SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBK* [2014] QCA 100
PARTIES:	**R** **v** **HBK** (applicant)
FILE NO/S:	CA No 198 of 2013 SC No 988 of 2011 SC No 989 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2014
JUDGES:	Margaret McMurdo P, Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to adduce further evidence refused.** **2. Application for leave to appeal against sentence granted.** **3. Appeal allowed.** **4. Sentence imposed on count 1 on indictment 988 of 2011 is varied only to the extent of ordering that the term of imprisonment be suspended after 15 months and six days.** **5. Each of the sentences imposed on counts 1 and 3 on indictment 989 of 2011 is varied only to the extent of ordering that each term of imprisonment be suspended after 16 months.** **6. The sentences imposed at first instance are otherwise confirmed.** **7. The Appeal Record Books, written submissions and the material in the application to adduce further evidence are to be placed in sealed envelopes which are not to be opened without an order of a Supreme Court Judge.** **8. The transcript of the appeal hearing is not to be provided to anyone without an order of a Supreme Court Judge.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of trafficking in a dangerous drug and one count of possession of dangerous drug – where the applicant sentenced for each trafficking offence to five years imprisonment suspended after 22 months – where the applicant provided information to the police about the criminal activities of others – where the applicant and the applicant's family were placed in the witness protection program – where imprisonment for the applicant would be more onerous as a result of the assistance given to the police – where the sentencing judge concluded a substantial moderation of the sentences was required to reflect the applicant's assistance to the police – whether sentences were manifestly excessive

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, considered
R v Briggs [2012] QCA 291, considered
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, considered
R v Ungvari [2010] QCA 134, considered

COUNSEL: A Boe with P Morreau for the applicant
G J Cummings for the respondent

SOLICITORS: Boe Williams Anderson for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with the reasons and orders proposed by Mullins J.

[2] **MORRISON JA:** I have read the reasons of Mullins J and agree with those reasons and the orders her Honour proposes.

[3] **MULLINS J:** In July 2013 the applicant pleaded guilty to one count of trafficking in the dangerous drug cannabis sativa between 1 January and 25 May 2004, one count of trafficking in dangerous drugs between 1 May and 27 July 2010 and one count of possession of the dangerous drug methylamphetamine on 27 January 2011 where the quantity exceeded two grams.

[4] On the count of trafficking in cannabis sativa, the applicant was sentenced to imprisonment for five years to be suspended after serving 22 months' imprisonment for an operational period of five years. On the other trafficking count, he was also sentenced to five years' imprisonment, but suspended after serving two years for an operational period of five years. In relation to the possession of methylamphetamine, he was sentenced to three years' imprisonment suspended after serving two years for an operational period of five years. In respect of the latter two counts, a declaration was made under s 159A of the *Penalties and Sentences Act* 1992 (the Act) in

respect of the 25 days spent in pre-sentence custody between 30 April and 25 May 2011.

[5] The applicant applies for leave to appeal against the sentences on the basis that the learned sentencing judge failed to give adequate reasons for imposing the sentences, and erred in determining not to wholly suspend the sentences, and the sentences are manifestly excessive and failed to meet parity considerations.

[6] At the same time the applicant was sentenced for the drug offences, he also pleaded guilty to one charge of driving without a licence (repeat offender) that was transmitted to the Supreme Court. He was convicted and ordered to be disqualified from holding or obtaining a driver's licence for a period of two years. The application for leave to appeal against sentence does not relate to that sentence.

The circumstances of the offences

[7] The applicant carried on the business of large scale trafficking in cannabis sativa over a period of five and one-half months in 2004. He arranged for 10 to 20 pounds of cannabis sativa to be transported from Melbourne to Brisbane each week. It was transported either by the applicant or another person arranged by the applicant. He sold the cannabis for $3,300 per pound to one customer who averaged six to eight pounds per week or per fortnight. He sold 2.8 kilograms of cannabis to another customer on or about 18 May 2004 for $20,000. On 24 May 2004 the applicant was located by New South Wales police at a train station with eight vacuum sealed plastic bags containing a total weight of dried cannabis leaf of 3.3 kilograms. This ended the period of trafficking which is the subject of the first count. The applicant was charged with supply a prohibited drug and sentenced in November 2004 in the Local Court to nine months' imprisonment with a non-parole period of six months, but was released after serving two months in custody. It was not until 2011 that the police in Queensland sought to interview the applicant about the trafficking in 2004. The applicant declined to be interviewed. (The other person involved in the first trafficking was sentenced for trafficking from 1 January 2003 for a period of five years after pleading guilty on an ex officio indictment. He was a courier for the first half of the period of the trafficking and then engaged in business on his own account with his own client base. He had desisted from offending by the time he was charged and there was extensive cooperation with the police. He was sentenced to imprisonment of seven years with a parole eligibility date fixed after serving two years.)

[8] The second trafficking offence was committed six years later. Between 28 May and 20 July 2010 the applicant's telephone calls with a person of interest to the police were recorded. There were 128 telephone conversations and text messages in that period between the applicant and the person of interest from which it was apparent that the applicant was the supplier to the person of interest of amphetamine based drugs and cannabis sativa. The person of interest was on-supplying the drugs for distribution in northern Queensland. At any one time the applicant was supplying methylamphetamine in amounts of eight balls and ounces. The person of interest owed the applicant large amounts of money ($5,000 at a time) for drugs purchased on "tick". On 23 June 2010 the person of interest asked the applicant for "five elbows of cannabis" and they negotiated the price of $18,000. Police subsequently executed a search of the residence of the person of interest and located 11 vacuum sealed bags containing approximately 1.531 kilograms of cannabis sativa and

23 grams of methylamphetamine powder. (The person of interest who was drug-addicted was subsequently sentenced to a period of imprisonment of seven and one-half years with a parole eligibility date after serving two and one-half years.)

[9] The police did not follow up the applicant in relation to the second trafficking until they executed a search warrant at the applicant's residence in January 2011. Three clip sealed bags containing 17.71 grams of crystal substance (analysed to contain 5.269 grams of pure methylamphetamine) were located. This was the basis of the third count. The applicant declined to be interviewed in relation to the second trafficking or the methylamphetamine found at his residence.

The applicant's antecedents

[10] The first trafficking charge was committed when the applicant was about 29 years old. At that stage he had a minor and irrelevant criminal history.

[11] The applicant had no further convictions between his conviction in New South Wales in 2004 and his undertaking the trafficking that was the subject of the second charge.

[12] The applicant has been in a relationship with his partner since 2001 and there are children of that relationship.

Cooperation with law enforcement agencies

[13] Between January 2011 and March 2012 the applicant provided information to police about the criminal activities of others that would not have come to the attention of the police using conventional policing methods.

[14] The information related to the activities of a number of persons in connection primarily with trafficking or possession of dangerous drugs. As a result of the information provided by the applicant, five persons were charged with possessing dangerous drugs for which each was fined in the Magistrates Court. Another person charged with possessing dangerous drugs was sentenced to 12 months' imprisonment and also fined. Another two persons were charged with producing dangerous drugs and fined in the Magistrates Court. Another person was to be charged with possessing dangerous drugs. Another person was charged with possessing dangerous drugs, but that matter was not finalised at the time of the applicant's sentencing. Another person was charged with unlawful possession of a weapon and that offence was dealt with in the Magistrates Court with other unrelated offences. At the time of the applicant's sentence an investigation was ongoing in respect of another three persons identified by the applicant as involved in the trafficking of dangerous drugs. Apart from the information provided in relation to drug activities, the applicant provided information in relation to a person of interest in respect of a murder committed over 20 years ago which information had not been verified by police by the date of the applicant's sentence, but did establish a line of enquiry previously unknown to police.

[15] As a result of this cooperation in January 2012 the applicant and his family were placed in the Crime and Misconduct Commission's witness protection program. That placement continued for the applicant until he was sentenced. Immediately the applicant and his family were admitted to the program, they were relocated from their residence, leaving behind their possessions, except for those they could pack in their suitcases. Before the CMC could organise for removalists to collect the rest of their belongings, they were removed from the house by unknown persons.

Submissions at sentence

[16] The prosecutor who appeared on the sentence submitted that, but for the co-operation, the effective head sentence would have been eight to nine years to reflect the applicant's overall criminality arising from both periods of trafficking. In respect of the second trafficking, the prosecutor relied particularly on *R v Hennig* [2010] QCA 244 and *R v Briggs* [2012] QCA 291. Apart from the seriousness of the second trafficking offence, it showed that the applicant had not rehabilitated after committing the first trafficking offence (for which he had served a short time in prison in New South Wales as the charge of supply was a particular of the trafficking). In respect of the first trafficking the applicant never named his supplier in Victoria and did not name his suppliers for the second trafficking. The applicant's trafficking in drugs was motivated by profit. The applicant's cooperation with police can be considered under s 9(2)(i) of the Act. The applicant gave information about offenders who were less culpable than him. He did not offer to give evidence against others. Ultimately the prosecutor did not dispute one of the reasons threats were made to the applicant and his family was the assistance he gave to police, but submitted that the threats to the applicant could also be attributed to his longstanding criminal activities as a drug trafficker. The prosecutor accepted that the cooperation would bring the effective head sentence down to five to six years, but that the applicant should be required to serve two years of that sentence in prison. The prosecutor conceded that, if the sentencing judge opted to give the applicant certainty of release by way of a suspended sentence, the head sentence could be five years, but the prosecution maintained that the applicant should serve two years in custody before the sentence was suspended.

[17] The applicant's counsel listed numerous matters of significant mitigation including: the significant delay in the prosecution; the applicant entered timely guilty pleas; he provided reliable and significant assistance to police in the detection and investigation of serious crimes including murder and other drug offences by known figures in organised crime networks; this resulted in the applicant and his family being placed in witness protection due to identified risks to his life and that of his family; placement in witness protection curtailed significantly the applicant's liberty over the preceding 18 months resulting in severe financial and other impacts on his family; placement in a correctional facility will expose the applicant to significant risks to his safety; and any period of actual custody will be significantly more onerous for the applicant than other prisoners. Whilst the applicant's trafficking was commercial in nature, there was no evidence of a lavish lifestyle or unaccounted assets or cash being held by the applicant. For comparable authorities in trafficking in amphetamines, the applicant's counsel relied on *R v Cooney; ex parte A-G (Qld)* [2008] QCA 414 and *R v Coleman* [2006] QCA 442. The applicant was diagnosed as suffering from depression when he was a teenager and, since co-operating with police, having criminal networks after him and joining witness protection, the applicant felt more distressed and depressed. At the time of the sentencing, he was prescribed anti-depressants Zoloft and Mirtazapine and the sedative Quetiapine.

[18] The applicant's counsel submitted for an effective head sentence for the overall conduct in the order of four to five years imprisonment and for the court to wholly suspend that term, in order to give recognition to the special mitigating features. The applicant's counsel emphasised the reasons that favoured a wholly suspended term of imprisonment. Counsel stated:

> "All we can submit to your Honour is that it would be within the proper bounds of discretion in weighing each of these countervailing factors to wholly suspend and we are not submitting that you must do it. It's not a case, for example, like as found in *York* where the evidence was such that it just had to happen. We're not putting it in that category at all."

[19] When the sentencing judge questioned the applicant's counsel to confirm that the effect of the submission was not that a period of imprisonment was not within range, counsel responded:

> "No, no. It's not. I'm not. It is, therefore, that – given that there is a range that includes both options, that your Honour approach this matter with a leniency that we are asking that your Honour take to this matter, bearing in mind that there has been some custodial component in the penalty already. They're not long periods, but there has been a custodial component and there has been a very onerous, nearly 18 months of punishment upon not only [the applicant], but also his family. So it's another question of where's – as is sometimes said, that a person whose got off scot-free.
>
> He hasn't and there is not only past punishment in terms of jail, past punishment of, you know, a really unfortunate kind of a father having to see his children in those circumstances that he's had to see them and further, knowing that, the risks to him for what he has done in terms of cooperation will continue into the future – into the unforeseeable future. It's in those circumstances that we put our case that it is well within your Honour's proper exercise of discretion to wholly suspend a term of five years imprisonment."

Sentencing remarks

[20] After summarising the facts and the submissions of counsel, the sentencing judge identified what emerged during the sentencing submissions that the dispute between the prosecution and the applicant's counsel was not on the head sentence, but whether any further period should be served by way of actual custody:

> "Where counsel differed was in relation to what period should be served by way of actual custodial sentence. In that regard, your counsel urged that the sentence imposed be wholly suspended. In so doing, your counsel, nevertheless, accepted that it was also within range to require a component of actual imprisonment. I note, in relation to the matters emphasised by your counsel, were the significant delay in the prosecution of the matters, particularly the first trafficking offence, the fact that timely pleas were entered, the assistance you have provided in the detection and investigation of serious crimes. And your counsel noted that, in addition to a large number of drug offences, that your assistance concerned also a murder investigation. Your counsel emphasised that, as a result of your assistance, risks have been identified to your life and to your family also, and that as a result you and your family have been placed under witness protection. But I reiterate, a concession was made in relation to the cause of the risk – that is, that the risk arose from a mixture of your assistance and the perception of others as to your assistance, and also from the nature of your own involvement in criminal activity."

[21] The sentencing judge observed that there was some difficulty in actually quantifying the extent to which the applicant's assistance resulted in his being placed at risk, but noted that the prosecution did not argue that there was "a nil factor" in his being at risk from the assistance he provided to police and the perception of others as to that assistance. The sentencing judge noted the other matters submitted by the applicant's counsel arising from the witness protection and the risks to which the applicant would be exposed, if imprisoned. The sentencing judge noted the submission about the applicant's depression and current medications. The sentencing judge noted that the applicant had been assessed (by the CMC) "as being at a high threat level." The sentencing judge expressly found that even though the risks of harm to the applicant arose as a result of a mixture of his cooperation with police and his involvement in criminal activity, it was "appropriate that a substantial moderation is provided in the sentence to be fashioned to reflect [his] assistance in the administration of justice".

[22] In reaching a conclusion, the sentencing judge stated:

> "Taking into account the gravity of the offending, the need for general and personal [deterrence], while also bearing in mind the significant matters of mitigation to which I have referred, particularly your plea and cooperation, and associated consequences, I consider that the balance is most appropriately struck by imposing, in relation to the trafficking offences, concurrent sentences of five years imprisonment."

[23] The sentencing judge then proceeded to impose each of the sentences and partially suspended the concurrent sentences of imprisonment for five years for each trafficking offence. Although the above-quoted conclusion refers expressly only to the imposition of the head sentence of five years for each of the trafficking offences, it is apparent from the juxtaposition of the imposition of the sentences to that conclusion, incorporating the partial suspensions, that the balancing exercise that the sentencing judge described resulted in structuring the sentences in the manner they were imposed. It would amount to ignoring the real issue that was articulated by the sentencing judge for decision and that was decided by the sentencing judge by the sentences imposed, if that conclusion were read otherwise.

Submissions on the application for leave to appeal

[24] Whether or not the application was successful, both counsel agreed that, as the 25 days spent in pre-sentence custody could not be taken as imprisonment served in respect of the sentence for the first trafficking, that sentence should have been suspended on the same date the suspension of the other sentences would take effect. To do otherwise would effectively deprive the applicant of the benefit of the pre-sentence custody declaration.

[25] There was no challenge by the applicant to the effective head sentence of five years. The focus of the submissions was that the sentences should have been wholly suspended and not to do so made the sentences manifestly excessive. The applicant's counsel referred to the unique feature of the cooperation with police, the period spent in witness protection and the more onerous time the applicant would serve in custody as warranting the suspension of the whole term of imprisonment. The sentence imposed required 40 per cent of the head term to be served before suspension (giving credit as the sentencing judge did for the two months served in

prison in New South Wales). The sentencing judge did not make any finding whether or not a wholly suspended term was appropriate nor explain why the applicant ought to serve that proportion of the head sentence before suspension of the term. The failure to provide adequate reasons to explain why the sentencing judge exercised the discretion in that manner amounted to appellable error. In addition, the sentencing judge failed to make any finding as to the value of the assistance provided by the applicant which was necessary in order to properly reflect that assistance in determining the appropriate sentence. The overall effect of the sentences imposed upon the applicant requiring him to serve two years actual custody raised "a justifiable sense of grievance" in the light of the sentences imposed on the other person involved in the first trafficking and the person of interest in the second trafficking.

[26] The applicant's counsel took issue with the recording by the sentencing judge that he had accepted that it was within range to require a component of actual custody. The applicant's counsel drew the court's attention to the exchanges with the sentencing judge and submitted that his concession should be read as an acknowledgment that, given that a custodial component had already been served, it was not a case where any penalty being imposed would not include a custodial component.

[27] After the hearing, the parties were given leave to make further submissions in light of *Barbaro v The Queen*; *Zirilli v The Queen* [2014] HCA 2. The applicant's counsel submitted that, on the basis that a submission on the bounds of the available range is an opinion only, any concession made by the applicant's counsel could not be binding either on the sentencing judge or this Court.

[28] The respondent's counsel submitted that the sentencing judge had undertaken the process approved in *Markarian v The Queen* (2005) 228 CLR 357 at [36]-[37] and [39]. The sentencing judge did significantly reduce the applicant's sentence by bringing the effective head sentence down to five years to enable the sentence to be partially suspended and therefore gave effect to the applicant's assistance in a significant way. In any case, the genuineness of the applicant's cooperation was limited, in that he did not identify his suppliers and was not prepared to give evidence. No issue of parity arises as neither of the offenders whose sentences arose out of the first and second trafficking was charged with the same offences as the applicant committed over two distinct periods of time. In supplementary submissions, the respondent submitted that *Barbaro* made no change to the law applicable to the determination of this application for leave to appeal. To the extent that the concession that the sentencing judge recorded had been made by the applicant's counsel was accepted as accurate, it affected the scope of the evidential burden on the applicant in this application.

Were the sentences manifestly excessive?

[29] Although four grounds were articulated for the application for leave to appeal, the first ground that the learned sentencing judge failed to give adequate reasons for imposing the sentences is disposed of by the proper reading of the sentencing remarks. There is no true parity consideration with each of the offenders involved in the two trafficking offences, because it was only the applicant who was convicted of both trafficking offences committed over separate periods of time.

[30] The ground that the sentencing judge erred in failing to wholly suspend the sentences is the nub of the argument relied on for showing that the sentences were manifestly excessive. It is therefore appropriate to deal with the argument about the suspension of the sentences in dealing with the ground that the sentences were manifestly excessive.

[31] As has been observed in many cases, there is a real public interest in encouraging offenders to supply information to police that assists in the prosecution of other offenders (and thereby puts the informant at risk of harm) by giving tangible recognition in the sentence imposed on the informant: *R v Gladkowski* (2000) 115 A Crim R 446 at [7]. The sentencing judge had found that substantial moderation of the sentence was required to reflect the applicant's assistance to the police. Did the sentences reflect that substantial moderation?

[32] But for the applicant's significant cooperation with the police and the negative consequences that entailed for him, he was exposed on a guilty plea to an effective head sentence of imprisonment to reflect his overall criminality in the vicinity of eight years for the trafficking in methlyamphetamine as a wholesaler motivated by profit (even though it was only for a short period of two months) which may have been mitigated with eligibility for parole after serving one-third of the sentence: *Briggs* at [14]; and *R v Ungvari* [2010] QCA 134 at [29]–[30].

[33] The reduction of the head sentence to five years is itself significant. It is the entire sentence, however, that needs to be evaluated. It is not appropriate to adopt the approach proposed by the applicant's counsel of evaluating the actual custodial component as a proportion of the reduced head sentence. The question is whether the ultimate sentence gave sufficient recognition to the significant matters of mitigation identified and accepted by the sentencing judge.

[34] The applicant's submissions at the sentencing required the sentencing judge to consider the appropriate actual custodial component of the head sentence when the applicant had already served two months in prison in New South Wales in 2004 coupled with the 25 days in pre-sentence custody in 2011. In light of the scale and seriousness of the applicant's offending over two distinct and separated periods of time, there was no error in the sentencing judge's conclusion the balancing of the relevant factors favoured further actual custody being served by the applicant.

[35] The requirement that the applicant serve 22 months (less 25 days pre-sentence custody) in prison before the suspension took effect suggests that the ultimate sentence does not reflect the substantial moderation that the sentencing judge intended to give for the cooperation with police and the resultant consequences for the applicant whilst in the witness protection program and the likely consequences for him in prison. Insufficient weight for these significant mitigating factors makes the sentences manifestly excessive. It is therefore necessary to re-sentence the applicant.

[36] For the purpose of re-sentencing, the applicant applied for leave to adduce further evidence from himself and his partner concerning the events that have transpired since the sentence. If those affidavits were able to be relied on by the applicant, the respondent sought to rely on an affidavit from a police officer about the CMC's dealing with the applicant's partner subsequent to the sentence. None of these affidavits changes significantly the factual matrix that was before the sentencing judge. It is not appropriate to give leave to the applicant to adduce the further evidence.

[37] On the basis that the head sentences for each of the offences remain the same, the mitigating factors (including the two months served in prison in New South Wales) would be reflected appropriately, if the suspensions took effect after 16 months in custody, but with the applicant obtaining the benefit of the pre-sentence custody of 25 days for all the offences.

Orders

[38] The orders which should be made are:

1. Application for leave to adduce further evidence refused.
2. Application for leave to appeal against sentence granted.
3. Appeal allowed.
4. Sentence imposed on count 1 on indictment 988 of 2011 is varied only to the extent of ordering that the term of imprisonment be suspended after 15 months and six days.
5. Each of the sentences imposed on counts 1 and 3 on indictment 989 of 2011 is varied only to the extent of ordering that each term of imprisonment be suspended after 16 months.
6. The sentences imposed at first instance are otherwise confirmed.
7. The Appeal Record Books, written submissions and the material in the application to adduce further evidence are to be placed in sealed envelopes which are not to be opened without an order of a Supreme Court Judge.
8. The transcript of the appeal hearing is not to be provided to anyone without an order of a Supreme Court Judge.