SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nguyen* [2015] QCA 205
PARTIES:	**R** **v** **NGUYEN, Thang Huy** (applicant)
FILE NO/S:	CA No 88 of 2015 SC No 543 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Unreported, 30 January 2015
DELIVERED ON:	27 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2015
JUDGES:	Fraser and Gotterson JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
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 pleaded guilty to two counts of possession of dangerous drugs, namely methylamphetamine and 3,4-methylenedioxymethamphetamine – where the applicant was sentenced to imprisonment for a period of two years and six months – where the applicant was intercepted by police and found to be in possession of 13.051 grams of pure methylamphetamine as well as 0.441 grams of MDMA – where the learned sentencing judge made a finding that the methylamphetamine was to be used for a commercial purpose although his Honour was not prepared to make a positive finding that sales were to be made by the applicant himself – where the applicant was 27 years old at the time of offending, married and had two children – where the applicant had a previous conviction for trafficking in the dangerous drug heroin at the age of 17 – where the applicant submits that the sentence is manifestly excessive in that insufficient regard was given to the applicant's psychological vulnerability in prison and to the strain placed on the applicant by his wife's mental illness – where allied with these factors was a further submission that

too much weight was placed upon the applicant's prior offending – whether the sentence is manifestly excessive

Drugs Misuse Act 1986 (Qld), s 9(b), s 9(d)

R v Bankier, Unreported, Dutney J, SC No 996 of 2007 & SC No 205 of 2008, 25 March 2008, considered
R v Beasley [2013] QCA 322, cited
R v Duggan [2004] QCA 442, considered
R v Fabre [2008] QCA 386, cited
R v Gillbanks [2015] QCA 148, cited
R v Griffiths [2009] QCA 13, cited
R v Hesketh; Ex parte Attorney-General (Qld) [2004] QCA 116, considered
R v Rabjones, Unreported, Atkinson J, SC No 276 of 2007, 2 August 2004, considered
R v Tabe [2004] QCA 17, cited

COUNSEL: S J Keim SC for the applicant
D L Meredith for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** On 30 January 2015, in the Supreme Court at Brisbane, the applicant, Thang Huy Nguyen, pleaded guilty to two counts of possession of dangerous drugs. Count 1 alleged an offence against s 9(b) of the *Drugs Misuse Act* 1986 (Qld) and Count 2, an offence against s 9(d) of that Act. Count 1 was that between 4 and 8 October 2013 at Durack, the applicant unlawfully had possession of the dangerous drug methylamphetamine in a quantity which exceeded 2.0 grams. Count 2 alleged unlawful possession of the dangerous drug 3,4-methylenedioxymethamphetamine ("MDMA") between 3 and 8 October 2013, also at Durack.

[3] At a hearing on 13 April 2015, the applicant was sentenced on Count 1 to imprisonment for a period of two years and six months. For Count 2, a conviction was recorded but no further penalty imposed. The learned sentencing judge fixed a parole release date at 13 January 2016.

[4] On 11 May 2015, the applicant filed an application for leave to appeal against sentence. One ground of appeal only is proposed, namely, that the sentence imposed is manifestly excessive.

Circumstances of the offending

[5] The applicant was intercepted by police while driving with his wife and children. The police found him to be in possession of 26.636 grams of substance in a single bag. It was a little under 50 per cent purity and constituted 13.051 grams of pure methylamphetamine. As well, two green tablets amounting to 0.441 grams of MDMA were found.

[6] The police also located $2,100 in cash, a set of scales and three mobile phones, all in the applicant's possession. No evidence was presented at sentence indicative of use of the phones for drug trafficking.

[7] The learned sentencing judge made a finding on this evidence and evidence of the applicant's drug dependency that while to some extent, probably a relatively limited extent, the methylamphetamine was available for the applicant's personal use, most of it was to be used for a commercial purpose.[1] His Honour was not prepared to make a positive finding that sales were to be made by the applicant himself.

The applicant's personal circumstances and prior criminal history

[8] The applicant was 27 years old at the time of offending and 29 years old at sentence. He was born in Vietnam and came to Australia with his parents as a one year old. The applicant left school at end of Year 10 and then went to TAFE in Sydney. He frequented a pool hall.

[9] As a 17 year old, the applicant pleaded guilty to a count of trafficking in a dangerous drug and to a count of possessing a dangerous drug in excess of two grams. The drug was heroin. He and two other youthful co-offenders had travelled to Queensland at the instigation of an older man whom they had met at the pool hall. The purpose of the trip was to participate in selling heroin in balloons and foils to make some money to buy a car. They were set up with a supply of drugs and mobile phones to whom customers would make calls. Their involvement endured for about a week and was quickly detected by police.

[10] At that point, the applicant had no previous convictions. He was sentenced on 23 February 2006 to five years' imprisonment on the trafficking count. The sentence was suspended after 80 days (which had by then been served as declarable time) for an operational period of five years. The judge noted that she would have ordered the applicant to serve "a considerable part" of the sentence if he was "not so young and had not been so misled and foolish".

[11] The learned sentencing judge here stated that he was minded not to give the 2006 sentence as much weight as he ordinarily would in determining the penalty because of the applicant's immaturity at the time and the lapse of time since that offending. As it happens, the applicant's current offending occurred less than three years after the expiration of the operational period for his trafficking sentence. His Honour noted that that sentence should have been "a very serious warning" to the applicant to avoid further involvement in drugs.

[12] In the intervening years, the applicant had married and had two children. He supported his family and was a hard worker. He worked in a family cleaning business and then with a tissue manufacturing company. It was after he lost his job with the company that he started to use drugs and developed a drug dependence. The applicant continued to be drug dependent after he was apprehended by police. Just prior to his sentencing he had taken some modest steps towards treatment for it.

[13] There are two additional circumstances personal to the applicant which feature in this application. There are central to the ground of appeal to which I now turn.

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1 AB52 ll6-9.

The ground of appeal

[14] The applicant accepts that, in view of the early plea of guilty, a sentence of two years and six months with an actual period of imprisonment of approximately one-third was an appropriate starting point for the Count 1 offence.[2] The parole date fixed after nine months is one month short of one-third of the sentence.

[15] The sentence is manifestly excessive, it is submitted, in that insufficient regard was given to the applicant's psychological vulnerability in prison and to the strain placed on the applicant by his wife's mental illness. Allied with these factors was a further submission that too much weight was placed upon the applicant's prior offending.

[16] Counsel for the applicant contends that an appropriate sentence giving proper weight to these factors would involve a variation of the parole release date to 13 October 2015, thereby providing for an actual period of imprisonment of six months.[3]

The applicant's psychological vulnerability

[17] At sentence, a report by Dr J Yoxall, clinical psychologist, dated 29 March 2015[4] was tendered. Dr Yoxall was of the opinion that the applicant had a substantial history of an untreated major depressive order. She described him overall as an individual with a substantial vulnerability to depression, a fragile self-identity, and a very low self-esteem and self-worth.[5]

[18] Dr Yoxall expressed the following opinion:

> " … Mr Nguyen would be an extremely vulnerable person in a prison environment. Although he is 28 years of age he is a man of below average height and a very slight build. He appears much younger than his chronological age. Mr Nguyen has lived for most of his life in a fairly sheltered environment within his extended family unit. He has little understanding or skills in terms of navigating difficult circumstances and his history shows that he is prone to exploitation by others."[6]

[19] The learned sentencing judge averted to Dr Yoxall's opinion. His Honour remarked:

> "The psychologists report records that you have a substantial history of untreated major depressive disorder and – at least what appears to be – a substantial substance use disorder, being a methylamphetamine dependence. It also records some matters about you personally, including extreme anxiety, the fact that you appear to be a relatively passive person who would be extremely vulnerable in a prison environment and that you would have considerable difficulties given that you have lived nearly all your life close to your family, including your parents. …"[7]

What his Honour said does, I think, fairly represent Dr Yoxall's opinion concerning the applicant's vulnerability in prison.

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2 Written submissions paragraph 18, citing *R v Beasley* [2013] QCA 322; *R v Fabre* [2008] QCA 386; *R v Duggan* [2004] QCA 442; *R v Gillbanks* [2015] QCA 148; *R v Tabe* [2004] QCA 17; *R v Griffiths* [2009] QCA 13 and *R v Hesketh* [2004] QCA 116.

3 Written submissions paragraph 20.

4 AB102-122.

5 AB118-19.

6 AB122 paragraph 14.

7 AB52; Sentence p4 ll16-22.

The applicant's wife's mental illness

[20] At the hearing, a letter written by the applicant's wife dated 12 April 2015 was tendered.[8] In the letter, she described herself as having had a discognitive disorder for which she did not seek medical help. She says that the applicant stood by her despite her abusive behaviour and notwithstanding that it caused him to lose his job and his friends. His despair, she said, led him to turn to drugs.

[21] The learned sentencing judge did not refer to this letter or to any mental illness on the part of the applicant's wife. That he did not do so is quite understandable in light of other documents tendered at sentence. A report of Dr Toan Nguyen, consultant clinical psychologist, dated 27 February 2015[9] written to Dr Thu Phan was received. Dr Phan had referred the applicant's wife for a psychological assessment. In his report, Dr Nguyen noted that the applicant's wife presented with a symptomatology of a severe major depressive disorder and an acute stress disorder.

[22] According to Dr Nguyen, the applicant's wife reported to him that her symptoms developed "about one year ago". That is consistent with a short note from Dr Phan dated 6 January 2015[10] certifying that he had been treating the wife for an anxiety-depressive disorder since 1 March 2014.

[23] If, as the applicant's wife reported to Dr Nguyen, her symptoms started about February 2014, that is well after the applicant's offending in October 2013. On this documentary evidence, the learned sentencing judge could not have been satisfied that mental illness on his wife's part was responsible for, or contributed to, the applicant's drug dependency.

The prior offending

[24] As noted, the learned sentencing judge attributed less weight to the applicant's prior offending than he would ordinarily have in determining the penalty. He did so on account of the lapse of time, the nature of the offending and the applicant's youth. In oral submissions, counsel for the applicant modified the suggestion in written submissions of an over-attribution of weight to that offending. He did so by informing the Court that there was no criticism of how his Honour dealt with it. To my mind, this offending was dealt with in a balanced way which is beyond criticism.

Other matters relied on by the applicant

[25] In support of the application, the applicant referred to two sentencing decisions at first instance. They are *R v Bankier*[11] and *R v Rabjones*.[12] In *Bankier*, the principal counts to which the offender pleaded guilty were possession of 22.848 grams of methylamphetamine and 128.7 grams of ecstasy. The offender was 20 years old. He was a minor player in commercial activity. He had no relevant criminal history but had been suffering from depression and drug addiction. Significantly, he had undertaken a substantial drug rehabilitation program since his arrest. His parole release date on a two years and six month sentence was fixed at four months.

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8 Exhibit 9; AB127-128.
9 Exhibit 9; AB130-131.
10 Exhibit 9; AB129.
11 Indictments 996 of 2007 and 205 of 2008, Dutney J, 25 March 2008 (unreported).
12 Indictment 276 of 2007, Atkinson J, 2 August 2004 (unreported).

[26] In *Rabjones*, the offender was apprehended with clip seal bags containing 18.313 grams of methylamphetamine and 4.741 grams of MDMA in his possession. He was 29 years old when he offended. He had had consistent employment as a civil engineer. Significantly, the offender had a very minor and dated criminal history which suggested that he had been a drug user. On pleas of guilty, he was sentenced to two and a half years' imprisonment, wholly suspended for an operational period of four years.

[27] The applicant differs significantly from the offenders in these two decisions in that he had a prior conviction for the very serious offence of trafficking in heroin. Notwithstanding the circumstances that warranted the placing of less weight on it than ordinarily might have been the case, the trafficking conviction was a serious warning to the applicant to avoid further drug involvement. It was a warning which he failed to heed. Further, it was appropriate for the learned sentencing judge to have regard to his failure to heed it in structuring the applicant's sentence. This significant difference places a limitation upon the comparability of these decisions for present purposes.

[28] It remains to note that in cases where the offender has had a history of serious drug offending, sentences of which a substantial period must actually be served, have been imposed. It is sufficient for present purposes to refer to two decisions of this Court to illustrate that.

[29] In *R v Duggan*[13] the offender, though older than the applicant here, had a history of convictions in 1995 for trafficking methylamphetamine and supplying other drugs. For the drug possession offences for which he was sentenced in 2004 (5.157 grams of cocaine, 1.3 grams of cannabis, 0.047 grams of MDMA, 2.087 grams of methylamphetamine and traces of ketamine), the prison term of two years and six months was suspended after 12 months for an operational period of three years.

[30] In *R v Hesketh; Ex parte Attorney-General*,[14] the offender was 39 years old. She pleaded guilty to possessing 57.347 grams of pure methylamphetamine. The sentencing judge found that mostly it was for her use to feed her drug addiction. After apprehension by the police, she had taken steps to rehabilitate herself. The offender had a criminal record consisting of a series of property offences followed by a series of drug supply and possession offences involving methylamphetamine and cannabis, and later offences of assault occasioning bodily harm and entering of a dwelling and committing an indictable offence. On an Attorney-General's appeal a sentence of two years and six months suspended after nine months with an operational period of five years was substituted.

Disposition

[31] For these reasons, I am unpersuaded that the learned sentencing judge failed to give appropriate weight to the two personal factors identified by the applicant. In setting a parole release date of little less than one third of the sentence, his Honour gave recognition to the applicant's psychological vulnerability in prison. The sentence needed also to have regard for the applicant's prior serious offending for which he had been given a sentence that reflected his then naivety and inexperience.

[32] The applicant has failed to establish that his sentence is manifestly excessive. The application for leave to appeal it must therefore be dismissed.

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13 [2004] QCA 442.

14 [2004] QCA 116. See also *R v Fabre* [2008] QCA 386.

Order

[33] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[34] **DALTON J:** For the reasons given by Gotterson JA the application for leave to appeal against sentence must be refused. In my view, the contention that the sentence imposed below was manifestly excessive was unarguable. I would add that while, seemingly by consent, the learned sentencing judge accepted the opinion of a psychologist that this applicant was depressed, a psychologist does not have the medical expertise to make that diagnosis. The psychologist in this case is not a medical practitioner.