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Criminal Law- sentencing - appeal - challenge to “facts” found by sentencing judge not made out -further evidence of sentencing statistics from another jurisdiction not received on appeal - sentences not manifestly excessive. (Australia)

J was convicted under the *Drugs of Dependence Act 1989* (ACT), for: (1) possession of a trafficable quantity of a prohibited substance for the purpose of sale or supply, (2) possession of a drug of dependence for the purpose of sale or supply, and (3) supply of a drug of dependence. He was sentenced to imprisonment for a total of four and a half years with a fixed non-parole period of 18 months.

The case against J was that on 18 February 1999, a man identified as 'A' telephoned J. In accordance with arrangements made in that conversation, J met with A at a car park where J handed over to A, a container containing methamphetamine. The Police moved in and arrested the offender and A. The container was found to have within it 30 blue tablets, each impressed with a 'Batman' symbol. The Police also found \$1,800 in cash, on J's person as well as a notebook containing entries about amounts owed as well as more drugs in the car.

On 18 October 2000 J pleaded guilty to all three offences charged in the indictment. At the sentencing hearing, the Crown tendered the record of the appellant's previous convictions and a statement of facts, together with a pre-sentence report prepared by a probation and parole officer. J also tendered a signed statement and oral evidence by his parents, three character references and a report from the Education Officer at the Remand Centre at which he was held. He did not give evidence himself.

J appealed the sentence on the following grounds:

1. The sentence imposed was excessive.
2. The sentencing judge placed undue weight and emphasis on the aspect of deterrence in the sentence that he imposed on the appellant.
3. The learned Sentencing Judge took factual matters into account that were not before him.

► **Held:** dismissing the appeal;

Counsel for J argued that the approach of the sentencing judge to the factual matters involved an error of the kind identified in *R v*

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Mason [2000] NSWCCA 82. In that case a District Court judge, in sentencing an offender on a single count of supplying methylamphetamine, had purported to take judicial notice of common knowledge that excessive use of amphetamines can induce a state that is indistinguishable from paranoid schizophrenia. The Court of Criminal Appeal held that, in the absence of expert evidence on the psychiatric effects of amphetamine abuse, the judge erred in proceeding upon such an assumption.

In *Mason* the court evidently considered that the sentencing judge's knowledge did not satisfy the test in s 144(1) of the *Evidence Act* and that proof was required of such a matter. So understood, the case is merely another instance of the application of the well-known principle that an exercise of discretion miscarries if a judge mistakes the facts.

Counsel also contended generally that heroin and Ecstasy were irrelevant to the offences for which the appellant stood for sentence and that references by his Honour to such drugs impermissibly elevated the appellant's criminality.

The finding that J "was clearly participating in an organised distribution ring" was well open to the judge on the agreed statement of facts in evidence. Any other conclusion would have bordered on the perverse. Moreover, and most importantly, such a finding was directly relevant to an evaluation of the criminality involved in J's offences.

On the other hand, however, no pharmacological or medical evidence was given in the sentencing proceedings. Nor were any crime statistics received in evidence. Thus there was no evidence on which to base any findings about links between amphetamine trafficking and organised violent crime, the incidence of illegal drug use or the effects of using any particular drugs. The judge must have relied on other sources of information for the views he expressed on these topics. Those views did not, however, necessarily betoken a sentencing error. What must be determined in a specific case are the facts relating to the commission of the offence and the personal circumstances of the offender. These are the so-called "objective" and "subjective" considerations. In the present case the sentencing judge had not mistaken those facts, and his relevant findings were firmly based on the evidence before him.

The harsh language used by the judge to denounce the illegal drug trade generally did not, infect the specific findings required in the present case. J was not, therefore, sentenced on the basis of a finding of fact for which there was no evidence. This ground of appeal was not made out.

Counsel for the appellant further submitted that the sentencing judge erred in failing to take account of the appellant's "addiction" to drugs. The court presumed that, in view of the way the second ground of appeal was expressed, the error must have resulted from the undue priority allegedly given to deterrence by the trial judge.

In support of this ground, J contended that the sentences were manifestly excessive having regard to the quantity of drugs involved in the offences, the guilty pleas and the possibility of rehabilitation. He also tendered sentencing statistics from the on-line information system of the Judicial Commission of New South Wales. This information showed that the penalties imposed in the higher courts of New South Wales during the period from April 1993 to March 2000 for the offences under the *Drug Misuse and Trafficking Act 1985* (NSW) for supplying less than a commercial quantity of each of the prohibited drugs LSD, Ecstasy and amphetamines.

The Appeal court saw no reason to exercise its discretion to receive them at the appellate stage and held that their relevance was marginal at best and did not demonstrate that the sentencing discretion of the judge had been miscarried.

The Court found further that the maximum terms of imprisonment for the offences in question were respectfully 25 years, 5 years and 5 years. These were the starting points in determining the appropriateness of the sentences. In his sentencing remarks the judge carefully took into account all the objective and subjective circumstances of the case. The nonparole period meant that J would be eligible to be released from prison within a relatively short time. Sentencing J obviously required different and often conflicting matters to be considered and balanced. "Sentencing is not a mathematical process: *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]." In the court's opinion, J had failed to demonstrate that the sentencing judge made an error of principle or that the sentences are manifestly excessive.

Jacobs v The Queen [2001] FCA 1192

Criminal Law - bail - review by Supreme Court of the Australian Capital Territory of decision of Magistrates Court refusing bail - consideration of whether to grant bail for a serious offence allegedly committed while on bail for another serious offence - whether acquitted on pending charges might amount to "special or exceptional" circumstances justifying grant of bail. Bail Act 1992 (ACT) ss 9A, 22 -Bail Amendment Act 2001 (ACT) s 12- (Australia)

A applied for leave to appeal from a decision of a judge of the Supreme Court of the Australian Capital Territory on 29 June 2001 affirming the decision of an Australian Capital Territory Magistrate on 12 June 2001 to refuse the applicant bail. If leave is granted, the proposed grounds of appeal are as follows:

"1. That His Honour misconstrued the effect of the phrase 'special or exceptional circumstances' contained in Subsection 9A(2) of the Bail Act 1992; and

2. That His Honour erred in His ruling that the combined effect of Subsections 9A(2) and 9A(3) of the Bail Act 1992 was that the Applicant for bail bears the onus of establishing both special circumstances and of satisfying the criteria set out in Section 22 of the Bail Act 1992."

The question as to whether leave to appeal is required is a moot point, having been left open in *Dunstan v Director of Public Prosecutions* (1999) 92 FCR 168 ("*Dunstan*"). As the grounds of appeal involved construction of the *Bail Act 1992* (ACT) ("the Act") in the light of recent legislative amendments, the respondent did not oppose a grant of leave if that be necessary and agreed that the Court should adopt the same approach as in *Dunstan*, namely, to grant leave without finally deciding that it is necessary. Argument was heard on both leave and the appeal.

On 25 November 2000, A was charged with making a demand accompanied by a threat (maximum penalty: ten years imprisonment), assault occasioning actual bodily harm (maximum penalty: five years imprisonment) and assault (maximum penalty: two years imprisonment) and he was granted bail.

On 4 April 2001 A was again charged with further offences relating to armed robbery, theft, assault, possession of an offensive weapon with

intent, possession of a knife in a public place and dishonest use of computers. His application for bail was refused. On 21 May 2001 A was acquitted of the first set of charges.

By virtue of s 8 of the Act, the applicant was entitled to be granted bail in accordance with the Act unless the Court was satisfied that, having regard to the matters referred to in s 22, the Court was justified in refusing bail. Section 22 of the Act states:

"22. Criteria for granting bail to adults

- (1) In making a determination regarding the grant of bail to an accused person who is not a child, a court or an authorised officer shall have regard to the following matters, so far as they are ascertainable:
- (a) the probability of the person appearing in court in respect of the offence for which bail is being considered, having regard only to -
 - (i) the background and community ties of the person, having regard to the nature of his or her home environment and employment and to his or her criminal record; and
 - (ii) the circumstances in which the offence is alleged to have been committed, the nature and seriousness of the alleged offence, the strength of the evidence against the person and any other information relevant to the likelihood of the person absconding;
 - (b) the interests of the person charged, having regard only to -
 - (i) the period that the person may be held in custody if bail is refused and the conditions under which he or she would be held in custody;
 - (ii) the need of the person to be free for the purposes of preparing for his or her appearance before a court and obtaining legal advice and for other purposes; and
 - (iii) the need of the person for physical protection, whether the need arises because the person is incapacitated by intoxication, injury or use of drugs or arises from other causes;
 - (c) the protection of the community, having regard only to -
 - (i) the likelihood of the person interfering with evidence, intimidating witnesses or otherwise obstructing the course of justice

- whether in relation to himself or herself or any other person;
- (ii) the likelihood of the person committing an offence while released on bail; and
- (iii) the likelihood of the person harassing a victim or other persons while released on bail.

(2) In subparagraph (1)(c)(ii) a reference to an offence shall be read as including a reference to an offence against a law in force in the Territory and a law of the Commonwealth, a State or another Territory (including an external Territory)."

Section 9A of the *Bail Amendment Act* inserted the following:

"9A. Bail for serious offence committed while on bail for another serious offence

- (1) This section applies if -
 - (a) a person is accused of an offence punishable by imprisonment for 5 years or more (a **serious offence**); and
 - (b) the person is alleged to have committed the offence while on bail for another serious offence (or a number of offences including a serious offence).
- (2) A court or an authorised officer must not grant bail to the accused person unless satisfied that special or exceptional circumstances exist justifying the grant of bail.
- (3) However, even if special or exceptional circumstances are established, the court or officer must refuse bail if satisfied that refusal is justified having regard to
 - (a) if the accused person is an adult - the matters mentioned in section 22 (Criteria for granting bail to adults) ..."

A was arraigned for trial on the second set of charges and he applied again for bail and was refused. His application for review was rejected. The reviewing judge had before him, the statement of facts in relation to the charges upon which A was committed for trial, his then criminal record, affidavit and oral evidence as to A's personal circumstances, his reasons for seeking bail and the bail conditions which he proposed.

The judge held that he was not satisfied that there were special or exceptional circumstances to grant bail stating that the mere fact that A was acquitted of the serious offences could constitute of itself, or in conjunction with the other matters before him, a sufficiently special

or exceptional circumstance to fall within the provisions of section 9A.

► **Held:** allowing the appeal;

1. "Bail" could only be granted in accordance with the Act, which purports to abolish any inherent power of the Supreme Court to grant bail (s 57AA of the Act). The grant of bail was governed by s 22 of the Act. Yet, if the hurdle of s 9A(2) is overcome, the grant of bail then depends upon a separate application of s 22. The circularity is revealed by reading the words "justifying the grant of bail" into s 9A(3) after the words "special or exceptional circumstances". It follows that "justifying the grant of bail" in s 9A(2) cannot mean actually justifying the grant of bail to the particular applicant in the circumstances of the particular case. The words are limiting and require that the circumstances alleged to be special or exceptional be properly related to the grant of bail. The special or exceptional circumstances must be such that they might justify the grant of bail, depending upon all of the circumstances relevant to s 22. Put another way, the special or exceptional circumstances must be such as would favour the grant of bail.

2. The judge found that acquittal on the charge (or charges) which caused s 9A to apply in the first place could not be special or exceptional circumstances within the meaning of s 9A(2). The decision therefore raised a question of law for determination on appeal. The Director of Public Prosecutions submitted that the evil at which s 9A was aimed was the abuse of the grant of conditional freedom and had nothing to do with guilt or innocence upon the original charges. Although the first part of the proposition was attractive, upon analysis, the second part was not sound.

"The point is illuminated by taking examples. Assume that the applicant, whilst on bail in relation to a charge of murder, is charged with another murder, or with manslaughter, or with intentionally inflicting grievous bodily harm, or with causing death by negligent culpable driving, or with recklessly interfering with the lawful use of a computer, or with causing the working of a railway carriage to be obstructed by neglect. Each of those later offences is a serious offence within the meaning of s 9A(1). Each of those offences has different characteristics and has a different relationship with the original charge of murder. The issue of conditional release on the later charge is surely different according to whether there is or there

is not a murder charge already outstanding against the applicant. In our view, acquittal of the original murder charge before the question of bail in relation to the second charge is considered is relevant to the possible grant of bail and would be a circumstance, viewed alone, which is in favour of and might justify the grant of bail depending upon the circumstances and so is a circumstance capable of "justifying the grant of bail" within the meaning of s 9A(2)". This analysis also lead to the conclusion that acquittal on the original charge was at least capable of being regarded as "special or exceptional". A person who is acquitted is presumed to be innocent. The fact that s 9A picks up such a case does not deny the possibility of an acquittal amounting to a special or exceptional circumstance. The nature of the various charges and the relationship between them will vary from case to case. Further, the circumstances of the acquittal may be a factor to be taken into consideration when assessing issues relating to bail. For example, the significance of an acquittal might be reduced or eliminated if it occurred because the principal witness was shot in cold blood the day before trial".

3. In the opinion of the Court, the judge was wrong in rejecting the possibility that the acquittals here could be special or exceptional circumstances within the meaning of s 9A(2) of the Act.

The case was remitted to the Supreme Court for further hearing.

Achanfu-Yeboah v. R [2001] FCA 1152

Money Laundering – Conspiracy – Distinguishing between the proceeds of drug trafficking and proceeds of criminal conduct – whether alternative counts appropriate – Criminal Justice Act 1988, Drug Trafficking Act 1994 – (UK)

E owned a "bureau de change". He was charged with conspiracy to launder property which represented the proceeds of criminal conduct, and in the alternative, conspiracy to launder property representing the proceeds of drug trafficking. The allegations against E were that between September 1994 and November 1996, more than £70M was laundered through his bureau through the exchange of low denomination notes for high-value foreign

notes. Surveillance and telephone monitoring of his and his business associates showed that the other co-conspirators, K, M and R frequently visited E's bureau de change and that calls made between them coincided with substantial supplies of foreign currency to the bureau from other financial institutions. There was also evidence of cash being moved abroad.

E had submitted during trial that there was no case for him to answer on the ground that the prosecution had not proved that the money was either the proceeds of drug trafficking or criminal conduct. This submission was rejected and in summing up, the trial judge directed the jury to consider the first count relating to drug trafficking, then if necessary the counts relating to criminal conduct. E was convicted on the counts relating to criminal conduct.

He appealed, contending that the jury could not have been sure either that the proceeds were from criminal conduct or from drug trafficking.

► **Held:** dismissing the appeal;

There were circumstances in which it might be clear that a defendant committed one of two offences, but it was impossible to say which. However, in the present case, the jury had only to be satisfied that part of the money came from a given source. Although the judge should not have directed the jury that each pair of charges should be treated as alternatives, this worked to the advantage of E. In the view of the appeal court, there was evidence to justify conviction on either the drug trafficking charges or criminal activity charges.

per curiam: The court expressed concern that the UK legislation still provided separately for laundering the proceeds of drug trafficking and laundering the proceeds of other criminal conduct, despite international agreement that states should extend their money laundering legislation beyond drug trafficking to include all criminal activity.

R. v. El-Kurd [2001] Crim. L.R. 234

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been admissible against D in the circumstances
and the fact that another officer took the
statement made no material difference.

Rohan Anthony Dixon, [2001] EWCA Crim
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