

19/10; [2010] VSCA 78

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v BALA

Maxwell P, Ashley JA and Coghlan AJA

21 October 2009; 16 April 2010 — (2010) 201 A Crim R 505

CRIMINAL LAW – SENTENCING – TRAFFICKING IN CANNABIS – NON-COMMERCIAL QUANTITY – PLEA OF NOT GUILTY – PRIOR TRAFFICKING CONVICTIONS – STRONG EVIDENCE OF REHABILITATION – SENTENCED TO SEVEN YEARS’ IMPRISONMENT WITH A NON-PAROLE PERIOD OF FIVE YEARS – MANIFESTLY EXCESSIVE – UNJUSTIFIABLE DISPARITY BETWEEN SENTENCE IMPOSED AND SENTENCES IN COMPARABLE CASES – CROWN SUBMISSION ON RANGE – NEED FOR EXPLANATORY MATERIAL TO ASSIST JUDGE – SENTENCING DISCRETION RE-OPENED – RE-SENTENCED TO THREE AND A HALF YEARS’ IMPRISONMENT WITH NON-PAROLE PERIOD OF TWO YEARS.

B. was sentenced on the basis that he had sold and subsequently delivered 1.27kg of cannabis, for which he received about \$7,800. The amount which was trafficked was less than 5% of a commercial quantity of cannabis and such a charge would usually be dealt with in the Magistrates' Court and would very often attract a non-custodial sentence. The sentencing regime for drug trafficking is quantity-based, which means that the quantity trafficked will ordinarily be a key indicator of the seriousness of the offence, though it is never determinative of penalty. On the appeal, helpful references to a series of decisions of the Court of Appeal in the period 2006–09 were provided to illustrate current sentencing practice for trafficking offences. Those decisions are collected in the tables annexed to these reasons and it can readily be seen from Table B that the sentence imposed in the present case was anomalously high for the offence of trafficking in a non-commercial quantity, even allowing for B.'s plea of not guilty and his prior conviction for trafficking. Sentenced to 3½ years imprisonment with a non-parole period of two years.

MAXWELL P:

1. The appellant ('Bala') stood trial in the County Court on one count of trafficking in heroin and one count of trafficking in cannabis, both being drugs of dependence. He was acquitted of the first count but convicted on the second. On that count, he was sentenced to seven years' imprisonment with a non-parole period of five years.
2. Bala was sentenced on the basis that he had sold and subsequently delivered 1.27 kilograms of cannabis, for which he received about \$7,800. He appealed by leave against sentence. His primary complaint was that the sentence was manifestly excessive.
3. At the conclusion of the hearing, the Court announced that the appeal would be allowed and the sentence below set aside. We re-sentenced the appellant to three and a half years' imprisonment with a non-parole period of two years. It was declared that 338 days had already been served under the sentence.
4. We said that the reasons for allowing the appeal and re-sentencing the appellant would be published in due course. These are my reasons for joining in the orders made.

The applicable sentencing range and the relevance of current practice

5. At the conclusion of argument on the plea, the sentencing judge asked the prosecutor to indicate what the applicable sentencing range was. The matter was stood down to enable the prosecutor to seek instructions. Counsel subsequently submitted on behalf of the Crown that the head sentence should be in the range six to eight years, and the non-parole period in the range four to six years. Nothing was said, however, to explain the basis of that submission.

6. In *R v MacNeil-Brown*,^[1] this Court emphasised that the function of Crown submissions on range is to promote consistency of sentencing and to reduce the risk of appealable error. A submission which baldly states figures is unlikely, however, to be of much assistance and may – as occurred here – be productive of error. As with any submission advanced by counsel, the

mere statement of a conclusion will rarely be sufficient. If it is to assist the Court, the submission should articulate the considerations on which it is based, so that its validity can be tested in argument and evaluated by the judge.

7. The Court in *MacNeil-Brown*^[2] identified what a submission on sentencing range should include, as follows:

The range thus nominated must be based on a clearly-articulated view of the gravity of the offence, the relevant sentencing principles and practices, and relevant aggravating or mitigating factors. All of these matters should be referred to in the course of the submission, so that the court understands how the Crown contends that the relevant matters should be brought to bear. How much detail is required in relation to any of these matters will, of course, depend on the circumstances of the case.

8. What was notably lacking from the prosecutor's submission on range in the present case was any reference to current sentencing practices. As it turned out, this was a serious omission. Counsel for the Crown was constrained to concede in his appeal submission that the range which the prosecutor put forward – and the sentence which the judge imposed – were 'out of kilter' with current practices. This concession was properly made, in my view. (A sentencing judge is not necessarily constrained by current sentencing practices,^[3] but nothing was said in the present case to suggest that a departure from current practices was either intended or warranted.)

9. On the appeal, counsel for both parties provided helpful references to a series of decisions of this Court in the period 2006–09, to illustrate current sentencing practice for trafficking offences. Those decisions are collected in the tables annexed to these reasons. It can readily be seen from Table B that the sentence imposed in the present case was anomalously high for the offence of trafficking in a non-commercial quantity, even allowing for Bala's plea of not guilty and his prior conviction for trafficking.^[4]

10. Two examples will suffice to illustrate the anomaly. First, the present sentence of seven years simply cannot be reconciled with the sentence of two years and six months imposed in *R v Doherty*,^[5] where the offender – like Bala – had relevant prior convictions and had pleaded not guilty. Likewise, Bala's sentence of seven years for trafficking in a non-commercial quantity cannot be reconciled with the sentences of eight years and nine years respectively imposed in *R v Sibic & Sibic*^[6] for trafficking in a large commercial quantity of a drug of dependence, even allowing for the pleas of guilty in that case.^[7]

11. These are, in my view, unjustifiable disparities. There is no reasonable justification either for the sentencing differentiation in the first example or for the lack of differentiation in the second. This would no doubt have been apparent to the sentencing judge had he been supplied with the sentencing information which was provided to this Court on the appeal.

12. Importantly, the amount which Bala trafficked was less than five per cent of a commercial quantity of cannabis. The sentencing regime for drug trafficking offences is quantity-based,^[8] which means that the quantity trafficked will ordinarily be a key indicator of the seriousness of the offence, though it is never determinative of penalty.^[9] Based on quantity, Bala's offence was at the bottom end of the scale of seriousness for trafficking in a non-commercial quantity.

13. Senior counsel for the Crown acknowledged on the appeal that a charge of trafficking in a quantity of cannabis of this order would almost always be dealt with in the Magistrates' Court, and would very often attract a non-custodial sentence. Senior counsel for the appellant drew attention to the Sentencing Advisory Council's Sentencing Snapshot No 69 (February 2009), which records sentencing outcomes in the Magistrates' Court in the three year period 2004-05 to 2007-08 for trafficking cannabis. In that period, only 8.2 per cent of those sentenced for trafficking cannabis were sentenced to imprisonment. This was also important information about current sentencing practice, and it remained relevant even though Bala's prior conviction (for trafficking heroin) and plea of not guilty made it necessary for this offence to be dealt with in the County Court.

14. For these reasons, in my view, the sentence imposed was outside the range reasonably open to the judge. To have allowed the sentence to stand would have produced, in my view, an unjustifiable inconsistency in sentencing. Accordingly, the sentencing discretion was reopened and it fell to this Court to re-sentence the appellant.

Re-sentencing

15. As his Honour noted, Bala had a relevant prior conviction. On 18 December 1998, he had been convicted in the County Court of trafficking and possession of heroin. He had been driving a car when stopped by police and was found to have in his possession eight ounces of heroin. He was sentenced to imprisonment for four years and six months, with a non-parole period of two years and six months. As his Honour correctly stated, that conviction was relevant both to specific deterrence and to prospects for rehabilitation.

16. There was another – and much more recent – matter which was also directly relevant to rehabilitation, but for a different reason. Following his arrest in April 2006, Bala had been released on bail. In the period of more than two and a half years up to the date of sentence in December 2008, he had been in continuous employment, with the same employer. He had reported regularly to police while on bail and there had been no further offending. In the circumstances, these were very positive indicators of rehabilitation, in my view, such that the prior conviction was of less significance than it might otherwise have been.

17. It was relevant, moreover, that on the basis of the quantity trafficked, the present offence was much less serious than the previous one. The quantity of heroin which Bala had trafficked was 8 ounces or 227 grams, which was almost 50 per cent of a commercial quantity. Defence counsel quite properly made that point on the plea.

18. For these reasons, I considered that the appellant should be sentenced on the count of trafficking in cannabis to three and a half years' imprisonment with a non-parole period of two years.

ASHLEY JA:

19. It was either not in debate, or scarcely in debate, in this Court that – (1) trafficking the amount of cannabis in respect of which the appellant was found guilty would most often be dealt with in the Magistrates' Court and would most often attract a non-custodial sentence; (2) the reason why the appellant came to be tried in the County Court was because of the heroin-trafficking count on which he was acquitted; (3) although the appellant pleaded not guilty to the cannabis-trafficking count, he in fact offered no defence to that count; (4) the sentencing judge's description of the amount trafficked as being 'approximately five times the quantity of cannabis specified as a traffickable quantity', though literally correct, was apt to mislead because the amount was also very much less than the threshold for the more serious offence of trafficking a commercial quantity of the drug; (5) the prosecutor's 'quote' of a head sentence range of six to eight years and a non-parole period range of four to six years was wholly insupportable by reference to any publication by which 'current sentencing practices' could be divined; (6) the judge was not invited to depart from current sentencing practices; and (7) the cases involving broadly comparable circumstances which were referred to in argument underlined the anomaly of the appellant being sentenced as he was.

20. In those circumstances, I concluded that the sentence passed was manifestly excessive. I therefore joined in the order that the appeal against sentence be allowed, and I subscribed to the order by which the appellant was re-sentenced.

COGHLAN AJA:

21. I have read in draft the reasons for judgment of Maxwell P. It was for the reasons his Honour gives that I too joined in the orders made at the conclusion of the hearing.

TABLE A: Trafficking in Large Commercial Quantity: (Maximum: Life imprisonment)

Case	G/NG	Relevant prior convictions	Sentence on trafficking count(s)
R v Sibic & Sibic [2006] VSCA 296; (2006) 168 A Crim R 305	G	Yes	9y & 8y respectively
R v D'Aloia [2006] VSCA 237	G	No	9y (5y for trafficking simpliciter)
R v Duncan [2006] VSCA 239	G	No	8y
R v Demaria [2008] VSCA 105	G	Yes	9y

TABLE B: Trafficking in Non-Commercial Quantity: (Maximum: 15 years' imprisonment)

Case	G/NG	Relevant prior convictions	Sentence on trafficking count(s)		Comments
R v Ienco [2008] VSCA 17	G	No	1y 9m		
R v Ferguson [2008] VSCA 257	NG	No	2y 6m		
DPP v Willis & Hossack [2009] VSCA 14	G	Yes	Willis	1y 6m (susp)	
		Yes	Hossack	6m	
R v Bennett [2009] VSCA 42	G	No	2y 4m (10m susp)		
R v Georgio [2009] VSCA 57	NG	Yes	4y		
R v Markovski, Moir and Sheen [2009] VSCA 65	G	Yes	Markovski	4y 2y 6m	
	G	Yes	Moir	1y 6m 1y	
	G	Yes	Sheen	2y 1y	
R v Bidmade [2009] VSCA 90	G	Yes	2y 6m		Breach of bond. Focus of sophisticated drug ring
R v Dare [2009] VSCA 91	G	No	4y; 3y; 1y		
R v Waugh [2009] VSCA 92	G	Yes	3y 6m; 1y 6m		
R v Barbaro [2007] VSCA 271	G	No	5y; 3y		'consistent and major trafficker' [43]
R v Doherty [2009] VSCA 93	NG	Yes	2y 6m		Breach of suspended sentence
R v Bassie [2009] VSCA 120	G	No	3y 6m; 1y		
R v Dominique [2009] VSCA 133	G	No	3y 6m; 1y; 1y 6m; 1y		

[1] [2008] VSCA 190; (2008) 20 VR 677; (2008) 188 A Crim R 403 ('MacNeil-Brown').

[2] Ibid 681.

[3] *R v AB (No 2)* [2008] VSCA 39; (2008) 18 VR 391; (2008) 182 A Crim R 87; *DPP (Vic) v CPD* [2009] VSCA 114; (2009) 22 VR 533; (2009) 196 A Crim R 1.

[4] See [13] below.

[5] [2009] VSCA 93.

[6] [2006] VSCA 296; (2006) 168 A Crim R 305.

[7] See also *R v Demaria* [2008] VSCA 105, where the offender, who had relevant prior convictions, received a sentence of nine years for trafficking in a large commercial quantity.

[8] *R v Pidoto & O'Dea* [2006] VSCA 185; (2006) 14 VR 269; (2006) 165 A Crim R 61.

[9] *R v McCulloch* [2009] VSCA 34, [46]; (2009) 21 VR 340; (2009) 193 A Crim R 580.

APPEARANCES: For the appellant Bala: Mr OP Holdenson QC, counsel. Lewenberg & Lewenberg, solicitors. For the Crown: Mr JD McArdle QC, counsel. Mr C Hyland, Solicitor for Public Prosecutions.