SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnson* [2015] QCA 171
PARTIES:	**R** **v** **JOHNSON, Lee Harold** (applicant)
FILE NO/S:	CA No 174 of 2015 DC No 172 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville – Unreported, 6 August 2015
DELIVERED ON:	18 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2015
JUDGES:	Holmes CJ and Gotterson JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal against sentence.** **2. Allow the appeal.** **3. Set aside the sentences imposed and substitute the following:** **(a) on Count 1, a sentence of nine months' imprisonment;** **(b) on Count 2, a sentence of one month's imprisonment;** **(c) on Count 3, a sentence of three months' imprisonment;** **(d) on Count 4, a sentence of six months' imprisonment;** **(e) on Count 5, a sentence of one month's imprisonment** **all sentences wholly suspended with an operational period of two years.** **4. Declare that the applicant has served imprisonment between 6 August 2015 and 18 September 2015, a period of 44 days, under those sentences.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of trafficking in dangerous drugs, three counts of possessing a dangerous drug and one count of possessing a thing used in the commission of a crime – where the applicant was sentenced to 18 months imprisonment in respect of the trafficking count; nine months, 12 months and six months on the possession counts; and three months for the possession of things count, to be served concurrently and suspended after four months for an operational period of two years – where the drugs in question were a form of "synthetic cannabis" – where the applicant, who operated a tobacconist shop, acquired the drugs lawfully prior to the amendment of the definition of "dangerous drug" in s 4 of the *Drugs Misuse Act* 1986 (Qld) – where the applicant admitted to police that he knew of the drug's illegal status, but had intended to sell the remainder of his stock – where the applicant cooperated with police but attempted to conceal his possession of some of the drug – where the applicant traded openly and kept records of his sales – where the applicant had no criminal history – whether the sentence was manifestly excessive

Drugs Misuse Act 1986 (Qld), s 4
Drugs Misuse Regulation 1987 (Qld), Schedule 2

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, applied
R v Beynon, unreported, Clare DCJ SC, District Court of Queensland, 2 February 2015, considered
R v Dolan [2008] QCA 41, distinguished
R v Gault [2006] QCA 316, distinguished
R v Jack, unreported, Reid DCJ, District Court of Queensland, 8 August 2013, considered
R v Moller, unreported, Bradley DCJ, District Court of Queensland, No 179 of 2015, 16 June 2015, considered
R v Osborn, unreported, McGinness DCJ, District Court of Queensland, No 319 of 2013, 23 July 2013, considered
R v Rodgers, unreported, Shanahan DCJ, District Court of Queensland, No 398 of 2015, 23 March 2015, considered

COUNSEL: D R Lynch for the applicant
S Farnden for the respondent

SOLICITORS: Anderson Telford Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The applicant was convicted, on pleas of guilty, of one count of trafficking in dangerous drugs, three counts of possessing a dangerous drug and one count of possessing a thing used in the commission of a crime. The drugs in question, while having differing chemical structures, were forms of what is known as "synthetic cannabis" and are listed under Schedule 2 of the *Drugs Misuse Regulation* 1987 as

a dangerous drug. The applicant was sentenced to imprisonment for 18 months in respect of the trafficking count and respective periods of nine months, 12 months and six months on the possession counts, with three months' imprisonment imposed on the possession of things count. The sentences were concurrent and were suspended after a period of four months, for an operational period of two years.

[2] The applicant seeks leave to appeal in respect of those sentences on the grounds that the sentencing judge erred in failing to give any weight to the fact that the dangerous drugs were acquired legally and to the fact that the trafficking charge was based substantially on his admissions; that his Honour erred in concluding that he had no choice but to impose a term of actual imprisonment; and, more generally, that the sentence was manifestly excessive.

The offences

[3] The facts were unusual. The applicant, with his wife, operated a tobacconist shop at which synthetic cannabis was sold. On 29 April 2013, by amendments to the definition of "dangerous drug" in s 4 of the *Drugs Misuse Act* 1986, any drug with a substantially similar pharmacological effect or chemical structure to a scheduled drug became a dangerous drug. On 7 May 2013, an undercover police officer purchased from the applicant's shop separate amounts of three forms of synthetic cannabis, all weighing about 1.5 grams, for $30 a bag; she was offered, but did not purchase, a different form of the drug. The applicant was charged with one count of possession in respect of the synthetic cannabis sold to the police officer.

[4] On 30 May 2013, police returned to the shop and searched it. The applicant told them that he had synthetic cannabis in the store, on a shelf in the office area; that it was the last of his stock and he had not known what to do with it. On the shelf to which they were directed, police found 106 packets of synthetic cannabis weighing between one and seven grams, with a total weight of 348.50 grams. At the retail prices charged by the applicant, that amounted to $6,740 worth of drugs. The finding of those drugs gave rise to the second of the counts of possession. The applicant and his wife were cooperative during the search: Mrs Johnson assisted the police in examining the shop's computer system and advising them of the retail prices charged, while the applicant demonstrated how the point of sale system worked. However, when the police asked the applicant to open the safe on the premises he said that he could not do so, because he did not know the combination.

[5] The applicant volunteered to police that he and his wife had been to see their solicitor during the previous week and had been advised not to sell the product any more. However, they could not throw out $5,000 worth of stock, so they decided to sell it. The applicant was charged with trafficking in dangerous drugs over the three week period between 6 May 2013 and 31 May 2013.

[6] On 24 January 2014, police returned to the store to execute another search warrant. They found that the safe could be opened. Notwithstanding the applicant's professed ignorance of the combination as at 30 May 2013, they found inside it a copy of the local paper from June 2013. The safe contained a tub with 2.9 grams of synthetic cannabis and 20 packets of the drug, ranging in weight between one and three grams, the weight totalling 47.8 grams and the retail value being $1,180. In addition, five packets of powder and one packet containing two tablets, all of which contained methylhexanamine, a Schedule 2 drug, were located. The finding of the drugs on that occasion gave rise

to the third count of possession. At the same time, clip seal bags and two sets of digital scales with flecks of green plant material were found; those items formed the basis of the count of possessing a thing used in the commission of a crime.

[7] The applicant, who had no criminal history, was 35 years old at the time of the offending. He and his wife had three young children. His counsel submitted that the couple contributed in various ways to a number of charities and were hard working members of the community. The applicant was involved in his son's Scouts organisation; a conviction would mean that he would not be able to hold a blue card enabling him to continue in that role.

Other District Court sentences for offences involving synthetic cannabis

[8] Counsel for the applicant put before the sentencing judge sentencing remarks in three District Court matters concerning synthetic cannabis. The first was ***R v Jack***.[1] The defendant in that case was convicted of trafficking in synthetic cannabis, possession of about 35 kilograms of the drug and possessing things in relation to the crime of possession of the drug. The defendant, who was 27 years old, had set up a company and advertised the product for sale on the internet. The form of synthetic cannabis relevant in that case had been added to Schedule 2 of the *Drugs Misuse Regulation* about seven and a half months before she was charged. It was accepted, however, that she did not know the drug was illegal. It is unclear from the sentencing remarks for how long she was engaged in selling the product, although it seems probable in context that it was the entire period since the drug became illegal. She had no previous convictions. The sentencing judge imposed a sentence of two years' imprisonment fully suspended for an operational period of three years.

[9] ***R v Osborn***[2] concerned the man who supplied synthetic cannabis to the defendant Jack as well as to a tobacconist, Beynon. Osborn was engaged generally in the sale of herbal products, including synthetic cannabis which he produced. He was charged with one count of production, a number of counts of supply and one count of possession. He had supplied Beynon with 4.3 kilograms of the product, invoicing him for nearly $40,000. Osborn pleaded guilty on the basis that he did not know the drug was illegal; the sentencing judge described his conduct and lack of enquiry as to the legislation as "extreme recklessness". However, he had pleaded guilty early, and was otherwise of good character. He was fined $10,000, and a conviction was recorded in relation to each count.

[10] ***R v Beynon***[3] concerned the tobacconist to whom Osborn had supplied synthetic cannabis. He was charged with trafficking and counts of supply and possession. The sentencing judge noted that the business was conducted openly; the product was not sold to minors; the defendant had kept proper records, and had disclosed the sale for tax purposes. He had been cooperative when the police questioned him, made frank admissions naming his suppliers, and provided relevant documents. It was submitted on his behalf that he bought his stock on the basis of certificates from his suppliers which asserted, falsely, that it did not contain synthetic cannabis. The sentencing judge described reliance on those certificates as "extremely reckless". Having regard to the need for parity with Osborn's sentence, the sentencing judge fined Beynon $10,000 and recorded convictions.

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1 Unreported, Reid DCJ, District Court of Queensland, 8 August 2013.

2 Unreported, McGinness DCJ, District Court of Queensland, No 319 of 2013, 23 July 2014.

3 Unreported, Clare DCJ SC, District Court of Queensland, 2 February 2015.

[11] On this application, the applicant relied on two further decisions: *R v Rodgers*[4] and *R v Moller*.[5] The defendants in those cases were, like the applicant, tobacconists. On a search of Rodgers' shop, police found 36 envelopes containing synthetic cannabis under the counter. The defendant admitted to the police that he had been selling the product to customers over a short period of time; he was aware it was illegal. On one count of supply and one of possession, he was fined $5,000 without any conviction being recorded. The sentencing judge noted that he was 67 years old, otherwise of good character, and involved in the community. He had pleaded guilty early, and made full disclosures to the police concerning the sale of the drug, which had allowed the charge of supply to be brought.

[12] Moller had obtained synthetic cannabis at a time when it could legally be bought. Like the present applicant, once he became aware it was illegal he did not acquire more, but tried to get rid of his existing stock by selling it. It is not clear from the sentencing remarks how much of the drug was involved. He was charged with trafficking and possession. That defendant was 75, without criminal history, and with some health problems. He was sentenced to six months' imprisonment, wholly suspended for an operational period of 18 months.

The sentencing remarks in this case

[13] The sentencing judge distinguished between the applicant's case and those of *Osborn*, *Jack* and *Beynon* by noting that in those cases, the defendants' conduct was reckless, rather than entailing actual knowledge that they were dealing with illegal dangerous drugs. The applicant, on the other hand, had taken legal advice and made a deliberate decision to continue selling what was left of his stock. While the other cases concerned significantly greater quantities of banned substances, the applicant had been driven by commercial considerations to supply customers, knowing that what he was doing was unlawful. The sentencing judge noted that the applicant had been a useful member of the community, and a contributor to charitable causes, and that he had entered an early plea of guilty. However, but for police intervention, he might have sold some $6,000 worth of drugs into the community. It was not suggested that he was unaware of the harmful effects that the drugs could have. In order to send a message of deterrence, it was necessary to impose actual prison time.

The applicant's submissions on the application for leave

[14] In submitting that the sentence was manifestly excessive, the applicant pointed to the shortness of the trafficking period and the facts that the drugs were acquired legally; that his admissions had assisted in proving the trafficking charge; that he had dependents; and that he presented a low risk of re-offending, having no prior criminal history, a good work record and a record of community involvement. The comparable cases, it was said, suggested that actual imprisonment was not required. They involved far greater quantities, a more significant feature, it was submitted, than the differing states of knowledge involved in those cases.

[15] Moreover, it was an error for the sentencing judge to find that there was no alternative but to impose a sentence of imprisonment; the objective seriousness of the offending and the need for deterrence could adequately be met by the imposition of a fine, or a wholly suspended term of imprisonment. The failures to refer to the importance of the applicant's admissions in establishing the trafficking charge, and to the fact that the drugs were obtained lawfully, were also indicative of error.

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4 Unreported, Shanahan DCJ, District Court of Queensland, No 398 of 2015, 23 March 2015.

5 Unreported, Bradley DCJ, District Court of Queensland, No 179 of 2015, 16 June 2015.

The respondent's submissions on the application for leave

[16] Counsel for the respondent argued that the applicant's admissions did no more than inform the sentencing judge of his ability to sell $6,000 worth of drugs in a couple of days, and should not be regarded as significant in permitting the prosecution to establish the trafficking, or as warranting any substantial discount on *AB v The Queen*[6] principles. The sentencing judge had not fettered himself in the exercise of his discretion and was justified in concluding that an actual period in custody was warranted. The applicant had made a conscious decision, against legal advice, to sell synthetic cannabis, regardless of the risk to his customers. He had concealed the drugs in his safe from police. Considerations of personal and general deterrence required actual imprisonment. The lack of knowledge of illegality on the part of other defendants in the single judge decisions on which the applicant relied was a proper basis for distinguishing those decisions. The appropriate comparative sentences to consider were those involving the business of trafficking for short periods of time in Schedule 2 drugs.

[17] Two decisions of this Court were referred to: *R v Dolan*[7] and *R v Gault*.[8] In each of those cases, short periods of actual custody had been imposed on persons trafficking in cannabis; in Dolan's case, over a period of six weeks, and in Gault's, six months. In *Dolan*, the applicant was 23 years old when he was trafficking; he was selling to about 20 customers, and making $200 to $300 per week. The charge was based on his admissions, and he pleaded guilty at an early stage. He was sentenced to two years' imprisonment, suspended after four months. Because of an error in the exercise of the sentencing discretion, this Court resentenced. The application was heard a little under three months after the date of sentence. The sentence was set aside and the applicant was, instead, sentenced to two years' imprisonment with immediate parole. McMurdo P would have regarded immediate or early release on parole as preferable in any event; Fraser JA did not consider immediate release on parole was appropriate, but agreed with early release as at the date of the application and appeal; while Mullins J considered the original sentence appropriate.

[18] In *Gault*, the applicant had been sentenced to two and a half years' imprisonment, suspended after six months with an operational period of three years. The applicant had the practice of buying a pound of cannabis for $4,000 and reselling it in quantities of one-half or one-quarter ounce at the rate of $320 per ounce. The sentencing judge accepted that his profit was likely to have been around $2,500. He too had made admissions without which he could not have been prosecuted for trafficking. He was 49 years old when sentenced, without relevant criminal history. He had a number of serious health conditions including emphysema which could, however, be dealt with in the custodial sentence. His application for leave to appeal was dismissed.

Discussion

[19] I do not think the cannabis trafficking decisions provide much assistance in this case. The applicants in *Gault* and *Dolan* acted as criminals throughout: they obtained an illegal drug with the plan of selling it surreptitiously for profit and did so. The applicant in this case, as with the tobacconists charged in the other District Court cases on which he relied, acquired a legal product in the course of a legitimate business operation. For commercial reasons he tried to dispose of the remainder of the drug once it

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6 (1999) 198 CLR 111.
7 [2008] QCA 41.
8 [2006] QCA 316.

became illegal, with the knowledge of its illegal status, but, nonetheless, trading openly and keeping proper records. Neither the applicant nor any of the other defendants charged with the sale of the product in the cases referred to had previously fallen foul of the law. That is not to say that imprisonment may not, in some cases, be warranted for a business proprietor who, in the course of a legitimate trading operation, chooses to sell an illegal product. A good deal will depend on the length of time for which the product has been illegal, the state of knowledge of the offender, the quantities sold and the time for which the sales have continued.

[20] In the present case, the applicant is correct in saying that the sentencing judge did not advert to the significance of his admission to having intended to continue to sell the drug. Although counsel for the respondent contended that the applicant's admission was not significant, it seems to me that the trafficking charge could not have been brought without it. The only demonstrated sales were the two made to the undercover police officer. At the time of the 30 May 2013 search (the warrant for which referred to possession and supply, not trafficking, offences) the stock was not on display for sale. If the applicant had not expressed his intention to continue selling, there would not have been any basis for charging him with carrying on the business of trafficking. That was a significant consideration not, it appears, taken into account by the sentencing judge. In my view, the failure to make any allowance for it in sentencing, in accordance with the principle in *AB v The Queen*, was an error which requires this court to set the sentence aside and re-exercise the sentencing discretion.

[21] The trafficking period in this case was extremely brief, and the actual sales were of very modest amounts. Although the obvious inference is that the applicant sought to conceal his possession of more drugs than were seized by the police in May 2013 by professing to be unable to open his safe, he had previously conducted sales openly in accordance with ordinary business practice, and there is no evidence that he actually sold any more product after that date. That aspect of his conduct, the attempt at concealment of some of the drug, certainly adds a greater seriousness to the offending, and diminishes the extent to which he is entitled to recognition of his cooperation by a discounting of the sentence. Nonetheless, the total quantity of the drug possessed was relatively small. The applicant's personal circumstances and history all stood in his favour, as did his plea of guilty.

[22] I do not consider that questions of deterrence loom large in this case. The tobacconists who have been charged with sale of synthetic cannabis generally seem to have been engaged in disposing of product legally acquired; there is nothing to suggest any wide-scale supply of illegal drugs in the industry or recidivist tendencies among those charged. The otherwise good character of the applicant in this case would suggest that personal deterrence was not a critical consideration.

[23] In my view, two factors - the applicant's deliberate decision to continue to sell and his concealment of some product from the police - indicate that imprisonment, albeit suspended, is warranted in this case, with the necessary result that convictions must be recorded. The appropriate sentence on the trafficking charge is one of nine months' imprisonment. The sentences on the possession charges should also be reduced to reflect the mitigating features to which I have referred. The first of the possession counts involved only a very small amount, while of the remaining two counts, the possession of the drugs in the safe, involving as it did their concealment, is the more serious. All sentences should be wholly suspended with an operational period of two years. However, the fact is that the applicant has been in custody since he was sentenced on 6 August 2015, a period of 44 days, which should be declared as time served under that sentence.

Orders

[24] I would:

1. Grant the application for leave to appeal against sentence.
2. Allow the appeal.
3. Set aside the sentences imposed and substitute the following:
   (a) on Count 1, a sentence of nine months' imprisonment;
   (b) on Count 2, a sentence of one month's imprisonment;
   (c) on Count 3, a sentence of three months' imprisonment;
   (d) on Count 4, a sentence of six months' imprisonment;
   (e) on Count 5, a sentence of one month's imprisonment

   all sentences wholly suspended with an operational period of two years.
4. Declare that the applicant has served imprisonment between 6 August 2015 and 18 September 2015, a period of 44 days, under those sentences.

[25] **GOTTERSON JA:** I agree with the orders proposed by the Chief Justice and with the reasons given by her Honour.

[26] **McMEEKIN J:** I have had the advantage of reading the reasons of the Chief Justice. I agree with those reasons and the orders that her Honour proposes but I wish to stress one thing.

[27] But for the admissions that effectively made the trafficking charge possible, and hence the "special leniency"[9] that is appropriate, I would have reached the same conclusion as the sentencing judge that a period of actual custody was appropriate. A cynical engagement in trafficking in drugs purely for monetary gain, known at the time to be illegal, and brought to an end only by police intervention, deserves condign punishment.

[28] It is worth recording too that the principles that pertain where an offender provides the evidence of the charge, a charge that would not otherwise have come to light, were not expressly advanced as relevant to the primary judge. Experience suggests that it is useful for the sentencing judge to be made well aware of those occasions when recourse can and should be had to those exceptional principles.

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9 *AB v The Queen* (supra) particularly at [114] per Hayne J.