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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v GHERGHE**Murphy, O'Bryan and McDonald JJ****10 October 1990****CRIMINAL LAW – SENTENCING – DRUG TRAFFICKING – HEROIN/COCAINE – CUSTODIAL SENTENCE NOT INAPPROPRIATE.****Trafficking in heroin is a serious and prevalent crime and courts are required to impose condign punishment on such offenders.**

MURPHY J: [1] The applicant in this case was born in Rumania on 27th December, 1952. He came to Australia in 1979. He seeks leave to appeal against sentences of imprisonment imposed upon him in the County Court where he was presented on 21st August this year on Presentment V786 on one count of trafficking in a drug of dependence, the offence alleged to have occurred in December of 1989 at Tullamarine. At the same time he was presented on Presentment U.1428 on two counts, one of trafficking in a drug of dependence and one of possession of a drug of dependence, the trafficking and possession offences alleged to have occurred between March 1988 and March 1989. He also asked the learned sentencing Judge before whom he pleaded guilty to the above counts to have regard to matters which, by consent, were considered, matters laid by information number 6, resisting police; number 9, possessing a pistol without a licence, and number 11, possessing an unregistered pistol.

The learned sentencing Judge imposed a sentence of seven years with a minimum of five years on the single count in Presentment V786 and a sentence of five years on the first count, trafficking in a drug of dependence, on Presentment U.1428, and two months' imprisonment on the count of possession of a drug of dependence, which related to his possession of cocaine. On information No 6 His Honour imposed a sentence of four months' imprisonment; for possession a pistol without a licence, one month's imprisonment, and for possessing an unregistered pistol, one month's imprisonment. By orders relating to both concurrency and cumulation, His Honour arrived at an [2] effective term of ten years and two months' imprisonment, and His Honour fixed a period of seven years five months' imprisonment before which the applicant will not become eligible for parole.

The ground upon which Mr Walmsley, who appeared as counsel for the applicant before us, relied was the sole ground that the sentence was manifestly excessive. He pointed to the fact that the applicant had been in constant employment and had had a good work history since his arrival in this country. The material before us indicates that the applicant is quite an intelligent person. He has no dependants and no commitments. He is a tradesman who had carried out work of a qualified nature as a tradesman. He had engaged in successful investments in this country. On his own admission, he was himself in the habit of taking cocaine. Indeed the only excuse, if it may be so termed, that has been advanced for the applicant's engagement in the trafficking of these drugs was put forward as being the fact that he was addicted to cocaine.

Mr Walmsley has submitted to the Court that the trafficking in which the applicant engaged, to which he pleaded guilty, should be considered to be in the middle range, and he did not quibble at His Honour's description of the operation as being a considerable business undertaking. His Honour used the word "commercial", but obviously not in any misapprehension as to the law concerning quantities of drugs which may be described as being of a commercial quantity.

[3] The major thrust of Mr Walmsley's submission to us this morning has been to indicate, by reference to other cases which have been decided in this Court and in the County Court, that the sentencing range was lower, in his submission, than the sentences which were imposed by the learned sentencing Judge in this case. He has handed to the Court in precis form a list of cases

which have been dealt with from time to time from 1986 onwards in connection with trafficking in drugs. He, of course, conceded that those synopses do not by any means tell the whole story; that each case must be decided on its own facts, and no two cases are the same. Nonetheless he submitted that the sentences which were imposed in this case are able to be demonstrated to be manifestly excessive by a consideration of other cases where similar charges have been laid.

In my view, it is vitally important, if one is to gain benefit from considering the sentences imposed in other cases, to be well aware of all the circumstances applicable to the particular individual who has been sentenced. Many cases of trafficking come before the Court where it is demonstrable that the applicant is of very low intelligence, or without any trade or skill, or unable for one reason or another to obtain employment, or is an addict doomed to attempt to service his addiction, or is beset by family commitments, or personal tragedies have occurred in his life, any combination of which may go to afford some explanation, at least, for the commission of this vicious yet financially rewarding crime.

[4] The Court is in a position, having regard to the vast amount of crime with which it deals, to say that the drug trade corrupts the youth of today, and that the taking of drugs goes a good deal of the way to provide an explanation for many of the crimes with which this Court is called upon to deal. In fact it is possible to go as far as to say that the vast majority of crime with which this Court deals has, in its background, as a responsible factor the taking of these drugs of addiction. Oftentimes the fact that a person has had some compelling extenuating motive for the acquisition of money has been seen by the Courts as a good reason for tempering justice with mercy, mercy perhaps which may not have been appreciated by the applicant, nor indeed perhaps by the public generally. But in my opinion, where any of these supposedly extenuating circumstances are lacking, and where it can be properly assumed and concluded, as indeed the learned sentencing Judge in this case concluded, that greed alone was the dominant factor leading to the commission of the crime by the applicant – the soul-destroying crime, as I have said – the Court is in justice, in my view, required to visit the crime with what has been often described as condign punishment.

It is unnecessary to go into the details of the facts of this case save to mention that the applicant, after having been apprehended in the commission of this crime of trafficking in heroin, engaged again in the same crime, dealing with large sums of money and with much [5] financial gain destined to flow to him if the crime was successfully carried out. In my view, the sentences which were imposed by the learned sentencing Judge were appropriate in the circumstances of the case, which is one of the repeated commission of what has been described as an abhorrent crime. In my view, the sentences cannot be shown to be manifestly excessive. In fact, in my view, in the circumstances of this case I would class the sentences which were imposed as being merciful. I would dismiss the application.

O'BRYAN J: I agree. The list of cases referred to this morning in support of this application shows very clearly one thing, I believe: that trafficking in heroin is very prevalent in our community and current sentencing practice is having little or no effect in deterring would-be offenders from their nefarious trade in heroin. Courts are entitled to regard these offences of trafficking in heroin as serious and prevalent. Offenders cannot expect to receive lenient sentences, even after they plead guilty. In my view, the learned sentencing Judge took into account all matters relevant to sentencing, and I am not persuaded by the argument advanced this morning by Mr Walmsley that the sentence is manifestly excessive.

McDONALD J: I also agree with the learned presiding Judge and with the further views expressed by my brother O'Bryan.

MURPHY J: The order of the Court is that the application will be dismissed.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant Gherghe: Mr B Walmsley, counsel. Balmer & Associates, counsel.