SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ta* [2019] QCA 53
PARTIES:	**R** **v** **TA, Piet Luan** (applicant)
FILE NO/S:	CA No 87 of 2018 SC No 451 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 11 April 2018 (Mullins J)
DELIVERED ON:	5 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2019
JUDGES:	Holmes CJ and Gotterson and Morrison JJA
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – PARTICULAR OFFENCES – DRUG OFFENCES – DEALING AND DISTRIBUTION OF DRUGS – TRAFFICKING OR SALE AND SUPPLY – where the applicant pleaded guilty to unlawfully trafficking in methylamphetamine and cannabis – where the applicant disputed the factual basis upon which he was to be sentenced – where one of the factual issues in dispute was whether the applicant was responsible for drugs found by police at a storage shed – where the learned sentencing judge found that the storage shed was rented on the applicant's behalf and so the applicant was in possession of drugs located at that storage shed – where the learned sentencing judge made that finding based on, among other things, a finding that the relationship between the applicant and his associate was one of employer and employee in the applicant's trafficking business – whether the learned sentencing judge made an error in finding that the storage shed was rented on the applicant's behalf – whether the learned sentencing judge made an error in not making an intermediate finding that the applicant's associate had a second phone for communicating with the applicant – whether the learned sentencing judge could have been satisfied to the requisite degree

Evidence Act 1977 (Qld), s 132C(3), s 132C(4)

R v Carrall [2018] QCA 355, considered
R v Strbak [2019] QCA 42, considered

COUNSEL: P J Callaghan SC, with A J Kimmins, for the applicant
P J McCarthy for the respondent

SOLICITORS: Guest Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA and with the order his Honour proposes.

[2] **GOTTERSON JA:** On 28 March 2018, the applicant, Piet Luan Ta, pleaded guilty in the Supreme Court at Brisbane to an offence against s 5 of the *Drugs Misuse Act* 1986 (Qld). The count in the indictment alleged that between 31 January 2012 and 14 February 2013 at Brisbane and elsewhere in Queensland, the applicant carried out the business of unlawfully trafficking in the dangerous drugs methylamphetamine and cannabis. He was convicted and sentenced on 11 April 2018 to 10 years six months imprisonment. A serious violent offence declaration was made. A period of some 321 days of pre-sentence custody was declared to be time served under the sentence.

[3] The applicant had also pleaded guilty to a number of other drug related offences which had been charged summarily. For them, convictions were recorded but the applicant was not further punished.

[4] On 13 April 2018, the applicant filed an application for leave to appeal against the sentence of imprisonment.[1]

The sentence hearing

[5] The sentence hearing took place over two days on 28 and 29 March 2018. At the commencement of the hearing, the parties handed up a Summary of Facts document.[2] It was agreed between them that underlined portions of the document were matters in dispute and that highlighted portions were matters that each relied on the evidence of an individual, Y, in terms of its underlying premise.[3] In summary, the matters that were primarily in dispute were:

(i) the length of the period of trafficking;

(ii) whether a storage shed at Durack was kept by Y on the applicant's behalf; and

(iii) whether the applicant was responsible for methylampetamine found in a Toyota Prado motor vehicle on 12 February 2013.[4]

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1 AB1-3.
2 Exhibit 5: AB988-991.
3 AB14 ll1-6.
4 AB27 ll13-32.

[6] At the sentence hearing on 28 March 2018, Y and another individual known to the applicant, X, gave evidence in closed court.

[7] The learned sentencing judge made the following findings in respect of the matters in dispute:

(i) that she could not be satisfied that the period in which the applicant trafficked commenced prior to 25 September 2012 with the consequence that the total trafficking period for which he was to be sentenced was 4.5 months;[5]

(ii) that the storage shed was rented by Y on the applicant's behalf with the consequence that the applicant was in possession of drugs located at the shed on 8 February 2013;[6] and

(iii) that she could not be satisfied that the applicant was responsible for the methylamphetamine located within the Toyota motor vehicle on 12 February 2013.[7]

[8] It is the second of these findings that is relevant for present purposes.

The reasoning underlying the finding with respect to the shed

[9] In the course of her sentencing remarks, the learned sentencing judge reasoned towards her finding with respect to the shed as follows:

> "The storage shed was rented by Y at Durack in Y's business trading name on 25 September 2012. Only Y signed the storage agreement. Lam Ta's name and contact details were handwritten out by Y on the form that I infer was used by the owner of the storage shed to create the written agreement. Those details about Lam Ta were incorporated into the typewritten form showing Lam Ta as the alternative contact person to Y.
>
> You spent a week overseas between 7 and 16 January 2013 and kept in contact with Y and your brother, Lam Ta, while you were away. Text messages were exchanged between you and Y concerning debts. It is apparent from the content of these messages that Y was looking after your business in collecting debts for you. Reference was made in one call to a customer owing $132,250. It is also relevant that Y only entered the storage shed on two occasions while you were away, the first on 8 January and the second the day before you return. The tenor of these messages confirms that you treated Y as an employee.
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> Y asserts that you instructed him to buy a Nokia telephone that he kept for communicating with you. His evidence was challenged on this aspect. His explanation as to destroying the SIM card and giving the phone to a friend to destroy the phone and Y's assertion that he had no idea of the telephone number of the phone seemed an incredible explanation. Ultimately, it was not necessary for me to make a

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5 AB77 ll19-26, AB 78 ll5-11.
6 AB77 ll15-17.
7 AB76 ll5-8.

> finding about whether Y had this phone, as I am satisfied otherwise on the evidence that I can infer that Y was your employee in your trafficking business.
>
> Y was the only person ever to access the storage shed and there were 112 entries. On a number of occasions the records show that Y entered the shed either before or after he visited your home. For example, these occasions include 12, 13, 17 and 24 October and 1, 3, 9, 15, 20, 21, 28, 29 and 30 November 2012. Exhibit 4 contained the extract from the CCTV of your residence recorded on 8 February 2013 at 6.24 pm which shows your meeting an unidentified man who reverses a Commodore sedan into your driveway. The boot is opened and the man puts a number of items into a blue bag and a red and white bag. The man carries the bag into your house via the garage. Y then attended your home at 7.17 pm. At 7.49 pm, Y left your garage carrying something which cannot be identified because of darkness. Y then entered the storage shed at 7.56 pm. A blue Cotton On Kids bag showed in the photographs in exhibit 3 containing methylamphetamine was found by the police during the search of the shed in the evening of 8 February 2013. The timing of the discovery of these drugs, in conjunction with the CCTV evidence from your home recorded on the same day, is independent evidence that confirms Y's evidence about transporting drugs to the shed on that evening in accordance with your instructions.
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> The fact that Y put Lam Ta's contact details on the storage shed agreement is not overly significant evidence, but it is one small piece of evidence that is also consistent with the shed being rented for your purposes. The fact that you may not have known the storage shed number is not sufficient to dissuade me from this conclusion. Significantly, the relationship between you and Y as employer and employee in your trafficking business persuades me, in conjunction with the other indications I have just mentioned, that I can accept Y's evidence that he rented the storage shed at Durack on your behalf. I, therefore, conclude that you were in possession of the drugs located in the shed on 8 February 2013."[8]

[10] Y's evidence that he rented the shed on the applicant's behalf was contained in a statement that he gave to police on 25 March 2015[9] and in his evidence in chief given on 28 March 2018.[10]

The ground of appeal

[11] The application for leave to appeal lists two grounds of appeal. At the hearing of the application, the Court was informed that one of them, that the sentence is manifestly excessive, was no longer advanced.[11] The active ground of appeal is that the learned sentencing judge "made an error of finding in relation to the facts, as the finding was not supported by the evidence". The finding in question is that Y

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8 AB76 l17 – AB77 l17.
9 Exhibit 1 Document 8 paragraphs 80, 81: AB 438.
10 In Camera Hearing Transcript ("ICHT") 1-23 l44 – ICHT 1-24 l3.
11 Appeal Transcript 1-2 ll20-24.

rented the shed at Durack on the applicant's behalf and that consequently he was in possession of the drugs located there.

The applicant's submissions

[12] The applicant referred to the provisions of s 132C(3) *Evidence Act* 1977 (Qld) that permit a sentencing judge to act upon an allegation which is not admitted if satisfied on the balance of probabilities that the allegation is true, and to those of s 132C(4) which vary the degree of satisfaction required according to the consequences adverse to the person being sentenced of making a finding that the allegation is true.

[13] It was submitted that a finding that the trafficking enterprise carried on by the applicant was of a sufficient scale as to warrant use of a storage shed for drugs would have very significant consequences for the applicant's sentence. This was all the more so when a serious violent offence declaration was under consideration. Accordingly, the applicable degree of satisfaction for this finding was, it was submitted, a "very high" one.[12]

[14] The applicant contended that the learned sentencing judge needed to have been satisfied to a very high degree of the applicant's:

(i) "relationship and control over Y";

(ii) "knowledge and control over the shed"; and

(iii) "possession of the drugs located in the shed".[13]

[15] In written submissions, the applicant has not taken issue with the availability of the factors referred to by her Honour as justifying acceptance of Y's evidence that he rented the storage shed on the applicant's behalf. Those factors include that some of the drugs in the shed were found inside a blue "Cotton On" bag with a "dinosaur motif"; that the placing of drugs into a similar bag was recorded by surveillance footage on 8 February 2013 at the applicant's residence; and that the applicant's brother had an association with the rental agreement for the shed.[14]

[16] As well, the applicant accepts that the evidence of X was generally supportive of Y being "an employee" of the applicant and that in a phone call several days after the drugs were located in the shed, the applicant told X that he was having "major dramas".[15] I note that further support for a relationship of that kind is given by an intercepted phone call between the applicant and an associate after the shed had been searched by police. During this conversation, the applicant stated that he had told Y that he "wasn't angry or upset with him".[16]

[17] The applicant's submission is that notwithstanding those factors, other considerations precluded her Honour from being satisfied to a very high degree that Y rented the shed on the applicant's behalf and, ultimately, that the applicant had possession of the drugs located in the shed. Those considerations concerned factors personal to Y – that he was a co-accused with a motivation to implicate the applicant; that, independently, he had been supplying drugs to others at the time when the shed was searched; and that he had access to, and control of, the shed. As well, there was

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12 Applicant's Outline of Submissions ("AOS") paragraph 16.
13 AOS paragraph 38.
14 AOS paragraph 39.
15 Ibid. Telephone call at Exhibit 1 Document 22: AB979.
16 AB979.

no evidence that the applicant had any direct involvement with the shed. He did not have access codes or a key for it.[17]

[18] In a supplementary outline of written submissions, the applicant identified what he contended is a further specific error in the reasoning of the learned sentencing judge towards the challenged conclusion. That error, it was alleged, was not making a finding whether Y had a second phone for communicating with the applicant. The finding was essential, it was submitted, in view of Y's in-camera evidence that he only went to the shed when the applicant directed him to do so and that, in the main, the directions were by text message on the Nokia phone.[18] The applicant was also critical of her Honour's description of Y as "an employee".

[19] In oral submissions, the applicant focused upon the issues raised in the supplementary outline and also addressed several instances where, it was argued, Y's evidence was contradicted by other evidence.

Respondent's submissions

[20] The respondent submitted that the applicant's challenge is to a finding of fact by the learned sentencing judge. Citing the decision of this Court in *R v Carrall*,[19] the respondent further submitted that such a challenge will not succeed unless the appellate court concludes that the finding was not reasonably open or that it was the product of legal error.[20] Here, there was evidence to support the challenged finding and no material error of law was involved in making it.[21]

[21] Specifically, the evidence independent of Y's testimony, to which her Honour referred, supported the finding.[22] Criticisms of Y's evidence did not diminish the value of that evidence. In any event, there was overstatement in the applicant's criticisms of Y's evidence.

[22] The respondent contended further that there was no error of law in not making a finding with respect to the Nokia phone. Besides, communications other than by the Nokia phone that were recorded and were in evidence, justified an inference that the applicant and Y did communicate with each other by a second phone.

Discussion

[23] The applicant's case is not that there was no evidence to support the finding that is challenged. He accepts that there was such evidence both in Y's statements and in circumstances independent of those statements that tended to support it. Nor is it alleged that the learned sentencing judge misstated the degree of satisfaction required in order to make the finding.

[24] The applicant's case is put at two levels. At a broad level, it is argued that it was not open to the learned sentencing judge to be satisfied to the requisite degree. An error in being satisfied to an insufficient degree is to be inferred. At a more specific level, it is suggested that her Honour erred in not making an intermediate finding with respect to a fact that was critical to the finding she did make. The intermediate

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17 AOS paragraph 40.
18 ICHT 1-69 l31 – ICHT 1-70 l9.
19 [2018] QCA 355 per Sofronoff P at [10], [14].
20 Respondent's Outline of Submissions ("ROS") paragraphs 3, 4.
21 Ibid paragraph 5.
22 Ibid paragraph 22.

fact was, of course, communication between Y and the applicant via the Nokia phone.

[25] Because of its centrality to the applicant's case, I propose to consider first the Nokia phone issue. Discussion of the other matters raised by the applicant will follow.

[26] **Nokia phone:** I would accept that the mode by which the applicant and Y communicated about the shed was relevant to a conclusion as to the degree of direction given by the applicant to Y about use of the shed. Hence, it was also relevant to a finding whether Y rented it on the applicant's behalf.

[27] Y's in-camera evidence was that he and the applicant messaged each other "via cheap Nokia phones that were acquired in Inala…It was under an assumed name".[23] Other evidence established that Y visited the shed 112 times. There was, of course, no evidence of the content of any messages between the applicant and Y on a Nokia phone.

[28] However, the content of recorded communications that was in evidence before the learned sentencing judge did support an inference that the applicant and Y were messaging each other via another phone. The following schedule lists those communications and the basis upon which they support that inference.

Date/type of communication	**Content of communication as stated in log**	**Basis for inference**
27 November 2012 Text message from Y to X	Hey mate I think hes [the applicant] on a plane coming back to Bris as we speak that's why he might not be answering **but Ive text him to call u asap**	The log of recorded communications does not show a contemporaneous message sent from Y's intercepted number, or received by the applicant's intercepted number.[24]
8 January 2013 SMS message from Y to the applicant	Nah he didn't, **so I TXT him but no reply**l There's a txt on the blackberry but I can't open it, theres a passcode?	The log of recorded communications does not show a contemporaneous message sent from Y's intercepted number.[25]
29 January 2013 Text message from Y to X	[the applicant] flies in at 5:30, he said he'll contact you after you arrive	The log of recorded communications does not show that Y and the applicant had been communicating before this message was sent to X.[26]

23 ICHT 1-26 l45 – ICHT 1-27 l3.
24 AB934.
25 AB954.
26 AB966.

07 February 2013 Phone call between Y and the applicant	Y asked if the applicant was home. The applicant denied and asked if Y had messaged him. Y confirmed, and the applicant said he will message Y back	The log of recorded communications does not show a contemporaneous message sent from Y's intercepted number, or received by the applicant's intercepted number.[27]
12 February 2013 Phone conversation between X and Y	Y said that he had spoken to the applicant today and the applicant said for X to wait until the applicant contacts him	The log of recorded communications does not show that Y and the applicant had been communicating before this conversation took place.[28]

[29] As well, the evidence before the learned sentencing judge of police surveillance and CCTV footage of the applicant's residence also supported the inference. On 11 February 2012, police surveillance observed Y leaving the shed at Durack and then arriving at the applicant's residence. The applicant was at the front door ready to meet him. This sequence of events suggests that the applicant knew that Y was coming to his residence. However, there is no contemporaneous message sent from Y's intercepted number or received by the applicant's intercepted number by which the meeting may have been arranged.[29]

[30] Thus, the fact to be inferred does support the challenged finding. That the inference was not drawn by the learned sentencing judge does not detract from that. Nor is there any impediment to deploying it in support of the finding, that arises from her Honour's view that Y's evidence about giving the phone to a friend, destroying the SIM card and not knowing its number was "incredible".

[31] I would observe that it is not at all clear to me why the learned sentencing judge took that view. If Y had been using the phone to message with the applicant, it is unremarkable that after the storage shed was searched, he would give the phone away and destroy the SIM card and the recorded transmission data on it. Likewise, it is unremarkable that if he used the phone only for messaging with the applicant, he did not know its number.

[32] **Credibility of Y's evidence:** The applicant identified two aspects to Y's evidence that he submitted reflected "very poorly" on Y's credibility. One of them was her Honour's implicit rejection of Y's in-camera evidence that X and the applicant were fifty-fifty partners in trafficking in both cannabis and methylamphetamine in Western Australia.[30] She accepted X's evidence concerning transportation of drugs to Western Australia in which he described his role in it as akin to that of a hired driver, rather than a partner. Her Honour said that she had no difficulty in accepting

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27 AB975.
28 AB979.
29 AB978.
30 ICHT 1-59 l46 – ICHT 1-60 l5.

X's evidence to the extent that there was inconsistency between it and that of Y on this issue.[31]

[33] The second aspect is that Y "lied" to police on 25 March 2013 when he told them that the applicant's brother signed the rental agreement as well as himself.[32] A perusal of the rental agreement[33] reveals that the brother did not sign it. However, his name, address and mobile phone number appear under the heading "Alternative Contact Person" on the agreement.

[34] I do not regard either of these aspects as reflecting very poorly on Y's credibility. Her Honour did not expressly find that Y lied with respect to X's role. Further, a preference for X's evidence about his own role does not imply a finding of deliberate misstatement on Y's part. Her Honour may well have regarded Y's account as less reliable though honestly given.

[35] There is no foundation to the contention that Y lied to police about the applicant's brother and the rental agreement. Certainly, it was factually inaccurate to say that the brother signed the rental agreement, but it by no means follows that the inaccuracy was deliberate. In any event, the point is of little significance given that the brother was associated with the setting up of the rental of the shed in that he was nominated as the alternative contact person.

[36] **Description of Y as "an employee":** The criticism made is that the description of Y as an employee was of questionable utility in the context of drug trafficking where there is no regulated workplace structure. This criticism is, in my view, without substance. Her Honour evidently did not use the word "employee" as it is understood in a master and servant or an industrial relations context. The word, as used by her Honour, has a connotation of subordination to, and subject to the direction of, another; in this case, the applicant.

[37] **Summary:** For these reasons, I am quite unpersuaded that the challenged finding was without an evidential foundation or that the learned sentencing judge erred in law in making it. There was sufficient evidence for her Honour to have been satisfied to the requisite degree that Y rented the storage shed on the applicant's behalf and that the applicant was in possession of the drugs located at the shed on 8 February 2013.

[38] I note that since argument on this application was heard, the judgment of this Court in *R v Strbak*[34] has been delivered. In that case, McMurdo JA[35] (with whom Fraser JA agreed) favoured a more extensive jurisdiction to review fact finding by a sentencing judge than that enunciated in *R v Carrall*. Under the more extensive jurisdiction, an appellate court may review a factual finding for error in the course of making it. I would add that, in my view, no error on the part of the learned sentencing judge as might have engaged the more extensive jurisdiction, was demonstrated in this case.

[39] The ground of appeal has not been made out. The application for leave to appeal against sentence ought therefore be refused.

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31 AB75 ll39-41.
32 Exhibit 1 Document 8 paragraph 81: AB438.
33 AB982 – AB985.
34 [2019] QCA 42.
35 Ibid at [21].

Order

[40] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[41] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.