**[2018] QCA 7**

**COURT OF APPEAL**

**SOFRONOFF P**
**MORRISON JA**
**McMURDO JA**

**CA No 109 of 2017**
**DC No 2337 of 2016**

**THE QUEEN**

**v**

**HARRIS, Nathan John Daniel** **Applicant**

**BRISBANE**

**FRIDAY, 9 FEBRUARY 2018**

**JUDGMENT**

**McMURDO JA:** On 24 April 2017, the applicant was sentenced for seven drug offences, the most serious of which was one count of trafficking in cannabis. The other offences were the supply of cannabis and possessing items in connection with his trafficking. For the trafficking offence, he was sentenced to five years imprisonment, which was suspended after 20 months with an operational period of five years. He was not further punished for the other offences. He applies for leave to appeal against his sentence upon three grounds. The first is that the sentence was manifestly excessive. The second is that the sentence involved a misapplication of the parity principle. The third ground is that the sentencing judge made an error of fact in finding that the applicants had supplied about 180 pounds of cannabis when he could not have found that the amount was more than 140 pounds.

The applicant's offending was detected when police intercepted calls between him and a man then under their investigation, a Mr Latter. The telephone calls indicated that the applicant was regularly supplying him and others with cannabis. Those intercepted conversations were summarised in the schedule of facts provided by the prosecutor to the sentencing judge. Within that schedule, there was a statement that the evidence of the intercepted conversations indicated that the applicant had supplied 180 pounds of cannabis at a rate of $3,300 per pound. That meant that the applicant had supplied nearly $600,000 worth of the drug and, at a profit of $100 per pound, made a profit of $18,000.

These conversations were intercepted from 9 March 2015 until 13 May 2015. At that point, police decided to search the applicant's residence, which they did under a warrant, on 15 May 2015. In the applicant's bedroom, police located several bags of cannabis amounting to a total of about 24 kilograms. In a wardrobe in his bedroom, they found a locked box, in which there was an amount of $125,400 in cash. They also found vacuum seal machines and vacuum seal packaging and a mobile phone that had the same number as that which they had intercepted. They found other items such as scales and the water pipe. The applicant was then interviewed by police, when he admitted possession of the five scales and cannabis found at his residence, but refused to comment on the purpose of his possession of the cannabis. The indictment was dated 22 November 2016. The period of trafficking which was alleged was that in which the applicant's telephone calls had been intercepted – that is to say, a period of about 11 weeks.

His case was listed for trial in the District Court in March 2017, and it was not until then that he pleaded guilty. The sentencing judge said that this was not an early plea, but that it had facilitated the administration of justice, and he was to be given due credit for it. The applicant was aged 29 at the time of the offences and 31 when sentenced. He had a relatively minor criminal history, having appeared in Magistrates Courts for drug offences for which he had received a custodial sentence.

The sentencing judge remarked that the applicant had been operating a commercial wholesaling business in cannabis, which had reaped significant profits for him, although the period of trafficking was relatively short. The judge discussed the sentences imposed on Mr Latter and upon a Mr Yip, who was another cannabis wholesaler who came to light in the investigation of Mr Latter. Latter was sentenced in March 2017 to six years and two months imprisonment with parole eligibility after three years. However, as the sentencing judge here noted there was a period of 22 months which Latter had spent in custody which could not be declared as imprisonment served under the sentence so that Latter's head sentence was effectively one of the order of eight years.

Latter was said to have made profits in excess of $700,000 over a period of two years and three months. The sentence judge in this case was not particularly influenced by the orders in Mr Latter's case. Of more relevance, the judge said, was the sentence imposed upon Yip. He was sentenced in the Supreme Court in June 2016. He was a wholesale supplier of cannabis. He pleaded guilty at an early stage. He received a sentence of five years imprisonment suspended after 20 months. The judge said that there were mitigating factors in this case: the plea of guilty, the availability of work for the applicant upon his release from prison, and the support of his family, which were promising indications for his rehabilitation. The judge concluded that the appropriate sentence was that which had been imposed upon Yip, and he so ordered.

Although the sentence is said to have been manifestly excessive, that argument was not developed by reference to any comparable case, with the exception of the sentence imposed upon Yip, to which I will come. Remarkably, it is a contention made in the course of submissions which ultimately suggest in this court that:

> "The appropriate sentencing range for this level of cannabis trafficking falls generally between four to six years of imprisonment."

For which the submissions cite three cases in this court: *R v Collins*,[1] *R v Brienza*,[2] and *R v Falconi*.[3] The argument that the sentence is manifestly excessive cannot be accepted. It is argued that the facts and circumstances of Yip's case were more serious and that the parity principle required that the applicant should receive a term which was less than that imposed upon Yip. It is not common ground that Yip's sentence engaged the parity principle, but the respondent accepts that it is a comparable case and that the facts and circumstances of the applicant's case were no less serious.

As was inevitable, the facts and circumstances of the two cases were not identical. It could be said that Yip had a more serious criminal history, because he had received a sentence for what had been described as a very serious assault. But that was an offence committed by him as a juvenile, for which he had been sentenced in the Childrens Court. Yip was also sentenced for an offence of the possession of methylamphetamine, for which he had received a concurrent sentence of two years imprisonment suspended after 12 months. There was no finding of a commercial purpose in that offence.

Against the applicant's arguments are the facts that Yip's plea of guilty was an early one and the amount of cannabis which was trafficked in Yip's case was said to be "more than 66 pounds", which on any view of the applicant's case was a significant distinguishing feature. If Yip was to be regarded as a co-offender and his case was relevant under the parity principle, there was no disparity between the sentences imposed upon these two offenders.

The third argument involves the judge's finding that, as he put it, the telephone intercept evidence revealed that the applicant had supplied 180 pounds of cannabis to Mr Latter. In making that finding, the judge noted a submission by the applicant's then-counsel that the figure of 180 pounds, which, as I have said, was asserted in the schedule of facts, was "not necessarily accurate". It is argued that the judge should not have been satisfied that it was accurate. Something more should be said about the submissions by the applicant's then-

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1 [2009] QCA 387.
2 [2010] QCA 15.
3 [2014] QCA 230.

counsel to the sentencing judge. The prosecutor had referred to the possibility that there may be some dispute as to the quantity which had been supplied, and the judge asked the applicant's counsel about that matter. The response was initially:

> "The Crown put a figure of 180 pounds. I'm not particularly comfortable with that as an overall figure, but it doesn't particularly matter, I don't think."

Understandably, the judge pressed for clarification of the applicant's position. The response from counsel was to say:

> "In terms of the overall 180 pounds, I fail to see that the telephone evidence reaches – gets into a figure that is that high, but it probably is irrelevant given that he was trading in wholesale quantities of cannabis clearly for a commercial profit."

Again, the judge pressed counsel to be clear on what was his client's position, asking:

> "You're not really quibbling with the Crown's figure or are you?"

Counsel continued:

> "I certainly don't want to be calling evidence[.]"

But the telephone intercepts, he argued, showed a total of less than 180 pounds. When asked:

> "What's the highest that … it could possibly be?"

Counsel said that it might be:

> "more in the order of 140 pounds."

Adding that:

> "It doesn't really, as I say, make much difference."

In this court, it is said that the judge and counsel were then at cross-purposes and that counsel was including within his 140 pounds the 56 pounds or thereabouts which had been found in the applicant's possession. Counsel for the respondent was sought here to explain how the amount of 180 pounds could be derived from the schedule of facts. She has provided a plausible explanation, but if it mattered, a finding on this question would probably require the

court to listen to the conversations. That exercise was unnecessary for the sentencing judge, just as it is for this court.

As was properly conceded by counsel then appearing for the applicant, whether the total was 180 or 140 pounds was of little significance, and the same may be said substituting 230 for 180 pounds. Notably, Mr Latter was not the applicant's only customer. As I have said, the quantity in Yip's case was said to have been something not much over 66 pounds. I am not persuaded that there was an error of fact, or that, more relevantly, it affected the exercise of the sentencing discretion. In my view, the application for leave to appeal should be refused.

**MORRISON JA:** I agree.

**SOFRONOFF P:** I also agree. The order of the court is the application is refused.