SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lau* [2002] QCA 542
PARTIES:	**R** **v** **LAU, Ho Sum** (applicant)
FILE NO/S:	CA No 273 of 2002 SC No 339 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2002
JUDGES:	McPherson and Williams JJA and Philippides J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – DRUG OFFENCES – PENALTIES – PRODUCING OR CULTIVATING – where applicant pleaded guilty to 4 counts of production of the dangerous drug methylamphetamine and was sentenced to 3 years' imprisonment suspended after nine months with an operational period of 5 years – where applicant was a chemist who sold large quantities of Sudafed tablets and Iodine to an undercover police officer – whether the learned trial judge erred in not giving consideration to the fact that the sale was requested by an undercover police officer and that no dangerous drugs would be in fact produced – consideration of authorities where offences committed within covert police operations – consideration of the distinction between inducement by police and the detection and obtaining of evidence *Drugs Misuse Act* (Qld) 1986, s 4 *R v Barker* (1988) 34 A Crim R 141, followed *R v Brown* [1978] 2 NZLR 174, distinguished *R v Lim* (unreported) Philippides J, 31 January 2001, referred to

R v Mandica (1980) 24 SASR 394, followed
R v Masters (1974) 15 CCC (2d) 142, distinguished
R v Miller [1990] 2 Qd R 566, followed
R v Rahme (1991) 53 A Crim R 8, considered
R v Sang (1980) AC 402, considered
R v Swift (1999) 105 A Crim R 279, followed

COUNSEL: A Boe (solicitor) for the applicant
T A Fuller for the respondent

SOLICITORS: Boe & Callaghan for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Williams JA for dismissing this application.

[2] I wish to reserve opinion on the relevance or applicability, if any, to the Queensland drugs misuse legislation of the Ontario decision in *R v Masters* (1974) 15 CCC (2d) 142 and the New Zealand decision in *R v Brown* [1978] 2 NZLR 174. In each of those cases there was a statutory provision in effect making it an offence to offer to supply or to deal in a substance represented to be an illicit drug even if in fact it was not.

[3] Here the applicant was charged with doing or offering to do an act for the purpose of producing a scheduled drug. By his own admission or as a matter of inference from the huge quantity of Sudafed being sold, he knew the purpose to be the production of methylamphetamine. The fact that the offeree was, unknown to the applicant, an undercover police agent or operative who had no intention of producing the drug did not make the applicant's action any the less an act done by him for the purpose of such production. It was his own purpose, and not that of the offeree, that determined that his action in selling Sudafed was done for the purpose of producing the drug methylamphetamine. I am inclined to think that under the extended definition of "produce" the result would have been the same even if the applicant had knowingly supplied not Sudafed but something resembling it from which the drug was not capable of being produced. Only then would the question arise of whether the sentence called for mitigation in line with the reasoning in the Ontario and New Zealand decisions referred to.

[4] **WILLIAMS JA:** The applicant seeks leave to appeal against a sentence of three years' imprisonment suspended after nine months with an operational period of five years imposed consequent upon his pleading guilty to four counts of production of a dangerous drug, namely methylamphetamine. It was not contended that the sentence should be set aside as being manifestly excessive; rather it was said the learned sentencing judge failed to have regard to relevant considerations and therefore this court should impose the appropriate sentence.

[5] At all material times the applicant was a chemist who owned and operated a pharmacy at Rochedale. In the course of conducting that business he sold, as he lawfully could, the pharmaceutical product Sudafed, which contains

pseudoephedrine. That product may be sold over the counter by a registered chemist and is used therapeutically as a nasal decongestant.

[6] Pseudoephedrine can be used in the production of the illicit drug methylamphetamine and it is a well known fact that drug producers have in recent times been extracting pseudoephedrine from Sudafed tablets to obtain one of the raw materials necessary for such production.

[7] Against that background law enforcement authorities monitor wholesale purchases of Sudafed by pharmaceutical chemists. Information placed before the sentencing judge disclosed that on average a pharmacy in Queensland sold about 84 boxes of Sudafed 90s (7,560 tablets) in 1999. Evidence from an officer of the Pharmacy Board of Queensland indicated that the applicant's pharmacy purchased 10,662 boxes of Sudafed 90s in the year 1999. Because that suggested an apparently large volume of trading in Sudafed the police began an investigation into the applicant's pharmacy business. A covert police operative was introduced by a third party to the applicant and negotiated the purchase of Sudafed and Iodine, another precursor to the production of methylamphetamine, on four occasions. The conversations associated with each of those transactions were recorded.

[8] On 17 November 1999 the applicant supplied the operative with 7,200 Sudafed tablets at a cost of $2,770.00. It was indicated to the applicant that the intention was to use the tablets in the production of methylamphetamine. An arrangement was made to obtain more tablets and a kilogram of Iodine in the following day. That transaction was the subject of count 1 on the indictment.

[9] On 18 November 1999 a further 7,200 tablets and a kilogram of Iodine were supplied by the applicant to the police operative at a cost of $3,120.00. On that occasion there was a discussion between the applicant and the operative concerning a blocking agent present in the tablets which inhibited the extraction of pseudoephedrine. This transaction was the subject of count 2 on the indictment.

[10] On the morning of 19 November 1999 an arrangement was made for the supply of tablets and Iodine later that day. That afternoon a further 7,200 tablets and half a kilogram of Iodine was supplied by the applicant to the police operative at a cost of $2,920.00. In the course of the conversation on that day the police operative advised the applicant that the "speed" that was being produced was of high quality. This was the subject of count 3 on the indictment.

[11] On 25 November 1999 the operative sought to obtain a further 18,000 tablets. The applicant indicated that he would obtain as many of the tablets as possible and asked if further Iodine was required. On 6 December 1999 the operative arrived to purchase 2,700 tablets for $1,050.00. This was the subject of count 4 on the indictment.

[12] The term "produce" is defined in the *Drugs Misuse Act* 1986 as follows:

> "produce means –
>
> (a) prepare, manufacture, cultivate, package or produce;
>
> (b) offering to do any act specified in paragraph (a);
>
> (c) doing or offering to do any act preparatory to, in furtherance of, or for the purpose of any act specified in paragraph (a)".

[13] Given that the covert police operative made it known to the applicant that the Sudafed was required for the purpose of manufacturing methylamphetamine the supply by the applicant was clearly caught by paragraph (c) of the definition. It mattered not that no methylamphetamine was actually produced; nor was it relevant that the police operative to whom the product was supplied had no real intention of producing methylamphetamine. (*R v Miller* [1990] 2 Qd R 566 and *R v Barker* (1988) 34 A Crim R 141).

[14] The learned judge in the course of his remarks on sentencing the applicant said: "you were only too ready to commit the offences to which you have pleaded guilty". On the evidence that was the only reasonable conclusion open. The material does not suggest any importuning on the part of the undercover police operative. Looked at objectively on each day there was a commercial transaction, the applicant being a willing participant, and obviously motivated by the profit generated by the transaction.

[15] There was evidence from a chemical analyst that the tablets supplied would in theory yield a maximum of 958.56 grams of methylamphetamine. In those circumstances the applicant had to be sentenced as a person who was prepared to profit from the sale of chemical substances capable of producing a significant quantity of methylamphetamine.

[16] The applicant was aged 41 when the offence occurred and 43 when sentenced. He had no prior criminal history. References were tendered on the applicant's behalf which indicated that he was held in good regard by members of the community. There were also reports from a psychiatrist and a psychologist tendered on his behalf. There was no evidence of any actual unlawful sales other than those the subject of the charges in question.

[17] The learned sentencing judge considered the deterrent aspect of punishment was significant in this particular case. He referred to the comparable sentence imposed by Justice Philippides on Adrian Lim on 31 January 2001. Lim was a pharmacist (with no criminal history) who supplied significant quantities of Sudafed, but of smaller quantity than was involved in this case. Again the supplier was aware of the intended use of the Sudafed tablets for manufacturing methylamphetamine. He was sentenced to two years' imprisonment with a recommendation for parole after eight months.

[18] In this case the applicant pleaded guilty after the trial judge had given rulings on two questions of law. In the circumstances the prosecution conceded that the applicant should be treated as having made a timely plea. The learned sentencing judge took that into account in determining the appropriate sentence, and it was not submitted in this court that there had not been appropriate discounting for the guilty plea. The essence of the argument on behalf of the appellant was that the learned sentencing judge erred in not further discounting the sentence having regard to two factors:

(1) the applicant was induced by police who were themselves acting unlawfully to commit the offences in question;

(2) no dangerous drugs were in fact produced and there was no prospect of any such drug being produced in fact.

The submission was that the learned sentencing judge erred in not giving any weight to those matters.

[19] The question for this court is whether either or both of those considerations should have resulted in some further discounting of the head sentence; if so, then this court should impose the appropriate sentence.

[20] It was submitted on behalf of the applicant that the police officer involved in the transaction was also guilty of production of a dangerous drug; objectively the definition of "produce" was wide enough to catch both parties to the transaction. As the police officer personally had no real intention of manufacturing methyl amphetamine no useful purpose would be achieved by considering whether technically he was guilty of production of a dangerous drug. The only question in these proceedings was as to the appropriate penalty to impose on the applicant who had pleaded guilty. It was then submitted that as the applicant's criminal conduct was induced by the police officer a significant reduction in the sentence which would otherwise be appropriate was called for.

[21] There are some cases in which it has been held that because the conduct of the police incited or encouraged the commission of the crime some reduction in the sentence was called for. Generally such cases have involved importuning by police over a period of time or persistent requests over a period of time before the facts giving rise to the crime occurred. But the authorities also indicate that no reduction in sentence is warranted where the conduct of the police officer was merely directed to obtaining evidence of an offence the offender was only too ready to commit. Here the learned sentencing judge quoted and applied the statement of King CJ (Jacobs J and Mohr J agreeing) in *R v Mandica* (1980) 24 SASR 394 at 403:

> "This ground for leniency does not exist, however, where the effect of the police trap is not to encourage a person to commit an offence which he would not otherwise have committed, but merely to detect and obtain evidence against an offender who is only too ready to commit the offence".

[22] The distinction between conduct inciting or encouraging the commission of a crime and conduct merely directed to obtaining evidence was clearly drawn by Lord Salmon in his judgment in *R v Sang* (1980) AC 402 at 443. The following observation he made there is clearly apposite to the applicant here:

> "No doubt, the accused would not have committed the crime of trying to sell forged bank notes to the police had he known it was the police. There can, however, be little doubt that he would have tried to sell the forged notes to anyone else whom he 'considered safe'."

[23] In my view there is nothing in *R v Rahme* (1991) 53 A Crim R 8, a decision of the New South Wales Court of Criminal Appeal referred to by the solicitor for the applicant, to the contrary. The distinction in question was also recognised by this court in *R v Swift* (1999) 105 A Crim R 279.

[24] On the whole of the evidence before the sentencing judge it is clear that the applicant was only too willing to supply extremely large quantities of Sudafed to the person with whom he was dealing, and with the belief it was to be used in the manufacture of methylamphetamine. This was not a case where an offence would not have been committed, or may well not have been committed, but for inducement

or encouragement emanating from a police officer. It follows that the learned sentencing judge was correct in not giving any weight to this consideration. No further discounting was called for because of that matter.

[25] It is a fact that no methylamphetamine was actually produced as a result of the transactions constituting the offences, and indeed at no time did the covert police operative have any intention of producing that drug. Based on that the solicitor for the applicant submitted that the applicant should have been sentenced on the basis that only an attempt to commit the offence of production was involved; as an attempt normally carries as a maximum only one half of the sentence for actually committing the offence (s 537 of the Code) there should have been a comparable discounting of the sentence here. Based on reasoning of the New Zealand Court of Appeal in *R v Brown* (1978) 2 NZLR 174 and the Ontario Court of Appeal in *R v Masters* (1974) 15 CCC (2d) 142 it was submitted that if an offender is convicted of committing an offence in the belief of something which is in fact untrue, he should get a reduction to reflect his mistaken belief; in this case the mistaken belief was that production of methylamphetamine would occur and the appropriate approach was to sentence as for an attempt only.

[26] In broad terms Brown was charged with supplying a narcotic, namely Lysergide, to an undercover policeman. On analysis it was established that the substance was not a scheduled drug. The court held that under the applicable legislation it was an offence to supply a scheduled drug with the intention that the offer should be understood as being genuine, even though the substance offered was in fact not a scheduled drug and the offeror could not supply the drug. But the court held that the fact that the supply was not of a scheduled drug was material to the question of sentence.

[27] The sentencing judge said that the fact that the substance was not LSD but some other drug was in his view not material. In the judgment of the Court of Appeal, delivered by Cooke J, that approach was erroneous. The Court said it was "material for sentencing purposes that the offers could not have resulted in the actual supply of scheduled narcotics" because it was "the misuse of such drugs against which the legislation is ultimately aimed" (182). The Court was influenced in arriving at that decision by the reasoning in *Masters*.

[28] There is some force in that reasoning, and in some cases a reduction in sentence would be called for because the substance supplied was not what it was believed to be. But that is not the case here. The applicant here by his conduct gave the purchaser the capacity to make methylamphetamine. He did all that he could, all that was necessary on his part, to enable the purchaser to manufacture the drug. The fact that the purchaser had no such intention did not detract from the criminality of the applicant's conduct. That distinguishes *Brown*. In consequence it is not necessary to define the area of operation of the principle in *Brown* so far as this jurisdiction is concerned.

[29] *Masters* is also distinguishable. There the undercover policeman was interested in purchasing heroin which was locally referred to as "junk". The accused in that case said that he had some "real good junk" and price was discussed. A quantity was ultimately purchased by the police officer. On analysis the substance sold was not heroin; indeed it did not contain any illicit drug. The relevant legislation made it an offence to traffic in any substance held out to be a narcotic; it followed that a

conviction was inevitable. Importantly for present purposes the court on appeal pointed out that there was no evidence that the accused believed he was selling heroin, as distinct from his attempting to perpetrate a fraud by representing the substance was heroin. That led the court to say:

> "While we are of the view that there may very well be cases in which no distinction should be made with respect to the sentence imposed upon conviction for the offence of trafficking in a substance represented to be a narcotic as distinct from actually trafficking in a narcotic, we are of the view that in all the circumstances of this case that the learned trial judge should have differentiated between actually selling heroin and selling a substance represented to be heroin". (144)

[30] That is vastly different to the situation with which this court is now concerned. The transaction in question here involved the applicant knowingly supplying a substance which could be used for, and believing that the purchaser would use it for, the production of an illicit drug.

[31] Given the circumstances of this case no additional discounting was warranted because, given the supply was to an undercover police operative, there was no prospect of any illicit drug being in fact produced.

[32] The learned trial judge did not err in failing to give due consideration to the two matters relied on by the applicant. There is no basis for this court interfering with the sentence.

[33] The application for leave to appeal against sentence should be refused.

[34] **PHILIPPIDES J:** I agree with the reasons of Williams JA and with the order proposed.