SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harms* [2002] QCA 121
PARTIES:	**R** **v** **HARMS, Colin Gordon** (applicant / appellant)
FILE NO/S:	CA No 65 of 2001 SC No 228 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction and sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2002
JUDGES:	McPherson and Williams JJA and Byrne J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – MISDIRECTION AND NON- DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – GENERALLY – where appellant convicted of trafficking and production of methylamphetamine - whether learned trial judge erred in failing to give a *Jones v Dunkel* direction for the Crown's failure to call certain witnesses – consideration of prosecution's obligation to call material witnesses – consideration of S 57(c) of the *Drugs Misuse Act* CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CORROBORATION – DIRECTION OF JURY – ADEQUACY OF WARNING – GENERALLY- whether learned trial judge erred in failing to give an adequate warning about accepting the evidence of prosecution witnesses who were involved in drug dealings with the appellant – where specific directions to jury on the criminal history, drug habits and concessions received by witnesses

for testifying found satisfactory

CRIMINAL LAW – PARTICULAR OFFENCES - DRUG OFFENCES – IDENTITY OF PROHIBITED SUBSTANCES – whether evidence of witnesses with a considerable association with methylamphetamine was probative of the fact that the substance was methylamphetamine – test for admissibility discussed

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL- APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OTHER OFFENCES – where sentence of 9 ½ years on separate conviction for attempted murder taken into account – where totality principle applied – where alternative sentencing procedures discussed – where concurrent sentence of 8 ½ years imposed with a serious violent offence declaration – *R v Everett* discussed

Drugs Misuse Act 1986 (Qld)

Jones v Dunkel (1959) CLR 298, considered
R v Apostilides (1984) 154 CLR 563, considered
R v Brennan (1998) 101 A CrimR 214, followed
R v Dillon (1983) 2 Qd R 627, applied
R v Everett [1999] QCA 14; CA No 311 of 1998, 5 February 1999, considered
R v Geary [2002] QCA 33; CA No 241 of 2001, 22 February 2002, followed
R v Price and Stamford (1981) TasR 306, applied
R v Weatherall [2001] QCA 435; CA No 94 of 2001, 12 October 2001, followed
RPS v The Queen (2000)199 CLR 620, followed

COUNSEL: The appellant appeared on his own behalf.
S G Bain for the respondent.

SOLICITORS: The appellant appeared on his own behalf.
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: I agree with the reasons of Williams JA for dismissing this appeal and for refusing the application to appeal against sentence.

[2] **WILLIAMS JA:** The appellant, CG Harms, appeared before the court on his own behalf on 1 March 2002. So there is no confusion I would record at the outset of these reasons that the appellant then orally abandoned an application for an extension of time to appeal against conviction for certain property offences which were dealt with in the District Court at Ipswich on 31 October 2001. The court formally dismissed that application which was numbered 349/01.

[3] The hearing then proceeded with respect to the appellant's appeal against conviction and application for leave to appeal against sentence with respect to a series of drug offences set out in an indictment presented to the Supreme Court on 6 August 1999. At the outset of the trial the Crown entered a *nolle prosequi* with respect to counts 7, 9 and 13 upon that indictment, and later in the course of the trial entered a further *nolle prosequi* with respect to counts 2, 4 and 5 thereon.

[4] At a late stage in the trial the appellant was re-arraigned on count 3, a charge of unlawful possession of cannabis sativa the quantity exceeding 500 grams. On re-arraignment he pleaded guilty.

[5] The jury returned a verdict of not guilty with respect to count 11, but he was convicted of the remaining 6 counts on the indictment. The offences of which he was convicted by verdict of the jury were the following:

(i) one count of carrying on the business of unlawfully trafficking in the dangerous drug methylamphetamine between 1 May 1997 and 23 February 1998;

(ii) one count of producing between 1 May 1997 and 30 July 1997 methylamphetamine, the quantity exceeding 2 grams;

(iii) one count of possessing methylamphetamine on 10 December 1997, the quantity exceeding 2 grams;

(iv) two counts of possessing methylamphetamine; the dates in question being 2 February 1998 and 23 February 1998;

(v) one count of having possession on 10 December 1997 of a document containing instructions about the way to produce methylamphetamine.

[6] On the trafficking charge he was sentenced to 8 ½ years imprisonment with a serious violent offence declaration. On each of the remaining counts on which he was found guilty by the jury he was sentenced to 12 months imprisonment, and on the charge of possessing cannabis he was sentenced to 1 month imprisonment. All the sentences were ordered to be served concurrently with each other and also concurrently with another sentence the appellant was serving.

[7] In the initial notice of appeal against conviction (which was drafted by a solicitor) the grounds stated were:

"(1) the learned trial judge failed to give a *Jones v Dunkel* direction in relation to the absence of an explanation for the Crown's failure to call Tracey Perkins.

(2) the learned trial judge failed to give a strong warning about accepting the evidence of the Crown witnesses in relation to drug dealing with myself.

(3) the learned trial judge failed to discharge the jury after the witness Amber Mai Brown gave a non-responsive and prejudicial answer to a question by counsel."

[8] In the appellant's outline of argument he expanded the alleged omission to give a *Jones v Dunkel* direction to include the failure to call Nicole Bradford. In what was described as the appellant's Summary of Argument, which was one of the documents filed on 4 October 2001, additional grounds of appeal were referred to. Leave was not formally given at the hearing to amend the grounds stated in the Notice of Appeal, but I have had regard to all of the matters raised by the appellant both in his written documentation and in his oral submissions to the court.

[9] The plaintiff contends that the failure by the prosecution to call some witnesses required the trial judge in summing-up to give a *Jones v Dunkel* direction and that the failure to do so amounted to a miscarriage of justice. The submission is misconceived. The principle derived from *Jones v Dunkel* (1959) 101 CLR 298 is that in a civil trial an inference may more confidently be drawn when a person who might reasonably be expected to give relevant evidence was not called and no sufficient explanation was given for the absence of that witness. Where a trial judge has given a direction along those lines in a criminal case because of the failure of an accused to call a witness a mistrial has resulted because the direction undermined the onus of proof and the accused's right to silence (*RPS v The Queen* (2000) 199 CLR 620, *R v Brennan* (1998) 101 ACrimR 214, *R v Weatherall* [2001] QCA 435 and *R v Geary* [2002] QCA 33).

[10] There is, of course, an obligation on the prosecution to call all material witnesses, and the failure to do so, without proper explanation, may result in a mistrial because the trial was not conducted fairly with respect to the accused. The relevant principle is derived from a series of cases of which *R v Apostilides* (1984) 154 CLR 563 is a good starting point; *Jones v Dunkel* is not a relevant authority.

[11] As part of its case the prosecution called Constable Raven to give evidence of a search of the appellant's residence at Ipswich on 10 December 1997. He gave evidence that the appellant was present at that time. During a search of a cupboard in the appellant's bedroom Raven located a large red bag and inside that he located several small clip sealed bags containing white powder. (Subsequent analysis established the powder contained methylamphetamine.)

[12] Under cross-examination Constable Raven admitted that there was another person, a female, present in that room at the time of the search. When it was put to him that her name was Tracey Perkins he replied: "I can't remember her name". Police witnesses denied that female clothing was also found in the red bag.

[13] Later in the absence of the jury (record 190) counsel at trial for the appellant indicated he wanted Raven recalled to put to him there were two females actually present; when Raven was recalled (record 265) that was not put to him. The Exhibit O referred to by the appellant in his outline was in fact Exhibit 39 tendered at record 155. Nothing specifically was said to link Tracey Perkins with that exhibit. In the evidence of Cecily Oerton-Stafford there was mention of Tracey Perkins being at the appellant's home at various times.

[14] In argument in this court the appellant maintained the red bag belonged to Perkins and contained some of her clothing. There was no evidence to that effect. The appellant neither gave nor called evidence; one could be pardoned for thinking if the bag and its contents belonged to Perkins and the appellant knew that, he would have called her. In the circumstances there was an onus on the appellant (s 57(c) of the *Drugs Misuse Act* 1986) and that was referred to in the summing up.

[15] There is nothing in the appellant's argument to indicate that there was some want of fairness in the trial because the prosecution did not call Tracey Perkins. Nothing in the material indicates she could have given evidence favourable to the appellant.

[16] The prosecution witness Cecily Oerton-Stafford admitted that she had pleaded guilty to an offence of trafficking in amphetamine and had been sentenced for it.

She gave detailed evidence of regularly obtaining amphetamine from the appellant. Relevantly she gave evidence that Exhibit 70 was a book maintained by she and the appellant in which a record of supplies of drugs on credit was kept. In evidence-in-chief she said that invoice 30 in that book was in the appellant's writing, but during cross-examination volunteered that such evidence was erroneous and that in fact the writing was that of one Nicole Bradford. The appellant's counsel put to her that she was correct in so claiming. Nothing else of relevance relating to Nicole Bradford was drawn to the court's attention. The appellant now claims that the trial judge failed to give an appropriate direction in relation to the prosecution's failure to call Bradford.

[17] Again I cannot see that any unfairness to the appellant flowed from the failure of the prosecution to call Bradford. Indeed nothing was said by counsel for the appellant at trial which might have called for an explanation from the prosecution for the failure to do so.

[18] I am not satisfied that the appellant has established any impropriety in the prosecution by virtue of the failure to call either Perkins or Bradford.

[19] There is then an alleged failure by the learned trial judge to give a strong enough warning about accepting the evidence of prosecution witnesses who were involved in drug dealings with the appellant.

[20] In her summing-up the learned trial judge referred specifically to the fact that certain prosecution witnesses had "a history of various convictions" and were "engaged in heavy drug taking". The jury was specifically directed that they should have regard to such matters when assessing credibility and the reliability of the memory of those witnesses. Further the attention of the jury was specifically directed to the fact that some of the witnesses had given undertakings to give evidence against the appellant in order to secure some concession on being sentenced for their own criminal activity.

[21] In all the circumstances I am satisfied that proper warnings were given to the jury with respect to the credibility and reliability of the prosecution witnesses who had been involved in drug dealing with the appellant.

[22] The next point raised by the appellant was that evidence was led from a number of prosecution witnesses to the effect that they purchased amphetamine from the appellant when there was no scientific evidence establishing that the powder sold was in fact amphetamine. Of course, the powder could not have been analysed because it had been ingested by the witnesses. In many instances the witness was able to give evidence of the effect of the ingestion of the substance and that was consistent with it being amphetamine. The witnesses had a considerable association with the drug and they were in consequence better equipped than an ordinary person to identify the substance supplied by the appellant, and subsequently ingested by them. Here it is of significance that some of the witnesses were experienced in the manufacture or preparation for use of that drug. Their evidence was certainly probative of the fact that the substance was what it purported to be, namely methylamphetamine. The evidence was capable of satisfying the test for admissibility found in cases such as *R v Price* and *Stamford* (1981) TasR 306 and *R v Dillon* (1983) 2 QdR 627.

[23] The appellant then referred to the alleged non-responsive and prejudicial answer to a question given by the witness AM Brown whilst under cross-examination. She was another young woman called by the prosecution to give evidence that she regularly obtained amphetamine from the appellant's residence. Under cross-examination it was put to her: "In your first statement you said Colin was the person who gave you the drugs?" Her response was:

> "No, see what I mean that is that I knew he was a supplier. You would have to be stupid if you didn't know he was the supplier, but he never actually handed it to me himself, kind of thing, that's all I remember of that."

[24] Reading the whole of her evidence it appears that she was saying that she would go to the appellant's residence and there obtain the drug, though it was rarely, if ever, physically handed to her by the appellant. On only one occasion did the appellant actually physically handle the drug in her presence; that was on 15 February when she and others were told by the appellant to "mix it up". He gave them a bag of white powder. They "mixed it up" and "we all had a shot".

[25] As I understand the appellant's contention the objection is to the use of the term "supplier" in the answer quoted above. Given all of the evidence at the trial, and in particular the whole of the evidence of the witness Brown, that could not be said to be either non responsive or an inadmissible answer.

[26] There is nothing in that ground of appeal.

[27] The appellant then contends that prejudicial and inadmissible evidence in the form of bank statements were before the jury. Oerton-Stafford gave evidence that she was involved with the appellant in the trafficking business and that she was often responsible for depositing sums of money from the sale of drugs into accounts of the appellant. That provided the basis for the admissibility of the bank statements relating to the accounts in question. The appellant claims that some of the deposits evidenced thereby were of moneys legitimately obtained by him. That may well be so, but he did not give evidence at trial and so the statements were only relevant in so far as they recorded transactions to which Oerton-Stafford referred. The appellant specifically complained that the deposits included moneys obtained from the sale of a house in which he had an interest. Relevantly Sergeant Dixon, one of the principal investigating police officers, when dealing with the bank statements in evidence-in-chief specifically referred to the fact that a deposit of $20,000 probably represented funds from the sale of the house. Oerton-Stafford also said in evidence that she did not deposit the $20,000.

[28] The appellant has not demonstrated that any inadmissible evidence got before the jury because of the tendering of the bank statements.

[29] In his written outline of argument the appellant contended that the jury should have been discharged because prejudicial and inadmissible evidence was admitted from the witness Vallely, an analyst with the Government Chemical Laboratory called by the prosecution. He gave evidence with respect to a number of chemicals, and product containing chemicals, found at the appellant's address. His evidence indicated that some, but not all, could have been relevant to the production of methylamphetamine. He gave evidence that certain fertilizers were found on the premises in reasonable quantities. That had some relevance because of the evidence

of Oerton-Stafford that the appellant was using a business of fertilizer and chemical suppliers as a front to enable him to obtain chemicals without arousing suspicion. The appellant maintained on appeal that the business was a legitimate one, but no evidence to that effect was given at trial.

[30] I am unable to see that any of the evidence given by Vallely was inadmissible or otherwise such as to call for the discharge of the jury.

[31] Some vague complaint was also made about use of hearsay evidence. The appellant did not specifically identify any evidence improperly admitted against him. He was represented by experienced counsel at trial and it would appear that whatever evidence the appellant is now referring to was not objected to at the time. Some point was also taken that handwriting experts should have been called to give evidence as to the writing in the various account books and other documents. It would appear that the entries relied upon by the Crown were all proved by a witness identifying the handwriting in question. There was no need in all the circumstances for any expert in that field to be called.

[32] There is no substance in any of the matters raised by the appellant with respect to his conviction. If the jury accepted the evidence of most of the prosecution witnesses who were drug users and had dealings with the appellant then the case against him was overwhelming. There was much documentary evidence, and indeed other evidence, to corroborate if required the evidence of his accomplices. It could not be said that a verdict of guilty was unsafe and unsatisfactory in all the circumstances.

[33] The appeal against conviction should be dismissed.

[34] I turn now to the application for leave to appeal against sentence; the appellant concentrated on that in the course of his oral argument. His main contention is that the sentence is manifestly excessive, and in particular there was no justification for making a declaration that the offence was a serious violent one. Other specific points he raised with respect to the sentence and its effect were the following:

(i) five separate police searches of his residence sometime apart uncovered only a total of 3.5 grams approximately of methylamphetamine;
(ii) he had no significant prior drug offences in his criminal history;
(iii) there was a lapse of 2 years from offence until trial and it was impossible to defend the charges adequately;
(iv) he would be over 60 years of age on release;
(v) the sentence imposed was longer because he had dared to try and prove his innocence;
(vi) there was no violence involved in the offences and it was wrong to make a serious violent offence declaration.

[35] Before considering the arguments relevant to the propriety of the sentence one further matter should be recorded. On 15 February 1998 a man named Fisher was at the appellant's residence presumably because of the drug trafficking business centered there. The appellant believed that Fisher had contacted the police and that in consequence there would be another police raid on the premises. In the light of that he procured Laing (called as a prosecution witness at the trial with which this Court is now concerned) to kill Fisher. Laing took a sworn-off .22 rifle from the appellant's bedroom. The appellant also made arrangements for Oerton-Stafford to

be the getaway driver for Laing after he had dealt with Fisher. Laing duly shot Fisher but he survived. Laing pleaded guilty to attempted murder and received a reduced sentence on the basis that he would give evidence against the appellant both with respect to the attempted murder charge and the drug trafficking charges. The appellant was tried for attempted murder and found guilty by the jury. He was sentenced by Shepherdson J on 18 December 1999 to 9 ½ years imprisonment; the sentencing judge specifically declined to make a serious violent offence declaration. The appellant appealed against that conviction and sentence but failed; the reasons of the Court of Appeal were delivered on 10 October 2000: [2000] QCA 419. It should also be noted that Shepherdson J, whilst recognising that the attempted murder took place in the drug trafficking context, specifically said that he was not sentencing the appellant "for any illegal activity other than the offence of which the jury have recently convicted you."

[36] The proceedings with respect to the attempted murder charge caused the delay in proceeding with the drug trafficking charge which did not come on for trial until February 2001. Many of the prosecution witnesses in this trial also gave evidence at the earlier trial. In the circumstances the appellant cannot complain about the time lapse between the commission of the drug offences and the trial in question commencing.

[37] It should also be noted that effectively it was the attempted murder which brought to an end the appellant's drug trafficking. The last police search of his premises was on 23 February 1998 shortly after the attempted murder. He was arrested about that time.

[38] All of the evidence before the jury clearly establishes the prosecution contention that the appellant was engaged in trafficking in considerable quantities of methylamphetamine. The fact that police raids uncovered only 3.5 grams is of little comfort to the appellant; that evidence supports that given by many prosecution witnesses that amphetamine was freely available for use at the appellant's residence.

[39] Whilst it is true to say, as the appellant emphasised, that he has no previous convictions for drug trafficking, he does have a significant criminal history containing a wide range of offences. His first drug related conviction was in 1994.

[40] Whilst the appellant was a user of amphetamine the drug trafficking was not limited to what was necessary in order to feed a habit. The prosecution contended, clearly correctly, that the conduct was motivated by commercial gain. This was a significant commercial operation which effectively supplied a large number of young people with significant quantities of methylamphetamine, virtually on a daily basis.

[41] In the course of her sentencing remarks the learned trial judge observed that "although the trafficking business was at the lower end of the chain it was extensive and of a purely commercial nature". In the overall context that was a reference to the fact that the appellant was primarily supplying the ultimate users of the drug and was not a wholesaler.

[42] The appellant's lack of remorse, and the degree of his criminality, is demonstrated by the fact that he continued the trafficking operation after he had been arrested and bailed on at least two occasions prior to February 1998.

[43] It follows that the appellant had to be sentenced bearing in mind the term of imprisonment he was already serving for the attempted murder. As was noted in the sentencing remarks, pursuant to that sentence his fulltime discharge date was 22 April 2009, and the date on which he became eligible to apply for parole was 23 July 2004. Both counsel submitted, and it was accepted by the learned sentencing judge, that the totality principle had to be applied in determining the appropriate sentence. Counsel for the prosecution referred to two approaches which could be adopted; make the sentence, coupled with a serious violent offence declaration, cumulative on the other sentence being served or impose a concurrent, but longer, sentence again coupled with a serious violent offence declaration. Counsel for the appellant below agreed that the second course should be adopted. Counsel for the prosecution contended for a sentence in the range 8 to 10 years with a declaration, whilst counsel for the respondent contended for a range of 6 to 8 years again with a declaration. At no stage did counsel for the appellant take issue with the submission that a serious violent offence declaration should be made.

[44] It became clear that what the learned sentencing judge wished to achieve was a sentence which would require the appellant to serve a somewhat longer period in custody than would be the case if he was only serving the sentence for attempted murder. Once it was accepted that the sentence for drug trafficking should be concurrent the desired extended gaol term could be achieved by making the concurrent term either lengthy without a serious violent offence declaration, or shorter but with such a declaration. The desired result would be achieved adopting the latter course because with that declaration the appellant would have to serve a greater proportion of the sentence before becoming eligible to apply for parole.

[45] It was in that context that the head sentence was fixed at 8 ½ years imprisonment with a serious violent offence declaration. As was noted in the sentencing remarks that sentence would postpone the appellant's parole eligibility by some 41 months from the date he would have become so eligible consequent upon the sentence for attempted murder.

[46] Given all of the matters to which I have referred I am not persuaded that a sentence having that consequence is manifestly excessive. The practical result achieved could have been reached by adopting a number of alternative sentencing procedures, and it cannot be said in my view that there was any error by the learned sentencing judge in proceeding as she did. The practical result is not out of step with sentences imposed in other cases involving trafficking in amphetamines. The result achieved closely accords with the sentence in *Everett* CA 311/98.

[47] There is no merit in any of the other issues raised by the appellant with respect to the sentence; it is not manifestly excessive however it is looked at. The application for leave to appeal against sentence should be refused.

[48] The order of the court should be:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence dismissed.

[49] **BYRNE J**: I agree with Williams JA.