

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Christodoulou* [2019] QCA 233

PARTIES: **R**  
**v**  
**CHRISTODOULOU, Jim**  
(applicant)

FILE NO/S: CA No 239 of 2019  
DC No 123 of 2019

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Bundaberg – Date of Sentence:  
11 September 2019 (Everson DCJ)

DELIVERED ON: 29 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 10 October 2019

JUDGES: Fraser and Morrison and Philippides JJA

ORDER: **The application should be refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced on a plea of guilty to one count of possession of a dangerous drug, being cannabis, in excess of 500 grams – where, after a contested sentence, the applicant was sentenced to nine months imprisonment with parole after serving three months – where the applicant was 59 at the time of offending and sentence with no relevant criminal history, and no criminal history in Queensland – where, at sentence, the applicant disputed that he possessed the cannabis for a commercial purpose – where the trial judge found that he did, and sentenced him on the basis that, while he plead guilty, he “did not accept the inevitable finding of commerciality” – whether the sentence is manifestly excessive

*R v Barratt* [\[2014\] QCA 227](#), considered  
*R v Crook* [\[2012\] QCA 305](#), considered  
*R v Smith* [\[2005\] QCA 398](#), considered

COUNSEL: S Lynch for the applicant  
D Balic for the respondent

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

respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the order proposed by her Honour.
- [2] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the order her Honour proposes.
- [3] **PHILIPPIDES JA:** The applicant was sentenced on 11 September 2019 on his plea of guilty to one count of possession of a dangerous drug in excess of 500 grams. After a contested sentence, he was sentenced to nine months imprisonment with a parole release date of 11 December 2019, after serving three months.
- [4] The applicant, who was 59 at the time of the offending and sentence, applies for leave to appeal against his sentence on the ground that the sentence is manifestly excessive in all the circumstances.
- [5] The other grounds of appeal contended that there was specific error resulting in the sentencing discretion miscarrying because the sentencing judge:
  - (a) erred in finding that there was a commercial element to the possession, having regard to the fact that the applicant gave sworn evidence and lack of other indicia of commerciality;
  - (b) placed excessive weight on the fact that the applicant did not accept the allegation of commerciality and therefore lacked remorse; and
  - (c) placed insufficient weight on the Crown's submission that the appropriate sentence extended up to 12 months imprisonment wholly suspended for two years.
- [6] These grounds of specific error were not pressed but subsumed in the contention that the sentence was manifestly excessive in requiring a period of actual imprisonment to be served. In that regard, the applicant did not press the contention that there was error in the finding that there was a commercial element to the possession. Rather, it was contended that the sentencing judge failed to give weight to the proposition that there was an aspect of possession for personal use, which was a factor in rendering the sentence manifestly excessive.
- [7] It was submitted that the sentence that ought to be imposed if the sentence is found to be manifestly excessive is one of six to 12 months wholly suspended or with immediate parole.

### **Background**

- [8] On 11 December 2018, a search warrant was executed at the applicant's residence where he lived with his sister and her child. The applicant was not at home but his partner was present and directed police officers to the applicant's bedroom. In the bedroom cupboard police located containers containing cannabis having a total weight of 1.422 kilograms as follows:
  - (a) two vacuum sealed bags of cannabis containing 426 and 416 grams respectively;
  - (b) a box containing cannabis in the amount of 172 grams;
  - (c) a container of cannabis in the amount of 96 grams;

- (d) a container of cannabis in the amount of 4 grams;
  - (e) 12 clip seal bags containing cannabis in the amounts of 64, 54, 43, 42, 39, 13, 13, 12, 6, 6, 1 and 1 grams; and
  - (f) loose cannabis and stems in the amount of 14 grams.
- [9] In the same cupboard, officers also located two sets of digital scales and a bag containing a number of unused clip seal bags and a plastic pill bottle containing \$2,340 in \$5 notes, bundled with rubber bands.
- [10] The value of the seized cannabis would be at between \$5,000 and \$12,000 if sold by the pound.
- [11] The applicant declined to participate in a record of interview with police.
- [12] At the sentencing hearing, the applicant disputed the prosecution's allegation that the cannabis was possessed for a commercial purpose. In respect of that contention, the prosecution relied upon the quantity of the drug found, the way the drug was packaged into both wholesale purchase amounts (pounds) and commonly sold amounts (quarter and half ounces etc), the presence of the digital scales, unused clip seal bags and the unexplained cash.

### **Applicant's evidence**

- [13] The applicant's evidence was that he bought three pounds of cannabis for \$2,500 per pound that he paid for from money inherited from his mother. He said he had been using cannabis for 20 years after fracturing his back in a horse riding accident to ease back pain and to sleep better. He smoked it, rubbed oil made from the plant on his back and consumed a "rice grain" of the oil every night. He gave evidence of the cooking process used to recover the oil and identified a photo said to depict a bottle of the oil. He said that about two ounces of cannabis produced "about a centimetre square or something like that" of oil and he sometimes mixed it with food products.
- [14] The applicant said the 426 gram and 416 gram bags were sold to him as pound lots and they were unchanged. He also would break down the bags into smaller lots to work out amounts to cook<sup>1</sup> and put some in small bags to take camping. He purchased the bags from "Woolies". He said of the three sets of scales, he thought two did not work. He used the one that did for making the oil. He explained the presence of the bundle of \$5 notes as a compulsory form of saving by putting aside \$5 notes given to him in change over a three to four year period. He denied ever selling cannabis.
- [15] In cross examination, the applicant said of the money inherited from his mother that he put most towards his house, which he was making mortgage payments on, and denied he used it to buy drugs. He maintained that the \$2,340 in \$5 notes located by police were stored in the same wardrobe with the cannabis because "everything" was stored in there. He denied the \$5 notes were given to purchasers in change and that the cannabis had been bought for a commercial purpose. He accepted he would use the same rubber bands to keep the money together that he used for the cannabis.

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<sup>1</sup> AB at 21.10-19.

He accepted that if he had bought three pounds of cannabis and was using two pounds a day he would have had possession of less cannabis than the quantity located but could not say where the rest of the cannabis came from. He accepted that ounce, half ounce and quarter ounce reflected the amounts that cannabis is sold in and it was just a coincidence that these were the amounts he cooked with. He said he would use about an ounce to make butter.

### **Sentencing judge's findings and sentencing remarks**

- [16] At sentence, the prosecution initially submitted “a sentence of 12 months imprisonment to be suspended wholly for two years” as being within range given the early plea but also accepted that a period of actual imprisonment was in range. The submission made on behalf of the applicant was that, if a finding of a commercial purpose was made, the appropriate sentence was one of nine months imprisonment wholly suspended for 18 months to two years.
- [17] The sentencing judge noted the applicant’s evidence. In particular, his claim that he used cannabis to alleviate back pain and that he distilled oil from green cannabis material. He alleged that the scales were used to measure the cannabis for processing it in this regard. He claimed to bag the cannabis up in the quantities which are recorded in the agreed statement of facts. He consumed approximately two grams of cannabis a day and bought, what the prosecution submitted, was a two year supply of cannabis because it was cheaper to buy it in bulk.
- [18] The sentencing judge found that the applicant possessed the cannabis for a commercial purpose. In doing so, he considered the evidence given by the applicant and expressly made adverse findings as to the applicant’s credibility. His Honour found the applicant’s evidence “completely unconvincing” and that the applicant was a “witness who lacked veracity”. His Honour noted that when it came to why the applicant measured and stored the cannabis in small bags before he distilled it into oil, the applicant claimed that it was just a coincidence that the quantities in the bags that were located roughly corresponded to amounts that are generally used commercially. Further, as to the explanation given by the applicant as to the presence of the cash in the manner it was stored, his Honour again found that the applicant failed to give a realistic explanation. The applicant’s assertion that he saved money in \$5 notes in this way and for years when he obtained change was found to be “fanciful”.
- [19] His Honour noted the submission on behalf of the applicant that there was no evidence of text messages or tick sheets and the quantities of the drug located could be explained by purchasing it in bulk. His Honour observed that there were numerous indicia of commerciality present, including scales and cipseal bags. The quantities into which the cannabis was divided were consistent with it being for a commercial purpose. His Honour considered that there was overwhelming evidence of commerciality and that the applicant’s evidence which attempted to explain away what, for all intents and purposes appeared to be a commercial operation, was completely without merit.
- [20] The sentencing judge thus proceeded to sentence the applicant on the basis that while he pleaded guilty to the charge, he did so in circumstances where he “did not accept the inevitable finding of commerciality”, given the strength of the prosecution case.

- [21] In imposing sentence, his Honour took into account the applicant's plea of guilty which was an early plea, but observed that it was qualified by the fact that he gave evidence which his Honour found to be lacking in credibility, seeking to assert that there was no commercial purpose to the offending when there clearly was in his Honour's view.
- [22] The sentencing judge had regard to the applicant's personal circumstances, including his age and his lack of criminal history in Queensland and that his Victorian criminal history was very dated and irrelevant. He was thus sentenced as someone who was presently otherwise of good character. His Honour noted that the applicant left school in year 10 and his work history included working in steel manufacturing and as an auto assembly worker and he was currently employed and paying off a mortgage.
- [23] His Honour accepted that the applicant had a history of back injuries after falling from horses on two occasions.
- [24] His Honour observed that those who engage in commercial drug possession warrant sentences reflective of not only personal but also general deterrence.
- [25] His Honour considered the two decisions referred to by the prosecution of *R v Barratt*<sup>2</sup> and *R v Crook*.<sup>3</sup> His Honour dismissed *Crook* as a useful comparative, observing that the applicant's offending was more serious than that in that case given that the applicant had possession for a commercial purpose. His Honour took the view, which he considered consistent with comments in *Crook*, that the presence of a commercial element made a sentence requiring a period of actual custody to be served to be within range.
- [26] On the other hand, his Honour considered that the applicant's offending was less serious than that in *Barratt*, given that the 52 year old offender in that case, who was found to possess 3.178 kilograms of cannabis for a commercial purpose, had two entries of relevant offending. That offender was sentenced to imprisonment for 18 months suspended after six months with an operational period of three years.
- [27] In imposing sentence, his Honour noted that the applicant was a mature offender without any relevant criminal history but with the limited remorse evidenced by his contesting the commercial component of the offending 'in a most unconvincing performance in the witness box'. That called into question the remorse shown by the applicant in the face of an overwhelming prosecution case. The applicant's early plea was to be seen as something of an acceptance of the inevitability of a conviction but an attempt to avoid the consequences of the true extent of his criminality. Balancing these factors and having particular regard to his lack of relevant criminal history, his Honour imposed a sentence of imprisonment for nine months with a parole release date after the one third mark as appropriate.

### **Consideration**

- [28] It was submitted that the sentencing judge should have at least found some personal use of the quantity found given the applicant's history of back injuries and evidence of long term use. It was said that where the quantity was not considerably large,

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<sup>2</sup> [2014] QCA 227.

<sup>3</sup> [2012] QCA 305.

such a finding and the extent of the commerciality was an important finding, particularly in relation to the potential for profit to be made. It is to be noted that his Honour accepted that the applicant had a history of back injuries and that his Honour made reference to the applicant's assertion of drug use. His Honour was not asked to make a finding beyond that there was a commercial element to the possession.

- [29] The submission before this Court was that a sentence imposing a period of actual imprisonment was manifestly excessive in the circumstances of the present case where the applicant was a mature man without a prior relevant history who had entered a plea, albeit that the possession in question was found to have a commercial element, but no actual commercial exploitation was suggested.
- [30] It was submitted that the manifest excessiveness of the sentence was evident when regard was had to the comparable sentences. The applicant's case was not in the same category as *Barratt* which involved a commercial enterprise where the defendant had travelled to purchase the cannabis for sale.

### **Consideration of decisions**

- [31] There were three decisions referred to the sentencing judge.
- [32] The sentence imposed in the present case was half of that upheld in *Barratt*, which concerned a plea to possession of well over 3 kilograms of cannabis where it was conceded that the cannabis was for a commercial purpose. The sentence of 18 months suspended after six months was imposed in circumstances where the offender undertook a round journey to purchase the cannabis which was described as "a significant undertaking", and where the offender had a prior criminal history of two minor possession offences for which no convictions were recorded. The sentence in *Barratt* also required consideration of mental health issues suffered by the offender which was not a factor in the present case.
- [33] As the sentencing judge observed, *Crook*, which concerned a plea to possession of 1.173 kilograms of cannabis and one count of supplying cannabis to another for which concurrent sentences of six months imprisonment wholly suspended for nine months were imposed against a background of a previous history of production, was not a pertinent comparative given that it was not disputed that there was no evidence of commerciality.
- [34] In *R v Smith*,<sup>4</sup> the applicant pleaded guilty to a charge of possessing cannabis in excess of 500 grams and was sentenced on appeal to 12 months imprisonment wholly suspended for two years and 80 hours community service. He had no criminal history and was one of three persons who entered into an arrangement to purchase 10 pounds of cannabis (4.53 kilograms). The sentence imposed on appeal had regard to parity issues arising from the partially suspended sentence imposed on a co-offender with a prior substantial criminal history who offended during the currency of a suspended term of imprisonment and who received a lesser sentence than that imposed in *Smith* at first instance.

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<sup>4</sup> [2005] QCA 398.

- [35] Counsel for the applicant also referred to cases concerning the production of cannabis where sentences of imprisonment were imposed not requiring a custodial component to be served. Those authorities are also of limited assistance.
- [36] A further matter to which the sentencing judge was entitled to have regard was his finding that the applicant's disputation of the commerciality of the possession was lacking in credibility and veracity and called into question the extent to which the plea reflected remorse as well as cooperation.
- [37] The difficulty in the contention advanced by the applicant that actual imprisonment was not required to be imposed is that the question for consideration by this Court is not whether another sentence may properly have been imposed but whether the sentence in fact imposed was not within the proper exercise of the sentencing discretion.
- [38] In the applicant's favour was that he had no relevant criminal history and had shown cooperation with the administration of justice through his plea. Against those factors was the feature of commerciality to the possession which was ultimately not contested on the application to this Court. That there was also an element of personal use did not detract from that significant feature. Furthermore, insofar as remorse is relevant, this was not a case where remorse was considered to weigh in the applicant's favour. His Honour had regard to the applicant's personal circumstances in terms of his family and finances. The evidence indicated that his sister assisted in mortgage repayments and no submission was made that actual imprisonment would result in an inability to make mortgage payments.
- [39] It may be accepted that the sentence imposed was a harsh one in requiring a custodial component and that it was also well within the sentencing discretion to have fashioned a sentence that imposed a longer term of imprisonment but without a custodial component. However, I am unable to conclude that the sentence has been shown to be manifestly excessive.
- [40] The application should be refused.