SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ta* [2018] QCA 342
PARTIES:	**R** **v** **TA, Cong Khanh** (applicant)
FILE NO/S:	CA No 157 of 2018 SC No 715 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 14 May 2018 (Boddice J)
DELIVERED ON:	7 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2018
JUDGES:	Morrison and Philippides JJA and Crow J
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to possessing the dangerous drug, cocaine, in excess of 200 grams (count 1), possessing the dangerous drug, cannabis, in excess of 500 grams (count 2), possessing a thing for use in connection with possessing a dangerous drug (count 3), possessing the dangerous drug, methylamphetamine, in excess of 200 grams (count 4) – where the applicant was sentenced to seven years imprisonment for count 1, eight years imprisonment for count 2, four years imprisonment for count 3 and 11 years imprisonment for count 4, to be served concurrently with parole eligibility date set at four years from date of sentence – where the sentencing judge had regard to the fact that the applicant was a user of drugs but not addicted and that he was engaged in the commercial possession of large quantities of drugs for profit – where the applicant seeks leave to appeal against his sentence on the basis that the sentence imposed was

manifestly excessive – whether in all the circumstances the sentence imposed was manifestly excessive to warrant the re-exercise of the sentencing discretion

Corrective Services Act 2006 (Qld), s 182
Penalties and Sentences Act 1992 (Qld), s 161A

R v Cooney [2004] QCA 244, considered
R v Duong (2015) 255 A Crim R 57; [2015] QCA 170, considered
R v Gordon [2016] QCA 10, distinguished
R v Luu [2018] QCA 281, distinguished
R v Oliver [2007] QCA 361, considered
R v Richards [2017] QCA 299, distinguished
R v Tran [2014] QCA 90, considered
R v Tran; Ex parte Attorney-General (Qld) [2018] QCA 22, considered
R v Truong [1997] QCA 49, considered
R v Van Huynh [2003] QCA 371, considered

COUNSEL: A J Kimmins for the applicant
C N Marco for the respondent

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

[1] **THE COURT:** The applicant pleaded guilty and was convicted of the following offences:

Count 1 - possessing the dangerous drug, cocaine, in excess of 200 grams;

Count 2 - possessing the dangerous drug, cannabis, in excess of 500 grams;

Count 3 - possessing a thing for use in connection with possessing a dangerous drug, namely a cutting agent and digital scales; and

Count 4 - possessing the dangerous drug, methylamphetamine, in excess of 200 grams.

[2] The applicant was sentenced to 11 years imprisonment in respect of count 4, with shorter concurrent terms of imprisonment imposed in respect of the other offences. Parole eligibility was set at 13 May 2022, after four years or just over one third of the head sentence.

[3] The sole ground of appeal is that the sentence of 11 years with parole eligibility after four years was manifestly excessive. The applicant seeks the imposition, in lieu, of a sentence of nine and a half years with a commensurately lower non parole period, in the vicinity of one third of the sentence.

The circumstances of the offending

[4] On 9 June 2016, police executed a search warrant at the applicant's unit. In the garage, police located three garbage bags in the back seat of a motor vehicle registered to the applicant. The bags contained a total of 22 sealed bags, each containing about 453 grams of cannabis, having a total weight of 14.38 kilograms. A further 13.8 kilograms of cannabis was found in a box in an adjacent room. That cannabis was packaged in 31 sealed bags, each containing 453 grams of cannabis.

[5] In the room was a ducted vacuum system with an attached waste collection point canister. Inside the canister, police located a plastic bag containing 392.9 grams of white powder identified as containing 283.2 grams of pure cocaine, a purity of 72.1 per cent.

[6] A second plastic bag was also located which contained the following:

- a sealed bag containing 502.8 grams of compressed white powder later identified to contain levamisole;
- 270 grams of cannabis which forms part of count 2 on the indictment;
- a clipseal bag containing 1.663 grams of white powder found to contain 1.054 grams of pure cocaine;
- a clipseal bag containing 246.5 grams of white powder identified as levamisole; and
- a set of digital scales.

[7] Levamisole, the possession of which concerned count 3, is known to be a cutting agent for cocaine.

[8] Later that afternoon, the applicant arrived (at the applicant's unit) in his Jeep motor vehicle, which police also searched. They found a crystalline substance which contained 757.3 grams pure methylamphetamine with a purity of 75.8 per cent. Police also found other items at that time, including cash and some messages the applicant had been receiving.

[9] The total amount of cocaine found in the vacuum canister was 394.5 grams, of which 284.2 grams was pure cocaine, 72 per cent purity. The Crown accepted the applicant was storing the cocaine in the vacuum canister for someone else for their commercial use. The potential value of the cocaine was in the order of $84,000 to $98,000 if sold in one ounce lots and, if sold in one gram lots, was estimated as attracting a street value of $118,350 to $157,800.

[10] The total weight of the cannabis located was 28.45 kilos. It was estimated to have a potential value of between $137,000 and $313,000 with a potential yield, if sold in one ounce lots, of between $132,000 and $457,000.

[11] The methylamphetamine located was estimated to have a wholesale value of at least $206,480.

[12] The Crown alleged, and it was accepted by the sentencing judge, that the cannabis and methylamphetamine were possessed by the applicant for a commercial purpose.

[13] The applicant did not participate in a record of interview with police and declined to identify the person for whom the cocaine had been stored.

The sentencing remarks

[14] In sentencing the applicant, the sentencing judge had regard to the applicant's pleas of guilty, which his Honour found were early and evidenced cooperation and assisted in the administration of justice. His Honour referred to the applicant's age, he was 27 at the time of the offences and 29 years old at sentence. He had a limited but relevant criminal history with a previous entry for drug possession, for which he received a period of probation. The present drug offences breached that order (they occurred one month prior to the expiry of the probation order).

[15] The applicant ran a family business as a jeweller and worked in the family grocery store. A number of references were tendered on the applicant's behalf from his friends and family which spoke highly of the applicant.

[16] His Honour observed that while the applicant had been a drug user, he was not an addict and that it was clear that he was engaged in the commercial possession of large quantities of drugs for profit.

[17] His Honour had regard to the fact that the cocaine was stored on behalf of somebody else and stated that this limited the sentence that might otherwise have been imposed. His Honour did however state that this did not, in any way, restrict the level of the criminality having regard to the vast quantities of cannabis and methylamphetamine found in the applicant's possession that was held for a commercial purpose. His Honour also stated that there was a need for the community to understand that entrepreneurial actions that the applicant had engaged in, would receive condign punishment.

The applicant's submissions

[18] Before this Court, counsel for the applicant referred to the fact that the pleas were entered in the context of negotiation, which led to a factual concession by the Crown on sentence. Reliance was placed on the references which suggested that the offending was out of character for the applicant and that he was a reliable, hardworking and family orientated man. The offending had brought shame to his family and his parents would struggle to maintain the family businesses without him.

[19] It was also submitted that there was evidence before the sentencing judge that the applicant's home had twice been the subject of "drive-by" shootings in September 2017. The applicant's counsel at sentence had submitted that it was in this context that the applicant had declined to identify the person for whom he had stored the cocaine and he ought not to be penalised for not cooperating in those circumstances. A

submission that insufficient regard was had to the applicant's remorse was not pursued.

[20] Counsel for the applicant contended that the sentencing judge erred in imposing a head sentence of 11 years, which was not in line with the cases for comparable offending to which his Honour was referred, namely *R v Cooney*,[1] *R v Duong*,[2] *R v Tran*,[3] *R v Gordon*,[4] *R v Tran; Ex parte Attorney-General (Qld)*[5] and *R v Richards*.[6] Before this Court, the decision of *R v Luu*[7] was also relied on.

[21] It was also submitted that the sentencing judge's imposition of a sentence in the middle of the range submitted by the Crown and at a point that was over 10 years was informed by the following submission by the Crown:[8]

> "The only observation that the Crown makes in relation to the trafficking matters is that they do have to serve 80 per cent of the sentence ... in relation to the two trafficking decisions where they received 10 years, both of those would have to serve eight years before they would be eligible for release. And that's why, in the Crown's submission, a sentence higher, in this case, is appropriate, having regard to the fact that he does not attract the mandatory 80 per cent."

[22] It was submitted that a proper consideration of the comparatives indicated that that was not accurate and that the cases referred to did not support a head sentence of 10 years or more for the applicant's offending. It was submitted that the manifest excess of the sentence imposed was reflective of the sentencing judge misconstruing the comparable sentences and therefore the appropriate sentencing range. Further, the application of an "uplift" on what might otherwise have been a sentence of 10 years or less, because the sentence would not attract an automatic serious violent offence declaration, was not an appropriate exercise of sentencing discretion.

The respondent's submissions

[23] The Crown's actual submission as to sentence was that "a head sentence of 10 to 12 years would be appropriate and a sentence towards the upper end of that range, having regard to the quantities of the drug, the presence of large quantities of cutting

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1 [2004] QCA 244.

2 (2015) 255 A Crim R 57; [2015] QCA 170.

3 [2014] QCA 90.

4 [2016] QCA 10.

5 [2018] QCA 22.

6 [2017] QCA 299.

7 [2018] QCA 281.

8 AB at 28.26-28.43.

agents, and the fact that there is also money that has been found in a significant quantity".

[24] The respondent emphasised the following uncontroversial propositions. The process of sentencing is not a mathematical exercise but rather the balancing of many different and conflicting features to reach a single sentence for each offence. Sentencing is a discretionary judgment and so there is no single correct result, rather a range of sentences in a given case may be said to be "warranted in law". Therefore, it is not sufficient to show that the sentence imposed is markedly different from sentences in other cases, unless the difference is such that there must have been a misapplication of principle or the sentence is unreasonable or plainly unjust. Whether or not a sentence is manifestly excessive is to be decided by reference to all of the factors relevant to the sentence. Comparable cases assist in understanding how factors should be treated but they are not determinative of the outcome and do not set a "range" of permissible sentences or the outer bounds of permissible sentencing discretion with numerical precision.

[25] The respondent referred to the authorities of *R v Oliver*,[9] *R v Van Huynh*[10] and *R v Truong*[11] as indicating that the sentence was within the proper exercise of the sentencing discretion.

Consideration

[26] In relation to the applicant's failure to identify for whom he held the cocaine, the sentencing judge remarked, during submissions, that such a failure was not to be approached by penalising the applicant, but rather the applicant did not gain the benefit of remorse or cooperation that disclosing the names would have attracted. That is an entirely correct approach.

[27] In the decision of *Cooney*, a sentence of eight and a half years imprisonment was imposed with release after three and a half years. This involved an offender who was found in possession of 900.39 grams of substance, containing 641.077 grams of pure cocaine. This is distinguishable from the present case as it was a courier case where the offender was a small scale drug addicted courier who undertook the transportation of cocaine to meet a drug debt. *Truong* is also a courier case.

[28] In *Duong*, a sentence of nine years imprisonment was imposed on an offender convicted after a trial of having possessed and intending to supply 393.891 grams of substance, of which 204.391 grams was pure methylamphetamine. No parole eligibility was fixed in circumstances where the offender gave evidence that had been dishonest, demonstrating a lack of remorse and dubious prospects for rehabilitation. Duong was storing drugs to deliver to others, which may be seen as akin to the applicant's possession of the cocaine in the present case. While Duong

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9 [2007] QCA 361.

10 [2003] QCA 371.

11 [1997] QCA 49.

did not have the benefit of a plea, his offending involved possession of a considerably lesser quantity of methylamphetamine (approximately 204 grams of pure methylamphetamine compared with the applicant's possession of 757 grams of pure methylamphetamine) and in terms of value, Duong had $80,000 worth of wholesale methylamphetamine, whereas the applicant had between $206,480 and $999,200 in wholesale value. The applicant's offending also extended to possession of large quantities of other drugs and occurred in breach of a court order. The respondent's submission that *Duong's* case supports a sentence of 11 years is well made.

[29] In *Tran*, the applicant pleaded guilty to a number of possession offences which arose in two distinct periods some three years apart (including possession of 559.767 grams containing 83 grams of pure heroin, 280.872 grams containing 125 grams of pure methylamphetamine and 131.755 grams of pure methylamphetamine, amongst other drugs and quantities). He had an extensive criminal history involving previous drug offences, including a supplying offence for which he had previously spent time in custody. He was also on parole when he committed the first set of offences and was later on bail when he committed further offences. While he failed to appear and a warrant was issued and remained outstanding for some two and a half months, he ultimately pleaded guilty to all charges and he had served some time in custody that could not be declared. Cumulative sentences were imposed in respect of the two distinct periods of offending, resulting in an effective sentence of 11 years and three months with parole eligibility after approximately five and a half years. On appeal, this Court interfered only to impose parole eligibility after about four and a half years. Tran possessed less than a quarter of the amount of methylamphetamine that the applicant possessed and Tran did so because he was a long term drug addict and engaged in the commercial possession to feed his habit. *Tran* is not of assistance as a comparable case. It does not suggest that the sentencing judge's sentence of 11 years was excessive. Rather to the contrary, particularly given that the applicant had a vastly greater sum of dangerous drugs and had them for commercial purposes unrelated to any personal addiction but rather for commercial profit, *Tran* supports the sentence imposed as within the proper exercise of the sentencing discretion.

[30] In *Gordon*, this Court refused leave to appeal against sentence in respect of a sentence of 10 years imprisonment, with an automatic serious violence offence declaration, for 14 counts, including various possessions, productions and two counts of trafficking in cannabis and methylamphetamine over a period of almost five years. The offender was arrested and charged with drug related offences, including trafficking, during the charge period, but persisted in his offending. He was 21 years of age when he offended. He commenced using cannabis when he was a 12 or 13 year old boy and progressed to methylamphetamine when he was 16 or 17 years of age. As he was sentenced for trafficking and to 10 years, Gordon was required to spend eight years in prison, that is from age 26 to 34. *Gordon* does not assist the applicant in demonstrating that the sentence of 11 years is manifestly excessive.

[31] In *Tran; Ex parte Attorney-General*, a sentence of nine and a half years, with parole eligibility fixed after three years and 59 days was (on an Attorney-General's appeal,

amended to remove the parole eligibility date only) for a trafficking charge and two possessions. Tran entered a late plea of guilty, failed to appear for sentence and was arrested on a warrant some six months later. The trafficking extended over a period of five and a half months and was said to involve large scale, wholesale level trafficking.[12] The appeal was allowed to the extent of removing the parole eligibility date, such that the statutory eligibility date of halfway, being four years and nine months, applied. Counsel for the applicant made submissions that do not suggest that *Tran; Ex parte Attorney-General* itself was of any particular assistance in arguing that the sentencing judge's sentence was manifestly excessive, rather, the case was used to demonstrate that the submission referred to already made by the Crown at sentence was incorrect and that may have affected the sentencing judge's decision.

[32] Counsel for the applicant was correct to point out that the submission of the Crown at sentence was not accurate because *Tran; Ex parte Attorney-General* involved a trafficking offence where the head sentence was nine and a half years with only *Gordon* involving a sentence of 10 years. But the Crown's argument, although made on a half incorrect premise, was not that the applicant ought to receive an uplift but rather that trafficking sentences ought to be read with the mandatory 80 per cent rule imposed by s 161A of the *Penalties and Sentences Act* 1992 (Qld) (the Act).[13] It has not been demonstrated that the Crown's reference to the case of *Tran; Ex parte Attorney-General* resulting in a nine and a half year sentence in any way affected the sentence imposed by the sentencing judge.

[33] *R v Richards*,[14] which was referred to at first instance, concerned a successful appeal against conviction in respect of two counts of trafficking which resulted in the appellant being resentenced by this Court in respect of one count of possession alone. That possession concerned 1,812 grams of substance, containing 176.6 grams of pure methylamphetamine. The offender was sentenced on the basis of a commercial possession where he knew, at least, that a valuable quantity of methylamphetamine was in his possession. On appeal, a sentence of four years imprisonment, suspended after 20 months was imposed. Given that *Richards* concerned a young and first time offender with no prior convictions and with less than a quarter of the amount of methylamphetamine possessed by the applicant, albeit without the benefit of a plea, it does not provide a useful comparative.

[34] In *Oliver*, the applicant was convicted on his plea of guilty of possessing cocaine in excess of 200 grams. On appeal the sentence was reduced from 11 and a half years imprisonment to nine years imprisonment with a parole eligibility date being set after three years. The applicant, who had prior convictions for possessing drugs that

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12 [2018] QCA 22 at [10].

13 That is, conviction of an offence mentioned in sch 1 to the Act and, if convicted, of the serious violence order, then pursuant to s 182 of the *Corrective Services Act* 2006 (Qld), the offender is required to serve at least 80 per cent of the term of imprisonment (or 15 years, whichever is the lesser).

14 [2017] QCA 299.

attracted fines, was to receive two kilograms of a substance containing cocaine at a purity of 66 per cent but never actually came into possession of the drug. The sentence was imposed on the basis of a constructive possession of the cocaine. It does not render the sentence imposed for actual possession of drugs with a proprietary interest in a large quantity of the drugs manifestly excessive.

[35] *Van Huynh* also concerned a sentence imposed for constructive possession. The sentence of 12 years, imposed after trial, concerned 131 grams of pure heroin within 347 grams of a substance. Parity issues applied. The street value of the drug was, if cut as far as possible, $700,000. The applicant had no significant criminal history. The application was refused.

[36] In *Truong*, the applicant was convicted on her plea of guilty of couriering 76.896 grams of pure heroin within 135.143 grams of a substance from Sydney to Brisbane in her five year old daughter's backpack. The street value of the heroin was approximately $300,000. The applicant who had no prior criminal history and no addiction, made full admissions and identified the other men involved, was sentenced to nine years imprisonment with parole after three and a half years.

[37] The sentencing judge described the applicant's offending as "particularly serious". It is clear that the sentence imposed was informed by the gravity of the offending which involved wholesale quantities of three dangerous drugs, two of which were categorised under schedule one, of substantial street value where the possession was cynically commercial.

[38] *Luu*, which was also not referred to at sentence, concerned an applicant who trafficked in a number of drugs and had committed fraud offences. A sentence of nine years imprisonment was imposed for the trafficking with two years imposed for the fraud offences to be served cumulatively. A parole eligibility date was set at five and a half years of the total 11 year sentence. The drug offending involved 56.3 grams of pure cocaine, a much greater quantity of cannabis in addition to approximately 275 grams of pure methylamphetamine and approximately 144 grams of pure MDMA. About $1.8m in cash was also located. The case does not provide an apposite comparative. The sentence imposed for the trafficking on the first time offender is to be considered in the context that a cumulative sentence was imposed. The focus of the application before this Court was whether there was error in failing to also take into account the plea in reducing the parole eligibility date as well as the head sentence.

[39] Even allowing for the reduced criminality of the applicant for his possession of the cocaine, it has not been demonstrated that the sentence of 11 years imprisonment is manifestly excessive, given the totality of the offending, the sentencing principles of deterrence, community denunciation and community protection and the comparable cases.

Order

[40] We would refuse the application for leave to appeal against sentence.