SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bradforth* [2003] QCA 183
PARTIES:	**R** **v** **BRADFORTH, Nathan Paul** (applicant)
FILE NO/S:	CA No 423 of 2002 SC No 551 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2003
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. The sentences imposed on 6 December 2002 be set aside and that there be substituted therefor terms of imprisonment of 10 years, 1 year and 9 years respectively, such terms to be served concurrently and a declaration that the trafficking conviction is a conviction of a serious violent offence**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CHARACTER OF OFFENCE – DRUG OFFENCES – where applicant convicted on own plea of one count of trafficking in dangerous drugs, one count of possession of things in relation to trafficking and one count of possession of dangerous drugs – where sentenced on each count to 12 years' imprisonment – where the appellant seeks leave to appeal against the sentences – whether the sentences imposed were manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 161C

Pearce v The Queen (1998) 194 CLR 610, considered
R v Christensen [2002] QCA 113; CA No 313 and 314 of 2001, 22 March 2002, considered
R v George [2001] QCA 135; CA No 339 of 2000, 6 April 2001, considered
R v Le; ex parte A-G (Qld) [2000] QCA 392; CA No 103 of 2000, 29 September 2000, considered
R v Lund [2000] QCA 85; CA No 386 of 1999, 17 March 2000, considered
R v Melano [1995] 2 Qd R 186, considered
R v Nagy [2003] QCA 175; CA No 24 of 2003, 2 May 2003, considered
R v Nguyen [1999] QCA 258; CA No 151 of 1999, 9 July 1999, considered
R v Tran [1996] QCA 173; CA No 111 of 1996, 20 May 1996, considered

COUNSEL: A J Kimmins for the applicant
M J Copley for the respondent

SOLICITORS: Price & Roobottom for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading reasons for judgment of Muir J wherein all the relevant facts are set out. The applicant was clearly a significant dealer in illicit drugs, but his activities by no means placed him at the top level of dealers. However, the overall criminality of his conduct is heightened by the fact that he was arrested for the offence the subject of count 3 on the indictment whilst on bail for the offences being counts 1 and 2 thereon.

[2] The level of sentencing demonstrated by the comparable cases referred to in the reasons of Muir J indicates that the head sentence imposed here was manifestly excessive; that is particularly so when regard is had to the nine months served in custody prior to sentence.

[3] In all the circumstances I agree with the orders proposed by Muir J.

[4] **JERRARD JA:** I have read the reasons of Muir J and agree with those and the order proposed. This is because His Honour has calculated the sentence appropriate on its own merits for each of the applicant's three offences; and the sentence of 10 years on count one, the only schedule or serious violent offence of the three, is not imposed as a "head sentence" reflecting the totality of the applicant's criminal behaviour. I also accept that in the circumstances of this matter the applicant is adequately punished for that totality of criminal behaviour by that 10 year sentence and without making a sentence for the offence described in count 3, committed whilst on bail, cumulative upon that 10 years.

[5] It follows that, while on the facts of this case I agree in the result, it would be otherwise if the sentence for count one was fixed to reflect the overall criminality of the applicant's conduct, and **thereby** caused the sentence for that offence to equal or exceed 10 years imprisonment, where it otherwise would not. My reasons are sufficiently explained in *R v Nagy* [2003] QCA 175.

[6] **MUIR J:** In September 2002 the applicant was convicted on his own plea of:

one count of trafficking in cocaine, 3,4-methylenedioxymethamphetamine and methylamphetamine between 1 August 2000 and 3 August 2001;

one count of having in his possession two motor vehicles, a quantity of mobile phones and a set of scales used in connection with the crime of trafficking; and

one count of possession of the drugs gamma hydroxybutyric acid, cocaine, ketamine, methylamphetamine and 3,4-methylenedioxymethamphetamine on 2 August 2001 with the quantity of the drugs gamma hydroxybutyric acid and 3, 4-methylenedioxymethamphetamine exceeding two grams.

[7] He was sentenced on each count to 12 years imprisonment with a declaration it was a commission of a serious violent offence and applies for leave to appeal against those sentences on the grounds that they are manifestly excessive.

[8] The applicant was 26 years of age at the date of sentencing. He had no previous drug-related convictions but had been convicted on counts of stealing, wilful damage and entering a dwelling house and committing an indictable offence in 1998.

[9] The facts relating to counts 1 and 2 are as follows. On 2 August 2001 in a hotel room rented by a female friend of the applicant, Miss Kruck, police found a black bag belonging to the applicant which contained –

- 1,386 tablets of 3,4-methylenedioxymethamphetamine containing 62.086 grams of the drug;
- 63.398 grams of cocaine;
- 7.379 grams of methylamphetamine.

These drugs, separated by type, were in 82 clip seal plastic bags.

They also found a metal grinder, a piece of paper with figures on it ranging from '2,050' to 'G170' and a notebook containing the names of 10 people. The figure $7,740 appeared beside one of the names and it is reasonable to infer that it records a sum of money owing to the applicant by a customer in connection with the applicant's drug dealing activities.

[10] The tablets had a street market value of $35 each and were thus capable of being sold for a total of some $48,000. Presumably, the applicant would have received rather less had he sold them.

[11] Kruck informed the police that the book was kept by the applicant for the purposes of recording debts owed by customers in relation to the sale of drugs and the quantities of drugs sold. She said that he had been selling drugs on the Gold Coast for the preceding 12 months and such was his success that he had given up his job as plasterer one and a half months prior to the police raid in order to concentrate on selling drugs and the establishment of a business of selling "adult products".

[12] The applicant had five mobile phones in his possession when apprehended. His motor vehicle had been purchased with funds derived from the sale of drugs but was worth so little that it was not deemed worthy of a forfeiture application.

[13] The persons to whom the applicant sold were described by Kruck as 'fairly clean' and were said not to be drug addicts. The prosecution submitted that this meant that the supply was not to end users. On occasions, the applicant's customers, would call on him for their supplies. On other occasions he would deliver to them. He also had an assistant but little is known about the nature and extent of his employment. At first instance, the applicant's counsel conceded, in relation to the applicant's drug selling activities, "it is a large business".

[14] Whilst on bail for counts 1 and 2 the applicant's car was stopped by police and he was found in possession of –

- 85.174 grams of gamma hydroxybutyric acid;
- .448 grams of cocaine;
- 22.633 grams of 3, 4-methylenedioxymethamphetamine.

Some of the drugs were in the form of tablets. A set of scales was found in the vehicle and it was not denied at first instance that the quantities of the drugs were such that it could reasonably be inferred that they were in the possession of the applicant for a commercial purpose. Those matters are the subject of count 3.

[15] No substantial sums of money were found in the applicant's possession and nor has any been located in bank accounts or elsewhere. Kruck's account was that the proceeds of the sale of drugs were spent on living expenses and were used to supplement her income.

[16] Although Kruck's evidence was that the applicant had no drug addiction he informed a clinical psychologist that he started selling drugs to support his drug habit.

[17] It was submitted on behalf of the applicant that there was an error in the exercise of the sentencing discretion resulting from the imposition of 12 year terms of imprisonment for each of the three offences despite the fact that count 1 was by far the more serious offence. Reliance was placed on the joint judgment in *Pearce v The Queen*[1] in which it was said that the fact that inappropriate sentences are ordered to be served concurrently does not relieve the sentencing judge from the obligation of fixing an appropriate sentence for each offence "and (to) then consider questions of cumulation or concurrence as well, of course, as questions of totality".[2]

[18] The following arguments, in addition to the central contention that the sentences were manifestly excessive, were advanced also. The discretion miscarried because, of the three offences, count 1 was the only offence noted in the serious violent offenders schedule to the *Penalties and Sentences Act*. It is said to flow from this that even if the learned trial judge had imposed a cumulative sentence for the possession of dangerous drugs he had a discretion as to the imposition of a serious violent offender declaration by operation of s 161C of the *Penalties and Sentences Act*, provided that the trafficking sentence was for less than 10 years. In the way the sentence was structured, the trial judge had reflected the overall criminality of the

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1 (1998) 194 CLR 610

2 At 624

applicant's conduct in the 12 year sentence imposed but in so doing had not considered the effect of s 161C.

[19] It was pointed out that the applicant was effectively sentenced to 13 years imprisonment with a serious violent offender declaration because the sentencing judge took into account in sentencing that the applicant had been on remand for 9 months. Because the remand was in relation to other offences no declaration could be made as to time served under the sentence.

[20] Finally, it was argued that a serious violent offender declaration is not called for (presumably if the appeal is allowed and a sentence of less than 10 years for count 1 is substituted for the existing sentence) as there is nothing in the facts relating to the trafficking case which possess some special feature that "marked it off from other offences and thus calling for additional punishment". See *R v Lund*[3].

[21] In *R v Nagy*,[4] Williams JA discussed, at considerable length, *Pearce v R* and the sentencing principles to be derived from that decision. I respectfully agree with his Honour's analysis. It shows that the sentencing judge made no error in principle if, as appears to be the case, he fixed the sentence for count 1 in order to reflect the overall criminality of the applicant's conduct. Nor do I consider that the applicant has shown that the sentencing judge erroneously failed to take into account the consequences of s 161C of the *Penalties and Sentences Act* when determining the sentence for count 1. It seems plain enough from his Honour's reasons that he had in mind that an appropriate sentence for count 1, even if considered in isolation, would be in excess of 10 years. Such a sentence would attract the application of s 161C automatically.

[22] The primary judge erred, however, in imposing the 12 year term of imprisonment for count 2, as it resulted in additional punishment being imposed for the conduct already punished by the sentence imposed in respect of count 1. There is an obvious connection between the carrying out of activities which constitute trafficking and the possession of items of property which provide the trafficker with the means of conducting his activities. The offence of possession of motor vehicles, mobile phones and scales used in connection with commission of the crime of trafficking could not conceivably justify a 12 year sentence. It is thus a reasonable inference that a substantial portion of the sentence reflected the degree of criminality involved in the trafficking count. Prima facie, the applicant "was doubly (and impermissibly) punished for the one act"[5]

[23] The applicant's counsel referred to a great number of cases in which relatively low sentences had been imposed for trafficking in heroin and methylamphetamine. Many of these cases were single judge decisions, many were dated and, necessarily, the relevant facts were extremely varied. In reliance on them he submitted that an appropriate sentence on the trafficking count was 7 years with no serious violent offender declaration.

[24] The submissions overlooked the effect of *R v George*[6] and failed to accommodate the observations of members of this court in *R v Le* [2000].[7] In *Le*, upon which

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3 [2000] QCA 85
4 [2003] QCA 175
5 See *Pearce v R* at 623
6 [2001] QCA 135

considerable reliance was placed, a sentence of 7 years with a recommendation that the respondent be considered eligible for parole after 2½ years was imposed for trafficking in heroin. The sentence was upheld on an Attorney's appeal but, apart from that consideration,[8] there was the special feature that the respondent had voluntarily ceased trafficking. Nevertheless, the respondent's activities appear to have been on a more substantial and commercial scale than those of the applicant.

[25] Thomas JA, with whose reasons Pincus JA agreed, expressed the view that without mitigating circumstances (which include youth, an early plea and prospects of rehabilitation) a sentence in the range of 10 to 12 years would have been appropriate.

[26] In *R v George*, a sentence of 14 years for trafficking in heroin and cocaine, imposed after taking into account an early plea of guilty, was upheld. The applicant, aged 51 at sentence, had previous convictions for drug offences. In four transactions specified in the indictment he had supplied 178.511 grams of heroin and 84.530 grams of cocaine for a price of $63,500. There was evidence that the applicant was making to the order of $100,000 a year from his unlawful activities.

[27] In the course of her reasons in *George*, White J referred to *R v Tran* (CA No 111 of 1996) in which a sentence of 15 years was not interfered with. There, 44.485 grams of heroin had been sold for $48,730 whilst the applicant was on bail for drug offences. Her Honour observed that in *R v Nguyen* (CA No 151 of 1999) where 591.86 grams of heroin were sold for about $99,000 a sentence of 13 years imposed on the 17 year old offender was said to be appropriate.

[28] The applicant places considerable reliance on *R v Christensen*,[9] in which a sentence of 10 years for trafficking in methylamphetamine was upheld. The appellant aged 40 was not an addict or a user. His activities, which included the production of the drug, which at the time was a schedule 2 drug, generated a profit of about $500,000 over a period of about 4 years. His sentence took into account a plea of guilty.

[29] Major determinants of penalty in trafficking cases include the type of drugs supplied, the quantity of the drugs, their value, the nature of the venture or undertaking, and whether the activities are commercial or are engaged in to feed a habit. In all cases, however, regard must be had to the maximum penalties imposed by statute and the recognition by the Legislature and the courts that the purveying of drugs of the nature of those under consideration, however motivated, has the potential to cause much individual suffering, as well as social harm and decay.

[30] There were plainly commercial aspects of the applicant's trafficking activities and he appears to have been motivated by financial gain, at least to a degree. Against that, there is scant evidence of substantial profitability or the trappings of wealth and there is evidence which suggests that the applicant's conduct was actuated, in part, by the desire to feed a drug addiction. He is a young man with a minor criminal history which does not include any drug related convictions.

[31] In my view, these considerations suggest that the sentence imposed in respect of count 1 is manifestly excessive and that a sentence of 10 years is appropriate. That

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7 *R v Le; ex parte A-G* [2000] QCA 392

8 See *R v Melano* [1995] 2 Qd R 186 at 189, 190

9 [2002] QCA 113

will give appropriate recognition to the early plea of guilty and to the fact that the applicant was on remand for 9 months prior to being sentenced.

[32] The sentence imposed in respect of count 3 is the same as the sentence imposed in respect of count 1. It is manifestly excessive also. I would impose a sentence of 9 years for count 3 having regard to the commercial quantity of drugs involved and, in particular, the circumstance that the offence was committed whilst the applicant was on bail in relation to an extremely serious drug offence.

[33] For count 2, I would sentence the appellant to imprisonment for 12 months. I would order that all terms of imprisonment be served concurrently.

[34] The orders I propose are –

1. Application for leave to appeal against sentence be granted.

2. The appeal be allowed.

3. The sentences imposed on 6 December 2002 be set aside and that there be substituted therefor terms of imprisonment of 10 years, 1 year and 9 years respectively, such terms to be served concurrently. There should be a declaration that the trafficking conviction is a conviction of a serious violent offence.