SUPREME COURT OF QUEENSLAND

CITATION:	*R v JQ* [2011] QCA 212
PARTIES:	**R** **v** **JQ** (applicant)
FILE NO/S:	CA No 38 of 2011 SC No 203 of 2011 SC No 513 of 2010 SC No 588 of 2010 SC No 2806 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2011
JUDGES:	Muir and White JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal.** **2. Allow the appeal for the limited purpose of stating (in camera) the sentence which would have been imposed but for s 13A considerations.** **3. Otherwise confirm the sentences imposed below.** **4. The further reasons for judgment handed down to the parties today be not further published and a copy be placed in a sealed envelope and it be opened only by order of the Court or upon an application under s 188(2) of the *Penalties and Sentences Act*.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECT OF SENTENCE OF IMPRISONMENT ON PRISONER – where the applicant pleaded guilty to trafficking of cannabis sativa, possession of a sum of money obtained from the trafficking, possession of cannabis sativa with a circumstance of aggravation,

possession of a pump action shotgun without being the holder of a licence and summary offences – where the applicant was sentenced to three and a half years imprisonment to be suspended after serving six months with an operational period of three and a half years for the trafficking offence and six months imprisonment for the balance of the indictable offences – where the applicant was convicted but not further punished for the summary offences and was re-sentenced to 12 months imprisonment suspended after six months with an operational period of 18 months for an offence dealt with in the District Court in 2000 by way of community-based orders – where the applicant claimed that the requirement to serve any term of actual imprisonment was manifestly excessive in the circumstances

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – whether it is in the interests of justice to admit further evidence relating to the safety of the prisoner in prison

Corrective Services Act 2006 (Qld), s 176
Criminal Code 1899 (Qld), s 668E(3), s 671B
Penalties and Sentences Act 1992 (Qld), s 9(2)(i), s 13A, s 188(1)(c)

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
Markarian v The Queen [2005] 228 CLR 357; [2005] HCA 25, cited
R v Berolli [1996] QCA 204, considered
R v Le Blowitz [1998] 1 Qd R 303, [1996] QCA 451, considered
R v Brienza [2010] QCA 15, considered
R v Broad & Prior [2010] QCA 53, considered
R v Wallace [2008] QCA 135, considered
R v Yates [2006] QCA 101, considered
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: A J Kimmins for the applicant
M B Lehane for the respondent

SOLICITORS: Ryan & Bosscher Lawyers for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] **MUIR JA**: I agree with the reasons of White JA and with the orders proposed by her Honour.

[2] **WHITE JA**: On 16 March 2011 the applicant pleaded guilty on ex officio indictment to trafficking in cannabis sativa between 1 March 2008 and 19 May 2009 at Brisbane, possession of a sum of money obtained from the trafficking, possession of cannabis sativa with a circumstance of aggravation and possession of

a pump action shotgun without being the holder of a licence. He also pleaded guilty to a number of summary offences. The applicant was in breach of a probation and community service order imposed in the District Court on 25 February 2000 which was dealt with on that day.

[3] The applicant was sentenced to imprisonment for three and a half years to be suspended after serving six months with an operational period of three and a half years for the trafficking offence and six months imprisonment for the balance of the indictable offences. He was convicted but not further punished for the summary offences and was re-sentenced to 12 months imprisonment suspended after six months with an operational period of 18 months for the offence dealt with in the District Court in 2000 by way of community-based orders.

[4] The applicant seeks leave to appeal against his sentence on the ground that to require him to serve any period of actual imprisonment in the circumstances is manifestly excessive. He also seeks a reduction in the head sentence to one of three years imprisonment.

[5] The sentences imposed were affected by s 13A of the *Penalties and Sentences Act* 1992 considerations. Consistently with observations made by this Court in *R v M*[1], a consideration of the nature of the co-operation will be handed down separately from these reasons and only distributed to the parties involved in the appeal.

[6] The applicant seeks leave to adduce fresh evidence addressing matters which have occurred since he was sentenced. That application is best left for consideration until the facts and circumstances of the offending conduct are set out.

[7] The applicant was aged almost 30 when he was sentenced. The trafficking commenced when he was almost 27 and continued until he was 28. The applicant had some previous criminal history. He was charged with stealing and dealt with in the Magistrates Court in 1998 where he was convicted and fined. Six months later he was convicted and fined for a street offence. On 25 February 2000 he was dealt with in the District Court at Brisbane for robbery with violence which had occurred in March 1999. No conviction was recorded and he was required to undergo probation for three years and to carry out community service of 240 hours. The facts of that offending, as reflected in the sentence, had him merely as a passive bystander with his co-accused who robbed a student on a train but they shared the small sum of money obtained. The applicant failed to carry out any community service or to report for probation supervision. The applicant was convicted of possession of a small quantity of drugs a month later in the Magistrates Court at Holland Park.

[8] The sentence below proceeded on a schedule of facts.

[9] At about 7.30 am on 18 May 2009 police attended at the applicant's home in response to an alarm that had been sounding for the previous 12 hours. Police entered the property through an open rear garage door. The house was empty. Police noted a cryovac bag full of cannabis sativa in the laundry area. They executed an emergent search during which the applicant and his partner arrived home. Police located a pump action shotgun in a walk-in wardrobe, a safe containing $18,000 in cash, and six shotgun shells in the wardrobe. They also

---

1 [2002] 1 Qd R 520; [2001] QCA 131

found nine cryovac bags containing cannabis weighing approximately a pound each in an esky in the lounge room, scales, a heat sealer machine, clip seal plastic bags, a pipe for smoking cannabis, a bowl containing some remnants of cannabis and $4,300 cash and a water pipe in a motor vehicle parked on the property. Police identified a number of drug related text messages on the applicant's mobile telephone which was seized. The total amount of cannabis seized was nearly 10 pounds with an estimated value of $38,000.

[10] After the search the applicant took part in a recorded interview during which he made a number of admissions. He said that he had been selling cannabis since March 2008; that he had received pounds of cannabis from an undisclosed supplier and on-sold it; that he had two customers to whom he sold once or twice a week; a runner would deliver the drugs to his house and collect the money after the drugs were sold; that he would receive between $1,600 and $2,000 per fortnight for selling the cannabis; he would receive three and a half ounces for his personal use and that he used the money to pay for his living expenses and to gamble. He told police that he worked and the money he derived from the sale of drugs was mixed with his legitimate income. He had acquired the shotgun to protect himself and his drug operation approximately a week earlier and did not have a licence. He was then charged.

[11] There was some delay due to police operations in bringing the applicant's sentence on for hearing.

Fresh evidence

[12] The fresh evidence related to events which had occurred whilst the applicant was in custody which caused him and his family concern.

The sentence proceedings

[13] The court was provided with a detailed forensic report by psychologist Dr L Hatzipetrou who had interviewed the applicant on three occasions. The applicant told him of a dysfunctional childhood and a longstanding history of poly-substance abuse stemming from early adolescence. His chronic alcohol abuse had led to some health problems. His use of cannabis after he ceased using heroin was on a daily basis and was described as "severe" permeating his lifestyle and relationships. At the time of interview with Dr Hatzipetrou the applicant had attended the Drug and Alcohol Clinic at Redcliffe for five months but had not participated in further counselling or residential services which Dr Hatzipetrou regarded as desirable. The applicant had difficulties with gambling. He suffered from panic attacks and a generalised anxiety disorder as well as demonstrating aspects of an antisocial personality disorder and anger management issues such as to lead Dr Hatzipetrou to mention "untreated yet masked mental health problems".[2] Dr Hatzipetrou concluded:

> "Without appropriate and ongoing support and treatment, current findings suggest [the applicant] is at risk of maintaining a serious drug addiction. In light of his personal history and assessed clinical problems, his participation in structured rehabilitation and treatment should be encouraged and monitored."[3]

---

2 AR 100.

3 AR 100.

He noted that the applicant had demonstrated initiative and willingness to address his drug addiction but required support to maintain and sustain treatment gains. He had family support, employment options and the cognitive capacity to benefit from particular programs and those programs were typically available in both custodial and community settings. Dr Hatzipetrou noted that if detained the applicant would require "support and assistance from the Prison Mental Health Service". The applicant's remorse was noted.

[14] It was accepted before the primary judge that the finding of almost ten pounds of cannabis, a large sum of cash and drug related telephone text messages would readily have enabled the inference of commercial possession and drug trafficking to be made. However, the admissions made in the first interview with police led to a charge of trafficking from March 2008 to May 2009 – a significantly longer period than would have been inferred – and identified a more complete picture of his illicit business activities. The applicant had sold approximately 260 pounds of cannabis with a turnover at $3,800 per pound of just under $1,000,000. The applicant's estimated profit was between $48,000 and $60,000 for the period.

[15] The prosecutor submitted that a head sentence of imprisonment of seven years with parole eligibility after serving a third of that sentence at two years and four months, before considering s 13A matters, was within range. Mr Kimmins, who was counsel below as well as on appeal, submitted for a head sentence of five years to be wholly suspended after taking into account all the mitigating features including the applicant's significant co-operation with police.

The decision below

[16] The primary judge's reasons were all delivered in camera with only the sentence given in open court. Consistently with the provisions of s 13A and the purpose for those non-publication provisions a discussion of her Honour's reasons is contained only in the reasons handed separately to the parties and placed on the court file.

[17] On this application Mr Kimmins contended in his written submissions that the sentence of six years imprisonment with a recommendation for parole after serving 18 months as the indicative sentence failed appropriately to take into account all of the substantial mitigating features and that the appropriate sentence, leaving aside the letter of comfort considerations, would have been five years to be released after serving nine months. To support that submission Mr Kimmins referred to *R v Bercolli*[4], *R v Brienza*[5], *R v Yates*[6] and *R v Le Blowitz*.[7] However, at the commencement of his oral submissions he accepted that a sentence of six years with release after 18 months to reflect the mitigating features including the *AB* admissions[8] was within range. Mr Lehane contended that this was "generous" to the applicant, noting that in *Wallace* this court regarded seven years as not "at the top of the range"[9] for similar but slightly more extensive trafficking and that that applicant's *AB* admissions earned a reduction of nine months on parole eligibility which might otherwise have been given, the head sentence having already been reduced to reflect the plea and other mitigating factors.

---

4 [1996] QCA 204.
5 [2010] QCA 15.
6 [2006] QCA 101.
7 (1996) 90 A Crim R 232.
8 *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46.
9 [2008] QCA 135 at p 8.

[18] Mr Kimmins submitted that the letter of comfort considerations should have led the sentence to be further ameliorated to one of four years wholly suspended. He submitted that the primary judge did not adequately reduce the sentence for the s 13A co-operation and that a sentence of three and a half years suspended after serving six months was manifestly excessive. The appropriate sentence, he submitted, was one of three years wholly suspended.

[19] To demonstrate that her Honour's starting point was well within range some consideration may be given to the authorities put forward by Mr Kimmins. In *R v Bercolli*[10] the applicant pleaded guilty to trafficking in cannabis over a period of approximately 13 months. He was sentenced to six years imprisonment with a recommendation for parole after serving two years. He was aged 38 with no prior criminal history. His trafficking activities involved cannabis grown on his own property and derived from other sources which were never identified to police. Sales by the applicant generated receipts to him of $50,000. This court considered a number of comparable sentences and by reference to them concluded that the sentence was a high one but not outside the appropriate range. There was no suggestion that the applicant was a drug user or drug dependent person. Police located 61 plants growing and a further 2.24 kilograms of cut up material. His illegal operations had been detected by telephone intercepts and observations made by undercover agents.

[20] In *R v Brienza*[11] the applicant pleaded guilty and was sentenced to six years imprisonment with parole after serving one-third for trafficking in cannabis over approximately 11 months. An aspect of the application for leave to appeal against sentence was parity with his co-offenders. There are some parallels with the present case in as much as the applicant and his co-offenders were part of an organised crime network trafficking commercial quantities of cannabis grown in South Australia. It was packaged into one pound units and transported to Queensland in motor vehicles specially modified for the purpose of concealing the drug. The cannabis was delivered to wholesalers and distributed by retail sales in the Gold Coast area. The applicant's role was that of a wholesaler. He had been sentenced on the basis that he was supplied with a total of 70 pounds of cannabis in 12 transactions. There was no evidence of the extent of profit made by him but the street value of the cannabis he sourced and supplied was said to be in the order of $250,000. He was not a user of cannabis, the motivation was solely commercial. He ceased of his own volition but after he had reason to believe that the network had been compromised. The applicant had no relevant criminal history and was aged 37 at sentence. He was said by psychologists to be suffering from chronic untreated and undiagnosed depression. Keane JA noted that the applicant was involved in an extensive wholesale commercial operation over a 12 month period and that his sentence for his role, motivated solely by the pursuit of money, was not manifestly excessive.

[21] The comparison with *R v Yates*[12] finds few parallels in terms of the criminality involved or, indeed, the facts. That applicant was convicted on her own pleas of guilty of one count of trafficking in cannabis and methylamphetamine over approximately a five month period and a number of counts of supply of a variety of dangerous drugs. She was sentenced to four and a half years imprisonment

---

10 [1996] QCA 204.
11 [2010] QCA 15.
12 [2006] QCA 101.

suspended after 15 months with an operational period of five years. The applicant was, to a large extent, the agent of her mother who was an extensive and long time trafficker in a variety of dangerous drugs. The applicant sold to an undercover police operative who witnessed her participation in numerous sales and spoke to him of other transactions. Apart from the co-operation evinced by her plea of guilty there was little other co-operation. She was said to be suffering from a borderline personality disorder and a generalised anxiety disorder. In the past she had a dependence on cannabis. The court did not consider a head sentence of four and a half years imprisonment excessive compared to other cases. The application for leave to appeal was granted and the appeal allowed solely on the issue of the distinct risk to her whilst she was in prison, her custody, accordingly, being more difficult. The suspension was reduced to occur after serving nine months imprisonment.

[22] The final case which Mr Kimmins submitted set a lower range was that of *R v Le Blowitz.*[13] There were numerous co-accused involved in the production and other unlawful dealings in cannabis. Only one of that group who applied for leave to appeal against sentence was convicted of trafficking in cannabis – Coleman. He was also convicted of producing cannabis. The period of trafficking appears to have been carried on over some 18 months. He had numerous convictions including for possession and production of drugs but had never been imprisoned. He was actively involved in the sale of cannabis and was associated in the cultivation over some 15 months. He was sentenced to imprisonment for three years and nine months.

[23] These cases do not indicate any particular range, except that they were said not to be manifestly excessive. Only *Bercolli* and *Brienza* have some similarities to the present facts.

[24] Mr Lehane referred to *R v Wallace*[14], a decision her Honour found of assistance. That applicant admitted to police that he had trafficked in cannabis over a 12 month period supplying an average of 10 pounds a week. He made $200 profit on each pound he sold amounting to $2,000 per week. Over the period of the trafficking he sold approximately 236 kilograms of cannabis with a profit of about $100,000. The cannabis was valued at about $1.8 million. He was described by Mackenzie AJA as a significant wholesaler of cannabis. He had two minor drug convictions and was 48 years old. He had co-operated with police in admitting his involvement in trafficking which was more extensive than could otherwise have been proved. He had been a hard worker and had used cannabis for back-related pain. His involvement in trafficking occurred because of financial difficulties caused by a failing business. His plea was timely after a full hand up committal. He was sentenced to seven years imprisonment with a parole eligibility date after two years and nine months. His application was refused. The submission below had been that a period of imprisonment not exceeding six years should have been imposed with a two year recommendation for parole to reflect the special leniency to which he was entitled by reason of his full and frank admissions. Mackenzie AJA said:

> "The present applicant's offending involved repetitive wholesale dealing in cannabis obtained in a well-organised way from an

---

13 (1996) 90 A Crim R 232.

14 [2008] QCA 135.

> interstate supplier. The quantities and profits were quite large. Analysis of the authorities suggests that the head sentence of seven years, having regard to the facts of the case, is neither manifestly excessive nor even at the top of the range that might have been properly imposed."[15]

The recommendation for parole nine months before the statutory eligibility was said to have made sufficient allowance for the *AB* factors. Although the profit in *Wallace* is larger and the trafficking is for a slightly longer period the case has many parallels with the present and when the quantity involved is as great as in that case and in the present the difference is of no great moment in terms of criminality.

[25] Mr Lehane referred to *Brienza* and also to *R v Broad & Prior*.[16] Broad pleaded guilty to trafficking in cannabis over a five month period. He was sentenced to seven years imprisonment with parole eligibility after two years and three months. Prior pleaded guilty to trafficking in cannabis over the same period and other drug related offences and was sentenced to four and a half years imprisonment with parole eligibility after 13 months. The applicants were part of an organised crime network trafficking commercial quantities of cannabis grown in South Australia and transported into Queensland in motor vehicles especially modified to conceal the drugs. Much of the proceeding at first instance and on appeal was concerned with the factual basis upon which Broad had been sentenced. This court did not disagree with the conclusion that Broad trafficked between 122 to 222 pounds of cannabis over the trafficking period and, although it was far from clear what profits he derived from that business, they were significant. Broad had a substantial criminal history over many years and had had a long history of drug addiction. The sentence was not held to be manifestly excessive.

[26] When those authorities are considered, *Wallace* and *Brienza* are of most assistance when considering this applicant's offending conduct. They demonstrate that a head sentence of six years was within range taking into account the admissions made.

[27] Mr Kimmins submitted that a further reduction ought to have been granted for the "letter of comfort" information to reduce the head sentence to one of four years wholly suspended. Mr Lehane argued that a further reduction to reflect those matters may be taken up in the s 13A reduction considerations. There are two matters to note of those submissions. Section 13A serves a particular purpose distinct from the recognition mandated by s 9(2)(i).[17] It may not *necessarily* result in a significant discount if the real benefit to the authorities came from *past* as opposed to *future* co-operation, or for some other reason.

[28] The other concern, raised by Mr Kimmin's submissions, is to avoid fragmenting the sentencing process. In *Markarian v The Queen*[18] Gleeson CJ, Gummow, Hayne and Callinan JJ rejected the "two-tier" approach to sentencing, quoting with approval the observations of Gaudron, Gummow and Hayne JJ in *Wong v The Queen*:[19]

> "Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in

---

15 At 18.

16 [2010] QCA 53.

17 "… how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences …".

18 [2005] 228 CLR 357.

19 (2001) 207 CLR 584 at 611.

> which there are to be 'increment[s]' to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a 'two-stage approach' to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.
>
> It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say 'may be' quite wrong because the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features."[20]

[29] Notwithstanding those considerations, s 13A expressly requires the sentencing judge to state the sentence that would otherwise have been imposed but for the s 13A co-operation, that is, the undertaking to co-operate in the *future*, not which was given in the *past,* the s 9(2)(i) co-operation. Past co-operation has been given by the offender and the benefit for doing so cannot be disturbed. Future co-operation may not occur, for example, because the offender reneges on the undertaking or admits in the witness box that the statement he or she gave the authorities was not truthful. In such cases the benefit can be withdrawn and the offender re-sentenced.

[30] After sentence was pronounced in open court counsel requested her Honour to close the court to make clear the sentence which would have been imposed but for the s 13A co-operation. At this point the distinction between past and future co-operation became blurred and resulted in an error which must be rectified. Her Honour had rightly recognised that even with significant and impressive co-operation as here, punishment was required to reflect that the applicant had engaged over a period of 15 months in trafficking huge quantities of a dangerous drug, not just to discharge his drug debts, but also for commercial gain.

Fresh evidence

[31] Mr Lehane argued that the evidence as advanced by the applicant concerning post sentence events could not be received by this court with the potential to affect the sentence. He contended that the evidence must be evidence which could have been available to the sentencing judge. This is because, he argued, s 668E(3) of the *Criminal Code* provides the basis upon which this court can alter a sentence:

> "On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and *should have been passed* …"
> (emphasis added)

---

20 [2005] 228 CLR 357 at [37].

[32] Mr Lehane also contended that the applicant could apply to the parole board pursuant to s 176 of the *Corrective Services Act* 2006 (Qld) for an exceptional circumstances parole order if appropriate. The administrative vagaries of s 176 of the *Corrective Services Act* will often not be appropriate, particularly where the events are closely connected to the exercise of the sentencing discretion.

[33] Since an error in the sentencing process has been identified, this court sentences afresh and may, as a matter of discretion, receive up to date material. The fresh material, which should be admitted, demonstrates no more than was anticipated by her Honour.

[34] I would make the following orders:

1. Grant the application for leave to appeal.

2. Allow the appeal for the limited purpose of stating (in camera) the sentence which would have been imposed but for s 13A considerations.

3. Otherwise confirm the sentences imposed below.

4. The further reasons for judgment handed down to the parties today be not further published and a copy be placed in a sealed envelope to be opened only by order of the Court or upon an application under s 188(2) of the *Penalties and Sentences Act*.

[35] **FRYBERG J**: I agree with the orders proposed by White JA and with her Honour's reasons for them.