SUPREME COURT OF QUEENSLAND

CITATION:	*R v Atkins* [2007] QCA 309
PARTIES:	**R** **v** **ATKINS, Michael Ian** (applicant)
FILE NO/S:	CA No 141 of 2007 SC No 1078 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	25 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2007
JUDGES:	Holmes JA, Jones and Lyons JJ Separate reasons for judgment, each concurring as to the order made.
ORDER:	**Application for leave to appeal sentence refused**
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 REFUSED – GENERALLY – where applicant sentenced to six years imprisonment for trafficking a dangerous drug under the *Drugs Misuse Act 1986 (Qld)* – whether sentence manifestly excessive. *Drugs Misuse Act 1986(Qld)* s 5(a), s 9(a), s 9(b)(ii) *R v O'Brien* [2006] QCA 482; CA No 259 of 2006, 20 November 2006, considered *R v Taylor* [2006] QCA 459; CA No 156 2006, 10 November 2006, considered
COUNSEL:	M E Johnson for the applicant M R Byrne for the respondent
SOLICITORS:	Ryan and Bosscher for the applicant Director of Public Prosecutions (Queensland) for the respondent

JONES J: The applicant seeks leave to appeal against sentences imposed on him on 8 June 2007 in respect of three offences against the Drugs Misuse Act. The details are, (1) between 14 March 2004 and 21 April 2004 trafficking in methylamphetamine, six years imprisonment with a parole eligibility date after 2 years; (2) on 10 February 2006, possession of methylamphetamine, 18 months imprisonment; (3) possession of cannabis sativa, no penalty imposed but a conviction recorded.

As the second term of imprisonment was ordered to be served concurrently, this appeal is concerned only with the penalty imposed on the first offence - trafficking. The applicant was born on 21 April 1975 and was, at the time of these first offences, 32 years old. The circumstances of the trafficking were established by means of the intercepts of telephone calls between the applicant and an established drug dealer. The Prosecution alleged, and the applicant accepted, that he was, in fact, dealing in methylamphetamine. In the five week period covered by the indictment there were 21 intercepted conversations involving the applicant.

In this period, quantities of material which were estimated to involve, at least, 20 grams of methylamphetamine and said to be worth in excess of $60,000, were traded. The applicant both purchased and sold the drug in multiple ounce lots. He was correctly identified as a wholesaler. Other persons identified as the participants in the same

trafficking ring, had been dealt with at earlier dates. The respective penalties imposed on these persons were referred to by Wilson J, in her sentencing of a co-offender Khor Tran Ly, (No. 2 of 2006). He was the person with whom the applicant dealt. He was described as being at mid level in the hierarchy of drug dealing. He dealt with five persons. He was sentenced, after pleading guilty, to nine years imprisonment without any provision for early eligibility for parole. Another person at an equivalent level was similarly punished; Saled Elizade [2006] QCA 330.

One of the offenders, said to be higher up the trafficking chain (Omar-Noori) was sentenced after pleading guilty, to 13 years imprisonment with a serious violent offence declaration. Another co-offender (Townson), pleaded on an ex officio indictment to street level selling and was sentenced to five years imprisonment to be suspended after 12 months.

These sentences, properly put before the learned sentencing Judge, define the consideration of parity between co-offenders.

As well, separate cases which were said to be comparable, were considered. These were:

(1) Queen v Barton [2006] QCA 267, which concerned trafficking of 26 grams of methylamphetamine over two and a-half period, resulting in a head sentence of seven years imprisonment;

(2) R v Postic [2004] QCA 301, concerned trafficking and production of dangerous drugs, resulting in sentences of seven years and four years imprisonment respectively;

(3) Queen v Coleman [2006] QCA 442, trafficking approximately 20 ounces of methylamphetamine over a four month period where the Court of Appeal described the appropriate sentencing range as being between five years and seven years;

(4) Queen v Witherspoon [2003] QCA 58, trafficking in methylamphetamine as well as a number of other drugs over an 11 months period, sentenced to seven years, nine months imprisonment; and

(5) Queen v Donnelly and Corbic, initially sentenced to eight years imprisonment reduced on appeal to six years.

Based on those cases, the Prosecution suggested a range of six to eight years as the head sentence. Defence counsel, while suggesting a range of between five and seven years ultimately contended for a sentence of six years, with parole eligibility after two years to take into account matters personal to the applicant. The learned sentencing Judge appears to have accepted this contention.

Before this Court, the focus was on whether the parole eligibility period after two years imprisonment should be reduced in the sense that the learned sentencing Judge's discretion had miscarried in imposing such a period.

The applicant introduced two further cases for consideration by this Court. Queen v O'Brien [2006] QCA 482 where the accused pleaded guilty to trafficking in methylamphetamine and a number of other drugs over a 20 month period and when arrested had large quantities of various drugs in his possession which would suggest both wholesale and retail activity. He was sentenced to eight years imprisonment with parole eligibility after two years and eight months. Queen v Taylor [2006] QCA 459 where the accused pleaded guilty to trafficking in various drugs including cocaine and methylamphetamine over a three month period. He was sentenced to seven years and four months imprisonment for the trafficking charge with no early parole eligibility. The Court of Appeal allowed the appeal to the extent of fixing the parole date two and a-half years after sentence. In my view both these cases confirm the correctness of the penalty imposed below.

The Crown Prosecutor before us referred particularly to the case of the Queen v Grima [2000] QCA 105 which concerned trafficking in methylamphetamine when the drug was listed as a schedule two drug. That offender was sentenced to four years imprisonment with no parole recommendation which means that he would have become eligible after serving two years imprisonment. He had no previous convictions. The quantity of drug which he was involved in trafficking was two and a-half ounces over a short period. His activities involved less intensity than that evidenced by the material against the applicant.

The applicant has a limited criminal history. The only prior offences that invited comment were his offending as a 19 year old in the possession and supply of Cannabis sativa and his being in unlawful possession of weapons in 2006. The drug offences attracted a penalty of 200 hours of community service. The firearms offence related to his possession of three plastic pellet guns and attracted a fine of $750. Neither of these offences impacted significantly on the sentence which was imposed and now being considered.

However, there was not put before the Court any compelling ameliorating factors such as his personal rehabilitation or cessation of use of drugs or co-operation with the police as would invite any greater consideration for early eligibility than was allowed in this case. The applicant had a troubled teenage period and a reasonable work record despite being a user himself of methylamphetamine for a 12 to 18 month period. The fact that he was found to be in possession of a quantity of that drug as well as of cannabis sativa two years after the trafficking suggests there was an ongoing problem.

The learned sentencing Judge had to balance the requirements of parity in sentencing the applicant as a co-offender, sentencing him within an identifiable range and taking into account aspects personal to him. Considering all of these matters it cannot be said, in my view, that the sentence imposed was manifestly excessive.

In my view the application should be refused.

HOLMES JA: I agree. So far as the question of ameliorating circumstances bearing on parole eligibility is concerned, while it is true, as counsel for the applicant contended, that there is no evidence of continued trafficking after the 38 day period covered by the telephone intercepts, it is not a case, unlike some others, where counsel for the applicant at first instance was able to point to any positive act of desistence. And unlike the circumstances in O'Brien and Taylor, this is not a case where the time which elapsed between the trafficking and the applicant's arrest could assist him, given his possession of what the learned sentencing Judge found to be a commercial possession of methylamphetamine in February 2006, in circumstances where he held, also, $1,700 cash. One could hardly argue, then, that there was rehabilitation in the intervening period. Another matter of distinction is, of course, that this is a case of wholesaling methylamphetamine rather than retail by an addict at a street level. For those reasons, together with those which Justice Jones has already given, I would dismiss the application for leave to appeal.

LYONS J: I agree with the reasons of Justice Jones and I also agree that the application should be refused.
