SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thornbury* [2017] QCA 283
PARTIES:	**R** **v** **THORNBURY, Terrence John** (applicant)
FILE NO/S:	CA No 344 of 2016 SC No 1256 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 18 November 2016 (Byrne SJA)
DELIVERED ON:	17 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2017
JUDGES:	Sofronoff P and Morrison JA and Boddice J
ORDER:	**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 one count of trafficking in a dangerous drug – where the applicant was sentenced to 10 years' imprisonment – where the conviction was declared a serious violent offence – where the sole ground of appeal contended is that the sentence imposed was manifestly excessive in all the circumstances – whether leave to appeal should be granted *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, considered *R v Ahmetaj* (2015) 256 A Crim R 203; [2015] QCA 248, considered *R v Gordon* [2016] QCA 10, considered *R v Heckendorf* [2017] QCA 59, applied *R v Heilbronn* [2017] QCA 21, considered *R v Kalaja* [2012] QCA 329, considered *R v Kerma* [2006] QCA 127, considered *R v Salter* [2010] QCA 284, considered *R v Tout* [2012] QCA 296, applied
COUNSEL:	M J Copley QC 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 18 October 2016, the applicant pleaded guilty to one count of trafficking in a dangerous drug, namely, cannabis. The trafficking period was between 1 January 2013 and 16 April 2014.

[4] On 18 November 2016, the applicant was sentenced to 10 years imprisonment with 38 days pre-sentence custody declared as time served in respect of that sentence. As a consequence of that sentence, the conviction was declared to be a conviction of a serious violent offence pursuant to s 161B of the *Penalties and Sentences Act* 1992.

[5] The applicant seeks leave to appeal that sentence of imprisonment. The sole ground for the appeal, should leave be granted, is that the sentence imposed was manifestly excessive in all the circumstances.

Background

[6] The applicant was born on 9 November 1977. He was 39 years of age at the time of sentence and 35 to 36 years of age at the time of the trafficking offence.

[7] The applicant had a limited prior criminal history. Relevantly, it included previous drug and firearm offences for which fines had been imposed in 2014 and 2016. The applicant had not previously been sentenced to periods of imprisonment.

The offence

[8] The applicant and his brother Joshua, trafficked in large quantities of cannabis over a period of approximately 15 months. The business employed five persons to courier cannabis from Melbourne to Queensland. On most occasions the drug was transported on commercial airline flights. The couriers would carry the purchase money in cash Melbourne to the supplier and return with cannabis prepared in multiple vacuum packed bags and wrapped in scented cloth. The quantities of cannabis on each occasion ranged between 50 to 100 lbs. In total, 108 journeys were made at about 2,834.87 kgs of cannabis were couriered up. There were other occasions when cannabis was couriered by road. The number of those occasions and the quantity of drugs on each such occasion were unknown.

[9] The applicant and his brother provided approximately $15.6 million to purchase the cannabis, paying about $2,500 per pound. At sentence it was alleged that a pound of cannabis was able to be sold for about $4,900. Couriers were paid $100 for every pound couriered by them. The cannabis was sold to five customers.

[10] During the trafficking period some of the couriers were intercepted by police. Those interceptions occurred on 18 and 23 December 2013, on 9 January 2014, and

26 March 2014. On those occasions cannabis weighing 21.7 kgs, 10 lbs, 22.7 kgs and 21.6 kgs were seized by police. Notwithstanding these interventions, the trafficking operation continued until the applicant, his brother and most of the couriers and purchasers were arrested by police on 15 April 2014.

[11] At the time of his arrest, the applicant was found in possession of $4,250 in cash. A search of a residence connected to his brother revealed a further $111,370 in cash.

[12] At sentence it was alleged that the applicant was the overall controller of the trafficking business. His role was to communicate with the supplier and with the purchasers. The applicant's brother's role was to manage the funds provided to couriers and received from purchasers. It was alleged that on one occasion the applicant threatened one of the couriers after the intercept and seizure of his cannabis.

Sentencing remarks

[13] The sentencing Judge observed that the applicant was a mature man with a limited criminal history who had "overall control" of a significant drug trafficking business in which large quantities of cannabis were transported from interstate on multiple occasions. The sentencing Judge observed that the applicant's role was as "the head of a sophisticated, large cannabis trafficking operation … the business involved the transportation of very large quantities of cannabis and distribution of it in South East Queensland". The applicant was "motivated solely by a concern to make money."

[14] The sentencing Judge further observed that the potential harm associated with the drug was considerable and that there was a need for the courts to impose sentences which were calculated to deter others from committing such offences.

[15] The sentencing Judge specifically noted that the applicant had entered a timely plea of guilty which had resulted in substantial savings of time and money including the expense of a trial which was estimated to take two weeks.

[16] In imposing a sentence of 10 years imprisonment, the sentencing Judge said "it must also be borne in mind that the sentence which I have in mind will require you to serve a minimum of 80 per cent of the sentence before being eligible for parole, and for that reason, I must select a sentence which is at the lower end of the applicable range."

Applicant's submissions

[17] The applicant submits that a sentence of 10 years imprisonment did not properly reflect the mitigating factors in the applicant's favour. Whilst the trafficking operation involved a substantial turnover, it was only in operation for about 15 months and it only involved one Schedule 2 drug. Further, the applicant pleaded guilty and had a limited criminal history.

[18] A consideration of the comparable authorities supports the conclusion that a sentence of 10 years imprisonment after timely pleas of guilty in respect of an applicant with a minor criminal history is manifestly excessive. A sentence of nine years imprisonment, with parole eligibility at half of that term, was an appropriate exercise of the sentencing discretion.

Respondent's submissions

[19] The respondent submits that in order to establish that the sentence imposed was manifestly excessive, the applicant must demonstrate that the difference in the sentence imposed in his case to those said to be comparable authorities supports a conclusion that there has been a misapplication of principle or that the sentence imposed is unreasonable or plainly unjust.

[20] The respondent submits the sentence imposed on the applicant was not manifestly excessive. That the drug in question was a Schedule 2 drug was but one relevant feature to be considered by the sentencing Judge. The sentencing Judge also had to have regard to the serious and aggravating features of the applicant's offending. The applicant was the principal of a large profitable wholesale trafficking enterprise, utilizing interstate connections and multiple couriers for a not insubstantial period of time. He engaged in such an enterprise purely for profit. For part of the period, the applicant was charged with other offences. The applicant also was a mature man.

[21] The respondent submits that even if the Court were to conclude that the sentence of 10 years was manifestly excessive, the imposition of any lesser head sentence should be accompanied by a declaration that the offence is a serious violent offence necessitating that the applicant serve 80 per cent of any lesser sentence before being eligible for parole.

Discussion

[22] A consideration of the remarks of the sentencing Judge reveals that in imposing a sentence of 10 years imprisonment, the sentencing Judge had regard to both the aggravating and mitigating features of the offence. There is no basis to conclude that in exercising the sentencing discretion the sentencing Judge misapplied any aspect of the applicable sentencing principles or did not give weight to relevant matters in mitigation of sentence.

[23] That being so, the applicant can only succeed in the present application if the applicant is able to establish that the sentence imposed is so different from other comparable sentences that there must have been a misapplication of principle or that the sentence imposed is unreasonable or plainly unjust.[1] In considering this issue, recognition must be given to the principle that comparable authorities do not mark with numerical precision the outer bounds of a sentencing Judge's permissible discretion.[2]

[24] The wholesale trafficking of a dangerous drug over a 15 month period purely for profit involves serious criminality. Whilst the dangerous drug in the present case was a Schedule 2 drug, the amount of drug involved in that operation was enormous. Over 2,800 kgs of cannabis was couriered from interstate on 108 occasions. There were further unspecified occasions when unknown quantities of cannabis were driven from interstate to Queensland. In excess of $15 million was paid for the cannabis known to have been couriered to Queensland and the couriers were paid in excess of $600,000 for their efforts.

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1 *R v Tout* [2012] QCA 296 at [8].
2 *R v Heckendorf* [2017] QCA 59 at [21].

[25] That significant drug trafficking operation was overseen by and under the control of the applicant. Whilst the applicant had a limited criminal history, he was a mature man with no addiction to drugs. The applicant had continued to traffic in the dangerous drug for a further two months after he was charged by police with drug and firearm offences.

[26] When regard was had to the magnitude of the trafficking operation, there was a sound basis for the sentencing judge's observations as to the need for the imposition of a sentence calculated to deter others in the future. Allowing for that factor, a sentence of 10 years imprisonment for such sustained sophisticated trafficking in a dangerous drug, albeit a Schedule 2 drug, was well within the sentencing discretion, even allowing for the timely plea of guilty and other mitigating factors.

[27] In *R v Kerma*[3] a sentence of 10 years imprisonment imposed on an offender who was convicted after a trial of trafficking and producing cannabis over a period of three years and four months was found not to be manifestly excessive (although the sentence was reduced due to parity considerations). That offender was also a mature aged male. He had a significant past criminal history including having served imprisonment for previous drug offences. That offender produced a significant quantity of cannabis at a remote property. The trafficking period extended over almost seven years. In considering the ground that the sentence imposed was manifestly excessive, the Court observed that having regard to that offender's criminal history and the fact that he proceeded to trial "a head sentence of the order of 10 years … could not be said to be excessive."[4]

[28] In *R v Salter*[5] a 42 year old offender who trafficked in cannabis over a five year period, paying $14 million towards the purchases of such cannabis and having made a profit of between $1.3 and $2 million, had his appeal against a sentence of nine years imprisonment dismissed. That offender had pleaded guilty by way of ex officio indictment, after having made extensive admissions to police implicating himself in further activity and substantiating trafficking over an extended period initially as a courier. As was observed on appeal, the sentence imposed at first instance reflected matters in mitigation, including principles in *AB v The Queen*.[6]

[29] In *R v Kalaja*[7] a sentence of 14 years imprisonment imposed on an offender who trafficked in the dangerous drugs cannabis, methylamphetamine, MDMA and GHB whilst aged between 27 and 29 years was found to be within the proper sentencing discretion albeit "at the high end". That offender had a not insignificant past criminal history, having previously been sentenced to wholly suspended terms of imprisonment for drug offences. He had also offended whilst on bail for the trafficking in cannabis that occurred over a three year period. Unlike the present applicant, that offender was a user of drugs, although he was found to be motivated by profit.

[30] In *R v Gordon*[8] sentences of eight years and 10 years imprisonment for cannabis trafficking and methylamphetamine trafficking over a period of four years and nine months were found to be within the proper sentencing discretion. That offender was

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3 [2006] QCA 127.
4 Ibid [171].
5 [2010] QCA 284.
6 (1999) 198 CLR 111.
7 [2012] QCA 329.
8 [2016] QCA 10.

only 21 years of age when the trafficking began, a significant mitigating factor. Further, whilst he had a limited criminal history and had continued to traffic whilst on bail for drug charges his trafficking business was less sophisticated and involved substantially less volume and profit.

[31] In *R v Heilbronn*[9] a sentence of 11 years imprisonment, imposed after a trial, on an applicant who trafficked both in cannabis and methylamphetamine over a seven month period was said to be heavy but not sufficiently so to indicate error in the exercise of the sentencing discretion. That offender was a similar age to the applicant, being aged 36 to 37 years. Whilst he had a more extensive criminal history and was trafficking in both a Schedule 1 and Schedule 2 drug, that offender had trafficked for a significantly shorter period, primarily in cannabis. Further, his trafficking in cannabis involved significantly less occasions of purchase of cannabis from the supplier.

[32] In *R v Ahmetaj*[10] a sentence of 10 years imprisonment imposed on a 40 to 42 year old offender for trafficking in heroin and methylamphetamine over a period of two years and three months was not interfered with on appeal. Whilst that trafficking involved Schedule 1 drugs and the trafficking period was longer, the occasions of supply were significantly less.

[33] A consideration of those authorities supports the conclusion that a sentence of 10 years imprisonment, for a sophisticated drug trafficking operation over an extended period involving over 100 occasions of transportation of drugs from interstate by a mature aged offender motivated purely by profit, properly fell within an appropriate exercise of the sentencing discretion, even allowing for the applicant's timely pleas of guilty, limited criminal history and other mitigating factors in his favour.

[34] Whilst *Kerma* received a similar sentence of imprisonment for a lengthier trafficking period and after a trial, the volume of drugs the subject of that trafficking was significantly less than in the present case. Similarly, the trafficking undertaken by *Gordon* was of a lesser magnitude, albeit over a substantially longer period. More significantly, *Gordon* was a youthful offender.

Conclusion

[35] The sentence imposed on the applicant is not one that so markedly differs from relevant authorities as to evidence any misapplication of principle. Further, the sentence is not unreasonable or plainly unjust.

[36] The sentence imposed on the applicant was not manifestly excessive.

Orders

[37] I would order that leave to appeal be refused.

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9 [2017] QCA 21.
10 [2015] QCA 248.