SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gair* [2019] QCA 172
PARTIES:	**R** **v** **GAIR, Matthew Anderson** (applicant)
FILE NO/S:	CA No 114 of 2019 DC No 368 of 2018 DC No 142 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 8 April 2019 (Cash QC DCJ)
DELIVERED ON:	6 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2019
JUDGES:	Morrison and McMurdo JJA and Applegarth J
ORDER:	**Application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – DRUG OFFENCES – DEALING AND DISTRIBUTION OF DRUGS – TRAFFICKING OR SALE AND SUPPLY – where the applicant trafficked in cannabis for about 22 months, at both street level and wholesale quantities – where the applicant had about 21 customers and over the period of trafficking engaged in about 162 transactions – where the trafficking stopped when his house was searched by police and he was given a notice to appear – where the applicant pleaded guilty to a number of counts under the *Drugs Misuse Act* 1986 (Qld) including trafficking and possession of dangerous drugs – where the sentence imposed on the applicant for the trafficking count was three years' imprisonment, with a parole release date set at 8 January 2020 after serving nine months – where the sentence imposed on the applicant for the possession of dangerous drugs was twelve months' imprisonment, to be served concurrently – where it was submitted that the applicant's efforts towards rehabilitation were such as to call for a lesser period to be served in custody – whether the sentences imposed upon the applicant were manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG

PRINCIPLE – where the applicant seeks leave to appeal his sentence – where it is submitted that the learned sentencing judge did not take into account the principle in s 9(2)(a)(ii) of the *Penalties and Sentences Act* 1992 (Qld) that a sentence allowing an offender to remain in the community is preferable – where the applicant contends that the learned sentencing judge did not advert to that principle because his Honour did not refer to it – where it is submitted that resultingly there was an error in the exercise of the sentencing discretion – whether the learned sentencing judge made an error in the exercise of the sentencing discretion

Penalties and Sentences Act 1992 (Qld), s 9(2)(a)(ii)

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Leathers (2014) 247 A Crim R 137; [2014] QCA 327, cited

COUNSEL: T Ryan for the applicant
D Balic for the respondent

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

[1] **MORRISON JA:** The applicant trafficked in cannabis for about 22 months, at both street level and wholesale quantities. He had about 21 customers and over the period of trafficking engaged in about 162 transactions, on average about 10 each month. He supplied in quantities ranging from 7 grams up to a full pound (453 grams). Some drugs were supplied on credit and he advertised to his customers.

[2] The trafficking stopped when his house was searched by police and he was given a notice to appear. In his house were bags containing varying quantities of cannabis, from 1 gram up to 436 grams. There were also $17,930 in cash and various items associated with drug use or sale, such as digital scales, pipes and clip seal bags.

[3] He pleaded guilty to a number of counts under the *Drugs Misuse Act* 1986 (Qld):

(a) Count 1 – trafficking in dangerous drugs (cannabis);

(b) Count 2 – possession of dangerous drugs (cannabis), namely a schedule 2 drug in a quantity exceeding 500 grams;

(c) summary offence Count 3 – possessing anything used in the commission of a crime;

(d) summary offence Count 4 – possession of property suspected of being the proceeds of a drug offence;

(e) summary offence Count 5 – possession of pipes or utensils that had been used in the commission of a drug offence; and

(f) summary offence Count 6 – possession of property suspected of having been used in connection with the commission of a drug offence.

[4] The sentences imposed upon him were: (i) on the trafficking count, three years' imprisonment, with a parole release date set at 8 January 2020 after serving nine months; (ii) on the possession of dangerous drugs, 12 months' imprisonment, to be served concurrently; (iii) on all other summary counts, convicted and not further punished.

[5] He seeks leave to appeal against his sentence on two bases: (i) that it is manifestly excessive; and (ii) that the learned sentencing judge did not take into account the requirements of s 9(2)(a)(ii) of the *Penalties and Sentences Act* 1992 (Qld).

[6] As became clear in the applicant's outline and submissions before this Court, no challenge was mounted as to the head sentence of three years' imprisonment, nor to the imposition of a period of actual custody, it being expressly conceded that it was open to impose a period of between four to six months. The contention was that nine months was excessive.

Circumstances of the offending

[7] An agreed schedule of facts was tendered at the sentencing hearing.[1]

[8] The applicant carried on the business of trafficking in cannabis for about 22 months, in both street level and wholesale quantities. His customers contacted him by mobile phone, arranging meetings by text messages. Those messages rarely discussed the quantity to be purchased.

[9] The applicant occasionally discussed quantities and prices with new customers. One example was: a customer asked for the price of "the small stuff"; the applicant asked "How small?"; the customer responded "quarter", meaning a quarter of an ounce; the applicant responded that it would cost $80. The applicant also negotiated prices with customers, asking one whether he wanted "four or eight?", and telling him it would be "cheaper with eight".

[10] Customers arranged to come to the applicant's house to buy drugs, texting where they were as they approached the area, to indicate how far away they were. The applicant also met customers at arranged locations, for example on five occasions at "Repco". On such occasions the customers would text how far away they were from the intended location, and (occasionally) the type of car they were driving.

[11] If the applicant did not have any cannabis to supply, he would let his customers know when he would have more. He regularly sent messages to his customers advertising that he had good quality cannabis for sale. Occasionally he would check with customers, enquiring as to the quality of the cannabis he sold.

[12] Text messages indicated that the applicant supplied cannabis on credit, as indicated by "tick sheets" located at his home during a police search on 4 May 2017. He also texted credit customers, pursuing the debts owed to him.

[13] The applicant communicated with his supplier by text message and purchased from the same supplier regularly once or twice a month. Quantities and prices were not discussed in those messages, but meetings were arranged. He purchased in large quantities due to the large quantity he was supplying, the large quantity found at his home and the fact that he only bought once or twice a month. On one occasion the

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1 Appeal Book (**AB**) 54.

text messages indicated he was purchasing either 3 pounds (about 1,360 grams) or 3 ounces (about 85 grams) of cannabis.

[14] The applicant's phone records revealed that he had engaged in about 162 transactions (actual supplies or offers to supply) over the 22-month period, to about 21 customers. About 10 transactions a month took place. He sold in small quantities of 7 grams up to large wholesale amounts such as a "full" pound (about 453 grams). On one occasion he sold half a pound (about 226 grams) for $1,900, and on another, a pound (about 453 grams) for $3,500.

[15] The applicant's profit could not be determined as there was no evidence to indicate the price or quantities he purchased, and how much he used himself. However, based on the large quantity of cannabis and sums of cash found at his home, as well as the frequency of sales over the 22 months, the applicant was selling cannabis for a commercial purpose.

[16] During the search of the applicant's house police located a clip seal bag with a small quantity of cannabis in his bedroom. Under the house in a padlocked room were items containing varying quantities of cannabis: (i) three plastic bags (350, 436 and 145 grams); (ii) three clip seal bags (one, three and eight grams); and (iii) a glass bowl (three grams). That cannabis was possessed for a commercial purpose.

[17] Police also located various items, including a mobile phone, two clip seal bags containing a total of $17,930, digital scales, scissors, clip seal bags, two water pipes and a metal cone piece.

[18] The applicant later attended a police station but declined to participate in an interview.

Additional facts admitted without objection

[19] At the sentencing hearing the defence supplied facts without objection. They included: (i) a Court Report from QMERIT;[2] (ii) letters relating to the applicant's work experience and volunteer work with the State Emergency Service;[3] (iii) a character reference;[4] (iv) a letter from the applicant's mother detailing the medical conditions suffered by the applicant from the time of his birth;[5] and a number of medical history records.[6]

[20] The QMERIT reports revealed that the applicant had been enrolled for 16 weeks in their programme, starting on 23 November 2017. He attended 10 weekly counselling sessions, and had undergone 17 random drug-screening tests, none of which showed any illicit substances in his system.

[21] It detailed his background. His parents divorced when he was a child but his mother remarried and he had a good upbringing. He left to move back with his father when he was 13, but left again when he was 16. He then started using cannabis. When he was 18 he moved to be close to and assist his mother. Two years later he moved to the Sunshine Coast and commenced work. In 2014 he had his first epileptic seizure, and that condition forced him out of work.

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2 AB 59.
3 AB 64-65.
4 AB 66.
5 AB 67.
6 AB 69-98.

[22] The applicant's cannabis use started when he was about 16 and he had used cannabis consistently since.[7] His use increased to 15-20 cones a day prior to commencing the QMERIT programme.

[23] The applicant had serious health issues (some from childhood), including decreased lung function, epilepsy,[8] ulcerative colitis,[9] asthma and obesity. During the QMERIT programme he had been admitted to hospital for respiratory failure related to his lung condition, sleep apnoea, obesity and hyperventilation.

[24] The letter from the applicant's mother detailed his medical conditions in childhood. They included measles leading to pneumonia and collapse of the lungs, and several admissions to drain fluid from his lungs.

[25] The medical records revealed that the applicant suffered from ongoing issues. These included: ongoing epileptic seizures, occasional asthma, sleep apnoea requiring use of a CPAP machine, and lung issues from the damage when he was a child. The epileptic seizures were described as occurring in the morning, each lasting for a few seconds but over an hour, during which time the applicant did not lose consciousness. All those issues were successfully managed with various forms of medication. He was admitted to hospital for respiratory failure in November 2018, and had surgery in December 2018 to fix the ulcerative colitis (inflammatory bowel disease).

[26] The applicant worked as a fibreglass moulder until he ceased employment due to the epileptic seizures in 2014. At that time he was married, and had a small child. He was still recovering then from surgery for bowel cancer, which had left him with a cancer bowel-bag around his waist. His cannabis use increased and became his source of income apart from Centrelink payments. The bag around his waist was finally removed in the operation done in December 2018.

[27] It was said that of the $17,930 cash found by police, about $12,000 came from the sale of the applicant's car.

[28] The applicant had engaged in volunteer work with two organisations and though he was concerned about the prospect of obtaining employment because of his epilepsy, the applicant was seeking to return to the workforce.

[29] By the time of the sentencing the applicant had been on bail for two years, without reoffending. He was 38 at sentencing.

Criminal history

[30] The applicant had a relevant criminal history. When he was about 18 and 20 (1999 and 2001) he had drug related convictions (possession of dangerous drugs and possession of utensils). There were also offences of dishonesty (fraud and stealing), and breaches of court orders (fine options orders and probation). In 2007 he was convicted of supplying dangerous drugs, and possession of drugs and utensils; he was put on probation for 12 months. In 2008 he was convicted of possession of dangerous drugs, and possession of things used in a crime.

Approach of the learned sentencing judge

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7 Except for a few periods of abstinence.
8 Diagnosed in 2014.
9 He underwent surgery for this in 2015.

[31] The learned sentencing judge noted the pleas of guilty to the charges, and the general nature of the offending. His Honour did not make a finding that the $12,000 said to have come from the car sale came from drug sales, but observed that even so, " … you had $5,000 from the cannabis trafficking, and the amounts in which you trafficked are suggestive of a fairly large scale enterprise, in any event".[10]

[32] His Honour then noted the criminal history, and in particular the fact, in the applicant's favour, that there had been a hiatus between 2008 and the current offences.

[33] His Honour noted the attendance at QMERIT and that there had been rehabilitation, saying:

> "It is said that your arrest in July 2017 has been the trigger for you to work towards rehabilitation and there is evidence to support the conclusion that you have, to a substantial degree, rehabilitated yourself."[11]
>
> "There are good reasons to think that you have broken your drug habit."[12]
>
> "The fact that you have undertaken that rehabilitation is significant and important but it is not the only factor that I need to consider in imposing a just sentence today."[13] and
>
> "There may not be any real need to deter you because you have broken your drug habit."[14]

[34] The learned sentencing judge referred to the competing factors in the sentencing determination, namely the balance between (i) the achieved rehabilitation on the one hand and (ii) the seriousness of the offending and the need for denunciation and general deterrence, on the other. His Honour expressed his conclusion in this passage:[15]

> "Your risk of reoffending might be low, but again, that is not something which can determine on its own an appropriate sentence to impose. Those factors obviously pull in different directions. On the one hand, the need for deterrence suggests a longer jail sentence, and on the other hand, your rehabilitation and low risk of reoffending suggests that a shorter, or indeed no jail term, might be appropriate. My job is to try and balance those competing factors as best as I can, and then that way, arrive at a sentence which I think is an appropriate one in the circumstances.
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> Having done so, my view is … that the seriousness of the conduct is such that there has to be some period of time served in actual custody. So the sentence that I will shortly impose will, in effect, be one which involves you potentially having to serve as long as three years in jail, but I will order that you be released earlier than that."

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10 AB 46 line 17.
11 AB 46 lines 38-40.
12 AB 47 line 5.
13 AB 47 lines 9-11.
14 AB 47 lines 14-15.
15 AB 47 lines 21-33.

[35] His Honour then dealt with the period to be served in actual custody, commencing by observing that normally a three year sentence might result in a period of 12 months to be served. However, "because of your additional rehabilitation, I am going to further reduce that to nine months".[16]

Discussion

[36] The applicant's contentions were that the period of actual custody (nine months of a head sentence of three years) was manifestly excessive and should have been "at a point in time no longer than 4 to 6 months".[17] The essence of this submission was that the applicant's impressive efforts towards rehabilitation were such as to call for a lesser period to be served because they lessened the weight to be placed upon deterrence and denunciation.[18]

[37] Secondly, it was submitted that the learned sentencing judge had not referred to the principles in s 9(2)(a)(ii) of the *Penalties and Sentences Act*, which provides that a sentencing court have regard to the principle that a sentence allowing an offender to remain in the community is preferable. It was submitted that it meant it should be inferred that his Honour did not advert to that principle, with the result that there was an error in the exercise of the sentencing discretion.

[38] For a number of reasons I am unable to accept either contention.

[39] First, the learned sentencing judge did not miss the principle in s 9(2)(a)(ii) of the *Penalties and Sentences Act*. That section obliges a court to have regard to the principle that a sentence which allows the offender to stay in the community is preferable. His Honour's reasons reveal that he weighed competing considerations. One was the seriousness of the offending, 22 months of trafficking in cannabis at a street level and wholesale level, for commercial purposes. His Honour described that as trafficking "of a fairly large scale" and "a serious level". Another, linked to that, was the need for general deterrence and denunciation by the community.

[40] On the other side was the demonstrated and accepted rehabilitation and low risk of reoffending. As his Honour acknowledged, that meant that personal deterrence was not necessary, but more significantly that "suggests that a shorter, or indeed no jail term, might be appropriate".

[41] It is clear from that comment that his Honour asked himself whether there should be no period of actual custody at all. His Honour answered that question in the second paragraph of passage set out in paragraph [34] above. His Honour balanced the competing factors and answered the question: " … the seriousness of the conduct is such that there **has to be** some period of time served in actual custody".[19]

[42] Secondly, once it is conceded, as the applicant does, that it was open to impose a period of actual custody to be served, the task of demonstrating that the period that was imposed was unreasonable or plainly unjust,[20] becomes difficult. Once it is

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16 AB 47 line 36.

17 Applicant's outline, paragraph 13.1, referring to *R v Leathers* [2014] QCA 327, and *R v Dolan* [2008] QCA 41.

18 Applicant's outline, paragraph 13.3.

19 Emphasis added.

20 *Hili v The Queen* (2010) 242 CLR 520 at [58]-[59].

conceded, as the applicant does, that a period of up to six months was appropriate, the task becomes even harder.

[43] The learned sentencing judge accepted that the applicant's rehabilitation was real and a significant mitigating factor in his favour: see the passages at paragraph [33] above. His Honour's view of it is reflected in the fact that it was acknowledged to be a reason to discount personal deterrence and even possibly lead to no actual custody at all. His Honour also weighed in the balance the personal circumstances of the applicant, including the health issues he had confronted, and the ongoing issues.

[44] But always confronting those factors was the objective seriousness of the offending. This was a long period (22 months) of serious trafficking in cannabis. As his Honour found, and was accepted by the applicant, it was: (i) not just street level but at a wholesale level; (ii) large scale, with 21 customers and 162 transactions; (iii) for commercial purposes, albeit that the applicant served his own habit as well; and (iv) only stopped because of the police search.

[45] As it was, the learned sentencing judge gave a discount for what his Honour called "your additional rehabilitation", recognising the unusual nature of the effort. That discount was three months off 12 months, being what his Honour said might normally be expected on a three year head sentence. That discount was substantial in itself.

[46] Thirdly, whilst the applicant had suffered significant health issues in the past, the ongoing ones were being controlled by medication or specific apparatus. His Honour plainly took that history and the ongoing issues into account. There was no basis to conclude that his time in custody would be so compromised that the period in actual custody should be materially reduced. The acknowledgment that up to six months was appropriate tells heavily against such a conclusion.

[47] Fourthly, this contention does not proceed on the basis of specific error but by submitting that not enough weight was given to a particular factor. That does not demonstrate legal error in the sense of *House v The King*,[21] nor does it, in my view, manifest excess. The cases put forward by the applicant do not establish that either. The facts in *R v Leathers*[22] and *R v Dolan*[23] are well removed from the current case. *Leathers* involved: (i) a much shorter period of trafficking in cannabis (six and a-half months), only at street level and with no commercial element; (ii) an offender with no criminal history, and shared responsibility for eight children; and (iii) a period of actual custody heavily influenced by the interests of the children and issues of comparability with the offender's partner who was also trafficking. *Dolan* involved: (i) a very short period of trafficking (six weeks); (ii) a much younger offender with no criminal history; (iii) cooperation without which there would have been no charge of trafficking; and (iv) a real risk that the offender's rehabilitation would be jeopardised by a lengthy custodial sentence.

[48] The fact that a particular sentence differs, even markedly, from others imposed for comparable offending does not establish manifest excess.[24] In the end all that might

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21 [1936] HCA 40; (1936) 55 CLR 499; see *R v Leathers* [2014] QCA 327 at [37].

22 [2014] QCA 327; trafficking only at street level and for a much shorter period.

23 [2008] QCA 41; a young offender, no previous convictions and cooperation with authorities.

24 *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at [58], [59]; *R v Tout* [2012] QCA 296 at [8].

be said here is that another sentencing judge may have set a different period of actual custody but that does not mean the sentence imposed was beyond the scope of the appropriate exercise of the sentencing discretion.

[49] I would refuse the application for leave to appeal.

[50] **McMURDO JA:** I agree with Morrison JA.

[51] **APPLEGARTH J:** I agree with the reasons of Morrison JA and with the order proposed by his Honour.