SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown* [2009] QCA 359
PARTIES:	**R** **v** **BROWN, Laurence Charles** (applicant)
FILE NO/S:	CA No 320 of 2008 SC No 374 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2009
JUDGES:	Fraser JA, Cullinane J and P Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence dismissed** **2. Leave for the applicant to rely upon the affidavits of Laurence Charles Brown sworn 4 September 2009 and Patricia Anne Brown sworn 9 September 2009 is refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted of one count of trafficking in a dangerous drug and seven counts of supplying a dangerous drug – where applicant sentenced to eight years imprisonment – where applicant eligible for parole fixed at 30 June 2010 – where applicant applies for leave to appeal against sentence on the grounds that the sentence is manifestly excessive in all the circumstances – where applicant seeks leave to appeal based upon a number of additional matters – where time served for other offences with common elements – whether sentence is manifestly excessive *Criminal Code* 1899 (Qld), s 651 *Penalties and Sentences Act* 1992 (Qld), s 159A

Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57, considered
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, distinguished
R v Bellino (1999) 105 A Crim R 137; [1999] QCA 106, distinguished
R v Elizalde [2006] QCA 330, distinguished
R v Flew [2008] QCA 290, considered
R v Manning [2007] QCA 145, distinguished
R v Taylor [2006] QCA 459, distinguished
R v Webber (2000) 114 A Crim R 381; [2000] QCA 316, considered

COUNSEL: S Di Carlo (pro bono) for the applicant
M B Lehane for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of P Lyons J and the orders proposed by his Honour.

[2] **CULLINANE J:** I have read the reasons of P Lyons J in this matter. I agree with those reasons and the orders proposed.

[3] **P LYONS J**: On 31 October 2008, the applicant pleaded guilty to one charge of carrying on a business of trafficking in dangerous drugs, and seven charges of supplying those drugs. In respect of the trafficking count, he was sentenced to a term of imprisonment of eight years. His parole eligibility date was fixed at 30 June 2010. A declaration was made under s 159A of the *Penalties and Sentences Act* relating to 357 days spent in pre-sentence custody. The result was that the parole eligibility date was slightly less than two years and eight months from the commencement of his time in custody. For the supply counts, convictions were recorded, but no further penalty was imposed.

[4] The applicant now seeks leave to appeal against his sentence. He contends that the sentence is manifestly excessive in all the circumstances. A number of additional matters have been raised in the outline of argument prepared by his Counsel.

[5] On the hearing of the application, Counsel for the applicant sought to rely on an affidavit from the applicant sworn on 4 September 2009, and an affidavit from his mother, Patricia Anne Brown, sworn on 9 September 2009. He was invited to deal with them in his oral submissions, though the question of leave to rely upon them was reserved.

Circumstances of offences

[6] The supply-related offences are, in effect, instances of the applicant's carrying on the business of trafficking in dangerous drugs. They occurred between 6 March 2007 and 5 July 2007. They were transactions involving the purchase of drugs by a covert police operative.

[7] On three occasions, the applicant supplied cocaine with a total weight of 24.016 grams, and a calculated weight of pure cocaine of 10.239 grams.

[8] On three occasions, the applicant supplied methylenedioxymethamphetamine (MDMA) with a total weight of 300.387 grams, and a calculated weight of pure MDMA of 50.536 grams.

[9] Also on three occasions, the applicant supplied methylamphetamine (speed) with a total weight of 6.281 grams, and a calculated weight of pure speed of 0.65 grams.

[10] The total amount paid for the drugs was $24,275. On some occasions, the drugs were initially offered by another person, or another person was involved in taking the operative to meet the applicant. On some occasions, the operative made arrangements direct with the applicant. Usually, but not always, the applicant was able to supply drugs on short notice. However, towards the end of the period, there were difficulties with the quality of the drugs that the applicant was able to obtain.

[11] Some of the offences were said to have been committed while the applicant was on bail.

[12] Some context for the trafficking charge was provided by statements the applicant made to the operative. On one occasion the applicant stated he obtained up to 5,000 MDMA pills. On another occasion, he said he had almost 10,000 MDMA pills. On yet another occasion, the applicant said he had orders for 17 ounces of cocaine and five ounces of speed. Text messages on three phones related to arranging drug deals.

Applicant's criminal history

[13] The applicant's first recorded conviction was for the possession of drugs on 9 March 1996, resulting in a fine of $1,300. Over the subsequent years he was convicted of charges relating (on two occasions) to the production of dangerous drugs, and (on five occasions) to the possession of dangerous drugs. On some occasions, he was convicted of the possession of utensils or pipes used in connection with the taking of drugs. He was also convicted of possessing tainted property, possessing a weapon, dangerous conduct with a weapon, receiving stolen property, unlawful use of a motor vehicle, entering premises and committing an indictable offence, and wilful damage. In 1999, he was convicted in New South Wales of one count of possessing a prohibited drug, and one count of possessing equipment for administering prohibited drugs.

[14] The last occasion when the applicant was sentenced prior to October 2008 was in February 2008, by the Magistrates Court at Southport. On that occasion, he was sentenced in respect of some ten offences. For some of the offences he was sentenced to terms of imprisonment, in some cases for three months. These sentences will be the subject of further discussion.

Applicant's other personal circumstances

[15] The applicant was 28 years of age at the time of offending. He had been addicted to drugs from his teenage years.

[16] At the sentence, it was submitted on the applicant's behalf that he had overcome his addiction, being subjected to tests whilst in custody. A certificate of analysis was

tendered in support of this submission. It was also supported by letters from his mother. In a letter from the applicant which was tendered at the sentence, he stated that he had been trying to undertake drug rehabilitation since he had been taken into custody. A letter was also tendered from the Salvation Army Brisbane Recovery Services, apparently in response to an application by the applicant, confirming that he would be accepted into a rehabilitation program on his release.

[17] Letters of support from family members were tendered; as was a letter from someone who knew him, and was prepared to employ him.

[18] The sentence had previously been adjourned because the applicant wished to provide information to the police. A meeting took place at which the applicant was said by the Crown Prosecutor to have been cooperative, and the meeting was described as productive, but it did not result in any document on which the applicant could rely at the sentence.

Sentencing remarks

[19] The learned sentencing judge noted the applicant's age at the time of offending; his criminal history, which was described as "substantial"; and his drug addiction. He also noted that two of the drugs were Schedule 1 drugs, and that some of the offending took place while the applicant was on bail. He also noted the considerable potential for harm to the community which could result from the applicant's activities. His Honour considered that it was necessary to impose sentences calculated to deter such activity. His Honour said that the only significant matter in mitigation was the plea of guilty, which led him to impose a more lenient sentence than would otherwise have been imposed.

Comparable appellate decisions on sentence

[20] Reference has been made to the following decisions relating to sentence: *R v Elizalde*,[1] *R v Taylor*,[2] *R v Assurson*,[3] *R v Manning*[4] and *R v Bellino*.[5]

[21] In *Elizalde*, the applicant had pleaded guilty to trafficking of the same dangerous drugs as the present applicant. That applicant was sentenced to a term of imprisonment of nine years for that offence. He was also convicted of possession of dangerous drugs, for which a sentence of three years' imprisonment was imposed. He was sentenced on the basis that he was prepared to sell very large amounts of MDMA, up to 5,000 tablets at a time, for what was described as a "total turnover of about $100,000". The summary of the facts showed regular negotiations over a period of more than three months relating to drug dealing.

[22] Mr Elizalde had only one prior criminal conviction, for a minor drug offence committed in 1995. After his arrest, he worked to overcome his substantial drug addiction, and obtained regular employment. He had a number of favourable personal and employer references.

[23] His application for leave to appeal was dismissed.

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1 [2006] QCA 330.
2 [2006] QCA 459.
3 [2007] QCA 273.
4 [2007] QCA 145.
5 [1999] QCA 106.

[24] Mr Taylor had pleaded guilty to one count of carrying on the business of unlawfully trafficking in dangerous drugs; 11 counts of supplying dangerous drugs; and two counts of possession of dangerous drugs. The drugs involved were: cocaine, speed and MDMA as well as 3,4-methylenedioxyamphetamine (MDA). The supply counts related to supplying cocaine to an undercover police officer. The trafficking occurred over a period of a little less than four months. Mr Taylor was 21 at the time of the offences, and 23 when sentenced. He had one prior conviction of relevance, which was for possession of a dangerous drug in 2004.

[25] The quantities of cocaine sold by Mr Taylor to the undercover police officer were of half an ounce or an ounce, and of varying degrees of purity. Tablets of MDA and MDMA were sold in quantities of up to 200. The total amount paid by the undercover police officer was $38,500. Generally, Mr Taylor was able to obtain drugs on short notice.

[26] Mr Taylor was sentenced to seven years and four months' imprisonment on the trafficking count, without suspension of any part of the order, nor a recommendation as to when he might be released on parole. Mr Taylor had spent some time in custody which could not be the subject of a declaration, but for which the sentence would have been eight years.

[27] The Court of Appeal considered that the failure to fix a parole eligibility date did not adequately reflect the efforts made by Mr Taylor to rehabilitate himself. A reference from an employer described Mr Taylor as having a strong work ethic; and a report from a psychologist showed him to be an obviously intelligent young man with prospects of rehabilitation. These were not adverted to by the learned sentencing judge. For that reason, the sentence was varied by fixing a parole eligibility date which was some two and a half years after he was sentenced, but which seems to reflect a time prior to parole eligibility of three years and two months, allowing for time in custody which was not the subject of a declaration.

[28] Mr Assurson had been sentenced to a term of nine years' imprisonment with a declaration that he was convicted of a serious violent offence, on his plea of guilty to trafficking in speed, cocaine and MDMA, and other drug-related offences. The effect of the declaration was that the applicant's parole eligibility date would be some 7.2 years after he commenced his time in custody. This was the focus of the appeal.

[29] The trafficking occurred over a six week period. The estimated receipts from trafficking were $29,900. The applicant was able to obtain and on-sell significant quantities of all three drugs. Negotiations occurred for significantly larger transactions, which did not come to fruition. One involved the sum of $1,000,000. Mr Assurson had a relevantly minor previous criminal history with apparently only one drug-related conviction. He was 23 years of age at the time of the offences and 26 when sentenced.

[30] The Court considered that the learned sentencing judge erred in making the declaration, as it was not made by reference to the facts relating to the offences the subject of the convictions. The head sentence of a term of nine years' imprisonment was held to be "clearly within range".[6] However, in view of what was described as a "relatively late plea of guilty", and because there was some violence related to the

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6 At [19].

applicant's trafficking activities, Mr Assurson's parole eligibility date was fixed at five and a half years (after more than half of the head sentence had been served).

[31] Mr Bellino pleaded guilty to trafficking in MDMA, a Schedule 2 drug. He also pleaded guilty to five counts of supplying MDMA and one count of supplying heroin. The quantity of heroin was 0.069 grams pure. The MDMA was supplied in quantities of 100 tablets. He was paid a total of $22,400 for the drugs the subject of the supply counts. At first instance he was sentenced to a term of imprisonment of eight years on the trafficking count. The learned sentencing judge formed the view that Mr Bellino was an experienced commercial operator conducting a cold-blooded commercial business to exploit the market for the illegal drug in which he trafficked. In part, that conclusion was based on inferences from transcripts of recorded conversations. The Court considered that on analysis the conversations revealed a great deal of "puffery" and exaggeration, and the objective facts supported the view that his access to drugs was more limited than had been represented. The sentence was reduced from a term of eight years to one of six years.

[32] Ms Manning had pleaded guilty to ten offences, including trafficking in lysergide, amphetamine, methamphetamine, MDMA and cannabis. The trafficking offence related to a period of some five and a half months. Some of the other offences were for the unlawful supply of drugs, and possession of drugs. She had been sentenced on the basis of statements she had made about the level of her activity, and about making profits of the order of $1,000 a day.

[33] Ms Manning was 21 years old at the time of the offences. On the appeal, objective evidence established that she had been subjected to significant violence by a male accomplice who was some years older and with whom she was in a relationship. He had also threatened violence to her child. The violence to which she had been subjected included his driving a motor vehicle over her legs. The violence appears to have had some role in her becoming involved in the commission of the offences; and the violence and the threats played a significant role in statements she made about the extent of her involvement. The statements were made because her accomplice wished to ensure that she took most of the blame, if their activities were detected. In light of this evidence, the sentence for trafficking was varied to a term of five years' imprisonment with a parole eligibility date a little over 14 months after the date when the sentence was imposed at first instance. There had been a declaration of pre-sentence custody for a period of 261 days, the result being that the parole eligibility date was about one year and 11 months after the day when Ms Manning was taken into custody.

Was the sentence manifestly excessive?

[34] There are significant differences between the present case and *Bellino* and *Manning*. The other appellate authorities, to which reference has been made, show that the sentence was clearly within range, and suggest that the learned sentencing judge was, if anything, lenient in fixing the parole eligibility date, although it is not uncommon to fix this after one-third of the head sentence has been served.

[35] The sentencing remarks make no reference to the applicant's efforts to overcome his drug addiction; or to his prospects of employment; or to his attempts at cooperation. Equally, they do not note that he was somewhat older than some of the applicants in

the cases referred to, nor do they compare the present applicant's criminal history with the criminal history of the applicants in the other cases. It seems to me that the sentencing remarks can be fairly described as economical. His Honour's statement that the only significant matter in mitigation was the plea of guilty should be seen in that light. It should not be taken to mean that he has ignored other matters which were relied upon in mitigation of the sentence. Moreover, if the sentencing discretion were to be exercised afresh, the outcome is unlikely to be significantly different.

[36] The oral submissions made on behalf of the applicant drew attention to the statement made by the learned primary judge that the applicant was on bail from 16 May 2007, which was around the middle of the period to which the trafficking charge related. Although the applicant's Counsel at the sentence had not challenged this statement, it was suggested on the present application that in truth the applicant had been given a Notice to Attend Court in relation to an offence of possession of cannabis. It was also submitted that in any event too much weight was put on this matter, because of the applicant's drug addiction. The Notice to Attend should have alerted the applicant to the fact that his conduct was in breach of the law, which might result in his prosecution, in a way similar to his being charged and then released on bail. His drug addiction was referred to by the learned sentencing judge. I do not think his addiction, or the fact (if correct) that the applicant was not on bail, but had been issued with a Notice to Attend Court, provides any real basis for imposing some other sentence than that imposed by the learned sentencing judge.

[37] It has been submitted on behalf of the respondent that the sentence imposed was the sentence for which the applicant's Counsel contended at first instance. That is clearly true in respect of the head sentence, but perhaps not as clear in respect of the identification of the parole eligibility date. At least in respect of the head sentence, the applicant faces the difficulty referred to in *R v Flew*.[7]

[38] In those circumstances, and subject to a consideration of the matters discussed below, I would not be prepared to grant leave to the applicant to appeal against the sentence, on the ground that it was manifestly excessive.

Time served but not declared?

[39] The outline of submissions asserts that the applicant's Counsel made an error in not seeking to have the three month period from the imposition of sentences in February 2008 in the Magistrates Court treated as time served, even if not declared. The outline further asserts that the offences for which the applicant was then sentenced could have been dealt with at the same time as the trafficking and supply charges, under s 651 of the *Criminal Code*; and the applicant had given instructions to his Counsel that steps should be taken to bring this about. It is also submitted that the applicant was twice punished for the same offence or similar offences.

[40] The respondent submits that the offences dealt with on 19 February 2008 included both summary and indictable offences, and could not therefore have all been transmitted to the Supreme Court under s 651 of the *Criminal Code.* While that may be literally true, it would be a little surprising if all matters could not have been dealt with at the same time.

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[7] [2008] QCA 290 at [28] and [52], per Keane JA and Fraser JA, Atkinson J agreeing.

[41] The respondent also submits that the drug offences dealt with in February 2008 did not form part of the particulars of the trafficking charge.

[42] It is clear that not all of the offences for which the applicant was sentenced form the particulars of the trafficking charge. Some do not relate to drugs. At least one appears to relate to the personal use of drugs, rather than trafficking in them (the charges of possessing a smoking pipe). On a number of the unrelated charges, the applicant was sentenced to concurrent terms of three months' imprisonment. Equally, on charges of possession of drugs within the trafficking period, he was sentenced to two terms of three months' imprisonment, concurrent with the other sentences.

[43] In *Pearce v The Queen*[8] it was said that, to the extent to which two offences have common elements, it would be wrong to punish the offender twice for the commission of the elements that are common. It is therefore necessary to make some attempt to identify the elements common to the offences to which this application relates, and to the offences for which the applicant was sentenced in February 2008.

[44] The schedule relating to these offences which appears in the applicant's written submissions refers to only three offences of possession of drugs, whereas the criminal history tendered before the learned sentencing judge identifies four such offences. The applicant's schedule identifies the drugs. In the case of two offences the drug was cannabis, which is not the subject of the trafficking charge. In the third case, the drugs were speed and morphine. Morphine is not mentioned in the trafficking charge. A possible common element therefore, on the material provided on behalf of the applicant, would seem to be possession of one of the drugs the subject of a charge, the offence being committed on 3 August 2007. It should also be noted that, according to the applicant's schedule, one of the other charges was the possession of scales. That may have related to the trafficking offence, but it is not impossible that the scales were used in connection with the applicant's personal use of drugs. However the applicant's Counsel submitted that the common element was the possession on 3 August 2007 of telephones which presumably recorded messages relating to drug trafficking.

[45] If some of the offences for which the applicant was sentenced in February 2008 related to activities which formed part of the trafficking activity, then it may have been appropriate not to impose an additional sentence on him for those offences. However, this is not an appeal against the sentences imposed in the Magistrates Court.

[46] It then becomes necessary to consider whether some other sentence for the offences the subject of the present application is warranted in law and should have been passed.[9] I have already indicated the limited extent to which there are elements common to the offences for which the applicant was sentenced in February 2008, and the present offences. Moreover, those common elements were not specifically identified to his Honour, and are unlikely to have contributed to his Honour's decision as to the appropriate penalty.

[47] In my view, recognition of elements common to the offences for which the applicant was sentenced in the Magistrates Court on 19 February 2008 and the

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8 (1998) 194 CLR 610 at [40], in the joint judgment of McHugh, Hayne and Callinan JJ.

9 See s 668E of the *Criminal Code.*

offences which have led to the present application does not lead to a conclusion that in respect of these offences some other sentence was warranted and should have been imposed.

[48] On behalf of the applicant it is submitted that, had the matters dealt with in February 2008 been dealt with at the same time as the offences the subject of the present application, then they would not have resulted in any additional penalty. Alternatively, had they been properly explained to the learned sentencing Judge, recognition might have been given to the applicant's time in custody for those offences. While that may be correct, it is by no means inevitable that the total time the applicant is to spend in prison would be shorter. It is to be noted that the offences which have some elements in common with the present offences were only some of the offences for which the applicant was sentenced in February 2008. He was separately sentenced to terms of imprisonment of three months for a number of them. In view of his previous offending, that is not surprising.

[49] I do not consider, therefore, that some other sentence than that which the learned sentencing judge imposed is warranted in law and should have been imposed.

Applicant's cooperation

[50] At the hearing at first instance, the prosecutor informed the Court that the sentencing proceedings had previously been adjourned because the applicant was keen to provide information to the police; and that a meeting took place in which the applicant was cooperative. The meeting was described as productive, but the police did not provide what is referred to as a letter of comfort. It was submitted on the applicant's behalf the sentence failed to reflect his cooperation with the authorities.

[51] In *R v Webber*,[10] this Court recognised that cooperation, which incriminated other persons, would be likely to produce a significant discount in sentencing; though the adjusted sentence must nevertheless reflect the seriousness of the offence which is being punished.[11] Counsel for the respondent submits that, notwithstanding the positive attitude of the applicant, the applicant provided no information of any real utility; and that is why a letter was not furnished by the authorities in recognition of his assistance.

[52] There is no positive evidence to establish that the applicant provided any significant assistance to the authorities in relation to the criminal activity of other persons. On the application, no attempt was made to adduce evidence or otherwise establish that the applicant provided assistance which was of any real utility. Nor had any attempt been made to do so before the learned sentencing judge.

[53] In those circumstances, it seems to me that this matter would not warrant any alteration to the sentence imposed.

Applicant's statements to operative

[54] The outline of submission asserts that an error occurred because statements by the applicant that he had obtained 10,000 MDMA tablets were not true; the applicant was not given the opportunity by his Counsel to provide evidence to that effect;

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10 (2000) 114 A Crim R 381.

11 See at [16]; [4]-[5].

there was evidence, by way of correspondence from the applicant's mother, from which it could be inferred that the applicant's level of trafficking was not as significant as the statements would have indicated; the applicant had given instructions to tender medical records which, it would appear from the reference to the outline of submissions, were relevant to the applicant's level of trafficking; but the sentencing judge proceeded on the basis that there was no evidence to affect the inference to be drawn from the statements. Difficulties apparent from the material before the sentencing judge about the ability of the applicant to supply drugs on some occasions were also referred to.

[55] It seems to me that the material which was in fact before the sentencing judge did not provide a firm foundation for the submission. At this point, reference should be made to the affidavit material on which the applicant now seeks to rely.

[56] In the applicant's affidavit, he expresses the view that his mental state was not normal. He attributed this to the effect of drugs, to which he had been addicted. It seems that the statement is directed to the applicant's mental state at the time of the trafficking. The evidence seems directed to a submission that the applicant's statements about the scope of his trafficking activities was untrue, being a great exaggeration resulting from his mental condition.

[57] In fact, no psychiatric report related to the applicant was put before the learned sentencing judge; nor was such a report tendered on the present application.

[58] The applicant's affidavit goes on to confirm that he instructed his Counsel at the sentence to say that statements made to the operative were "merely bravado." The affidavit from the applicant's mother was somewhat similar in effect. Both affidavits are critical of the applicant's legal advisers at the time of sentence, and previously.

[59] The difficulty which the applicant faces on this issue is that, as I have previously indicated, I consider that on the basis of the uncontested facts, the sentence imposed by the learned sentencing judge is appropriate. Those facts are the applicant's criminal history; the nature and quantity of the drugs; the amount paid for the drugs; and the period over which the trafficking occurred. Even if one were to ignore the statements made to the operative, I do not consider that some other sentence is warranted, and should have been imposed.

Reception of affidavit material

[60] I have mentioned the affidavit evidence relevant to the truth of the statements made by the applicant to the operative. The affidavits deal with some other matters. These include the applicant's attempts to overcome his drug addiction; the fact that he carried on trafficking only to pay for drugs for personal use; and his reasons for not providing greater cooperation to the police.

[61] On an appeal against sentence, there is a discretion to receive evidence not put before the sentencing judge, if refusal to do so would result in a miscarriage of justice.[12] Although some reference has been made to this evidence earlier in these reasons, in my view the evidence does not satisfy the test for its reception. Accordingly, the applicant should be refused leave to rely on these affidavits.

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12 *R v Maniadis* [1997] 1 Qd R 593, 596-597.

Conclusion

[62] I would refuse the applicant leave to rely on his affidavit sworn on 4 September 2009 and the affidavit of Patricia Anne Brown sworn on 9 September 2009. I would dismiss the applicant's application.