# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Brookes* [2017] QCA 63 |
| PARTIES: | **R**<br>**v**<br>**BROOKES, Alan James**<br>(applicant) |
| FILE NO/S: | CA No 182 of 2016<br>SC No 666 of 2016<br>SC No 65 of 2015<br>SC No 663 of 2016<br>SC No 781 of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane – Date of Sentence: 23 June 2016 |
| DELIVERED ON: | 11 April 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 February 2017 |
| JUDGES: | Gotterson and Morrison and McMurdo JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Grant leave to appeal.**<br>**2. Allow the appeal.**<br>**3. Set aside the order that the sentences for the counts on Indictment 666 of 2016 be cumulative upon the other sentences imposed on 23 June 2016.**<br>**4. Substitute an order that the sentences for the counts upon Indictments numbered 65 and 781 of 2015 be cumulative upon the sentences imposed for the offences on the Indictment numbered 666 of 2016.** |
| CATCHWORDS: | CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – NON-PAROLE PERIOD OR MINIMUM TERM – QUEENSLAND – PARTICULAR CASES – where the sentencing judge sentenced the applicant to a term of five years' imprisonment for a drug trafficking offence cumulative upon a sentence of two years' imprisonment for other offending – where s 182A *Corrective Services Act* 2006 (Qld) had the effect that the applicant was not eligible for parole until he had served 80 per cent of his term for the drug trafficking offence – where the sentencing judge fixed a |

parole eligibility date four years from the commencement of imprisonment for both offences rather than four years into the five year term of imprisonment for drug trafficking – whether the sentence complied with s 182A(3) *Corrective Services Act* 2006 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to trafficking in methylamphetamine over a six month period at a wholesale and retail level and other possession offences – where the applicant had been in custody for two months during the trafficking period but continued to manage the operation from prison – where the operation was large scale and the applicant had customers owing him amounts in the order of $20,000 and $30,000 – where the applicant was aged 50-51 years and had a relevant criminal history but had been a "largely law abiding citizen for many years" – where the applicant's addiction to methylamphetamine provided some explanation for his conduct but the scale of the operation went beyond merely supporting his habit – where two co-offenders acted under his direction, were each at least 20 years younger than the applicant and with less serious criminal histories, and both received sentences of four years' imprisonment – where the applicant was sentenced to five years' imprisonment for the trafficking offence – where the applicant's trial counsel had broadly agreed with the sentence which was eventually imposed – whether the sentencing judge had properly applied the principle of parity between co-offenders – whether the sentence imposed was manifestly excessive

*Corrective Services Act* 2006 (Qld), s 182A
*Penalties and Sentences Act* 1992 (Qld), s 156

*R v Barton* [2006] QCA 367, distinguished
*R v Briggs* [2012] QCA 291, distinguished
*R v Clark* [2016] QCA 173, distinguished
*R v Hunt* [2016] QCA 297, distinguished
*R v Reid* [2013] QCA 190, cited
*R v Ungvari* [2010] QCA 134, distinguished

COUNSEL: The applicant appeared on his own behalf
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

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

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

[3] **McMURDO JA:** On 23 June 2016 the applicant pleaded guilty to several drug offences which were charged over three indictments and a number of summary offences. He was then sentenced. The highest of the sentences was a term of five years imposed for trafficking in methylamphetamine. This is an application for leave to appeal against that sentence. In the application as filed, the grounds were said to be that the sentence was manifestly excessive and that the judge erred by not considering the applicant's relevant mitigating circumstances. As I will discuss, in arguing his own case in this Court the applicant has made some further criticisms of the sentence.

[4] Although only the five year term for trafficking is challenged, it is necessary to consider the applicant's criminality overall and to consider this sentence in the context of the other sentences which were then imposed. On the first (in time) of the indictments was a count of the possession of methylamphetamine in a quantity exceeding 2 grams. The quantity was 5.673 grams containing 4.259 grams of pure methylamphetamine. The applicant accepted that he was in possession of the drug at least in part for a commercial purpose. For that offence he was sentenced to a term of two years' imprisonment.

[5] Next there was an indictment which charged him with 10 counts of the supply of methylamphetamine and one count of the possession of $300 as property obtained from supplying methylamphetamine. On each of the supply counts, he was sentenced to a term of 18 months' imprisonment and on the other count, a term of six months' imprisonment.

[6] The third indictment charged him with the trafficking offence and with another count of supply, the drug in that case being cocaine, for which he was sentenced to a term of 18 months' imprisonment.

[7] The terms on the first and second indictments were ordered to be served concurrently with one another. The two terms from the third indictment were ordered to be served concurrently with each other but cumulatively upon the sentences imposed on the first and second indictments. A total of 544 days of pre-sentence custody, served from 17 December 2014 until 22 June 2016, was declared as time served "in respect of the sentences of imprisonment".

[8] The judge fixed the parole eligibility date at 17 December 2018, which he noted would be four years from when the applicant went into custody and which he said represented a non-parole period of 80 per cent of the five year sentence for trafficking. That sentence was subject to the then provisions of s 5(2) of the *Drugs Misuse Act* 1986 (Qld) (the DMA), which required that the court "make an order that the person must not be released from imprisonment until the person has served a minimum of 80% of the prisoner's term of imprisonment for the offence."

[9] On each of the summary offences a conviction was recorded but no further penalty was imposed.

**The parole eligibility date**

[10] Although the submissions of neither party raised the question, it seemed to the Court that there may have been an error in the structure of the sentence. The Court received further submissions on the question and it is convenient to discuss it before going to the applicant's arguments.

[11] From his reasons and from what he said in pronouncing the orders, it was clearly his Honour's intention to impose a period of imprisonment of seven years, quantified by the addition of the two year term (the highest of the terms imposed on the first and second indictments) and the five year term (the higher of the terms imposed on the third indictment). His intention was that the applicant should be eligible for parole after serving four years of that period, which was declared to have commenced on 17 December 2014.

[12] In ordering that some sentences be cumulative upon others, it was necessary for the judge to identify which sentences would be served before others commenced. The power to accumulate sentences is conferred by s 156 of the *Penalties and Sentences Act* 1992 (Qld) (the PSA) which provides:

> "156 Cumulative orders of imprisonment
>
> (1) If—
>
> (a) an offender is serving, or has been sentenced to serve, imprisonment for an offence; and
>
> (b) is sentenced to serve imprisonment for another offence;
>
> the imprisonment for the other offence may be directed to start from the end of the period of imprisonment the offender is serving, or has been sentenced to serve.
>
> (2) Subsection (1) applies whether the imprisonment for the first offence is being served concurrently or cumulatively with imprisonment for another offence."

[13] The power to order a cumulative term exists in the circumstance where at the time that a sentence of imprisonment is being imposed, the offender is already serving or has been sentenced to serve imprisonment for another offence or offences. The power under s 156(1) is to direct that the sentence then to be imposed start from the end of the period of imprisonment which the offender is already serving or has already been sentenced to serve.

[14] In the present case, the judge first pronounced the sentence of two years' imprisonment on the earliest of the indictments. He then pronounced the sentences on the second of the indictments before ordering that the sentences upon the two indictments be served concurrently with each other. At that point, in the terms of s 156(1), the applicant was an offender who had been sentenced to serve imprisonment for an offence. His Honour then pronounced the sentences upon the third indictment by saying the following:

> "In respect of the count 1 on the new indictment presented today, namely trafficking in dangerous drug, you are convicted and sentenced to five years' imprisonment. On count 7 of that indictment, you are convicted and sentenced to 18 months'

> imprisonment. I order those sentences of imprisonment be served concurrently on each other but cumulatively on the sentences of imprisonment that I imposed for the indictable offences, indictment numbers 65 of 2015 and 781 of 2015."

[15] The verdict and judgment record is in error in duly recording those orders. At one point it records that the two year sentence was to be served "cumulatively with [the third indictment]". At another point, it records that the sentences upon the third indictment were to be served "cumulatively with those imposed in respect of the [earlier indictments]". These entries do not record the sequence of the sentences. The error could be cured under the slip rule, namely r 62(5) of the *Criminal Practice Rules* 1999 (Qld), if that was the only matter to be corrected.

[16] A consequence of these orders was that the five year term, as a term which was cumulative upon the terms imposed under the first and second indictments, could not commence until those terms had been served. In other words the five year term was not to commence until 17 December 2016.

[17] The power of a sentencing court to make an order relating to a person's release on parole derives from s 160B to s 160D of the PSA.[1] A sentencing court cannot fix a date under those provisions that reduces the minimum period of imprisonment an offender must serve under certain provisions of the *Corrective Services Act* 2006 (Qld) (the CSA), including s 182A(3).[2] Section 182A then provided as follows:

> "182A Parole eligibility date for prisoner serving term of imprisonment for other particular serious offences
>
> (1) This section applies to a prisoner who is serving a term of imprisonment for a drug trafficking offence.
>
> (2) Also, this section applies to a prisoner who is serving a term of imprisonment, other than a term of imprisonment for life, for an offence against the Criminal Code, section 314A.
>
> (3) The prisoner's parole eligibility date is the day after the day on which the prisoner has served—
>
> (a) if the prisoner is serving a term of imprisonment for a drug trafficking offence—80% of the term; or
>
> (b) if the prisoner is serving a term of imprisonment for an offence against section 314A—the lesser of the following—
>
> (i) 80% of the term;
>
> (ii) 15 years.
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> (4) However, if a later parole eligibility date is fixed for the period of imprisonment under the *Penalties and Sentences Act 1992*, part 9, division 3, the prisoner's parole eligibility date is the later date fixed under that division.

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1 s 160A(2) of the PSA.

2 s 160A(5) of the PSA.

(5) This section is subject to section 185."

By s 160A(5) of the PSA, a court cannot fix a date for the offender's release on or eligibility for parole that reduces the minimum period of imprisonment which the offender must serve under s 182A(3).

[18] It follows that the sentencing judge was constrained by the then legislation to make an order that the applicant not be released on parole before he had served 80 per cent of the term imposed for the trafficking offence. This order was beyond the court's power, because it provided for the applicant's eligibility for parole, on a date which was at the half-way mark of that term, 17 December 2008.

[19] The outcome which his Honour clearly intended could have been achieved by reversing the order of the accumulation of the sentences. The terms imposed for the offences on the first and second indictments could have been made cumulative upon those terms imposed for the trafficking offence and the other offence on the third indictment. Other than s 182A(3), there was no other provision which relevantly constrained the court in this case. By the five year term being served first, from 17 December 2014, the parole eligibility date of 17 December 2018 would have satisfied s 5(2) of the DMA and s 182A of the CSA.

[20] As I will now discuss, the applicant's arguments against his five year sentence should not be accepted. But because of that structural flaw, it will be necessary for this Court to re-sentence the applicant in the way which I have just described. That would not disadvantage the applicant, as his parole eligibility date will remain unchanged at 17 December 2008 and his period of imprisonment will remain at seven years.

**The facts of the offences**

[21] The facts were undisputed and were set out in a schedule tendered at the sentencing hearing. The facts of the possession charge, for which the two year term was imposed were as follows. In November 2013 the applicant, when stopped in his car, was found to be in possession of $3,370 in cash and the methylamphetamine within seven clip seal bags. He admitted that $300 of the money was gained from selling drugs. There were text messages on his mobile phone evidencing his sales.

[22] That evening he was interviewed by police. He said that he was addicted to methylamphetamine and that he was selling drugs to pay for his habit. He said he had sold methylamphetamine to 10 friends over the past four or five months. Those admitted transactions became the subject of the 10 counts of supply. The $300 which he admitted had come from drug sales was the subject of the count of possession of property obtained from supplying a dangerous drug.

[23] The period of the trafficking was from 13 June 2014 to 18 December 2014. He trafficked at a wholesale and retail level. Two co-offenders, Bailey and Geddes, worked under him in the business although they also had their own customers. The applicant was in custody in August and September 2014, but he managed to continue his business by giving instructions from the jail to Geddes. The prosecution submitted that the applicant must have had a significant trafficking operation for it to be worth his while to continue it while he was in custody, when he rang Geddes 50 times and rang Bailey 23 times about the business. He was recorded telling Geddes to pass on messages to customers who owed drug debts, threatening violence to them.

[24] In addition to Bailey and Geddes, the applicant used four other persons to sell methylamphetamine for him. During his period of trafficking he was recorded as saying that customers owed him amounts such as $20,000 and $30,000 and that he was threatening them with violence to recover the debts. Other recorded conversations evidenced his intention, late in the trafficking period, to be involved in production of methylamphetamine.

[25] It is unnecessary to detail the facts of the summary offences. They included some minor drug offences, traffic offences, possession of items such as knives and other weapons, offences of dishonesty and breaches of bail.

[26] The applicant was aged 50 to 51 years at the time of the offending and was 53 years when sentenced. He had a relevant criminal history in three States which had commenced in 1983. There were prior convictions for drug offences, weapons offences and breaches of bail. But the sentencing judge said that although he did have a criminal history, the applicant had been "a largely law abiding citizen for many years" and that "[p]erhaps the explanation of the involvement with methylamphetamines does provide some understanding as to why you engaged in such significant illegal activity over this period of time."

**The sentencing hearing**

[27] The applicant was sentenced at the same time as his co-offenders Bailey and Geddes. Bailey was convicted on her plea of guilty of one count of trafficking, four counts of supplying a dangerous drug and 15 summary offences. The judge found that her involvement in the trafficking enterprise was less than that of the applicant although her involvement "was of a significant magnitude." She became a participant because of difficult financial circumstances and she was addicted to drugs. She was sentenced to four years' imprisonment on a trafficking count and 18 months' imprisonment on each of the counts of supply, those sentences to be served concurrently. The sentences were suspended after 12 months with an operational period of four years.

[28] Geddes pleaded guilty to one count of trafficking, one count of possessing a dangerous drug and two summary offences. His trafficking, whilst over a shorter period than that of the applicant and Bailey, was described by the judge as being of a high level. He was effectively running a business on behalf of the applicant whilst the applicant was in custody. The judge accepted that Geddes had participated because he needed a means of repaying a large debt. Geddes was addicted to drugs. On the trafficking count he was sentenced to four years' imprisonment and on the possession count, one year of imprisonment, the sentences to be served concurrently. The sentences were suspended after serving nine months with an operational period of four years.

[29] The applicant's counsel began his submissions to the sentencing judge by saying that there should be sentences of the order of those which were ultimately imposed. And he submitted that the two year sentence should be made cumulative upon the five year term for trafficking. He confirmed that that would represent "an overall head sentence of seven years, to do a minimum of four years". But at the end of his submissions, the applicant's counsel said that his Honour "should look favourably upon imposing an overall sentence of five years with a suspension at 20 months or, say, two years" adding that "[t]hey're his instructions. Your Honour has my submissions on the way that, perhaps, your Honour might be able to deal with it." This was then followed by an address by the applicant himself, in which he

expressed his remorse, referred to his addiction and claimed that he was "never in it for the money". He said that having been in jail for 554 days he was rehabilitated and drug free.

**The sentencing judge's reasons**

[30] The judge referred to the applicant's pleas of guilty which he said were timely and indicated a level of co-operation. He accepted that the applicant was remorseful and had committed the offences "in the grip of a very significant drug addiction." However his Honour found that the offending went beyond that of a person just trying to fund their addiction. He described the trafficking enterprise as a sophisticated operation over a period of time, involving the use of threats and intimidation. He remarked that the applicant had available to him weapons to carry out those threats.

[31] His Honour said that the summary offences indicated "the sheer array of the criminal behaviour" which the applicant had engaged in over an extended period of time with scant regard for the law or his obligations under orders which had been made.

[32] His Honour referred to the complicating factor of the requirement of a non-parole period of 80 per cent for the trafficking sentence. He found that the applicant was not an appropriate candidate for a suspended sentence. Because the 80 per cent rule would apply, his Honour said that he would take that into account in "tempering" the sentence.

[33] His Honour referred to the steps taken by the applicant to address his offending behaviour and the applicant's genuine desire to change his ways.

[34] His Honour also had regard to the totality principle without saying that this had significantly affected the overall period of imprisonment. The sentences were then pronounced.

**The applicant's arguments**

[35] The first of the grounds of the proposed appeal is that the sentence of five years was manifestly excessive. The applicant cited *R v Ungvari*,[3] *R v Clark*[4] and *R v Briggs*.[5]

[36] In *Ungvari*, that applicant pleaded guilty to one count of unlawfully trafficking in methylamphetamine over a period of three months and eight counts of the supply and two counts of possession of that drug. He also pleaded guilty to offences of serious assault on police officers. There were further offences which were drug related and an offence for the possession of a weapon, all of which had been committed more than a year before the period of the trafficking. The primary judge imposed a sentence of seven and a half years' imprisonment for the trafficking offence. He imposed a cumulative sentence of six months for an unlawful possession of methylamphetamine which had occurred after the trafficking period. There were other concurrent terms imposed with the net result of a period of eight years' imprisonment with a parole eligibility at a point close to three years and two months. White JA (with whom McMurdo P and Muir JA agreed) said that as a matter of general practice in this jurisdiction, a plea of guilty is normally recognised

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3 [2010] QCA 134.
4 [2016] QCA 173.
5 [2012] QCA 291.

by a parole eligibility at the one-third mark of a sentence,[6] but that in this case the eligibility for parole would be after serving nearly 40 per cent of the sentence. The court varied the sentence so as to provide a parole eligibility date after two years and eight months. Accepting for the moment that the offending was similar to that of the present case, it may be observed that the overall period of imprisonment was higher and that the non-parole period was lower, because that was not a case under the subsequently enacted s 5(2) of the DMA.

[37] *Briggs* was also a case which preceded the 80 per cent rule under s 5(2). That offender pleaded guilty to trafficking in methylamphetamine over a nine month period, for which he was sentenced to eight years' imprisonment with a parole eligibility date fixed after serving one-third of his sentence. This Court held that the sentence was not manifestly excessive. He was a man in his forties with an extensive criminal history. He was an addict. Again it may be observed that his head sentence was higher but the non-parole period was lower because this was before the enactment of s 5(2).

[38] In *Clark*, an offender who had pleaded guilty to trafficking in methylamphetamine was sentenced to three years with an order that she be released on parole after serving 80 per cent of the sentence. This was a case affected by s 5(2). It was said by the President, with the agreement of Morrison JA and North J, that she was not a suitable candidate for a suspended sentence. She had a criminal history of drug offences. Her period of trafficking was about two and a half months. This was less than half of the period of the present applicant's trafficking. And of course in his case there is the aggravating circumstance that for some of that period he conducted the enterprise from jail. The fact that this Court refused to disturb the sentence in *Clark* does not indicate that a higher sentence in her case would have been impermissible.

[39] The respondent in this Court referred to *Briggs* and also *R v Reid*,[7] *R v Barton*[8] and *R v Hunt*.[9] In the last of those cases the offender pleaded guilty to charges which included trafficking in methylamphetamine over a five month period and producing the drug within that period. He was sentenced to seven years' imprisonment on the trafficking offence and to lesser concurrent sentences on the remaining drug offences. He was sentenced to a cumulative term of 12 months for unlawful possession of a motor vehicle. His parole eligibility was fixed at one-third of the eight year period. Again the case is an example of a higher head sentence and shorter non-parole period than in the present case. It confirms the correctness of the sentencing judge's reasoning here that a term of five years for the applicant's trafficking reflected an allowance for the impact of s 5(2).

[40] In *Reid*, the applicant received a term of five years and nine months for trafficking in this drug over a period of less than two months. There were other concurrent sentences imposed. A parole eligibility date was fixed after effectively a little less than two years three months. The head sentence was higher there than in the present case although the period of trafficking was relatively short.

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6 [2010] QCA 134 [30].
7 [2013] QCA 190.
8 [2006] QCA 367.
9 [2016] QCA 297.

[41] In *Barton*, the applicant pleaded guilty to one count of trafficking in methylamphetamine and several counts of supplying the drug together with some other offences. She was sentenced to seven years' imprisonment on the trafficking count and was not further punished on the supply counts, they being particulars of the trafficking. Otherwise she received shorter concurrent terms. The sentencing judge recommended that she be eligible for parole after two years and three months. The trafficking was over a period of two and a half months. It was at a lower level than that in the present case. This Court held that the sentence was excessive because the recommendation for parole eligibility, at about the one-third mark, did not adequately recognise the applicant's impressive and successful efforts at rehabilitation since the birth of her child. The sentence was varied so as to provide an eligibility for parole after 18 months. Again, that case was not affected by s 5(2).

[42] From these cases it fairly appears that the term of five years here was quantified with due allowance for the impact of s 5(2). The trafficking was engaged in only partly to support the applicant's drug habit. His conduct persisted even during a period in custody. Whilst his turnover cannot be determined, he was trading at such a level that he was supplying on credit in amounts of the order of $20,000 and $30,000. He employed others in his enterprise. He was both a wholesaler and retailer. There were the mitigating circumstances to which his Honour referred: his plea of guilty and his efforts towards rehabilitation. But the sentence cannot be regarded as manifestly excessive. And what I have just said is sufficient to dispose of the applicant's other stated ground of appeal which is that his mitigating circumstances were not given sufficient weight.

[43] In his written and oral submissions the applicant challenged the sentence on some further grounds. One was that there was a disparity between his sentence and those imposed upon Bailey and Geddes. Each of those offenders worked under his direction. His level of trafficking warranted a substantially higher sentence than in either of their cases. And his extensive offending, beyond the trafficking, further distinguished his case from theirs. They were each some 20 years younger than the applicant and with less serious criminal histories. Bailey was pregnant when sentenced and was sentenced as a retailer only. There was no disparity in these sentences.

[44] There was also a complaint that this sentence was made cumulative upon others, a complaint which would also be made if the sentence was restructured by making the others cumulative upon this sentence. It is sufficient to say that the imposition of cumulative sentences for the outcome intended by the sentencing judge was within his discretion. The offences upon the other indictments were quite distinct from those upon the third indictment and justified an order for cumulative sentences although, as his Honour intended, the non-parole period would be unaffected.

[45] To the extent that the applicant suggested that his sentence offended the totality principle, that claim could not be accepted. Lastly, the applicant further claimed that, in fact, he was only trafficking at a "street level/borderline wholesale level". But the agreed facts supported the judge's description of his trafficking as being at a retail and wholesale level.

**Conclusion and order**

[46] Each of the applicant's arguments should be rejected. But it is necessary to restructure the orders made by the sentencing judge as I have discussed. I would order as follows:

(1) Grant leave to appeal.

(2) Allow the appeal.

(3) Set aside the order that the sentences for the counts on Indictment 666 of 2016 be cumulative upon the other sentences imposed on 23 June 2016.

(4) Substitute an order that the sentences for the counts upon Indictments numbered 65 and 781 of 2015 be cumulative upon the sentences imposed for the offences on the Indictment 666 of 2016.