁵ which is the phrase used in the schedule of facts.²⁶ However, Mr Chung’s role after that time included:
- (a) delivering drugs to the couriers;
 - (b) collecting money from the couriers;
 - (c) moving the drug phone between the couriers, depending on who was working;
 - (d) arranging which couriers would work and when; and
 - (e) on occasions, meeting the couriers to deliver the drugs to them.
- [42] That describes a role more in the management area of the operation, than what he did previously merely as a courier. I reject the submission that Mr Chung was merely an intermediary, in a role more analogous to that of courier during that period.
- [43] The learned sentencing judge was provided with the sentencing reasons in respect of the courier TOC. He was charged with trafficking in cocaine over about three and a half months. He was in his 50’s at the time of offending and sentence, and had a drug related criminal history. He had worked as a courier delivering cocaine for Lai. He stopped his involvement when he lost his licence. There had been no re-offending in the two and a half years between when he was charged and sentenced, and he had taken some positive steps towards rehabilitation. When interviewed by police he made full admissions to his involvement. The sentencing judge in his case found that he had “co-operated in every respect possible”. The full admissions, plea of guilty and full co-operation were “very significant factors that must be reflected by a reduction of the sentence I would otherwise have imposed”.²⁷
- [44] TOC also had a very difficult upbringing, and struggled with anxiety and depression. He had sought and commenced professional help to counter that.
- [45] Once those matters are understood it becomes apparent that the learned sentencing judge’s treatment of that sentence was appropriate. For comparative purposes TOC received four years, suspended after 14 months. However, as the learned sentencing judge noted, he had a much lower level of criminality, exhibited much greater co-operation, and was only involved for about three and a half months, desisting of his own accord. By contrast, Mr Chung’s participation was greater and for far longer,

²⁴ AB 27 lines 11-16.

²⁵ AB 26 line 46.

²⁶ AB 33.

²⁷ AB 57 line 5.

the only co-operation he showed was by entering his guilty plea, and his trafficking was in respect of two dangerous drugs, not just one.

- [46] In *Munoz* the offender trafficked in cocaine over a period of five months, for which he was sentenced to seven years' imprisonment.²⁸ He was 22-23 at the time of the offending and engaged in a sophisticated enterprise involving the importation and distribution of cocaine. There were three importations, only one of which was intercepted. The intercepted importation was 193.5 grams, at a very high purity. The other two packages were of comparable purity, and weighed about 200 grams. The street value of the intercepted importation was \$97,250.
- [47] There were mitigating features including a plea of guilty, addiction to cocaine, the absence of any re-offending, remorse and a constructive attitude towards the future. The seven year term was not adjusted on appeal. The Court noted that "for a sophisticated operation of this type with significant potential profits and extending over five months a sentence greater than seven years imprisonment was very much open".²⁹
- [48] Those features show that *Munoz* supports the sentence imposed on Mr Chung.
- [49] *Burrell* concerned a six year sentence imposed for trafficking in methylamphetamine and other dangerous drugs. There were other summary offences. The offender sold mostly at street level, and used some of the purchased drugs. He did not act as a courier, but did provide "input" into the decision made by the person in charge of the overall operation. Therefore, his culpability was increased by his knowledge of and knowing involvement in the trafficking operation in those respects.³⁰ His trafficking was in methylamphetamine over a three month period, during which time he built up the customer base and had input into decisions made by the organiser. More than 14 ounces of methylamphetamine were acquired at a value of between \$140,000 and \$280,000. The offender, aged between 26 and 27 at the time of the offence (and 28 when sentenced) committed the offence to feed his own habit and did not make any profit. He had an extensive criminal history which included drug offences. There was evidence of a traumatic childhood and very limited education.
- [50] The Court did not interfere with the sentence imposed, having reviewed various authorities including *R v Rizk*,³¹ *R v Barton*,³² and *R v Cooney; ex parte Attorney-General (Qld)*.³³
- [51] That review shows that in *Burrell* the trafficking was for a much shorter period of time, but by someone who had an extensive criminal history, and it was not for commercial gain as it was in Mr Chung's case. Balancing those features, *Burrell* can be seen to support the sentence imposed on Mr Chung.
- [52] *Challacombe* is a less serious case than the present one. That involved trafficking in MDMA over a four to five month period by a younger man. The offender made

²⁸ There was a lesser charge in respect of possession of cannabis.

²⁹ *Munoz* [2012] QCA 269 at [16], referring to *R v Feakes* [2009] QCA 376 at [23]-[33], and *R v Kashton* [2005] QCA 70.

³⁰ *Burrell* at [8].

³¹ [2004] QCA 382.

³² [2006] QCA 367.

³³ [2008] QCA 414.

full admissions, which is not the case here. For those reasons *Challacombe* does not assist in showing that Mr Chung's sentence is manifestly excessive.

- [53] In *Keenan* the offender pleaded guilty to trafficking in methylamphetamine and cannabis. There were other supply counts, and other offences. The head sentence for the trafficking was four years and 10 months, with parole eligibility fixed after two years and two months. The offender was 35 at the time of the offences and 37 when sentenced, and had a lengthy criminal history. His offending was in assisting another person to make sales of methylamphetamine, on behalf of that other person. Some sales were made on his own account. Cannabis was sold on his own account. It was unknown how much profit, if any, was made from the drug transactions.
- [54] The principal argument on appeal was that there was a disparity between his sentence and that of another person also convicted of trafficking out of the same activities. In other words, it was a parity argument. The other person had received a sentence of three and a half years' imprisonment. However, she was trafficking to feed her own addiction, and was not on bail at the time of the trafficking offence, as was Keenan. Further, at the time of sentence she was undergoing a drug rehabilitation program and had good references.
- [55] Noting that he had subsequently offended while on bail for the trafficking offence, the Court declined to interfere with his sentence. That recitation is sufficient to show that *Keenan* does not compel the conclusion that the sentence imposed on Mr Chung is manifestly excessive.
- [56] The remaining decision to which some reference needs to be made is *Cooney*. That involved trafficking in cocaine, MDMA, MDMEA and MDEA over a five month period.³⁴ The offender was sentenced to five years' imprisonment. He was 37 years old at the time of offending, and 39 at sentence. He had pleaded guilty at the committal, and co-operated in significant ways with the police investigation. The Court accepted that he was unlikely to put at risk the welfare of his wife and children, and his own liberty and prosperity, by re-offending in the future.³⁵ The Court noted that whilst the offender was a mature man, with some relevant but minor criminal history, his involvement in the actual trafficking business was peripheral. He was a customer who did not make a living through drug trafficking, but merely supplied friends and acquaintances for modest profit. In the end result the Court was not persuaded that the sentence was manifestly inadequate. However, it was noted that a head sentence of between five and seven years was warranted on comparable cases.³⁶ The sentence imposed was on a view of the evidence which was generous to the offender.
- [57] For those reasons, and noting that it was an Attorney-General's appeal, *Cooney* is of no assistance in this case.

Conclusion

- [58] None of the matters raised by Counsel for Mr Chung demonstrate that the sentence imposed was manifestly excessive. The application for leave to appeal should be refused.

³⁴ There were other offences of possession and some summary offences.

³⁵ *R v Cooney; ex parte Attorney-General (Qld)* [2008] QCA 414 at [29].

³⁶ *R v Cooney; ex parte Attorney-General (Qld)* at [35].