SUPREME COURT OF QUEENSLAND

CITATION:	*R v Welch* [2004] QCA 108
PARTIES:	**R** **v** **WELCH, Prem Chilan** (applicant)
FILE NO/S:	CA No 412 of 2003 SC No 48 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	13 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2004
JUDGES:	McMurdo P, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW- JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF THE OFFENCE – where the appellant pleaded guilty to possession of cocaine with a circumstance of aggravation, the quantity of the drug being 39.1 grams – where the learned sentencing judge found that the possession was for a commercial purpose – whether the sentencing judge erred in reaching the conclusion that the cocaine was possessed for a commercial purpose *Darren Gaven* (Indictment No 297 of 2001), distinguished *R v Ioan Ban* [1992] QCA 98; CA No 33 of 1992, 13 May 1992, distinguished *R v Jenkins* [1999] QCA 447; CA No 148 of 1999, 27 of October 1999, considered
COUNSEL:	The appellant appeared on his own behalf B G Campbell for the respondent

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

HOLMES J: The applicant for leave to appeal against sentence was sentenced to three years' imprisonment for possession of cocaine with a circumstance of aggravation, the quantity of the drug being 39.1 grams.

The learned sentencing Judge found that the possession was for a commercial purpose. He took into account a timely plea of guilty (a plea was entered at the committal proceedings) and the absence of any prior convictions as at the date of arrest. The applicant did have one conviction subsequent to his arrest. He had pleaded guilty to possession of a small amount of cannabis and of utensils and was dealt with by way of a fine in the Magistrate's Court.

He was 22 and was described as unemployed when the offence was committed, but he had worked as a casual labourer. He was 24 years of age at sentence. The applicant contends that the learned sentencing Judge erred in reaching the conclusion that the drugs were possessed by him for a commercial purpose. He asserts there was no evidence to support that conclusion.

The cocaine, the subject of the charge, was found in a pencil case inside a bag belonging to the applicant upon a police search of a motel room in Cairns occupied by the applicant and his girlfriend. The applicant was not there at the time but

arrived later. A search of his person found $3,100 in cash in a bag in his underpants. Another person in his company had $5,350 on him.

The applicant had arrived at the motel about four days before the incident. He rented a room for two nights originally but then extended for a further night. He was using a hire car during his stay. When asked questions by the police he said he did not know how the cocaine had got into his bag. The cocaine itself was of a high level of purity, about 72 per cent.

His counsel submitted, on his behalf, that he was in Cairns with his girlfriend on his way to deliver a car from Melbourne to his mother who lived on the Atherton Tablelands. In Cairns he had put the car in for a service and hired another vehicle meanwhile, but his mother's car required longer repairs and that was why the stay at the motel was extended for a day. His counsel's submission at sentence was that he was, at the relevant time, a heavy drug user and wanted a couple of weeks of supply of cocaine. While in Cairns he was introduced by a friend to a drug supplier who delivered the cocaine to his motel room in his absence. He had not expected the quantity of drugs that was actually delivered, nor could he have paid for them. His counsel submitted that he should be sentenced on the basis of section 129C of the Drugs Misuse Act as an occupier of premises where the drug was.

On inquiry by the learned sentencing Judge as to why the applicant had $3,100 on him when arrested, the applicant's counsel said it was not an inordinate amount for a man working as a casual labourer. The applicant did not seek to give any of this evidence on oath. For the Crown it was submitted that the submissions for the applicant were improbable.

The learned sentencing Judge, in reaching the conclusion that the drugs were possessed for a commercial purpose, referred to the unlikelihood that the supposed supplier would enter the applicant's motel room without prior arrangement or payment and secrete a pencil case of cocaine of such purity in his belongings. He also found improbable the proposition that someone employed as a casual labourer would be living in a motel, using a hire car, supporting a two gram a week habit and in possession of some thousands of dollars. He noted, too, that the applicant's companion was similarly in possession of a large amount of money.

Here the applicant said that those matters were extraneous and should not have been relied on to reach the conclusion that the drugs were possessed for a commercial purpose. That does not seem the case to me at all; these seem to me quite the sort of indicators one might reasonably regard as indicative of a commercial intention.

The applicant also asserted that the moneys found in his possession belonged to both himself and his partner having been earned by him as a labourer and by his partner as a

dancer, and he said he was unaware of the purity of the drug. I should mention too that in his written outline the applicant suggested that the Judge may have been influenced by unfavourable publicity about his case in the newspapers at that time.

The applicant also reiterated the mitigating features to his case in the form of a lack of previous convictions, the fact that he had a partner and child, and the support of his family.

The learned sentencing Judge was not obliged to accept the inherently improbable scenario at sentence which, it seems to me, was what was being advanced on the applicant's behalf. He was entitled to draw, what again seems to me an overwhelmingly inference from the facts as to the finding of the cocaine, its purity and the money found on the applicant's person; that is, that the cocaine was possessed by the applicant for commercial purposes. I should mention too that there was no evidence to support the suggestion that his Honour had regard to what appeared in newspapers, let alone that it had any bearing on his sentence.

The mitigating features in the applicant's favour were clearly taken into account by his Honour. He reduced what he said, would otherwise be a sentence of four years to three years' imprisonment. There was some mention, I should add, in the applicant's written submissions of the learned trial Judge having erroneously given him credit for a plea of guilty at

the close of committal proceedings when, in fact, he says, he pleaded guilty before the committal proceeded. The precise timing of the plea during the committal is immaterial. All that is of relevance is that it occurred at the committal.

The Crown relied on *Iaon Ban* [1992] QCA 98; CA No 33 of 1992, 13th of May 1992. There the applicant's sentence of five years' imprisonment for possession of 12.945 grams of cocaine was reduced to three and a half years. The applicant there had a previous conviction for trafficking in heroin. Crucially, however, in that instance, he was sentenced on the basis that the cocaine was possessed by him for a non-commercial purpose and it is also worth noting that he had spent five months on remand which was not declared.

Similarly, in *Darren Gaven*, a single Judge decision on which the applicant relied (Indictment Number 297 of 2001, a decision of Justice Muir) the Court proceeded to sentence on the basis that there was no commercial purpose; and that case also had the unusual feature that the drugs had been taken by the applicant to the police station.

Reference was also made by both the applicant and the Crown to *The Queen -v- Darren John Jenkins*, [1999] QCA 447; CA No 148 of 1999, 27th of October 1999. In that case the applicant was sentenced to four years' imprisonment suspended after 12 months with an operational period of five years in respect of possession of 19.2 grams of pure cocaine. He was also sentenced to periods of imprisonment in respect of possession

of other drugs including methylamphetamine. The Court of Appeal while confirming the sentence described it as compassionate. It seems to me that the sentence here is not out of kilter with that authority.

In short, I do not consider that his Honour erred in reaching the conclusion that the cocaine was possessed for commercial purposes, nor do I think that the sentence was outside the proper range. I would dismiss the application for leave to appeal.

THE PRESIDENT: I agree.

McPHERSON JA: I agree.

THE PRESIDENT: The application for leave to appeal is dismissed.