SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carrall* [2018] QCA 355
PARTIES:	**R** **v** **CARRALL, Brent Gregory** (applicant)
FILE NO/S:	CA No 275 of 2017 SC No 1626 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 20 November 2017 (Lyons SJA)
DELIVERED ON:	18 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2018
JUDGES:	Sofronoff P and Jackson and Bowskill JJ
ORDER:	**Leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty to one count of trafficking in dangerous drugs, one count of possessing things used in connection with trafficking and one count of supplying a dangerous drug – where the applicant was sentenced to 10 years imprisonment on the trafficking count and not further punished on the other two counts – where the applicant's sentence on the trafficking count carried with it an automatic serious violent offender declaration – where there was a dispute between the applicant and respondent at first instance as to the quantity of drugs carried by couriers on behalf of the applicant and the role that the applicant played in the trafficking operation – where evidence was led by the respondent from two of the applicant's accomplices – whether there was no evidence to support the learned sentencing judge's factual findings or the fact finding process involved a material error of law CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant submits that the imposition of a sentence of 10 years imprisonment on the trafficking count, which carried with it an automatic serious

violent offender declaration, was manifestly excessive – where the applicant submits that the learned sentencing judge failed to take into account his steps towards rehabilitation – whether the sentencing discretion miscarried

Evidence Act 1977 (Qld), s 132C

Carroll v The Queen [2011] VSCA 150, cited
R v Abbott [2017] QCA 57, cited
R v B; Ex parte Attorney-General (Qld) (2000) 110 A Crim R 499; [2000] QCA 110, cited
R v Cooney; Ex parte Attorney-General (Qld) [2008] QCA 414, cited
R v Cowie [2005] 2 Qd R 533; [2005] QCA 223, cited
R v Crossley (1999) 106 A Crim R 80; [1999] QCA 223, cited
R v Feakes [2009] QCA 376, cited
R v Herford (2001) 119 A Crim R 546; [2001] QCA 177, cited
R v Johnson [2014] QCA 79, cited
R v O'Donoghue (1988) 34 A Crim R 397, cited
Willis v The Queen (2016) 261 A Crim R 151; [2016] VSCA 176, cited

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

SOLICITORS: Rostron Carlyle Rojas Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The applicant pleaded guilty to one count of trafficking in dangerous drugs, namely methylamphetamine and cocaine. He also pleaded guilty to a charge of possessing things used in connection with trafficking and a charge of supplying a dangerous drug. Lyons SJA sentenced him to 10 years imprisonment on the trafficking count and imposed no sentences on the other two counts. The sentence of 10 years imprisonment carried with it an automatic serious violent offender declaration with the consequence that the applicant will have to serve 80 per cent of that sentence before becoming eligible for parole.

[2] The applicant now seeks leave to appeal against that sentence on four grounds. The first ground is that the sentence was manifestly excessive. The second ground is that the learned sentencing judge's discretion under s 132C of the *Evidence Act* 1977 (Qld) miscarried. The third ground is that the applicant was sentenced on a factual basis "not reasonably supported by the evidence". The fourth ground is that the learned sentencing judge failed to take into account the delay and rehabilitation of the applicant between arrest and sentence.

[3] The agreed facts were, in summary, as follows. The applicant was engaged in trafficking cocaine and methylamphetamine for a period of 19 months. He obtained drugs from Sydney by the use of couriers on 25 identified occasions. His practice was to arrange for an accomplice to drive to Sydney while the applicant himself flew down. He would then arrange for the purchase of drugs which he handed to his accomplice to transport to Brisbane by road while the applicant returned by air. He played a substantial role in the trafficking operation, which Lyons SJA described

as "a pivotal role in a very extensive and sophisticated drug distribution network". His activities facilitated the greater use of these drugs at a very wide level throughout Queensland in the relevant period. This operation involved outlaw motorcycle gangs and, indeed, it was detected because police were investigating a particular gang. The applicant used sophisticated counter-surveillance techniques to avoid detection. The quality of drugs trafficked by him was high.

[4] Only two facts were disputed. The first dispute concerned the quantity of drugs carried on behalf of the applicant on the 25 occasions when a courier transported drugs by car from Sydney to Brisbane at the applicant's request. The second was whether the applicant was, in fact, a mere "middleman".

[5] The Crown led evidence from two accomplices, BD and RN. Each gave oral evidence and was cross-examined. Her Honour took into account, in assessing their credit, that they were accomplices who had been given immunity in exchange for their evidence. Having heard the evidence, her Honour concluded that the evidence of BD was credible and the evidence of RN was less so. Her Honour found that BD had transported drugs in the order of a kilogram on three occasions and RN had transported substantial quantities in the order of at least 200 grams.

[6] BD had estimated the quantity he transported based upon his assessment of the size and weight of the packages that he handled and upon his knowledge that between $220,000 and $250,000 had been paid for each of them.

[7] Section 132C(3) of the *Evidence Act* 1977 permits a judge to act upon a fact that is not admitted if the judge is satisfied on the balance of probabilities that the fact is true. Section 132C(4) provides that the required degree of satisfaction will vary according to the consequences of making the finding. Lyons SJA applied those provisions to her fact-finding task.

[8] The applicant now argues that "the Learned Sentencing Judge's discretion under s 132C *Evidence Act* miscarried" and that the Court should find that "this miscarriage of discretion amounted to an appealable error of the first kind identified in *House v The King*".

[9] The submission is misconceived. Section 132C does not confer a discretion. It places a burden upon the Crown to prove the facts upon which it wishes to rely if those facts are not admitted and it prescribes the standard of proof that must be satisfied in order to prove such facts.

[10] It is important to bear in mind the fundamental proposition that an appeal against sentence under s 668D(1)(c) and s 668E(3) of the *Criminal Code* is in the nature of an appeal *strictu sensu*. The Court of Appeal does not sit to rehear the proceeding. An appellate court hearing such an appeal will not interfere with a judge's findings of fact unless it concludes that the finding was not reasonably open or that it was the product of legal error.[1]

[11] The applicant submits that "it was not open" for her Honour to make the findings that she made. He points to instances which, he submits, show that the witnesses were unreliable or lacked credit. He also argues that the packages of drugs that

---

[1] *Carroll v The Queen* [2011] VSCA 150 at [16]-[18] per Maxwell P with whom Buchanan JA agreed; *Willis v The Queen* (2016) 261 A Crim R 151 at [94]–[101] per Weinberg and Beach JJA; *R v O'Donoghue* (1988) 34 A Crim R 397 at 401 per Hunt J with whom Carruthers and Wood JJ agreed.

were carried contained quantities of substances other than drugs so that the total weight did not represent the weight of actual drugs.

[12] The findings made by her Honour were findings of fact that depended upon her assessment of credit. The matters to which the applicant points to undermine the credit of BD, for example, include that BD could not give accurate evidence about the amount of money involved and that the drugs were "cut" with an unquantified amount of coffee and pepper. It is said that RN was uncertain in many particulars of his evidence and that there is a significant risk that his memory was distorted by his use of drugs. In any event, her Honour did not find that the weight of drugs in the packages represented the gross weight of the packages; her Honour appreciated that the packages contained substances other than drugs.

[13] The contention that the applicant was a mere "middleman" in the transactions is sterile. The term "middleman" is neither a legal nor a commercial term of art. What mattered for sentencing was what the applicant had done and not what catchword fitted his involvement.

[14] In an appeal in the strict sense it is pointless to argue that factual findings were wrong unless there was no evidence to support the findings or the fact finding process involved a material error of law. In this case, there was no submission put that there was no evidence to support the disputed findings or that her Honour applied a wrong principle.

[15] I would reject this ground.

[16] Otherwise, upon the basis of the cases cited by her Honour, namely *Cooney*,[2] *Abbott*,[3] *Feakes*[4] and *Johnson*,[5] it cannot be said that the length of the term of imprisonment that was imposed was so inconsistent with previous sentences that it should be regarded as the product of some undetectable error in the exercise of discretion.

[17] As I apprehend this application, it involves a plea that the sentence of 10 years imprisonment may not be too long, because the alternative for which Mr Kimmins advocates is for a sentence of nine and a half years on the first count and six months on the second, to be served cumulatively. The thrust of the application is that the requirement to serve 80 per cent of the term is excessive.

[18] A sentencing judge must have regard to the mandatory non-parole period that is invoked by the operation of a declaration of a serious violent offence.[6] Such consideration may result in a decision to impose a sentence at the lower end of the range.[7] However, a sentencing judge is not obliged in such a case to sentence at the lower end of the range.[8]

---

2 [2008] QCA 414.
3 [2017] QCA 57.
4 [2009] QCA 376.
5 [2014] QCA 79.
6 *R v Herford* (2001) 119 A Crim R 546 at [19] per Williams JA; *R v Cowie* [2005] 2 Qd R 533 at [19] per Keane JA and McMurdo J.
7 *R v Brown* (2000) 110 A Crim R 499 at [32] per Moynihan SJA and Atkinson J.
8 *R v Cowie*, *supra*, at [19].

[19] The applicant did not submit that Lyons SJA failed to take into account the fact that the sentence she was considering would have the effect that the applicant would have to serve 80 per cent of his term of imprisonment before becoming eligible for parole. Her Honour made express reference to this feature when considering the issue of the parity of the proposed sentence with the sentence that had been imposed upon the applicant's co-offender, Corones. Rather, the applicant's submissions were premised upon his success in his challenges to the factual findings. As those challenges have failed, so too does his argument based upon them.

[20] The applicant also submitted that Lyons SJA failed to take into account his substantial steps towards rehabilitation. The applicant had a long-term addiction to drugs. Since his arrest he had abstained from using drugs. He had good character references. His steps towards rehabilitation proceeded over a period of three years between arrest and sentence. The applicant contends that her Honour omitted to make mention of these matters in the course of her sentencing remarks and, as a consequence, it should be inferred that she failed to take them into account.

[21] The point loses its force when it is appreciated that, as the submission was put below, it amounted to little more than pointing out that the applicant had not reoffended during the period of delay and had weaned himself off drugs. It cannot be inferred that her Honour was not aware of these matters, they having been the subject of discussion a few minutes before the applicant was sentenced. They did not bear mention because, in the context of a serious case of drug trafficking in which the applicant had conceded that a sentence of 10 years was within the appropriate range, they were largely immaterial.

[22] Nor can the submission that the sentence was manifestly excessive be accepted. Indeed, both at first instance and on appeal the applicant submitted that a sentence of 10 years was appropriate but advocated for such a sentence to be structured so that it resulted from two sentences of nine and a half years and of six months, respectively, to be served cumulatively.

[23] This is an invitation to the Court to structure a sentence to evade the consequence for parole that is mandated by the statute. This is something that the Court will not do.[9]

[24] For these reasons, I would refuse leave to appeal.

[25] **JACKSON J:** I agree with Sofronoff P.

[26] **BOWSKILL J:** I agree with Sofronoff P.

---

9 *R v Crossley* (1999) 106 A Crim R 80 at [30] per McPherson JA.