SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rohl* [2015] QCA 78
PARTIES:	**R** **v** **ROHL, Neville Desmond** (applicant)
FILE NO/S:	CA No 329 of 2014 SC No 589 of 2013 SC No 595 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 24 November 2014
DELIVERED ON:	8 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2015
JUDGES:	Holmes and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is granted and the appeal is allowed.** **2. On counts 4 and 5 of indictment No 589/13: set aside the sentences of imprisonment of four years and nine months suspended after nine months and substitute sentences of three years and nine months suspended forthwith, with an operational period of four years.** **3. On counts 2, 3, 6, 7 and 8 of indictment No 589/13 and the sole count on indictment 595/14: vary the sentences by ordering that the applicant's parole release date be fixed at 8 May 2015.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty and was sentenced to four years and nine months imprisonment, suspended after nine months with a five year operational period, on two counts of supplying a dangerous drug (methylamphetamine); two years imprisonment in respect of each of three further counts of supplying a dangerous drug and one count of possessing a dangerous drug in excess of 2 grams (methylamphetamine); six months imprisonment for

possessing a thing (electronic scales) used in connection with the possession of a dangerous drug; two years imprisonment for one count of possessing a dangerous drug (methylamphetamine) in excess of 2 grams; and convicted but not further punished in relation to two summary offences – where the quantity of drugs supplied, their purity and the number of transactions suggested the supply was of a commercial nature – where the applicant committed two of the offences while he was on parole, and one while he was on bail and subject to a suspended sentence – where the applicant was an addict at the time of his offending – where the applicant had served 15 months in pre-sentence custody which could not be declared – where the applicant had a criminal history with five convictions for possession of dangerous drugs and an extensive traffic history – where the applicant co-operated with police by giving an interview and disclosing information both about his own offending and the involvement of others – where the applicant subsequently received threats and was required to be held in protective custody – whether the sentencing judge made proper allowance for the applicant's co-operation with police – whether the sentence was manifestly excessive

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
R v Armstrong [2005] QCA 116, considered
R v Carter [2008] QCA 226, considered
R v Cone [2010] QCA 274, considered
R v Eaton [2007] QCA 43, considered
R v Gabbert [2010] QCA 133, considered
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, cited
R v Hesketh, ex parte A-G (Qld) [2004] QCA 116, considered
R v Stuck [2008] QCA 165, considered

COUNSEL: G McGuire and D Gates for the applicant
D C Boyle for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the applicant

[1] **HOLMES JA:** The applicant seeks leave to appeal against his sentences for a number of drug-related offences. He pleaded guilty and was sentenced to: four years and nine months imprisonment, suspended after nine months with a five year operational period, on two counts of supplying a dangerous drug (methylamphetamine); two years imprisonment in respect of each of three further counts of supplying a dangerous drug and in respect of one count of possessing a dangerous drug in excess of 2 grams (again, methylamphetamine); and six months imprisonment for possessing a thing (electronic scales) used in connection with the possession of a dangerous drug. Those counts were on a single indictment. He was separately indicted on, and pleaded guilty to, another count of possessing a dangerous drug (methylamphetamine) in excess of 2 grams and was sentenced to two years

imprisonment. On each of the five sentences of two years imprisonment, a parole date was fixed after nine months. He was convicted and not further punished in relation to two summary offences, one a breach of bail and the other, possession of a thing for use in connection with the smoking of a dangerous drug. He had served 15 months in pre-sentence custody which could not be declared, but which was taken into account in the sentence.

The offences

[2] The applicant's activities were detected through telephone intercepts directed to one of his associates, a woman named Dixon. Through those intercepts it was established that he had supplied her with methylamphetamine on three occasions, once in January 2011 and twice in March 2011, in amounts of 3.5 grams, 2 ounces (approximately 56 grams) and 7 grams respectively. On 29 January 2011 and again on 16 February 2011, Ms Dixon supplied the applicant with methylamphetamine, respectively in amounts of 10 grams and 2 ounces, the latter at a price of $11,500 per ounce. Those five supplies were charged on the first indictment. On 28 September 2011, police executed a search warrant at the applicant's home where they found 26 grams of a substance which on analysis proved to be 18 grams of pure methylamphetamine, electronic scales and a smoking pipe. That gave rise to the counts of possession of drugs and of a thing used in connection with the drug possession on the first indictment and the summary charge of possessing a thing used in connection with smoking a drug.

[3] The applicant was charged with those offences and given bail. In November 2012, he committed the offences on the second indictment, which again came to light through intercepted communications; in this case, a text message sent to the applicant offering, in code, to supply him with drugs. The applicant and an associate met one of the suppliers and received 2 ounces of methylamphetamine. The associate's vehicle was pulled over by police soon afterwards and the methylamphetamine was found in it. The total weight of the substance seized was 55.155 grams, which was 32.595 grams of pure methylamphetamine.

[4] A year later, the applicant took part in a formal interview with police. The interview was explained at the outset to be part of an investigation into trafficking and money laundering involving the suppliers of the drugs in the November 2012 incident. The applicant gave a rather complicated explanation in which he said that he had worked for the suppliers and knew they had "ice". He could not afford much, but his associate wanted to make a purchase. He accompanied the latter, who bought two ounces on credit. When police took the methylamphetamine from them, they had no means of paying for it, and something of the order of $24,000 was owed. Although he had not purchased the drugs, the suppliers threatened him as well as his associate and forced him to take out a loan, which covered other debts as well. It was secured by a second mortgage over his house, which, according to his counsel's submission at sentence, he ultimately lost as a result of the loan. The police questioning, to which the applicant was responsive, although not very precise, appeared to focus both on the suppliers and the man who had made the loan arrangements on their behalf.

[5] The applicant was charged with the summary offence of breaching bail in October 2013, when it was discovered that he had not complied with his undertaking to reside at a specified address. His bail was revoked and he remained in custody between 24 October 2013 and the date of sentence, 24 November 2014.

Antecedents

[6] The applicant had a criminal history which contained a number of convictions in the Magistrates Court, resulting in fines in five instances for possessing dangerous drugs. Three of those charges related to cannabis and one to steroids, while the identity of the drug in the fifth charge is unknown. His traffic history was very extensive; on four occasions he was jailed for disqualified driving. Significantly, he was sentenced to six months imprisonment and placed on immediate parole on 3 June 2011, so that he was on parole when he committed the offences, including possession of methylamphetamine, which came to light on the search of his property on 28 September. He was sentenced again on 24 July 2012 to eight months imprisonment suspended after two months for a period of three years, so that the offences on the second indictment, committed in November 2012, occurred while he was both on bail and subject to the suspended sentence imposed for disqualified driving.

The applicant's submissions on sentence

[7] The applicant's counsel said in his submissions that his client had had a difficult upbringing, his father dying when he was 11, and his mother taking up with a man who was physically abusive to him. He was an automotive spray painter by trade. (When he was interviewed by police in November 2013, he was on a disability pension for a spinal injury.) His offending had occurred while he was in the grip of addiction which had caused him to lose not only his house but his car and spray-painting equipment. In his favour it was said that in the 2013 interview, he had provided considerable co-operation to the police. His acknowledgment of involvement in the 2012 supply, counsel submitted, ruled out the possibility of any trial (although, as the sentencing judge observed, the text message contained a coded reference to supply, and the applicant's apprehension shortly after in a car containing the methylamphetamine would have been compelling evidence on any trial). In addition, he had provided some information about the circumstances of the supply. There had been discussions as to whether he would be called as a witness against the suppliers, which had resulted in his receiving threats while in prison, requiring his move into protective custody. According to his counsel, during his period in custody the applicant had not used drugs.

The sentencing judge's remarks

[8] The sentencing judge was satisfied that the 2011 supplies were of a commercial nature. Although it was submitted that the applicant was addicted to methylamphetamine, he seemed at the same time, to be able to make supply arrangements and also carry on his trade as a spray painter; consequently, his Honour concluded that although part of his purpose might have been to obtain money and drugs to supply himself with methylamphetamine, it was not purely a case of obtaining the drugs to supply his own use. The commercial nature of the involvement was evident from the quantity of drugs, the number of transactions and their purity, the last indicating something above a street level supply. The applicant's ability to obtain two ounces of methylamphetamine at short notice indicated some sophistication, and he knew that the drugs he supplied to Dixon would be sold on by her. The methylamphetamine obtained in the 2012 transaction was also for a commercial purpose. The arrangements were unusual, but it was evident that the applicant formed part of a supply chain between the suppliers and his associate in a transaction which entailed drugs of a value of about $20,000.

[9] His Honour noted that, had the applicant's bail on the 2011 charges been revoked when he was remanded in custody for the 2012 possession charge, the 396 days he had served thereafter could have been declared as part of the sentence served. Rather generously, his Honour took into account not only the period of 13 months after the applicant's second arrest, but also the period of two months he had served at the end of 2011, on the logic that if it had not been for his involvement in the drug offences, his parole would not have been suspended and he would not have been required to serve that period.

[10] The sentencing judge expressed the view that a substantial sentence was required because of the commercial aspects of the offending and the fact that the applicant's arrest at the end of 2011 had not deterred him from subsequently being involved in facilitating the supply of another substantial quantity of methylamphetamine to his associate. The applicant was entitled to some benefit for his co-operation with police; but the information provided was to some extent probably already known to the police, who had been monitoring the suppliers. The benefit of co-operation, then, was less than that to be afforded someone who had provided the police with previously unknown information. However, his Honour said, he recognised that the requirement the applicant be held in protective custody meant that his time in prison had been made more difficult. He took into account the timely pleas of guilty.

[11] His Honour referred to the case of *R v Cone*,[1] relied on by the Crown, and observed that it involved broadly similar facts, although the applicant there possessed far smaller quantities of drugs. The present applicant's offences in 2011 alone would warrant a higher sentence than Cone's, and there was then the 2012 offence also to be taken into account.

[12] His Honour arrived at the ultimate sentence by regarding the 2012 possession as warranting a sentence of 2.5 years imprisonment, and the 2011 offences as warranting 4.5 years. Recognising the totality principle, a sentence in the order of six years would be appropriate to reflect the entirety of the criminal activity and its seriousness, while taking into account mitigating circumstances. He reduced both the head sentence and custodial component (one third) to reflect the 15 months spent in custody, arriving at the head sentence of four years and nine months with actual custody of nine months.

The comparable sentence cases

[13] The sentencing judge was referred to seven authorities, *Cone* and six others: *R v Eaton*;[2] *R v Gabbert*;[3] *R v Armstrong*;[4] *R v Stuck*;[5] *R v Carter*;[6] and *R v Hesketh; ex parte A-G (Qld)*.[7] Those cases were also the subject of submission in this Court. The first three involved offending of a much lower order than the applicant's. In *Eaton*, the applicant was a 23 year old with two small children who had pleaded guilty to two counts of supplying ecstasy, which involved a transaction to sell 200 tablets for $4,600 delivered in two instalments. She unsuccessfully sought leave to appeal a sentence of two and a half years imprisonment with a parole date fixed eight months after the

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1 [2010] QCA 274.
2 [2007] QCA 43.
3 [2010] QCA 133.
4 [2005] QCA 116.
5 [2008] QCA 165.
6 [2008] QCA 226.
7 [2004] QCA 116.

date of sentence. In *Gabbert*, the applicant's sentence of two and a half years imprisonment on two counts of supplying methylamphetamine (to a covert police operative in transactions two weeks apart) was reduced to 18 months imprisonment in respect of each supply, with a parole release date fixed after six months. The methylamphetamine totalled 4.1 grams in bulk but was of an extraordinary low purity. The applicant was 31 years old, an addict, and while he had some previous drug-related convictions, had not previously served any prison sentence.

[14] The applicant in *Armstrong* was 34 years old when he was found in possession of three clipseal bags containing a total of 24 grams of powder with a pure weight of 2.7 grams of methylamphetamine, which, it was accepted, was for his own use. He had long been a drug addict, with the associated criminal history of offences and drug possession but, as at sentence, he had been drug-free for a substantial period. His sentence of two and a half years imprisonment suspended after 12 months with an operational period of three years was set aside because of his rehabilitation and guilty plea, and a sentence of 18 months imprisonment suspended as at the date of appeal was substituted. (He had already spent nine and a half months in custody by the time of appeal.)

[15] The offenders in *Stuck* and *Hesketh* both pleaded guilty to offences involving commercial possession of drugs in a significant amount, but in contrast to the present case, those offences were in each instance committed on a single occasion. In Stuck's case, drugs and money ($4,000) were found at his house on the execution of a search warrant. The drugs consisted of cocaine (3.3 grams of powder which was .933 grams pure) testosterone and nandrolone, and 1,050 tablets which contained 17.6 grams of MDMA and 62 grams of methylenedioxyethylamphetamine (MDEA). He was sentenced to various concurrent terms of imprisonment, the most severe of which was imprisonment for four years suspended after 18 months with an operational period of four years on the charge of possession of MDMA. His possession of the MDMA and MDEA was found to have been for commercial purposes; he was not an addict and was motivated by financial gain. He was 25 years old without prior convictions. Referring to the need for deterrence in crimes entailing financial greed and noting the large amounts of MDMA involved (30 times the scheduled amount), the Court refused the application for leave to appeal against sentence.

[16] Similarly, in *Hesketh*, the charges arose from a search of the respondent's property: a number of plastic bags containing powder ranging between 36 and 61 per cent pure methylamphetamine (a total of 57.347 grams of pure methylamphetamine) was found, together with $3,550 in cash hidden about the house. The respondent pleaded guilty to one charge of possession of methylamphetamine. She had a criminal history for property offences and assault as well as convictions for drug offences, in respect of all of which she was given either community based orders or fined. She was 39 years old when she offended, was the sole carer of a five year old child, and was also caring for her elderly mother, who was in poor health. The sentencing judge proceeded on the basis that the respondent acquired drugs primarily to satisfy an addiction but also traded in order to support it. There was some evidence that she had taken steps to rehabilitate herself. Having regard to her rehabilitation and her early plea of guilty, the judge at first instance sentenced her to imprisonment for 12 months to be served by way of an intensive correction order.

[17] On the Attorney-General's appeal, that sentence was found to be inadequate in light of the respondent's criminal history and the extremely large quantity of drugs found in her possession. Significantly, the Court observed that the broad range of imprisonment

for an offence of the type was between two and a half and four years imprisonment. Accepting that in light of the mitigating factors, particularly the respondent's attempts at rehabilitation and her responsibilities for her child and mother, the custodial sentence ought to be kept to a minimum, the Court substituted a sentence of imprisonment for two and a half years suspended after nine months with an operational period of five years.

[18] The applicant in *Carter*, like the present applicant, was guilty of repeated offending, although the amounts of drugs involved were smaller. He had pleaded guilty to a range of offences committed on various dates. On one occasion, on a search of his property police found powder containing 2.2 grams of methylamphetamine and 514 tablets which contained 22.809 grams of 3, 4-methylenedioxymethamphetamine (MDMA, or ecstasy) as well as scales and a smaller amount of property suspected of being tainted property. On a later date police found him in possession of 10 empty clipseal bags in which were powder residues containing a gram of methylamphetamine, and on a third occasion they found him in possession of 6.385 grams of methylamphetamine, $7,000 in cash and a notebook containing references to drug transactions. He was also charged with receiving stolen property. That offender was between 26 and 27 years of age when the offences were committed, and had some minor criminal history for possessing drugs and drug utensils. He had served 101 days in custody which could not be declared, but which was taken into account. The judge at first instance, noting the repetition of his activities and the fact that the later offending occurred while he was on bail, sentenced him to three years imprisonment in respect of the drug offences, with a parole release date was set at just over 15 months. His application for leave to appeal against sentence was refused.

[19] The case whose facts bear the strongest similarity to those of the present matter is *Cone*. As with the present case, it involved offending on more than one occasion. On the first, the applicant was apprehended in a hotel room with a number of other people. He was holding a large amount of cash, some $7,320, which he attempted to conceal, and 19 grams of a brown substance, of which 5.4 grams was pure methylamphetamine, was seized from him. The applicant admitted that most of the money came from selling drugs. He had sold amphetamine for $6,000 in a transaction the previous evening. A year later, because of the applicant's failure to observe his bail conditions, police executed a search warrant at his residence; they found five clipseal bags containing 14.6 grams of material which was 2.3 grams of pure methylamphetamine, some cannabis, a crossbow and a bong. He was sentenced on the basis that the earlier offences involved commercial dealing, while the drugs found on the search of his house were not for a commercial purpose. At the time of the first set of offences, Cone was on parole in respect of an attempted arson offence, while at the time of the second set of offences he was on bail. He had a long criminal history indicative of a drug problem.

[20] The applicant in *Cone* was sentenced to four and a half years imprisonment in respect of the supply charge to which he had admitted and the possession of methylamphetamine; a further 15 months imprisonment cumulative in respect of the possession of methylamphetamine found in the subsequent search; and a further three months cumulative in respect of his breach of bail; totalling six years imprisonment. His eligibility for parole was fixed at one third of the sentence. This Court concluded that the sentence was manifestly excessive: a sentence of four and a half years in respect of the first set of offending was difficult to justify, with the result that the

total term was excessive. A sentence of three and a half years was substituted on the first supply and possession counts, with nine months imprisonment imposed cumulatively in respect of the later possession count, and the further three months cumulative imprisonment in respect of the breach of bail left undisturbed. The result was that the applicant was to serve four and a half years imprisonment, with eligibility for parole at one third.

The submissions in this Court

[21] Counsel for the applicant contended that by comparison with the approach in *Cone*, to begin with a notional head sentence of six years imprisonment was excessive. In addition, the applicant had not been given any benefit for the information he had provided to the police, with the knowledge that he might be required to give evidence. Reference was made to this passage from *R v Gladkowski*:[8]

> "The necessity of encouraging persons to inform so that offenders may be convicted is regarded as a matter of "high public policy". The benefits of such a policy are not likely to ensue without substantial inducement…Discounts of one-third or even one-half of the sentence that would otherwise be appropriate are not uncommon, according to the value and risk of the assistance rendered…"

It was apparent that the applicant feared, with good reason, the persons against whom he gave information. In addition, the applicant was entitled to some credit for his admissions about his own criminal conduct, although it was accepted that they were not of the kind considered in *AB v The Queen*.[9]

[22] Counsel for the respondent pointed to a number of aggravating features of the applicant's offending which warranted a severe sentence: the sequence of offending while on bail, parole and a suspended sentence; the quantity of the drugs and the commerciality of the dealing. The applicant knew that the different drugs provided to Ms Dixon were to be sold. It was suggested that his sentence had been mitigated in ways reflective of an allowance for his co-operation in the interview: he had the advantage of a fixed release date, had been given an allowance for the period he spent in custody as a result of his parole suspension and might, in other circumstances have been required to spend more than a third of his sentence in custody given his age and previous criminal history.

Conclusions

[23] In my view, the factors pointed to by counsel for the respondent as aggravating circumstances are capable of explaining why a sentence as high as six years imprisonment might properly have been adopted as a starting point, and I would reject the applicant's contention in that regard. But the sentencing judge did not articulate in what way he adjusted the sentence in order to recognise the applicant's co-operation, and, notwithstanding the respondent's suggestions, it is difficult to identify what allowance, if any, was made for it. Although his Honour observed, no doubt accurately, that the police had been monitoring the suppliers and may have been aware of the information given, the applicant was entitled to some credit for his willingness to assist. There was, in addition, information provided about the

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8 [2000] QCA 352, at [7].
9 (1999) 198 CLR 111.

activities of the man who acted on their behalf in arranging the loan, which may or may not have been known to the police.

[24] The co-operation may not ultimately have been of any great use, but it was given at risk to the applicant and consequent hardship in the serving of his sentence. It was of a kind to be encouraged, for the public policy reasons identified in *Gladkowski*, by a reduction in sentence. The absence of any discernible reduction has, in my view, resulted in a sentence which is manifestly excessive. While I do not consider that the assistance given was such as to require a discount of the third or one half mentioned in *Gladkowski*, I would recognise it by lowering the notional head sentence from six years to five years, while maintaining the custodial/non-custodial ratio at 1:3. Making the same allowance as the sentencing judge for the 15 months already served, the net result will be that the applicant should not be required (absent future breach) to serve any further time in custody, and the remaining sentences should be adjusted correspondingly. The sentences imposed on the summary charges, were, unsurprisingly, not the subject of any submission and require no attention.

Orders

[25] The application for leave to appeal against sentence should be granted and the appeal allowed. I would vary the sentences as follows.

1. On counts 4 and 5 of indictment No 589/13: set aside the sentences of imprisonment of four years and nine months suspended after nine months and substitute sentences of three years and nine months suspended forthwith, with an operational period of four years;

2. On counts 2, 3, 6, 7 and 8 of indictment No 589/13 and the sole count on indictment 595/14: vary the sentences by ordering that the applicant's parole release date be fixed at 8 May 2015.

[26] **MORRISON JA:** I have had the advantage of reading the reasons of Holmes JA and agree with those reasons and the orders her Honour proposes.

[27] **BODDICE J:** I agree that the application for leave to appeal against sentence should be granted for the reasons given by Holmes JA. I agree with the proposed orders.