SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hoskin* [2020] QCA 10
PARTIES:	**R** **v** **HOSKIN, Samantha Jane** (applicant)
FILE NO/S:	CA No 311 of 2019 SC No 87 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Date of Sentence: 11 November 2019 (Crow J)
DELIVERED EX TEMPORE ON:	6 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2020
JUDGES:	Fraser and Morrison JJA and Boddice J
ORDERS:	**1. Allow the application for leave to appeal.** **2. Allow the appeal.** **3. Set aside the orders made on 11 November 2019.** **4. Sentence the applicant to 18 months' imprisonment.** **5. Declare the 87 days already served as time served under the sentence.** **6. The applicant be released on parole as from 6 February 2020.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced, on her own plea of guilty, on one count of supplying a dangerous drug, methylamphetamine, with a circumstance of aggravation – where the aggravating circumstance was that the drug was administered to a girl, MEB, only 16 years old – where the sentence imposed was two years' imprisonment, with a parole release date set after serving eight months – whether the sentence is manifestly excessive CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE –

GENERALLY – where the learned sentencing judge erred in his understanding of the applicant's past criminal history – where that led to the misunderstanding that the earliest offences occurred when the applicant was 19, and leniency was extended because of her youth – where it is difficult to conclude that the error might not have had an influence on the way the offending conduct was characterised

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – GENERALLY – where there was a mischaracterisation of the factual basis for sentencing, insofar as it was said that: "when the child said no, she did not want to be injected, you honestly but unreasonably believed that the child wanted the drug but could not inject it herself because of her … phobia" – where the agreed schedule of facts makes it plain that MEB did not wish to be injected at all

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – APPROACH TO SENTENCING PROCESS – GENERALLY – where the learned sentencing judge's approach treated the applicant's response to the probation order, and its requirement to address drug-related problems, as separate from efforts to deal with the applicant's psychiatric condition – where the psychiatric report makes it plain that the applicant's psychiatric conditions impacted upon her ability to respond to efforts to deal with her drug addiction

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the foregoing is sufficient to demonstrate that the sentencing discretion was affected by errors, and must be set aside – where that then requires this Court to resentence the applicant – where the applicant's psychiatric condition and the effects of her substance abuse were factors which diminish the claims for general or personal deterrence by way of her sentence – where her apparent willingness to re-engage in respect of her psychiatric condition, as well as her actual engagement in respect of her drug-related issues, in light of her psychiatric conditions, compel the view that a supervisory order was within a sound exercise of sentencing discretion – where *Ferlin* and *Elliott* stand as yardsticks for a sentence in the order of 12 months, where the supply to the minor involved willing participation by the minor, both as to the drugs and the way in which they were administered; there was no element of corruption, and steps towards rehabilitation

R v Elliott, unreported, Rockhampton Supreme Court, McMeekin J, 8 December 2015, applied

R v Ferlin, unreported, Brisbane Supreme Court, Boddice J, 20 May 2016, applied

COUNSEL: K Hillard with A Cousen for the applicant
MT Whitbread for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

MORRISON JA: On 11 November 2019, the applicant was sentenced, on her own plea of guilty, on one count of supplying a dangerous drug, methylamphetamine, with a circumstance of aggravation. The aggravating circumstance was that the drug was administered to a girl only 16 years old. The sentence imposed was two years' imprisonment, with a parole release date set after serving eight months, namely, 10 July 2020.

The applicant challenges the sentence on the basis that it is manifestly excessive. The challenge is as to the head sentence as well as the requirement that the applicant serve a period in actual custody. As the applicant has now served a period of about 87 days in custody, she seeks an order for her immediate release. The applicant also challenges the sentence on the bases of enumerated errors.

The applicant was 34 years old at the time of the offence. She had a female friend, who was just 16 years old. That friend, to whom I shall refer as MEB, regularly visited the applicant and, on each occasion when she did so, she smoked cannabis, which the applicant provided to her. MEB had attended at the applicant's residence for the purpose of consuming cannabis prior to the current offence. MEB also told the police that she had "tried speed before, and I don't like it."

On 15 March 2018, in the early hours of the morning, MEB received a call from the applicant, asking her to go to the Longreach Hospital and get some needles. Though she was hesitant to do so, MEB complied. MEB then went to the applicant's house alone. She had earlier given the applicant $300 to purchase drugs. The applicant purchased amphetamine, which was dropped off to her house by another person earlier. Although MEB initially wanted cannabis, she agreed to take methylamphetamine, and was encouraged to do so by the applicant.

The applicant and MEB went into the bathroom. Though MEB wanted to take the methylamphetamine, she did not want to be injected, having a fear of needles. The applicant mixed approximately three points, that is, 0.3 grams, of methylamphetamine with water into a syringe. Already reluctant, when MEB saw there was a bubble in the needle, she told the applicant no. The applicant, still honestly but unreasonably believing that because MEB wanted the drug, the applicant could inject it, injected the needle into MEB's arm. MEB fell back into the bathtub, and could only recall waking up in hospital with two puncture marks in her left arm.

MEB suffered an adverse reaction to the drug. She ran out into the yard, and was sweating, and started vomiting. One of the applicant's housemates got MEB some food and milk for her to eat. The applicant took MEB into her house, and into the bedroom. At approximately 1.50 am, the applicant called one of MEB's friends, asking her to go to the house, as MEB needed her. That friend ran to the house, and found MEB in the corner with a blanket. MEB reported to her that she thought her brain was "frying", and that she was cold. MEB had a seizure after approximately half an hour. The applicant and the friend put MEB into a bathtub.

At 3.18 am, the applicant called triple zero. She reported that MEB was awake, breathing, and had not more than one seizure in a row. MEB's friend got on the phone and told officers that MEB was vomiting and had not eaten. The friend told the triple zero operator that MEB was talking to them normally when she started to have a seizure. The friend reported to the operator that MEB was drinking, and asked the applicant how much. The friend then told the operator that MEB had consumed a carton.

Ambulance officers arrived at 3.33 am, and MEB was transported to the Longreach Hospital. Later that day, MEB's mother contacted police regarding her having possibly had a drug overdose. Police spoke to MEB, who indicated the applicant was responsible for injecting her.

On 18 March 2018, the applicant was interviewed by police. She stated that MEB was 16; that she had turned up to her house, and had gone into the applicant's bathroom. The applicant stated that she went into the bathroom five minutes later, and saw MEB was trying to inject herself. The applicant said that MEB asked the applicant, "Can you please do it?" The applicant said she did not want to, but she injected MEB. She said, it was "only the tiniest little bit".

Police asked what the drug was, and the applicant said it was "methylamphetamine or amphetamine". The applicant expressed remorse, stating she never intended to harm MEB. She also described MEB vomiting outside, and having a seizure. The applicant said she had some speed in her drawer, which she thought MEB took. She said the drug was in the syringe already when she entered the bathroom. However, she said, the drug was put into the syringe with a spoon, but then stated she did not know that for sure. She said, water was put in with the powder to dissolve it. In relation to the puncture wounds on MEB's arm, the applicant said that one of the wounds was from where she, the applicant, injected MEB, and the other was from MEB's actions. The applicant also said, she allowed MEB to attend her house to smoke cannabis on various occasions over the past year.

It was stated in the agreed schedule of facts, and not challenged at the sentencing hearing, that the Crown did not accept that MEB asked the applicant to inject her with methylamphetamine. Counsel for the applicant expressly told the learned sentencing judge that:

> "[T]hat is an agreed schedule of the facts."

The applicant was born on 3 December 1983, in Alpha, and grew up in Roma. She moved to Longreach with her parents when she was 12. She was the eldest of three children. Of her two brothers, she was close to one, who lived in Alpha, and worked at the local council. Her father was somewhat overzealous in his corporal punishment of the applicant when she was a child, but she otherwise described a normal childhood. There were no instances of alcohol abuse, illicit drug use, domestic violence, or sexual abuse within the family unit.

The applicant had never married, though she had three children, with three different men. Her former relationship with her youngest child's father was marred by domestic violence. She had her first child at 17, and the second when she was 26; the last was born when she was about 31. The eldest child was 18, and living with the applicant and her parents. Her two younger children were cared for by others: one, the biological grandparents, and the other, in foster care.

The applicant was educated to grade 9, and had been the victim of bullying at school. After leaving school, she found work in local shops, and worked on and off as a delivery driver for 11 years. She had not worked for the six years prior to her sentence, during which time she had a disability support pension.

A report from a psychiatrist revealed the applicant's psychiatric and other issues. After being introduced to methylamphetamine in 2010, she began to hear voices, and had auditory hallucinations. She had started smoking cannabis at the age of 18, and continued that throughout her adult life. She was introduced to amphetamines at 21, and methylamphetamine at about 26. She had attended counselling for drug use, but never undergone a drug rehabilitation program. A probation order in November 2017, following convictions for drug offences, required her to engage in such a program, but the applicant did not fully engage in it.

Her psychiatric history was that she had been known to mental health services since 2011, when she was diagnosed with a schizoaffective disorder, and had been admitted in 2012 and 2014 with auditory hallucinations. She was admitted again in 2015, and received mental health treatment in 2016. Treatment continued through to 2018. However, her response to the mental health services was sporadic. Her illness was characterised by auditory hallucinations, with "good voices" and "bad voices". The "bad voices" were derogatory, and commanding her to do things. When she followed the instructions of the "bad voices", the applicant was usually under the influence of drugs or alcohol. The medications she had been given worked well for a time, but did not overcome the auditory hallucinations. The psychiatrist's opinion was that the applicant:

> "... has a psychiatric history consistent with a severe and enduring psychotic illness since 2015."

She satisfied the criteria for paranoid schizophrenia and the criteria for mental and behavioural disorder due to multiple drug use and use of other psychoactive substances. Her psychosis was characterised by persistent auditory hallucinations. In the psychiatrist's opinion, the illness:

> "... can be further classified as treatment resistant schizophrenia as even with high doses of antipsychotic medication she is symptomatic."

At the time of the alleged offences, the applicant had not been receiving antipsychotic medication, and, instead of having her prescribed treatment, had not received an injection since early December 2017, that is, for a period of over four months. During that time, she was using methylamphetamine every two or three days, and smoking cannabis at night, and hearing voices.

The applicant's criminal history revealed a number of offences concerning dangerous drugs. They commenced with counts of possession of cannabis, in August 2013, at which time the applicant was aged about 30 years old. Two months later, there were further charges of producing cannabis, three small plants. About four years later, in November 2017, the applicant was convicted of possession of dangerous drugs, methylamphetamine; possession of utensils and pipes; and failure to properly dispose of a needle and syringe. She was given a nine-month probation period. At that time, she was 34 years old. The current offences occurred four months into that probation order.

The applicant also had a subsequent conviction for possession of utensils or pipes, in December 2018. Finally, in August 2019, she had convictions for a variety of drug charges, including supply, the day before the current offence, of cannabis, and possession the day after. She was given a second probation period, of 18 months. Significantly, the applicant had never been sentenced to a period of imprisonment.

A report from the applicant's probation orders was tendered at the sentencing hearing. The report dealt with the applicant's compliance with the probation order made on 21 November

2017. She had been referred to Lives Lived Well immediately after the probation order was made. Four months later, they advised that she had not attended at all. Further, at about the same time, it became apparent that although the applicant was open to mental health services, she had not engaged with the Central West Mental Health and Alcohol and Drug Service other than to provide a change of address. The applicant was directed to contact Lives Lived Well, in order to address her substance use. She subsequently attended two appointments with that program. However, she also returned a positive test to cannabis.

On 5 April 2018, the Longreach Family Medical Practice provided information about the applicant's treatment since 2012 in relation to schizophrenia and borderline personality disorder. She had been receiving care through that practice in recent times, according to the report, and had agreed to go on a mental health care plan. On 6 June 2018, the applicant reported that she was undertaking a Positive Parenting Program through Child Safety, and was continuing to be engaged with Lives Lived Well. That program advised, she had not attended any appointments since 12 April 2018.

The summary of the report was that the applicant was assessed as having high needs in relation to substance abuse, and accepted a referral to Lives Lived Well, but her attendance was "somewhat limited".

At the sentencing hearing, the applicant's counsel told the learned sentencing judge, without objection, that since her offending, the applicant had "now engaged with mental health service providers", and was compliant with the injections that were to occur every three weeks.

The learned sentencing judge commenced with a recitation of the relevant facts, drawn from the agreed schedule. His Honour then turned to the applicant's criminal history. Unfortunately, there were some errors in recording these facts. Specifically, his Honour said that the applicant was:

> "... only aged 19 years of age when you had your first conviction, in the Longreach Magistrates Court for possessing dangerous drugs."

The applicant was born on 3 December 1983, and was therefore almost 30 years old when that order was made. His Honour went on to say that the applicant had been dealt with relevantly leniently "because you were young"; that could not have been correct. In respect to the applicant's second court appearance, on 22 October 2013, his Honour again recorded that the applicant was aged 19; she was then almost 30 years old. His Honour then referred to the offences and convictions recorded on 21 November 2017, referring to the applicant as being aged 23; in fact, the applicant was almost 34.

The learned sentencing judge then reviewed the probation report, noting the applicant's poor response to programs to assist with her drug abuse. His Honour did note that, subsequent to her most recent probation order being put in place, the applicant had attended on nine occasions, and therefore her compliance:

> "... more recently, is far more impressive."

The learned sentencing Judge then recited the essential parts of the psychiatric report and the applicant's personal circumstances. His Honour referred to the medical history:

> "... which shows that cannabis and ice have been a consistent feature of your mental health condition, and hence the diagnosis, in addition to the schizophrenia of mental and behavioural disorder due to multiple drug use."

His Honour described it as "quite a sad case". The learned sentencing judge referred to the fact that it was a serious aggravating feature that the offence was committed whilst on probation. His Honour also referred to features in the applicant's favour, which included (a) the plea of guilty, which, though it was not an early plea, nonetheless aided the administration of justice; its lateness was explained by negotiations as to the precise factual basis for the plea; (b) the Crown accepted that the applicant did not corrupt MEB, because she had previously used other drugs "and perhaps a similar drug"; and (c) the applicant had made frank admissions, and exhibited remorse, as shown in her record of interview, though this was tempered by "your failed attempt to exclude the evidence".

His Honour distinguished all of the cases that had been advanced by both the prosecutor and the defence counsel. They were *R v Alizadeh* [2017] QCA 269; *R v Ferlin*, unreported, Brisbane Supreme Court, Boddice J, 20 May 2016; and *R v Elliott*, unreported, Rockhampton Supreme Court, McMeekin J, 8 December 2015. In each case, his Honour found that the circumstances were quite different from those before him. His Honour then concluded his sentencing remarks as follows:

> "The sentence which we impose upon you is the sentence of two years imprisonment. You will be released on parole after having served a third of that, which is a period of eight months, so it ought let you be released on parole on the 10th of July 2020."

In my respectful view, there are a number of difficulties evident with the approach taken by the learned sentencing judge. They are summarised as follows. First, his Honour erred in his understanding of the applicant's past criminal history. That led to the misunderstanding that the earliest offences occurred when the applicant was 19, and leniency was extended because of her youth.

In fact, all of the applicant's offending took place when she was a mature-aged person, the first time occurring when she was several months off turning 30. The probation order which was in place when the current offence was committed was imposed when she was almost 34. It is difficult to conclude that the error might not have had an influence on the way the offending conduct was characterised, particularly as reference was made to the leniency with which the applicant had been dealt.

More significantly, all of the offending had occurred subsequently to her diagnosis of schizoaffective disorder, and during a period when she was in receipt of a disability support pension, being unable to work because of her psychiatric and substance abuse issues. The offending in 2017, in respect of which she received the probation order, was also subsequent to her suffering what the psychiatrist described as a "severe and enduring psychotic illness", consistent with paranoid schizophrenia and mental and behavioural disorder due to multiple drug use and use of other psychoactive substances.

Secondly, the applicant's response to the probation order had to be seen in the context of her psychiatric condition, as well as the condition induced by the substance abuse. The learned sentencing judge's approach treated the response to the probation order, and its requirement to address drug-related problems, as separate from efforts to deal with the applicant's psychiatric condition. That dichotomy was exemplified in his Honour's comments:

> "As Dr Duggan says, and you have heard me discuss with the barristers, if you choose to take cannabis, if you choose to take methylamphetamine, and you choose not to take your antipsychotic drugs, then you're a danger

> to society, and that leaves the Court with no option but to lock you up. So if you choose the drugs, you will choose prison."

The psychiatric report makes it plain that the applicant's psychiatric conditions impacted upon her ability to respond to efforts to deal with her drug addiction.

Thirdly, there was a mischaracterisation of the factual basis of the sentencing, insofar as it was said that:

> "When the child said no, she did not want to be injected, you honestly but unreasonably believed that the child wanted the drug but could not inject it herself because of her … phobia."

The agreed schedule of facts makes it plain that MEB did not wish to be injected at all, even if she was prepared to take methylamphetamine. It records that MEB said "she did not want to be injected", and told the applicant "no" when the needle was prepared.

In my respectful view, the foregoing is sufficient to demonstrate that the sentencing discretion was affected by errors, and must be set aside. That then requires this Court to resentence the applicant.

The circumstances of the offence have been set out above. Although this was a case of a dangerous drug being administered to a minor, MEB was a friend of the applicant, and had some history of drug use in the applicant's company, albeit in relation to cannabis. Further, MEB told police that she had previously tried speed, inferentially prior to the offence in question. As the learned sentencing judge acknowledged, this was not a case where the offender corrupted a minor, nor was it committed in order to achieve some other purpose, such as sexual favours. Further, the accepted fact was that while the applicant's belief that she could inject MEB, because MEB wanted to try the drugs, was unreasonable, nonetheless that view was honestly held. In the circumstances, the unreasonable aspect could only have been that MEB objected to being injected.

It is true that the applicant's response in the police interview included some statements which, given the agreed set of facts, were lies. Instances of that were the applicant's statement that MEB was trying to inject herself, the drug was in the syringe already when the applicant entered the bathroom, and MEB asked the applicant to inject her. However, at the sentencing hearing, the prosecutor did not place any emphasis on the fact that those lies were told.

The applicant's psychiatric condition is explained in the psychiatrist's report, and the effects of her substance abuse were factors which diminish the claims for general or personal deterrence by way of her sentence: *R v Elliott* [2000] QCA 267 at [11]; *R v Neumann; Ex parte Attorney-General (Qld)* [2007] 1 Qd R 53 at [27]; *R v Goodger* [2009] QCA 377 at [21]. Further, in my respectful view, they reveal that the imposition of a period of actual custody exceeding the three months that the applicant has already served was inappropriate.

While the applicant's performance under the probation order made in 2017 was not impressive, it was the fact that her response to the 2019 probation order was far better. She had engaged nine times with probation officers, and been referred to a psychologist, but was waiting to see her general practitioner. Her apparent willingness to re-engage in respect of her psychiatric condition, as well as her actual engagement in respect of her drug-related issues, in light of her psychiatric conditions, compel the view that a supervisory order was within a sound exercise of sentencing discretion.

Further, no other comparable cases suggest a head sentence as high as two years. Not surprisingly, none of the factual circumstances of those cases are particularly close to the present case, although they all involve the administration of dangerous drugs to a minor. That notwithstanding, *Ferlin* and *Elliott* stand as yardsticks for a sentence in the order of 12 months, where the supply to the minor involved willing participation by the minor, both as to the drugs and the way in which they were administered; there was no element of corruption, and steps towards rehabilitation. The present case is somewhat more serious, because MEB's willingness was only to the type of drug, but not to the method of administration. *Alizadeh* is of no utility, given that the circumstances are so removed from the current case.

The applicant also referred to *R v Russell & Callaghan* [1995] QCA 454; *R v Sainsbury*, unreported, Lyons J, Brisbane Supreme Court, 1 August 2017; *R v Gesler*, unreported, District Court, 26 November 2015; and *R v Gesler* [2016] QCA 311. *Russell & Callaghan* do not assist, given that it did not involve a schedule 1 drug, and the offending conduct had ulterior purposes, and took advantage of the minor's impressionability. *Sainsbury* involved the administration of methylamphetamine by a mother to her own daughter, in circumstances of a dysfunctional relationship, and for that reason may be distinguished from the current case. The circumstances in *Gesler* are far removed from the present, and there is no need to refer further to it.

In the particular circumstances, and allowing some moderation to reflect the fact that the existing probation order still has about 12 months' remaining operation, a sentence higher than 12 months was appropriate, but not as high as two years. In my view, a sentence of 18 months is appropriate. Further, for the reasons outlined above, a further period of actual custody is not required, but rather an order providing for supervision. For that reason, and given the applicant has now served 87 days in custody, I would order her immediate release on parole.

I propose, therefore, the following orders:

1. Allow the application for leave to appeal.
2. Allow the appeal.
3. Set aside the orders made on 11 November 2019.
4. Sentence the applicant to 18 months' imprisonment.
5. Declare the 87 days already served as time served under the sentence.
6. The applicant be released on parole as from 6 February 2020.

FRASER JA: I agree.

BODDICE J: I agree.

FRASER JA: The orders are those articulated by Justice Morrison. We thank counsel for their assistance.

MR WHITBREAD: Thank you.

MS HILLARD: Thank you, your Honour.

FRASER JA: Madam Associate, call the next matter.