SUPREME COURT OF QUEENSLAND

CITATION:	*R v Piccinato* [2019] QCA 123
PARTIES:	**R** **v** **PICCINATO, David Andre Jules** (applicant)
FILE NO/S:	CA No 89 of 2018 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:	**Application for leave to appeal against the sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of trafficking in dangerous drugs and one count of possessing things for use in connection with trafficking in dangerous drugs – where the trafficking involved the commercial sale of synthetic cannabis as "tea" through retail premises – where the applicant owned the business through which the "tea" was trafficked – where customers warned employees of the harmful effects of the "tea" – where two people died after using the drug, and others were admitted to hospital – where the applicant was sentenced to an effective head sentence of six years imprisonment, with a parole eligibility date set after serving 18 months – whether the sentence was manifestly excessive *R v Falconi* [2014] QCA 230, cited *R v Harris* [2018] QCA 7, cited *R v Heckendorf* [2017] QCA 59, cited *R v Johnson* (2015) 255 A Crim R 73[2015] QCA 171, cited *R v Leathers* (2014) 147 A Crim R 137; [2014] QCA 327, cited *R v Tout* [2012] QCA 296, cited *R v Verhagen; Ex parte Attorney-General (Qld)* [2018] QCA 142, cited

COUNSEL: R J Glenday for the applicant
J A Geary for the respondent

SOLICITORS: Alexander Law for the applicant
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:** On 12 April 2018, the applicant pleaded guilty to one count of trafficking in dangerous drugs and one count of possessing things for use in connection with trafficking in dangerous drugs. He was sentenced to an effective head sentence of six years imprisonment. A parole eligibility date was set after he had served 18 months of that imprisonment.

[4] The applicant seeks leave to appeal that sentence. The sole ground of appeal is that the sentence was manifestly excessive.

Background

[5] The applicant, who was born on 3 November 1972 and had no criminal history, trafficked in synthetic cannabis between 3 October 2014 and 15 January 2015. The trafficking involved the commercial sale of synthetic cannabis as "tea" through retail premises.

[6] The applicant operated five stores in various locations in regional Queensland. The applicant did not physically work in any of those stores. He was based in Melbourne. A co-offender, Ross McGlone, had local responsibility as manager.

[7] The synthetic cannabis was sold in small one gram bags. Each bag comprised green leafy material which had been sprayed with synthetic chemicals. It was estimated the turnover generated by the product in the trafficking period was in the order of $350,000.

Statement of Facts

[8] The applicant was sentenced on an agreed statement of facts. Relevantly, it stated:

(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) The applicant 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 McGlone's residence using a packaging machine purchased by the applicant and McGlone.

(c) McGlone 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. McGlone 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, the applicant and McGlone assisted another dealer in New South Wales with packaging of synthetic cannabis through use of their machine.

(f) During the trafficking period, the applicant and McGlone 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 the 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 McGlone's house.

(m) Subsequent to those deaths, and after search warrants were executed at the retail stores and McGlone's house, the applicant and McGlone attempted to contact staff to ensure they did not say anything incriminating about the synthetic drugs. The applicant also attempted to move the product from the

Mackay store to a neighbouring store. The applicant and McGlone discussed getting rid of evidence on computers at the applicant's address.

(n) During the sale of the product the applicant and McGlone had also taken 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 the owner of the business and acted in the day-to-day operations of all five stores. The applicant used remote access to direct and coordinate the sale of synthetic drugs through those stores, including ordering and paying for the stock, organising its distribution, implementing store-wide procedures for concealment to avoid detection, and collecting the proceeds of sale of the synthetic drug.

Sentencing Remarks

[10] The sentencing judge observed that although the dangerous drugs were synthetic drugs and Schedule 2 drugs, the substances were always illegal. It was not a situation where they had been legal drugs at the commencement of the business. Further, whilst the drugs were sold under the guise of tea, the fact that protective equipment was used when packing the drugs meant the applicant knew they were actually dangerous. Accordingly, the applicant's trafficking involved a purely commercial operation carried out knowing that the drugs were unlawful and that they were dangerous.

[11] The sentencing judge noted that the applicant was a mature man with no criminal record who had pleaded guilty at a very early stage. The sentencing judge accepted the early pleas of guilty demonstrated an acceptance of responsibility and a willingness to facilitate the course of justice.

[12] The sentencing judge referred to the purposes of sentencing, noting that one relevant factor to take into account was the damage, injury or loss occasioned by the commission of the offences. Whilst there had been physical consequences to certain customers from using the drugs, the applicant was not charged with having caused those results. The relevance of those allegations was that there was no doubt about the seriousness and dangerousness of the particular synthetic drug and there was evidence the business had been carried on for at least some of its time with direct knowledge of the physical consequences to some customers.

[13] The sentencing judge accepted that whilst general deterrence was relevant, there was less relevance in the need for personal deterrence having regard to the applicant's mature age and lack of criminal history. The sentencing judge also observed that delay was relevant. There had been delay since the offences, none of which was attributable to the applicant who had been able to demonstrate good prospects of rehabilitation and no suggestion of reoffending in the interim. The sentencing judge also had regard to the applicant's individual circumstances,

including some medical issues and the consequences of the offences on his ability to operate a business.

[14] The sentencing judge observed that while the comparable authorities provided some guidance, none involved a business set up through an established network of shops with the aggravating inclusion of otherwise innocent employees in the unlawful conduct.

[15] Having considered all of those matters, and the fact that the trafficking involved a Schedule 2 drug, the sentencing judge found the particularly aggravating features of the applicant's conduct, namely, a purely commercial operation in a drug that was obviously dangerous which was continued despite those dangers having materialised, warranted an overall head sentence of six years imprisonment, notwithstanding the factors in the applicant's favour such as his cooperation, early pleas of guilty and demonstrated prospects of rehabilitation. Allowing for those factors, the sentencing judge fixed a parole eligibility date after serving 18 months of that sentence.

Applicant's submissions

[16] The applicant submits that leave to appeal ought to be granted as the sentencing judge failed to give appropriate weight to the totality of the applicant's circumstances, adopted an erroneous approach, failed to consider mitigating factors and was misguided and/or misapplied the proportionality principle. As a consequence, the sentence imposed was unreasonable or plainly unjust.

[17] The applicant also submits the sentence imposed was unreasonable and unjust, having regard to the Crown prosecutor's submissions that a sentence of between three and five years imprisonment be imposed in all the circumstances. Such a sentence was supported by the comparable authorities.[1]

Respondent's submissions

[18] The respondent submits that the sentence imposed was neither unreasonable nor plainly unjust. The sentencing judge gave appropriate weight to all relevant matters and correctly applied all relevant principles. Accordingly, the sentence is not manifestly excessive.

Discussion

[19] The sole ground of appeal is one of manifest excess. There is no ground of appeal alleging specific error in the exercise of the sentencing discretion.

[20] Accordingly, to succeed in the present application, the applicant must establish that the sentence imposed is so different from other comparable sentences that there must have been a misapplication of principle or that the sentence imposed is unreasonable or plainly unjust.[2] In determining whether the applicant is able to establish those matters, regard must be had to the principle that comparable authorities do not establish the outer bounds of a sentencing judge's permissible discretion with numerical precision.[3]

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1 *R v Johnson* [2015] QCA 171; *R v Harris* [2018] QCA 7; *R v Leathers* [2014] QCA 327; 247 A Crim R 137; *R v Falconi* [2014] QCA 230.

2 *R v Tout* [2012] QCA 296 at [8].

3 *R v Heckendorf* [2017] QCA 59 at [21].

[21] Consideration of these principles have particular relevance in the present case. As the sentencing judge correctly observed, the authorities relied upon were not appropriate to describe comparable authorities. Whilst they involved trafficking in large quantities of cannabis for significant sums, the applicant's offending involved circumstances of particular aggravation, namely, trafficking in a synthetic drug for pure commercial profit in circumstances where the applicant continued with that trafficking notwithstanding knowledge that the synthetic drug was actually dangerous to its consumers.

[22] Further, although the prosecutor had contended those authorities supported the impositions of a head sentence in the order of three to five years, the sentencing judge specifically and immediately raised the limited guidance provided by the authorities relied upon in support of that submission. The circumstances in which the offending had been committed by the applicant amply supported the correctness of those observations.

[23] A consideration of the authorities relied upon by the prosecution also supported the sentencing judge's conclusion that a sentence in the order of three to five years would not appropriately reflect the particularly aggravating aspects of the applicant's conduct, notwithstanding those mitigating factors.

[24] *R v Harris* concerned an offender who operated a commercial wholesaling business in cannabis over a period of approximately two months.[4] The supplies involved well in excess of 100 pounds of cannabis at a value of approximately $600,000. In rejecting an application for leave to appeal against the sentence of five years imprisonment, suspended after 20 months for an operational period of five years, on the basis it was manifestly excessive, the court noted it had been submitted at first instance that an appropriate sentence for that level of cannabis trafficking generally fell between four to six years imprisonment. *Harris*, a mature individual with a limited criminal history, had not engaged in conduct which involved the continued sale of the dangerous drug for commercial profit knowing it had caused physical harm to its consumers.

[25] *R v Leathers* also involved an unsuccessful application for leave to appeal against a sentence imposed on a mature offender with no previous criminal history.[5] The sentence of three years imprisonment, suspended after serving six months for an operational period of three years, was imposed in respect of offending which did not involve that significant aggravating feature. *R v Falconi* also involved materially different offending without that particular aggravating circumstance.[6]

[26] Having correctly observed that the authorities relied upon were not relevant comparable authorities, the sentencing judge undertook a careful assessment of both the aggravating and mitigating features before concluding that the appropriate head sentence, to reflect the applicant's criminality, was a sentence of six years imprisonment with parole eligibility after serving 18 months of that sentence.

[27] In undertaking that task, the sentencing judge did not fail to give appropriate weight to the totality of the applicant's circumstances or to the significant mitigating features in his favour. The sentencing judge expressly had regard to the early pleas

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4 [2018] QCA 7.
5 [2014] QCA 327; 247 A Crim R 137.
6 [2014] QCA 230.

of guilty, the cooperation shown by those pleas of guilty, the acceptance of responsibility, the applicant's good prospect of rehabilitation having regard to his lack of prior criminal history and the significant period that had expired since commission of the offences, noting that there had been no further offending by the applicant.

[28] As the sentencing judge correctly observed, those features did not detract from the seriousness of the applicant's offending and the need for general deterrence. There is no basis to conclude that having considered all relevant factors, the sentence imposed on the applicant was not a sentence which fell within a sound exercise of the sentencing discretion. To the contrary, a consideration of the one authority which may properly be said to be comparable, supports the conclusion that the sentence imposed on the applicant did not involve any misapplication of principle and was neither unreasonable nor plainly unjust.

[29] In *R v Verhagen; Ex parte Attorney-General (Qld)* a sentence of three years imprisonment imposed for an offence of trafficking in synthetic cannabis for a period of 11 months by a mature businessman with no previous convictions, was set aside on a successful appeal by the Attorney-General against the manifest inadequacy of that sentence.[7] A sentence of four and a half years imprisonment suspended after that offender had served 20 months imprisonment for an operational period of 20 months, was imposed on appeal.

[30] Whilst Verhagen's offending involved a substantially longer period of trafficking, it occurred in circumstances where that offender had initially operated a business selling synthetic cannabinoids that were not unlawful but continued to sell those products after becoming aware that to do so was unlawful. That circumstance is materially different to the circumstances in which the applicant committed the trafficking offence. The applicant's offending involved the sale of a product known from the outset to be unlawful. Further, during the trafficking period, the applicant became aware of actual danger to consumers from that product, but continued to sell the product notwithstanding that danger.

[31] Those particularly aggravating features of the applicant's conduct substantially increased the nature of his criminality and highlighted the need for a sentence reflecting general deterrence. In *Verhagen*, this court observed that persistent illegal conduct engaged in for profit and motivated by pure greed with a level of sophistication designed to hide its unlawful activity, warranted a head sentence in the order of four and a half to five years imprisonment. The applicant's more substantially aggravating conduct warranted a sentence in excess of that imposed in *Verhagen*.

Conclusions

[32] The sentence imposed upon the applicant fell within an appropriate exercise of the sentencing discretion. The sentence was not manifestly excessive.

Order

[33] I would order that the application for leave to appeal against the sentence be refused.

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7 [2018] QCA 142.