

SUPREME COURT OF QUEENSLAND

CITATION: *R v Smith* [2018] QCA 228

PARTIES: **R**
v
SMITH, Matthew John
(applicant)

FILE NO/S: CA No 66 of 2018
SC No 71 of 2017
SC No 356 of 2018

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 14 March 2018 (Lyons SJA)

DELIVERED ON: Orders delivered ex tempore 18 September 2018
Reasons delivered 21 September 2018

DELIVERED AT: Brisbane

HEARING DATE: 18 September 2018

JUDGES: Sofronoff P and Morrison JA and Henry J

ORDERS: **Orders delivered ex tempore on 18 September 2018:**

- 1. Application for leave to appeal granted.**
- 2. The sentence imposed below is varied only to the extent of varying the parole eligibility date from 13 May 2020 to 18 July 2019.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant was sentenced to a head sentence of seven years imprisonment – where there were significant mitigating circumstances – where there was a delay in the disposition of the sentence – where the applicant seized the opportunity of the delay between arrest and sentence to progress rehabilitation – where the applicant arranged for bail revocation to start to serve his sentence – where there was a likely mathematical error in how the parole eligibility date was arrived at – where there was undeclarable presentence custody to be taken into account

Penalties and Sentences Act 1992 (Qld), s 159A

R v Boyd [2013] QCA 335, cited
R v Briggs [2012] QCA 291, cited
R v Ta [2016] QCA 305, cited

COUNSEL: A J Kimmins for the applicant
N W Needham for the respondent

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

- [1] **SOFRONOFF P:** I agree with the reasons of Henry J.
- [2] **MORRISON JA:** I agree with the reasons of Henry J as they reflect the basis for my joining in the orders made on 18 September 2018.
- [3] **HENRY J:** On the hearing of this application for leave to appeal sentence on 17 September 2018 the court ordered:
1. Application for leave to appeal granted.
 2. The sentence imposed below is varied only to the extent of varying the parole eligibility date from 13 May 2020 to 18 July 2019.

These are my reasons for joining in those orders.

- [4] The applicant sought leave to appeal his sentence for carrying on the business of trafficking in methylamphetamine on the ground that it was manifestly excessive. While there was no substance to that ground to the extent it related to the head sentence, there appeared to have been a mathematical error in the setting of the applicant's parole eligibility date, resulting in a sentence which was manifestly excessive.
- [5] On 14 March 2018 the applicant pleaded guilty to the following offences, receiving the following sentences:
- Indictment One:
- Count 1 Trafficking between 4 August 2013 and 31 December 2014, seven years' imprisonment.
- Count 2 Possession of mobile phone used in connection with trafficking on 19 November 2015, convicted but not further punished.
- Count 3 Possession of money obtained from trafficking on 19 November 2015, convicted but not further punished.
- Indictment Two:
- Count 1 Supply methylamphetamine on 9 May 2015, six months' imprisonment.
- [6] All of the sentences were to be served concurrently and the applicant's parole eligibility date was set at 13 May 2020, two years and two months after the date of sentence. The head sentence for trafficking of seven years imprisonment equated to a sentence of about seven years and seven months' imprisonment.
- [7] Conscious that he was going to be sentenced to imprisonment and being desirous of commencing his term of imprisonment, the applicant arranged for his bail to be revoked and entered presentence custody on 25 August 2017. He had therefore served 201 days or just under seven months in custody by the time of sentence, however he

was also on remand during that period for a summary charge relating to possession of a utensil or pipe. That charge was not transmitted to be dealt with as a plea of guilty on the occasion of the applicant's Supreme Court sentence. This had the consequence the applicant's approximately seven months in presentence custody could not be the subject of a declaration pursuant to s 159A *Penalties and Sentences Act* 1992 (Qld). The proper approach and the approach taken by the learned sentencing judge was to reduce the head sentence which would otherwise have been imposed by seven months in arriving at the actual sentence imposed for trafficking.

- [8] The applicant's complaint that the effective head sentence of seven years and seven months was of itself manifestly excessive can be dispensed with briefly. The applicant carried on the business of unlawfully trafficking in methylamphetamine for one year and nearly five months. His offending was detected principally through telephone intercepts and optical and listening devices. The latter devices monitored activity at an industrial shed. The applicant was there supplied with and supplied methylamphetamine. He had at least 20 different customers, most of whom were supplied street level amounts of methylamphetamine by him. However, he also supplied slightly larger amounts to at least five of his customers with the knowledge they were intending to on-supply as part of their own street level dealing. He supplied in quantities ranging from half a gram to an ounce. Tick lists found by the police demonstrated he was at times owed substantial amounts of money by those whom he supplied.
- [9] There was evidence the applicant himself was a user of methylamphetamine and the submission that he was drug-dependant during the period of trafficking was not disputed. It may be accepted some of the proceeds of his trafficking activity were used to fund his habit however over \$16,000 of un sourced income was ascertained by the police investigation to have been used by the applicant to purchase a Toyota Hilux vehicle.
- [10] In the circumstances, the prosecution's submission below that the appropriate head sentence was in the vicinity of seven to eight years' imprisonment was entirely unremarkable and the submission of the applicant's counsel below and here that the head sentence ought be no higher than seven years' imprisonment is unsustainable – see for instance, *R v Briggs* [2012] QCA 291, *R v Boyd* [2013] QCA 335, *R v Ta* [2016] QCA 305.
- [11] The quantum of the head sentence and the structure of the sentence imposed suggests that the effective head sentence of seven years and seven months was intended to reflect the criminality involved without material discounting for mitigating circumstances. Instead the fixing of a parole eligibility date earlier than the statutory halfway point was adopted as the method of discounting to allow for mitigating circumstances.
- [12] Her Honour set the parole eligibility date at 13 May 2020, two years and two months after the date of sentence. The remarks do not identify how that date was arrived at. It likely resulted from a mathematical error.
- [13] It will be recalled the applicant entered custody in order to commence the effective service of his prison term on 25 August 2017 and the only apparent reason why a presentence custody declaration was not made - so that his sentence would commence from that date - was the non-transmission of a minor summary charge. Allowing for his approximately seven months in presentence custody prior to sentence, the head sentence of seven years was an effective sentence of seven years and seven months.

Just as the undeclarable period of presentence custody was taken into account by the reduction of the head sentence imposed, so too should it have been taken into account in arriving at the appropriate parole eligibility date.

- [14] Given that the applicant entered custody on 25 August 2017 but will not be eligible for parole until 13 May 2020, about two years and nine months after he entered custody, the practical effect of the parole eligibility date is that he must serve a minimum of two years and nine months.
- [15] By way of illustration of the apparent mathematical error that was made, a period of two years and nine months, if it represented one-third of the head sentence, would indicate an intended head sentence of eight years and three months. Alternatively, if it was intended to represent one-quarter of the head sentence, it would indicate the intended head sentence would have been one of 11 years' imprisonment.
- [16] Illustrating the point by reference to the effective head sentence, of seven years and seven months, had it been her Honour's intention to fix parole release after one-third, that would have been a period of two years six and one-third months from 25 August 2017, giving rise to a parole eligibility date of 5 March 2020. Had it been her Honour's intention to be somewhat more generous and fix parole eligibility at, say, the one-quarter mark, that would have been a period of one year 10 and three-quarter months from when the applicant entered custody, giving rise to a parole eligibility date of 18 July 2019.
- [17] There is nothing in the learned sentencing judge's reasons or in the facts of the case to suggest the applicant's mitigating circumstances were so modest as to have resulted in the parole eligibility date imposed by the learned sentencing judge. The preceding analysis strongly suggests the date identified was the result of a miscalculation and, for the following reasons, it gave rise to a sentence which was manifestly excessive.
- [18] The applicant's criminal conduct was unquestionably very serious but on the other hand there were a number of significant mitigating circumstances.
- [19] Despite delay in the disposition of the sentence, the applicant's pleas of guilty were not merely timely, but were early. The second indictment was presented on the day of sentence and the applicant pleaded guilty to it on that occasion, so on any view that was an early plea of guilty. As to the first indictment containing the charge of trafficking and charges associated with it, the applicant was charged for those offences on 19 November 2015. He was committed for trial on 4 August 2016. The indictment was presented on 23 January 2017 and he pleaded guilty and was sentenced on 14 March 2018. There was no evidence that any of that delay was the applicant's fault. The delay of nearly a year between the cessation of the trafficking and the arrest was because the relevant police operation was investigating a broader number of offenders and the applicant was only arrested when the police operation finally came to a close. The reason for the delay in the matter proceeding through the committal stage is not apparent but was not said to be the applicant's fault. There was a long delay between the date of presentation of the indictment and the disposition of the matter as a sentence. However, there was a dispute about the duration of the trafficking, which was finally resolved on the morning of sentence when the learned Crown Prosecutor amended the indictment to reduce the period of the trafficking by almost one year. Against that background and the material alteration of the level of criminality alleged, the pleas of guilty were, if not literally then as a matter of principle, to be treated as early pleas of guilty.

- [20] Prior to the trafficking period the applicant had a criminal history which was so minor as to carry no weight on sentence. During the trafficking period he was sentenced for possession of dangerous drugs and utensils or pipes. Between the trafficking period and his arrest he was sentenced for similar charges and after his arrest he was sentenced for one minor breach of bail for a singular failure to comply with a daily reporting condition. In short, other than as a result of the applicant's descent into drug dependency and drug offending with which the Court is now concerned, a period during which he was in his early thirties, the applicant had lived an essentially law-abiding life.
- [21] There was persuasive information before the Court of the applicant seizing the opportunity presented by the lengthy delay between arrest and sentence to make very significant progress in his rehabilitation. He claimed to have ceased illicit drug use, an assertion supported not only by the reference material but also 16 clear urine screens from May 2016 to August 2017. It appeared from the reference material and a psychologist's report that he was genuinely remorseful. The applicant was well behaved in custody on remand and completed a number of training courses. Earlier, whilst on bail awaiting sentence, he had completed an apprenticeship as a plumber with an employer who was motivated to write a letter to the Court which said:
- “I came to know Matthew when he started working for me as a general labourer in 2011. During his employment, he progressed to full-time and successfully completed an apprenticeship achieving trade qualification as a mechanical plumber before he voluntarily revoked his bail.
- At the time of Matthew's arrest I was shocked to learn of the nature of his charges, I always found Matthew to be a kind and hard-working member of our team. Looking back now, prior to his arrest, Matthew did show signs of personal issues outside of work with his attendance and attentiveness at work. But since then, his work ethic excelled and he quickly became one of my best employees. I would have no hesitation in offering Matthew his position back within my company once he completes his incarceration.”
- [22] It is to applicant's credit that having completed his apprenticeship he made arrangements to have his bail revoked in order that he could serve his sentence, put his punishment behind him and continue with his return to a productive and law-abiding life. That the applicant thought it was in the best interests of his wife and young son to press on and start serving his sentence, doubtless provided some added motivation. Nonetheless, that the applicant had the willpower to take such a course also tends to confirm a more responsible mindset, consistently with his good rehabilitative progress.
- [23] When the matters in mitigation are considered collectively, it appears a materially more generous parole eligibility date was called for. The parole eligibility date actually imposed, albeit as a result of a probable mathematical error, gave rise to a sentence which was manifestly excessive.
- [24] In light of this error the proper course was to grant leave to appeal and sentence afresh.
- [25] The court was not inclined to depart from the effective head sentence imposed below of seven years and seven months, giving rise to the actual head sentence of seven years. Such a head sentence was appropriate.

- [26] However, in order to properly reflect the significant mitigating circumstances of this case, it was appropriate for this court to fix the parole eligibility date at the one-quarter point of the effective head sentence, namely 18 July 2019.