SUPREME COURT OF QUEENSLAND

CITATION:	*R v Frith* [2017] QCA 143
PARTIES:	**R** **v** **FRITH, Robert Benjamin** (applicant)
FILE NO/S:	CA No 353 of 2016 SC No 102 of 2016 SC No 103 of 2016 SC No 104 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Mackay – Date of Sentence: 24 November 2016
DELIVERED ON:	23 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2017
JUDGES:	Morrison and McMurdo JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal against sentence be allowed.** **3. Sentence varied by substituting a sentence of 5 years, suspended after the applicant has served 3.5 years, for an operational period of 5 years, on the count of trafficking in dangerous drugs.** **4. The other sentences imposed on 24 November 2016 are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was sentenced to imprisonment for six years for trafficking in

dangerous drugs – where the application of *Drugs Misuse Act* 1986 (Qld) s 5(2) meant that the applicant must then serve 80 per cent of that sentence – where the applicant contends that the sentence imposed is manifestly excessive – where the applicant contends that the sentencing Judge failed to have proper regard to the applicant's rehabilitation – where the applicant contends that the sentencing Judge erred in imposing a sentence which enlivened the provisions of *Drugs Misuse Act* 1986 (Qld) s 5(2) – where the evidence before the sentencing Judge demonstrated that the applicant had been rehabilitated – whether the sentence imposed was manifestly excessive – whether a lack of regard to the applicant's rehabilitation infected the sentencing discretion

Drugs Misuse Act 1986 (Qld), s 5(2)
Penalties and Sentences Act 1992 (Qld), s 144

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, applied
R v Barton [2006] QCA 367, applied
R v Briggs [2012] QCA 291, considered
R v Brookes [2017] QCA 63, considered
R v Clark [2016] QCA 173, considered
R v Hunt [2016] QCA 297, considered
R v Neilson [2014] QCA 221, cited
R v Prendergast [2012] QCA 164, considered
R v Vailea (Sentence, Unreported, Henry J, Supreme Court at Mackay, 14 October 2016), considered

COUNSEL: The applicant appeared on his own behalf
J A Wooldridge for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the orders his Honour proposes.

[2] **McMURDO JA:** I agree with Boddice J.

[3] **BODDICE J**: On 24 November 2016, the applicant pleaded guilty to one count of supplying the dangerous drug methylamphetamine, one count of trafficking in the dangerous drug methylamphetamine, one count of possessing a mobile phone used in connection with the commission of the offence of trafficking and one count of possessing a category R weapon. The applicant also pleaded guilty to a summary charge of possessing a restricted item.

[4] On that same day, the applicant was sentenced to six years imprisonment on the trafficking count, and lesser but concurrent terms of imprisonment for the supply

count, the possession of the weapon count and the summary charge. He was convicted but not further punished in respect of the possession of the mobile phone count. As s 5(2) of the *Drugs Misuse Act* 1986 ("the Act") was applicable, the applicant was required to serve 80 per cent of the sentence imposed on the trafficking account prior to being eligible for parole.

[5] The applicant seeks leave to appeal the sentence imposed on the trafficking count. He relies on three grounds of appeal, in the event that leave is granted. First, that the sentence imposed was manifestly excessive in all the circumstances. Second, that the sentencing Judge failed to have proper regard to all mitigating factors and, in particular, the applicant's applicable rehabilitation. Third, that the sentencing Judge erred in imposing a sentence with the consequence s 5(2) of the Act was applicable.

Background

[6] The applicant was born on 28 May 1979. He was aged 37 at the time of conviction and 35 and 36 at the time of commission of the offences. The applicant had a relevant past criminal history.

[7] In February 1999, he was convicted of offences of supplying dangerous drugs, producing dangerous drugs, possessing dangerous drugs and possession of a utensil in 1999. Those offences related to the dangerous drug cannabis. In respect of each offence, the applicant was fined with no conviction recorded.

[8] In July 1999, the applicant was convicted of further offences of supplying dangerous drugs, possessing dangerous drugs, possessing things used in the commission of a crime defined in Part 2 and possessing a utensil. Again, the offences related to the dangerous drug cannabis. The applicant was fined and convictions recorded.

[9] In May 2001, the applicant was convicted of offences of producing dangerous drugs, possessing dangerous drugs, possessing anything for use in the commission of a drug offence and possessing utensils. All offences related to the dangerous drug cannabis. The applicant was sentenced to three months imprisonment, wholly suspended for an operational period of nine months.

[10] In August 2003, the applicant was convicted of offences of producing dangerous drugs, possessing dangerous drugs in excess of the Schedule 3 quantity, possessing dangerous drugs, possessing property suspected of being proceeds and possessing utensils. The offence primarily related to the dangerous drug methylamphetamine. The applicant was also convicted of weapons offences. The applicant was sentenced to an effective head sentence of four years imprisonment, suspended after having served 15 months, for an operational period of four years.

[11] In January 2011, the applicant was convicted of offences of possessing dangerous drugs and possessing utensils. The applicant was fined with convictions recorded.

Offences

[12] The count of supplying a dangerous drug related to one instance of supplying a dangerous drug to an undercover officer approximately nine months prior to the commencement of the trafficking period. That supply related to a substance weighing 3.5 grams. On analysis it was found to contain 1.222 grams pure methylamphetamine. The supply was in exchange for $2,000 cash.

[13] The count of trafficking related to the period 17 July 2014 to 29 May 2015. It involved wholesale dealing in methylamphetamine. During the trafficking period, the applicant made seven actual supplies of the drug methylamphetamine. On five occasions, the supply involved 14 grams of high purity methylamphetamine. On one occasion, it involved the supply of slightly under seven grams of high purity methylamphetamine. The first occasion involved the supply of 0.15 grams only.

[14] The last actual supply occurred on 10 January 2015. There were indications of a willingness to continue to supply methylamphetamine after those dates. In total, the applicant actually supplied in excess of 77 grams of substance containing in excess of 58 grams of pure methylamphetamine in exchange for $36,150 cash. The applicant employed another person to undertake those supplies. She was paid a weekly sum to sell drugs on his behalf eight hours a day, seven days a week. The applicant had two known suppliers. The applicant sourced drugs from one on approximately 10 occasions between 11 November 2014 and 9 March 2015.

[15] The facts relied upon on sentence alleged the applicant had a further seven customers to whom thirteen instances of supplies were made, with the applicant primarily selling in quarter and half ounce quantities. There was also evidence the applicant arranged for an associate to attempt to recover a debt due from a customer during the trafficking period and that the applicant had indicated in telecommunications during the trafficking period that he was aware of a liability of seven to 10 years imprisonment should he be apprehended by police.

[16] It was alleged the applicant had told an undercover agent that he had $450,000 stored as well as other assets and that he was looking to save $1 million. At sentence, it was contended this conversation was boasting and not based in truth and was made at a time when the applicant was affected by drugs. It was also alleged on sentence that the applicant's operation involved some subterfuge with the applicant taking care in what was discussed over the telephone and deleting messages from his phone.

Sentence hearing

[17] At the sentence hearing, a large quantity of material was tendered as to the applicant's personal circumstances and the steps taken by him since the offences by way of rehabilitation. One witness was also called in respect of that rehabilitation.

[18] In summary, the material relied upon by the applicant established that the applicant had successfully completed a rehabilitation programme conducted by the Salvation Army and had thereafter maintained a positive role in mentoring others in the community. There was evidence of regular attendance at counselling and other sessions. The applicant also produced evidence of clear drug screenings over an extended period.

[19] In addition to that material, reports from a clinical psychiatrist and a clinical psychologist spoke of the applicant having clear insight into the unacceptability of his behaviour with a genuine wish to change and demonstrated progress towards rehabilitation. Those reports also contained an explanation for the applicant having commenced using methylamphetamine in 2010. He had suffered a workplace injury. His use thereafter had escalated to daily use leading to the development of a substance abuse disorder.

Sentencing remarks

[20] The sentencing Judge observed that the applicant's offending involved a considerable degree of planning and some sophistication, including taking steps to avoid detection. It was a carefully managed wholesale operation, inconsistent with street level activities purely to feed a drug addiction. The applicant had an employee. He had sold high quantities of high purity drugs for significant sums. The applicant was aware of the seriousness of his actions and their consequences, including substantial periods of imprisonment if apprehended by police. The offending had also been committed against a background of a relevant criminal history, including having previously served a period of actual imprisonment for drug offences.

[21] The sentencing Judge acknowledged the applicant's pleas of guilty and the time the applicant had spent in pre-sentence custody, which was declared as time served. The sentencing Judge observed that the material placed before him was impressive, noting he had "rarely" seen such an impressive bundle of evidence in support of the case for rehabilitation of an offender. However, the material was so impressive that it had "all the hallmarks of an elaborate preparation" for sentence. The sentencing Judge said the material left him with a lurking doubt that the applicant had approached the sentence with "the same degree of planning, foresight and insight" that he had approached his trafficking business. The sentencing Judge, however, said he would put that to one side and dismiss it "as a lurking, not proven or established, fear".

[22] The sentencing Judge observed that the evidence of rehabilitation was such that he could not overlook it. The applicant had taken steps towards rehabilitation. However, the applicant was a mature offender with a relevant prior history who had engaged in serious trafficking for a commercial reward. The trafficking enterprise had involved substantial quantities of methylamphetamine, usually at a high level of purity.

[23] The sentencing Judge found there was a well recognised need to protect the community and denounce the applicant's conduct. The sentencing Judge expressly acknowledged the effect of s 5(2) of the Act but concluded a sentence of between four and five years, as urged by the applicant's counsel, would not be "a sentence within the sound exercise of a sentencing discretion". The factors referred to warranted a sentence of between seven to eight years. However, in light of the evidence of the attempts at rehabilitation", the sentencing Judge imposed a sentence of six years for the trafficking count.

Applicant's submissions

[24] The applicant submits the sentence imposed was manifestly excessive having regard to the evidence of rehabilitation and the consequence of the imposition of a sentence of six years imprisonment due to the effect of s 5(2) of the Act.

[25] The applicant submits the sentence imposed failed to give proper regard to the mitigating factors, and in particular, his rehabilitation. Whilst the sentencing Judge had referred to the evidence of rehabilitation as impressive, the sentencing Judge erroneously viewed those efforts or attempts at rehabilitation as part of a carefully constructed and executed plan for sentence. No real allowance was given for the applicant's rehabilitation, which was genuinely established by the material relied upon at the sentencing hearing.

Respondent's submissions

[26] The respondent submits the sentence imposed was not manifestly excessive. The applicant had engaged in the wholesale trafficking of a Schedule 1 drug for commercial gain over a ten and a half month period. He was a mature offender with a relevant previous criminal history, including having previously been sentenced to a period of actual imprisonment for drug offences. The applicant's efforts towards rehabilitation, whilst relevant, could not outweigh matters of general deterrence and the need for denunciation of that conduct.

[27] The respondent further submits the legislative requirement that the applicant in that event serve 80 per cent of his sentence was expressly considered by the sentencing Judge in determining the appropriate sentence was one of six years imprisonment, not four to five years imprisonment as contended for by the applicant.

[28] Finally, the respondent submits the sentencing Judge did not err in relation to the evidence of rehabilitation. The sentencing Judge expressly referred to the substantial material relating to rehabilitation. There was no basis to conclude the sentencing Judge erred in the consideration of that material. The observations that the material should be viewed with "some caution" were appropriate having regard to the scale and circumstances of the offending, the applicant's stated motivation for that offending and the applicant's past criminal history.

Discussion

Manifest excess

[29] Absent a positive finding of successful rehabilitation, the sentence of six years imprisonment imposed on the applicant for the offence of trafficking was within a proper exercise of the sentencing discretion. Trafficking in the dangerous drug methylamphetamine at a wholesale level for a period in excess of 10 months involves serious criminality. In the applicant's case, that criminality was compounded by the quantities and purities of the drug, the level of sophistication of his operation and its brazenness having regard to his stated knowledge of the likely period of imprisonment if he was detected by the authorities.

[30] When regard was had to the applicant's age and past criminal history, which included serving a not insignificant period of actual imprisonment for drug offences, there was a sound basis for the sentencing Judge's observation of the need for general deterrence and community denunciation in any sentence imposed on the applicant. The circumstances overall also justified the sentencing Judge's observations that a sentence for the drug trafficking in excess of six years was open.

[31] In *R v Briggs*[1] a mature offender with a prior extensive criminal history who was himself a drug addict was sentence to eight years imprisonment for trafficking in methylamphetamine over a nine month period. The offender had pleaded guilty. An application for leave to appeal on the ground that the sentence was manifestly excessive was refused. In *R v Hunt*[2] a sentence of seven years imprisonment for trafficking in methylamphetamine over a five month period was also not disturbed on appeal.

[32] The applicant accepted that the comparable decisions relied upon by the respondent at the sentence hearing[3] involved the imposition of more substantial sentences of imprisonment than were imposed upon him. However, he submitted that in each case their pleas of guilty were reflected by a significantly reduced parole eligibility date.

[33] Whilst those decisions, and the decisions referred to in [29] involved circumstances where s 5(2) of the Act had no operation, other decisions which were subject to s 5(2) of the Act, supported a sentence of six years for the drug trafficking as being within a sound exercise of the sentencing discretion. Those decisions include *R v Vailea*[4], who was sentenced to eight years imprisonment for trafficking over a nine month period.

[34] The decisions of *R v Clark*[5] and *R v Brookes*[6] had distinguishing features. *Clark* was a street level drug trafficker who was significantly younger, trafficked over a significantly shorter period, and who had a significant tragedy in her life prior to turning to drugs. *Brookes'* sentence must be viewed in the context of other sentences being imposed cumulatively for drug related offending in separate and discreet periods.

[35] In any event, that the sentence imposed on the applicant was higher than imposed in another factual circumstance does not establish manifest excessiveness. A particular fact situation does not support a single correct decision. The sentencing discretion involves an allowance of flexibility in the exercise of that discretion.[7]

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1 [2012] QCA 291.

2 [2016] QCA 297.

3 *R v Prendergast* [2012] QCA 164; *R v Neilson* [2014] QCA 221.

4 *R v Vailea* (Sentence, Unreported, Henry J, Supreme Court at Mackay, 14 October 2016).

5 [2016] QCA 173.

6 [2017] QCA 63.

7 *Markarian v The Queen* (2005) 228 CLR 357 at 371.

[36] In undertaking the exercise of that discretion regard must obviously be had to the legislative consequence of a sentence of imprisonment, having regard to the then existing provisions of s 5(2) of the Act. However, the operation of that provision cannot of itself render a sentence manifestly excessive if the sentence is otherwise a proper exercise of the sentencing discretion. The operation of the section is the consequence of the legislative intention of Parliament.

[37] The sentencing Judge expressly had regard to the effect of s 5(2) of the Act when reducing the sentence of imprisonment imposed on the applicant for trafficking and dangerous drugs. No error has been demonstrated in that approach.

[38] The sentence imposed was not manifestly excessive.

Rehabilitation

[39] At the sentencing hearing, the applicant placed before the sentencing Judge a considerable body of material evidencing the applicant's successful rehabilitation. That material established the applicant had successfully completed courses to address his substance addiction, was now drug-free and had been for a considerable period of time, was continuing to assist others in their rehabilitation from the use of drugs and had the support of persons well experienced in dealing with persons who suffered from drug addictions.

[40] Oral testimony was also given by a member of the Salvation Army who personally had significant experience with persons suffering a drug addiction. That testimony supported the assertions of rehabilitation. It was not contended by the Crown in cross-examination that the applicant had not rehabilitated successfully.

[41] The evidence placed before the sentencing Judge supported a conclusion that the applicant was rehabilitated from his drug addiction. That was the finding contended for on sentence. It was not submitted by the Crown that such a finding was not open on the evidence. Notwithstanding that situation, the sentencing Judge made no finding that the applicant was rehabilitated from his drug use.

[42] Despite acknowledging the impressiveness of the material placed before the Court and dismissing a lurking fear as to its genuineness, the sentencing Judge sentenced the applicant on the basis he had taken "steps towards" and had made "efforts at" rehabilitation. That conclusion failed to give proper weight to the evidence of rehabilitation. An appropriate exercise of the sentencing discretion must give sufficient recognition to successful rehabilitation.[8]

[43] The failure to make findings in relation to that material meant the sentencing Judge did not properly give due regard to the applicant's rehabilitation when exercising the sentencing discretion. The presence of rehabilitation was central to the applicant's submissions. The failure to make a finding of rehabilitation, in those particular circumstances, constituted an error which infected the exercise of the

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[8] *R v Barton* [2006] QCA 367 at [15].

sentencing discretion. As that discretion has miscarried, it is necessary to re-exercise the sentencing discretion.

[44] As to the re-exercising of the sentencing discretion, both the applicant and the respondent relied on a number of authorities. In *R v Neilson*[9] this Court observed the cases span trafficking "in different drugs, in different quantities and with different levels of intensity of participation by the offenders. As well, significantly different personal circumstances were involved."[10]

[45] A consideration of the circumstances of the applicant's offending and of his personal circumstances supported the imposition of a head sentence of six years, as imposed by the sentencing Judge, for an offence of trafficking over an extended period of time, where there were steps towards rehabilitation. However, the applicant had undertaken more than steps towards rehabilitation. He was rehabilitated on the evidence placed before the sentencing Judge.

[46] The finding of successful rehabilitation, which ought properly to have been made on the material tendered on sentence, justified a reduction in the head sentence to be imposed on the applicant for trafficking in dangerous drugs from six years to five years imprisonment.

[47] Once that conclusion is reached, consideration must be given to whether it is appropriate to suspend any part of the sentence.[11] The applicant's successful rehabilitation justified a conclusion that it was appropriate to suspend part of that sentence. The applicant's need for supervision was less. Further, the applicant's continued rehabilitation would benefit from a fixed release date.

[48] Allowing for those matters, I would order that the sentence of five years, to be imposed in respect of the trafficking count, be suspended after the applicant has served 3.5 years, for an operation period of five years.

Orders

[49] I would order:

1. Leave to appeal be granted.
2. The appeal against sentence be allowed.
3. Sentence varied by substituting a sentence of 5 years, suspended after the applicant has served 3.5 years, for an operational period of 5 years, on the count of trafficking in dangerous drugs.
4. The other sentences imposed on 24 November 2016 are otherwise confirmed.

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9 [2014] QCA 221.

10 At [29].

11 *Penalties and Sentences Act* s 144.