

SUPREME COURT OF QUEENSLAND

CITATION: *R v Thornbury* [2017] QCA 284

PARTIES: **R**
v
THORNBURY, Joshua Paul
(applicant)

FILE NO/S: CA No 364 of 2016
SC No 1256 of 2016
SC No 1451 of 2016
SC No 1453 of 2016
SC No 1454 of 2016
SC No 1465 of 2016

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 28 November 2016 (Atkinson J)

DELIVERED ON: 17 November 2017

DELIVERED AT: Brisbane

HEARING DATE: 30 August 2017

JUDGES: Sofronoff P and Morrison JA and Boddice J

ORDER: **The application for leave to appeal be 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 two counts of trafficking in a dangerous drug, one count of possessing a dangerous drug in excess of two grams, one count of knowingly possessing a sum of money obtained from trafficking in a dangerous drug, multiple property related offences, fraud, official corruption and attempted official corruption offences – where there were over 150 counts – where the applicant was sentenced to concurrent sentences of ten and six years’ imprisonment on the trafficking counts – where the sentence of ten years attracted an automatic serious violent offence declaration – where the applicant was sentenced to two and a half years’ imprisonment on the remaining counts to be served cumulatively with the sentences imposed on the trafficking counts – where the applicant contends that those sentences of imprisonment were manifestly excessive – whether the head sentence imposed on the trafficking count breached the parity principle – whether the sentences imposed created an overall crushing sentence –

whether leave to appeal should be granted

R v Barker [2015] QCA 215, considered
R v Galeano [2013] 2 Qd R 464; [2013] QCA 51, considered
R v Gordon [2016] QCA 10, considered
R v Heilbronn [2017] QCA 21, considered
R v Jacobs [2016] QCA 28, considered
R v Kerma [2006] QCA 127, considered
R v Salter [2010] QCA 284, considered
R v Thornbury [2017] QCA 283, considered
R v Tout [2012] QCA 296, applied

COUNSEL: A J Kimmins for the applicant
 J A Wooldridge for the respondent

SOLICITORS: Guest Lawyers for the applicant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of Boddice J and with the order his Honour proposes.
- [2] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the order his Honour proposes.
- [3] **BODDICE J:** On 28 November 2016, the applicant pleaded guilty to two counts of trafficking in a dangerous drug, one count of possessing a dangerous drug in excess of two grams, and one count of knowingly possessing a sum of money obtained from trafficking in a dangerous drug, together with multiple property related offences, fraud official corruption and attempted official corruption offences. There were five separate indictments, containing over 150 counts. The various counts related to conduct between January 2013 and September 2014.
- [4] The applicant was sentenced to concurrent sentences of 10 years and six years imprisonment for the trafficking counts (with an automatic serious violent offence declaration for the first trafficking count) and two years six months imprisonment on the remaining counts, to be served cumulatively with the sentences of imprisonment for the trafficking counts.
- [5] The applicant seeks leave to appeal those sentences of imprisonment, on the ground they were manifestly excessive. In support of that ground, the applicant submits the sentence of imprisonment imposed on the trafficking count breached the parity principles and the imposition of cumulative sentences of imprisonment created an overall crushing sentence.

Background

- [6] The applicant was born on 17 February 1984. He was aged 28 to 30 years during the offending period and 32 years at sentence.
- [7] The applicant had a limited prior criminal history. He had no prior drug offences. He had not previously been sentenced to imprisonment.

Offences

- [8] The applicant was charged separately with having trafficked in cannabis and methylamphetamine. The cannabis trafficking count related to a significant wholesale trafficking business conducted over a period of 15 months with his brother, Terrence Thornbury. The business utilised the services of five couriers to transport cannabis from interstate, predominantly by commercial airline, although there were unspecified occasions when cannabis was brought from interstate via road.
- [9] There were 108 identified transportations by air, involving 2,835 kilograms of cannabis. The cannabis was on-sold to at least five other suppliers in Queensland. It was estimated the cannabis was worth \$4,900 per pound and was purchased for \$2,500 per pound. In all, approximately \$15.6 million was paid for the cannabis transported by air. No estimate was given in relation to the cannabis transport by road.
- [10] The applicant was sentenced on the basis he was the second in command to his brother who had overall management and control of the business. It was his brother who communicated with suppliers and customers. The applicant's responsibility covered organising money, drugs and couriers.
- [11] The methylamphetamine trafficking count concerned a separate trafficking operation conducted by the applicant alone over a period of about nine months. The applicant sourced varying amounts of methylamphetamine, which he on-sold to five customers. He engaged two associates as "buffers" to meet with other relevant parties. It was alleged the applicant in the course of this operation threatened violence in order to enforce drug debts. He also accepted stolen property in exchange for drugs. He had an enforcer who collected money on his behalf.
- [12] At the time of the applicant's interception on 15 April 2014, he was found in possession of 18.358 grams of pure methylamphetamine. Police located a further 7.111 grams of pure methylamphetamine which the applicant denied was his drug.
- [13] The property offences related to various items found in the applicant's possession on his arrest on 15 April 2014. It was alleged the applicant had either obtained or stolen that property. The applicant was involved in a series of heists with two co-defendants during which they unlawfully entered various premises and businesses and stole property.
- [14] The official corruption counts related to a scheme undertaken by the applicant and his girlfriend whereby the applicant arranged to illegitimately register stolen property with the Department of Main Roads and Transport. This scheme involved the assistance of an employee of that Department. An aspect of the scheme involved obtaining false Queensland driver licences for people not entitled to obtain licenses.

Sentence hearing

- [15] The Crown submitted the trafficking counts were committed by the applicant purely for greed. Whilst the applicant had drugs, there was no evidence the applicant was an addict. Further, although the applicant had entered timely pleas of guilty following a full hand-up committal, the case against him was strong and the applicant had made no admissions.
- [16] The Crown accepted that in respect of the cannabis trafficking operation the applicant's brother had overall control of the operation but submitted the applicant had a large hands-on involvement himself and was engaged in the use of threats.

Whilst there were issues of parity with the applicant's brother, who was sentenced to 10 years imprisonment for one count of trafficking in the dangerous drug cannabis, the applicant had trafficked separately in a Schedule 1 drug.

- [17] The Crown submitted the applicant's level of drug trafficking would normally warrant a sentence of imprisonment between 10 to 14 years. After applying principles of parity and allowing for the applicant's cooperation and factors in his favour, the Crown submitted the appropriate sentence was a global sentence between 10 and 11 years imprisonment to be imposed on the count of trafficking in cannabis, with a lesser concurrent sentence on the count of trafficking in methylamphetamine.
- [18] In respect of the remaining offences, the Crown submitted the appropriate sentence in usual circumstances would be between five and seven years imprisonment. Having regard to the Crown's submission that any sentence imposed should be served cumulatively, the Crown submitted the cumulative term for the remaining offences should be between 18 months and three years.
- [19] Defence counsel submitted that whilst the individual conduct of itself might support a sentence in the order contended for by the Crown, the overwhelming majority of the offences were committed during the same period as the trafficking counts and any further sentences of imprisonment should be served concurrently.
- [20] Defence counsel submitted that having regard to the applicant's personal circumstances and other factors in his favour, including his cooperation, a sentence of eight to nine years imprisonment should be imposed for the trafficking counts, with a further two years imposed cumulatively for the remaining counts.
- [21] In making these submissions, defence counsel observed that the applicant had two children, was at the time and had been for most of his adult years a user of illicit drugs, and was the second in command to his brother in the cannabis trafficking operation. Whilst the applicant had a hands-on role, the applicant's brother provided the money and was in charge of the overall operation. The applicant also suffered from a serious mental illness, schizophrenia, for which he was receiving treatment whilst in custody.

Sentencing remarks

- [22] The sentencing judge accepted that issues of parity supported the sentence contended for by the Crown in respect of the trafficking counts. The sentencing judge observed that may not have been the sentence to be imposed had no issue of parity arisen.
- [23] In respect of the trafficking counts, the sentencing judge observed that whilst the applicant's brother had overall control of the cannabis trafficking operation, the applicant was effectively his second in command, having a more hands-on managerial role organising the money, the drugs and the couriers. Further, the trafficking operation continued notwithstanding a police interception of drugs in January 2014. The operation only ceased due to police intervention in April 2014.
- [24] The sentencing judge observed that the methylamphetamine trafficking operation was the applicant's own business, undertaken without any involvement of his brother. The applicant had used others as buffers and sold to a small number of customers who were purchasing to on-sell the drugs to others. The sentencing judge

- accepted the applicant was a drug user himself, but found the applicant was engaging in this business for profit as well as to source drugs for his own use. There were occasions when the applicant used violence to recover drug debts. He also used the assistance of another as an enforcer in collecting money.
- [25] In respect of the property offences, the sentencing judge observed they involved the theft of high value machinery and equipment from construction sites, the receipt of tainted property, and stealing personal property such as jewellery, which was described as “very low behaviour”. The property offences suggested a professional approach to receiving stolen property. Many of these offences were committed whilst on bail.
- [26] In relation to the official corruption counts, the sentencing judge observed that the applicant and his brother were involved in a sophisticated rebirthing of motor vehicles, vessels, trailers and jet skis through the use of a friend who worked in the relevant Department. There were 31 false vehicle registrations involving non-compliance with normal requirements, such as safety testing, and 57 issued or upgraded driver’s licences in an 18 month period. The offending included people receiving licences who had never been licensed before or were not able to get a licence due to express prohibitions. It also involved upgrading people for larger and heavier vehicle licences without the requisite training or experience. This criminal offending occurred over an incredibly long period, and involved the corruption of a public official.
- [27] The sentencing judge accepted the applicant had entered timely pleas of guilty, was in a long-term relationship in which he had two children, and suffered from a serious mental health condition, schizophrenia. The applicant also had a longstanding drug habit. The sentencing judge accepted the applicant had learning difficulties and was functionally illiterate.
- [28] The sentencing judge took into account the sentence of 10 years imprisonment imposed on the applicant’s brother on his plea of guilty. Whilst it was true the applicant was his brother’s second in command, the applicant had a very important if not equal role in the trafficking in cannabis operation which took place over a longer period. That lesser role would suggest a slightly lesser sentence for the applicant. However, the applicant alone was involved in his own business of trafficking in the even more dangerous drug methylamphetamine, for a shorter but still lengthy period.
- [29] The sentencing judge, taking into account all of the applicant’s criminality in respect of the drug counts, imposed a sentence of 10 years imprisonment for the trafficking in cannabis count and a concurrent period of six years imprisonment on the trafficking in methylamphetamine count.
- [30] The sentencing judge found it was appropriate to impose cumulative sentences in respect of the property and corruption counts as they were different types of offending warranting their own periods of imprisonment. Even though they occurred during the same period, they involved serious offending, persistently over a long period and caused much damage to other people.
- [31] The sentencing judge moderated the sentence to allow for the fact they were to be served cumulatively. The sentence imposed was two years imprisonment for the property offences and a further six months imprisonment for the corruption offences, to be served cumulatively upon the periods of imprisonment imposed for the trafficking counts.

Applicant's submissions

- [32] The applicant submits the sentences imposed for the trafficking counts were manifestly excessive having regard to comparable decisions, the sentence imposed on the applicant's brother and their differing roles in the cannabis trafficking operation. The applicant submits that having regard to his psychiatric injury at the time and the fact he occupied a secondary position to that of his brother together with his pleas of guilty and assistance in the administration of justice, a sentence slightly less than the sentence imposed on his brother was appropriate. This is particularly so when regard is had to the imposition of the cumulative periods of imprisonment.

Respondent's submissions

- [33] The respondent submits that no issue of parity arises in respect of the sentence imposed upon the applicant's brother. There was only a limited basis to distinguish between their level of criminality in the cannabis trafficking and the sentence imposed on that count reflected the applicant's involvement in his own trafficking operation in the dangerous drug methylamphetamine. The applicant's drug use and mental health did not warrant any more significant reduction in the applicant's sentence. There was no evidence the applicant was a drug addict. His offending was motivated by money, not addiction. The applicant's counsel specifically disavowed any suggestion of a relationship between the applicant's offending and his mental health condition. The sentence of 10 years imprisonment was not a high sentence, let alone manifestly excessive.
- [34] The respondent submits there was no error in the imposition of cumulative terms of imprisonment for the remaining offences. Those offences involved serious separate offending, over an extended period. Official corruption required a strong deterrent on its own, justifying the imposition of a cumulative term. The other course would have been to increase the head sentence of the trafficking offence with an adverse consequence to the applicant as he would be required to serve 80 per cent of that sentence as opposed to 50 per cent of any cumulative periods of imprisonment.

Discussion

- [35] The effective head sentence of 10 years imprisonment for the trafficking counts (with the consequent declaration of a conviction for a serious violent offence) was the same sentence imposed on the applicant's brother. An application by the brother for leave to appeal that sentence on the ground it was manifestly excessive was unsuccessful.¹ That sentence was held not to be out of place with comparable decisions.² The sentence does not involve a difference suggestive of a misapplication of sentencing principles or that the sentence is unreasonable or unjust.
- [36] Whilst the applicant's brother had overall control of the cannabis trafficking operation, there was much force in the sentencing judge's observation that the applicant, as the brother's second in command, "had a very important, if not quite equal, role in the trafficking in the dangerous drug cannabis, which took place over a long period." That feature would itself support a sentence of imprisonment for the trafficking in cannabis count in the order of nine years imprisonment.

¹ *R v Thornbury* [2017] QCA 283.

² *R v Kerma* [2006] QCA 127; *R v Salter* [2010] QCA 284; *R v Heilbronn* [2017] QCA 21.

- [37] However, the applicant was involved in his own business of unlawfully trafficking in methylamphetamine. Whilst that trafficking period was shorter, it was still lengthy and it involved a Schedule 1 drug. That additional factor amply supported the sentencing judge's conclusion that the applicant's criminality in trafficking in two types of dangerous drugs over an extended period was properly reflected in a head sentence of 10 years imprisonment, even allowing for his cooperation and the other mitigating factors.
- [38] Such a sentence of imprisonment is not so disproportionate to the sentences imposed in comparable cases as to support a conclusion the sentencing judge misapplied the sentencing principles or failed to give due weight to appropriate considerations, or that the sentence is plainly unjust.³
- [39] In *R v Barker*⁴ a sentence of 10 years imprisonment imposed after a plea of guilty to trafficking in methylamphetamine and other associated drug charges was not disturbed on appeal. That trafficking involved the wholesale supply of drugs to four other persons over approximately 10 months, a similar period as the applicant. Whilst there were multiple sales, almost \$1 million in cash was found at the time of that offender's arrest, and that offender had unexplained wealth estimated in the vicinity of \$1.6 million, that offender did not traffic in a further separate business operation involving a different drug.
- [40] In *R v Gordon*,⁵ sentences of 10 years imprisonment for trafficking in methylamphetamine and a concurrent eight years imprisonment for trafficking in cannabis were not disturbed on appeal. Whilst that trafficking was driven by greed, occurred over four years and nine months and involved the production of drugs, and was committed by an offender who had prior drug convictions and was on bail, the offender was only 21 years old at the commencement of the offending. His youth was a significant distinguishing factor.
- [41] In *R v Jacobs*,⁶ a sentence of 10 years imprisonment for trafficking in methylamphetamine for eight months, as well as a variety of other drugs offences including producing methylamphetamine, was not disturbed on appeal. That offender also pleaded guilty to property offences as well as extortion and two offences of procuring misconduct of a public officer, which attracted a further 18 months imprisonment to be served cumulatively on the sentence for the trafficking count. Whilst that offender had prior convictions for trafficking and other drug offences, the overall trafficking period was significantly less than the present applicant. Further, considerations of totality were applicable when determining individual sentences.
- [42] In *R v Galeano*,⁷ a sentence of 10 years imprisonment for trafficking in methylamphetamine, MDMA and cannabis over a period of two years and three months was the subject of a successful appeal. A head sentence of nine years imprisonment was imposed on appeal. That applicant was 49 years of age and had prior convictions for drug trafficking as well as weapons and property offences, had a busy and expanding trafficking business. However, the appeal was primarily

³ *R v Tout* [2012] QCA 296 at [8].

⁴ [2015] QCA 215.

⁵ [2016] QCA 10.

⁶ [2016] QCA 28.

⁷ [2013] QCA 51.

allowed due to the effect of substantial injuries sustained by that applicant at the time of his arrest, which led to the development of a significant psychiatric disorder.

- [43] There was also a sound basis for the sentencing judge to impose cumulative periods of imprisonment for the applicant's other offences. The applicant engaged in persistent offending in relation to property offences as part of a sophisticated arrangement for obtaining the property of others. Further, his conduct subject to the official corruption counts resulted in the false registration of illegally acquired property and the licensing of people not entitled to be licensed due to Court orders or inadequate experience.
- [44] The imposition of a total additional sentence of two and a-half years imprisonment, to be served cumulatively, for such separate offending conduct properly reflected the seriousness of that offending whilst recognising the impact of an order that it be served cumulatively by the applicant.

Conclusion

- [45] The overall head sentence of 12 and a-half years properly reflected the applicant's sustained criminality over an extended period of time, even allowing for his significant cooperation with the administration of justice.
- [46] The sentence of imprisonment imposed on the applicant were not manifestly excessive.

Order

- [47] I would order that the application for leave to appeal be refused.