SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morrison* [2020] QCA 93
PARTIES:	**R** **v** **MORRISON, Joshua John** (applicant)
FILE NO/S:	CA No 249 of 2018 SC No 819 of 2018 SC No 1216 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Southport – Date of Sentence: 27 August 2018 (Boddice J)
DELIVERED ON:	6 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2020
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDER:	**The application for leave to appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted, on his own pleas of guilty, of trafficking in dangerous drugs, failing to comply with an order under s 3LA(5) of the *Crimes Act* 1914 (Cth), and breaching his bail conditions – where, for the trafficking offence, the applicant was sentenced to 10 years' imprisonment with a declaration that he committed a serious violent offence – where the applicant used the dark web to advertise drugs for sale and received payment in bitcoin – where the sentencing judge described the offending as a serious and sophisticated operation – where the applicant submits that the serious violent offence declaration makes the head sentence crushing and excessive – whether the sentence was manifestly excessive *R v Barker* [2015] QCA 215, cited *R v Feakes* [2009] QCA 376, considered *R v Gordon* [2016] QCA 10, cited *R v McGinniss* [2015] QCA 34, considered *R v Rodd; Ex parte Attorney-General (Qld)* [2008] QCA 341, considered

COUNSEL: The applicant appeared on his own behalf
B J Power for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **SOFRONOFF P:** I agree with McMurdo JA.

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

[3] **McMURDO JA:** On 27 August 2018, the applicant was convicted, on his own pleas of guilty, of two indictable offences and one summary offence. The most serious offence was the trafficking in dangerous drugs, namely cocaine, methylamphetamine, MDMA, and cannabis, for which he was sentenced to 10 years' imprisonment with an inevitable declaration that he committed a serious violent offence.

[4] The other indictable offence was a failure to comply with an order under s 3LA(5) of the *Crimes Act* 1914 (Cth), for which he was sentenced to a term of two years' imprisonment, to be served concurrently with the sentence for trafficking. The summary offence was a breach of his bail conditions, for which he was sentenced to six months' imprisonment, to be served cumulatively upon the other sentences.

[5] The outcome was that he was sentenced to a period of imprisonment of 10.5 years. His parole eligibility date was fixed at 26 August 2026, which is the date at which the required 80 per cent of his sentence for the serious violent offence will have been served.

[6] He applies for leave to appeal, contending that the overall sentence was manifestly excessive, and that the sentencing judge made errors.

The offences

[7] At the sentencing hearing, the prosecution tendered a schedule of facts which, the applicant's counsel confirmed, was an agreed schedule. The relevant facts were as follows.

[8] The applicant engaged in trafficking over a period of 10 and a half months, using the dark web to advertise drugs for sale and receiving payment in bitcoin. On receiving purchase orders, by encrypted communications, the applicant would send the drugs using Express Post packages.

[9] His business was established on or about 15 July 2015. By 9 May 2016, he had made at least 345 sales, and at that date he had 74 products listed for sale. The estimated cost of the items which were then on sale, at the then rate for bitcoin, was approximately $180,000.

[10] Many times during the course of the police investigation, the applicant was seen driving his utility to a commercial shed located at Biggera Waters. Only the applicant was seen to come and go from there. On the afternoon of 18 May 2016, he was inside the shed for about an hour before he drove to the post office at

Harbour Town, where he was seen carrying Express Post satchels and envelopes and handing them to staff.

[11] He was seen to do the same at the post office at Sanctuary Cove on 30 May 2016, and on the following day, he went to another post office, where he purchased a quantity of envelopes and satchels, before going to the shed at Biggera Waters where he stayed for over an hour. From there he went to the post office at Harbour Town, where he handed eight Express Post items to a staff member. A short time later, police officers seized those eight items, each of which contained drugs.

[12] On 2 June 2016, police officers executed a search warrant at the applicant's house at Hope Island. One of the officers then showed the applicant a signed copy of an order under s 3LA, which was headed "Order to provide information or assistance". He was provided with a copy of the order and it was read to him. The order required the applicant to furnish access codes, Personal Identification Numbers, passwords and other information which was required to enable police to search the contents of items of electronic equipment located at the house. The applicant responded with "no comment". He was then arrested for the offence of trafficking, and taken to a police station where, again, he declined to provide the information and assistance which was required by the order under s 3LA.

[13] At the house, police located and seized quantities of methylamphetamine and cocaine. It was an agreed fact that these drugs were in his possession for the purpose of commercial supply.

[14] On the same day, police officers executed a search warrant at the shed at Biggera Waters. According to the agreed facts, they located drugs there in the following quantities:

- 441.7 grams of cocaine;
- 31.1 grams of methylamphetamine;
- 165.5 grams of MDMA; and
- 522.4 grams of cannabis.

It was agreed that these drugs were in his possession for commercial supply.

[15] On 3 June 2016, the applicant was granted bail on conditions which included a prohibition of any use of the internet.

[16] Police seized a number of his electronic devices. Almost all of them were encrypted and not able to be accessed, because of the applicant's failure to comply with the s 3LA order. However, police were able to access some items, which they had seized from the applicant's house, which included two USBs. The schedule of facts detailed the contents of certain files on one of the USBs, containing summaries of individual transactions. Relevantly for the applicant's argument that there was a factual error by the judge, is this description of one of the files:

> "(c) A file last edited on 18 May 2016 (created on 5 October 2015) with 11 different names and Australian addresses for printing typed address labels. The file was edited 164 times.

Accompanying each of the addresses was a reference to the drug ordered by the recipients, as follows:

i. 1 g Charlie

ii. P weed

iii. 1 g asain

iv. 3.5 mol

v. 5mol

vi. 2mol

vii. 14 weed

viii. 7 shard

ix 3.5 charlkie

x. 448 p

xi. 1 g chjsarliew"

[17] The applicant complains that he was sentenced upon the basis that the "448 p", being the tenth transaction recorded on that file, was the sale of 448 MDMA pills. The applicant contends that, in truth, this was a reference to a sale of 448 grams of cannabis. However, a little later in the agreed schedule (paragraph 44), the "448 p" was said to have been "MDMA pills". Unambiguously, therefore, what the agreed schedule stated was that the relevant transaction on that file was a record of a sale of 448 pills, and not a sale of cannabis. Whether that was a correct statement of fact, the applicant, through his counsel, admitted the fact.

[18] The sentencing judge was informed that the value of the drugs, which were seized from the house and the shed, was more than $230,000. Police officers identified two bitcoin accounts, one of which alone showed that the applicant received more than 217 bitcoins into that account in the period from 15 July 2015 to 20 May 2016. The value of bitcoin, as at the end of that period, made those receipts worth more than $130,000. Police were able to see that there were other bitcoin accounts used by the applicant, but which they were unable to identify.

[19] The bitcoin account into which there had been those receipts was operated with an entity called "CoinJar". In breach of his condition of bail that he not use the internet, the applicant corresponded with CoinJar, on 19 occasions between 29 June and 3 August 2016, in which he accessed and managed to reactivate this account.

The applicant's personal circumstances

[20] The applicant was born in 1981 and had no relevant criminal history. There were references speaking highly of him as a family man.

[21] His parents separated when he was very young and he was raised by his mother and maternal grandparents. He went to numerous schools and repeated grade two because of learning difficulties. He eventually left school at the age of 14, when he was introduced to cannabis and began to use it daily. He worked at his grandfather's factory from that age for about 10 years. He completed an

apprenticeship as a machinist, before leaving his home city of Melbourne and moving to the Gold Coast. He worked there in numerous jobs, his longest period of employment spent in maintenance work for gymnasiums.

[22] About five years before he was sentenced, he began to use methylamphetamine, as a medication to deal with his stress from financial and relationship difficulties. The Court was told that he was "generally using less than one gram per day of methylamphetamine" and that he described himself as a "high functioning meth user," such that his wife was unaware of his drug use. The Court was told that he continued to struggle with an addiction to methylamphetamine.

The reasons of the sentencing judge

[23] The judge acknowledged that the applicant's pleas of guilty had saved the community time and money, saying that a trial would have been complex and taken some time. His Honour added there was an overwhelming Crown case.

[24] The judge described the offending as a serious and sophisticated operation, which should be seen "as high level street dealing".

[25] His Honour said that there were aggravating features, being the extended period of time during which the operation was conducted, the level of sophistication of that operation and the applicant's conduct in failing to provide the information required by the notice under s 3LA, which the judge described as akin to a contempt of court. His Honour inferred that it was done to prevent the authorities obtaining further information as to the magnitude of his trafficking operation.

[26] His Honour said that the breach of bail was a further aggravating feature, and showed "the level of subterfuge [the applicant was] prepared to engage in to try and ensure the authorities could not ascertain the true nature of [his] operation."

[27] The judge accepted that in addition to the pleas of guilty, there were mitigating circumstances, being the absence of a relevant criminal history, the character references, the support of his family, his difficult upbringing and, the judge accepted, his dependency on drugs. In that last respect, his Honour was not prepared to find that there was an addiction to drugs.

[28] The judge accepted that there had been some cooperation with the authorities, but could not accept that it had been extensive.

[29] His Honour said that the offence of trafficking was of a magnitude that justified, of itself, a sentence in excess of 10 years' imprisonment, and the other indictable offence justified a cumulative term of imprisonment, as did the breach of bail offence. However, the judge said, allowance had to be made for the fact that a sentence of imprisonment on the trafficking charge of 10 years would require him to serve at least eight years of that term, so that the overall period of imprisonment should be moderated to take account of his pleas of guilty. In that way, he arrived at the sentences which were imposed. His Honour added that he had considered imposing a sentence of less than 10 years' imprisonment on the trafficking charge, and imposing a cumulative period of imprisonment on count 2, but that he had concluded that the level of trafficking was of a sophistication and nature which justified a sentence in excess of 10 years' imprisonment.

The applicant's submissions

[30] I will discuss first the applicant's complaint that he was sentenced upon an incorrect factual basis. In his outline of submissions, the applicant says that there was an error "when calculating the amounts of drugs he had in his possession and the totals the Crown has stated were sold by the applicant". He submits that the totals of the various quantities of drugs, derived from the agreed schedule of facts, was misleading because it included drugs which he had ordered and which were "delivered to the applicant after his arrest." As the respondent submits however, the schedule did not include any such drugs.

[31] The applicant submits that "the AFP established during their investigation [that] he did not sell any drugs above 47 grams in weight". Again, as the respondent submits, that cannot be accepted, firstly for the reason that the full facts of his trafficking were not able to be established by the police (because of the applicant's failure to disclose the access codes to his various devices). Secondly, such facts as were known showed that on at least one occasion, the applicant shipped three pounds of cannabis at a time. And the schedule of facts stated that he had shipped the 448 MDMA pills, to which I have referred at [17], the powder weight of which would have exceeded 47 grams.

[32] It is that last point which the applicant seeks to answer by saying that this entry in the schedule was referring to a quantity of cannabis. As I have said, that cannot be accepted. The judge made no specific finding as to that transaction, and nor was that necessary to do so. But had he done so, there would have been no error in relying upon the agreed schedule of facts. The applicant's assertion, that what was recorded was a sale of cannabis and not MDMA pills, is not supported by any evidence.

[33] The applicant's submissions as to the sentence being manifestly excessive are as follows. He does not seek to have the head sentences altered, except as is necessary to avoid a declaration of a serious violent offence. It is that declaration, with the requirement that he serve at least 80 per cent of the sentence on count 1, which he says makes the head sentence "crushing and excessive", and denies him the opportunity to participate in community based parole release as "a first time street level offender".[1]

[34] The applicant argues that his case is "unique as the public was never aware of [his] activities",[2] because his customers ordered online.

[35] The applicant takes issue with the judge's description of his operation being a sophisticated one, because he used encrypted messages which were "password protected". He argues "that this is considered best practice for anybody doing any type of business online with the risk of your personal information being stolen." He suggests that this is a way of ensuring that the "customers are safe".

[36] The applicant submits that the judge erred by imposing a sentence which was appropriate for "high level wholesale trafficking", when he was convicted of "street level dealing", in that he was selling to the end user of the drugs.

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1 Outline of submissions on behalf of the Applicant p 3, para (e).

2 Outline of submissions on behalf of the Applicant p 4, para (f).

[37] In another submission, he contends that he did not commence this operation in order "to supply other people", but that instead "this happened by chance and progressed over time". Just how that occurred is not explained by him.

[38] Those submissions, unpersuasively, seek to minimise the criminality of his offending. However he also submits that his understanding of the gravity of his conduct is demonstrated by the fact that he ceased his operation once he was arrested, which, he suggests, indicates his excellent prospects of rehabilitation and suitability for parole.

[39] The applicant complains that the judge was biased, in unfairly concluding that the applicant's failure to comply with the order under s 3LA showed a lack of cooperation.[3] And he submits that his overall sentence is manifestly excessive having regard to *R v Feakes*[4] and *R v McGinniss*.[5]

[40] From some of those submissions, the applicant appears to regard his offending as effectively victimless, suggesting he still lacks insight into seriousness of his offending. It is obvious to say that the offence of trafficking in schedule 1 drugs, which carries a possible penalty of 25 years' imprisonment, is a very serious one, which is no less so for the fact that the offender is facilitating the supply of a substance to persons who wish to receive it. The level of criminality which is involved in this offence will vary from one case to another. The scale of this operation and, from that, the likely profit to the offender, is obviously material. So too is the commercial sophistication of the enterprise, where, as in this case, that is conducive to higher profits from the offence and a reduced risk of detection of it. The judge accepted that the applicant was selling to end users "more often than not"; meaning he was also supplying to persons who were not in that category. In these cases, the shorthand description of drug dealing as being at a "wholesale" level, or at "street level", can be useful to describe the scale of the enterprise and thereby the number of people who might have been affected by it. But the application of the sentencing principles for this offence does not call for the strict demarcation between wholesale and street level trafficking which the applicant suggests, and in any case, the judge found that he was operating at each of those levels.

[41] In my conclusion, a reference to some decisions of this Court, as relevant yardsticks, demonstrates that there was no manifest excess in the orders which were made in this case.

[42] In *Feakes*, the Court held that the applicant's sentence of 10 years' imprisonment, on an offence of trafficking in cocaine, MDMA and MDEA (with further counts of producing and possessing the drugs) was not manifestly excessive. That offender had some criminal history and was a member of a group. He was trafficking for monetary gain and the net profit to him, at a minimum, was approximately $50,000. The trafficking by Feakes was based on 11 particularised occasions over a seven month period. Slightly in excess of $115,000 passed through his hands. In that case, McMurdo P discussed a number of comparable cases, which she summarised by saying that "in cases of trafficking in sch 1 drugs on a scale like the present offence,

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3 Outline of submissions on behalf of the Applicant p 16.
4 [2009] QCA 376.
5 [2015] QCA 34.

the sentence imposed on mature offenders who have pleaded guilty is ordinarily in the range of 10 to 12 years' imprisonment." Her Honour noted that there were cases where younger offenders without a significant criminal history and excellent rehabilitative prospects might be sentenced to "a slightly lesser" term in the range of eight to nine years.[6]

[43] In *McGinniss*, the Court held that a sentence of 10 years for an offence of trafficking in methylamphetamine was not manifestly excessive. That offender trafficked over a seven month period, supplying small amounts of the drug to three regular customers and also other occasional customers. During the trafficking period there were more than 250 calls and text messages between the applicant and one of the regular customers. The offender in that case also was paid by the head of a drug syndicate to perform various tasks in that person's trafficking enterprise, involving the delivery of wholesale quantities of drugs in Brisbane and two provincial cities. He was 26 years old when he offended and had no relevant criminal history. He used methylamphetamine. He had "commendably embarked upon his rehabilitation" but that process was incomplete.[7] The leading judgment was given by Fraser JA, where it was said that the offender was younger than the offender in *Feakes*, but his criminality was markedly worse.

[44] In *R v Rodd*; *Ex parte Attorney-General (Qld)*,[8] this Court increased a sentence of nine years, with parole eligibility after six years, to one of 10 years with an automatic SVO declaration, for the offence of the trafficking in methylamphetamine. The offending lasted for more than two years. He was sentenced as a principal of a large wholesale operation, from which he derived a benefit estimated at between $100,000 and $200,000.

[45] Two more recent cases, in which a sentence of 10 years was not disturbed on appeal, are *R v Barker*[9] and *R v Gordon*.[10] In *Barker*, the offender was 45 years old and the period of offending was approximately 10 months. He trafficked in methylamphetamine. He was a wholesaler, with a very large unexplained income, although this may have come from a legitimate business which he owned. He was part of a syndicate. He had little or no relevant criminal history. In *Gordon*, the offender was aged only 21 years. He had a history of drug related offences. In his case there were threats of violence. He trafficked in methylamphetamine and cannabis.

[46] In the present case, the sentencing judge was correct to regard the other offences committed by the applicant as worthy of cumulative terms of imprisonment. But his Honour decided, in the applicant's favour, not to make the sentence for the other indictable offence cumulative upon that for the trafficking. The summary offence did result in a cumulative sentence, but not so as to affect the parole eligibility date.

[47] This was a very sophisticated operation of trafficking, conducted over an extensive period and evidently very remunerative. It cannot be thought that the applicant's

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6 Citing as examples *R v Assurson* (2007) 174 A Crim R 78; [2007] QCA 273 and *R v Elizalde* [2006] QCA 330; see also *R v Cumner* [2020] QCA 54, *R v Grey* [2020] QCA 77 and *R v Roccisano* [2018] QCA 215.

7 [2015] QCA 34 at [8].

8 [2008] QCA 341.

9 [2015] QCA 215.

10 [2016] QCA 10.

motivation was simply to feed his own drug use. The applicant was a mature offender. It was necessary for a sentence to be imposed which acted as a strong deterrent to people like him, who might consider that no real harm can come from their conduct and who are motivated by their own greed. In my conclusion, the orders were within the proper exercise of the sentencing discretion.

Order

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