SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tout* [2012] QCA 296
PARTIES:	**R** **v** **TOUT, Brenden Macquarie** (applicant)
FILE NO/S:	CA No 81 of 2012 SC No 128 of 2012 SC No 891 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2012
JUDGES:	Muir, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was convicted upon pleas of guilty of trafficking dangerous drug methylamphetamine, trafficking dangerous drug cannabis, two counts of possessing a dangerous drug, possessing a dangerous drug in excess of two grams, possessing a prohibited combination of items, possessing a thing used in connection with trafficking in a dangerous drug, possessing property obtained from trafficking and a summary drug offence – where applicant sentenced to a concurrent term of six years with parole eligibility after 18 months – where applicant contended sentence was manifestly excessive – where applicant contended sentencing judge failed to give weight or proper weight to co-operation with authorities – where applicant argued sentencing judge failed to give weight to or proper weight to the circumstances of applicant and his rehabilitation since offence – where applicant argued sentencing judge erred in giving weight or unreasonable weight to his belief that applicant had a strong capacity and influence over his co-accused – whether sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – PARITY BETWEEN CO-OFFENDERS – where applicant contended that the applicant's sentence is manifestly excessive when compared with co-accused – where co-accused was a youthful first offender and the applicant a more mature offender with a criminal record – where co-accused under influence of applicant – whether sentence was manifestly excessive compared with co-accused

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Barton [2006] QCA 367, considered
R v Bedeau [2009] QCA 43, cited
R v Cooney, ex parte A-G (Qld) [2008] QCA 414, considered
R v Gough [2008] QCA 372, considered
R v Ikin [2007] QCA 224, considered
R v Latif; ex parte Cth DPP [2012] QCA 278, cited
R v Major; ex parte A-G (Qld) [2012] 1 Qd R 465; [2011] QCA 210, cited
R v Thompson [2008] QCA 256, considered
R v Tytherleigh [2006] QCA 193, considered
R v Wirth (1976) 14 SASR 291, cited

COUNSEL: S T Courtney for the applicant
D L Meredith for the respondent

SOLICITORS: Justin Grosby Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: I agree that leave to appeal should be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** The applicant has applied for leave to appeal against sentences imposed upon his convictions on his pleas of guilty of eight drug related offences. For trafficking (between 1 July 2010 and 23 January 2011) in the (Schedule 1) dangerous drug methylamphetamine the applicant was sentenced to six years imprisonment (count 1). For trafficking (between 1 May 2010 and 23 January 2011) in the (Schedule 2) dangerous drug cannabis he was sentenced to a concurrent term of three years imprisonment (count 2). Lesser, concurrent terms of imprisonment were imposed for offences committed on 22 January 2011 of possessing a dangerous drug (counts 3 and 5), possessing a dangerous drug in excess of two grams (count 4), possessing a prohibited combination of items (count 6), possessing a thing used in connection with trafficking in a dangerous drug (count 7), and possessing property obtained from trafficking (count 8). He was convicted and not further punished of a summary drug offence. Parole eligibility was fixed at 20 September 2013, after 18 months (one quarter of the six year term of imprisonment).

[3] In the afternoon of 22 January 2011 police executed a search warrant at the applicant's rented unit on the Sunshine Coast. A co-offender, Boyland, was at the unit. Police saw a clandestine laboratory in the kitchen area. Boyland cooperated with the police and made full admissions. She and the applicant were in a relationship. About four months earlier they had financial difficulties. Another person showed them how to produce methylamphetamine. She and the applicant bought the material necessary to set up a laboratory and the three of them moved into a unit to produce the drug. The applicant sold some and gave a lot of it away. Boyland tasted the product after every cook. A fourth person moved into the unit. Subsequently they moved into different premises where they continued to produce the drug. Ultimately the applicant and Boyland parted from the others, taking the laboratory with them to produce the drug on their own. The applicant taught Boyland how to make the drug. He sold nearly all the drug they made.

[4] Later in the evening the applicant arrived at the unit. He was carrying 478 grams of cannabis, amphetamine with a pure weight of 2.187 grams, and $765 in cash. The applicant participated in a record of interview. He admitted that the drug laboratory was his. He had initially learned to make methylamphetamine with the third person mentioned by the applicant. He sold about one gram a week for about $1,000. Some of the drug he sold was later replaced because of complaints about quality. About six weeks before the police search, when the applicant and the third person had a falling out, the applicant left, taking the laboratory with him. He continued to make and sell the drug. In the six weeks since 9 December 2010 he had made about 30 grams of the drug and sold it for a total of about $30,000.

[5] The prosecutor submitted to the sentencing judge that the applicant trafficked in methylamphetamine and cannabis at street level for some six or seven months and made a turnover of up to $46,000. The applicant's counsel conveyed his instructions that the total turnover was between $20,200 and $21,200, comprising $7,200 during the period in which another person was involved in the production and $13,000 or $14,000 in the subsequent period. The sentencing judge found that the ingredients purchased to produce the drug were capable of producing a turnover of about $46,000 if they were converted to methylamphetamine but that there were not enough ingredients overall for that amount. It was a potential figure rather than a realistic indication of the turnover.

[6] The sentencing judge accepted that the applicant's frank admissions to police to a large extent founded the charges against him and that the applicant had co-operated with the police. The applicant had a criminal history which included some minor property offences and one common assault. He had not been imprisoned. The applicant was not addicted to methylamphetamine but produced and sold it for respect and power. He was engaged in the business for about six or seven months. His phone contained about 6,200 text messages, a large proportion of which related to the production and sale of drugs. He was an active seller. For a considerable period the applicant and Boyland carried on the business of producing methylamphetamine with two other persons. The applicant was one of the principals in the operation. The applicant entered a timely plea of guilty, although he could have notified his intention to plead guilty at the earlier committal proceedings. The sentencing judge accepted Boyland's evidence that she became involved when requested by one of the other people involved in the production to purchase the ingredients. The applicant must have been aware of that. The sentencing judge also accepted Boyland's evidence that the applicant told her that the drug was good and she should use it, and that on one occasion the applicant

forced the drug into her mouth; that was to the applicant's discredit because Boyland who was aged 17 and had no previous convictions, was a vulnerable person and the applicant had a strong capacity to influence her. The offences involved street level dealing for limited profit. The applicant had made good progress in his rehabilitation since he was charged. The sentencing judge considered that the sentence should both act as a deterrent for others and as a deterrent for the applicant, and at the same time maximise his prospects of rehabilitation.

[7] Ground 1 of the proposed appeal contends that the sentence was manifestly excessive. Ground 2 contends that the sentencing judge failed to give weight to or proper weight to the co-operation by the applicant to authorities in the justice system, and ground 3 contends that that the sentencing judge failed to give weight to or proper weight to the circumstances of the applicant and his rehabilitation since the offence date. The applicant's counsel did not address oral submissions in support of grounds 2 and 3. There is no indication in the sentencing remarks that the sentencing judge failed to give proper weight to the applicant's co-operation with the authorities or to the applicant's rehabilitation. Grounds 2 and 3 seem to have been included as possible explanations for the claimed manifest excess of the sentence, but ground 1 implies that there has been a failure properly to exercise the sentencing discretion the nature of which is not discoverable: *House v The King* (1936) 55 CLR 499 at 505. Accordingly, grounds 2 and 3 should be disregarded: see *R v Major; ex parte A-G (Qld)* [2011] QCA 210 at [62], [87] – [90] and *R v Latif; ex parte Cth DPP* [2012] QCA 278 at [17].

[8] As to ground 1, a contention that the sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is "unreasonable or plainly unjust": *Hili v The Queen* (2010) 242 CLR 520 at [58], [59].

[9] The respondent referred to *R v Barton* [2006] QCA 367. That offender's sentence of seven years imprisonment with parole eligibility fixed after two years and three months was varied on appeal only to the extent of substituting a parole eligibility date after 18 months. She pleaded guilty to one account of trafficking in methylamphetamine, seven counts of supplying methylamphetamine, one count of possessing pseudoephedrine for use in producing dangerous drugs, and three summary offences. She committed two counts after she was charged with the summary offences. She was 24 at the time of the offences and had a minor criminal history of drug offences. The trafficking occurred over a period of nearly six months. On seven occasions she sold 26 grams of methylamphetamine in 120 grams of powder to an undercover police officer for $14,700 and 120 pseudoephedrine tablets were found at her home. The variation in the parole eligibility date was made because, by the time of the sentence hearing, that previously addicted offender had given birth and made successful efforts at rehabilitation. The applicant's contention that his sentence was manifestly excessive is not easy to reconcile with the seven year term imposed in *R v Barton* and not disturbed on appeal for a similar offence, particularly bearing in mind that the applicant was also convicted of trafficking in cannabis.

[10] The applicant referred to *R v Tytherleigh* [2006] QCA 193; *R v Ikin* [2007] QCA 224; *R v Thompson* [2008] QCA 256; *R v Gough* [2008] QCA 372; and *R v Cooney, ex parte A-G (Qld)* [2008] QCA 414.

[11] In *R v Tytherleigh*, a sentence of four and a half years imprisonment with parole eligibility after 15 months for one count of trafficking in methylamphetamine was found to be "high" but within the sentencing discretion. There were supply and other counts, but Holmes JA described them as being "subsumed in the trafficking'. That offender had a fairly lengthy criminal history which included prison terms for drug offences, but the sentence took into account the significant circumstance in his favour that the trafficking and supply counts were based entirely (rather than substantially, as the sentencing judge found in relation to the applicant) upon his own admissions (see *AB v The Queen* (1999) 198 CLR 111 per Hayne J at [113] – [114]). Further, although that offender's trafficking in methylamphetamine was similar in extent to the applicant's offence, he was a street level dealer who sold low purity drugs to addicts to support his heroin addiction. The applicant was not an addict and trafficked in drugs for the unworthy motive of gaining some illegitimate form of respect and power. Furthermore, the applicant's sentence reflected his criminality, not only in his methylamphetamine trafficking, but also in other offences which included trafficking in cannabis. *R v Tytherleigh* does not indicate that the applicant's sentence was outside the discretion of the sentencing judge when those differences are taken into account.

[12] In *R v Ikin* the offender failed to demonstrate manifest excess in a sentence of eight years imprisonment with parole eligibility effectively after two years and eight months. The applicant emphasised Ikin's criminal record of drug offences and that at the time of the offending he was bound by an intensive correction order relating to a charge of possessing dangerous drugs. However, the decision was merely that the sentence was not manifestly excessive or affected by other sentencing error. Similarly, in *R v Thompson* the appropriateness of a sentence of seven years imprisonment with parole eligibility fixed at three years and three months was not in issue. The issue concerned only parity with a co-offenders' sentence. I would add that the sentences for the offences in *R v Thompson* and *R v Ikin* are not inconsistent with the less severe sentence imposed upon the applicant for his less serious offending. As was submitted for the respondent, one should not necessarily expect a direct correlation between the severity of sentences and the seriousness of trafficking in a Schedule 1 drug.

[13] *R v Gough* involved markedly less serious offences. The Court's conclusion that the offender's sentence of three years imprisonment with parole fixed after twelve months was not manifestly excessive has no bearing upon the appropriateness of the applicant's sentence.

[14] The refusal of the Attorney-General's appeal in *R v Cooney; ex parte A-G (Qld)* against a sentence of five years imprisonment with parole eligibility after two years does not suggest that the applicant's sentence is excessive. That offender made more money from his drug trafficking over a period of about five months, but McMurdo P, with whose analysis White AJA and McMeekin J agreed held (at [32]) that the appropriate range extended to seven years imprisonment with parole eligibility after two or two and a half years to reflect that offender's plea, co-operation with the authorities, and prospects of rehabilitation. Significantly, the President described (at [31]) that offender's involvement in the trafficking business as "peripheral". He did not make his living through drug trafficking. Rather, he was a customer, he supplied friends and acquaintances for a modest profit, his affluent middle class lifestyle was funded from a successful business rather than from drug trafficking, he pleaded guilty at the very early committal stage, and there

were good reasons to think that he was unlikely to reoffend. The applicant was given a more favourable parole eligibility date and his longer head sentence is consistent with the greater significance of his role as a principal in the trafficking of both methylamphetamine and cannabis. *R v Cooney; ex parte A-G (Qld)* supports the respondent's submission that the applicant's sentence was within the range of proper sentences.

[15] Ground 4 of the proposed appeal contends that the sentencing judge erred in giving weight or unreasonable weight to his belief that the applicant had a strong capacity and influence over his co-accused Boyland. In oral argument the applicant's counsel challenged the sentencing judge's finding that Boyland was vulnerable and the applicant was in a position to influence her. That finding was plainly open in light of Boyland's youthfulness (she was only 16 when the applicant met her), the disparity between the applicant's and Boyland's ages at the time of the offences (25 and 17 respectively), the applicant's more significant role in the methylamphetamine trafficking offence (for example, their mobile phone records showed that he was vastly more involved in the trafficking), his correspondingly more powerful position (he alone was found in possession of the money and the drugs), the evidence that he exercised his dominance over her (the applicant urged her to use the drug, told her it was good, and on one occasion forced her to use it), and the sentencing judge's advantage in seeing Boyland give evidence.

[16] The applicant also argued that the sentencing judge erred taking into account the finding that it was to the applicant's discredit that the applicant on one occasion forced the applicant to use methylamphetamine. That remark was certainly justified by Boyland's evidence. Understood in its context, the remark does not imply that the sentence imposed upon the applicant was made more severe than it otherwise would have been. Its relevance was that it was one of the reasons why a much less severe sentence was imposed upon Boyland, who was sentenced on the same occasion. It was also relevant to the sentencing judge's immediately following observations that the applicant needed to learn to empathise with other people, that methylamphetamine was a "terribly destructive drug", he did not help people by selling to them because it could destroy their lives, it showed a lack of empathy to commit such an offence, and that was reflected in the applicant's treatment of Boyland.

[17] Ground 5 of the proposed appeal contends that the applicant's sentence is manifestly excessive when compared with the sentence imposed on Boyland. This ground was intended to invoke the "parity principle". The applicant argued that, notwithstanding the differences in the degrees of criminality, the difference between the penalties imposed for the same offence of trafficking in methylamphetamine upon the applicant and Boyland was "manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done": *Postiglione v The Queen* (1997) 189 CLR 295 per Gummow J at 323.

[18] Boyland was charged jointly with the applicant only on counts 1, 3, 6 and 7. She pleaded guilty and was sentenced to three years imprisonment upon count 1 and to lesser, concurrent terms on the other counts. A parole release date was fixed on 20 March 2012, the date of sentence. Both the applicant and Boyland made full admissions and notified a plea of guilty shortly after presentation of the indictment, but Boyland also provided a statement which implicated three co-accused and was

available to give evidence (although that was not needed because the co-accused also pleaded guilty). Each achieved a substantial degree of rehabilitation, having successfully completed a program and (after an initial positive urine test) having returned only negative results in numerous tests. Most significantly, the applicant committed more offences (including trafficking in cannabis), Boyland was a youthful first offender whereas the applicant was a more mature offender with a criminal record (albeit a relatively minor one), and the sentencing judge found that Boyland was under the influence of the applicant, her involvement in the trafficking was far less than the applicant's involvement, the bulk of the money did not go to Boyland and, whilst the applicant was a user of the drug but not an addict, Boyland was to some extent addicted. The much more severe sentence imposed upon the applicant is readily explicable by those significant differences in the circumstances of their offences and their personal circumstances. The applicant does not have a justifiable grievance arising from the less severe sentence imposed upon Boyland.

[19] Although not the subject of any ground of the proposed appeal, the outline of submissions filed on the applicant's behalf included a contention that the sentencing judge erred in disregarding the applicant's role in caring for his great-grandmother. That was submitted to be a factor to be taken into account, although it was conceded that it could not overwhelm other factors, including retribution and deterrence: *R v Bedeau* [2009] QCA 43 at [13] per Muir JA, Holmes JA and Atkinson J agreeing.

[20] It was submitted to the sentencing judge that he had been his great-grandmother's fulltime carer for ten months. The applicant's great-grandmother provided a statement which explained the applicant's assistance with daily chores and looking after her for a period of seven months. The sentencing judge considered that the law did not permit him to take that into account because family circumstances could affect a sentence only in extraordinary cases. Understandably, the applicant's counsel did not place much weight upon this in his oral submissions. Whilst the imprisonment of the applicant would inevitably cause grief and sadness to the applicant's great-grandmother, his imprisonment for a lengthy period was an inevitable result of his having committed such serious offences and there was no evidence that it would cause any particular hardship beyond that which is commonly encountered in numerous cases. In *R v Wirth* (1976) 14 SASR 291 at 296 Wells J said that:

> "Hardship to spouse, family, and friends, is the tragic, but inevitable consequence of almost every conviction and penalty recorded in a Criminal Court … It seems … that courts would often do less than their clear duty … if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other points of view were justified, would be likely to cause to those near and dear to prisoners."

[21] This factor could not have had a significant influence upon the severity of the sentence. The discounting of it by the sentencing judge does not supply a basis for appellate interference.

Proposed order

[22] I would refuse leave to appeal.

[23] **GOTTERSON JA**: I agree with the order proposed by Fraser JA and with the reasons given by his Honour.