SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nunn* [2019] QCA 100
PARTIES:	**R** **v** **NUNN, Daniel Glen** (applicant)
FILE NO/S:	CA No 225 of 2018 SC No 1214 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 23 August 2018 (Ryan J)
DELIVERED ON:	Date of Orders: 7 May 2019 Date of Publication of Reasons: 28 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2019
JUDGES:	Sofronoff P and Fraser JA and Mullins J
ORDERS:	**Date of Orders: 7 May 2019** **1. Application granted.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was sentenced to 10 years imprisonment for trafficking in the dangerous drug methylamphetamine – where the primary judge articulated the "principle" that mature offenders who have pleaded guilty to trafficking in schedule 1 drugs can expect a sentence of at least 10 years imprisonment except in extraordinary circumstances – whether the sentencing judge erred in holding that a sentence of at least 10 years imprisonment was required unless extraordinary circumstances justified a more lenient sentence *Penalties and Sentences Act* 1992 (Qld), s 9(2) *R v Abbott* [2017] QCA 57, cited *R v Castner* [2018] QCA 265, applied *R v Corbett* [2018] QCA 341, cited *R v Feakes* [2009] QCA 376, explained *R v Johnson* [2014] QCA 79, cited *R v McGinniss* [2015] QCA 34, cited *R v Strutt* [2017] QCA 195, cited

R v Tran; Ex parte Attorney-General (Qld) [2018] QCA 22, distinguished

COUNSEL: B J Power for the applicant
C N Marco for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Fraser JA and the orders his Honour proposes.

[2] **FRASER JA:** The applicant pleaded guilty and was convicted of nine offences. He was sentenced to 10 years imprisonment for carrying on the business of trafficking in the dangerous drug methylamphetamine. He was given shorter concurrent terms of imprisonment for three counts of supplying the dangerous drug cocaine, two counts of possessing a dangerous drug, and one count of failing to answer a question before a CCC hearing. Convictions were recorded and he was not further punished for possession of a thing used in connection with trafficking and possession of property obtained from trafficking.

[3] The applicant applied for leave to appeal against sentence upon the ground that the sentencing judge erred by holding that there was a sentencing principle that required extraordinary circumstances before a sentence below 10 years imprisonment could be imposed in a case such as the present. After hearing argument upon the application the Court granted leave to appeal and ordered that the appeal be dismissed. These are my reasons for joining in those orders.

The circumstances of the offences and the applicant's personal circumstances

[4] The applicant trafficked in methylamphetamine between 16 September 2015 and 25 February 2016 and committed the other drug offences during that same period of about five months. He was sentenced upon the basis of a 44 page schedule of facts, which included an extensive summary of the evidence relating to the trafficking count. The trafficking was conducted largely as a wholesale business, with many of the customers supplying the drug to their own customers. Intercepted telephone communications revealed that the business supplied 30 customers in all, of which about nine were regular customers. The drug was distributed at the Sunshine Coast, Brisbane, and Gladstone. The applicant controlled the business. A co-offender, Dalton, was an employee. Dalton usually dealt with the majority of the lower level customers on a day to day basis. Three other people – Leather, Morrissey and O'Reilly – worked at times for the applicant distributing drugs and collecting money. The applicant and Dalton supplied in all at least 2,319.85 grams of methylamphetamine. The amounts sold ranged from 0.1 to 140 grams at a time, depending upon the customer. For example, Gerrard purchased the drug from the applicant in 112 gram quantities on four occasions and in a 140 gram quantity on one occasion, Hawkins and Bragg purchased in 14 and 28 gram quantities, Homans and Matherson purchased in 7 gram quantities, Young purchased in 3.5 gram quantities and Vansleve generally purchased in 1.75 gram quantities. The price of the drug varied according to customer and quantity. The applicant and Dalton preferred not to supply the drug on credit but Dalton occasionally did so to regular customers. It is

unclear how much profit was made from the trafficking business but the schedule of facts indicates that it was substantial: financial analyses revealed that in the period 1 January 2014 to 24 February 2016 the applicant had unsourced income of $66,625.08 and Dalton had an unsourced income of $32,054.86; the applicant and Dalton profited to an extent where, although they did not have other employment, they could rent a unit on the waterfront at the Sunshine Coast and buy cars with cash; and, on the assumption that the applicant and Dalton purchased the drug in wholesale quantities, a conservative estimate of their profits was $308,622 (if purchased in ounce quantities) or $454,253 (if purchased in pound quantities). After Leather was intercepted by police when working for the applicant and found in possession of four ounces, the applicant offered to pay Leather's legal fees. On occasions the applicant threatened violence to recover drug debts, including implicit threats to the mothers of two customers and kicking in the door to Leather's house when the applicant was owed $30,000. The applicant also supplied an unknown total quantity of cocaine.

[5] The applicant's trafficking business closed when police arrested the applicant and Dalton when a law enforcement person was in the process of paying the applicant for the supply of a pound of methylamphetamine. That drug was contained within 16 clip sealed plastic bags, each containing one ounce of substance, the total weight being about 447 grams and the calculated weight of pure methylamphetamine being about 336 grams. Upon a search of the applicant police found two clip sealed bags containing about 36 grams of pure methylamphetamine within about 49 grams of substance. At a shed used in the business police also found about $20,000 cash and three cryovac bags, each containing 61.77 grams pure methylamphetamine within 83.551 grams of a substance. Upon a search of the applicant's unit police found in Dalton's bedroom about 17 grams of substance containing a pure weight of methylamphetamine of about 12 grams.

[6] The applicant did not participate in a police interview. He subsequently refused to answer questions at a hearing before the Crime and Corruption Commission about his knowledge about other persons named in the schedule of facts. The applicant was 29 to 30 years old during the period of his offending. He had a relevant criminal history. In addition to convictions for offences of violence, for which he had been sentenced in 2005 to imprisonment for 12 months to be served by way of an intensive correction order, in October 2012 the applicant was convicted of five drug offences: possession of pyrovalerone; possession of that drug and anabolic steroids; possession of mobile phones, clip sealed bags and digital scales used in connection with the possession of a dangerous drug; possession of a quantity of cold and flu tablets; and possession of a document containing instructions about how to produce the dangerous drug methylamphetamine. For those offences the applicant was sentenced to 18 months imprisonment with immediate parole. The judge who imposed that sentence found that the applicant's offending was serious and had an element of commerciality but that the applicant could be given another chance because of his attempts to rehabilitate himself, his early plea of guilty, and much of the evidence against him came from his frank admissions to police.

Sentencing remarks

[7] The sentencing judge summarised the circumstances of the applicant's offences and his personal circumstances. The sentencing judge also made remarks to the following effect. The applicant's plea of guilty was taken into account in a reduction of the sentence imposed. The applicant's business was intense, wholesale

and successful and its geographical extent was an aggravating feature. It would have been open to impose a cumulative term for the offence of refusing to answer a question. (The maximum penalty for that offence is 200 penalty units or five years imprisonment.) The applicant had a good work history and had done many courses in prison, which was to his credit. A letter by the applicant mentioned his remorse and he apologised to the courts and the community for his offending and acknowledged the lives affected by it. In relation to a submission for the defendant that drugs he was taking for back pain and stress caused him to offend as he did, it was a little difficult to see a link between the applicant's pain and stress and his wholesale trafficking business which allowed him to live very comfortably. There was no suggestion that the profits of the business were consumed by a drug addiction. A letter from the applicant's sister-in-law referring to the applicant having fallen into the wrong crowd jarred a little with the role the applicant played in his drug business as the boss.

[8] The sentencing judge rejected a submission for the applicant that a sentence of 10 years imprisonment or more for the drug offending should not be imposed because it would be out of parity with the sentence of eight and half years imprisonment with parole eligibility after one third of that term imposed upon Dalton. The applicant's counsel referred the sentencing judge to three previous sentencing decisions in which persons who had trafficked in dangerous drugs at relatively high levels had been given sentences below 10 years imprisonment. After discussing those sentences the sentencing judge made the remarks upon which the application for leave to appeal is based:

> "The several cases referred to by the prosecutor support the contention that the appropriate penalty in this case, having regard to your plea of guilty, falls between 10 and 12 years imprisonment. The principle is often expressed in this way: absent extraordinary circumstances, in cases of trafficking in schedule 1 drugs on a large scale, mature offenders who have pleaded guilty can expect a sentence of at least 10 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to slightly lesser terms.
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> I find nothing extraordinary in your circumstances."

[9] Thereafter the sentencing judge had regard to Dalton's sentence of eight and half years' imprisonment with parole eligibility after one third of that period and sentenced the applicant.

R v Feakes

[10] The submissions for both parties acknowledged that the "principle" described by the sentencing judge was derived from the reasons of McMurdo P in *R v Feakes*.[1] After describing the circumstances in that case, and the sentences and circumstances in many earlier cases, McMurdo P stated:

> "My analysis of the comparable cases relied on by Feakes and the respondent in this application demonstrate that, absent extraordinary circumstances, in cases of trafficking in sch 1 drugs on a scale like the present offence, the sentence imposed on mature offenders who

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1 [2009] QCA 376.

> have pleaded guilty is ordinarily in the range of 10 to 12 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to a slightly lesser term of imprisonment in the range of eight to nine years; see, for example, *Assurson* (aged 23) and *Elizalde* (aged 25)."[2]

McMurdo P then discussed Feakes' circumstances and concluded that, "viewed in the context of the cases which I have discussed, it is not possible to conclude that his 10 year sentence is excessive." I and Fryberg J agreed with McMurdo P's reasons, subject only to the caveat expressed by Fryberg J that it was not necessary in deciding *Feakes* to identify a range of imprisonment ordinarily applied in serious trafficking cases or to set the boundaries of a range appropriate in that case.

[11] McMurdo P's analysis has been referred to with approval in many subsequent decisions concerning sentences imposed in comparable cases.[3] It clearly appears from the reasons in those subsequent decisions that in each case the sentence under review was considered with reference to the particular circumstances of the subject offence and offender, the sentences in the past cases which were described and analysed by McMurdo P being used only to "provide guidance … as a yard stick"[4] against which to examine the sentence.

Submissions

[12] The applicant argued that the sentencing judge wrongly fettered the sentencing discretion by treating *Feakes* and the subsequent decisions referring to it with approval as requiring in comparable cases a sentence of at least 10 years imprisonment unless extraordinary circumstances justified a more lenient sentence. The respondent accepted that those decisions did not justify any fetter upon the sentencing discretion of the kind described by the applicant. The respondent argued that the sentencing judge did not treat the sentencing discretion as fettered in the way contended for by the applicant. Rather, the sentencing judge merely provided her own reasons for imposing a sentence that was consistent with McMurdo P's analysis. This construction of the sentencing remarks was submitted to derive support from the fact that the sentencing judge thoroughly considered the circumstances material to the appropriate sentence, the sentence imposed upon Dalton, and the sentencing authorities mentioned in the parties' submissions. The respondent also reminded the Court that "[i]t is not appropriate to parse and analyse judgments given on an ex tempore basis by judges… who have a considerable caseload."[5]

Consideration of the application for leave to appeal

[13] The sentencing judge initially embarked upon an orthodox sentencing process, including by summarising the circumstances of the offences and the offender and analysing cited sentencing decisions. But the sentencing judge then articulated the "principle"

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2 [2009] QCA 376 at [33].

3 *R v Johnson* [2014] QCA 79 at [45], [48], and [49]; *R v Brown* [2015] QCA 225 at [1], [2] and [46] – [47]; *R v Abbott* [2017] QCA 57 at [1], [23] and [25]; *R v Castner* [2018] QCA 265 at [1], [26] – [28], [33]; *R v Dang* [2018] QCA 331 at [1], [2] and [26]. See also *R v Safi* [2015] QCA 13 at [1], [18] and [21]; *R v McGinniss* [2015] QCA 34 at [1], [11], [14]; *R v Ahmetaj* (2015) 256 A Crim R 203 at 205 [1], 220 [84], 223 [93].

4 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28 at 98 [304], approved in *Hili v The Queen* (2010) 242 CLR 520 at 537 [54] and *Barbaro v The Queen* (2014) 253 CLR 58 at 74 [41].

5 *R v Hooper; Ex parte Cth DPP* [2008] QCA 308 at [23], citing *Commissioner of Taxation v Baffsky* (2001) 164 FLR 375 at 386 [49]; *R v Stamatov* [2018] 2 Qd R 1 at 29 [97].

that mature offenders who have pleaded guilty to trafficking in schedule 1 drugs on a large scale can expect a sentence of at least 10 years imprisonment except in extraordinary circumstances. It is implicit in this part of the sentencing remarks that the applicant's offence fell within the terms of that suggested principle. That was the first step in this part of the sentencing judge's analysis. The second step was the finding that the circumstances were not extraordinary. Notwithstanding the sentencing judge's own analysis of the circumstances and past sentences, this stepped analysis apparently informed the immediately following determination of the sentence of 10 years imprisonment for the trafficking offence.

[14] Section 9(2) of the *Penalties and Sentences Act* 1992 (Qld) obliges a court sentencing an offender to have regard to specified factors, which comprehend some circumstances which may be treated as aggravating factors and some circumstances which may be treated as mitigating factors. There are statutory provisions which operate according to whether or not the circumstances are exceptional or extraordinary,[6] but none apply in this case. The sentencing judge's obligation when imposing sentence in a case to which s 9(2) applies is "to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances."[7] The required sentencing method, known as "instinctive synthesis", requires the sentencing court "to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all."[8] It was entirely appropriate for the sentencing judge to use the past sentences described and analysed by McMurdo P in *Feakes* in the way described in [10] of these reasons, for guidance as a yard stick in determining the sentence which was just for the particular circumstances of the subject offence and offender. But the sentencing judge erred in that part of the reasoning in which her Honour started from a pre-determined range of sentences with fixed boundaries for a generally described kind of offence and offender.[9]

[15] Because the sentencing judge acted upon a wrong principle, the sentence imposed upon the applicant was not "warranted in law"[10] unless the Court in its independent discretion determines afresh that it is the appropriate sentence in all of the circumstances of this case.[11] That conclusion required that the application for leave to appeal be granted.

Consideration of the appeal

[16] In oral argument in this Court the applicant relied only upon one of the three cases referred to the sentencing judge in which persons who had trafficked in dangerous drugs at relatively high levels had been given sentences below 10 years imprisonment, namely, *R v Tran; Ex parte Attorney-General (Qld)*.[12] In *Tran* the Attorney General accepted that the head sentence of nine and a half years imprisonment was within the sentencing discretion and challenged only the parole

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6 See for example s 9(4) of the *Penalties and Sentencing Act* 1992 (Qld).

7 *Elias v The Queen* (2013) 248 CLR 483 at 494 [27].

8 *Wong v The Queen* (2001) 207 CLR 584 at 611 [75]; *Markarian v The Queen* (2005) 228 CLR 357 at 373 – 375 [37] – [39].

9 See *Wong v The Queen* (2001) 207 CLR 584 at 611 – 613 [75] – [78]; *Markarian v The Queen* (2005) 228 CLR 357 at 372 – 375 [30] – [39]; *Hili v The Queen* (2010) 242 CLR 520 at 536 – 537 [53] – [55]; *Barbaro v The Queen* (2014) CLR 58 at 72 [34], 74 [40] – [41]; *Director of Public Prosecutions of the State of Victoria v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at 434 [5] – [6], 445 [52], 453 – 454 [82] – [83].

10 *Criminal Code*, s 668E(3).

11 *Kentwell v The Queen* (2014) 252 CLR 601 at 618 – 619 [42].

12 [2018] QCA 22.

eligibility date, which was after one third of the head sentence had been served. The Court found that the fixing of the parole eligibility date at the one-third mark conferred upon the offender a double benefit for his plea of guilty which was not justified and, for that reason, allowed the appeal and set aside the parole eligibility date whilst leaving the head sentence intact.

[17] The applicant submitted that *Tran* indicated that it was open to impose the same sentence upon the applicant. If so, it would not follow that it is necessarily the appropriate sentence. Although the circumstances of the offence in *Tran* were very similar to the circumstances in this case, the offender in *Tran* had no prior criminal history. Thus *Tran* is not inconsistent with other decisions which suggest that a sentence of 10 years imprisonment is appropriate in this case. Furthermore, the guidance that may be obtained from *Tran* is limited by the facts that parity considerations were also relevant to his sentence and there was no contention that the head sentence was inadequate or any focus upon it in the reasons given by Boddice J, with which Philippides and McMurdo JJA agreed. For these reasons, which substantially accord with reasons given by the sentencing judge, *Tran* does not assist the applicant.

[18] A sentence of imprisonment of at least 10 years is suggested by sentences of 10 years imprisonment referred to in the comparable cases of *Feakes*, *Johnson*, *McGuiness*, *Abbott*, *Strutt*,[13] and *Castner* and with the sentence of nine years imprisonment imposed in *Corbett*,[14] which (like *Feakes*, *Abbott*, and *Strutt*) was a less serious case because a smaller quantity of drug was trafficked, there were no threats of violence by the offender, and the offender did not engage employees to assist in the trafficking.

[19] I will refer in more detail only to *Castner*, which might perhaps be regarded as the case with the most similarities to this one. That offender was sentenced to 10 years imprisonment for wholesale trafficking in dangerous drugs, predominantly methylamphetamine, during a six month period. She had at least 25 customers some of whom subsequently trafficked on their own account and in the period she sold at least 2.996 kilograms of methylamphetamine. She employed four people, endorsed threats of violence by employees to enforce payment of drug debts, and made an uncertain amount of profit which, on one estimate, was about $30,000 per week. She was 50 to 51 years old at the time of offending and pleaded guilty. She was apparently addicted to drugs. Notwithstanding her addiction she was able to run a sophisticated business. That offender had what the sentencing judge did not regard as a significant criminal history, which started when she was 40 years old and included possession of amphetamines and methylamphetamine, and other drug offences. The Court's conclusion was that the sentence imposed upon *Castner* was not manifestly excessive.

[20] In the result, many comparable sentencing decisions are consistent with my view that in the particular circumstances of the applicant's case the just sentence is at least 10 years imprisonment, with the consequential serious violence declaration, and no sentence drawn to the Court's attention indicates that such a sentence is too severe.

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13 *R v Strutt* [2017] QCA 195.
14 *R v Corbett* [2018] QCA 341.

[21] For these reasons I considered that the appropriate order was that the appeal be dismissed.

[22] **MULLINS J:** I agree with Fraser JA.