SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rooney; R v Gehringer* [2016] QCA 48
PARTIES:	**In Appeal No 93 of 2015** **R** **v** **ROONEY, Michael Robert** (applicant) **In Appeal No 94 of 2015** **R** **v** **GEHRINGER, Belinda Jane** (applicant)
FILE NO/S:	CA No 93 of 2015 CA No 94 of 2015 SC No 621 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 14 May 2015
DELIVERED ON:	4 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2015
JUDGES:	Fraser and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Each application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where Rooney was sentenced to seven years imprisonment for trafficking in methylamphetamine and cannabis and Gehringer was sentenced to five years imprisonment for the same offences – where the applicants allege that the sentencing judge erred in failing to accord sufficient weight to the pleas of guilty in determining their sentences – where the applicants entered late pleas of guilty – where the applicants contested their sentences unnecessarily – where the pleas did not reflect remorse – where the pleas were of limited utilitarian value – where the sentencing judge expressly allowed some credit because of the applicants' guilty pleas –

	whether the sentencing judge erred in the exercise of the sentencing discretion
	Penalties and Sentences Act 1992 (Qld), s 13, s 160C(5)
	Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, considered *R v Hoad* [2005] QCA 92, considered *R v McQuire & Porter (No 2)* (2000) 110 A Crim R 348; [2000] QCA 40, cited *R v Robertson* (2008) 185 A Crim R 441 [2008] QCA 164, considered *R v Ruha, Ruha & Harris; Ex parte Director of Public Prosecutions (Cth)* [2011] 2 Qd R 456; [2010] QCA 10, considered *R v Ungvari* [2010] QCA 134, considered
COUNSEL:	M J Copley QC, with S G Bain, for the applicants M T Whitbread for the respondent
SOLICITORS:	AW Bale for the applicants Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicants Rooney and Gehringer have each applied for leave to appeal against sentences imposed in the Trial Division. For trafficking in methylamphetamine and cannabis between 31 December 2011 and 17 January 2013 (count 1), Rooney was sentenced to seven years imprisonment and Gehringer was sentenced to five years imprisonment. In respect of each applicant, convictions were recorded and no further punishment was imposed for possession of methylamphetamine exceeding two grams (count 2), possession of cannabis exceeding 500 grams (count 3), possessing a thing used in connection with trafficking in a dangerous drug (count 5), and possessing property obtained from trafficking (count 6). The applicants were sentenced to a concurrent term of imprisonment of 12 months for possession of a category H weapon (count 4). In respect of each applicant the Court declared that one day during which the applicants were held in pre-sentence custody was time already served under the sentence.

[2] The applicants disclaimed any challenge to the head sentences imposed upon them. At the hearing of the applications, they were given leave to amend their applications for leave to appeal against sentence by omitting the stated ground that the sentence was manifestly excessive and substituting the ground that, "the learned sentencing judge erred in failing to accord sufficient weight to the pleas of guilty when determining the appropriate sentence."

Circumstances of the offences

[3] The applicants trafficked in cannabis sativa and methylampetamine for about 12 and a half months, between the end of December 2011 and 17 January 2013. Analysis of interceptions of telephone calls showed that between 2 October 2012 and 17 January 2013 the applicants had regular interactions and meetings with about 12 customers. Rooney had about 60 such meetings and Gehringer had about 33 such meetings. An income analysis conducted by police showed that the applicants had total unsourced income of about $54,000 for the period 1 January 2012 to 17 January 2013.

[4] Gehringer sold three grams of methylamphetamine (46 per cent purity) to a law enforcement participant for $1,800; she told that participant that the business sold gram amounts of methylamphetamine. The applicants sold an ounce of cannabis for between $260 and $300, a pound of hydroponic cannabis for $3,900 to $4,000, and one gram of "pure" methylamphetamine for $600. Police searched the applicants' home and found $11,000 in cash and evidence that $16,000 was owed to or by 10 people.

[5] On bushland adjacent to the applicants' property police found separate stashes of cannabis and methylamphetamine. Cannabis leaves and seeds weighing 68 grams were found in one container. At a separate place police found an esky which contained 24 clipseal bags (obviously packaged for sale) containing a total of 647 grams of cannabis. In a different area police found an ammunition tin which contained 34 separate containers of methylamphetamine (also obviously packaged for sale). In total there was 151 grams of methylamphetamine which, on analysis, included 69.5 grams of pure methylamphetamine. Seven of the packages contained about .7 or .8 of a gram with a purity of 10 per cent or less. The balance contained methlyamphetamine of about 50 per cent purity in five packages ranging between 12.8 and 55 grams and 22 packages weighing a little less than a gram. The total amount of cannabis was worth about $9,000 and the total amount of methylamphetamine was worth about $90,000. The ammunition tin also contained a loaded pistol (count 4).

The applicants' personal circumstances

[6] Gehringer was between 47 and 48 years old when she offended and 50 years old when sentenced. She did not have a criminal history. Rooney was between 53 and 54 years old when he offended and 56 years old when sentenced. He had prior convictions, including for assault and drink driving. The respondent did not contest the submission for Rooney that his convictions were not of great relevance to the present matter, save that the respondent submitted that Rooney's convictions for *Weapons Act* offences in the Magistrates Court on 4 December 2002 and 8 May 2006 (in respect of which no conviction was recorded and Rooney was given a fine with time to pay) were relevant, particularly in relation to count 4, and that Rooney's history justified the sentencing judge's remark that Rooney's criminal history showed a "continuing disregard for the law". That characterisation was open to the sentencing judge.

Procedural history

[7] On 5 September 2014 the applicants pleaded guilty to counts 1 – 4. On 13 May 2015 the applicants pleaded guilty to counts 5 – 6. The applicants were sentenced on 14 May 2015. The sentencing judge found: that from September 2014 until 13 May 2015, the matter was listed as a trial; as at September 2014 the matter was listed with uncertainty as to whether or not the sentence would be contested and whether or not counts 5 and 6 would be tried in the Trial Division or summarily in a lower court; that from 5 December 2014 the matter was listed in the Trial Division for five days, with two days allocated for a trial of counts 5 and 6 and three days allocated for a contested sentence in relation to counts 1 – 4; that on 13 May 2015 the applicants offered to plead guilty to amended versions of counts 5 and 6, they were arraigned on those matters and pleaded guilty, and the matter was adjourned; and that the matter came on for hearing as a contested sentence on 14 May 2015.

Contested sentence

[8] At the commencement of the sentence hearing on 14 May 2015, the applicants' counsel described the only point in dispute in the contested sentence as being about

the proportionality as between the trafficking in cannabis and the trafficking in methylamphetamine. Counsel submitted that the schedule of facts did not deal with this point. He referred to his instructions that trafficking in cannabis was far greater than trafficking in methylamphetamine. The applicants also disputed a contention for the Crown that the trafficking in methylamphetamine was of a wholesale nature. The applicants did not propose to call any evidence. Counsel submitted that the trafficking in cannabis was greater than the trafficking in methylamphetamine in the sense that the applicants sold more product of the former by weight. After further submissions, the hearing was adjourned. When the hearing resumed, the applicants' counsel substantially abandoned any contest about the facts set out in the Crown's schedule of facts and instead made a submission that, upon the evidence, it was not open to find that more methylamphetamine was trafficked than was cannabis.

Sentencing remarks

[9] The sentencing judge summarised the circumstances of each applicant's offences and their personal circumstances. The sentencing judge found that neither applicant co-operated with the police from the time of arrest. Neither applicant was addicted to drugs at any relevant time. Their drug trafficking was commercial and profit-driven. Gehringer played a lesser part in the trafficking business, as was reflected in the facts that she attended fewer meetings to supply drugs and collect money than did Rooney and the intercepted information showed that at times Gehringer appeared not to make decisions without first consulting Rooney.

[10] The sentencing judge summarised the procedural history of the matter and observed that the contested sentence was remarkable in that there was no sensible issue to contest and no evidence offered to contest the statement of facts put forward by the Crown. Whether the matter was looked at in terms of frequency of sales or amounts of money earned, there was no evidence to support the applicants' proposition that the trafficking in cannabis was greater than the trafficking in methylamphetamine. Even that slight contest was abandoned after the sentencing judge made it plain that vague statements of instructions about the point from the Bar table would not be accepted. The sentencing judge found that the day before sentence was a wasted day for which a jury panel was summoned. There was some saving of resources as a result of the applicants' pleas of guilty, in that the time spent on the day of sentence and on the day before sentence was less than the time which would have been required for a trial (the trial on the trafficking count might have gone into a second week). The pleas of guilty to counts 1 – 4 in September did not reflect remorse; in that context the sentencing judge referred to the evidence obtained by the police, the fact that the pleas were made on the basis that there would be a contested sentence, and the applicants' conduct in instructing their counsel in relation to the contested sentence on the morning of sentence. The sentencing judge allowed each applicant "some credit in terms of resource-saving" because of the pleas of guilty, but the allowance was "pretty limited". The sentencing judge reflected that allowance by a reduction of six months in the head sentence which otherwise would have been imposed.

The parties' arguments

[11] The applicants argued that in each case the reduction of the head sentence by six months did not allow adequate credit for the plea of guilty; that reduction merely allowed the applicants to apply for parole three months earlier than otherwise would

have been the case.[1] The error was evidenced by the trial judge's acknowledgement that the credit allowed because of the pleas that came "in two tranches" was "pretty limited". The applicants also argued that the sentencing judge's references to the absence of remorse and to the limited saving of resources contributed to a failure properly to recognise the utilitarian value of the pleas of guilty. It was submitted that the sentencing judge's remarks about there being no sensible issue in the contested sentence demonstrated that the failure of defence counsel's not unreasonable, albeit unsuccessful, submission, might have been given too much emphasis.

[12] The applicants submitted that a parole eligibility date should have been fixed at or near the point when each applicant would have served one third of the term of the head sentence. Alternatively in relation to Gehringer, a sentence suspended at the one third mark of the five year sentence was appropriate taking into account that she did not have a criminal history and her role in the drug trafficking was less significant than Rooney's role. On those bases, the applicants submitted that the sentences should be varied by fixing a parole eligibility date for Rooney on 13 September 2017 and a parole eligibility date, or suspension, for Gehringer on 13 January 2017.

[13] The respondent submitted that, whilst s 13 of the *Penalties and Sentences Act* 1992 requires a sentencing court to take a plea of guilty into account and state in open court that it has done so, that provision does not make it obligatory to reduce the sentence on account of a plea of guilty: the respondent cited *R v Corrigan*[2] and *R v Taylor & Napatali; ex parte Attorney-General (Qld)*.[3] The amendments made to counts 5 and 6 were submitted to be relatively insignificant in the context of the totality of each applicant's criminality; those offences were really particulars of the trafficking charged in count 1, and count 5 was amended only by reducing the number of motor vehicles and quad bikes mentioned in that charge from 2 to 1 respectively and count 6 was amended only by deleting a reference to a sum of money mentioned in that charge. The respondent submitted that the sentencing judge gave clear reasons and there was no error in the sentence.

[14] The respondent also submitted that the sentences proposed by the applicants did not take into account that the sentencing judge had reduced an appropriate starting point for each head sentence by six months and, particularly in that context, the mitigating factors did not justify a parole eligibility date for either applicant after only one third of the term.

Consideration

[15] The sentencing judge expressly took the pleas of guilty into account and made that clear, in compliance with s 13 of the *Penalties and Sentences Act* 1992, and the sentencing judge exercised the discretion to reduce the sentence imposed on account of the guilty pleas. The sentencing judge acted in accordance with principle by recognising that the pleas of guilty were mitigating factors in each case, notwithstanding that they were late and not accompanied by remorse.[4] Nothing in the sentencing judge's remarks suggests that the utilitarian value of the guilty pleas was not taken into account in either sentence.[5] It is clear that it was taken into account.

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1 *Penalties and Sentences Act* 1992, s 160C(5).
2 [1994] 2 Qd R 415 at 416.
3 (1999) 106 A Crim R 578 at 580.
4 *R v McQuire & Porter (No 2)* (2000) 110 A Crim R 348 at [89] (McMurdo P) and [109] (Byrne SJA).
5 Cf *R v Clark* [2009] QCA 361 at [25] (Keane JA).

[16] In the course of argument the applicants invoked the "common sentencing practice in Queensland", to which Jerrard JA referred in *R v Hoad*,[6] of making provision for parole or suspension of imprisonment after approximately one third of the head sentence has been served. However, Jerrard JA referred to Ms Hoad having pleaded guilty to an *ex officio* indictment, having not been responsible for the delay in the matter proceeding in the District Court, having indicated her preparedness to plead at her first appearance, having demonstrated genuine remorse, and having made full and frank admissions to police at the scene of the offence (dangerous operation of a motor vehicle causing death while adversely affected by an intoxicating substance).[7] Jerrard JA observed that "**[t]hose matters** in mitigation would ordinarily have resulted in Ms Hoad receiving either a recommendation for consideration for early post-prison community based release, or a suspension of her sentence, after approximately one third had been served", and **"[t]hat** would accord with common sentencing practice in Queensland."[8] In this case neither applicant could rely upon such substantial mitigating factors. Furthermore, Jerrard JA's reference to what the result for Ms Hoad "ordinarily" would have been and the reference to a "common sentencing practice" makes it plain that a departure from that practice does not of itself necessarily evidence any error justifying appellate interference.

[17] The applicants relied upon *R v Ungvari*,[9] in which White JA referred to the one third mark as being seen as "an appropriate starting point" to recognise a plea of guilty as "a matter of general practice", and that it might be "adjusted up or down as the particular circumstances warrant". The second proposition is arguably difficult to reconcile with the approval in *Hili v The Queen*[10] of this Court's decision in *R v Ruha, Ruha & Harris; Ex parte Director of Public Prosecutions (Cth)*[11] that the proportion which the pre-release period bears to a sentence of imprisonment "should themselves be the results of application of conventional sentencing principles to the particular circumstances of each case: the appellant's argument inverts that proper approach by requiring that the sentence in a particular case be substantially dictated by a pre-determined range unless there are unusual factors". A similar point was made in passage in *R v Robertson*[12] which was cited in *R v Ruha*:[13]

> "To the extent that decisions establish ranges within which sentences are regularly imposed for similar offending, it is of course right to take them into account, but in the end the proportion which the period to be served in prison bears to the whole term is to be fixed by taking into account all of the circumstances rather than by some rule of thumb. [*Bugmy v The Queen* (1990) 169 CLR 525 at 538.] The authorities do not condone, in any aspect of sentencing, some arithmetical approach under which a deduction is made from a pre-determined range of sentences: the sentencing judge is obliged 'to take account *all* of the relevant factors and to arrive at a single result which takes due account

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6 [2005] QCA 92 at [31].
7 [2005] QCA 92 at [30].
8 [2005] QCA 92 at [31] (emphasis added).
9 [2010] QCA 134 at [30].
10 [2010] HCA 45 at [42]-[44].
11 [2010] QCA 10 at [47].
12 [2008] QCA 164 at [6].
13 [2010] QCA 10 at [26].

> of them all.' [*Wong v The Queen* (2001) 207 CLR 584 at 74; [2001] HCA 64, approved in *Markarian v The Queen* (2005) 228 CLR 357 at [37]; [2005] HCA 25.]"[14]

[18] *Hili v The Queen*, *R v Ruha*, and *R v Robertson* concerned Federal sentences. Because this point was not agitated in the parties' submissions in the present context it is not appropriate to decide it here and it is not necessary to do so. White JA's remarks in *R v Ungvari* in any event make it plain that the recognition of a plea of guilty at the one third mark of the sentence reflects a general practice which may or may not be applied according to the particular circumstances of each case.

[19] In this case there is no ground for overturning any of the findings of fact by the sentencing judge, including in particular the findings that the pleas did not reflect remorse and were of limited utilitarian value for the reasons articulated by the sentencing judge. In these circumstances, and in light of my conclusion that the sentencing remarks do not evidence any error in principle, the issue is whether or not the quantum of the reduction allowed by the sentencing judge itself demonstrates that the sentencing judge must have erred in the exercise of the sentencing discretion. In Gehringer's case it was certainly within the sentencing judge's discretion not to suspend the sentence, notwithstanding the factors identified by her counsel in this Court. In both cases, as I have indicated, the sentencing judge's approach of reducing the term of the head sentence to account for the utilitarian value of the pleas was not of itself an error in principle merely because it departed from the common sentencing practice. Because that approach reduced both the head sentence and, as a result, the period prior to parole eligibility, it cannot be compared directly with the more common sentence practice. I nevertheless accept that a more substantial reduction might have been allowed on account of the pleas of guilty. It does not follow however, and I am not persuaded, that the allowance made by the sentencing judge in the particular circumstances of this case evidences any error in the exercise of the sentencing discretion.

[20] Taking into account both the effective term of imprisonment and the absence of any specification of the parole eligibility date (so that eligibility will arise at the mid-point of the head sentence in each case), each sentence was within the sentencing discretion.

Proposed Order

[21] Each application for leave to appeal against sentence should be refused.

[22] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[23] **McMEEKIN J:** I agree with the reasons of Fraser JA and the order proposed by his Honour.

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[14] This passage does not concern decisions that "good reason" must be demonstrated before fixing as the parole eligibility date a point later than the mid-point of the term: see *R v Robertson* [2008] QCA 164 at [5], citing *R v McDougall & Collas* [2007] 2 Qd R 87; [2006] QCA 365 at [14], [21] and *R v Assurson* (2007) 174 A Crim R 78; [2007] QCA 273 at [22], [27] and [33]-[34]; and see also *R v Kitson* [2008] QCA 86 at [15], [16].