

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Le; ex parte A-G* [2000] QCA 392

PARTIES: **R**  
v  
**LE, Phuong Thi Hoang**  
(respondent)  
**EX PARTE ATTORNEY-GENERAL OF QUEENSLAND**  
(appellant)

FILE NO/S: CA No 103 of 2000  
SC No 116 of 2000

DIVISION: Court of Appeal

PROCEEDING: Sentence Appeal by A-G (Qld)

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 29 September 2000

DELIVERED AT: Brisbane

HEARING DATE: 21 June 2000

JUDGES: Pincus, Davies and Thomas JJA  
Separate reasons for judgment of each member of the Court;  
Pincus and Thomas JJA concurring as to the order, Davies JA dissenting.

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OTHER OFFENCES – respondent pleaded guilty to the offence of trafficking in heroin – respondent was sentenced to seven years imprisonment with a recommendation for parole after two and a half years – where offences occurred whilst the respondent was subject to a suspended sentence and in respect of some sales subject to bail – consideration of the extent of involvement of co-offender – where respondent voluntarily desisted from any further trafficking notwithstanding pressure from undercover police for further sales – consideration of mitigating factors – whether the head sentence was too low – whether a recommendation for parole made the sentence manifestly inadequate

*Penalties and Sentences Act* 1992 (Qld), s 13A, s 148, s 161B(3)

*R v Garlagiu* [1999] QCA 164; CA No 329 of 1998, 10 May 1999, considered

*R v Giang* CA No 313 of 1997, 24 September 1997, considered

*R v Lynch* [1999] QCA 274; CA No 36 of 1999, 23 July 1999, considered

*R v Matasaru* [2000] QCA 246; CA No 24 of 2000, 19 June 2000, considered

*R v Nguyen* CA No 501 of 1995, 22 February 1996, considered

*R v Scaunasu and Voros* CA No 5 of 1993, 26 February 1993, considered

*R v Tilley; ex parte Attorney-General* [1999] QCA 424; CA No 244 of 1999, 7 October 1999, considered

COUNSEL: T A C Winn for appellant  
A Boe (sol) for respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for appellant  
Boe & Callaghan for respondent

- [1] **PINCUS JA:** I have had the advantage of reading the reasons of Davies JA and those of Thomas JA. I am in respectful agreement with the former reasons insofar as they hold the head sentence to be low.
- [2] The difficult question, being one on which my mind has fluctuated, is whether the addition to a low head sentence of a recommendation for early consideration of parole makes the sentence so lenient as to require this Court to increase it. Influenced by the consideration which Thomas JA describes as "exceptional", namely, the respondent's having resisted pressure to further involve herself in the heroin trade, I have reached the same conclusion on the case as has Thomas JA. That is, I agree that the appeal should be dismissed.
- [3] **DAVIES JA:** This is an Attorney's appeal against a sentence of seven years imprisonment, with a recommendation that the respondent be considered eligible for parole after two and a half years, imposed for trafficking in heroin. The sentence was imposed on 30 March this year on the respondent's guilty plea. She was also convicted of five counts of supply of heroin to an undercover police officer but no further penalty was imposed in respect of those offences.
- [4] The Attorney submits that the level of trafficking, the fact that the offence was committed whilst the respondent was subject to a suspended sentence and, in respect of some of the sales, whilst she was subject to bail and the excessive weight given by the learned sentencing judge to a sentence imposed on one Roshey, require a conclusion that the sentence was manifestly inadequate. Roshey was the respondent's boyfriend and was engaged with her in some of the sales. I shall refer later to his sentence.
- [5] The five counts of supply to the undercover police officer, which are, of course, included in the trafficking count, occurred between 3 October 1997 and 20 January

1998. Except for the first which was quite small, the supplies were each of a value of between \$2,000 and \$3,000, in each case being of over six grams of powder containing a little over three grams of pure heroin with a purity of between 40 and 50 per cent. The total amount sold in these transactions was about 13 grams of pure heroin for a total value of over \$11,000.

- [6] The trafficking count alleged a period between 1 April 1996 and 30 January 1998. However it was said on the respondent's behalf below, not disputed by the appellant and accepted by the learned sentencing judge that the period from April 1996 to March 1997 did not involve actual supply but merely showed the respondent's acquiescence in the actions of her mother and aunts in selling heroin. The period of supply was therefore from March 1997 until January 1998. Most known supplies other than to the police officer were to end users, only one such supply being to a heroin dealer.
- [7] The extent of the respondent's trafficking was described by the learned sentencing judge as "quite considerable" and the business described as "substantial". Those are fair descriptions. The respondent had at least three suppliers, used agents to transact her business and employed a locum to run her business when she was away. She gave Roshey to keep on her behalf various amounts of cash totalling, at one stage, over \$100,000 and some jewellery which represented, she said, money from drug dealing. Roshey was also with the respondent on one occasion on which she purchased jewellery for between \$20,000 and \$30,000. She also purchased two cars and a fishing trawler. It is plain from this that the sales to the undercover police officers represented only a small part of her business.
- [8] The respondent, who is now 26 years of age and a student at Griffith University was between 22 and 24 during the commission of the trafficking offence. Various members of her family have convictions for heroin offences, including both her parents who were sentenced to gaol in May 1997 leaving her with the financial and other responsibilities for her siblings. Her mother is facing further trafficking charges.
- [9] The respondent was also sentenced to six months imprisonment in May 1997 on three counts of supply of heroin but the sentence was wholly suspended for a period of two years. Those offences, to which the respondent also pleaded guilty, involved, at her aunt's insistence, driving her to places, on three occasions, where she delivered heroin. At the time of the imposition of the current sentence that sentence was ordered to be served concurrently with it. The respondent was also on bail in respect of a supply offence during part of the period of the trafficking.
- [10] The respondent was not a user of heroin; profit was the sole motive for her trafficking. And although, as I have mentioned, she was left, on her parents' incarceration, with the responsibility for the financial support of her siblings, five in all, the profit from her trafficking appears to have exceeded, by far, their financial needs and some of it was spent extravagantly.
- [11] One of the difficulties which the respondent faced, although it provided no excuse for her conduct, was the involvement of older members of her family in the heroin trade and pressure put by them upon her to become involved. Another, though it equally does not provide any excuse, is the fact that, after her parents went to gaol,

customers seeking heroin still came to their home and the respondent was tempted to continue to sell it. On the other hand, she appears to have willingly, even determinedly, taken over her family's trafficking business notwithstanding her own conviction and suspended sentence.

- [12] A factor which weighs strongly in the respondent's favour is the fact that she ceased trafficking in January 1998 of her own free will. Indeed she resisted the importuning of an undercover police officer to continue to sell heroin.
- [13] The learned sentencing judge thought that an appropriate starting point for a sentence for this level of trafficking was about 10 years. There was, in the end, no disagreement in this Court about the correctness of that view and I also think that that was within the appropriate range although towards its lower end bearing in mind that the offence was committed whilst the respondent was serving a suspended sentence and, in respect of some of the offences, was on bail.
- [14] His Honour then reduced the sentence to seven years to take into account the respondent's plea of guilty. This was, he said, substantially because of the resource saving associated with the plea. That was a very generous discount for that factor alone given that the prosecution case appeared to be a very strong one based as it was on surveillance of the respondent and the evidence of her accomplice, Roshey; and given that, despite the respondent's voluntary desistance from trafficking, there was no indication of remorse or of any assistance given to police.
- [15] His Honour then further reduced the sentence by, he said, not making a declaration that the offence was a serious violent offence<sup>1</sup> and by making a recommendation for parole after two and a half years. His Honour could have added also, by not making the sentence cumulative upon the activated suspended sentence.<sup>2</sup> He did this, he said, because of the respondent's youth, her prospects of rehabilitation, evidenced by her voluntary desistance from trafficking, and the fact that, to some extent, the offence was explicable by family pressure. There can be no doubt that these were all relevant factors and the first two are important ones. The extent to which allowance should be made for the third may be doubted in view of the scope of the respondent's business and the magnitude of her profits. Moreover as to all of these factors, as the Chief Justice said recently, punishment and deterrence are the substantial issues in cases of this kind and personal circumstances will not ordinarily weigh heavily in the offender's favour.<sup>3</sup>
- [16] Before reaching that conclusion his Honour compared the respondent's conduct and personal circumstances with those of Roshey, the respondent's co-offender. He was sentenced to seven years for trafficking with a recommendation for parole after one year. Roshey was sentenced on the basis that the present respondent was the principal offender and that he was influenced and led by her. That was accepted, on

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<sup>1</sup> *Penalties and Sentences Act* 1992, s 161B(3).

<sup>2</sup> Section 148 of the *Penalties and Sentences Act* would not have applied because the suspended sentence was ordered to be served before this sentence was imposed. As to whether the position would be different if the order was reversed, see *Lynch* CA No 36 of 1999, 23 July 1999 at [17].

<sup>3</sup> *R v Tilley; ex parte Attorney-General* CA No 244 of 1999, 7 October 1999.

the respondent's behalf, in this sentence. This factor appears to have induced the judge who sentenced Roshey to impose a sentence as low as seven years. He also pleaded guilty and he had no previous convictions. An important mitigating factor in his case, absent in this, was the co-operation of Roshey with the relevant authorities. Co-operation, of the kind which this obviously was, is most unusual in serious drug offences and it is important that it be encouraged by a substantial reduction. These mitigating factors appear to have resulted in the recommendation which was made. In short, the low term imposed on Roshey was thought to be justified by the fact that he was, to some extent, under the respondent's influence; and the generous recommendation was given substantially because of the extent of his co-operation.

- [17] All of the mitigating factors so far referred to, including the guilty plea, in my opinion justified a reduction in this sentence from 10 years to seven and, once that had been made, declining to make a declaration under s 161B(3). I think that his Honour was also justified in not imposing the sentence cumulatively upon the activated suspended sentence. But to make the further reduction, by making the recommendation for early parole, his Honour, in my opinion, reduced the sentence to one which was manifestly inadequate. Even without that reduction the sentence was, in my opinion, a low one when regard is had to the extent of the operation, the magnitude of the profit and the readiness of the respondent to engage in such a business so soon after the imposition of the sentences upon her parents and herself. That a sentence of seven years would have been a low one in this case may be demonstrated by reference to some comparable cases.
- [18] Of the cases contained in the schedule of comparable sentences tendered to the court during the sentence hearing, three of them have some similarities with this case. All involved pleas of guilty to trafficking by persons who were not themselves addicts; all involved trafficking which was not or could not be proved to be towards the higher end of the scale; and all involved sentences which were not disturbed by this Court on appeal.
- [19] In *Scaunasu and Voros*, 26 February 1993, the scale of trafficking by Scaunasu was quite substantial and he was sentenced to 12 years imprisonment. Voros, his female friend, was involved in only some of this trafficking. She had no prior criminal history and she gained little if anything out of the monies received by Scaunasu. The total amount of her trafficking involved about 10 grams of heroin for a total sum of about \$21,000. She was sentenced to nine years imprisonment with a recommendation for eligibility for parole after three years. Her criminality seems plainly less than that of the respondent.
- [20] *Nguyen*, CA No 501 of 1995, 22 February 1996, was a man of 41 with no prior criminal history. His trafficking was over a period of a little over three months. It involved sales to an undercover police officer on eight occasions of about six grams yielding a total of about \$8,000. It was conceded that there were probably other transactions although the size of the business could not be determined. He was sentenced to six years plus 225 days already served in custody, the plea of guilty being taken into account in the fixing of a lower head sentence than might otherwise have been imposed.

- [21] *Giang*, CA No 313 of 1997, 24 September 1997, was a young man of 22 years of age with a minor and irrelevant criminal history. He made 10 completed sales and one incomplete sale to an undercover police officer, the total amount being over \$8,000 and involving six grams of pure heroin. Again it was thought that his business was more extensive than those transactions but its extent was impossible to determine. He was engaged in tertiary studies in mechanical engineering and was close to graduating. A sentence of eight years imprisonment made allowance for the plea of guilty.
- [22] In *Garlagiu*, CA No 329 of 1998, 10 May 1999, the applicant was a 47 year old man with a previous conviction for an offence in another state which was equivalent in Queensland to supply of heroin. He sold heroin to an undercover police officer on eight occasions, the total being 28 grams of pure heroin for a total of \$22,400. Again he plainly had other customers but the extent of his operation could not be determined. The sentence was one of 11 years with parole after four.
- [23] In my opinion these cases demonstrate that a sentence of seven years imprisonment without a further recommendation for early parole would have been towards the lower end of the appropriate range, having regard to all of the circumstances of this case; and that the addition of a recommendation for early parole made it manifestly inadequate. The sentences for more serious examples of trafficking, such as those discussed by this Court recently in *Matasaru* CA No 24 of 2000, 19 June 2000, in my opinion confirm that view.
- [24] I would therefore allow the appeal only to the extent of deleting the recommendation that the respondent be eligible for parole after serving two and a half years of the sentence.
- [25] **THOMAS JA:** The relevant facts are set out in the reasons of Davies JA which I have had the advantage of reading.
- [26] The question is whether the sentence imposed on the respondent (seven years imprisonment with a recommendation that she be considered for parole after two and a half years) is manifestly inadequate and ought to be increased upon an appeal brought by the Attorney-General. The principal offence was trafficking in heroin, and in addition five counts of individual supply were charged over the period of the trafficking (April 1996 to 30 January 1998). No separate sentence was imposed in respect of them, as they were in effect partial particulars of the trafficking.
- [27] As Davies JA's reasons show, the respondent's activity between April 1996 and March 1997 was a measure of acquiescence in the actions of her mother and aunts who were in the business of selling heroin. Her personal and reprehensible trafficking activity occurred when she in effect took over the family heroin trafficking business just before her parents were sentenced to imprisonment in May 1997. She was then 23 years old and the eldest daughter in an Asian family left with the responsibility of several younger siblings.
- [28] What makes the present case exceptional in my view is the fact that the respondent of her own accord in January 1998 desisted from further activity of that kind. Her reluctance or perhaps ambivalence towards being involved in the activity even prior to that time was verified by the undercover police operative. From January 1998

however she completely refused any further involvement in the trade notwithstanding very strong pressure from the undercover police after that time. She has also shown a strong desire to get on with her life and make something of it and is endeavouring to pursue tertiary studies.

- [29] Her voluntary desistence is a very rare and special feature. To my mind it justifies a significantly lower sentence than would otherwise be appropriate. Among other matters it provides at least some foundation for a hope of rehabilitation, which does not often emerge in these cases.
- [30] Competing submissions were made as to the relevance of the sentence imposed upon the respondent's co-offender, Gavin Roshey, who had been her boyfriend. He had been sentenced to seven years imprisonment with recommended parole after one year. However he had the benefit of a s 13A sentence<sup>4</sup> and any objective factual comparison between the two is impossible, despite tabular comparisons presented in argument concerning their respective involvements. I do not think that the present sentence is rendered unsatisfactory by any perceived grievance arising from disparity; neither do I think that the appellant's contention that the learned sentencing judge gave too much weight to Roshey's sentence has been made out.
- [31] The present conviction activated a suspended six months sentence which had been imposed on the respondent in May 1997. The learned sentencing judge did not order that the activated six month suspended sentence be served cumulatively with the present sentence, and there was no obligation upon him to do so. The total picture of course needs to be examined in order to see whether the overall punishment for both offences is adequate. At the same time care is needed to ensure that the offender is not twice punished for the one offence. In this matter the learned sentencing judge regarded the respondent's commission of the present offences while she was subject to a suspended sentence as "a matter of considerable aggravation". That factor was relied on by counsel for the Attorney-General in the present appeal as justifying a higher sentence for the present offence. That is a perfectly proper submission, but if effect is to be given to it, it would be quite wrong also to impose a cumulative sentence in respect of it. In my view the propriety of the respondent's sentence needs to be determined objectively on its own facts, including the fact that the present offences were committed while the respondent had the benefit of a suspended sentence.
- [32] If one starts with the view that absent particular mitigating circumstances a sentence in the range 10 to 12 years would have been appropriate, the factors of her youth, her plea and her voluntary desistence suggest to me that the learned sentencing judge was correct in framing a sentence in the vicinity of seven years. Indeed any higher sentence would in my view fail to give proper account to those features. I cannot say that a sentence of seven years imprisonment with a recommendation that she be considered for parole after two and a half years lies outside the bounds of a sound sentencing discretion. Indeed, to convert such a sentence to one of seven years with an automatic consideration of parole after three and a half years is in my view too trivial an adjustment on an appeal of the present kind, and suggests that the original sentence was not manifestly inadequate.

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<sup>4</sup> *Penalties and Sentences Act 1992 s 13A.*

- [33] In my view the learned sentencing judge showed a sound understanding of all relevant features of the case and imposed a sentence which gave proper effect to them. I would dismiss the appeal.