SUPREME COURT OF QUEENSLAND

CITATION:	*R v Beakey* [2014] QCA 251
PARTIES:	**R** **v** **BEAKEY, Sean Jeffrey** (applicant)
FILE NO/S:	CA No 146 of 2014 DC No 489 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	7 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2014
JUDGES:	Holmes and Morrison JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application to amend the application for leave to appeal against sentence to include grounds (b) and (c) set out in paragraph 2 of the applicant's submissions filed on 29 August 2014 granted.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to one count of trafficking in the dangerous drug cannabis sativa – where the target of a police operation was conducting a trafficking business and used the applicant to obtain from a source three large supplies of cannabis sativa for a total value of $116,000 – where the applicant was not selling the drug but made arrangements with the target and the source for the payment, collection and delivery of the cannabis sativa on three occasions – where the applicant made two submissions relevant to the applicant's culpability which departed from the prosecution's schedule of facts – where the sentencing judge indicated difficulty in accepting the submissions – where the sentencing judge adjourned to consider the submissions in relation to the schedule of facts – where the sentencing judge rejected the applicant's submissions and imposed the sentence – whether procedural

fairness was afforded to the applicant in respect of the rejection of the applicant's submissions

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to imprisonment for four years to be suspended after serving a period of 12 months with an operational period of four years – where the applicant was not a mere courier and had some knowledge of the trafficking business of the target – where there was no error of principle in requiring the applicant to serve an actual custodial component of 12 months

Evidence Act 1977 (Qld), s 132C

R v Broad & Prior [2010] QCA 53, considered

COUNSEL: S R Lewis for the applicant (pro bono)
B J Power for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Mullins J and the orders she proposes.

[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 May 2014 the applicant pleaded guilty to one count of trafficking in the dangerous drug cannabis sativa. The trafficking period was between 24 May and 11 August 2011. The applicant was sentenced to imprisonment for four years to be suspended after serving a period of 12 months with an operational period of four years.

[4] The grounds for the application for leave to appeal against sentence are:

(a) the learned sentencing judge erred in making findings of fact without affording procedural fairness to the applicant;
(b) the sentencing judge erred in making findings of fact that were not supported by the evidence; and
(c) the sentence in all the circumstances was manifestly excessive.

[5] To the extent that leave is required to amend the application to include grounds (b) and (c), that leave was not opposed and should be granted. It was helpful that Mr Lewis of counsel (who was not the applicant's counsel at sentence) appeared for the applicant in this application on a *pro bono* basis.

The circumstances of the offence

[6] The prosecutor at the sentencing tendered a schedule of facts which was not objected to by the applicant. That schedule showed the applicant's offending was detected in the course of a police operation which targeted other persons suspected of trafficking in cannabis sativa in Central Queensland. Telephone intercepts were

used and, as a result, the police identified three transactions between the target and the applicant on the Gold Coast.

[7] The schedule noted that the intercepted conversations (voice and SMS) between the target and the applicant "revealed some of the history between them" and demonstrated that the applicant had knowledge of "[the target's] methodologies in conducting his own drug trafficking enterprise". The schedule also noted "Beakey and [the target] were in telephone contact in the days leading up to each exchange with Beakey then being in contact with his source of the cannabis to arrange the amount sought by [the target]".

[8] The first supply by the applicant to the target was of nine pounds of cannabis sativa on 8 June 2011, the second was 12 pounds on 27 June 2011 and the last supply was eight pounds on 29 July 2011. The purchase price was $4,000 per pound, so the total purchase price paid by the target to the applicant was $116,000.

[9] On each occasion, the target made arrangements with the applicant for the purchase and the purchase price was provided to the applicant before he obtained the cannabis sativa and delivered it to the target. The schedule did record, however, that on 18 July 2011 (in anticipation of the third supply), Mr Beakey sought a $500 advance from the target.

[10] The schedule did not disclose what reward the applicant received for his role in these three supplies to the target.

[11] The police did not attend at the applicant's address in relation to this offence until 16 May 2012, when he declined to be interviewed and was issued with a notice to appear.

The applicant's antecedents

[12] The offence was committed when the applicant was 34 years old. At that stage he had one prior conviction in 2006 in the Magistrates Court for failure to appear in accordance with an undertaking on 18 October 2004. During the course of the trafficking period, he was dealt with in the Magistrates Court on 6 July 2011 for failure to appear in accordance with an undertaking on 9 November 2010. He also committed the offence of contravene direction or requirement on 3 August 2011 for which he was dealt with in the Magistrates Court on 8 September 2011.

[13] The applicant had been a long term user of cannabis sativa. His wife developed anxiety from 2007 for which she was hospitalised and eventually became addicted to prescription medication which resulted in a turbulent time for the applicant and their four children. She was prone to violent outbursts that resulted in her hospitalisation in late 2009. Her prescribed medication was changed, but the problems continued, resulting in the Department of Child Safety taking the four children into kinship care in May 2011. The applicant and his wife had to work very hard in proving to the Department that his wife's problems had stabilised and that he was drug free. The children were returned to the family home in May 2013. The applicant and his wife now have another child.

[14] The applicant had his own cleaning business and for the four months prior to being sentenced had undertaken carpet cleaning for 50 hours per week at a resort.

The sentence hearing

[15] The prosecutor described the applicant "as an active participant in the trafficking enterprise of [the target]" with his role being as the main supplier to the target with knowledge of the target's enterprise. The applicant was also described as "essentially the middleman" between the target and the applicant's source.

[16] The prosecutor relied on *R v Parsons & Sanders* [1999] QCA 402 and *R v Broad & Prior* [2010] QCA 53.

[17] During the course of submissions made by the prosecutor by reference to these authorities, the sentencing judge noted that the applicant seemed to be acting on his own behalf and was not acting as a conduit for the target. The sentencing judge drew a distinction between the applicant's role where there was a transaction between the supplier to the applicant and then the applicant to the target and that of Prior's involvement in *Broad & Prior*. The prosecutor embraced the sentencing judge's comparison.

[18] In response to the prosecutor's submissions about Sanders' role in *Parsons & Sanders*, the sentencing judge noted that the applicant's "acting as a principal in his business whereas Ms Sanders was assisting Mr Parsons in the conduct of what was a significant – very significant – business."

[19] Counsel for the applicant before the sentencing judge described the applicant's personal life as having from 2007 "spiralled out of control". The offence was committed after the applicant's children had been taken into care by the Department. The applicant's counsel stated that the offending occurred in the context of the target having approached the applicant on a number of occasions when the applicant had declined to be involved, but "eventually … [the applicant] succumbed to supply [the target] and get some cannabis."

[20] The applicant's counsel informed the sentencing judge of two aspects of his instructions that were contrary to or not covered by the schedule of facts. The first was the supply was not organised through the applicant and, in fact, the applicant was told where to go and get it by the target. The second was the applicant was paid in cannabis and he estimated that he got in total about five ounces. The applicant's instructions were that at that stage five ounces would keep things going for a few weeks, because he was using such extraordinary quantities of it. The applicant had met the target many years previously at a time when he was smoking cannabis sativa and the target knew he was such a smoker.

[21] The applicant relied on a short form report from clinical psychologist Mr Robinson dated 9 May 2014 which incorporated earlier reports prepared by Mr Robinson when he was treating the applicant for an adjustment disorder with mixed anxiety and depression related to his children being taken into care. Mr Robinson provided counselling and therapy to both the applicant and his wife at the request of the Department of Child Safety. The report confirmed the stresses that the applicant was under at the time he committed the offence and the applicant's motivation to maintain his role as the provider and support to his wife and children and his concern that his wife may be overwhelmed, if he were imprisoned.

[22] The applicant's counsel relied on the significant rehabilitation achieved by the applicant since committing the offence and submitted the sentence should be

structured, so that there was no actual custodial component, because of a real risk of significant disruption of the lives of his wife and children, if he were imprisoned.

[23] At the conclusion of the submissions on behalf of the applicant, the sentencing judge directed a question to the prosecutor in these terms:

> "What I'm particularly interested in is the submission by [counsel for Mr Beakey] that it was [the target] who told Mr Beakey where to source the drugs and that effectively, while he purchased them from – the drugs [indistinct] and sold them to [the target], he was effectively nothing more than a conduit picking drugs up from a supplier that [the target] had put him in touch with. Do you know if that's consistent with the telephone interception material?"

[24] The prosecutor responded that it appeared there was a connection between the target and the ultimate source, but there were also specific conversations between the applicant and the source in terms of coordinating times for the arrangements of the pick-up.

[25] The sentencing judge then asked the question whether he should sentence the applicant on the basis that he was conducting his own business over a limited period of 11 or 12 weeks where he sourced on three occasions drugs totalling $116,000 in value, purchased them and sold them to the target, as a result of his own enterprise of getting in touch with the supplier or on the basis that it was the target who had told the applicant to go to the target's source for the three quantities of drugs, the applicant then contacted the supplier and asked for those quantities and picked them up and dropped them off, so was nothing more than a courier. The prosecutor responded that:

> "It would be more suited to the second circumstance that your Honour put to me in that [the target] would contact Mr Beakey and say 'get eight pounds, 12 pounds or nine pounds of cannabis from your source' ---
>
> HIS HONOUR: From X.
>
> [PROSECUTOR]: He would make that connection. Before Mr Beakey would collect the cannabis, he would be provided with the money for that cannabis by [the target] ---
>
> …
>
> [PROSECUTOR]: --- and then take that money to the supplier and then return the cannabis to [the target] …
>
> [PROSECUTOR]: So it was, in fact, the case that he wasn't necessarily selling cannabis to [the target] but ---
>
> HIS HONOUR: He was really picking it up and dropping it off."

[26] The sentencing judge then inquired whether there was anything in the intercept calls to show, consistently with the submission that had been made by the applicant's counsel that the applicant was being paid in cannabis or whether it was not known. The response from the prosecutor was effectively that it was not known, as there was no material on the Crown brief that would go to support any payment.

[27] The sentencing judge then adjourned until after lunch, explaining what he proposed:

> "… but I'll sentence him this afternoon because I want to read that schedule of facts more carefully and see what appropriate inferences I think ought to be drawn. When I read it last night, I was a bit of the view that it was a separate business. From what you've told me, it may be more akin to Mr Prior's involvement, so I'll adjourn it and give sentence at 2.30."

The sentencing remarks

[28] When the sentencing judge returned after the adjournment, he did not notify counsel of any conclusion that he reached upon further perusal of the schedule of facts, but proceeded to impose the sentence.

[29] The sentencing judge noted that on each occasion significant amounts of drugs were involved in the supply and described the applicant's involvement in these terms:

> "Importantly, you were aware of the network's business methods. You had a contact source and arranged for the purchase and collection of the drugs which were then supplied by you to [the target's] network. You were supplied with cash by the network, travelled to the source, collected the cannabis and returned it to [the target] or to his colleagues."

[30] The sentencing judge noted that it was important that the applicant's role was carefully identified in light of the applicant's counsel's submissions. The sentencing judge was not prepared to accept that the applicant's role was confined in the way submitted by the applicant's counsel. The sentencing judge's reasons for that conclusion were:

> "There is little reason, if it were so, why [the target] would not himself have contacted the supplier directly. Furthermore, the circumstances of at least one of the transactions, that of 8 June 2011, involved some last minute changes to arrangements by [the target], which resulted in his supplier becoming annoyed at the subsequent inconvenience. You communicated that annoyance to [the target]. I think it is more consistent with you operating as a principal, rather than being a courier for [the target], that you would have communicated this dissatisfaction by your supplier.
>
> So too, a conversation between [the target] and some unknown person of 28 June, praising you as 'unreal' and praising your efficiency, suggests your role was more significant than your counsel submits I, of course, cannot know how you were remunerated for your activities, whether by drugs or by selling marijuana to [the target] and his network at a higher price than that for which you purchased them. However, consideration of the schedule of facts suggests to me that your role was nevertheless significant and more than being a mere courier."

[31] The sentencing judge referred to the applicant's age and that he had no prior relevant criminal history, but had been a significant drug user. He referred to the applicant's family circumstances and the changes the applicant had made to turn his life around. The sentencing judge was of the view that the applicant's family circumstances were not so exceptional that the applicant should not serve a period of actual imprisonment, but took into account those circumstances and the

applicant's significant efforts towards rehabilitation and the possible effect of incarceration on the applicant's wife to ameliorate the sentence that might otherwise have been imposed.

Broad & Prior

[32] Comparisons were drawn at the sentencing hearing with the role of the offenders, particularly Prior, in *Broad & Prior*. Broad and Prior were part of an organised crime network trafficking commercial quantities of cannabis in South Australia and transported for sale into Queensland in motor vehicles. There were six deliveries over four months of at least 122 pounds of cannabis. Broad was one of the persons to whom the cannabis was delivered in Queensland. Broad engaged Prior to collect the cannabis from the person who transported the cannabis to Queensland and keep it for a short time and Broad collected it for later distribution. Prior was paid between $500 and $600 on each occasion to collect and deliver the cannabis. Prior took part in a full record of interview when the operation was closed down and made full admissions concerning his involvement. Prior's sentence was reduced on appeal to four years imprisonment with a parole eligibility date set after 10 months. Prior was described as being "a warehouseman of the drugs." Prior had one prior irrelevant conviction and his motivation for involvement with Broad was financial.

Was the applicant denied procedural fairness?

[33] The applicant's complaint is that no indication was given by the sentencing judge that he did not accept the applicant's counsel's submission to the effect that the source of the cannabis sativa was the target's source and the applicant was told by the target where to go and get the cannabis sativa from the source. The applicant also complains that the sentencing judge did not suggest he needed to hear evidence from the applicant with respect to this matter. It was argued this was particularly so, in view of the concession the prosecutor had made before the adjournment about the applicant's role.

[34] In order to address the issue of procedural fairness, the precise finding made by the sentencing judge should be considered.

[35] The sentencing judge rejected the applicant's counsel's submission that the applicant only did what he was instructed to do by the target in obtaining the cannabis sativa from the target's source. That was rejected as inconsistent with the schedule of facts that disclosed the nature of some of the communications the applicant had with the source of the cannabis sativa, particularly in respect of the first supply. The sentencing judge's description of the applicant as "operating as a principal rather than being a courier" for the target, must be understood in the context of what the sentencing judge described as the applicant's role. It was greater than a courier who passed over another's funds and collected and delivered the drugs, in accordance with the directions of a principal, as the applicant made arrangements with both the source and the target. The sentencing judge described the applicant as a principal in the limited sense of the applicant acting as the middleman between the target and the supplier. Perhaps "principal" was not the best choice of word, but the sentencing judge was not departing from the prosecutor's concession that the applicant was not selling the cannabis to the target, but picking it up and dropping it off, but in circumstances that made him more than a mere courier.

[36] As a result of the sentencing judge rejecting the submission made on behalf of the applicant that the only payment he received was about five ounces of cannabis sativa, the sentencing judge then proceeded to act on the state of the evidence relied on by the prosecution that it was unknown what the applicant received by way of remuneration for his role in making the arrangements for and undertaking the collection and delivery of the three supplies of cannabis.

[37] It was apparent before the adjournment of the sentence that the sentencing judge had difficulty with the two submissions made on behalf of the applicant that departed from the schedule of facts. The only purpose in the sentencing judge flagging that he was proposing to read the schedule of facts carefully was to decide whether he could accept those submissions. If the sentencing judge were to conclude that the submissions were not persuasive in light of the schedule of facts, it was open to the applicant to give evidence on the relevant matters. That must have been patent to the applicant's counsel and yet no indication was given prior to the adjournment that the applicant was willing to give evidence on the matters that had been the subject of his counsel's submissions and which were to be the subject of further consideration by the sentencing judge.

[38] A more cautious approach by the sentencing judge may have been after the adjournment to articulate his proposed findings relevant to the two submissions made on behalf of the applicant, before proceeding with the sentence. It does not follow that what the sentencing judge had flagged, before the adjournment, was not sufficient to afford procedural fairness to the applicant in respect of the findings of fact that the sentencing judge made in relation to those submissions. Those findings were consistent with the schedule of facts illuminated by the prosecutor's submissions and followed from the rejection of the applicant's submissions. In these circumstances, the applicant cannot succeed on ground (a) of the application.

Were the findings of fact not supported by the evidence?

[39] Fact finding on sentencing is governed by s 132C of the *Evidence Act* 1977 (Qld). It is such a basic premise that it does not require recitation in the sentencing remarks.

[40] The applicant's counsel submits that the sentencing judge could not have been satisfied to the necessary degree required by s 132C(4) of the Act to make the finding of fact that the applicant's involvement was "more consistent with you operating as a principal, rather than being a courier for [the target]".

[41] When that finding is understood in context, as explained above, and that it is not a finding that the applicant was operating a business of trafficking in cannabis sativa as a principal in an unqualified sense, there is sufficient support for the finding in the schedule of facts. The applicant has not established ground (b).

Was the sentence manifestly excessive?

[42] The applicant's lack of success on grounds (a) and (b) makes it difficult for the applicant to argue the sentence was manifestly excessive. The applicant's role was as the middleman in using the target's funds to purchase and collect significant quantities of cannabis sativa on three separate occasions, for delivery to the target where the applicant had some knowledge of the trafficking business of the target. The applicant was not a mere courier and did not have the mitigating circumstance

that Prior had in *Broad & Prior* of making full admissions in a record of interview, and yet his sentence was similar to that imposed on Prior.

[43] Exercising the sentencing discretion required the sentencing judge to weigh up the personal circumstances of the applicant, including the significant steps made in his rehabilitation, with the seriousness of the offending, in considering the appropriate sentence. There was no error of principle made in the circumstances of requiring the applicant to serve an actual custodial component of 12 months.

[44] The applicant also fails on ground (c), as the sentence imposed by the sentencing judge did not take it outside that which was appropriate to the offending and the applicant's circumstances.

Orders

[45] The orders which should be made are:

1. Application to amend the application for leave to appeal against sentence to include grounds (b) and (c) set out in paragraph 2 of the applicant's submissions filed on 29 August 2014 granted.
2. Application for leave to appeal against sentence refused.