Gooch & Pierce v The Queen [2002] NTCCA 3

PARTIES:	MARC LAWRENCE GOOCH AND JANET HILDA PIERCE v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA9 & CA10 of 2001
DELIVERED:	1 May 2002
HEARING DATE:	14 March 2002
JUDGMENT OF:	MARTIN CJ, BAILEY & RILEY JJ

REPRESENTATION:

Counsel:

First Applicant:	I. Read
Second Applicant:	C. Rozencwajg
Respondent:	G. Fisher

Solicitors:

Applicants	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gooch & Pierce v The Queen [2002] NTCCA 3
No. CA9 & CA10 of 2001

BETWEEN:

MARC LAWRENCE GOOCH
First Applicant

AND

JANET HILDA PIERCE
Second Applicant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, BAILEY & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 1 May 2002)

THE COURT

[1] The first applicant pleaded guilty to having, on or about 15 August 2000, imported into Australia not less than a traffickable quantity of heroin contrary to s 233B(1)(b) of the *Customs Act* 1901.

[2] The second applicant pleaded guilty to being knowingly concerned in that importation contrary to s 233(1)(d) of the *Customs Act* 1901. On 23 April 2001 they were each convicted and sentenced to a term of imprisonment of

six years with a non-parole period of four years. The sentences and non-parole periods were backdated to 17 October 2000 to take into account time in custody. The applicants sought leave to appeal against the sentences and, on 17 July 2001, those applications were refused. They now seek to have the applications for leave to appeal determined by this Court pursuant to the provisions of s 429(1) of the *Criminal Code*. The Court heard full argument from the applicants on the merits of the proposed appeals before determining that the circumstances did not warrant the grant of leave. These are the reasons for the orders refusing those applications which were made on 13 March 2002.

[3] The grounds which the applicants sought to agitate in the event that the applications were successful were: (1) that the learned sentencing Judge erred in law in failing to take into account the provisions of s 16G of the *Crimes Act*; (2) that he erred in imposing a sentence which was manifestly excessive; (3) that he imposed a non-parole period which in all the circumstances was manifestly excessive; and (4) that he failed to take appropriate account of all the factors mentioned in Part 1B of the *Commonwealth Crimes Act*. In addition the applicant Marc Lawrence Gooch wished to argue that his Honour erred in failing to impose disparate sentences for the applicants and that he should have imposed a more lenient sentence upon the applicant Gooch.

Applications for Leave

[4] A person may only appeal to this Court against sentence with the leave of the Court: s 410 *Criminal Code*. By virtue of s 429(1) of the Code the powers of the Court to grant leave to appeal may be exercised by any judge of the Court "in the same manner as they may be exercised by the Court and subject to the same provisions." In the event that the judge refuses an application "the appellant shall be entitled to have the application determined by the Court" (s 429(2)).

[5] In the present case leave to appeal was refused by a single judge and the applicants sought to have the application determined by the Court. The test to be applied in such circumstances was considered by Asche CJ in *McDonald v R* (1992) 85 NTR 1. Although, in that case, his Honour observed that the circumstances of an application for leave made to a single judge will differ from those of an application made to the Court when the application and the appeal are heard together, in our view the test to be applied is the same on each occasion. That this is so is made clear by the words of s 429 referred to above.

[6] In *McDonald v R* Asche CJ reviewed the authorities to that point in time. He noted that appellate courts have been reluctant to fetter the discretion to be exercised and that it followed that "no more than very general statements can be made as to how the court should act in considering whether to grant

leave to appeal against sentence (other than Crown appeals)". His Honour went on to say (5):

> "It seems therefore that one should take the broad view here and determine whether there is an arguable case that his Honour's sentencing discretion has miscarried or whether there appears any real element of injustice which might operate against the applicant if the leave is refused. In other words, it seems to me that the purpose of the application for leave to appeal against sentence is to weed out the obvious cases where it is plain that the appeal cannot succeed, but not otherwise to deprive an applicant of his right of appeal.
>
> Even if the individual judge hearing the application feels that on the probabilities the applicant will not succeed, if there is a real possibility that the applicant might suffer injustice by refusal, leave should be granted."

With respect, we agree. We observe that "an arguable case" denotes something more than a case where argument may be presented indicating appellable error. The argument must be sufficiently strong to call for a response.

[7] In circumstances where the application for leave to appeal and the appeal are heard together practical considerations may suggest a difference in approach, however the test remains the same. In *Bailey v Director of Public Prosecutions* (1988) 62 ALJR 319 Mason CJ, Brennan, Dawson and Toohey JJ in a joint judgment observed that:

> "When the Court of Criminal Appeal is satisfied that an application for leave to appeal against sentence is without merits, it may rightly refuse leave to appeal rather than grant leave and dismiss the appeal. The grounds of refusal of leave should be stated, though they need not be elaborated. But where there is a sufficiently arguable case, the more appropriate course is to grant leave to appeal, deal with the

merits of the argument and then reach a decision allowing or dismissing the appeal."

The Facts

[8] The facts placed before his Honour by consent were that on 15 August 2000 Ms Pierce arrived at Darwin International Airport where members of the Australian Customs Services conducted a search of her baggage. The search revealed a false bottom in a case that was in her possession and concealed beneath the false bottom was a package containing 337.5 grams gross of heroin. That heroin was subsequently analysed and found to have a purity of 75.3 per cent giving a pure weight of heroin of 254.1 grams. At the time of the search Ms Pierce admitted that the package contained heroin. She was arrested. She informed arresting officers that her de facto husband, the applicant Gooch, had accompanied her to Thailand and was due to arrive in Darwin a short time later on a flight from Kuala Lumpur. Mr Gooch arrived as predicted and was also arrested.

[9] Ms Pierce participated in a record of interview in which she stated that she and Mr Gooch had purchased the heroin in Chiang Mai in Thailand from a man she had known for several years. She said that the night before departing Thailand she and Mr Gooch hid the heroin in the case. When Mr Gooch was searched by Australian Customs Service members he was found to have a set of digital scales which, when subjected to an ion scan, proved positive to heroin. Mr Gooch confirmed that he had travelled to

Thailand with Ms Pierce and that they had purchased the heroin at Chiang Mai. They paid a total of 315,000 Thai baht for the heroin which Mr Gooch estimated to be the equivalent of $AUD10,000. He said that he wrapped the heroin in black electrical tape and glued some bracing around the edge of the package and placed the heroin into a false compartment in the bottom of Ms Pierce's case.

[10] Mr Gooch and Ms Pierce participated in further interviews later in August and, on that occasion, each indicated that the heroin was sealed using a cryovac vacuum sealing machine that another person, who had accompanied them on the trip, had brought with him from Australia. The cryovac machine was left in Chiang Mai.

[11] The court was informed that Ms Pierce had one previous conviction for trafficking a drug of addiction in 1986 in relation to which she was released on a $200 bond to be of good behaviour for 2 years and on condition that she continue treatment with Odyssey House in Victoria. Mr Gooch did not have any prior convictions. Those facts were agreed on behalf of the applicants and formed the basis of the sentencing remarks.

The Proposed Grounds of Appeal – Grounds 1 and 4

[12] Counsel for the applicants argued proposed grounds of appeal 1 and 4 together. It was contended that his Honour failed to take appropriate account of all of the factors mentioned in Part 1B of the *Crimes Act (Cth)* and, in particular, failed to take into account the provisions of s 16G of that

Act. Those submissions do not find support in the way the matter was dealt with before the Court or in the observations of his Honour made in the sentencing process.

[13] In the course of submissions made to his Honour Mr Fisher, who appeared on behalf of the prosecution in each case, provided his Honour with a document entitled "Sentencing in Commonwealth Matters". That document appears in the appeal book and contains a summary of the requirements of Part IB of the *Crimes Act*. It made reference to each of the relevant sections within that Part and it dealt with s 16G in the following way:

> "Section 16G of the Act provides that any sentence of imprisonment for a Federal offence must be adjusted to take into account the absence of remissions. This involves the adjustment only of the head sentence, not the non-parole, as Part 1B of the Act requires that a non-parole period must be determined by reference to the head sentence which has already been adjusted, in this way: *El Kaharni* (1990) 21 NSWLR 370 at 383-384, 386.
>
> One can take into account that throughout Australia the reduction of custodial sentences for remissions is about one-third of the sentence. This is not a fixed ratio, as an individualised adjustment called for by s 16G, but it is an appropriate starting point: *El Kaharni* at 385, *Winchester* (1992) 58 A Crim R 345 at 349.
>
> In the general run of cases it is appropriate for the ratio of the non-parole period to the period of the head sentence – duly adjusted having regard to s 16G and all other relevant subjective factors – to be approximately 60% to 66 2/3% : *El Kaharni* at 386. *Warfield* (1994) 34 NSWLR 200. A figure of 75% would be reserved for the worst type of case: *Drazkiewicz* (CCA 23 November 1997, unreported at p7)."

Neither applicant made any complaint regarding the content of those written submissions.

[14] In the course of sentencing the applicants the learned sentencing Judge provided a detailed review of the history of the matter. He then observed that he had "considered the matters required to be taken into account by Part IB of the *Crimes Act* 1914". This was a reference to the provisions of the *Crimes Act* which the applicants now say were not taken into account. It is clear that his Honour had before him the detailed written submissions of the respondent in relation to the relevant provisions of the *Crimes Act* and there is also the direct confirmation by his Honour that he had reference to those matters.

[15] Section 16G of the Act provides a general discretion that must be exercised by the sentencing judge. It is not a mathematical calculation: *El Karhani* (supra at 384); *R v Li* (1998) 1 VR 637 at 642. There is no obligation imposed upon a sentencing judge to identify a specific figure when adjusting the sentence in accordance with s 16G of the Act: *Lawson, Wu and Thapa* (1997) 98 A Crim R 463 at 475-476; *R v Anton Majeric* [2001] VSCA 15 at par21-24. In this case there is nothing to suggest that his Honour did not take those matters into account. The sentences imposed indicate that he did so. The proposed grounds are without merit and cannot succeed.

Ground 2 – Manifestly Excessive

[16] The applicants submitted that the sentences imposed were manifestly excessive. In support of that submission the applicants identified a number of matters that were said to have been accorded insufficient weight in the

sentencing process. The particulars reflect an attempt by the applicants to identify the reasons for the sentence being manifestly excessive. The submission was put in these terms:

> "It is the applicants' submission that his Honour failed to give sufficient weight to their pleas of guilty, their admissions to police, their co-operation with the authorities, the report of Mr Joblin and their previous good character and testimonials. These mitigating matters were weighty and it is submitted that his Honour simply failed to give them sufficient weight."

[17] It was not suggested that his Honour failed to accord weight to the matters identified and, indeed, reference to the sentencing remarks reveals that his Honour specifically referred to each of them. The complaint is that he failed to give them "sufficient weight". It is unnecessary to identify a definite or specific error in support of this ground of appeal: *R v Tait & Bartley* (1979) 24 ALR 473 at 476. The ground is established where the appeal court evaluates the permissible range of sentence in the light of all the admissible considerations affecting the case in hand and, drawing upon its own accumulated knowledge and experience, concludes that the sentence was outside that range. Such a sentence is able to be corrected: *R v Holder* (1983) 3 NSWLR 245 at 254. The sentence may be so excessive or inadequate as to manifest error: *R v Tait* (supra). In *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47 Kearney J (with whom Martin and Angel JJ agreed) said, in dealing with a Crown appeal asserting the manifest inadequacy of a sentence:

> "In general, then, to establish the existence of the necessary (unidentified) error the Crown must show that the sentences are not just arguably inadequate but so very obviously inadequate that they are unreasonable or plainly unjust.".

In *Salmon v Chute & Anr* (1994) 94 NTR 1 Kearney J made it clear that the same principle applies in an appeal against severity save that the word "excessive" is substituted for the word "inadequate" and "the appellant" is substituted for "the Crown".

[18] If a sentence is "out of all proportion to any view of the seriousness of the offence which could reasonably be taken" it will be manifestly excessive: *Cranssen v R* (1936) 55 CLR 509 at 520. There will need to be a "striking disparity" before a court will interfere with the exercise of discretion by the sentencing judge: *R v Allinson* (1987) 49 NTR 38 at 39. It has often been said that it is essential for an applicant to show that the sentences are manifestly and not merely arguably excessive. It is also often observed that such a submission is not one which is capable of a great deal of elaboration.

[19] In this matter his Honour carefully considered the nature of the conduct of the applicants and how that conduct should be charaterised. The quantity of heroin actually imported was 337.5 grams gross of which 50 to 70 grams "at least" was for personal use by the applicants. His Honour observed:

> "[M]y findings do not go so far as to warrant the conclusion that the accused should be treated as 'principals', a term which is usually used in the context of importation for commercial gain. As I have said, I do not know the purpose for which the vast majority of heroin was to be used. It would be wrong, in those circumstances, to punish the offenders on the basis that they were principals. See the case of

> *R v Olbrich* (1999) 108 A Crim R 464 at 474. I consider that, consistently with that case, I should approach the sentencing task on the basis that apart from the 50 to 70 grams, I know nothing about what was intended for the balance."

[20] In the sentencing process his Honour was referred to a range of sentences for similar offences. He was referred to the judgment of the New South Wales Court of Criminal Appeal in *Wong & Leung* (1999) 108 A Crim R 531 including the sentencing summaries for similar sentences throughout Australia which appear therein. This matter went on appeal to the High Court (*Wong v R* (2002) 185 ALR 233) where Gaudron, Gummow and Hayne JJ held that the Court of Criminal Appeal had no power or jurisdiction to prescribe what sentence should be passed in the future. However the analysis of the decided cases by the Court of Criminal Appeal and the schedule of cases attached provided his Honour with a useful resource in examining the permissible range of sentences. It appears his Honour did not follow the guidelines in the case. Contrary to the submission of the applicants his Honour did not place undue emphasis upon the weight of heroin involved. This is clear from his sentencing remarks. Even if it be thought that his Honour incorrectly applied the decision of the Court of Criminal Appeal in New South Wales in *Wong & Leung* (supra) when considered in the light of the subsequent decision of the High Court, it does not follow that this Court will interfere with the sentence he imposed. This Court will only interfere with a sentence "if it is of the opinion that

some other sentence, whether more or less severe, is warranted in law and should have been passed": s 411(4) of the *Criminal Code*.

[21] In the present case the sentences imposed on each of the applicants were entirely unexceptional. They were comfortably within the range and this Court ought not interfere.

Ground 3 - The Non-parole Period

[22] The applicants submitted that his Honour erred in imposing a non-parole period which in all the circumstances was manifestly excessive. It was submitted that his Honour having found that, apart from the heroin related activities of the applicants, they were both persons of good character, he ought to have found that their prospects of rehabilitation were good. It was submitted that the non-parole period imposed was "too long in all the circumstances of the offences and particularly, in all the circumstances of the applicants". In his sentencing remarks the learned sentencing Judge set out in detail the history of each of the applicants and the circumstances that applied to them at the time of the offending. He noted the lengthy period during which each had been involved with heroin and the largely unsuccessful efforts that they had made to deal with their respective addictions. His Honour concluded that apart from their heroin activities "they are both persons of good character". He accepted that "to the extent that the importation was for personal use, this is a mitigating factor" but

went on to make observations regarding the danger such an importation represents to the community even in those circumstances.

[23] The non-parole period of four years set for each applicant is 66 per cent of the head sentence. That is unexceptional. See *El Karhani* (supra at 386) and also *R v Warfield* (1994) 34 NSWLR 200 at 207.

[24] In fixing a non-parole period the sentencing Judge does not approach the task on the "footing that he or she is solely or primarily concerned with the prisoner's prospects of rehabilitation". Non-parole periods provide for mitigation of the punishment in favour of rehabilitation through conditional freedom once the prisoner has served the minimum term that justice requires in all the circumstances: *Bugmy v The Queen* (1990) 169 CLR 525 at 530-531.

[25] In this case the offences were correctly characterised by his Honour as serious. He considered matters personal to each of the applicants and he also gave weight to the protection of the community and the need for both general and personal deterrence. In our opinion this ground of appeal can not be made out.

The Applicant Gooch

[26] Mr Read, who appeared on behalf of the applicant Mr Gooch, contended that the learned sentencing Judge erred in failing to impose disparate sentences upon the applicants. It was his submission that on the material before his Honour a more lenient sentence should have been imposed upon Mr Gooch

when compared with Ms Pierce. The bases of that submission were that: Ms Pierce had a relevant prior conviction whereas Mr Gooch did not; Mr Gooch did not have the underlying psychological problems that would make it more likely for him to revert to substance abuse when compared with Ms Pierce; and that Mr Gooch admitted his involvement in the offence at an early stage of proceedings notwithstanding that the case against him was a more difficult case than that against Ms Pierce.

[27] In considering the involvement of each applicant in the proceedings his Honour concluded that "[t]he level of Gooch's involvement is no different from that of Pierce". There is no challenge to that finding.

[28] As to the submission that Ms Pierce had a relevant prior conviction, his Honour considered that matter and noted that the conviction was a long time ago and that he would therefore "not place any weight on it". The earlier conviction had occurred in 1986 and led to Ms Pierce being placed on a $200 two year bond to be of good behaviour on the further condition that she continue with her treatment. It was not submitted by Mr Read that his Honour erred in his approach to the conviction.

[29] In relation to the rehabilitation of each applicant his Honour noted that each had been a user of heroin over a substantial period of time. He said that by September 1994 Mr Gooch had a "significant habit". Thereafter both applicants were described as being "constant and heavy users of that drug". They each tried to get off heroin under a methadone program but both failed.

They both visited Perth and undertook a Naltraxone rapid detoxification program after which they were drug free for a period. Unfortunately they resumed use of heroin in June 1998. In relation to Ms Pierce the psychologist, Mr Joblin, noted that she had a "concerning history" and that she had a number of psychological problems but, on the other hand, he said "she is intelligent and she has good potential". He regarded her drug use as being related to attempts to overcome what he described as "underlying profound problems". He regarded her as motivated to do something about her life and said that her prognosis was reasonably good. In relation to Mr Gooch, Mr Joblin noted that he had undertaken various rehabilitation programs but none had worked. He did not have any diagnosable psychological abnormality. Mr Joblin expressed a more positive outlook for Mr Gooch but he noted that it would be "simply naïve or arrogant to consider that this man's difficulties with drugs are well and truly over … given his long history of heroin use [he] is fragile in relation to such drug use."

[30] In considering sentence his Honour heard from Mr Gooch. He was not impressed with that evidence noting that he obtained the impression that Mr Gooch was not giving a truthful account of the purposes of the purchase and he expressed difficulty in accepting the evidence of Mr Gooch in some areas.

[31] In relation to the admissions in the record of interview made by Mr Gooch it should be noted that Ms Pierce also made admissions to authorities and she

did so at a very early time. In so doing she implicated Mr Gooch. At the time he made his admissions there was no reason for Mr Gooch to believe that there was other than a very strong Crown case against him. The assertion that the Crown case against Mr Gooch was more difficult than that against Ms Pierce is speculative. We see no reason to distinguish between Mr Gooch and Ms Pierce on this basis.

[32] There was no submission made to the learned sentencing Judge that there should be any difference in approach in sentencing the applicants. It was not suggested that Mr Gooch should be treated more leniently than Ms Pierce on the bases now identified by Mr Read or on any other basis. In any event the matters addressed on behalf of Mr Gooch do not identify a need to distinguish between himself and Ms Pierce for the purposes of sentencing. In our view his Honour correctly imposed the same sentence upon each applicant.

[33] For these reasons the applications for leave to appeal were refused.

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