SUPREME COURT OF QUEENSLAND

CITATION:	*R v JZ* [2017] QCA 65
PARTIES:	**R** **v** **JZ** (applicant)
FILE NO/S:	CA No 367 of 2016 SC No 1522 of 2016 SC No 856 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 5 December 2016
DELIVERED ON:	18 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2017
JUDGES:	Sofronoff P and Gotterson JA and Douglas J Judgment of the Court
ORDER:	**The application is refused.**
CATCHWORDS:	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 an 18 month period and six other drug related offences, including producing methylamphetamine, possession of a weapon and possession of various dangerous drugs – where the applicant was sentenced to six years for the drug trafficking offence and two years or less for each of the other indictable offences, served concurrently – where the applicant also pleaded guilty to 13 summary charges including driving without a licence whilst disqualified by a court order – where the applicant was disqualified from holding or obtaining a driver's licence for a period of four years – where the sentencing judge took into account the other summary offences in sentencing the indictable offences, but no further penalty was imposed – where the applicant contends the sentencing judge made errors of fact in the sentencing remarks – where the applicant disputes an inference of the sentencing judge that the appellant's traffic history showed a "complete disregard of the law" – where the applicant argues that the danger to which he has been exposed by his willingness to cooperate

with authorities was not taken into account by the sentencing judge – where the applicant's trial counsel had broadly agreed with the sentence which was eventually imposed – whether the sentence was manifestly excessive

R v Gladkowski (2000) 115 A Crim R 446, [2000] QCA 352, cited

COUNSEL: The applicant appeared on his own behalf
P J McCarthy for the respondent

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

[1] **THE COURT:** The applicant pleaded guilty to the following charges:

Count 1 - Trafficking in dangerous drugs, namely methylamphetamines;

Count 2 - Producing a dangerous drug, namely methylamphetamine;

Count 3 - Possession of a category R weapon, namely a stun grenade;

Count 9 - Possession of a dangerous drug, namely methamphetamine in a quantity exceeding 2g;

Count 10 - Possession of a dangerous drug, namely 3,4-methylenedioxymethamphetamine;

Count 11 - Possession of a dangerous drug, namely heroin;

Count 12 - Possession of a dangerous drug, namely cannabis.

[2] The applicant also pleaded guilty to 13 summary charges which it is not necessary to set out in detail; they concerned possession of property suspected of being the proceeds of an offence under the *Drugs Misuse Act*, several counts of possession of dangerous drugs or controlled or restricted drugs, unlawful possession of weapons and explosives and driving whilst disqualified and other associated offences.

[3] The offence of trafficking was committed between 28 February 2013 and 27 September 2014. The production of methylamphetamine took place on a date unknown between 31 December 2013 and 27 September 2014. The other charges were committed between 28 February 2013 and 27 September 2014. The other offences were committed on 26 September 2014.

[4] The learned sentencing judge sentenced the applicant to a period of imprisonment of six years with a non-parole period of two and a half years for Count 1, the trafficking offence. On Count 2 he was sentenced to a term of imprisonment of two years; on Count 3, a sentence of 12 months; on Count 9, a sentence of two years. On Count 10 the applicant was sentenced to imprisonment for six months. For Count 11 he was sentenced to imprisonment for 12 months. For Count 12 the applicant was sentenced to imprisonment for three months. He was disqualified from holding or obtaining a driver's licence for a period of four years. Otherwise the summary offences were taken into account in the sentences imposed for the indictable offences.

[5] The learned sentencing judge declared that 770 days spent in pre-sentence custody would be declared as time already served under the sentence. The result was that, taking into account one month of custody which was not declared (for reasons not relevant for present purposes), the applicant's parole eligibility date is 27 April 2017.

[6] The applicant was born on 2 November 1957. He was 59 years old at the time of sentence. He has a criminal history for drug offences. Relevantly, on 27 September 1995 he was convicted of trafficking in a dangerous drug and sentenced to a term of imprisonment of four and a half years with a recommendation that he be considered for parole after serving 18 months. While serving that sentence he was convicted, on 1 May 1997, of procuring the supply of a dangerous drug whilst a prisoner. He was sentenced to a term of imprisonment of five years but this was wholly suspended for a period of five years. On 27 March 2001, after his release, he was convicted of producing dangerous drugs, possessing instructions for the production of dangerous drugs and possessing dangerous drugs. He was sentenced to a term of imprisonment totalling three years and the period of imprisonment of five years that had been suspended was invoked. A number of summary offences were dealt with on the same occasion. It is not necessary to detail them; they were all connected with the possession or use of drugs and included charges relating to unlawful possession of weapons.

[7] The applicant also has a bad traffic history. Apart from numerous speeding and like offences, which are of no relevance for present purposes, the applicant's licence has been suspended or cancelled on seven occasions. He has been convicted of driving without a licence or while disqualified on four occasions.

[8] The applicant came to the attention of police and, from 28 May 2014, his telephone calls and messages were intercepted by them. In August 2014 listening devices and optical devices were installed into his home. These revealed the applicant going about the business of trafficking in methylamphetamine. They recorded his discussions with an accomplice whom he engaged to deliver drugs on his behalf to his customers. He was seen regularly smoking methylamphetamine with some of these customers and discussing with others his production of the drug and his accumulation of the necessary precursor chemicals. A warrant was executed at his home and at a storage shed which was used by him. Cash and drugs were found. Just under 25 grams of a substance was located; analysis showed that the content of pure methylamphetamine in the substance ranged from 64 per cent to 74 per cent. In addition the searches found 1.245 grams of heroin, a tablet of MDMA and four grams of cannabis. Other drug paraphernalia were also located. Equipment used to produce methylamphetamine was found and precursor drugs and instructions for the production of methylamphetamine were discovered. A stun grenade, a .303 rifle and a quantity of commercial fireworks were found in the storage shed along with a quantity of stolen property.

[9] The applicant cooperated with police. In a statement of facts that was tendered by consent at the sentence hearing it was said that he had made a "full and frank confession to trafficking in methylamphetamine over 18 months". He obtained his supply of drugs from a man, whom he named, and on-sold the drugs for a profit of between $3,000 and $4,000 an ounce.

[10] The result of his confession was that police were able to charge the applicant in respect of a period of trafficking greater than they would have been able to prove

otherwise. In addition, he was prepared to give evidence against his alleged supplier.

[11] Although the applicant initially pleaded not guilty, the convictions were the result of his ultimately pleading guilty to all charges. There was some delay in those pleas which was explained by his counsel as due to difficulties which the applicant had encountered with his first legal representatives, a delay in obtaining fresh representation and further delay in those solicitors obtaining the necessary documents from the earlier representatives.

[12] At the sentence hearing, it was urged in mitigation on his behalf that he suffered from a spinal injury which causes severe stabbing pain if left untreated. In addition, it was submitted that while in custody awaiting sentencing, he was assaulted by other prisoners.

[13] His counsel submitted that the applicant's involvement in drug trafficking resulted from his agreeing to take on a liability for a $10,000 debt that his eldest son had incurred to third parties. His trafficking was unprofitable because of losses suffered in an attempt to produce methylamphetamine using material supplied by the person who otherwise supplied him with drugs for resale and also for other reasons. The failure to produce methylamphetamine resulted in a further debt which the applicant was obliged to repay and he trafficked in order to pay these liabilities.

[14] The Crown Prosecutor referred to four decisions which she submitted were comparable. These were *R v Ikin*,[1] *R v Prendergast*,[2] *R v Briggs*[3] and *R v Cant*.[4] On the basis of these authorities she submitted that the starting point for consideration of a sentence was imprisonment for a term not less than eight years. Counsel for the applicant did not contest the Crown Prosecutor's analysis of these authorities. He agreed that they indicated that a period of imprisonment of eight years was "in the range". However, he submitted that, when taking into account the peculiar factors in those cases, a sentence of eight years' imprisonment was at the top of that range. He submitted that a "range of seven to eight might be appropriate in [his] client's case".

[15] The learned sentencing judge took into account that the trafficking was of a Schedule 1 drug for a period of 18 months. He observed that the trafficking was not sporadic but was consistent over that period and that the applicant's motive to traffic in drugs was a commercial one, albeit that the initial motivation was to assist his son in discharging a debt. His Honour took into account the substantial profits made over this period (although the profits were not entirely realised by reason of other factors). He also observed that the trafficking came to involve the production of drugs as well. He took into account the applicant's criminal history which he described as a serious one characterised by substantial previous sentences of imprisonment in relation to drug offences.

[16] We would respectfully agree with his Honour's observation that it is evident that these periods of incarceration have not deterred the applicant from reoffending.

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1 [2007] QCA 224.
2 [2012] QCA 164.
3 [2012] QCA 291.
4 [2016] QCA 52.

[17] The learned sentencing judge also, correctly in our view, observed that the applicant's traffic history demonstrated a disregard for the law. In this respect, we are referring particularly to the convictions for unlicensed driving. Of course, that disregard can be gleaned from the history of drug offences themselves even in the absence of the traffic history.

[18] The learned trial judge took into account the pleas of guilty although he observed that they were "rather late". Nevertheless, the pleas of guilty included pleas to offences that could otherwise not have been proved to the full extent of the charges that were ultimately laid. His Honour took into account the applicant's cooperation with police, which included incriminating himself as well as giving information about others. His Honour took into account that the applicant had promised to cooperate further with authorities including giving evidence.

[19] His Honour was of the opinion that a sentence of eight years would have been appropriate without these mitigating factors. This is consistent with the applicant's counsel's submission. In that event, his Honour would have ordered that the applicant be eligible for parole after four years.

[20] However, taking all of the mitigating factors into account, his Honour sentenced the applicant to imprisonment for six years with parole eligibility after two and a half years.

[21] The applicant raises six points in support of his application.

[22] *First*, he contends that the Crown Prosecutor was factually incorrect in submitting to the learned sentencing judge that the applicant had been "found on two occasions with large quantities of pseudoephedrine". The applicant says that there was only one quantity of pseudoephedrine and not two. He points out that in his sentencing remarks, the learned sentencing judge referred to this offence as one in which the applicant was "in possession of drugs". The applicant points out correctly that he was not in possession of drugs; the substance was pseudoephedrine which is used to make methylamphetamine.

[23] Whether the substance that the applicant unlawfully possessed was a precursor chemical or "drugs" and whether there was one quantity or two quantities is, in our opinion, of no moment. The sentencing judge rightly remarked that the offences were grave ones when considered collectively. In particular, he took into account that they had been committed while the applicant was on parole and while he was subject to a suspended sentence.

[24] There is no substance in the applicant's first contention.

[25] *Secondly*, the applicant points out that the learned sentencing judge had inferred that a taser that had formed the basis of a prior conviction in 2013 was "part and parcel of your involvement in drugs". The applicant contends that the magistrate who sentenced him on that occasion accepted a statement that another person actually owned the weapon. The applicant correctly submitted that it would be wrong to infer that he had the taser in order actually to threaten or to assault people. However, in our view, his Honour did not draw that inference. The offence was merely regarded by his Honour as in keeping with the applicant's conduct of a criminal trade.

[26] *Thirdly*, the applicant complains that the learned sentencing judge ought not have inferred that the applicant's traffic history showed that he had a "complete disregard

of the law". This is because, the applicant contends, on the last occasion for which he was convicted of driving whilst disqualified he was on his way to hospital. In that sense, he was compelled to break the law.

[27] However, that is beside the point. The applicant does indeed have a "shocking traffic history"; he has lost his licence many times and he has been convicted on a number of occasions of driving while not authorised to do so. The observation that his traffic history shows a disregard of the law on his part was, in our view, accurate. Indeed, it adds little to the more serious prior convictions which, without more, demonstrate the same thing.

[28] *Fourthly*, the applicant says that the assault he suffered whilst in prison has left him partly deaf in one ear with accompanying tinnitus. He has an aneurysm in his head and suffers pain as a result.

[29] *Fifthly*, the applicant says that the prosecutor incorrectly said that he was being kept in protective custody when that is not true. Indeed, the applicant says that he has been exposed to successive threats against him.

[30] *Sixthly*, the applicant points out that his supplier was connected to influential criminal gangs. This makes him a dangerous enemy.

[31] The point the applicant makes based upon these three matters is that the danger to which he has been exposed by his willingness to cooperate should be taken into account as a mitigating factor. The learned sentencing judge did not expressly refer to the existence of a risk of retribution arising from the applicant's cooperation as a mitigating factor. However, in our view it was not necessary for him to do so. It is well established that the discount that is applied to a sentence to take into account a convicted person's willingness to cooperate with authorities is a discount that is given because of, among other things, "the risk of incidental retributive violence … whilst incarcerated" and because of the position of danger such a person finds himself or herself in: see eg *R v Gladkowski*.[5] It was to this principle to which the learned sentencing judge referred when he observed that the applicant was "deserving of the discount which applies to persons who undertake to give evidence". His Honour referred to *Gladkowski*.

[32] In our view, for these reasons, the applicant has not made out any grounds to justify a grant of leave to appeal against his sentence and the application should be refused.

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5 [2000] QCA 352; (2000) 115 A Crim R 446 at 447 per Pincus and Thomas JJA, Atkinson J.