SUPREME COURT OF QUEENSLAND

CITATION:	*R v Roccisano* [2018] QCA 215
PARTIES:	**R** **v** **ROCCISANO, Rocky Martin** (applicant)
FILE NO/S:	CA No 165 of 2017 SC No 432 of 2016 SC No 577 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 29 June 2017 (Douglas J)
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2018
JUDGES:	Fraser and Gotterson and Philippides JJA
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of 18 drug-related offences, the most serious of which were trafficking in a dangerous drug (cannabis) and trafficking in a dangerous drug (methylamphetamine) – where the applicant was convicted of eight weapons-related offences, the most serious of which was unlawfully possessing a category H weapon, with the circumstance of aggravation of possessing it in a public place without a reasonable excuse – where the applicant was sentenced to 12 years imprisonment for the count of trafficking in a dangerous drug (cannabis), which was intended to reflect of overall criminality of his offending – where the applicant applied for leave to appeal against his sentence on the ground that it is manifestly excessive – where the applicant argued that a global sentence of nine and half years imprisonment should have been imposed for the count of trafficking in a dangerous drug (cannabis), without a serious violent offence declaration – whether the sentence imposed on the applicant is manifestly excessive *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, applied *R v Feakes* [2009] QCA 376, applied *R v Gordon* [2016] QCA 10, considered

R v Kalaja [2012] QCA 329, considered
R v Markovski [2009] QCA 299, considered
R v Thornbury [2017] QCA 284, distinguished

COUNSEL: M Harrison for the applicant
C N Marco for the respondent

SOLICITORS: Lawler Magill for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** On 24 January 2017, in the Supreme Court at Brisbane, the applicant, Rocky Martin Roccisano, pleaded guilty to, and was convicted of, 18 drug-related offences alleged in a 20-count indictment. They were:

Count 1	trafficking in a dangerous drug (cannabis)
Count 2	trafficking in a dangerous drug (methylamphetamine)
Counts 3 – 15	supplying a dangerous drug (in 11 instances, cannabis; and in two instances, methylamphetamine)
Count 16	possessing property obtained from trafficking
Count 17	unlawfully possessing a motor vehicle
Count 18	possessing things used in connection with trafficking in a dangerous drug

All offences were against provisions in the *Drugs Misuse Act* 1986 (Qld).

[3] Later, on 29 June 2017, the Crown entered a nolle prosequi in respect of Count 19 and the applicant pleaded guilty to, and was convicted of, the offence in Count 20, namely possession without reasonable excuse of a shortened firearm.

[4] The applicant also pleaded guilty to, and was convicted of, eight weapons-related offences on a separate eight-count indictment on 29 June 2017. The offences were:

Counts 1, 2	unlawfully possessing a category H weapon (a replica handgun)
Counts 3, 4	unlawfully possessing a category H weapon (a shortened rifle), with the circumstance of aggravation of possessing it in a public place without a reasonable excuse
Counts 5, 6	possessing without reasonable excuse a firearm that had been shortened
Count 7	possessing without reasonable excuse a weapon of which the identifying serial number had been defaced
Count 8	possessing dangerous goods (firearms) in a vehicle

Count 20 and Counts 1 to 8 were *Weapons Act* 1990 (Qld) offences.

[5] As well, on the same day, the applicant pleaded guilty to six offences that were charged summarily, namely, four charges of failing to have an authority required to possess explosives; one charge of receiving tainted property; and one charge of possessing utensils or pipes in connection with the use of dangerous drugs. He was convicted of those offences.

[6] The applicant's sentence hearing also took place on 29 June 2017. On that occasion, he was sentenced on the 20-count indictment as follows:

Count 1	12 years imprisonment
Count 2	8 years imprisonment
Counts 17, 20	12 months imprisonment
Counts 3-16, 18	no further punishment

[7] On the other indictment, the applicant was sentenced to 12 months imprisonment on all counts. This sentence was imposed in circumstances where s 50(1)(d)(iii) of the *Weapons Act* imposed a minimum penalty of that duration, to be served wholly within a corrective service facility, in respect of the Counts 3 and 4 offences.

[8] The learned sentencing judge intended that the sentence of 12 years imprisonment for the Count 1 trafficking offence reflect the overall criminality of the applicant's behaviour.[1] His Honour noted that the duration of this sentence compelled a serious violent offence declaration with the consequence that the applicant must serve 80 per cent of the term in custody.[2] A period of some 347 days pre-sentence custody was declared to be time served under the sentence.[3]

Circumstances of the applicant's offending

[9] The applicant was convicted of trafficking in cannabis over a two year period beginning in January 2013. The trafficking escalated over the following three to six months to a point where he was selling 200 to 300 pounds of cannabis per week. He paid his supplier $3,000 per pound and made a profit of $100 on each pound supplied. On 8 September 2014, his principal supplier was arrested and he was forced to source cannabis elsewhere. His trafficking in cannabis thereafter was on a much diminished basis.

[10] On his own admission, between the beginning of July 2013 and 7 September 2014, the applicant supplied a minimum of 12,400 pounds (5,617 kilograms) of cannabis, based on an average of 200 pounds per week. Over the longer period from the beginning of April 2013 until 7 September 2014, he supplied a maximum of 22,500 pounds (10,192 kilograms) of cannabis, based on an average of 300 pounds per week. Hence, the profit he derived from trafficking in cannabis ranged between $1,240,000 and $2,250,000.[4]

[11] The applicant pleaded guilty to trafficking in methylamphetamine between 21 June and 19 December 2014. He admitted that during the period from 8 September to

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1 Sentencing Remarks ("SR") p 7 ll15-16: AB55.
2 Ibid ll32-34.
3 Ibid ll30-32.
4 Schedule of Facts ("SF") pp 1-2: AB59-60.

18 December 2014, he would acquire 14 grams per fortnight for "$5,000 per half-ounce" (14 grams) acquisition. In all, he sourced at least 138.75 grams of methylamphetamine. Some of it he used himself, and the balance he supplied to others in gram lots up to 3.5 grams.[5]

[12] The applicant's trafficking was detected by telephone intercepts over the period from 4 June to 18 December 2014. On the latter date, police executed a search warrant at the applicant's residence at Greenbank and his father's business premises at Kingston where the applicant worked and from which he supplied drugs. During the searches, police located ammunition, a gun barrel, a sawn-off rifle, a syringe, a glass smoking pipe, a set of digital scales, a clear plastic tube containing traces of white crystalline residue, a stolen motorbike with the registration plates removed and a sum of $1,310 in the applicant's wallet.

[13] The intercepted telephone communications revealed that over the period of the warrant, the applicant had at least 14 different customers.[6] He admitted to having six or seven principal customers.

[14] The applicant was arrested on 18 December 2014. He was released on bail on 2 February 2015. On 9 September 2016, he was intercepted by police. Two replica handguns, a shotgun and a rifle were located in his vehicle. The rifle had been substantially shortened and the serial number on it obliterated. The applicant gave no explanation for his possession of the weapons. The offences charged on the second indictment arose out of this interception. They were committed while the applicant was on bail.

[15] Following his arrest, the applicant participated in an interview with police on 18 December 2014. Significantly, he confessed to trafficking in cannabis prior to the trafficking that police had detected by telephone intercept. He told police that the trafficking had ceased three months before his arrest when his supplier was arrested. There was telephone intercept evidence to the contrary.[7]

[16] On the applicant's account given to police, he began trafficking in methylamphetamine from September 2014, after his cannabis supplier had been arrested. However, telephone intercepts suggested that a methylamphetamine supply transaction took place as early as 22 June 2014 (referred to as "the other thing" in the intercepted conversation). They also revealed an interest in purchasing an ounce of methylamphetamine every two days which the applicant expressed in an intercepted conversation on 28 July 2014.[8]

[17] The applicant confessed to police to using codes while speaking on his mobile phone and to changing the phone number frequently. He said he worked "day and night" on his trafficking business.

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5 SF p 2: AB60.

6 SF p 3: AB61.

7 As noted, telephone intercepts indicated that the applicant was continuing to make isolated supplies of cannabis in quantities of a pound or so during October and November 2014: SF pp 12-13: AB70-71.

8 SF pp 4, 8: AB62, 66.

[18] He told police that on one occasion, when his car was stopped by police but was not searched, it contained 80 pounds of cannabis and $100,000 in cash.[9] He admitted to using weapons for protection.[10]

[19] The applicant also told police that he started trafficking in cannabis because he had a mounting gambling indebtedness. He was gambling up to $30,000 per week, mainly on poker machines. The trafficking was an easy way for him to make money.[11] At the time of his arrest, the applicant said he was owed $100,000 by one customer and himself owed one of his suppliers over $162,000.[12]

The applicant's personal circumstances and record of prior offending

[20] The applicant was aged between 23 and 25 at the time of the trafficking offending. He was 27 at the time of both the weapons offences and his sentence hearing. He married at 19 years of age and has three children. He is a qualified mechanic. He suffers from asthma and another disease for which he takes medication.

[21] The applicant initially used cannabis recreationally. By 2013, he had become addicted to methylamphetamine. He said he was using 1.75 grams of it per day at the point when he was arrested. The learned sentencing judge was sceptical of that having regard to references tendered on sentence which spoke of the applicant's ability as a mechanic, and to the applicant's management of a wholesale drug trafficking business of this scale.[13]

[22] The drug trafficking, though profitable, did not result in an accumulation of great or hidden wealth on the applicant's part. His gambling appears to have accounted for that, in part at least.[14]

[23] By the time that the trafficking began, the applicant had a criminal history which the learned sentencing judge described as "not particularly significant".[15] It included three offences of possession of a knife when the applicant was aged 17 and 18 and offences of breaking and entering and of burglary committed on a date in August 2007.

The sentencing remarks

[24] The learned sentencing judge referred to the above matters. He described the trafficking as "brazen" in the way in which it was conducted.[16] His Honour appears to have accepted a prosecution submission that it was "large-scale, wholesale and cynically commercial, showing a degree of sophistication and cunning".[17]

[25] His Honour noted that the applicant's admissions not only had added significantly to proof of the period over which he trafficked, but also had provided additional evidence beyond that which may have been obtained by police in respect of the quantities involved.[18]

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9 SF p 17: AB75.
10 Ibid.
11 SF p 16: AB74.
12 SF p 18; AB 76.
13 SR p 4 l54 – p 5 l5: AB52-53.
14 SR p 4 ll24-26: AB52.
15 SR p 4 l7: AB52.
16 SR p 3 l19: AB51.
17 SR p 4 ll12-13: AB52.
18 SR p 2 ll32-34: AB50.

[26] The learned sentencing judge was referred to four sentencing decisions of this Court as comparable. They are *R v Salter*,[19] *R v Briggs*,[20] *R v Kalaja*[21] and *R v Heilbronn*.[22] His Honour said that he found *Kalaja* of most use for present purposes.

[27] The offender in *Kalaja* was 32 years old when sentenced and 27 to 29 when he offended. His trafficking extended over a three year period; it involved four drugs, cannabis, methylamphetamine, 3,4 methylendioxymethamphetamine and gamma-hydroxybutyric acid, in large quantities which were supplied for substantial monetary sums yielding up to $600,000 in unsourced income; and much of the offending occurred when the offender was on bail. The offender had a previous history of drug offending, was a drug user and exhibited symptoms consistent with a polysubstance dependence. The sentencing judge found that, nonetheless, "he was able to engage in complicated, detailed and continuing offences consistent with an ability to control himself, and engaged in high-level, lengthy and brazen illegal conduct". The learned sentencing judge considered that these comments applied equally to the applicant here.[23]

[28] In *Kalaja*, the offender was sentenced to 14 years imprisonment with a serious violent offence declaration. His challenge to it as manifestly excessive was unsuccessful. However, the sentence was described as being "at the high end".

[29] The learned sentencing judge also referred to two decisions which had been analysed by Boddice J who wrote the principal judgment in *Kalaja*.[24] Both were decisions in which Keane JA had discussed the range of sentences for substantial trafficking offending.

[30] In *R v Markovski*,[25] Keane JA said that "[d]ecisions of this Court show that in cases of substantial trafficking at a relatively high level in the drug distribution network, a sentence between 11 and 13 years imprisonment is the appropriate range where the offender is entitled to the benefit of a plea of guilty". In *R v Kostopoulos*,[26] he observed that even with a plea of guilty, a sentence in the order of 16 years was within the proper range for trafficking on the grand scale in question, especially as the criminal enterprise had been conducted while the offender was subject to a suspended sentence for previous drug convictions.

[31] The learned sentencing judge here then noted that in *Kalaja*, Boddice J, speaking of the offending in that case, had said that but for the offender's early pleas of guilty, he could have expected to receive an effective sentence of substantially in excess of the 14 years imprisonment imposed by the sentencing judge.[27]

[32] Turning to the imposition of sentences in the case before him, the learned sentencing judge continued:[28]

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19 [2010] QCA 284.
20 [2012] QCA 291.
21 [2012] QCA 329.
22 [2017] QCA 21.
23 SR p 6 ll12-15: AB54.
24 Holmes and Gotterson JJA agreeing.
25 [2009] QCA 299 at [53].
26 [2007] QCA 266 at [31].
27 At [16].
28 SR p 7 ll1-16: AB55.

> "In this case, it seems to me that the range suggested by Keane JA in *Markovski* is an appropriate position to consider in respect of sentencing you, as it related to cases where there had been a plea of guilty, as has occurred here. But for the admissions made by you extending the period and clarifying the amounts involved, particularly in respect of your trafficking in cannabis, it would seem to me to have been appropriate to sentence you around the higher end of that range of 11 to 13 years suggested by Justice Keane. Taking those *AB* considerations into account, however, I would have sentenced you towards the lower end of that range, perhaps about 11 years in custody, but for the commission of the unexplained firearms offences while you were on bail until the 1st of September 2016.
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> There is also, of course, the issue to be taken into account that your offending covered cannabis as well as methylamphetamine. The firearms offences seem to me to be significant examples of offending of that nature and should be taken into account. The way I propose to do that is to sentence you to 12 years' imprisonment in respect of count 1, to reflect the overall criminality of your behaviour…".

I note that His Honour's reference to "*AB* considerations" alludes to his antecedent remarks concerning sentencing principles discussed by Hayne J in *AB v The Queen*.[29]

The application for leave to appeal and the ground of appeal

[33] On 27 July 2017, the applicant filed an application for leave to appeal against sentence.[30] The sole ground of appeal stated in the application is that the sentence is manifestly excessive.

Applicant's submissions

[34] The applicant's counsel in oral submissions referred to the principles affirmed by Hayne J in *AB*[31] that an offender who confesses to crime is generally to be treated more leniently than the offender who does not, and that a confession to an unknown crime may merit special leniency. Counsel characterised the applicant's confession as falling between a confession to an unknown crime and a mere plea of guilty to a known crime. The confession "elevated (the applicant's) cannabis trafficking to a far more significant level" than had been detected by the telephone intercepts.[32] The confession warranted leniency; yet, it was submitted, "no discernible discount" was given for it.[33]

[35] In a response to a question from the Court, counsel indicated that the submission he was making was one of a failure to take into account a relevant consideration, rather than one of insufficient allowance for the admission which contributed to a sentence that was manifestly excessive in all the circumstances.[34] However, it is apparent

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29 (1999) 198 CLR 111; [1999] HCA 46 at [113], which, his Honour remarked, were referred to by White JA in *Salter* at [12]: SR p 5 l20: AB53.
30 AB102-105.
31 At [13].
32 Appeal Transcript ("AT") 1-3 ll18-19.
33 AT1-2 ll40-41.
34 AT1-3 ll5-6.

from the submissions overall that an "insufficient allowance" argument was maintained, at least as an alternative.

[36] Further, the applicant questioned the adoption by the learned sentencing judge of the range suggested in *Markovski* and cited for guidance in *Kalaja*. The trafficking in *Markovski* was in cocaine and ecstasy, not cannabis. As well, *AB* considerations were not involved.

[37] Considerable reliance was placed for the applicant on two recent sentencing decisions of this Court. One of them, *R v Gordon*,[35] had been decided but was not referred to the learned sentencing judge. The other was *R v Thornbury*[36] which was decided after the applicant was sentenced. Both concerned sentences imposed on pleas of guilty to trafficking in cannabis and in methylamphetamine charged by separate counts. In neither case had *AB* type confessions been made. In each case, the offender was sentenced to 10 years imprisonment on the major count (cannabis in *Thornbury* and methylamphetamine in *Gordon*) with lesser periods of imprisonment on the other count. Neither sentence was disturbed on appeal.

[38] It was suggested that had those decisions been before the learned sentencing judge, he might have adopted a different approach. Finally, it was submitted for the applicant that a global sentence of nine and half years imprisonment should have been imposed for the Count 1 offending, without a serious violent offence declaration.

Respondent's submissions

[39] Counsel for the respondent noted that the sentence for which the applicant was contending was comparable to that imposed in *Salter*. Whilst there were similarities in the profit estimated to have been derived from the trafficking and in the admissions made to police as to the scale of trafficking, the trafficking in that case was in cannabis only; no other drug was involved.

[40] The decision in *Briggs* gave some guidance, it was submitted, as to the appropriate penalty to be imposed for trafficking in methylamphetamine alone. In that case, it was agreed that over 38 weeks, the offender had supplied methylamphetamine with a street value of $190,000 (or $5,000 per week) through individual supplies of 0.5 to 1.0 grams for $100 to $200 each. The offender was sentenced to eight years imprisonment with parole eligibility at the one-third mark.

[41] As to *Markovski*, it was noted that the offender in that case did not plead guilty. He was convicted following trial and sentenced to 15 years imprisonment, a term which Keane JA considered was within the appropriate range for trafficking of the order of seriousness involved.[37]

[42] In regard to *Thornbury*, the counsel for the respondent submitted that the scale of cannabis trafficking was substantially greater in the applicant's case than in that case and was carried out over a longer period. The sentence there was significantly influenced by parity considerations. Further, as well as the two concurrent trafficking sentences (10 years and six years), a cumulative sentence of two years and six months for a range of drug-related and corruption offences was imposed.

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35 [2016] QCA 10.
36 [2017] QCA 284.
37 At [53].

[43] Counsel for the respondent observed that in *Gordon*, the trafficking in cannabis was "substantially less" than in the applicant's case; whereas the trafficking in methylamphetamine was "clearly more". In that case the offending began when the offender was 21 years old. That was a significant factor in his sentence.

Discussion

[44] With regard to leniency for the admissions made by the applicant concerning the scale of his trafficking in cannabis, it is evident from the sentencing remarks that the learned sentencing judge intended to make allowance for it. But for the admissions, he thought that an appropriate sentence was to towards the higher end of the range of 11 to 13 years suggested by Keane JA. To allow for *AB* considerations, he would have sentenced towards the lower end. He adopted 12 years to allow for the criminality involved in the unexplained weapons offences committed while the applicant was on bail.

[45] The applicant's proposition that the learned sentencing judge failed to take *AB* considerations into account is plainly untenable. However, whether he did so in a meaningful way depends, to a considerable extent, upon whether, before *AB* considerations were taken into account, a sentence towards the upper end of the 11 to 13 years range appropriately reflected the criminality of the applicant's drug-related offending. I now turn to that topic.

[46] It is common ground that the offending in *Markovski* involved greater criminality than that of the applicant. However, the observations made by Keane JA were not limited to offending to that degree. They addressed substantial trafficking at a relatively high level. It is true that in that case, the trafficking was in cocaine and ecstasy. However, in *Kalaja*, where the observations were adopted, the trafficking involved cannabis, methylamphetamine and two other dangerous drugs.

[47] Neither *Kalaja* nor *Markovski* is referred to in the reasons in *Gordon* or *Thornbury*. However, I do not regard the latter two cases as manifesting the adoption by this Court of a different and more lenient range for the offending of which Keane JA was speaking.

[48] Of the two of them, *Thornbury* is closer to the applicant's case in that the trafficking in cannabis was over a longer period and of a greater value than the trafficking in methylamphetamine. Nevertheless, the trafficking in cannabis was over a shorter period than in the applicant's case. That aside, the parity considerations arising from a sentence of 10 years imprisonment given to the offender's co-offending brother, and the cumulative sentence of two and half years preclude a cogent argument that the sentence in *Thornbury* was intended to set a different standard for sentencing for trafficking where the dominant drug trafficked is cannabis.

[49] In *Gordon*, the Court was referred to a decision of this Court in *R v Feakes*[38] in which the trafficking was in a range of drugs similar to that in *Kalaja* but on a markedly lower scale than in that case or in the applicant's case.[39] In *Feakes*, McMurdo P observed that decisions to which the Court had been referred indicated that for mature offenders, trafficking on that scale normally attracted a sentence of 10 to 12 years on a plea of guilty.[40] Those observations reconcile comfortably with the observations of Keane JA directed towards higher-scale offending.

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38 [2009] QCA 376.

39 In *Feakes*, it was estimated that the offender had gained a minimum personal financial benefit of $56,200.

40 At [33].

[50] Having considered these authorities, I have come to the conclusion that the starting point adopted by the learned sentencing judge of towards 13 years was arguably high, but it was not unreasonably so. His Honour therefore did make meaningful allowance for the *AB* considerations. It was not at all inappropriate for his Honour to have chosen a sentence for Count 1 that reflected the overall criminality of the applicant's offending, including the weapons offending.

[51] For these reasons, I have come to the conclusion that the applicant's sentence is not manifestly excessive.

Disposition

[52] Since the applicant's proposed ground of appeal has not been made out, his application for leave to appeal against sentence must be refused.

Order

[53] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[54] **PHILIPPIDES JA:** I agree with the order proposed by Gotterson JA for the reasons given by his Honour.