# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v McGlone* [2019] QCA 124 |
| PARTIES: | **R**<br>**v**<br>**McGLONE, Ross**<br>(applicant) |
| FILE NO/S: | CA No 88 of 2018<br>DC No 2370 of 2017 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane – Date of Sentence: 12 April 2018 (Devereaux SC DCJ) |
| DELIVERED ON: | 21 June 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 June 2019 |
| JUDGES: | Fraser and Morrison JJA and Boddice J |
| ORDER: | **Leave to appeal be refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant was sentenced for one count of trafficking in Schedule 2 drugs – where the trafficking involved the commercial sale of synthetic cannabis as "tea" through retail premises – where the applicant was the manager of the business – where the applicant assisted the owner of the business by purchasing the machine used to package the drugs – where the applicant was involved in the placing of orders, the cutting of the dangerous drug with legal tea, its packaging, sorting and delivery and generally managing the business – where the applicant asserted that he received no financial gain from the trafficking business – where the owner of the business was sentenced to an effective head sentence of six years imprisonment, with a parole eligibility date set after serving 18 months – where other employees, who were sentenced on the basis that they received no financial gain in the trafficking business, received sentences of to two years imprisonment, fully suspended for an operational period of between two and three years – whether the sentencing judge erred by failing to give adequate weight to the absence of financial gain to the applicant from the offending – whether the sentencing judge erred by failing to |

apply the "parity principle" or the principle of equal justice to co-offenders

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where customers warned the applicant of the harmful effects of the "tea" – where the applicant and other employees wore masks to protect themselves from the harmful effects while packaging the "tea" – where two people died after using the drug, and others were admitted to hospital – where a sentence of five years imprisonment, suspended after serving 15 months for an operational period of five years was imposed – whether the sentence was manifestly excessive

*R v Harris* [2018] QCA 7, cited
*R v Leathers* (2014) 147 A Crim R 137; [2014] QCA 327, cited

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| the COUNSEL: | The applicant appeared on his own behalf<br>J A Geary for the respondent |
| SOLICITORS: | The applicant appeared on his own behalf<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[2] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the order his Honour proposes

[3] **BODDICE J:** The applicant seeks leave to appeal a sentence of five years imprisonment, suspended after serving 15 months for an operational period of five years, imposed in the District Court of Queensland on 12 April 2018 in respect of one count of trafficking in Schedule 2 drugs. Lesser concurrent sentences of imprisonment imposed at the time for related drug offence are not are not the subject of the application for leave.

[4] The grounds of appeal, should leave be granted, are:

1. The sentencing judge erred by failing to give adequate weight to the absence of financial gain to the applicant from the offending;
2. The sentencing judge erred by failing to apply the "parity principle" or the principle of equal justice to co-offenders;
3. The sentence was manifestly excessive.

**Background**

[5] The applicant was born on 4 January 1980. He was aged 34 to 35 years at the time of the offending and 38 at the date of sentence. He had a limited criminal history. It was accepted at sentence that that criminal history was largely irrelevant to the sentence.

[6] The trafficking period was a little over three months, between 3 October 2014 and 15 January 2015. The dangerous drug was synthetic cannabis. It was sold through five retail stores.

[7] The five retail stores were located in various parts of regional Queensland. Those stores were owned by the applicant's co-offender, David Andre Jules Piccinato. The applicant was employed in the retail business. His position was as operations manager.

**Offence**

[8] The applicant's plea of guilty was entered on the basis of an agreed statement of facts. Those facts were summarised in the judgment of this court in an application for leave to appeal by Piccinato. It is convenient to repeat that summary with relevant adaptation:

(a) The synthetic drugs were packaged and distributed in the retail stores under the guise of being "tea". The "tea" was sold under various names. Discounts were given to customers who purchased in bulk. It was not accessible to customers unless there was a specific request.

(b) Piccinato paid for the ingredients which arrived in 1 kg sealed bags. The ingredients consisted of green leafy material sprayed with synthetic chemicals. The "tea" was packaged at the applicant's residence using a packaging machine purchased by Piccinato and the applicant.

(c) The applicant and another employee wore masks, gloves and goggles whilst packaging the synthetic drug. Exposure to the product had caused the employee to have headaches and a bad skin rash. The applicant and the employee undertook packaging of products approximately twice per week. Between 5,000 and 8,000 bags would be packaged at a time.

(d) Customers were told the "tea" would not show up in drug tests. It was a popular product with customers employed in the mining industry. The Mackay store had the most sales, selling between 50 and 300 packets per day. The least sales occurred at the Bundaberg store. It sold between 1 and 50 packets on most days.

(e) At one point, Piccinato and the applicant assisted another dealer in New South Wales with packaging of synthetic cannabis through use of their machine.

(f) During the trafficking period, Piccinato and the applicant became aware that the product was dangerous to consumers and had to be recalled from sale. They made the decision to repackage the product and attempted to water it down with legal tea. At no stage did they organise any medical or chemical testing of that product.

(g) Complaints were made by customers to store employees about the strength of the drugs and of adverse reactions caused by the product. Customers reported being unable to walk or talk for several hours, vomiting extensively and of falling unconscious. One customer warned the products were too dangerous to sell.

(h) Employees who advised of these complaints were told the products were legal and that it must be teas from other competitors that were causing adverse reactions. Employees who expressed concerns about selling the "tea" were told they would lose their jobs unless they sold it.

(i) Police investigations confirmed customers had had adverse reactions from the product including dizziness, vomiting, rashes, loss of taste, bleeding in the stomach and seizures. A total of 32 people presenting to the Mackay Hospital Emergency Department between 1 December 2014 and 20 January 2015 alone in connection with having smoked the product.

(j) One regular customer was located deceased at his home on 13 January 2015. The cause of death was recorded as the toxic effects of synthetic cannabinoids. That customer had been admitted to hospital in November 2014 and placed in an induced coma due to issues with his kidneys as a result of smoking the product.

(k) Another customer was admitted to Mackay Hospital on 13 January 2015 after smoking the product. He was brain dead. On 14 January 2015, his life support was turned off. That customer obtained the product from the Mackay store on 13 January 2015. Again, the cause of death was the toxic effects of synthetic cannabinoids.

(l) Forensic testing of bags of product located at the address of each of those deceased men determined that the bags were packaged from the packaging machine located in the applicant's house.

(m) Subsequent to those deaths, search warrants were executed at the retail stores and the applicant's residence house. Various items were found at the applicant's residence, including a large quantity of product. Subsequent to the execution of those search warrants, Piccinato and the applicant attempted to contact staff to ensure they did not say anything incriminating about the synthetic drugs. Piccinato and the applicant discussed getting rid of evidence on computers at Piccinato's address.

(n) During the sale of the product Piccinato and the applicant also took steps to avoid detection. A safe house in Rockhampton was used to stock reserves so that excess product was not kept in any store. The drugs were sold from under the counter and stored in locked cabinets in the back storerooms so that they were not visible to customers. Staff were told not to sell the products to people who asked for "synthetic drugs". They were only to sell to known customers. When police had executed search warrants on other retail outlets in the area, staff were asked to remove the stock from the store and send it to a warehouse at Toowoomba.

[9] The applicant was sentenced on the basis he was an employee of the business, albeit a high level employee as operations manager. It was accepted he was a salaried employee who did not receive a percentage of the profits of the business.

**Sentencing Remarks**

[10] The sentencing judge noted the dangerous drugs were synthetic drugs that were Schedule 2 drugs. The trafficking involved the distribution of those drugs, mixed with tea, through retail premises. The drugs were sold in small amounts under the guise

of being tea. The applicant packaged those synthetic drugs at his residence in Toowoomba.

[11] The sentencing judge found the applicant understood there were serious consequences from exposure to the synthetic chemicals sprayed on the green leaf material as he and another employee wore masks, gloves and goggles whilst packaging those drugs. That other employee had complained of headaches and a bad skin rash as a result of exposure to the drugs.

[12] The packaging process involved the use of a machine purchased for $34,000 from overseas. The applicant and Piccinato split the cost of that machine, which had been shipped to the applicant's address in October 2014. After packaging, the applicant delivered the packages to the Toowoomba store from which they were sent by courier to the other stores. Between 100 and 1,000 packets were distributed at a time.

[13] The sentencing judge noted the applicant, as operations manager, was second in charge and worked in concert with Piccinato. The applicant was involved in the placing of orders, the cutting of the dangerous drug with legal tea, its packaging, sorting and delivery, and generally managing the business. In that role, the applicant became aware the drugs were dangerous to customers and had to be recalled. Despite that knowledge, the applicant repackaged the drug and attempted to water it down with legal tea rather than cease selling it.

[14] Various methods had been adopted to avoid detection. Employees were given instructions not to sell the product to people who asked for synthetic drugs. The drugs were only sold to familiar customers. Employees who expressed concerns about selling the product were told they were lose their employment unless they sold it. These concerns were against a backdrop of customers having complained to employees about the effects of smoking those drugs. Those effects included being unable to walk or talk, vomiting extensively and the risk of falling unconscious. One employee was warned by customers about the dangers associated with the product.

[15] The sentencing judge acknowledged the applicant was not charged with causing grievous bodily harm or death to any customer. However, evidence of physical consequences to customers who used the drugs removed any doubt about the seriousness and dangerousness of the drug. It also established that the applicant and Piccinato carried on the trafficking business, at least for some of the time, with direct knowledge of the physical consequences on some of the customers.

[16] The sentencing judge noted that after police executed search warrants on the stores and the applicant's residence, Piccinato and the applicant attempted to contact employees to ensure they did not say anything incriminating about the synthetic drugs. An attempt was also made to move products from the Mackay store to a neighbouring store.

[17] The sentencing judge accepted there had been delay, which was not due to the actions of the applicant. It was accepted the applicant pleaded guilty at an early stage, demonstrating an acceptance of responsibility and a willingness to facilitate the administration of justice. The applicant had also demonstrated real remorse for the effects of his actions.

[18] Notwithstanding the factors in the applicant's favour, the sentencing judge noted the substances in question were illegal prior to the commencement of the trafficking period. Accordingly, the trafficking operation involved a purely commercial operation carried out knowing that the drugs were unlawful and that they were dangerous.

[19] The sentencing judge accepted that whilst there was a need for general deterrence, personal deterrence was of less relevance as the applicant was a mature man with no relevant criminal history and with little prospect of reoffending in a similar way in the future. The applicant's "very impressive" references confirmed that the applicant was a good partner, father and hard worker, and a reliable member of the community.

[20] The sentencing judge found previous decisions, whilst of some guidance, were not factually similar. None involved the operation of a trafficking business through an already established network of shops with the aggravating inclusion of implicating otherwise innocent employees. Three of those other employees had been sentenced for the offence of trafficking in a dangerous drug. They now had serious criminal records affecting their future lives.

[21] The sentencing judge accepted the applicant was in a different position to Piccinato. He was not a proprietor of the business. However, the applicant had played a full role. The particularly aggravating features of the applicant's conduct, namely, the operation of a purely commercial business in a Schedule 2 synthetic drug that was obviously dangerous with a continuation of that business when the dangers materialised, warranted a sentence of five years imprisonment, notwithstanding the applicant's cooperation, very early pleas of guilty and demonstrated prospects of rehabilitation.

[22] After imposing concurrent lesser terms of imprisonment for a separate count of possessing things for use in connection with trafficking in dangerous drugs and a further summary charge, and having declared a period in custody as time served under those sentences, the sentencing judge ordered the sentences of imprisonment be suspended after the applicant had served 15 months in actual custody.

**Applicant's submissions**

[23] The applicant submits the sentencing judge failed to give proper regard to the fact that the applicant was an employee who received no financial gain in the trafficking operation. The sentencing judge's failure to mention that the applicant did not profit from the sale of the synthetic drugs supports the conclusion that little or no weight was given to this fact.

[24] The applicant further submits that three other employees, sentenced on the basis they were employees who obtained no financial gain in the trafficking business, each received sentences of imprisonment of two years, fully suspended for operational periods of between two and three years. Those employees were following orders from Piccinato, like the applicant. The applicant's sentence of five years imprisonment, partially suspended after serving 15 months in actual custody, was inconsistent with the principle of parity and of equal justice to co-offenders.

[25] Finally, the applicant submits the sentence imposed was manifestly excessive. The Crown submission at sentence was for a sentence of more than three years but less than five years. A sentence of four years imprisonment, suspended after serving 12 months, would properly represent his criminality.

**Respondent's submissions**

[26] The respondent submits that the sentencing judge expressly acknowledged that the applicant was in a different position to Piccinato, as the applicant was an employee. Further, it is not correct to assert that the applicant did not gain financially from the trafficking business. The applicant co-purchased the packaging machine and as operations manager, could be expected to benefit financially if the business was profiting at significant levels from the trafficking operation.

[27] That higher level of imprisonment distinguished the applicant from the other co-offenders. The differences in the sentences imposed on the applicant to each of the other employees properly reflected their differing levels of criminality. Two of those employees were sentenced on the basis they did not know that selling the product was illegal. Further, the sentencing judge properly recognised the differing level of criminality between the applicant and Piccinato by reducing the applicant's sentence from that imposed on Piccinato.

[28] Finally, the respondent submits the sentence imposed was neither unreasonable nor plainly unjust. There was no basis to infer that in imposing that sentence there had been an error in the exercise of the sentencing discretion or a misapplication of principle. The authorities relied upon in support of the contention that the sentence imposed was manifestly excessive are not comparable authorities. They did not have the aggravating features of a continuation of the trafficking when there was knowledge of the serious consequences of consumption of the synthetic drug.

**Discussion**

[29] The sentencing judge did not fail to give adequate weight to the absence of financial gain to the applicant. The sentencing judge expressly acknowledged the applicant was a salaried employee and that the applicant was in a different position to his co-offender, Piccinato. However, as the sentencing judge correctly observed, the applicant occupied a high level of responsibility as a salaried employee of the business. Further, he had had a full role in the operation of the trafficking operation, including contributing half of the cost of the packaging machine. He also had a full involvement in the continuation in the trafficking business, notwithstanding knowledge of the danger associated with the consumption of the synthetic product. Instead the applicant had continued to package the product, albeit in a purportedly watered-down state.

[30] There is also no substance in the applicant's contention that the sentencing judge erred by failing to apply the principle of parity or of equal justice to co-offenders. The three other employees did not have the applicant's high level of involvement. They did not contribute to the purchase of the packaging machine used to package the synthetic drug. Their criminality was plainly less serious and distinguishable from that of the applicant.

[31] There was also no error by the sentencing judge in failing to apply the principle of equal justice between co-offenders. The sentencing judge properly recognised that the applicant's criminality was less than that of Piccinato. That lesser criminality was reflected in both a lower head sentence and the imposition of a lesser period in actual custody.

[32] Having regard to the applicant's contribution to the purchase of the packaging machine, as well as his extensive involvement in the distribution of the synthetic drug in the business, in the continuation of the trafficking operation notwithstanding knowledge of the dangerousness of the drug, there is no basis to conclude that the sentence imposed on the applicant did not properly reflect his reduced but still extensive involvement in the trafficking operation and his criminality in the continuation of that trafficking operation.

[33] Finally, there is no basis to conclude the sentence imposed on the applicant was manifestly excessive. The authorities relied upon by the applicant[1] were not comparable authorities. Whilst each involved trafficking in cannabis over extended periods and in large quantities for commercial profit, neither concerned the particularly aggravating feature of that trafficking operation having been conducted through existing retail outlets, with knowledge both of the illegal nature of the synthetic drug and of the dangers to consumers associated with its consumption. When regard is had to those aggravating features, the need for general deterrence was paramount.

[34] A consideration of the applicant's overall criminality, amply supports a conclusion that the sentence imposed on the applicant fell within a sound exercise of the sentencing discretion, notwithstanding the significant mitigating factors in his favour. The imposition of that sentence did not involve a misapplication of principle, or an error in the exercise of the sentencing discretion.

**Conclusion**

[35] The sentencing judge did not fail to give adequate weight to the fact that the applicant was a salaried employee.

[36] The sentence imposed on the applicant did not offend the principles of parity, or of equal justice between co-offenders.

[37] The sentence imposed was neither unreasonable nor plainly unjust. It was not manifestly excessive.

**Order**

[38] I would order that leave to appeal be refused.

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1 *R v Leathers* [2014] QCA 327 and *R v Harris* [2018] QCA 7.