SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bailey* [2014] QCA 316
PARTIES:	**R** **v** **BAILEY, Ryan Keith** (applicant)
FILE NO/S:	CA No 197 of 2014 DC No 35 of 2014 DC No 48 of 2014 DC No 59 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2014
JUDGES:	Holmes and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to offences listed on three separate indictments covering different periods of time – where the offences of the first indictment included trafficking in a schedule 2 dangerous drug, production of a dangerous drug, and possession of things associated with the production of methylamphetamine, namely a reaction vessel and condenser – where the offences of the second indictment included production of a dangerous drug and possession of things associated with that production, namely a reaction vessel and condensers – where the third indictment listed a range of summary matters including; two charges of possession of things used in the commission of the offences, three charges of breach of bail conditions, one charge of possession of property suspected of having been acquired for the purpose of committing offences, four charges of forging and uttering, nine chargers of uttering, five charges of fraud, eight charges of possession of a dangerous drug, one charge of attempted fraud, one charge of using a thing to forge, two charges of possessing utensils for use in

connection with smoking a dangerous drug, and one charge of failing to take reasonable care in respect to a syringe – where on the first indictment the applicant was sentenced to three years imprisonment for trafficking, 12 months for the production of a dangerous drug, and six months for the charge of possessing things associated with that production; those sentences to be served concurrently – where on the second indictment the applicant was sentenced to nine months for the offence of producing a dangerous drug, and six months on the charge of possessing things associated with that production – where those two sentences were to be concurrent with each other, but served cumulatively with the sentences imposed on the first indictment – where the applicant was sentenced to six months imprisonment, to be served concurrently with the other sentences, for all of the summary offences on the third indictment – where the applicant contends that the sentence was manifestly excessive – where in written submissions the relevant grounds were that the applicant's lack of criminal history had not been properly taken into account, that the quantities of the drugs were only miniscule, and that insufficient regard was had to the applicant's rehabilitation and support in the community – where during oral argument the grounds were that too much emphasis had been placed on the trafficking being sophisticated, the applicant entered an early plea, that the trafficking was low level and over a very short period to feed the applicant's own addiction, and that the court did not give sufficient weight to the impact of family support on the prosects of rehabilitation, or consideration of the difficult time in custody the applicant would have given that his parents are Corrective Services officers – whether the sentence was manifestly excessive in all the circumstances

R v Dolan [2008] QCA 41, considered
R v Gault [2006] QCA 316, considered
R v Shailer [2006] QCA 196, considered
R v Thearle [2012] QCA 42, considered
R v Vellacott [1997] QCA 223, considered

COUNSEL: S G Bain for the applicant
D R Kinsella for the respondent

SOLICITORS: A W Bale & Son Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the order he proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[3] **MORRISON JA:** This is an application for leave to appeal against a sentence imposed on 22 July 2014. On that day the applicant pleaded guilty to the offences listed in three indictments covering different periods of time. In the first indictment,

covering the period 29 January to 8 April 2013, the applicant pleaded guilty to trafficking in a schedule 2 dangerous drug (fentanyl), production of a dangerous drug (methylamphetamine) on 7 April 2013, and possession of things associated with the production of methylamphetamine, namely a reaction vessel and condenser. On the second indictment, covering the period 22 July to 8 August 2013, the applicant pleaded guilty to producing a dangerous drug (methylamphetamine) and possession of things associated with that production, namely a reaction vessel and condensers.

[4] The third indictment listed a range of summary matters including: two charges of possession of things used in the commission of the offences; three charges of breach of bail conditions; one charge of possession of property suspected of having been acquired for the purpose of committing offences; four charges of forging and uttering; nine charges of uttering; five charges of fraud; eight charges of possession of a dangerous drug;[1] one charge of attempted fraud; one charge of using a thing to forge; two charges of possessing utensils for use in connection with smoking a dangerous drug; and one charge of failing to take reasonable care in respect of a syringe.

[5] On the first indictment the applicant was sentenced to three years imprisonment on the trafficking charge, 12 months on the production of a dangerous drug (methylamphetamine), and six months on the charge of possessing things associated with that production; those sentences were to be served concurrently.

[6] On the second indictment, the applicant was sentenced to nine months for the offence of producing a dangerous drug (methylamphetamine), and six months on the charge of possessing things associated with that production. Those two sentences were to be concurrent with each other, but served cumulatively with the sentences imposed on the first indictment.

[7] On all of the summary offences, the applicant was sentenced to six months imprisonment, to be served concurrently with all other sentences.

Circumstances of the offences

[8] The prosecutor relied upon a statement of facts in respect of the offences. Whilst it was not tendered by consent, in the end there was little disagreement with what it revealed.

[9] The trafficking count involved a schedule 2 drug, namely fentanyl. The applicant proffered false medical referrals to doctors in Rockhampton, from whom he obtained fentanyl prescriptions. Fentanyl is a potent, synthetic opioid analgesic with a rapid onset and short duration of action, and is approximately 50-100 times more potent than morphine on a dose-by-dose basis. The drug was prescribed as a durogesic patch. The applicant obtained the patches in Rockhampton, returned to Gladstone and on-sold them. He did this on five occasions during the period from 29 January to 8 April 2013.

[10] The applicant forged the medical referral letters, using two laptop computers. He would sign the referral letters in the names of various doctors.[2] The names of the doctors included doctors from the East Fremantle Medical Centre and also from Emerald. Having forged the referral letter, the applicant had another person visit the

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1 Fentanyl, methylamphetamine and cannabis.

2 The subject of summary charge 25.

doctor on his behalf, obtain the script, the script was then presented to a chemist, and the fentanyl fraudulently obtained.[3]

[11] On one of the occasions of obtaining a fentanyl prescription from a doctor, the applicant agreed to pay $1,000 to another person to visit a Rockhampton doctor using one of the false referrals provided by the applicant. The applicant gave that person $20 to pay for the prescription. The applicant returned to Gladstone and distributed the patches. In one such transaction he received $300. Ultimately the applicant gave the intermediary $800 for obtaining the patches on his behalf.

[12] On 7 April 2013 police executed a search of the applicant's Gladstone home. They found an unsigned doctor's referral letter. When asked about the letter, the applicant declined to comment.

[13] During the search police found items consistent with recent production of a dangerous drug, namely methylamphetamine. In particular, in the applicant's car they found a fuel can which had been used as a reaction vessel. In the laundry they found a "box lab" in a white plastic tub, which consisted of plastic tubing, a glass flask, funnels, a modified condenser and various chemicals. Near the roof police found a black suitcase containing two gas cookers.

[14] The seized items were analysed and methylamphetamine was detected in a conical flask, an improvised condenser and a number of used pH strips. The applicant's fingerprints were found on the flask, the fuel can and a dropper bottle containing phosphate ions.[4] The search also revealed chemicals used in the production of methylampetamine, such as hydrochloric acid, iodine, chlorine and caustic soda.[5]

[15] In a kitchen cupboard police found a clip seal plastic bag containing 0.554 grams of a crystalline substance, in which methylamphetamine was detected.[6] Some loose cannabis was found in a jar,[7] as well as a pipe and used syringe.[8] The applicant declined to participate in a recorded interview with the police in relation to the items discovered on the search.

[16] The applicant was released on bail on 7 April 2013. A condition of that bail was for him to report to the Gladstone watchhouse at regular intervals. On Friday 12 April 2013 the applicant failed to report as required. He was arrested on the following occasion when he went to report. Two days later the applicant turned up late to report. When he was arrested on 7 August 2013 for subsequent offending, police conducted an audit of the conduct of his bail reporting. He was found to have not reported on 22 occasions over the charged period, covering seven weeks and four days.

[17] The second indictment covered a period between 23 July and 8 August 2013. On 7 August police conducted a search at a rural property near Mount Larcom.

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3 This was the subject of summary charges 1-24.

4 The possession of the reaction vessel and condenser was the subject of count 3 on the first indictment, namely possession of things associated with the production of drugs.

5 The possession of these chemicals, along with the glassware (though not the reaction vessel or condenser) and the plasticware, were the subject of summary charge 32. A set of scales and a quantity of clip seal plastic bags were also found: summary charge 33.

6 Summary charge 26.

7 Summary charge 27.

8 Summary charges 28 and 29.

On that property were several caravans, two of which had semi-permanent dwellings attached to them. As the police approached one of the caravans, the applicant was seen to be leaving its front door. He was detained, along with four others found on the property, three of whom were then charged as co-accused.

[18] A search of the applicant's caravan, and the surrounding area, revealed equipment and chemicals which had been used in the production of methylamphetamine. Some of the production apparatus was still intact. Traces of methylamphetamine were found on two improvised condensers, a glass dish, a pH tester, a frying pan and within a brown liquid in a Pyrex jug. Police also located a reaction vessel, containers of phosphorous acid, caustic soda, a hydrochloric acid and iodine, along with 84 tablets packaged in clipseal bags containing pseudoephedrine. The search also revealed 0.5 grams of cannabis in a bowl and a plastic container,[9] some digital scales and a grinder,[10] and a used bong.[11]

[19] The applicant was arrested in respect of those matters, but declined to participate in an interview. Whilst he was held in custody on remand for those offences the applicant wrote a letter to one of the co-accused, in which he admitted responsibility for the items found by the police.

Ground of proposed appeal

[20] In the Notice of Appeal originally filed by the applicant himself there were three grounds relied upon to contend that the sentence was manifestly excessive. They were: that the applicant's lack of criminal history had not been properly taken into account; that the quantities of the drug were only miniscule; and that insufficient regard was had to the applicant's rehabilitation and support in the community.[12]

[21] As developed in the applicant's outline, and in oral argument, the points were somewhat different. They were: that too much emphasis had been placed on the trafficking being sophisticated; the applicant entered an early plea; that the trafficking was low level and over a very short period, as well as to feed the applicant's own addiction; and that the court did not give sufficient weight to the impact of family support on the prospects of rehabilitation, as well as the more difficult time the applicant will have in custody given that his parents are Corrective Services officers.

The applicant's circumstances

[22] The applicant was born on 19 February 1986, and was aged 26 to 27 at the time of the offences, and about 28 at the time of sentencing. The learned sentencing judge was told a number of details about his background, without objection.

[23] He was educated to grade 10, at which point he obtained an apprenticeship as a boilermaker. He completed his apprenticeship but during that time he was introduced, at age 15, to both alcohol and cannabis. After his apprenticeship was completed he took employment at a shipping company where he was working as

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9 Summary charge 34.
10 Summary charge 35.
11 Summary charge 36.
12 AB 130.

a boilermaker, modifying shipping containers. After a year with that firm, he then worked with another company, also as a boilermaker.

[24] He married at 19, and had three children who, at the time of sentencing, were aged eight years, three years and seven months. The applicant remained in employment, in Gladstone, where he worked at the aluminium smelter. Eventually the applicant and his wife were able to purchase their own home.

[25] The applicant continued in a productive life until 2012, when the vehicle he was in was hit from behind by a truck. He sustained significant injury to his cervical spine, including nerve damage and crushed vertebrae. At that point he went on to heavy pain medication. He was out of work and depressed, and as a consequence "fell into self-medicating with pain medication which then spiralled out of control into the use of methylamphetamine".[13] At that time he became a significant drug user and was addicted to methylamphetamine. In addition he was using fentanyl to achieve the same feeling as methylamphetamine.

[26] The applicant was supported in court by his parents, who were both senior Corrective Services Officers. Their positions had caused them difficulty because they had not been able to visit the applicant in the Rockhampton Correction Centre. The applicant's counsel put it this way: "So there's been that, in my submission, slightly more difficult circumstance for him in custody".[14] Counsel for the applicant also told the sentencing judge that whilst in prison the applicant had been assaulted, in which he had two front teeth broken off, and sustained some facial injuries. Whilst in custody the applicant had worked in the industry section, fabricating heavy steel items. He had been making farm gates and trays for the back of motor vehicles. At the time of sentencing he had not been able to complete any rehabilitation courses, as they were not available to a person who was only on remand. His plans for when he was eventually released included selling up the house and relocating to Brisbane so that he would have the support of his family. It was said that he had an offer of employment from his brother-in-law, where the applicant could work as a labourer for as long as it took him to re-engage in his trade as a heavy metal fabricator.

The approach of the sentencing judge

[27] In relation to the trafficking charge the learned sentencing judge noted that it "occurred over just under a two and half month period of time".[15] His Honour also noted that on the occasion that the applicant enlisted another person to assist him, the applicant ended up paying that person $800 for obtaining the prescription which:

> "was the full amount that you received from the sale of the patches that you received following the presentation of that prescription to a pharmacy. In other words, you did not make a profit, but you kept some of the patches which were obtained for your own use."[16]

[28] In terms of characterising the nature of the trafficking and the level of effort put into it, the sentencing judge said:

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13 AB 102.
14 AB 104.
15 AB 111.
16 AB 111.

> "You used two laptop computers to forge these medical referrals letters, and I infer that they were done reasonably professionally to fool these specialist doctors that were presented with them – or the staff of those doctors. You purported to sign letters in the names of doctors from as far … away as the East Fremantle Medical Centre, as one example. I am assuming that the identities of actual doctors were used.[17]
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> ….
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> In my view, there was some degree of sophistication and pre-planning in the trafficking, as evidenced by the preparation of the referral documents that you provided to the various doctors in the Rockhampton district. You involved at least one other person in this activity. Whilst you were not making a particular profit yourself, there was a commercial aspect to this, and it was being on sold – or the drugs were being on sold to members of the community. It was a persistent course of offending conduct on your part, being conducted at the same time that methylamphetamine was being produced, and, in all of those circumstances, general and personal deterrence are significant sentencing considerations."[18]

[29] The sentencing judge also noted that the offence involving production of methylamphetamine[19] had occurred whilst the applicant was on bail.[20] His Honour described that as "a serious aggravating feature".[21]

[30] The learned sentencing judge also referred to the fact that in the applicant's criminal history he had been subjected to an 18 month probation order in 2011, and that, despite that experience, the applicant committed the offences to which he pleaded guilty in July 2014. Notwithstanding that, the sentencing judge described the applicant as having a "limited criminal history with no similar offences in the past".[22]

[31] The learned sentencing judge noted that the applicant's prospects of rehabilitation were a relevant consideration. He commented that the applicant's "successful rehabilitation would not only be in the best interests of you and your family, but also of the community".[23] He then noted the applicant's essential background, specifically referring to the "continuing support of your wife and your parents, all of whom are present here in court, and have spoken of the changes they have seen in you during the past, almost 12 months whilst you have been on remand".[24] As to that aspect the sentencing judge said:

> "I note particularly that your parents abhor illicit drug use, and, no doubt, you have caused them much anxiety and shame. But they have taken it upon themselves to complete a counselling course for persons – to assist in teaching people how to deal with and how to

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17 AB 111.
18 AB 112.
19 There were two offences of this kind, one on each indictment.
20 AB 111.
21 AB 112.
22 AB 112.
23 AB 112.
24 AB 113.

> assist family members who have drug problems. You therefore find yourself in a position a little different to many that come before these courts in having that continuing support from those family members. I understand that upon your release from imprisonment the plan is to move away from Gladstone, once your house is sold, back to Brisbane where you can be closer to your parents, and, in that way, avoid the contacts that you have been making in Gladstone, and try and start afresh, where you have the offer of a job as a labourer through your brother's business.
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> It is quite obvious that ongoing support is going to be necessary for you."[25]

[32] The sentencing judge described the applicant's conduct as "serious offending" and that in all of the circumstances the true criminality of the offending conduct warranted a sentence greater than the total of three years which was being urged by the applicant's solicitor.[26] The structure of the sentence was made evident in the following passage:

> "On the three-count indictment,[27] on the charge of trafficking, you are sentenced to three years imprisonment. On the production of a dangerous drug charge: 12 months imprisonment. And on the possession of a relevant thing: six months imprisonment. For each of the summary offences you are sentenced to six months imprisonment. All of those terms of imprisonment are to be served concurrently. On indictment number 905 of 2014,[28] on the production of a dangerous drug charge, you are sentenced to nine months imprisonment.
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> I had taken the view that a sentence of 15 months imprisonment would have been appropriate for that charge, given the fact that you were on bail for drug-related offences at the time. However, I have reduced it to nine months, one, for the reason that it is to be ordered that it be served cumulatively, and, secondly, because I note that you have been assaulted whilst in prison, suffered broken teeth and facial injuries, and have not had the benefit of your parents being able to visit because of their employment. Hence, you have served your time a little harder than most, and that is a relevant consideration. On the possess a relevant thing charge on that indictment you are sentenced to six months imprisonment. Those two sentences are to be served concurrently with each other, but cumulatively upon the other sentences that I have just imposed.[29]

[33] Thus an effective sentence of three years and nine months imprisonment was imposed. A parole eligibility date was set at 7 November 2014, namely after serving 15 months. Pre-sentence custody of 349 days was declared as time served.

Discussion

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25 AB 113.
26 AB 113.
27 The first indictment referred to in paragraph [9] above.
28 The second indictment, referred to in paragraphs [17] - [19] above.
29 AB 113-114.

[34] One of the main points advanced on behalf of the applicant is that there was an undue emphasis on the level of sophistication involved in the trafficking. What the learned sentencing judge said about that is set out in paragraph [28] above. In my view the applicant's contention in this respect should not be accepted. The sentencing judge said that there was "some degree of sophistication and pre-planning" and identified why that was so, namely: two laptop computers were used to forge medical referral letters; the applicant used the names of doctors which included some from remote centres such as East Fremantle and Emerald; they were done professionally enough to fool the specialists to whom they were presented; the forged referral documents were provided to various doctors in the Rockhampton district; at least one other person was involved in the activity, in order to visit a Rockhampton doctor using a false referral, and collecting the script, for which he was paid a fee. In my view that amply supports the description given to the conduct by the sentencing judge.

[35] It was contended that the sophistication was no more than one would see in any case of addiction to prescription drugs, and in that respect *R v Shailer*[30] was referred to. In *Shailer* the offender, who resided mainly in New South Wales and Victoria, would drive up to Cairns visiting doctors and, using a number of false identities, obtain prescriptions for morphine. He would then use the prescriptions to obtain the morphine, and resell it. What the offender in *Shailer* did was less sophisticated than the conduct of the applicant. In *Shailer* it was simply a question of visiting a doctor, under a false name, and getting a script which was then filled. By contrast, the applicant forged referral letters, which required the selection of nominated names for medical practitioners (whether real or false), and the presentation of those referral letters in order to obtain the script. Even the applicant's solicitor conceded that the "fraudulent production of referral letters from doctors purportedly around the country involves a fair degree of premeditation and pre-planning".[31]

[36] In my view it has not been demonstrated that the learned primary judge gave undue emphasis to this aspect of the case.

[37] It was also contended that insufficient weight was given to the fact that: the applicant entered an early plea of guilty; his trafficking was at a low level, involving no more than five occasions and four supplies of drugs; all the offences were driven by addiction to methylamphetamine; and the bulk of the drugs were obtained for personal use.

[38] In my view this contention is also not made out. The learned sentencing judge specifically referred to the fact that the applicant had "entered an early plea of guilty" and specifically noted the limited nature of the trafficking in terms of time and extent. Further, the sentencing judge was plainly aware that the applicant was addicted to methylamphetamine, and that the drugs were used, at least in part, to service his own addiction. His Honour referred to the fact that once the drugs were obtained from the pharmacies they were "then, in part, on-sold", and that the applicant had "kept some of the patches which were obtained for your own use". Further, his Honour made specific mention of the fact that the applicant's parents had completed a counselling course designed to teach people how to deal with and assist family members who have drug problems. Shortly after that his Honour

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30 *R v Shailer* [2006] QCA 196. (***Shailer***)

31 AB 105.

expressly referred to the fact that fentanyl produced a similar effect to methylamphetamine, "a substance to which you were addicted at the time of the commission of these offences".

[39] A further point made in oral argument was that insufficient weight was given to the fact that the applicant had no relevant criminal history. That also must be rejected. The learned sentencing judge expressly stated that he took into account "the fact that you have a limited criminal history with no similar offences in the past".

[40] The applicant's contentions on the appeal also focussed on the fact that he was a young man who, prior to his injury in the car crash, was a hard worker involved in steady employment, and his situation was brought about by bad luck, misfortune and injury. It was said that the one addiction had driven all the offences. All of that may be accepted, and was, indeed, accepted by the learned primary judge as the basis upon which the applicant was sentenced. His Honour made quite clear the factors that warranted the sentence he imposed. They included that the trafficking involved some degree of sophistication, a commercial aspect even though no profit was made, the on-sale of highly addictive opioid analgesics to the public, the involvement of others in the activity, that a number of the offences occurred whilst on bail, and that it was a case of serious offending. His Honour's balancing of those matters with the mitigating factors to which the applicant referred on appeal, did not, in my view, miscarry.

[41] That leaves the question of whether the comparable cases referred to by the applicant demonstrate that the sentence was manifestly excessive. Those decisions were *R v Dolan*,[32] *R v Vellacott*,[33] and *R v Thearle*.[34]

[42] *Dolan* involved a 23 year old offender who was 25 at sentence. He pleaded guilty to one count of trafficking in cannabis, and possession charges. Because of an error by the sentencing judge this Court had to re-exercise the sentencing discretion. In doing so it reviewed the decisions in *Vellacott* and *R v Gault*.[35] In *Dolan* police had discovered a large bag of cannabis, weighing 169.5 grams. In addition there were seeds, a coffee grinder and various implements. The offender voluntarily participated in a police interview and the trafficking charge was based solely on the admissions he made. He had smoked cannabis daily for about a year, but denied any addiction to the drug. He had sold cannabis a couple of times a day for about six weeks and had about 20 customers, making $200 to $300 per week profit. The court held that a custodial sentence in the range of two years was warranted, but the mitigating factors called for early or immediate release on parole, or suspension.[36] The court took the view that Dolan was a heavy user of cannabis so that his trafficking "was at least directly linked to his cannabis use", "although he was also trafficking for profit". The mitigating factors included the early plea, the genuine, sustained and commendable efforts at rehabilitation, the real risk that his rehabilitation might be jeopardised by a custodial sentence, his full co-operation and the fact that without his admissions he would not have been charged. That led the court to the view that the appropriate sentence was two years imprisonment on the

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32 *R v Dolan* [2008] QCA 41. (***Dolan***)
33 *R v Vellacott* [1997] QCA 223. (***Vellacott***)
34 *R v Thearle* [2012] QCA 42. (***Thearle***)
35 *R v Gault* [2006] QCA 316. (***Gault***)
36 *Dolan* at p 8.

trafficking, three months imprisonment on the possession charges, with a parole release date set on the basis that he had already served a period of three months.[37]

[43] *Gault* and *Vellacott* were described as more serious examples of trafficking than was the case in *Dolan*. In each of *Gault* and *Vellacott* the trafficking was purely for commercial gain, whereas the offence in *Dolan* was at least directly linked to cannabis use, apart from trafficking for profit. Further, *Gault* and *Vellacott* involved trafficking over a longer period of time, and by older offenders than in *Dolan*.[38]

[44] *Vellacott* involved a plea of guilty to trafficking in cannabis, and to supplying and possessing cannabis. The sentence was two years, suspended after nine months, with an operational period of three years. The trafficking was over a period of eight months during which time the offender sold to five or six regular customers once a week or once a fortnight. The trafficking was for purely commercial reasons. The offender co-operated with the police and had no previous record. He was about 34 at the time of the offence. The court recognised that the trafficking and business had only been "in a small way", but nonetheless "for long enough to supply the drug to others at least eighty times".[39] The court concluded that the sentence imposed was within the scope of a proper exercise of the sentencing discretion.

[45] In *Gault* the offender was about 49, with no relevant criminal history. He pleaded guilty to trafficking in cannabis over a six month period, and to some related summary offences. He was sentenced to two and a half years imprisonment, suspended after six months, with an operational period of three years. The trafficking was said to be in a relatively small scale, in that he had outlayed $10,000 and made a profit of about $2,500. He made detailed admissions to the police without which he could not have been prosecuted successfully for trafficking. The court noted that such co-operation was deserving of special leniency. The offender was in poor health, suffering from morbid obesity, sleep apnoea, deep vein thrombosis, pulmonary hypertension and other ailments. In addition he was caring for his elderly parents. The trafficking was for purely commercial reasons as he had ceased his cannabis use about a year before, and used the profits to meet medical expenses. The court concluded that the sentence was within the sound exercise of discretion. The focus, however, was on the suspension of the sentence after six months.

[46] *Thearle* involved a 21 to 22 year old with no criminal history, who pleaded guilty to one count of trafficking in cannabis over a period of eight months. He was sentenced to two and a half years imprisonment on the trafficking count, and varying terms on related possession counts. Parole was fixed after serving eight months. The offender had co-operated with the police and made admissions about the various implements that had been discovered at his house. It was conceded that the length of trafficking beyond the police operation by which he was discovered, was based upon the offender's own admissions. He had about eight regular customers and sold between two and five ounces per week. The trafficking was described as "substantial both as to the period and the amount involved".[40] It appeared that the offender had ceased using cannabis when he was arrested, and clear urine drug tests were tendered. In addition there was evidence of a stable

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37 *Dolan* at pp 8-9; McMurdo P, Fraser JA concurring; Mullins J concurred except as to the release date, which she would have set after serving 4 months.

38 *Dolan* at p 8.

39 *Vellacott* at p 4.

40 *Thearle* at [24].

long-term relationship, and that the family was reliant upon the offender's wages for support.[41]

[47] The thrust of the argument was that the early plea of guilty, the fact of no re-offending since arrest, giving up cannabis and carrying out community work should have resulted in a parole date at about one-third of the head sentence, that is to say after 10 months.[42] In that sense the appeal was not concerned with the head sentence, but rather the release date. This Court concluded, after reviewing *Dolan*, *Vellacott* and *Gault*, that the sentence imposed was not outside the range of a sound sentencing discretion.[43]

[48] Each of *Dolan*, *Vellacott*, *Gault* and *Thearle* have distinguishing features from the applicant's case. First, in all of them the offender co-operated with police, which the applicant did not. In *Dolan* and *Gault* the charges could not have been brought, at least to some extent, except on the basis of that co-operation and admissions. That is not the case here. Secondly, each of those cases involved offences concerning cannabis whereas the applicant was trafficking in an highly addictive opioid.

[49] Thirdly, in none of those cases was any degree of sophistication involved in terms of the trafficking. Nor did they involve conduct that could be characterised, as it was characterised in the applicant's case, as being a "persistent course of offending conduct" involving a fair degree of pre-meditation and pre-planning and persistent deception of third parties in order to obtain the drugs.

[50] Fourthly, none of *Dolan*, *Vellacott*, *Gault* or *Thearle* involved any offending whilst on bail, as it did in the applicant's case. As the learned sentencing judge correctly said, that was a "serious aggravating feature".

[51] Fifthly, whilst the trafficking involved a schedule 2 drug, fentanyl, the two charges of producing a dangerous drug involved production of methylamphetamine, a schedule 1 drug. None of *Dolan*, *Vellacott*, *Gault* or *Thearle* had that added feature. Further, the applicant's case is more serious, in that the manufacture of the schedule 1 drug (methylamphetamine) occurred in the course of the trafficking, and whilst the applicant was on bail for like offences.

[52] Finally, in each of *Dolan*, *Vellacott*, *Gault* and *Thearle*, there were mitigating features that are not present in the case of the applicant. One of those factors is that each co-operated with the police, and in a couple of cases to the extent that the charges could not have been brought without that co-operation. Another is the extent of rehabilitation evident in *Dolan*, *Gault* and *Thearle*.

[53] The distinguishing features in each of *Dolan*, *Vellacott*, *Gault* and *Thearle* means that they do not, in my view, support the contention that the sentence in the applicant's case was beyond the range of a sound sentencing discretion. Indeed, allowing for those differences, *Gault* and *Thearle* would offer some support for the sentences imposed. True it is that the applicant's conduct was largely to service his own addiction but there was a commercial aspect to it. It is also true that it occurred over a shorter period than was the case in the decisions to which I have referred, however, it involved a greater degree of sophistication, pre-planning and deception

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41 *Thearle* at [20].
42 *Thearle* at [22].
43 *Thearle* at [25]-[28].

in order to obtain the drugs in the first place. Furthermore, the fact that the applicant committed offences whilst on bail, is also a factor that takes this case beyond those referred to.

[54] In my view it cannot be said that due amelioration of the sentence was not made by the learned sentencing judge. In fact, his Honour expressly stated that on the production charge he had reduced the sentence from what would have been imposed, given that it was committed whilst on bail for drug related offences, from 15 months to nine months. Further, the parole eligibility date was set at 7 November 2014. Taking into account the pre-sentence custody which was declared, that means that the applicant was eligible for parole after 15 months of imprisonment or one-third of the total sentence. By setting that parole eligibility date, the applicant got the benefit of not having to wait until the half-way mark, had such a date not been set,[44] and the benefit of the approach often taken in this Court, of setting parole eligibility at one-third of the total sentence.[45]

[55] In my view it has not been demonstrated that the learned sentencing judge made an error or misapplication of principle, nor that the sentence imposed is "unreasonable or plainly unjust",[46] nor that the sentence imposed was manifestly excessive.

[56] I would refuse the application.

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44 Section 184(2) of the *Corrective Services Act* 2006.

45 *R v Hoad* [2005] QCA 52 at [9].

46 *House v The King* (1936) 55 CLR 499, at p 505; *Dinsdale v The Queen* (2000) 202 CLR 321 at [6].