SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lacey* [2013] QCA 318
PARTIES:	**R** **v** **LACEY, Jade Michael**
FILE NO/S:	CA No 78 of 2013 SC No 123 of 2013 SC No 124 of 2013 SC No 134 of 2013 SC No 308 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2013
JUDGES:	Fraser and Gotterson JJA and McMeekin 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 seven indictable offences – where the applicant was already serving an effective period of 13 years imprisonment taking into account earlier presentence custody which was unable to be declared as time already served – where the applicant was sentenced to concurrent terms of imprisonment of five years for trafficking and 15 months imprisonment for assault – where the applicant was also sentenced to two years imprisonment for each count of armed robbery to be served concurrently with each other but cumulatively upon the sentences which the applicant was serving – where the applicant contended that the sentence was rendered manifestly excessive by the imposition of the cumulative imprisonment for the armed robbery counts and thereby offended the totality principle – whether the sentence imposed offended the totality principle – 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 argued that the sentence imposed on the armed robbery counts was not in parity with the sentence imposed upon Dionne Lacey – where the sentencing judge nevertheless considered that the same sentences should be imposed on the applicant having regard to various circumstances – whether the sentence was manifestly excessive in comparison

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Baker [2011] QCA 104, cited
R v Clements (1993) 68 A Crim R 167; [1993] QCA 245, cited
R v Lacey [2013] QCA 292, considered
R v Lacey & Lacey [2011] QCA 386, related
R v Lacey; Ex parte Attorney-General (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, related

COUNSEL: J Fraser for the applicant (pro bono)
G P Cash for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 19 March 2013 the applicant was convicted on his pleas of guilty of seven indictable offences:

(a) Trafficking in dangerous drugs ("ecstasy", cocaine and cannabis) between 4 June 2006 and 28 May 2007.
(b) Possession of things (mobile telephones) for use in connection with trafficking in dangerous drugs between 15 January 2006 and 11 May 2007.
(c) Unlawful possession of a dangerous drug (cocaine) on 9 May 2007.
(d) Assault occasioning bodily harm on 23 March 2006.
(e) Three counts of armed robbery in company with actual violence on 23 April 2007.

[2] The applicant was sentenced on the same date. He was then serving terms of imprisonment which, in the aggregate, amounted to 11 years. Taking into account earlier presentence custody which had been unable to be declared as time already served, the total period of imprisonment to be served by the applicant was 13 years. That period of imprisonment was due to expire on 11 May 2020, with eligibility for parole on 30 August 2016.

[3] The applicant was sentenced to concurrent terms of imprisonment of five years on the trafficking count and 15 months on the assault count. He was convicted on the counts of possessing telephones and cocaine but not further punished. For each count of armed robbery, the applicant was sentenced to two years imprisonment,

those sentences to be concurrent with each other but cumulative upon the sentences which the applicant was serving. Each of those convictions was declared to be a conviction for a "serious violent offence". The applicant's brother Dionne Lacey was given the same effective sentence for his related offending: *R v Lacey* [2013] QCA 292. The impact of the sentences upon the applicant was that the 13 years pre-existing imprisonment was extended by two years, to expire on 11 May 2022, and the applicant's parole eligibility date was delayed by about 19 months to 31 March 2018.

[4] The applicant has applied for leave to appeal against sentence. The ground of his application and proposed appeal is that the sentence was manifestly excessive in all the circumstances. The outline of submissions on behalf of the applicant, contended that the error was in the imposition of the cumulative imprisonment for the armed robbery counts, which resulted in the extension of the existing imprisonment and the deferral of the parole eligibility date. It was submitted that the sentence thereby offended the "totality principle" and was not in parity with the sentence imposed upon Dionne Lacey.

Circumstances of the offences

[5] The circumstances of the offences were detailed in an agreed statement of facts tendered at the sentence hearing. The applicant conducted his drug trafficking with his brother Dionne Lacey between 4 June 2006 and 28 May 2007. Dionne Lacey was described as "the principal" in the drug trafficking business. The applicant acted at his direction and assisted him in the collection of debts and the supply of drugs as required. The applicant's involvement did not extend to the whole of Dionne Lacey's business. The evidence specifically concerning the applicant included reference to text messages he sent to various recipients marketing the sale of drugs, conversations and messages between the applicant and one customer (King) in which the applicant pursued payment or security for payment for drugs supplied on credit, extending to threats, and to occasions upon which the applicant supplied drugs to various customers.

[6] The applicant committed the offence of assault occasioning bodily harm when, in the context of a dispute between a girlfriend of the applicant and a hairdresser, the applicant demanded a refund from the hairdresser for work which was considered to be unsatisfactory. When the hairdresser refused to refund the money and said he was going to call the police, the applicant punched him in the face. The complainant was left with a small laceration to his mouth and swelling and bruising to one eye.

[7] In relation to the armed robbery offences, the applicant was charged with two alleged co-offenders, Dionne Lacey and Giuseppe Furnari. (The applicant's contention concerning parity relates only to the sentence imposed upon Dionne Lacey.) The applicant, Dionne Lacey, Furnari, and an unidentified man went by arrangement to a unit occupied by one Pritchard, who had organised one Bandiera to supply 20 pounds of cannabis to the applicant and Dionne Lacey. Pritchard had arranged for his cousin, Whitehouse, to be present at the unit during the supply. After the Laceys had started to pack pound blocks of cannabis into their bag, Dionne Lacey produced a handgun and threatened the three complainants. Witnesses stated that the applicant was armed, but the schedule of facts noted that it was accepted for the purpose of sentence that he was not armed. Furnari kicked or punched Whitehouse and punched Pritchard and grabbed him by the hair and

dragged him. Furnari took the remaining cannabis and money from Pritchard's girlfriend's handbag. Other property was stolen. The applicant told one of the other co-offenders to turn up the television. Whilst Furnari was stealing items in the unit, someone turned up the sound and someone (not the applicant) said things like "[w]e should shoot them in the head". When someone (not the applicant or Dionne Lacey) said "[w]hy don't we shoot all three of them in the head right now?", the applicant replied "just shoot him in the legs". A shot was fired and the bullet grazed the outside of the calf muscle on Bandiera's leg. The bullet struck the floor between Whitehouse and Bandiera. The applicant, Dionne Lacey, Furnari, and the unknown fourth man left, taking property and the cannabis from the unit.

The applicant's personal circumstances

[8] The applicant was 23 to 24 years old when he committed the offences and 29 years old when he was sentenced. He had an extensive criminal history, mostly concerning offences of which he was convicted after the commencement of the present raft of offences. The earlier convictions were for summary offences for which he was fined. On 15 September 2006 the applicant was dealt with in the Magistrates Court for unlawful possession of a silencer and possession of steroids, offences committed on 16 January 2006. He committed the offence of assault occasioning bodily harm on the hairdresser some three months later. In October 2006 the applicant was fined for possessing a dangerous drug. He was first sentenced to imprisonment, for a term of five years, in May 2009 for an offence of unlawful wounding with intent to maim. The circumstances of that offence are described in *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274 at [1], [5]-[26]. The applicant and Dionne Lacey were each armed with handguns in a home unit on the evening of 6 May 2007. There were eight other people present in the unit. After an argument and a confrontation, the applicant fired his .38 calibre revolver at Kevin Palmer. The bullet passed through his left thigh and entered his right thigh. Seconds later Dionne Lacey fired his .25 calibre pistol at Mr Palmer, killing him nearly immediately when the bullet travelled through his heart and lung before lodging in rib tissue. Dionne Lacey was convicted of manslaughter and given an effective sentence of 12 years imprisonment (10 years imprisonment together with two years presentence custody which could not be declared as time served), with a declaration that the conviction was of a serious violent offence.

[9] The applicant was next sentenced in September 2010 for six years imprisonment for an offence of torture committed in April 2007, with a declaration that the conviction was of a serious violent offence and with the sentence to commence at the expiration of the sentence he was then serving for wounding with an intent to maim. He was convicted at the same time of a series of other offences for which he was given lesser concurrent terms. The circumstances of that offending are set out in *R v Lacey & Lacey* [2011] QCA 386 and summarised in *R v Lacey* [2013] QCA 292 at [9]-[11]. The three armed robbery offences were committed during the period when the applicant and Dionne Lacey were committing the torture and related offences in April 2007.

Sentencing remarks

[10] The sentencing judge referred to the applicant's serious, prior criminal history. In relation to the armed robberies, the sentencing judge accepted that a legitimate point of distinction between the applicant and Dionne Lacey was that the latter carried

a firearm, although the sentencing judge noted that the armed robbery offences "carried the appearance of a team effort by the three of you". The sentencing judge accepted that Dionne Lacey's involvement in the trafficking offence was more substantial, for a longer period (by five months), and exhibited some aggravating features which were not apparent in the applicant's trafficking offence. On the other hand, the sentencing judge noted that Dionne Lacey was younger when he committed his offences, aged between 19 and 20 years when compared with the applicant's age of 23 to 24 years. The sentencing judge took into account the evidence of some positive indications concerning rehabilitation of the applicant whilst in prison, remarking that the applicant was using his time in prison as productively as he could and bettering himself in anticipation of his eventual release.

[11] The sentencing judge did not accept the submission by the applicant's counsel that all of the sentences for the present offences should be served concurrently with the sentences the applicant was then presently serving. The sentencing judge acknowledged that care must be taken not to diminish the applicant's prospects unduly, but considered that it would send the wrong signal not to increase the applicant's imprisonment to some extent for the very serious, separate offending in these matters.

[12] In relation to parity of sentences as between the applicant and Dionne Lacey, the sentencing judge took into account Dionne Lacey's more substantial involvement in the trafficking offence, that it was Dionne Lacey who carried and used a handgun, and that it was also Dionne Lacey who committed the manslaughter of Palmer. The sentencing judge nevertheless considered that the same sentences should be imposed upon the applicant having regard to various circumstances: Dionne Lacey was three to four years younger than the applicant, the applicant committed the additional assault of a hairdresser, and when Dionne Lacey was sentenced in July 2012 he had a full time release date as far away as 2025 compared to the applicant's full time release date in May 2020, so that considerations of totality presumably produced a level of moderation in Dionne Lacey's sentence which was not quite so warranted in the case of the applicant.

Consideration

[13] It was submitted for the applicant that the imposition of a cumulative sentence on the existing very substantial period of imprisonment was "unduly onerous, overwhelming and crushing" and offended principles of totality: *Mill v The Queen* (1988) 166 CLR 59, *R v Clements* (1993) 68 A Crim R 167, and *R v Baker* [2011] QCA 104.

[14] Dionne Lacey's very similar contention in his application for leave to appeal in the related matters was rejected by Margaret Wilson J, with whose reasons Douglas J agreed, in the following passage:[1]

> "[46] At the time he was sentenced for the present offending, the applicant was already serving a very long period of imprisonment for various offences committed during the period of the trafficking – manslaughter, and four "District Court offences", namely torture, assault occasioning bodily harm whilst armed and in company, threatening violence,

[1] [2013] QCA 292 (I have omitted footnotes).

and deprivation of liberty. His convictions of three of those District Court offences were accompanied by serious violent offence declarations. As the President has explained, he was serving an effective sentence of 18 years imprisonment and, having regard to pre-sentence custody, he would not be eligible for parole until 14.8 years after his incarceration began.

[47] The present offending involved carrying on the business of unlawfully trafficking in three dangerous drugs – cocaine, which was a schedule 1 drug under the *Drugs Misuse Regulation* 1987, and MDMA and cannabis, which were then both schedule 2 drugs. The sentencing judge rightly described the offence as a serious one, given the extended period over which it occurred and the significant sums of money and considerable quantities of drugs involved. As her Honour observed, the trafficking involved the production of MDMA pills by the use of a pill press, as well as the sale and distribution of drugs, and was one in which violence was used to achieve business outcomes.

[48] The three offences of armed robbery with personal violence all occurred on the same occasion and were directly linked to the trafficking and the District Court offences for which the applicant had previously been sentenced. The applicant, his brother Jade Lacey, Giuseppe Furnari and another male went to a unit occupied by the complainants to obtain 20 pounds of cannabis. The applicant and his brother both brandished firearms, threatening the complainants and demanding property. Furnari physically assaulted the complainants. One of the assailants fired a shot which grazed the calf of one of the complainants, causing it to bleed mildly. This conduct occurred while the complainant in the District Court offences was detained in the laundry at the unit. The four intruders then left the unit, taking the cannabis and other property.

[49] The sentencing judge considered that ordinarily a sentence in the vicinity of eight years would be appropriate for the trafficking, and about four years would be appropriate for the armed robberies in company with personal violence. Her Honour identified the issue as whether or not the sentence for the present offending should be cumulative on the period of imprisonment already being served. Her Honour succinctly and accurately set out the totality principle when she said –

> ‘As I mentioned, the critical matter and difficult matter in the sentencing process here concerns whether or not a cumulative sentence should be imposed. An important sentencing consideration when imposing a cumulative sentence is the totality principle. It requires the Court when sentencing to review the

> aggregative sentence and consider whether the aggregate is just and appropriate. In particular, the Court must not lose sight of the overall effect of the sentence and must guard against a sentence that is so unduly onerous as to be overwhelming and crushing.
>
> Having regard to the serious nature of the offending before the Court, which concerns trafficking in both Schedule 1 and 2 drugs over a substantial period of time and in significant quantities, and offending involving firearms, at least one of which was loaded, considerations of deterrence are also significant matters for the Court. I bear in mind the matters of mitigation, including the pleas and other factors which have been raised by your counsel, and the need to keep firmly in mind the totality principle.'

…

[51] I have not detected any error in her Honour's application of the totality principle. She took account of the plea of guilty, which she described as a significant matter, and the other matters on which defence counsel relied in mitigation – the applicant's young age, both at sentence and at the time of the offending, his limited criminal history at the time of the offences, his prospects of rehabilitation, including significant steps taken up to sentence, and references tendered on his behalf.

[52] By the time of sentence, nearly five years had passed since the trafficking had ceased. During that time, the applicant had been sentenced for manslaughter after a 14 day trial, which was followed by appellate proceedings in the Court of Appeal and the High Court. He had been sentenced for the District Court offences after an 18 day trial, followed by appellate proceedings in the Court of Appeal.

…

[54] The applicant pleaded guilty to the present offences. The material tendered on his behalf was consistent with his having acquired some insight into his past conduct and being remorseful for it. He had taken commendable steps towards rehabilitation. The rehabilitation of an offender, especially one as young as the applicant, is to be encouraged, as it is in the community's interest, as well as the offender's, that he be a useful, law-abiding member of the community upon his ultimate release.

[55] The task which always confronts a sentencing judge is to impose the penalty which is "just and appropriate" in all the circumstances. It always necessitates fashioning a sentence provisionally, and then reviewing all its component parts

(which often comprise the imposition of a term of imprisonment, a decision on how pre-sentence custody is to be treated, and fixing a non-parole period by the imposition of a serious violent offence declaration or otherwise) to ensure the overall sentence is just and appropriate in all the circumstances.

[56] Where the imposition of a cumulative term of imprisonment is a live issue, the sentencing judge has to be especially careful to ensure that the sentence ultimately imposed is not disproportionate to the offender's overall criminality and that it does not stifle prospects of rehabilitation, which is one of the purposes of sentencing.

[57] In *R v Clements* Macrossan CJ and de Jersey J (with whom Pincus JA agreed) said –

> 'It is true that a broad discretion applies when a judge is giving consideration to a decision whether to impose consecutive or concurrent terms. Of course, if no special direction is given then the separate sentences which he pronounces will be concurrent: previously s 20 of the *Criminal Code* (Qld) and now ss 155 and 156 of the *Penalties and Sentences Act* 1992 (Qld). While the discretion as to the imposition of cumulative terms is broad, there are certain approaches which have gained acceptance. In *Campbell and Brennan* [1981] Qd R 516 at 524 it was said that it is important that the court should look for some clear reason why sentences should be served cumulatively in a particular case before so ordering and also should determine whether the resulting effective sentence is out of proportion to the combined seriousness of the offences (the 'totality' principle). It also appears to be accepted that concurrent terms will usually be called for in the case of a series of related offences committed over a short time span. In other situations the court may be conscious of a clear and compelling need to visit an offence with a separate additional penalty. However, in many instances the judicial discretion may be at large and less restricted by particular principle. Still, a need for caution will always attend the matter to which attention was drawn in *Campbell and Brennan*, viz that an unjust excessiveness may be produced if care is not taken to assess the overall effect of the imposition of cumulative penalties.'

[58] The offending conduct in the present case was very serious. The trafficking was more than mere background to the other

> serious offending for which the applicant had already been sentenced. The armed robbery offences, which occurred during the same incident as the District Court offences, involved the brandishing of firearms and the discharge of a loaded firearm.
>
> [59] In the assessment of whether there was good reason to impose a cumulative sentence, the seriousness of the applicant's present offending outweighed his youth and the potential impact of further punishment on his rehabilitation prospects. But his youth and the effect on his rehabilitation prospects remained relevant to the determination of by how much the existing period of imprisonment should be extended.
>
> [60] The sentencing judge moderated the sentences she considered would have been appropriate had the totality principle not loomed so large. The sentences her Honour imposed, which increased his period of imprisonment by two years and increased the period before which he will be eligible for parole by about 19 months, were just and appropriate in all the circumstances."

[15] The somewhat different circumstances of the offences committed by the applicant and his personal circumstances have no material effect upon that reasoning, which I would respectfully adopt in this application. The length of the cumulative two year term of imprisonment was obviously moderated substantively by the sentencing judge to take into account considerations of totality. No basis appears for finding any error in the sentencing judge's approach or the resulting sentence.

[16] In support of the applicant's contention that his sentence was too severe in comparison with the same sentence imposed upon Dionne Lacey, the applicant emphasised that, unlike Dionne Lacey, the applicant was not armed during the armed robbery offences, the applicant's involvement in the trafficking offence was for a shorter period and to a less significant degree than Dionne Lacey's involvement, and Dionne Lacey had a more serious criminal history, particularly because he had a prior conviction for manslaughter. These differences were taken into account. The sentencing judge also took into account other differences favouring comparative leniency in the sentence imposed upon Dionne Lacey: see [12] of these reasons. That was appropriate.[2]

[17] There was no error in the sentencing judge's decision that, allowing for the principles of totality and parity, the applicant and Dionne Lacey should be given the same effective sentences.

Proposed order

[18] I would refuse the application.

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

[20] **McMEEKIN J:** I agree with Fraser JA.

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2 *Postiglione v The Queen* (1997) 189 CLR 295 at 314, 322-324, 338 (points 5-6).