SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hitchcock* [2019] QCA 60
PARTIES:	**R** **v** **HITCHCOCK, Robert Ian** (applicant)
FILE NO/S:	CA No 147 of 2018 SC No 1073 of 2017 SC No 190 of 2018 SC No 267 of 2018 SC No 678 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 21 May 2018 (Jackson J)
DELIVERED ON:	Date of Order: 4 March 2019 Date of Publication of Reasons: 12 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2019
JUDGES:	Sofronoff P and Fraser and Philippides JJA
ORDER:	**Date of Order: 4 March 2019** **Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTILY EXCESSIVE OR INADEQUATE – where the applicant pled guilty to, inter alia, producing and possessing a dangerous drug in excess of 200 grams (methylamphetamine) – where the applicant was sentenced to 12 years imprisonment in respect of the possession charge and nine years imprisonment in respect of the production charge, to be served concurrently – where the sentencing judge did not fix a parole eligibility date – where the applicant is required to serve half of his sentence before being eligible for parole – whether the sentencing judge erred in failing to take into account the guilty plea by not imposing a parole eligibility date – whether the sentence without an early parole eligibility date is manifestly inadequate *R v Amato* [2013] QCA 158, applied *R v Flew* [2008] QCA 290, cited *R v Randall* [2019] QCA 25, followed

R v Watson [2017] QCA 82, cited

COUNSEL: A S McDougall for the applicant
C L Birkett for the respondent

SOLICITORS: ABF Legal for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** On 4 March 2019 the Court dismissed this application for leave to appeal. These are the reasons for that decision.

[2] On 7 August 2016 police searched the applicant's property at Tallai. Police found a laboratory that proved to be one for the manufacture of methylamphetamine. They found methylamphetamine on or in the lab equipment, as well as a quantity of cocaine. They also found a pistol with a silencer attached to it, two .22 calibre rifles - one of which was loaded and had a scope, laser pointer and silencer attached to it - ammunition and some firearm parts.

[3] During the search, police discovered a contract by the applicant of a storage unit at another premises. They searched those premises on 12 August 2016. They found 137 kilograms of various liquids that were found to contain over 2.6 kilograms of methylamphetamine. They also found various pieces of laboratory equipment that showed traces of methylamphetamine. A plastic trunk in the storage unit contained 14 rifles and another pistol with an attached silencer.

[4] A further search of the applicant's Tallai property on 14 and 15 August 2016 revealed a safe containing a quantity of drostanolone, testosterone and trenbolone, all of which are steroids. The total weight of these steroids was just over 46 grams. In another place on the property, police found 233 grams of methylsulfonylmethane, a substance used as a cutting agent for methylamphetamine. They also found more firearm parts, including magazines and more ammunition.

[5] These discoveries resulted in the nine counts contained in the first indictment.[1]

[6] After the applicant was charged with these offences, he was released on bail. On 3 November 2016 the applicant was stopped by police while driving with a relevant drug present in his blood. This resulted in a charge of breaching one of his bail conditions.

[7] On 30 January 2017 police searched another property at Tallai for reasons unconnected with the present charges. They noticed a shipping container which was locked with an evidently new padlock. They searched inside the container and found drums containing iodine, 11.58 kilograms of hypophosphorous acid and a stainless steel condenser. The key to the padlock was later found on the applicant's

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[1] Producing a dangerous drug in excess of 200 grams (methylamphetamine), possessing a dangerous drug (THC and GHB) in excess of 2 grams, possessing a dangerous drug (cocaine), possessing a thing for use in connection with a dangerous drug (lab equipment and some money), possess a category H and R weapon (pistol and silencer), possession of anything for use in commission of crime defined in Part 2 (scales), possession of utensils (bong), possession of weapon (rifle), possession of weapon (rifle), possession of explosives (ammunition), possession of dangerous drug in excess of 200 grams (methylamphetamine), possession of things for use in connection with production of dangerous drug (lab equipment), possession of 10 or more weapons with at least 5 category D, H or R weapons (14 rifles and pistol) and possession of a dangerous drug (steroids).

keychain. These discoveries resulted in three counts on the second indictment, namely counts of possessing a relevant substance or thing contrary to s 9A(1) of the *Drugs Misuse Act* 1986 (Qld). This possession also constituted a breach of the applicant's bail conditions and he was charged accordingly.

[8] On 11 May 2017 police conducted yet another search at the applicant's property. In the kitchen range hood they found 16 containers and a bag containing methylamphetamine in various amounts and degrees of purity. In total, the quantity of the drug that was found was just over 40 grams. Police also found a set of scales, a pH tester and a glass pipe. In another hiding place they found a separation vessel. These things resulted in two counts on the third indictment.

[9] The applicant declined to be interviewed by police about any of these matters. He pleaded guilty to all charges.

[10] The applicant was a mature man who was 39 years old at sentencing. His counsel submitted, and the learned sentencing judge, Jackson J, accepted that the applicant is an intelligent man. He has been running his own electrical engineering business. He has been in a stable marital relationship and has three dependent children whose ages range from 12 to just under a year old. He is not a drug addict. The applicant's counsel informed Jackson J that his client's activities were commercially motivated and formed part of the activities of a larger group of criminals. His Honour was also informed by the applicant's counsel that the applicant was not prepared to cooperate with authorities for fear of retribution from his criminal associates if he did so.

[11] The applicant's criminal history began in 1998 with a charge of possession of a dangerous drug, a charge of producing a dangerous drug and an associated charge. He was fined but no conviction was recorded. In 2007 he reoffended. Once more he was charged with producing a dangerous drug, possession of a dangerous drug, possessing things for use in the commission of a crime, possession of utensils and a fraud offence. He was convicted and sentenced to a suspended sentence of 12 months imprisonment. In 2011 he was charged once more with possession of a dangerous drug and convicted and fined $600. In 2016 he was convicted of two charges of possession of a dangerous drug in a quantity exceeding that stated in Schedule 3 of the Act, one charge of possession of drugs, possession of utensils and a weapons charge. He was fined $4,000. In 2017 he was convicted once more of two possession charges. Along the way, the applicant was convicted three times for breaching conditions of bail.

[12] At the sentence hearing, there were no mitigating factors that could be offered on behalf of the applicant arising out of these offences or out of the applicant's personal circumstances. He had a business that, one infers, gave him and his family a living and he was not compelled by any addiction to produce his drugs. No submission was made that the applicant was now remorseful. Rehabilitation could hardly be pressed as a mitigating factor in such a case; he was a mature man who knew what he was doing and did it anyway for personal gain. He had previously been caught in the act of production of drugs, had previously been given non-custodial sentences, but had still persisted in committing the present offences.

[13] However, the applicant did plead guilty and that was a matter that had to be taken into account. Jackson J said that he attached "significant weight" to that factor. His

Honour said that he accepted the applicant's pleas had been timely and that he would take them into account when fixing the head sentence. Implicitly, it is clear that the pleas were taken into account in mitigation of penalty.

[14] His Honour considered that the most serious of the offences was the offence of possession of a drug in excess of 200 grams, and that it was the sentence for this offence that would be the "head sentence". That approach has not been challenged on appeal. The prosecutor submitted that a sentence of "not below 12 years" was appropriate in this case. The applicant's counsel informed Jackson J that he had been unable to find any comparable case that suggested the contrary and submitted that the range should be between 12 and 13 years. His Honour accepted that submission and sentenced the applicant to a term of 12 years. In relation to the production charge, the applicant's counsel submitted that the appropriate range was imprisonment for eight to nine years. Jackson J accepted that submission too. His Honour sentenced the applicant to nine years imprisonment for that offence. Otherwise, his Honour imposed a range of penalties for the other offences which it is not necessary to consider here.

[15] The applicant now seeks leave to appeal against his sentence. In order to justify the grant of leave to appeal against sentence, an applicant must demonstrate an arguable error in the exercise of discretion.[2] The applicant submits that in "not imposing a parole eligibility date, the Learned Sentencing Judge did not take into account the plea of guilty, or alternatively, did not place sufficient weight upon that plea". He also submits that his Honour did "not state in open court the fact that the sentence was reduced for the guilty plea, nor its reasons for not reducing the sentence".

[16] The second submission is patently incorrect. His Honour expressly stated that he took the pleas into account in setting the head sentence.

[17] The first submission assumes that effect must be given to a guilty plea, if it is to be given any effect at all, by a reduction in the date for parole eligibility. It is true that that is commonly the way in which a plea of guilty is taken into account. It is also true that it is common for effect to be given by reducing the non-parole period to one third of the sentence. But there is no principle that requires such an approach. Indeed, recently this Court heard and rejected the contrary submission, namely that if effect is to be given to a guilty plea, then it must be by way of a reduction in the head sentence.[3] Both submissions are wrong.

[18] As Fraser JA said in *Amato*,[4] although s 13 of the *Penalties and Sentences Act* 1992 (Qld) requires a plea of guilty to be taken into account, the Act does not dictate how it must be taken into account. The discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary from case to case. Consequently, there can be no fixed mathematical approach to setting such a date.[5] And I would add, nor can there be any rule that effect must be given to a plea by reducing either the head sentence or the parole eligibility date. There is no justification in the statute or in principle to support such a proposition.

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2 *R v Watson* [2017] QCA 82 at [41].
3 *R v Randall* [2019] QCA 25.
4 [2013] QCA 158.
5 *supra*, at [20].

[19] Nor can any error in the exercise of discretion be inferred from the fact of the sentence itself. No authority was cited by the applicant that would justify such an inference. Moreover, as Ms Birkett, for the respondent, correctly submitted in oral argument, when defence counsel submits to a sentencing judge that a particular range of penalty is appropriate, then it is difficult for that applicant later to submit to the Court of Appeal that a sentence that has been imposed consistently with such a submission is *manifestly* excessive. Something special would have to be shown in such a case to maintain such a submission.[6] Nothing like that has been shown in this case. In fact, defence counsel accepted "there is a good argument for not providing an earlier than usual release [*sic*] date", and submitted that the applicant should serve half his sentence before becoming eligible for parole.

[20] There was no other arguable error advanced to support the application for leave to appeal and so the application was dismissed.

[21] **FRASER JA:** The President's reasons reflect my own reasons for joining in the order dismissing the application.

[22] **PHILIPPIDES JA:** The reasons of Sofronoff P reflect the basis for my joining in the order made on 4 March 2019.

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6 *R v Flew* [2008] QCA 290 at [27]-[28] per Keane JA.