SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chan* [2017] QCA 8
PARTIES:	**R** **v** **CHAN, Robert Wing Fong** (applicant)
FILE NO:	CA No 87 of 2016 SC No 480 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 24 March 2016
DELIVERED ON:	7 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2016
JUDGES:	Gotterson and Morrison JJA and Douglas 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 be granted.** **2. The appeal is allowed only to the extent that the sentences imposed for counts 2 to 14 inclusive and 16 are set aside and that no further punishment be imposed in relation to those counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where defendant convicted on his own plea of guilty to fifteen offences – where defendant sentenced to 10 years imprisonment for trafficking methylamphetamine over a two year period – where defendant received same sentence as co-offender whose criminal record was worse and whose offending was more serious – whether sentence was unreasonable or plainly unjust – whether sentencing judge gave sufficient weight to mitigating factors, namely the basis of offending, pleas of guilty and defendant's personal circumstances *R v Adams* [2009] QCA 56, cited *R v Connolly* [2016] QCA 132, cited *R v Jacobs* [2016] QCA 28, cited

COUNSEL:	D R Lynch QC for the applicant C W Heaton QC for the respondent
SOLICITORS:	Guest Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Douglas J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have read the reasons of Douglas J and agree with those reasons and the orders his Honour proposes.

[3] **DOUGLAS J:** The applicant was sentenced to 10 years' imprisonment on 24 March 2016 for the offence of trafficking in methylamphetamine, count 1 on the indictment. The consequence of the 10 year term imposed is that he is required to serve at least 80 per cent of that sentence before becoming eligible for parole. At the same time he pleaded guilty to 14 other offences. They consisted of eleven counts of possession of glassware for use in connection with producing a dangerous drug, one count of production of methylamphetamine in excess of 200 grams, one count of possession of methylamphetamine in excess of two grams and, finally, a count of possession of iodine, referred to as a relevant substance.

[4] The parties accept that the concurrent sentences of terms of imprisonment imposed for counts 2 to 14 inclusive and 16 should be set aside and that no further punishment be imposed in relation to those counts apart from the recording of convictions. The decision in *R v Connolly*,[1] recently reiterated the view that, where the trafficking count was largely constituted by acts of supplying a dangerous drug, error occurs from the imposition of additional punishment for the same act if concurrent terms of imprisonment are imposed for the counts of supplying.[2] The same approach is appropriate in this case.

[5] As was submitted, however, that error has no relevance otherwise in the exercise of the sentencing discretion in relation to count 1 and does not of itself require this court to interfere with the sentence imposed in respect of that count.

The circumstances of the offending

[6] The applicant obtained glassware which he supplied to others over a period of more than one year and nine months to assist them to establish laboratories to produce methylamphetamine. He also supplied precursor chemicals and sourced significant quantities of pseudoephedrine for this purpose. Over the relevant period he was said to have received unexplained income of over $690,000.

[7] Between 19 July 2011 and 1 April 2012 he imported glassware from China through 11 different deliveries, receiving enough glassware to compile 23 complete laboratories capable of producing methylamphetamine. He also obtained glassware and other apparatus through a person named Conboy and supplied it to someone named Matasaru so that he could produce methylamphetamine. Conboy and Matasaru were caught in the process of producing methylamphetamine on 3 May 2013.

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1 [2016] QCA 132 at [16]; see also s 16 of the *Criminal Code* (Qld).

2 See also *R v Bobonica & Runcan* [2009] QCA 287 at [38].

[8] He also supplied glassware, pseudoephedrine and other precursor chemicals to a man called Jacobs to assist him and another to produce methylamphetamine. The sentence imposed on Jacobs was the main focus of the submissions on this application as justifying a lesser sentence for the applicant.

[9] Jacobs and his associate carried out a large scale "cook" on 21 April 2012 and provided the applicant with 250 grams of methylamphetamine as his share of the amount produced on 22 April 2012. On that day police intercepted the applicant and found the 250 grams which contained 129.2459 grams of pure methylamphetamine in his car and located the rest of the methylamphetamine produced at Jacobs' residence in a package containing 275 grams of product which in turn contained 157 grams of pure methylamphetamine. That production of methylamphetamine, including that found both on the applicant and Jacobs, was the subject of count 13 while the possession of 129 grams was the subject of count 14. He also supplied pseudoephedrine and glassware to a man called Coombes to assist him to produce methylamphetamine and supplied others with significant quantities of pseudoephedrine as well. He imported a cold and flu medication from China, not commercially available in Australia and which contained 30 per cent pseudoephedrine for that purpose. He also arranged its transport from Sydney through an associate.

[10] The applicant's fingerprints were found on a container holding iodine at a dismantled clandestine laboratory located by police on 31 May 2012. This related to count 16.

[11] On 18 October 2012 police observed his associate collect a box from the Greyhound bus depot on the Gold Coast which he took to the applicant. On 18 January 2013 the associate was seen to receive a bag from the applicant which contained two kilograms of the Chinese medication that contained the pseudoephedrine.

[12] The applicant also directed his associate to supply pseudoephedrine to a covert police operative in Sydney on three occasions. On 14 December 2012 one kilogram of the medication was handed over. On 13 December 2012 his associate was recorded, just before the supply on 14 December 2012, saying there would likely be a further 10 such trips to Sydney from which the associate expected to be paid $5,000 per trip. The second supply to the covert police officer occurred on 12 January 2013 when three kilograms of the medication were handed over for $105,000. The third supply occurred on 27 January 2013, again where the applicant's associate was intercepted carrying three kilograms of the medication.

[13] On 14 February 2013 Coombes contacted the applicant and discussed further supplies of the medication to the covert police officer commencing with an amount of five kilograms. The applicant told Coombes it would not be possible for a while and that he was uncomfortable using his then associate for future deals. On 8 April 2013 there were again discussions between the applicant, his associate and the covert officer who paid the associate $35,000, apparently for one kilogram of the medication.

[14] The applicant was arrested on 22 April 2012 after location of the methylamphetamine the subject of count 14 and was then released on bail on 23 April 2012. He was again arrested on 26 July 2012 and charged in respect of count 16 and released on bail the next day and was finally arrested on 5 July 2013 and remained in custody after that time. He continued to traffic, therefore, during periods when he was on bail.

The antecedents of the applicant

[15] The applicant was born on 20 February 1942, was aged 69 to 71 at the time of offending and 74 at the time of his sentence. He had a criminal history which is relatively short but directly relevant. He was convicted of a number of minor,

summary offences from 1972 until 1990 where he was fined on each occasion but then, more relevantly, in November 1992 he was convicted of trafficking in LSD, amphetamine, methylamphetamine and BDMA. LSD was then a Schedule 1 drug while the others were then Schedule 2 drugs. He was also convicted of other related charges and following a successful appeal by the Attorney-General was sentenced to seven years' imprisonment.

[16] Finally, in March 2000, he was convicted of breaking and entering premises and committing an indictable offence and two offences of receiving. Again, after an appeal to the Court of Appeal, he was sentenced to a total of 18 months' imprisonment to be served cumulatively upon the other sentences he was then serving. These offences were committed in 1997 when he must have been on parole.

The reasons of the learned sentencing judge

[17] The learned sentencing judge, took into account the serious nature of the applicant's criminal misconduct, his previous conviction for trafficking, the fact that this charge of trafficking extended over a lengthy period with a scale of harm indicated by the quantity of glassware imported and the number of laboratories that might have been compiled as a result. His Honour also referred to the substantial quantities of drugs involved in the production and possession charges, the substantial sums of money involved in the supplies, his significant income from unknown sources and the fact that some of the offending was committed while he was on bail. His Honour's discussion also referred to the need to deter this sort of offending. He considered the applicant's age and health, his family situation and said the pleas of guilty were timely and resulted in significant reduction of the penalty to reflect facilitation of the course of justice, the saving of time and inconvenience to witnesses. His Honour was also clearly aware that the sentence imposed would require the applicant to serve a minimum of 80 per cent of the term before he became eligible for parole.

Submissions

[18] The ground of appeal argued was that the sentenced imposed was manifestly excessive, particularly in not giving sufficient weight to the basis of the applicant's offending, his pleas of guilty and his personal circumstances. The argument was that the applicant, although involved in serious offending, was nevertheless a party to trafficking and methylamphetamine by others rather than by himself dealing in drugs with the result that his conduct ought to be regarded as less serious than that of the principals.

[19] It was submitted that the sentence of 10 years' imprisonment imposed on his associate in *R v Jacobs*[3] should have resulted in the applicant receiving a lesser sentence than imposed there because Jacobs had a much worse criminal record than the applicant and his offending was more serious.

[20] Mr Lynch QC, for the applicant, acknowledged, however, that strict questions of parity with respect to Jacobs did not apply. He also submitted that the effect of the pleas of guilty was significant, reflecting cooperation in the administration of justice and resulting in substantial savings to the community in court time and expense. It was also submitted that the combined effect of the applicant's personal circumstances was such that the sentence that was imposed should not have been crushing. Mr Lynch pointed to his advanced age, his failing health and the prospect he would not see some family members again.

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3 [2016] QCA 28.

[21] Mr Heaton QC for the respondent distinguished this applicant's situation from that of Jacobs by pointing out that while some of this applicant's offending involved collaboration with Jacobs, Jacobs was otherwise carrying on his own business of trafficking in dangerous drugs, independently of the applicant. He submitted that there was limited assistance to be gained by attempting a direct comparison with Jacobs' position in all the circumstances of the applicant's offending. Jacobs' offending was incidentally related to the applicant's offending but otherwise quite separate. Once that was recognised his sentence became little more than a case of some comparable assistance.

[22] The matters taken into account by his Honour were referred to by Mr Heaton to support the conclusion that the scale of the operation was very considerable leading to a high potential for harm to the Australian community as a result of his conduct.

[23] In arguing that Jacobs' sentence reflected many differences between this case and his, he referred to the summary at [13] to [21] of the Court of Appeal judgment. From that one can ascertain that Jacobs controlled a trafficking business over a period of eight months involving the production and distribution of large quantities of methylamphetamine, including the sourcing of large quantities of precursor materials, organising the production of the drug on a commercial scale and selling it. He used threats and intimidation to recover debts owed to him from drugs and sometimes accepted payment by illegal acts which he procured. The financial analysis of his activities showed an amount in excess of $280,000 in unexplained income. His offending overlapped with that of this applicant, particularly in respect of the large scale production in April 2012 which was only one aspect of a much more extensive course of illegal conduct. His conduct occurred soon after he was released from custody for drug related offending and while he was on a suspended sentence. He had a significant and more serious criminal history than the applicant, having been previously convicted of trafficking in 1996 for which he was sentenced to 14 years' imprisonment.

[24] As well as pleading guilty, he had also demonstrated remorse by his conduct while in custody on remand and had also demonstrated steps towards rehabilitation and presented references attesting to his otherwise good character. A psychologist's report was also relied upon to assist in understanding the events that had shaped him and put his continued offending conduct in some context.

[25] Accordingly, Mr Heaton submitted that an analysis of Jacobs' circumstances as compared to those of the applicant showed that they were very different, making any meaningful direct comparison impossible. There were factors in mitigation in the case of Jacobs absent in the present case such as his demonstration of contrition, his psychological considerations, his otherwise good character and his steps towards rehabilitation. The court at [33] in rejecting Jacobs' contention that the sentence was manifestly excessive, said that it could not be described even as a heavy sentence. Mr Heaton submitted that it was not correct to say that the applicant's offending was less serious than Jacobs' and that it was inappropriate to apply some mathematical methodology to arrive at a lesser sentence.[4]

[26] He also drew our attention to the decision in *R v Adams*.[5] Adams had been sentenced to 10½ years' imprisonment for a number of offences including trafficking in

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4 *Barbaro v The Queen* (2014) 253 CLR 58 at [34].

5 [2009] QCA 56.

methylamphetamine over a period of about 13 months. He received about $200,000 either in cash or methylamphetamine from his involvement as a high level member of a drug producing syndicate. He had favourable references praising his efforts at rehabilitation and was described as not at the top of the organisational ladder in the syndicate but very close to it. He was aged 32 and 33 at the time of the offending and had what was described as a minor criminal history.

[27] While he was a user of drugs, he was said to have been primarily commercially motivated. This applicant is not said to have been a user of drugs and clearly was commercially motivated.

[28] Adams' offending was described as a grave example of trafficking with his involvement being at a high level and on a large scale. He continued to traffic after a direct associate had been arrested for his involvement. The court was of the view that the 10½ year sentence was lengthy but rightly so, even taking into account the mitigating factors of his guilty plea and promising rehabilitative prospects. The court emphasised the strong need for deterrence.

Conclusion

[29] Taking into account the seriousness of the applicant's offending and the sentences imposed in generally comparable cases, it cannot be concluded that the sentence is unreasonable or plainly unjust and thereby manifestly excessive. The applicant's case does not bear direct comparison with Mr Jacobs' sentence so as to demonstrate error in the exercise of the sentencing discretion. It was serious offending involving the production of large quantities of a harmful drug. The learned trial judge referred to the relevant matters in mitigation explicitly so that the sentence does not warrant further moderation in the context of the seriousness of the offending.

Order

[30] Consequently, taking into account the need to re-sentence on counts 2 to 16, the orders should be as follows:

1. the application for leave to appeal be granted;

2. the appeal is allowed only to the extent that the sentences imposed for counts 2 to 14 inclusive and 16 are set aside and that no further punishment be imposed in relation to those counts.