SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thearle* [2012] QCA 42
PARTIES:	**R** **v** **THEARLE, Chasse William** (applicant)
FILE NO/S:	CA No 296 of 2011 SC No 924 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2012
JUDGES:	Margaret McMurdo P, and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to trafficking in cannabis, possession of cannabis, possession of a thing used in connection with trafficking, and two summary offences – where applicant sentenced to two and a half years imprisonment on the trafficking count, with parole release fixed after serving eight months, 12 months imprisonment for the possession count, six months imprisonment for the possession of a thing used in connection count, and convicted and not further punished for the summary offences – where applicant contends that the parole release date did not sufficiently take his particular mitigating circumstances into account – whether the sentence fell outside the range of a sound sentencing discretion – where applicant contends that there was an absence of procedural fairness in that earlier sentences relied upon were not placed before the sentencing judge nor defence counsel – whether the earlier sentences could have resulted in submissions which might have caused a lesser penalty to be imposed

Weapons Act 1990 (Qld)

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, distinguished
Green v The Queen; *Quinn v The Queen* (2011) 86 ALJR 36; [2011] HCA 49, discussed
R v Dolan [2008] QCA 41, distinguished
R v Gault [2006] QCA 316, discussed
R v Vellacott [1997] QCA 223, discussed
R v Townsend, unreported, Supreme Court of Queensland, No 187 of 2011, 26 October 2011, distinguished

COUNSEL: M Byrne QC for the applicant
B J Merrin for the respondent

SOLICITORS: Brisbane Criminal Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with White JA's reasons for refusing this application for leave to appeal against sentence. The applicant was a young man when he offended and had no prior convictions. He confessed to police to trafficking in cannabis for a longer period than their investigations revealed. Material placed before the sentencing court suggested that he had successfully rehabilitated in the 20 months between the commission of his offence and sentence. He was in steady employment and supporting a young family. Commendably, he had worked as a volunteer with the SES assisting victims of the January 2011 flood. In those circumstances, the judge could have granted an immediate parole release date or set a parole release date earlier than she did: see, for example, *R v Dolan*.[1] But the sentence imposed was not manifestly excessive.

[2] The applicant was sentenced on 27 October 2011. Many other offenders apprehended in the same police operation as the applicant were sentenced by the primary judge on that and the previous day. The judge and the prosecutor (but not the applicant's counsel) were familiar with those matters and referred to them during the applicant's sentencing hearing. Sentencing judges and prosecutors must take care in such a situation not to disadvantage defence counsel in advocating for their clients when they are unfamiliar with the details of the sentences imposed on related offenders. In this case, however, the applicant's counsel has not demonstrated any resulting disadvantage to his client.

[3] I agree with the order proposed by White JA.

[4] **FRASER JA:** I agree with the reasons for judgment of White JA and the order proposed by her Honour.

[5] **WHITE JA:** On 27 October 2011 the applicant pleaded guilty to one count of trafficking in cannabis between 18 June 2009 and 18 February 2010, one count of possession of cannabis, one count of possession of a thing used in connection with trafficking (mobile phone and scales) and two summary offences - possessing a utensil and possessing an extendable baton which was a restricted item under the

1 [2008] QCA 41.

Weapons Act 1990. He was sentenced to two and a half years imprisonment on the trafficking count, 12 months imprisonment for the possession of cannabis, six months imprisonment for the possession of the mobile phone and scales, and convicted and not further punished for the summary offences. The sentencing judge fixed his parole release date at 27 June 2012 which was after serving eight months imprisonment.

[6] The applicant seeks leave to appeal his sentences. He does not complain about the head sentence of two and a half years but contends that in fixing the parole release date after serving eight months, the sentencing judge failed to take into account his particular mitigating circumstances adequately.

[7] In the course of the hearing Mr M Byrne QC, for the applicant, raised a matter which was not the subject of a ground of appeal. He was given leave to formulate an additional ground of appeal which was not opposed by Ms Merrin for the respondent. It was in these terms: "There was an absence of procedural fairness in that earlier sentences relied upon were not placed before the sentencing judge nor defence counsel".

Circumstance of offending

[8] Sentence proceeded below on an agreed schedule of facts[2] although, in the course of submissions, defence counsel (not Mr Byrne) seemed to resile from aspects of them or, at least, to seek to minimise inferences which might reasonably be drawn from those facts. On 1 November 2009 police commenced Operation Hotel Guarana on the Sunshine Coast to investigate drug offences. The operation was closed on 17 and 18 February 2010. The operation utilised covert surveillance including telephone taps. One of the persons under investigation was a man named Gary Reynolds-Morgan, known as "Mario". During the course of that operation the applicant was identified as having telephone contact with Reynolds-Morgan in relation to drug matters. Those intercepts were recorded between 14 January 2010 and 9 February 2010, a period of approximately three weeks. It was clear from those intercepts that the applicant was sourcing cannabis from, and regularly providing cannabis to, Reynolds-Morgan. The applicant was dealing in quantities up to four ounces at any one time and in small $50 bags. The applicant appeared to have a regular supply of cannabis.

[9] On 17 February 2010 police executed a search warrant at the applicant's address at Maroochydore. He declared a water pipe and a small amount of cannabis which was chopped up in a bowl. Police seized his mobile phone, electronic scales which had cannabis residue on them and a metal extendable baton found in his bedroom at the side of the bed. The pipe and baton were the subject of the summary charges.

[10] The applicant accompanied police to the police station and participated in an interview. He admitted that he liked to have "a little bit of a smoke sometimes". He also admitted that the scales, bowl, water pipe and cannabis found at the house belonged to him. He maintained that the baton belonged to a friend and that he had it to protect himself in case someone tried to mug him. He denied having used either of his girlfriend's mobile phones for any purpose.

[11] Police located a number of messages on the applicant's mobile phone and questioned him about them. Several were from "Mario" but the applicant said he

---

[2] AR 33-36.

did not know why "Mario" would send those messages. He claimed he did not understand the meaning of some of them and denied ever having purchased cannabis from him or selling cannabis to him. He was questioned about other messages from other persons. He acknowledged they were from people trying to get cannabis from him.

[12] Police then played the applicant a number of the telephone intercepts between himself and Reynolds-Morgan. He acknowledged that his voice was on the recording. As set out in the schedule of facts, the following relevant intercepts were noted:

"● On 14/1/10, the defendant offers to sell Mario "2 bags";
- On 14/1/10, the defendant requests "6 stingers" from Mario;
- On 16/1/10, the defendant calls Mario requesting "some of that smoking shit";
- On 17/1/10, Mario asked the defendant to put "four aside" for him. The defendant only had "one and a bit" but was getting more tomorrow. Defendant offers to sell the one and half ounces for $480.
- On 26/1/10, the defendant asks whether Mario can help him out "with that shit". Mario is waiting for "old mate" to contact him, but says that he's got some green and a couple beans. The defendant comments that if it comes to the worst, he'll get the beans off him.
- On 31/1/10, Mario requests "smoke" from the defendant.
- On 2/2/10, Mario says he just needs a "50" from the defendant.
- On 3/2/10, the defendant asked Mario whether he wanted a couple ounces, but Mario didn't have the money at the time.
- On 4/2/10, the defendant contacts Mario who requests "just one"
- On 5/2/10, Mario messages the defendant and asks if he "grab 4"
- On 7/2/10, Mario asks the defendant for a 50.
- On 9/2/10, the defendant receives a message from Mario offering "green louie voutons".[3]

[13] After hearing those telephone conversations the applicant made the following admissions:

"● There had been occasions when he had used his girlfriend's phone to make the calls
- He'd been selling cannabis, but only to mates when they asked for it, and that people would call and ask him whether he could help them out
- He had about 8 regular customers
- He would sell between 2-5 ounces per week
- He'd been doing this for 6-8 months."[4]

The applicant denied that he got "stuff" from "Mario". Initially the applicant said he was doing it because "we need money" but later claimed that he was doing it to get some free smokes to support his habit which was about one gram every couple of days. He admitted that he would make a small profit on the transactions.[5]

[14] The rate and profit derived from the applicant's admissions set out in the schedule of facts are as follows:

---

3 AR 33-34.
4 AR 35.
5 AR 35.

> "Based on the [applicant's] admissions, he was selling between 2-5 ounces per week. If one assumes he was selling 5 ounces per week, the [applicant] was making approx $100 per week, which accords with the approximate value of his smoking habit (which was 3-4g per week). Given the 8 month time frame of the trafficking, the [applicant] would have made a profit of approximately $3,200. However, the value of the drugs he was shifting was approximately $51,200 (being $320 per ounce, 5 ounces per week for 32 weeks). If the [applicant] had only been selling 2 ounces per week, his profit would have been $1,280, with total sales of $20,480. The average of the lower and upper figure is $35,840."[6]

Submissions on sentence

[15] The applicant had no criminal history. He was aged 21 and 22 years at the time of the commission of the offences and 24 when sentenced. The prosecutor conceded that the length of the period of trafficking beyond the operation was based on the applicant's "eventual" admissions. It was contended that he was trafficking in a schedule 2 drug in not insignificant amounts of between two and five ounces a week and was involved in the purchasing and on-selling and supply to Reynolds-Morgan. It was clear from the telephone intercepts that he was dealing in lots as large as four ounces of cannabis.

[16] The prosecutor reminded the sentencing judge of the sentence which her Honour had imposed the previous day on an offender named Townsend. Over several days her Honour had sentenced a number of offenders arising out of or connected to the operation which had detected the applicant. It was not group offending but rather that police had identified many who had contacted a man named Champion for drugs and others who had contacted Reynolds-Morgan, targets of the operation.[7] Only the sentence imposed on Townsend was mentioned before her Honour. From the transcript it is apparent that defence counsel below had not been involved in any of the sentences of the other offenders arising out of that operation.

[17] The prosecutor reminded her Honour that Townsend had trafficked for six and a half months; that Townsend was 20 to 21 at the time and had a minor unrelated criminal history (which she showed to defence counsel). Townsend had also been found in possession of a quantity of MDMA tablets which had a commercial aspect. The prosecutor explained that Townsend had been dealing in one to two ounces of cannabis per week in contrast to the applicant's two to five ounces and that the applicant had been trafficking for a month and a half longer than had Townsend. A further difference was said to be Townsend's "significant cooperation … with authorities … that was tendered in one of the exhibits in an envelope".[8] He was also said to have co-operated with police immediately, unlike the applicant who only co-operated after the covert telephone intercepts were played to him. Her Honour noted that there had been a parole release date fixed after six months for Townsend on a head sentence of two and a half years. She also noted, in

---

6 AR 35.

7 Ms Merrin, for the respondent, undertook to provide the transcript of sentencing remarks in respect of each of those offenders to Mr Byrne and to the court as a consequence of the amended ground of appeal. Mr Byrne and Ms Merrin have made further submissions in writing to address the added ground of appeal based on this further material.

8 AR 10.

response to the applicant's material showing rehabilitation, that Townsend had demonstrated rehabilitation. The prosecutor submitted that a sentence not less than two and a half years imprisonment should be imposed.

[18] Defence counsel said that he was "somewhat in the dark" about the issues of 'parity' which had been raised by reference to Townsend. Her Honour asked the prosecutor if she wished to provide further information to which she responded that Townsend was involved in a syndicate – an error which she later retracted – and that his communication was with the target, Champion.[9] Townsend had told police that he made $10 "here and there" from selling cannabis; had become involved to support his use of MDMA; and to make some money. Defence counsel expressed his satisfaction with the information.

[19] Defence counsel then provided the court with details of the applicant's background. He had worked as a long-line tuna fisherman from the age of 15 to 18 where he was introduced to cannabis. After he left the tuna industry and started to work as a roofer he continued smoking a couple of grams a week, described as not "a very serious addiction … more of a lifestyle". Defence counsel submitted that the persons to whom the applicant sold cannabis were not "customers", as described in the schedule of facts, but friends and harm to the community was thus restricted to other cannabis users who sourced from each other. He attempted to describe the activity as "more of a social setting where [the applicant] was sharing cannabis with other cannabis users"[10] than a trafficking enterprise where it was a business. The applicant's counsel explained the supply revealed on the telephone intercepts to Reynolds-Morgan as for Reynolds-Morgan's own use. Counsel submitted that the modest profit of up to $100 per week was paltry compared to the good weekly income the applicant was earning as a roofer.

[20] The applicant had immediately ceased using cannabis when he was arrested and charged. Clear urine drug tests were tendered. The applicant had volunteered assisting flood victims in Maroochydore. Amongst the references was one from the State Emergency Service co-ordinator for the area who was present in the court to support the applicant. References were also tendered from his employer who spoke very well of him and the work that he had done re-roofing from cyclone damage. The applicant was in a stable, long term relationship and had a young daughter. His partner had just been made redundant and the family was reliant upon the applicant's wages for support. Counsel relied upon the decision in *R v Dolan*[11] and sought to distinguish *R v Gault*[12] and *R v Vellacott*[13] relied upon by the prosecutor. Counsel also referred to *Townsend*, noting that Townsend was arrested with a quantity of MDMA which, he contended, was more serious than cannabis.

The sentence

[21] Her Honour accepted that the applicant's plea was an early one and that there had been significant co-operation. She noted that the telephone intercepts indicated that the applicant was offering to sell drugs to Reynolds-Morgan as well as requesting drugs from him; that he was dealing in quantities as large as four ounces at any one time as well as in small quantities; that he appeared to have a regular supply of

---

9 AR 13.
10 AR 15.
11 [2008] QCA 41.
12 [2006] QCA 316.
13 [1997] QCA 223.

cannabis; and the admissions were only forthcoming after police had played a number of intercept calls with "Mario". Her Honour made reference to the applicant's youth; no criminal history; that there was no further offending and that the applicant had demonstrated some rehabilitation; had a good employment record; was well regarded by those who had provided a reference; and that his partner had lost her employment. Her Honour observed that the trafficking was conducted over an eight month period with significant quantities of the drug involved with a number of customers. Her Honour concluded her sentencing remarks with the following observation which is the subject of complaint, particularly her reference to "parity":

> "Given the parity issues, amongst all of the sentences I have imposed and the sentences I have been referred to in terms of comparison, the penalty is two and a-half years and you have to serve eight months; that is the only appropriate sentence in the circumstances, given all of those factors I have taken into account."[14]

Submissions on appeal

[22] Mr Byrne submitted that the early plea of guilty; that the applicant had not re-offended over the one year and eight months between arrest and sentence; that he had given up cannabis; that he had carried out community work and was a hard working member of the community should have resulted in a parole date after or just before the one-third mark of the head sentence, that is, after 10 months. Mr Byrne emphasised that the sentencing judge did not adequately reflect the considerations mentioned by Hayne J in *AB v The Queen*[15] that an offender who brings to the notice of the authorities criminal conduct that was not previously known and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known. Mr Byrne submitted, as is the case, that the applicant had made admissions which extended the period of his trafficking from the three or so weeks of the telephone intercepts to six to eight months and had identified the likely profits. He submitted that this admission had been inadequately reflected in a reduction by only two further months to eight months before parole eligibility.

[23] Mr Byrne also submitted, in supplementary submissions, that there was want of procedural fairness because regard was apparently had to other sentences which were not disclosed to the applicant's counsel. The particular decision of *Townsend* involved trafficking in cannabis and possession of methylamphetamine, collectively more serious offending, for which that offender was sentenced to imprisonment of two and a half years with a fixed parole release date after serving six months.

Discussion

[24] So far as the *AB* principle is concerned, the applicant only made admissions after comprehensive denials (including of inferences of drug dealing from his telephone messages) when confronted with the telephone intercepts of conversations with Reynolds-Morgan. The authorities had sufficient evidence to charge the applicant with trafficking in cannabis without his admissions. The judge was right to describe the trafficking as substantial both as to the period and the amount involved. Furthermore, it was clear from those intercepts that the dealing was not just a quasi-

---

14 AR 27-28.

15 (1999) 198 CLR 111 at [113].

social arrangement amongst a small group of friends. The applicant was sourcing up to four ounces of cannabis and he was supplying to a person who appeared to be his supplier on occasions. General deterrence was a very important aspect of the penalty considering the large number of offenders uncovered by this operation.[16]

[25] Mr Byrne relied on the decision in *R v Dolan*.[17] That offender pleaded guilty to trafficking in cannabis over a six week period. He also pleaded guilty to lesser associated counts of possession of cannabis and money. He was sentenced to two years imprisonment suspended after serving four months with an operational period of three years. On appeal his sentence was reduced to the extent that this court made an immediate parole release order after serving approximately three months in prison. Mullins J dissented and would have left the time to serve as imposed below. Police had executed a search warrant at Dolan's home where he co-operated by directing them to a bag of cannabis, scales, clip seal bags of cannabis and some seeds and other drug paraphernalia. He told police he had been smoking cannabis daily for a year although denied addiction. He had sold the drug several times a day since he had stopped work about six weeks earlier and had about 20 customers. He made $200 to $300 per week profit and used the money for daily living expenses. He was 23 at the time and had no previous convictions. He had significant rehabilitation including a lengthy period of counselling to assist with his drug rehabilitation. He was in employment with his family and had suffered some adverse consequences through abandoning his drug dealing. There was insufficient evidence for a charge of trafficking without the offender's admissions. The differences with the present applicant are plain. Here there was ample evidence to charge trafficking without his admissions, although for a much shorter period of offending.

[26] The respondent relied on *R v Vellacott*[18] and *R v Gault*.[19] Vellacott pleaded guilty on ex officio indictment to trafficking in cannabis over a period of about eight months. He sold the drug on a weekly or fortnightly basis to five or six customers to provide money for his wedding. He co-operated with police. He was 35, had no prior convictions and a good work history. He was sentenced to two years imprisonment suspended after nine months with an operational period of three years which was held to be within range.

[27] The offender in *Gault* pleaded guilty to trafficking in cannabis over a six month period. He co-operated with authorities, had particularly poor health and trafficked on what was said to be a small scale. He had outlaid $10,000 and made a profit of about $2,500. He made detailed admissions to police without which he could not have been prosecuted successfully for trafficking. He was aged 49 and had no relevant criminal history. He was caring for elderly parents. He had ceased using cannabis about a year before his offending because it exacerbated one of his physical conditions. He used the profits to meet medical expenses including the costs of running his oxygen machine. Imprisonment would be harsher for him than for a healthy person. A sentence of two and a half years imprisonment suspended after six months with an operational period of three years was described as "while not generous" as within the sound exercise of the sentencing discretion.

---

16 As seen in the bundle of sentencing remarks provided by Ms Merrin.
17 [2008] QCA 41.
18 [1997] QCA 223.
19 [2006] QCA 316.

[28] When those cases are considered the sentence imposed here is not outside the range of a sound sentencing discretion.

[29] It remains only to consider the additional ground that in some fashion the sentencing judge fell into error by use of the expression "parity" and whether there had been a denial of natural justice in referring to other sentences not provided to defence counsel. Clearly there were no co-offenders with this applicant so that no strict issues of parity needed to be considered. Ms Merrin referred to the observation of French CJ, Crennan and Kiefel JJ in *Green v The Queen*; *Quinn v The Queen*:[20]

> "The foundation of the parity principle in the norm of equality before the law requires that its application be governed by consideration of substance rather than form. Formal identity of charges against the offenders whose sentences are compared is not a necessary condition of its application."

[30] The real benefit of the same judge sentencing a large number of offenders detected as a result of a single police operation is to ensure that there was some level of consistency across the range of sentencing taking account of individual circumstances. In this case the judge was able to appreciate the large number of people, at about the applicant's level, who were involved in dealing in drugs in this geographical area at the same time. That merely contributed to an understanding of the need for general deterrence - not a proposition of any novelty or particularity. In fact, the only particular sentence referred to was that of Townsend. He was sentenced the day before this applicant. There were no sentencing remarks available to give to defence counsel but he was sufficiently appraised of the relevant features of that sentence. Mr Byrne is unable to point to any particular fact which defence counsel below might have employed to the advantage of the applicant. Although Townsend pleaded guilty to possessing ecstasy and methylamphetamine in tablet form as well as trafficking in cannabis, it appears that very few of those tablets actually contained any illegal drug. Furthermore, the trafficking related only to cannabis and not to the other illegal drugs which were accepted to be for the offender's own use. The trafficking was over a six month period. There was particular co-operation being "the contents of Exhibit Four".[21] There was nothing in *Townsend* which, had more information been provided to the applicant's counsel, could have resulted in submissions which might have caused a lesser penalty to be imposed on the applicant.

[31] In my view the sentence imposed took into account all of the relevant mitigating factors and made appropriate allowances for them and the sentence imposed was within the exercise of a sound sentencing discretion.

[32] I would refuse leave to appeal against sentence.

---

[20] [2011] HCA 49 at [30].

[21] *R v Townsend*, unreported, Supreme Court of Queensland, No 187 of 2011, 26 October 2011 at 1-4.