SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barton* [2006] QCA 367
PARTIES:	**R** **v** **BARTON, Kellie Marie** (applicant/appellant)
FILE NO/S:	CA No 25 of 2006 SC No 473 of 2005 SC No 855 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2006
JUDGES:	McMurdo P, Jerrard JA and Mullins J Separate reasons for judgment of each member of the Court, McMurdo P and Jerrard JA concurring as to the orders made, Mullins J dissenting
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to the limited extent of recommending that the applicant be eligible for parole after serving 18 months imprisonment instead of two years and three months**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN GRANTED - GENERALLY - where applicant pleaded guilty to trafficking and supplying a dangerous drug and possessing things used in connection with producing dangerous drugs - where applicant's effective total sentence was seven years imprisonment with eligibility for parole after two years and three months - where applicant was previously drug-addicted but reports and references indicate that her efforts at rehabilitation have been successful - whether recommendation for parole eligibility after two years and three months adequately reflected many of the significant mitigating features of this case - whether the

sentence was manifestly excessive in all the circumstances

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - FRESH EVIDENCE - GENERAL PRINCIPLES - where this Court was asked to consider new evidence in the form of a psychiatric report attesting to the extent of the applicant's drug addiction - whether this report should be admitted on appeal to avoid a miscarriage of justice

R v Maniadis [1997] 1 Qd R 593, applied
R v Postic [2004] QCA 301; CA No 151 of 2004, 19 August 2004, distinguished
Ratten v The Queen (1974) 131 CLR 510, cited

COUNSEL: A J Glynn SC for applicant/appellant
R G Martin SC for respondent

SOLICITORS: Robertson O'Gorman for applicant/appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** The applicant, Kellie Marie Barton, pleaded guilty in the Supreme Court at Brisbane on 6 January 2006 to an indictment containing one count of trafficking in methylamphetamine (count 1), seven counts of supplying methylamphetamine (counts 2 to 8) and one count of possession of pseudoephedrine for use in connection with the commission of the crime of producing dangerous drugs (count 9). She also pleaded guilty to three summary offences. She was sentenced to seven years imprisonment for the trafficking (count 1) and to no further punishment for the counts of supply (counts 2 - 8), which were particulars of the offence of trafficking. She was sentenced to a concurrent term of 12 months imprisonment for the possession charge (count 9) and to concurrent terms of six months imprisonment for each of the summary offences. The judge recommended that she be eligible for parole after two years and three months.

[2] She was 24 at the time of the offences, 26 at sentence and had a short criminal history: in 2000 she was fined for possession of utensils and failure to dispose of a needle and syringe and in 2001 she breached a fine option order.

[3] All the offences occurred during the period of the trafficking between 4 July and 22 September 2004. During that time the applicant sold methylamphetamine to an undercover police officer on the seven occasions each charged individually in counts 2 to 8. She sold her white powder weighing 118.473 gms and containing 26.608 gms of pure methylamphetamine with an average purity of 22 per cent for $14,700. On 21 September 2004 police executed a search warrant at her home and found amongst other things a plastic bag with eight plastic trays, each containing 15 tablets of Sudafed.

[4] The summary offences occurred on 2 September 2004 when police found her in possession of pseudoephedrine tablets, a hypodermic syringe and needle and property suspected of being tainted (a video camera, DVD player, laptop computer, motorbike helmet, diving equipment and two mobile phones). She had been charged with the summary offences when she committed counts 8 and 9.

[5] At sentence the applicant's then counsel referred to her long-standing drug problem in these terms. She was first introduced to cannabis when she was 14 years old and to methylamphetamine when she was 16. Over time her addiction worsened. She had a five year relationship with Steven Woods who was the father of her child born on 9 May 2005. Counsel tendered references which supported his contention that the applicant had been drug addicted but that since the birth of her child she had made successful efforts to rehabilitate. The applicant's mother provided a letter in which she stated that the applicant came from a loving family and had a good employment record with the Logan City Council for five years but slipped downhill when she became involved with the wrong crowd and drugs; since she became pregnant she had changed for the better and was now a wonderful mother who truly regretted her previous actions. Another reference from Miss Snelius, who had known the applicant since they were primary school students together, was in these terms:

> "In this time I have watched Kellie be introduced to drugs and crime by a previous boyfriend of hers. I witnessed Kellie become addicted to drugs and also witnessed Kellie being emotionally and physically abused by this person. I believe this began a downward spiral for Kellie and these circumstances paved the way for the time in jail she is now facing.
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> Since Kellie became pregnant last year I watched intently to see if she was going to change and it is in sincerity that I say that she has indeed changed.
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> Since having her child ..., I have watched Kellie become a responsible adult once again. Her home is always clean; [the child] is always looked after and is loved so much. Kellie seems so unlike the person I had grown accustomed to previously.
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> Kellie has acknowledged her past and her wrongdoings and is facing up to the crimes that she has committed."

[6] Her counsel also tendered pathology reports which demonstrated that on 17 November 2004 and on 16, 23 and 29 September 2005 and 1, 9 and 30 November 2005 she provided urine samples which when analysed were drug free.

[7] In his sentencing remarks the learned primary judge addressed the applicant and listed the factors which he considered mitigated the seriousness of her conduct:

> "You were only 24 years of age at the time of your offences, and I am told you were addicted to methylamphetamine ... The evidence of how far you were addicted is thin. There is some reference to it in the references which have been provided by you and I have been told that you were addicted from the Bar table.
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> I am prepared to sentence you on the basis that you were an addict and that your conduct was in part motivated by a craving to finance your habit. I am not prepared to infer that you were trafficking in the amphetamine solely for that reason. I was invited to infer that you were not motivated by a desire for profit. I reject that approach."

[8] Later his Honour referred to the references tendered on the applicant's behalf, noting:

> "The dominating theme among them is what a reformed person you are since the birth of your child in May last year. It is a great pity

> that you were not able to reform yourself and to rehabilitate yourself from your addiction before that event. The result of your conduct will be to deprive your child of your presence at a critical time in its life, and that is something that is simply down to what you did.
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> I accept that you have not displayed indicia of great wealth as a result of what you have done. But at the end of the sentencing process, I have to take into account the seriousness of what you were doing; you were trafficking in methylamphetamine. That is a drug which ruins people's lives. From your own experience as an addict you must know the insidious way it affects people. It not only ruins people's lives but it is the source of much crime in the community, crime related to offences of violence as well as offences of dishonesty. That is why the Parliament has provided such heavy penalties for trafficking in it. I must impose a sentence which will deter you from future conduct, but equally as importantly, will deter others from this sort of conduct. You cannot look after yourself at the expense of ruining the lives of other people."

[9] Mr Glynn SC who now appears for the applicant does not contend that, on the material before the primary judge, the effective sentence of seven years imprisonment with a recommendation for parole eligibility after two years and three months was manifestly excessive. He asks this Court to receive new evidence contained primarily in a report from psychiatrist Dr Fred Ian Curtis and also in medical and hospital records and in a report from Centrelink. Mr Glynn submits that this new evidence sets out the true extent of the applicant's addiction to methylamphetamine at the time of her commission of the offences; the failure to place this information before the sentencing judge has resulted in a miscarriage of justice because had it been before the judge he would have recommended parole eligibility after 12 or 18 months; as a result this Court in accordance with the principles set out in *R v Maniadis*[1] should receive the new evidence, grant the application for leave to appeal against sentence, allow the appeal and substitute a recommendation for eligibility for parole after 12 or 18 months.

[10] The respondent submits that this Court should not receive the new evidence and that in any case the sentence imposed was within the appropriate range.

[11] *Maniadis* makes clear that this Court has a discretion (although not one lightly exercised[2]) to receive evidence which was not before the sentencing judge to avoid a miscarriage of justice even if the evidence is not fresh within the meaning of that term in *Ratten v The Queen*.[3] In deciding whether this is an appropriate case in which to exercise that discretion it is necessary to consider the new evidence which the applicant wishes this Court to receive.

[12] As noted earlier, the applicant places primary reliance on the report of psychiatrist Dr Fred Ian Curtis. He examined the applicant on 31 March 2006, almost three months after her sentence. He interviewed her parents in May 2006. He describes the applicant as a most severe polydrug and psycho-stimulant addict. The scarring of her veins was as bad as he had seen in observing intravenous drug addicts over his 33 years of clinical practice. He described the applicant as potentially a bright,

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1 [1997] 1 Qd R 593.

2 Above, 596 - 597.

3 (1974) 131 CLR 510.

talented Indigenous woman who successfully completed a subsidized Indigenous traineeship with the Logan City Council. Her life was then taken over by a series of abusive, controlling drug-addicted males. She developed a severe addiction to methylamphetamine which rendered her an ambulant psychotic with psychosis induced by her addiction to methylamphetamine. Dr Curtis predicts that the applicant will be intelligent and compliant in her rehabilitation but will require supervision and psychiatric case management and relapse-prevention training plus psycho-educative attempts to encourage her on a learning course in life. This is especially so as the father of her child (Steven Woods) is adversely known to the criminal justice system as a drug addict and user.

[13] The other new evidence which the applicant asks this Court to receive does not independently take the applicant's case further but is generally supportive of Dr Curtis' report.

[14] Had Dr Curtis' report been before the sentencing judge it is unlikely that his Honour would have noted as he did that the evidence of her addiction to methylamphetamine was "thin". His Honour did not, however, sentence the applicant on that basis. The judge stated that he was sentencing her on the basis that she was an addict and that her conduct was in part motivated by a craving to finance her habit. His Honour referred to the references, the applicant's experience as an addict and her resulting knowledge of the insidious way that methylamphetamine affects people and ruins their lives. But the judge considered that in sentencing he had also to take into account the seriousness of her conduct in trafficking in methylamphetamine. Had Dr Curtis' report been before his Honour, I am not persuaded that he would have imposed a significantly different sentence or even necessarily an earlier recommendation for parole eligibility. Whilst Dr Curtis' report went into considerable technical detail and jargon, its description of the applicant's addiction was no more poignant than that contained in the letter from the applicant's mother or in Miss Snelius' reference. His Honour had a realistic appreciation of the applicant's addiction. It follows that the applicant has not persuaded me that this Court should receive the new evidence to avoid a miscarriage of justice.

[15] The applicant's story is tragic but one all too familiar in the criminal courts. Her efforts at rehabilitation and her early plea of guilty are commendable. She is fortunate to have the support of a loving family. The offence of trafficking in methylamphetamine, a schedule one drug which causes great social evil, is most serious. Her conduct warranted a salutary deterrent penalty. It was the more serious because she committed counts 8 and 9 after she had been charged with the summary offences in early September 2004: cf *R v Postic*.[4] Mr Glynn did not vigorously contend that the effective seven year head sentence was excessive. Whilst towards the high end of the range, it appropriately reflected the serious aspects of the applicant's trafficking in methylamphetamine. The recommendation for parole eligibility after two years and three months (about one-third of the head sentence) adequately reflected many of the significant mitigating features of this case including the plea of guilty: cf *Postic*.[5] But that recommendation did not in this case adequately recognize the applicant's impressive and apparently successful efforts at rehabilitation since the birth of her baby daughter. If she is to continue her

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4 [2004] QCA 301; CA No 151 of 2004, 19 August 2004.

5 Above, 5 and 7.

rehabilitation on her release from prison, even with the support of her family, she will need a lengthy period of intense community supervision and control such as that provided under a parole order. In all the circumstances pertaining here, the judge should have given a recommendation for eligibility for release on parole at a point earlier than one-third of the head sentence to properly recognize the applicant's efforts at and good prospects of rehabilitation; his failure to do so was an error and made the sentence as a whole excessive in all the circumstances. I would recommend that she be eligible for parole after serving 18 months of the sentence.

[16] I would refuse the application to adduce further evidence. I would grant the application for leave to appeal against sentence and allow the appeal to the limited extent of recommending that the applicant be eligible for parole after serving 18 months instead of two years and three months.

[17] **JERRARD JA:** I have read the reasons for judgment of the President. I respectfully agree with those reasons and the orders proposed by Her Honour.

[18] **MULLINS J:** I agree with the President's reasons for refusing the application to adduce further evidence. I am not persuaded, however, that the requirement for the applicant to serve two years three months of the sentence of seven years before being eligible for parole makes the sentence manifestly excessive.

[19] The learned sentencing judge took into account all the factors in favour of the applicant when imposing the sentence. In fact, the written submissions of senior counsel for the applicant expressly stated that the applicant could not complain about the head sentence or the recommendation on the material before the sentencing judge.

[20] The appropriate sentence for a specific offender in a particular case will usually fall within a range of possible sentences. The sentence imposed on the applicant in this matter for trafficking in methylamphetamine was not outside the range of possible sentences that would result from the exercise of a sound sentencing discretion. I therefore would dismiss the application for leave to appeal against sentence.