SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hughes* [2017] QCA 178
PARTIES:	**R** **v** **HUGHES, Kelly Anne** (applicant)
FILE NO/S:	CA No 345 of 2016 SC No 74 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 14 November 2016 (Boddice J)
DELIVERED ON:	22 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2017
JUDGES:	Morrison and Philippides JJA and Brown J
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to a 25 count indictment where the most serious charge was trafficking in a dangerous drug – where the applicant was sentenced to imprisonment for four years on the trafficking count and other concurrent sentences – where pursuant to the *Drugs Misuse Act* s 5(2), the applicant was ordered to serve 80 per cent of that sentence before being released on parole – where s 5(2) of the *Drugs Misuse Act* was repealed after the applicant was sentenced – where the applicant appeals on the ground that the sentence is manifestly excessive – where the applicant refers to the sentences of similar offenders who were involved in the same drug trafficking scheme but were sentenced after s 5(2) of the *Drugs Misuse Act* was repealed – where the respondent submitted that issues of parity are not relevant – where the applicant claims to have made substantial efforts and successful attempts to rehabilitate – whether the sentence was manifestly excessive – whether, if the application were allowed, the applicant would be subject to s 5(2) of the *Drugs Misuse Act* as it stood at the time of the original sentence *Criminal Code* (Qld), s 668E

Drugs Misuse Act 1986 (Qld), s 5(2)
Serious and Organised Crime Legislation Amendment Act 2016

R v AAH & AAG (2009) 198 A Crim R 1; [2009] QCA 321, followed
R v Borowicz [2016] QCA 211, considered
R v Crossley (1999) 106 A Crim R 80; [1999] QCA 223, followed
R v Farrugia (2011) 32 VR 140; [2011] VSCA 24, distinguished
R v Floyd [2014] 1 Qd R 348; [2013] QCA 74, cited
R v Leathers (2014) 147 A Crim R 137; [2014] QCA 327, followed
R v Meerdink [2010] QCA 273, followed
R v Mikaele [2008] QCA 261, cited
R v Wruck (2014) 239 A Crim R 111; [2014] QCA 39, followed
Radenkovic v The Queen (1990) 170 CLR 623; [1990] HCA 54, followed

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

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

[1] **MORRISON JA:** On 18 May 2016, Ms Hughes pleaded guilty to a 25 count indictment:

(a) count 1: trafficking in a dangerous drug (methylamphetamine);

(b) count 2: producing a dangerous drug (cannabis);

(c) counts 3-21: supplying dangerous drugs (14 methylamphetamine within the date span of count 1, three MDMA, one cannabis and one GHB)[1];

(d) count 22: possessing a thing used in connection with trafficking in a dangerous drug (a mobile phone); and

(e) counts 23, 24 and 25: possessing dangerous drugs (testosterone, methylamphetamine and cannabis).

[2] The most serious charge, trafficking in methylamphetamine, took place over almost eight weeks between 25 September 2014 and 19 November 2014. The supply offences occurred within that period, and the possession offences occurring soon after when Ms Hughes was on bail.

[3] On the trafficking charge Ms Hughes was sentenced to imprisonment for four years. Pursuant to s 5(2) of the *Drugs Misuse Act* 1986 (Qld), the learned sentencing judge ordered that she serve 80 per cent of her sentence before being released. A serious drug offence certificate was issued.

[4] Penalties on the other offences were: one year imprisonment for each of the five supply offences[2] and the production offence, six months imprisonment on each possession offence, a conviction and no further punishment for the remaining

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1 Gamma hydroxybutyric acid.

2 The others constituting the trafficking, and for that reason were not punished apart from a conviction being recorded.

offences. All sentences were to be served concurrently, resulting in a head sentence of four years.

[5] Ms Hughes seeks leave to appeal against her sentence on the ground that it is manifestly excessive. The application did not attack the head sentence, but rather the period of imprisonment to be served (80 per cent of four years, being approximately three years and two and a-half months). While no specific error on the part of the learned sentencing judge was urged, the contentions surrounded the following key points:

(a) Ms Hughes was sentenced one month before s 5(2) of the *Drugs Misuse Act* was repealed, removing the requirement that offenders convicted of drug trafficking serve 80 per cent of a sentence of imprisonment;

(b) she had made efforts to rehabilitate, and was removed from a rehabilitation centre to attend the sentencing hearing before completing the rehabilitation program;

(c) while the trafficking generated a profit, that income was used to support Ms Hughes' own drug addiction; and

(d) others convicted as a result of the same police operation received a lesser sentence, and one offender was sentenced after s 5(2) was repealed.

Circumstances of the offending

[6] An agreed schedule of facts was tendered.[3] Ms Hughes was identified during a police operation investigating the distribution of dangerous drugs by one Lewis. Lewis was distributing or organising the distribution of street level quantities, primarily methylamphetamine but also GHB and MDMA on occasion. Through telephone intercepts, the operation identified Ms Hughes as a supplier of methylamphetamine to Lewis, who had about 38 customers.

[7] The schedule of facts particularised each of the 19 supply counts and described the trafficking. The trafficking occurred over an eight week period, and consistently involved the supply of 3.5 grams of methylamphetamine. Lewis paid cash. Ms Hughes also assisted Lewis to supply GHB and MDMA to another person.

[8] The intercepts showed that Ms Hughes was in a position to supply in greater quantities than 3.5g. The price charged was at times $500, and some transactions involved $1,000 and $3,000. Prices quoted by Ms Hughes were up to $7,500 and $14,000 for greater quantities. At one point Ms Hughes intended to increase the quantity of methylamphetamine supplied, from 3.5 grams to one ounce. She did so suggesting that would mean that she and Lewis could meet less frequently.

[9] On 18 November 2014 Lewis' home was searched. Ms Hughes was present during the search and was personally searched, at which time police found the phone Ms Hughes was using to contact Lewis. She was charged with trafficking and granted bail on 19 November 2014. The possession offences came to light when police searched Ms Hughes' home on 2 December 2014. Ms Hughes cooperated with police for the duration of that search and made some limited admissions. She declined to participate in an interview and was later released on bail.

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3 AB 50.

Antecedents of Ms Hughes

[10] Ms Hughes was born on 11 January 1981, and thus 33 years old at the time of the offences and 35 when sentenced. She has a criminal history in both Queensland and Tasmania. Her significant criminal history[4] reveals offending conduct from when she was 17 years old, and includes consistent offences relating to:

(a) dishonesty offences (such as unauthorized dealing with shop goods, entering premises, stealing, dishonest application of property, receiving and forgery): 1998, 2000, 2002, 2004, 2007, 2008, 2009, 2012 and 2013;

(b) unlawful use of motor vehicles: 2000, 2002, 2009, 2012 and 2013;

(c) breach of orders or undertakings (bail, probation or intensive correction orders, or suspended sentence): 2000, 2001, 2002, 2004, 2006, 2008, 2009 and 2012;

(d) drug possession and related matters: 2000, 2006 and 2012;

(e) weapons: 2000; and

(f) assault: 2010.

[11] The learned sentencing judge accepted that Ms Hughes' criminal history was consistent with that of a person with a long-standing drug addiction.[5]

[12] Ms Hughes spent most of her childhood in Papua New Guinea. At 12 years old Ms Hughes commenced at a boarding school in Brisbane. When Ms Hughes was in Grade 10, her mother returned to Australia and she moved with her mother and sisters to New South Wales, where she completed years 11 and 12. Ms Hughes presented as an intelligent and capable person. Upon graduating high school, she worked as a personal assistant, and later as a contracts administration manager.

[13] Despite those positive aspects of her upbringing, Ms Hughes' Counsel raised a number of traumatic childhood experiences during the sentencing hearing, including witnessing people being killed in Papua New Guinea. Counsel highlighted that it was while working as a contracts administration manager that Ms Hughes began associating with drug users, and became a drug user herself.

[14] Over a 15 year period, Ms Hughes suffered an addiction to a number of substances including heroin and methylamphetamine. During that time she resigned from her job, gave birth to a son, and accrued her criminal history. Ms Hughes' offending occurred regularly until the time she was arrested in 2014.

[15] Ms Hughes had been sentenced to various periods of imprisonment, largely suspended or the subject of immediate parole. However she had spent periods in custody in 2000, 2001, 2008 and 2012. Her history was one characterised by the learned sentencing judge as "an appalling history on of non-compliance with court orders".

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4 Queensland history at AB 40; Tasmanian history at AB 49. In many of the years referred to there were multiple offences in some categories.

5 AB 17.

[16] A reference provided by her mother[6] indicates that Ms Hughes has enjoyed her family's support for the entirety of her drug addiction. It refers to Ms Hughes' rehabilitation efforts.

Approach of the sentencing judge

[17] The learned sentencing judge reviewed the circumstances surrounding the offending and Ms Hughes' personal history.[7] Having done that his Honour took into account the following factors in determining the sentence to be imposed:

(a) the guilty pleas were timely, showing cooperation with authorities and remorse; however the remorse was "for the position you are now in";

(b) the offending was serious, described as "intensive trafficking, involving persistent and consistent conduct [and] … substantial supplies with a number of customers"; the methylamphetamine was supplied over an eight week period; the offending was made more serious by Ms Hughes' extensive criminal history;

(c) Ms Hughes suffered from a longstanding drug addiction; part of the proceeds of the offending was used to pay for her habit;

(d) Ms Hughes' criminal history reveals significant non-compliance with court and parole orders; she had "consistently breached each and every one of [the opportunities given by the courts] except, to your credit in relation to the last, when you were released on parole"; however she engaged in the trafficking soon after completing that parole; although she completed parole satisfactorily after a period of imprisonment, the effect of previous sentences on her has been minimal in terms of supporting and encouraging rehabilitation;

(e) she was sentenced on the basis of trafficking in one drug, even though she was "dabbling in the supply of others in a broad-ranging way"; she was sentenced on the basis that her production of cannabis, and the drugs under the possession charges were for personal use;

(f) however, Ms Hughes possessed testosterone, cannabis and methylamphetamine while on bail for the trafficking offence;

(g) the efforts since her arrest to undertake rehabilitation, and the mother's reference;

(h) the sentence imposed on Fyfe,[8] an offender identified in the same operation, with similar circumstances and to whom considerations of parity were relevant;

(i) the totality principle, with regard to the number of like offences committed; and

(j) weight had to be given to the purposes of punishing Ms Hughes, supporting her rehabilitation, denouncing this type of offending, and protecting the community from those who traffic drugs.

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6 AB 94.
7 AB 34.
8 Imposed on 2 August 2016; AB 54

[18] In relation to the imposition of a period of actual imprisonment the learned sentencing judge concluded that a suspended sentence was not appropriate given Ms Hughes' history of non-compliance with court orders and parole authorities. His Honour acknowledged that following a previous period of imprisonment Ms Hughes satisfactorily completed parole, but noted that the offending for which he sentenced Ms Hughes demonstrated the ineffectiveness of that sentence. His Honour said:[9]

> "Ultimately I am satisfied you are not an appropriate candidate for a suspended sentence. You have shown scant regard for court orders in the past. To place you on a suspended sentence would not properly reflect not only the criminality but all of the surrounding circumstances. The consequence is that you will be subject to the 80 per cent rule."

[19] The 80 per cent rule his Honour refers to was that mandated by s 5(2) of the *Drugs Misuse Act*, requiring offenders who were sentenced to a term of imprisonment for trafficking drugs to serve 80 per cent of their sentence before being released. His Honour acknowledged that the practical effect of this rule would be significant for Ms Hughes, but considered a sentence of imprisonment to be appropriate in light of all the circumstances.

Submissions at the Appeal Hearing

[20] The *Drugs Misuse Act* was amended on 9 December 2016, shortly after Ms Hughes was sentenced. The *Serious and Organised Crime Legislation Amendment Act* 2016 had the effect of removing the 80 per cent rule from s 5(2) of the *Drugs Misuse Act*.

[21] Ms Hughes' written submissions relied on that change to the law, and highlighted that Lewis, who was identified in the same operation as Ms Hughes, was sentenced after the amendment to the law. Lewis was sentenced to five years' imprisonment with a parole eligibility date after having served two years. Ms Hughes submitted that the disparity between the two sentences made her sentence manifestly excessive.

[22] In response to that submission, Counsel for the Crown acknowledged, referring to *R v Floyd*,[10] that the subsequent sentencing of Lewis does not preclude Ms Hughes from raising issues of parity on the application. Notwithstanding that, it was submitted that issues of parity do not apply because Ms Hughes and Lewis were not co-offenders, but operated at different levels of the drug trafficking hierarchy, in that Ms Hughes was a wholesale supplier to Lewis, the street level retail supplier. For this reason, the Crown submitted that the difference between the two sentences did not reveal any basis for a justifiable sense of grievance, or other unfairness that would lead this Court to intervene.

[23] Submissions about Ms Hughes' rehabilitation and drug habit were advanced, regarding her efforts to rehabilitate at the Moonya Recovery Centre and later at Fairhaven Recovery Centre, and her partial completion of the bridge program at Moonya. That information was before the learned sentencing judge, who described the success of Ms Hughes' rehabilitation efforts as "mixed",[11] a characterisation

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9 AB 36.
10 [2013] QCA 74.
11 AB 35 line 24.

with which Counsel for the Crown agreed during the hearing in this Court. The Crown highlighted that Ms Hughes was subject to a rehabilitation order as part of sentence imposed on her on 16 November 2012. That order expired six months before the current offending took place. The short time frame between the expiration of the rehabilitation order and trafficking formed the basis of the respondent's submission that the learned sentencing judge's limited consideration of Ms Hughes' rehabilitation efforts was sufficient.

[24] The Crown also submitted that the learned sentencing judge's characterisation of the purpose of the trafficking was correct. His Honour recognised that the trafficking was committed in circumstances where Ms Hughes had a drug habit, and the Crown contended that the learned sentencing judge found that most profits were directed to supporting that habit. The Crown contended that in the context of the trafficking offences, the significance of drug dependency or addiction was somewhat diminished and had to be balanced with the need for personal and general deterrence.

Discussion

[25] The issue of parity is resolved by this Court's decision in *R v Leathers*.[12] There it was urged that *R v Farrugia*[13] ought to be followed in Queensland. *Farrugia* extended the principle of parity beyond co-offenders and to individual offenders participating in a common criminal enterprise. The contention in *Leathers* was that such an extension should apply where a number of offenders engage in drug trafficking as part of a broader scheme, particularly between offenders who bought and sold drugs from a wholesale supplier.

[26] This Court rejected that argument, holding that to follow the Victorian approach would contradict previous Queensland authorities, including *R v AAH & AAG*.[14] Gotterson JA reasoned that it was neither necessary nor appropriate to apply the extension made in *Farrugia* because of the unusual factual circumstances of that case and the anomalies that would result if the parity principle were to apply to complex trafficking cases. Gotterson JA described the unique circumstances of similarity between the offenders in *Farrugia* as "remarkable coincidences"[15] and the sentencing judge's analysis of like cases as "a conventional [review]".[16]

[27] Issues of parity where one offender was subject to a rule setting a mandatory minimum to serve but another offender was not, were considered by this Court in *R v Meerdink.*[17] In that case, the applicant was sentenced to imprisonment for 10 years. Under s 161B of the *Penalties and Sentences Act* 1992 (Qld), such a sentence attracted a serious violent offence declaration with the consequence that the applicant had to serve 80 per cent of the term of imprisonment before being eligible for parole. Meerdink's co-accused, with whom he was charged jointly, was sentenced to nine years' imprisonment. Being less than 10 years, that sentence did not attract the same minimum time to serve in prison. The co-accused was eligible to apply for parole after serving four years in prison, effectively half of what Meerdink was to serve before parole.

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12 [2014] QCA 327.
13 (2011) 32 VR 140; [2011] VSCA 24.
14 (2009) 198 A Crim R 1; [2009] QCA 321.
15 *Farrugia* at [25].
16 *Farrugia* at [36].
17 [2010] QCA 273.

[28] White JA[18] referred to what was said in *R v Crossley*, where Pincus JA, with whom McPherson JA agreed, observed:[19]

> "In my opinion, the law requires that where one of two co-offenders but not the other is caught by the 80% requirement, that circumstance is to be ignored in considering parity between the two."

[29] White JA also referred to the decision in *R v Mikaele*,[20] where this Court[21] held that *Crossley*:

> "… is authority for the conclusion that, once a serious violent offence declaration is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation."

[30] White JA went on:[22]

> "It may be that that observation must be treated with some caution bearing in mind that there were significant differences between the relative criminality of each of the co-offenders in that case. As *McDougall and Collas* itself demonstrates, a close analysis of the participation of each offender in the offence, their antecedents and prospects for rehabilitation, will all impact on what is a just sentence. This is what the learned sentencing judge did in this case, carefully weighing the relevant factors. That his Honour did not make a declaration pursuant to s 161B(3)(b) in respect of Pearce did not require him to "avoid" the consequences of Part 9A for the applicant. The recognition of the timely plea of guilty by Pearce; his absence of past violent offending; his insight into his offending and the part that alcohol played in it; his genuine remorse; together with some positive prospects for rehabilitation, all factors largely absent in the applicant, permitted the disparity with the sentence imposed on the applicant. As Brennan J observed in *Lowe*, the applicant is likely to have a sense of grievance, but it is not, objectively, justifiable, and there is no appearance that justice has not been done."

[31] *Crossley* and *Mikaele* are binding on this Court and no argument was advanced that they should be departed from. There is no need to resolve whether White JA's observation on the need for caution is sufficient to moderate the impact of *Crossley* and *Mikaele* in so far as they hold that issues of parity are not, by reason only of the statutory rule setting a minimum time to serve, relevant as between Ms Hughes and Lewis. While each sentence offer guidance as to the circumstances of the offending, the considerations in each case need not inform the sentence of one another. Here the learned sentencing judge carefully considered each of the relevant factors, and took into account the sentence imposed on another offender in the same operation (Fyfe), and the impact of s 5(2) of the *Drugs Misuse Act*.[23] Fyfe was engaged in very similar conduct, though for a lesser period and lesser supplies. He

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18 *Meerdink* at [31], McMurdo P and Jones J concurring.
19 (1999) 106 A Crim R 80; [1999] QCA 223, at [87].
20 [2008] QCA 261 at [36].
21 Mackenzie JA, with whom Keane JA and Douglas J concurred.
22 *Meerdink* at [38]; internal citations omitted.
23 AB 36.

also had a bad criminal history, but committed the offences whist on bail and subject to a suspended sentence. That was the basis for the learned sentencing judge distinguishing Fyfe's effective five year sentence.[24]

[32] In both written and oral submissions Ms Hughes struggled to identify an error in the learned sentencing judge's remarks. The application was filed on the grounds that in all circumstances the sentence was manifestly excessive. Considering that in light of Ms Hughes' written and oral submissions, the circumstances which Ms Hughes submit make the sentence manifestly excessive are those outlined in paragraph [5] above. In her submissions, Ms Hughes placed considerable emphasis on her rehabilitation, commitment to abstaining from drug use and cooperation with police.

[33] The learned sentencing judge considered those factors in detail. As noted in paragraph [24] above, discussion surrounded the profits made, and the use of trafficking as a mean of sustaining Ms Hughes' drug habit. Following that, his Honour's sentencing remarks set out Ms Hughes' personal and criminal history, acknowledged Ms Hughes' drug addiction and rehabilitation, which he described as having mixed success, and accounted for her plea of guilty and remorse.

[34] During the course of the hearing some attention was focussed on the basis for the second sentence in this part of the learned sentencing judge's comments:[25]

> "I accept your trafficking occurred in circumstances where you have a longstanding addiction to drugs. I accept part of the proceeds was used to pay for your own habit."

[35] There is no doubt that the sentencing submissions proceeded on the basis that, as his Honour accepted in the sentencing remarks, Ms Hughes had a longstanding drug addiction and the trafficking was to service that habit, rather than for commercial purposes. The prosecutor referred to her situation as being that "she's become a seller of drugs, no doubt, because she had an expensive habit to maintain".[26] Then Counsel for Ms Hughes said:[27] "… whilst it's accepted what the schedule says with respect to profits, she certainly didn't keep any profits. Any money that she made was used to feed her drug addiction."

[36] In fact the schedule of facts does not detail profits as such, but rather sale prices. However that may be, in my view the learned sentencing judge's remarks were reasonable and had a proper foundation. True it is that Ms Hughes used part of her proceeds for her own drug use, but part of the proceeds obviously went on buying the drugs she supplied to Lewis. In that sense part of the proceeds was used to pay for her own habit.

Comparable cases.

[37] A period of imprisonment is common in cases of this kind, and a suspended sentence where a prolonged period of trafficking is involved is unusual. While the authorities concede that the 80 per cent rule in s 5(2) may have some bearing on the

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24 Fyfe was sentenced to three and a-half years' imprisonment, but that sentencing judge took into account 508 days of non-declarable pre-sentence custody.

25 AB 34 lines 18-20.

26 AB 18 line 2.

27 AB 29 lines 19-21.

sentencing discretion, the usual factors must be considered when determining whether the case is an appropriate case for a suspended sentence. With respect to the effect of s 5(2), Gotterson JA, with whom Holmes CJ and McMurdo JA agreed observed in *R v Borowicz*:[28]

> "I would regard it as a relevant consideration for deciding whether to opt for a suspended sentence, that, where s 5(2) would apply to a sentence of modest duration, the opportunity for parole conditions to achieve beneficial effect might be significantly truncated."

[38] In that case, Borowicz pleaded guilty to a five count indictment, the most serious count being trafficking in methylamphetamine over a period of three months. For the trafficking offence, Borowicz was sentenced to five years' imprisonment to be suspended after one year and eight months. An application to appeal against that sentence on the ground that it was manifestly excessive was refused. This Court noted the broad range of sentences imposed for trafficking and identified the significant moderating influences on a trafficking sentence, namely the age and maturity of the offender, and whether genuine and measurable attempts at rehabilitation are evident. *Borowicz* was the only case put before this Court where an offence of trafficking, while s 5(2) was operational, resulted in a suspended sentence.

[39] The factors which led the learned sentencing judge to a suspended sentence in that case were Borowicz's limited criminal history, family support, and prospects for rehabilitation.[29] Distinguishing the current case from *Borowicz* is Ms Hughes' nine page criminal history, her previous "appalling history of non-compliance with court orders", and limited prospects for successful, long-term rehabilitation.

[40] The learned sentencing judge found that a suspended sentence was not appropriate. His Honour was, in my respectful view, plainly correct in that approach.

[41] His Honour derived particular assistance from the sentencing of Fyfe, being satisfied that it was the most useful comparative sentence. His Honour identified the similarities in terms of longstanding drug problems, apparent disregard for the law, non-compliance with previous sentencing orders and significant criminal history. The learned sentencing judge in Fyfe took into account the non-declarable pre-sentence custody (508 days) in reaching the eventual sentence of three and a-half years. That meant that the effective sentence was one of five years. Taking into account s 5(2) of the *Drugs Misuse Act*, the learned sentencing judge imposed a sentence of three and a-half years' imprisonment, to serve 80 per cent before being released on parole.

[42] When sentencing Ms Hughes, his Honour noted that the trafficking period was slightly longer than that in Fyfe, leading his Honour to the conclusion that a sentence of four years' imprisonment was appropriate.

[43] The head sentence of four years is within the sentencing range for offences of this kind. The matters outlined in paragraph [17] above were determinative in the formulation of the head sentence. Where the trafficking is in schedule 1 drugs and at a wholesale level, as this trafficking was, the authorities referred to this Court

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28 [44].

29 *R v Borowicz*, sentencing remarks, Justice Peter Lyons, indictment No. 741 of 2014, 20 July 2015.

suggest a range of three to eight years' imprisonment.[30] That range was conceded by Ms Hughes' counsel at the sentence, where he suggested a head sentence of five years, albeit suspended after Ms Hughes served just two years.

[44] Of course every case depends on its own facts and no comparable dictates the outcome. However, such cases do indicate the guideposts for the sentencing discretion. I am not satisfied that there was a general misapplication of the sentencing discretion. For the reasons above the suggested suspension is not warranted, and the effect is that s 5(2) applied.

Application of s 5(2) of the Drugs Misuse Act

[45] There is no doubt that the provision was in force at the time Ms Hughes was sentenced. In the circumstances, the application of that law was unavoidable, so long as Ms Hughes was not sentenced to a suspended sentence. The learned sentencing judge's conclusion that a suspended sentence was not appropriate led him to make the following observation:[31]

> "The practical consequence of the 80 per cent requirement is that it does not allow the court to be able to properly reflect the co-operation shown by you by reducing the overall head sentence. I am satisfied it is appropriate to reduce the overall head sentence to allow for all of your personal circumstances and that co-operation. I do not accept, however that it is appropriate to reduce it to three and a half years' imprisonments. The aggravating features to which I have referred would mean that a sentence of three and a half years' imprisonment would not properly reflect your overall criminality, even allowing for all of your personal circumstances."

[46] Ms Hughes' written submissions suggest that a longer head sentence of five to six years to serve up to two years would be more appropriate. This is similar to that suggested by her Counsel at the sentencing hearing. With respect to comparable cases, Ms Hughes' suggestion is not beyond what a learned sentencing judge might have considered but for a suspended sentence being inappropriate and s 5(2) of the *Drugs Misuse Act*.

[47] There are two difficulties with Ms Hughes' submission. First, unless a relevant error is shown in the exercise of the sentencing discretion there is no basis for this Court to intervene. Secondly, unless she can show that a partially suspended sentence is suitable, the learned sentencing judge was unable to avoid the consequences of s 5(2) as it then stood.

[48] Given that s 5(2) has since been repealed, an issue not addressed by the parties to this appeal is whether this Court, if the application were granted, would be obliged to sentence Ms Hughes as the law stood at the time she was originally sentenced, applying s 5(2) or as the law currently stands, without s 5(2).

[49] Relying on the High Court authority of *Radenkovic v The Queen*,[32] the New South Wales Court of Criminal Appeal supports taking the first course:[33]

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30 See *R v Atkins* [2007] QCA 309; *R v Baradel* [2016] QCA 114*; R v Borowicz* [2016] QCA 211; *R v Challacombe* [2009] QCA 314; *R v Clark* [2016] QCA 173; *R v Reid* [2013] QCA 190.

31 AB 3 lines 25-33.

32 (1990) 170 CLR 623.

33 *R v MJR* [2002] NSWCCA 129 at [31].

> "In the context of an appeal against sentence, when a Court of Criminal Appeal is called upon to re-sentence because it has quashed the sentence initially imposed, considerations of justice and equity ordinarily require that the convicted person be re-sentenced according to the law as it stood at the time when he was initially sentenced."

[50] This Court in *R v Wruck*[34] also followed that approach, finding that the special circumstances rule in s 19 of the *Penalties and Sentences Act* was to have no effect on sentences for offences committed before the rule existed. Like this case, the offender would have had no benefit of such a rule (if special circumstances were indeed made out).

[51] That approach conforms with s 668E(3) of the *Criminal Code* 1899 (Qld). It provides:

> "On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

[52] The sentence that can be imposed in lieu of the one under appeal is "some other sentence … warranted in law and [which] **should have been passed**". The words highlighted make it clear, in my view, that the new sentence has to conform with the law as it was at the time of the original sentence.

[53] For those reasons I am satisfied that even if the application for leave to appeal was allowed, this Court would be bound to apply s 5(2) as it applied in November 2016.

Disposition

[54] I would refuse the application for leave to appeal.

[55] **PHILIPPIDES JA:** I agree that the application for leave to appeal should be refused for the reasons given by Morrison JA.

[56] **BROWN J:** I agree that the application for leave to appeal should be refused for the reasons given by Morrison JA.

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34 [2014] QCA 39, at [25]-[31].