SUPREME COURT OF QUEENSLAND

CITATION:	*R v Burrell* [2013] QCA 41
PARTIES:	**R** **v** **BURRELL, Mathew John** (applicant)
FILE NO/S:	CA No 165 of 2012 SC No 39 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	12 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2013
JUDGES:	Muir and Fraser JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of trafficking in the dangerous drug methylamphetamine – where the applicant also pleaded guilty to six summary offences and counts in an ex-officio indictment – where the applicant was sentenced to six years imprisonment for the trafficking offence with parole eligibility after serving one third of the sentence – where the period of drug trafficking to which the applicant pleaded guilty was inconsistent with the schedule of facts tendered at the sentence hearing – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant contended his sentence was not consistent with the sentence imposed on one of his co-offenders, Foley – where the applicant had an extensive criminal history and greater culpability than Foley – where the applicant was responsible for distributing drugs at street level and provided input into decisions made by one of his

co-offenders, Betts – whether the sentence was manifestly excessive in comparison to his co-offender

Drugs Misuse Act 1986 (Qld), s 5

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
Cheung v The Queen (2001) 209 CLR 1; [2001] HCA 67, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered
R v Barton [2006] QCA 367, considered
R v Cooney; ex parte A-G (Qld) [2008] QCA 414, considered
R v Raciti [2004] QCA 359, considered
R v Rizk [2004] QCA 382, considered
R v Tout [2012] QCA 296, considered

COUNSEL: The applicant appeared on his own behalf
B J Merrin for the respondent

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

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

[2] **FRASER JA:** On 15 June 2012 the applicant pleaded guilty to one count of trafficking in the dangerous drug methylamphetamine and other dangerous drugs. That offence was charged against both the applicant and one of his co-offenders, Betts, who pleaded guilty at the same hearing. The applicant also pleaded guilty to counts in an ex-officio indictment against him alone of unlawful possession of the dangerous drug methylamphetamine and unlawful possession of the dangerous drug cannabis and he pleaded guilty to six summary charges. On the trafficking count, the applicant was sentenced to six years imprisonment. One hundred and seventy days which the applicant served in pre-sentence custody between 29 December 2011 and 15 June 2012 were declared to be time served under the sentence. The twenty-eighth of December 2013 was fixed as the parole eligibility date. The applicant was sentenced to concurrent terms of six months imprisonment for the possession offences. He was sentenced to four months imprisonment for one of the summary offences (unlawful possession of a category H weapon). He was convicted and not further punished for the other summary offences, save that he was disqualified from driving for 12 months for the offence of dangerous operation of a motor vehicle.

[3] The applicant has applied for leave to appeal against sentence on the ground that it is manifestly excessive. The applicant, who was represented by counsel at the sentence hearing and appeared for himself in this application, submitted that the appropriate sentence was three to four and a half years imprisonment with an early parole eligibility date. The applicant submitted that a parole release date would facilitate appropriate drug treatment, but it must be noted that the *Penalties and Sentences Act* 1992 does not empower the Court to fix a parole release date for a sentence of imprisonment exceeding three years: see s 160B(1), s 160(C)(1),

s 160(D)(1). Rather, the offence of trafficking in dangerous drugs under s 5 of the *Drugs Misuse Act* 1986 is a "serious violent offence" in respect of which s 160(D)(3) empowers the court to fix the date upon which the offender is eligible for parole.

Circumstances of the trafficking offence

[4] The circumstances of the trafficking offence charged against the applicant and Betts were set out in a schedule of facts which was tendered without objection at the sentence hearing. Another co-offender, Foley, who is mentioned in the schedule, had been sentenced at an earlier hearing. Betts was the prime mover in the trafficking enterprise. He identified sources of methylamphetamine in New South Wales and arranged for the drug to be transported to Cairns for distribution and resale. He also purchased some methylamphetamine from a supplier in Townsville for the purpose of resale in Cairns.

[5] One uncontroversial aspect of the applicant's role in the trafficking operation was that he sold the drug within Cairns. The schedule records that "[the applicant] and others appeared to be primarily responsible for selling the drugs, mostly at street level." The applicant, like his co-offenders, used some of the purchased drugs. The schedule records the applicant's admissions that he was employed "as a runner for a 'friend'", whose identity he declined to nominate but who was obviously Betts. The applicant told police that over time he developed his own customer base, that he did not make a profit from his role, and that he participated purely to feed his own habit. The applicant also told police that his "friend" was in charge and that, whilst the applicant occasionally provided input, he was not involved in the decision-making. He said that he felt pressured and "indirectly threatened" to continue dealing drugs, apparently because he understood that Betts was being chased by others and was under a lot of pressure. (Submissions for Betts referred to violence and threats of violence against him and others as an explanation for his offending.)

[6] One issue in contention in this application was whether the applicant also acted as a courier to bring the drugs from Sydney to Cairns. Unfortunately, the schedule includes conflicting statements on this topic. On the one hand, it includes statements that the applicant was "one of three couriers used by Betts to fly to Sydney, purchase the drugs and transport the drugs back to Cairns", and that Betts "mostly … used couriers including [the applicant] …". On the other hand, the applicant is not mentioned as a courier in the apparently comprehensive summary of Betts' purchases from the three different suppliers from whom Betts sourced the drug during the trafficking period; that summary is said to have been evidenced by telephone intercepts and bank records, and confirmed by Betts in his police interview. According to the summary, the first flight from Cairns to Sydney which resulted in the purchase and transport to Cairns of methylamphetamine occurred on 13 February 2011, returning on the following day. The summary records three subsequent trips during which Foley purchased methylamphetamine in Sydney and Betts purchased the drug in Townsville. The next entry, 22 April 2011, notes that the applicant was booked to fly from Cairns to Sydney to purchase methylamphetamine from a new supplier but that he did not make the flight, telling Betts that he was kicked off the plane. The last entry is for 13 May 2011, referring to Betts acquiring the drug in Sydney and returning to Cairns on 15 May 2011, when he was intercepted by police at the airport.

[7] When the prosecutor outlined the circumstances of the offence of trafficking in submissions to the sentencing judge she substantially repeated what appeared in the schedule. Defence counsel also did not advert to the internal inconsistency in the schedule. When the sentencing judge addressed the applicant, he observed both that "you participated in the trafficking operation that was seemingly organised by Betts by being a courier but also a dealer on-selling the drugs in the market place" and also that "I take into account your activities as a potential willing courier, there is one trip I note that was aborted …".

[8] I accept the applicant's submission that, on the evidence, it could not be found that he in fact acted as a courier. However, that does not have the significance attributed to it by the applicant. On the agreed facts, the applicant's role extended beyond the sale of the drugs brought to Cairns by others. In addition to the applicant being one of those primarily responsible for selling the drugs at street level, and in addition to his admitted willingness to act as a courier, the applicant provided "input" into the decisions made by Betts, who was in charge of the overall operation. Whilst the applicant was less culpable than Betts, the applicant's culpability was increased by his knowledge of and knowing involvement in the trafficking operation in those respects.

[9] The sentencing judge remarked that Betts had pleaded guilty "to a period of trafficking of some six months …" but did not record any finding about the period of the applicant's offending. The respondent submitted that the applicant by his plea of guilty admitted that he engaged in trafficking for the whole of the charge period. There was, however, no evidence to support a sentence on that basis. The indictment alleged that the respondent engaged in trafficking of methylamphetamine and other drugs between two dates which were six months apart, but the schedule contains no statement about any drug sales by the applicant before the arrival in Cairns of the first purchase of methylamphetamine, on 14 February 2011. It clearly appears from the schedule that the only evidence of sales by the applicant involved the methylamphetamine which was obtained from Sydney from the three different suppliers used by Betts: the schedule plainly records that the methylamphetamine was sourced from the three different suppliers in Sydney "during the trafficking period" which, on the only evidence, extended for three months from 14 February to 15 May 2011. The schedule records that Betts flew to Sydney to purchase and collect the drugs on "occasions", but the summary of the purchases organised by Betts records only one trip by him to Sydney, the final trip when he was arrested on his return on 15 May 2011. One might therefore speculate that the police had gathered other evidence concerning the period of trafficking by the applicant, but there was no factual basis, either in the schedule or in the unchallenged submissions by the prosecutor, to justify a finding that the applicant sold drugs or otherwise participated in drug trafficking before 14 February 2011. The applicant could not be sentenced for drug trafficking over a six month period when there was no information about the existence, nature, or extent of any such trafficking and when the schedule conveyed that the applicant sold the drugs acquired by Betts during only the three month period between 14 February 2011 and 15 May 2011.[1]

[10] As to the extent of the applicant's trafficking, the sentencing judge remarked that there were "significant quantities of drugs and money" but made no finding about the quantity of drugs or their wholesale or retail values. The prosecutor made

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1 Cf *Cheung v The Queen* (2001) 209 CLR 1 at [6]-[7] and [13] (Gleeson CJ, Gummow and Hayne JJ).

a submission, extracted from statements of quantities and prices in the schedule that Betts purchased 14 ounces of methylamphetamine in all, at prices of $10,000 and $13,500 an ounce; adopting a conservative basis of $10,000 an ounce, that involved a total outlay of $140,000. Betts told police that he did not cut the drugs with other substances. Again on a conservative basis, using the onsale prices for the largest sale quantity, the total proceeds of sale were about $280,000. There would have been a greater return if the drug was sold in smaller quantities. The prosecutor made it clear that those were very rough, conservative estimates. Defence counsel did not take issue with those figures, remarking only that 14 ounces worked out to be about 383 grams (14 ounces is in fact 396.89 grams) together with a further unknown quantity.

[11] The applicant complained that the prosecutor had referred to the level of purity of the drugs which were found on Betts when he was arrested at the Cairns airport. There is no reason to think that any variations in the level of purity of the drugs had any influence on the sentence imposed upon the applicant.

[12] In summary, the applicant fell to be sentenced on the following bases. He engaged in the business of trafficking in the Schedule 1 dangerous drug methylamphetamine over a three month period. In addition to building up a customer base and selling the drug at street level, for which the applicant and others had primary responsibility, the applicant had input into decisions made by the organiser of the overall operation, Betts, and he was willing to act as a courier. The total quantity of the drug acquired in the trafficking period was more than 14 ounces. The purchase price and retail value of the drug were conservatively and roughly estimated at $140,000 and $280,000 respectively. The proceeds of resale were considerably less because the applicant and his co-offenders consumed unknown quantities of the purchased drug. The applicant committed the offence to feed his own habit and he did not make any profit beyond the value of the drug he consumed.

[13] In relation to the other offences admitted by the applicant, it is sufficient to mention that when a search warrant was executed at his house on 14 May 2011 police found small quantities of methylamphetamine and cannabis, drug utensils, and a loaded handgun. The applicant submitted that he was wrongly sentenced on the basis that the handgun was on his person when he was arrested. There is no basis for thinking that the sentencing judge made that mistake. The prosecutor informed the sentencing judge that police found a carbine .357 handgun loaded with .38 bullets in a bathroom, the applicant admitted that he was the owner of the handgun, and the applicant told police that he possessed the weapon for "personal protection". The sentencing judge referred to the applicant's possession of the weapon as one of the disturbing aspects of his behaviour. That was taken into account in the concurrent sentence of imprisonment for four months for that offence, the sentencing judge remarking that "it's a significant indication of the way in which you are prepared to behave and your preparedness to mix in circles where violence may be occasioned…". There was no error in this respect.

The applicant's personal circumstances

[14] The applicant was aged between 26 and 27 at the time of the offences and he was 28 years old when sentenced. He had an extensive criminal history which included many drug and property offences, together with breaches of various court orders, and public order offences. I will mention the most relevant offences. The

applicant's history of drug offences commenced on 13 August 2002 for summary offences committed in March of that year. He had convictions for offences of violence, commencing with a conviction for common assault committed in September 2002 for which he was sentenced to 61 days imprisonment and 12 months probation on 20 November 2002. A more substantial term of imprisonment, 12 months, was imposed in June 2003 for offences including burglary committed in 2001. In November 2005 he was sentenced to suspended terms of concurrent imprisonment with orders for intensive drug rehabilitation pursuant to s 19 of the *Drug Rehabilitation (Court Diversion) Act* 2000 for offences including attempting to enter premises with intent to commit an indictable offence, wilful damage, and possessing dangerous drugs, committed on various dates between May 2002 and October 2005. Those orders were terminated and a sentence of imprisonment of nine months and lesser concurrent sentences were imposed on 9 December 2005. In May 2006 the applicant was sentenced to imprisonment for three years for a robbery with actual violence when armed and in company committed in November 2005. A further rehabilitative order imposed in October 2009 for various offences, including offences of dishonesty was vacated in July 2010 and the applicant was re-sentenced to an effective term of imprisonment of 15 months for those offences. The applicant was convicted and sentenced to short terms of imprisonment for a variety of further summary offences in July 2010, including assaulting or obstructing a police officer, unlawful possession of weapons, and possessing dangerous drugs on various dates in March and June 2010. In August 2011 he was convicted of additional summary drug offences and sentenced to further, short terms of imprisonment.

[15] A report by a psychologist recorded the applicant's description of a traumatic childhood. He was homeless and without family support at the age of 12. At that very young age he was introduced to drugs by criminals to whom he turned for support, including intravenous use of amphetamines. The applicant had not been educated beyond Year 7 and he had spent most of his adult life to date in jail. When he was in the community homelessness dominated his life. The applicant expressed a desire to escape his current anti-social lifestyle, but admitted that he had no idea how he might do so and he acknowledged that he would require significant assistance. The psychologist accepted that the applicant was motivated for treatment but observed that there were potential difficulties in the necessary therapeutic process. The sentencing judge noted that the report suggested that there might be some prospect for the applicant to rehabilitate himself, in which event the community would be well served, but the offences committed by the applicant, particularly the trafficking, were serious. The sentencing judge acknowledged also that the applicant had made admissions about his own involvement and co-operated by the pleas he had entered; because of those pleas and the applicant's co-operation, the sentencing judge fixed a parole eligibility date after the applicant served one third of the term of imprisonment.

Comparable sentencing decisions

[16] The prosecutor referred the sentencing judge to *R v Rizk* [2004] QCA 382. That offender pleaded guilty to one count of trafficking in a Schedule 2 dangerous drug (MDMA, known as ecstasy) and one count of possession of the same drug. The court allowed an application for leave to appeal against a sentence of eight years imprisonment with a recommendation that the offender be considered for parole after three years and re-sentenced the offender to six years imprisonment with

a recommendation for parole after two years. The offender worked with a co-offender, Raciti, in obtaining large quantities of ecstasy from numerous suppliers at Raciti's direction and in distributing the drug to others below them in the chain of distribution over a period of between two and a half and three months. After Raciti was arrested when found in possession of a large quantity of drugs and given bail, he employed the offender to do the "hands on work" of the business on Raciti's behalf. Raciti was sentenced to 11 years for trafficking in Schedule 1 and Schedule 2 drugs (see *R v Raciti* [2004] QCA 359). McPherson JA, Jerrard JA and Jones J observed that they had taken the view in *R v Raciti* that the appropriate sentencing range for large scale trafficking in Schedule 1 and Schedule 2 drugs was 10 to 12 years and that Raciti's offending was at the upper end of that range. The position of the offender was distinguished because his trafficking was confined to Schedule 2 drugs, "for which we would ordinarily assume a range of 8 to 10 years imprisonment.": [2004] QCA 382 at [7]. The court took into account that the offender's period of trafficking was two and a half months, he was only 25 years of age, he had no prior criminal history of any kind, he had been working consistently and recently working six or seven days a week to assist an ill cousin, and he was an addict; but notwithstanding his addiction, the motivation for his offending was commercial gain. When the offender was arrested he was in possession of some 5,000 ecstasy tablets which contained more than 445 grams of pure ecstasy and for which he had paid $87,500. That was the final transaction amongst others in the trafficking period.

[17] Having regard to the applicant's role in providing input into Betts' decision-making and being one of those primarily responsible for the on-sale of the drug, albeit at street level and to feed his habit without monetary profit, and also having regard to the applicant's extensive criminal record and the fact that he was trafficking in a Schedule 1 rather than a Schedule 2 drug, the sentence imposed on appeal in *Rizk* is consistent with the sentence imposed upon the applicant.

[18] In this application the respondent referred to *R v Barton* [2006] QCA 367, in which a sentence of seven years imprisonment with eligibility for parole after two years and three months was varied on appeal only to the extent of substituting 18 months as the parole eligibility period. That variation was made to recognise the offender's "impressive and apparently successful efforts at rehabilitation since the birth of her baby daughter": [2006] QCA 367 at [15]. She had a background which, like the applicant's, involved very serious disadvantage. She was introduced to cannabis when she was 14 and methylamphetamine when she was 16. She was 24 at the time of the offences and 26 when sentenced. Her criminal history was much less significant than that of the applicant; she had been fined for summary drug offences. That offender trafficked for a period of some two and a half months, but the total quantity and price of methylamphetamine in which she trafficked was much less than in the operation in which the applicant participated. She sold drugs to an undercover police officer on seven occasions in a total amount which equated to about 26 grams of pure methylamphetamine for the total price of $14,700. Similarly to the applicant, that offender was sentenced on the basis that her conduct was in part motivated by a craving to finance her habit. McMurdo P, with whose reasons Jerrard JA agreed, described the seven year head sentence as being towards the high end of the range, but as appropriately reflecting the serious aspects of that offender's trafficking in methylamphetamine. *R v Barton* suggests that the applicant's contention, that the six year head sentence imposed upon him is manifestly excessive, must be rejected.

[19] Reference might also usefully be made to the refusal of the Attorney-General's appeal against the sentence of five years imprisonment with parole eligibility after two years in *R v Cooney; ex parte A-G (Qld)* [2008] QCA 414, in which McMurdo P (White AJA and McMeekin J agreeing) held at [32] that the range extended to seven years imprisonment with parole eligibility after two to two and a half years. That offender's involvement in the trafficking business was described as "peripheral"; he was a customer who supplied friends and acquaintances for a modest profit and he funded his lifestyle instead from a successful business. He pleaded guilty and there were good reasons to think that he was unlikely to reoffend. He also had a much less significant criminal record than the applicant. The sentence was described by the President as being "as lenient as it could be in all the circumstances…" and by White AJA as involving a view of the evidence which was "generous" to the offender: [2008] QCA 414 at [33] and [35]. The applicant offended to feed his drug habit, but having regard to his significant role in the trafficking of significant quantities of the Schedule 1 drug and his extensive criminal history, *R v Cooney* provides further support for the view that his sentence could not be regarded as being manifestly excessive. I note also that the applicant's sentence is consistent with the analysis in *R v Tout* [2012] QCA 296 at [9]-[14] of *R v Barton*, *R v Cooney* and other decisions concerning trafficking in Schedule 1 drugs.

[20] The applicant argued that his sentence was shown to be excessive by comparison with the sentence imposed in *R v Herrod* (unreported, 29 July 2011, North J). That offender was sentenced to four years and six months imprisonment with parole eligibility after 11 months. Taking into account seven months already served in custody, the pre-release period was effectively 18 months or one-third of the term. No estimates of the quantity of drugs trafficked, the turnover, or the profit appear in the sentencing remarks, but that offender trafficked in methylamphetamine over a two year period. The sentencing judge accepted that a range of between five and seven years as a head sentence was appropriate "as a general rule", but imposed the more lenient sentence because of a real prospect that the offender would rehabilitate himself. That offender had a criminal history which went back some years, but it seems to have been markedly less extensive than the applicant's criminal history. Importantly, that offender admitted to trafficking in drugs when the police apparently did not have much evidence to prove the extent or duration of that offence: see *AB v The Queen* (1999) 198 CLR 111. For those reasons, the decision does not support the applicant's contention that his sentence was manifestly excessive.

Parity

[21] The applicant referred to the sentence imposed upon the co-offender Foley of three years imprisonment with a parole release date after one year. The applicant pointed out that Foley had travelled from Cairns to Sydney and back four times during the trafficking period, purchasing drugs from a supplier nominated by Betts with money provided by him. Foley was paid $1,000 for three of the drug runs and she was given two grams of methylamphetamine for one other. After an initial interview Foley made full and frank admissions to police. She had a poor upbringing and a particularly troubled past. Foley had been in a relationship with Betts and he had a very negative impact on her behaviour. Nevertheless she had a history of apparently productive employment. She confessed to some criminal conduct which was not known to the police, which the sentencing judge remarked was to her credit.

Foley also had longstanding addiction issues. She had suffered a miscarriage shortly before being sentenced.

[22] The greater severity of the applicant's sentence is readily explicable by reference to his greater degree of culpability (whilst Foley acted repeatedly as a courier, the applicant was not only responsible for selling the drugs but also had input into decisions made by Betts), the applicant's extensive and concerning criminal history, and his less compelling personal circumstances. Taking those differences in circumstances into account, the disparity between the applicant's sentence and Foley's sentence does not give rise to a "justifiable sense of grievance": *Postiglione v The Queen* (1997) 189 CLR 295 at 309 (McHugh J) and at 301 (Dawson and Gaudron JJ), citing from *Lowe v The Queen* (1984) 154 CLR 606 at 610, 613, and 623.

Proposed order

[23] I would refuse the application.

[24] **MARTIN J:** I agree with Fraser JA.