SUPREME COURT OF QUEENSLAND

CITATION:	*R v Power* [2013] QCA 351
PARTIES:	**R** **v** **POWER, Kevin David** (applicant)
FILE NO/S:	CA No 185 of 2013 SC No 113 of 2013 SC No 345 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2013
JUDGES:	Gotterson and Morrison JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant seeks leave to appeal against sentence – where the applicant contends that the head sentence of four years was manifestly excessive – where it was not suggested that the learned sentencing judge had not taken all the relevant matters into account when passing sentence, or that the sentencing discretion had otherwise miscarried – whether the application should be granted or refused *R v Ban* [1992] QCA 98, distinguished *R v Jenkins* [1999] QCA 447, distinguished
COUNSEL:	J Hunter QC for the applicant P J McCarthy for the respondent
SOLICITORS:	Buckland Allen Criminal Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Daubney J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have read the reasons of Daubney J and agree with them, and the order his Honour proposes.

[3] **DAUBNEY J:** On 8 July 2013 the applicant was convicted, on his own pleas of guilty, of the following counts, in respect of which the following respective penalties were imposed:

- Count 1 – possessing a dangerous drug (cocaine) in a quantity exceeding two grams – four years' imprisonment.
- Count 2 – possessing dangerous drugs (methylamphetamine, amphetamine and N, N-dimethylamphetamine) – one year imprisonment.
- Count 3 – possessing a dangerous drug (cannabis) – six months' imprisonment.
- Count 4 – possessing things used in connection with possessing a dangerous drug – three months' imprisonment.

[4] The applicant also pleaded guilty to a number of summary offences, in respect of which he was convicted but no further penalty was imposed. The learned sentencing judge ordered a parole eligibility date of 7 November 2014 (i.e. after 16 months).

[5] The applicant now seeks leave to appeal against sentence, contending only that the head sentence of four years was manifestly excessive.

[6] The circumstances of the offending were that on Wednesday, 31 August 2011, police from Cunnamulla intercepted a bus with six occupants, including the applicant. Permission to search the bus was refused, but one of the occupants was seen to walk some distance away and surreptitiously dispose of an item, which was identified as a glass pipe. Police then searched the bus and the occupants, including the applicant.

[7] Police observed a plastic bag containing white powder hanging from the applicant's underwear. The applicant told police that it was cocaine. Police also subsequently located and seized another bag containing a white powdery substance. These two plastic bags contained a total of 51.281 grams of cocaine. On subsequent analysis, the total pure weight of the cocaine was 18.148 grams.

[8] When asked if he had anything else to declare, the applicant retrieved a clip seal bag containing a yellow crystalline substance from his pants. On subsequent analysis, this was found to contain methylamphetamine, amphetamine and N, N-dimethylamphetamine. The total gross weight of amphetamine was 39.259 grams (1.138 grams pure), and the total gross amount of methylamphetamine in the bag was 39.259 grams (0.824 grams pure). Police also located a lunch box in which there was a further clip seal bag containing 0.712 grams of methylamphetamine (0.027 grams pure). The total amount of methylamphetamine detected from both bags was 39.971 grams (0.851 grams pure).

[9] Police also located and seized two plastic bags which contained 464 grams of cannabis.

[10] The applicant produced $7,795 in cash from his pocket. He told police it was money that he and his friends had saved for the Birdsville races and that he was merely looking after it. Police also located a container with a number of clip seal bags, a set of scales and other drug-related paraphernalia.

[11] Before the learned sentencing judge, it was accepted on behalf of the applicant that he was on a "party bus" and that, whilst some of the drugs would have been distributed to other people on the bus, the variety of the drugs, the possession of the significant quantity of cash, and the presence of the various paraphernalia clearly indicated a commercial aspect to the possession of the drugs.

[12] A psychiatrist's report was in evidence before the learned sentencing judge. This included the applicant's account of the offences. The applicant had told the psychiatrist that he had been drug free for a period of about 20 years, but when his marriage failed about three years before the offending he embarked on a voyage of self-destruction involving alcohol and drugs. The applicant told the psychiatrist that the drugs had been jointly acquired and that the scales were to ensure fair distribution. When arrested, the applicant and his friends were travelling to Birdsville to celebrate his fiftieth birthday.

[13] The psychiatrist also set out the applicant's report of his difficult childhood. His father died when he was young. His mother remarried and his step-father was violent and abusive, causing him to leave home. Despite his troubled upbringing, he had a long and varied employment history. He had had two long-term relationships. Although the failure of the relationship was said to be the catalyst for the applicant's offending, he had in fact resumed that relationship and had the support of his partner.

[14] The psychiatric diagnoses were of substance dependence and abuse disorder (in remission) and of depressive illness (in partial remission). The psychiatrist thought the applicant had good prospects for rehabilitation on the basis of the resumption of his long-term relationship, his employment history and opportunities for work and the reported remission of his substance abuse disorder.

[15] It is relevant to note in this context that the psychiatrist reported having been told by the applicant that he had stopped using drugs in about April 2012. When that was repeated in submissions before the learned sentencing judge, his Honour told defence counsel that he was not prepared to accept that proposition without evidence.

[16] The applicant had a long criminal history. He did have prior convictions for drug offences, but these were quite dated by the time the present matters were before the Court.

[17] When passing sentence, the learned sentencing judge referred to:

- The applicant's criminal history, including the dated history of drug offences;
- The quantities of the various drugs found in the applicant's possession;
- The fact that "a substantial purpose for the possession of the cocaine and amphetamines and cannabis was commercial exploitation";

- The proposition that those who sell cocaine and amphetamines must expect substantial sentences calculated to deter them and others from committing such offences;
- The mitigating fact of the pleas of guilty, which the learned sentencing judge reflected by imposing "a more lenient sentence than would have been imposed had the case proceeded to trial";
- The mitigating circumstance that the applicant was a drug user (noting that the evidence did not really show that he was drug dependent);
- The lack of evidence of the applicant having embarked on a program of rehabilitation.

His Honour said that the sentences would be arrived at by forming a view concerning the overall criminality involved in the offending (to be reflected in the sentence for Count 1) and then imposing lesser concurrent sentences in respect of the other counts.

[18] Counsel for the applicant contended that, by reference to *R v Jenkins*[1], the head sentence of four years was manifestly excessive.

[19] In *Jenkins*, the head sentence was one of four years' imprisonment suspended after 12 months with an operational period of five years. The applicant in that case was 24 years old with a minor and irrelevant criminal history. Drugs were found in two motor vehicles owned by the applicant and in his residence. In one motor vehicle was a bag containing 27.7 grams of white powder which consisted of 19.2 grams of pure cocaine. There was also a plastic bag containing 50 methylamphetamine tablets, which analysed at 0.289 grams pure. In another car, police found a bag containing 55.507 grams of methylamphetamine (2.5 grams pure), and a bag containing 9.831 grams of cocaine (5.564 grams pure). They also found two bags containing a total of 219.4 grams of cannabis. Further quantities of drugs were found in various locations in the applicant's home, including three packets of cocaine containing 1.405 grams pure, six bags of pills with a small quantity of methylamphetamine and 96 squares of LSD (0.004758 grams pure LSG).

[20] The circumstances in *Jenkins* are clearly distinguishable from the present case – Jenkins was a much younger offender than the present applicant, the quantities of drugs involved in *Jenkins* were smaller, and Jenkins did not have a relevant criminal history. But, in any event, Thomas JA (with whom the other members of the Court agreed) said not only that, having regard to previous cases, it could not be said that the sentences imposed on Jenkins were too high, but that the sentence imposed on Jenkins could properly be described as "compassionate". That case lends no support for the proposition that the sentence in the present case was manifestly excessive.

[21] This Court was also referred to the judgment of the Court of Appeal in *R v Ban*.[2] In that case, the applicant had been imprisoned for five years for possession of 12.945 grams of cocaine and two years for possession of 0.485 grams of heroin. A particular issue in that case, however, was the fact that the applicant had spent a considerable period of time in custody, but this could not be counted as time

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1 [1999] QCA 447.
2 [1992] QCA 98.

served in respect of the index sentence. The reason for the Court of Appeal in that case reducing the head sentence of five years' imprisonment to one of three and a half years was that the Court had "reached the conclusion that a sentence equivalent to a little less than 6 years' imprisonment when the effect of the period spent in custody is taken into account is manifestly excessive". No such considerations arise in the present case. There is nothing in *R v Ban* to suggest that the sentence imposed on this applicant was excessive, let alone manifestly excessive.

[22] It was not suggested either that the learned sentencing judge had not taken all the relevant matters into account when passing sentence, or that the sentencing discretion had otherwise miscarried.

[23] I am not satisfied that the applicant has demonstrated that the sentence imposed in this case was manifestly excessive. The application for leave to appeal against sentence should be refused.