# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v FAF* [2014] QCA 360 |
| PARTIES: | **R**<br>**v**<br>**FAF**<br>(applicant) |
| FILE NOS: | CA No 28 of 2014<br>SC No 463 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 19 December 2014 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 July 2014 |
| JUDGES: | Muir JA and Philip McMurdo and Peter Lyons JJ<br>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 is granted.**<br>**2. Appeal allowed.**<br>**3. For the term of imprisonment imposed for the trafficking offence, a term of imprisonment of eight years is substituted.**<br>**4. The serious violent offender declaration is set aside.**<br>**5. The parole eligibility date is fixed at the date five years and six months after the commencement of the term of imprisonment.** |
| 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 a dangerous drug – where the *Penalties and Sentences Act* 1992 (Qld) requires that both past cooperation and future cooperation the subject of an undertaking under s 13A, if applicable, are to be taken into account by the sentencing Judge when imposing sentence – where the applicant submits that the learned sentencing Judge placed insufficient weight on his s 13A undertaking to provide future cooperation – whether the sentence imposed was manifestly excessive<br><br>*Penalties and Sentences Act* 1992 (Qld), s 9(2)(h), s 13A |

*R v Assurson* (2007) 174 A Crim R 78; [2007] QCA 273, considered
*R v Boyd* [2013] QCA 335, considered
*R v Cartwright* (1989) 17 NSWLR 243, followed
*R v Cunniffe* [2013] QSC 330, considered
*R v de Figueiredo* [2013] QCA 303, cited
*R v Feakes* [2009] QCA 376, considered
*R v Gladkowski* (2000) 115 A Crim R 446; [2000] QCA 352, followed
*R v Ly and Kyprianou* [2008] QCA 149, considered
*R v Miller* [2013] QCA 346, considered
*R v Westphal* [2009] QCA 223, considered

COUNSEL: M J Byrne QC for the applicant
B G Campbell for the respondent

SOLICITORS: Hannay Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree with the reasons of Peter Lyons J and with the orders he proposes.

[2] **PHILIP McMURDO J:** I agree with the orders proposed and the reasons to be published by Peter Lyons J.

[3] **PETER LYONS J:** These abbreviated reasons record for publication some aspects of the Court's reasoning in this case.

[4] The applicant pleaded guilty to a charge of trafficking in cocaine. The trafficking occurred over a period substantially in excess of a year. Information about the extent of the trafficking is unreliable, but the gross proceeds might indicatively be regarded as falling between $300,000 and $400,000; and the total quantity, again indicatively, in excess of a kilogram. Sales were to end users.

[5] The applicant was plainly a mature man at the time of offending. He had a limited criminal history, including some minor drug-related offences. After his apprehension, he was released on bail. Over the very lengthy period which passed prior to his sentencing, he committed no further offences, and did not breach his bail conditions.

[6] The applicant did not assist police with information relating to his own offending, nor with information about the offending directly connected with his trafficking. He did, however, provide information about the unrelated offending of other people. He also gave an undertaking under s 13A of the *Penalties and Sentences Act* 1992 (Qld) (*PS Act*) in respect of that offending. It became necessary to consider how both forms of cooperation should be dealt with in the sentencing process.

**Cooperation with the authorities in relation to offending by others**

[7] It was submitted for the applicant that the PS Act requires that both past cooperation of this kind, and future cooperation (being a reference to cooperation the subject of an undertaking under s 13A), are to be taken into account; and that accordingly the sentence which would otherwise be imposed is to be reduced by reference to both forms of cooperation. Those submissions are correct.

[8] Section 9(2)(h) of the PS Act requires the court to have regard to past cooperation of this kind. Section 13A(1) provides that the section applies "for a sentence that is to be reduced by the sentencing court because the offender has undertaken to cooperate with law enforcement agencies in a proceeding about an offence, including a confiscation proceeding". This subsection therefore recognises that the provision of the undertaking itself justifies a reduction in the sentence.

[9] It is relevant to note that s 13A applies only in respect of a sentence to be reduced by reason of an undertaking to cooperate in future proceedings. Thus s 13A(7) requires, after the sentence has been imposed, that the sentencing Judge state in closed court that the sentence was reduced under s 13A; and also state the sentence that would otherwise have been imposed. These statements (as well as the undertaking) are to be included in material which is to be "sealed" and placed on the court file with an order that it may be opened only by an order of the Court, including on an application to reopen the sentencing proceedings under s 188(2) of the PS Act. That subsection expressly recognises that a court might reopen the sentencing proceeding where an undertaking has been given to which s 13A applies, resulting in a reduction of the sentence; and the defendant, without reasonable excuse, subsequently does not cooperate according to the undertaking. Section 188(4) then requires the court, where there has been a complete failure to cooperate, to resentence the defendant having regard to the sentence which the sentencing Judge in the earlier proceedings would have imposed, but for the undertaking under s 13A. If there is a partial failure to provide the promised cooperation, then in the later proceedings, the court may resentence the defendant to a sentence not greater than that which would have been imposed if the undertaking had not been given, no doubt a reference to the sentence stated pursuant to s 13A(7)(b). In light of these provisions, it is a matter of some importance that the sentence identified under s 13A(7)(b) is the sentence which would have been imposed but for the undertaking to cooperate; and not the sentence which would have been imposed but for all cooperation, including past cooperation, in relation to any other offender[1].

[10] Encouraging persons to provide cooperation of both kinds has been described as a matter of "high public policy", justifying substantial inducement by way of a reduction of sentence. That is apparent from the following statement:

> "Discounts of one-third or even one-half of the sentence that would otherwise be appropriate are not uncommon, according to the value and risk of the assistance rendered … (with) the possibility of the discount exceeding 50 per cent"[2].

[11] However, the reduction must not result in a sentence that is "an affront to community standards"[3].

[12] A number of principles relevant to the determination of the extent to which a sentence should be reduced by reason of such cooperation were identified by Hunt and Badgery-Parker JJ in *R v Cartwright*[4], the correctness of which has been accepted by this Court[5]. Thus the reduction should be granted, even if the assistance is given out

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1 See *R v Harbas* [2013] QCA 159 (*Harbas*) at [18]-[19], where Fraser JA noted that a similar conclusion had been reached in *R v McGrath* [2002] 1 Qd R 520 (*McGrath*) at [13].

2 *R v Gladkowski* [2000] QCA 352 (*Gladkowski*) at [7].

3 *Gladkowski* at [7].

4 (1989) 17 NSWLR 243 (*Cartwright*), 252-253.

5 *R v de Figueiredo* [2013] QCA 303 (*de Figueiredo*) at [39]-[40].

of self-interest; although greater leniency may be warranted if the assistance is motivated by remorse. On the other hand, if the assistance is tailored, so that the defendant discloses only information which is already, to the defendant's knowledge, in the possession of the authorities, the sentence should not be reduced. However, if the offender has genuinely cooperated with the authorities, the sentence should be reduced, whether or not the information supplied by the defendant ultimately turns out to have been useful.

[13] In *Cartwright* their Honours also said that "the information must, of course, be true; a false disclosure attracts no discount at all"[6]. A little earlier, their Honours stated that the enquiry was "into the subjective nature of the offenders' cooperation"[7]. For that reason, it seems that their Honours were referring to the provision of information which the defendant believed to be true.

[14] Although their Honours expressed the view in *Cartwright* that a defendant "will not lose the discount" because the authorities were already in possession of the information which the defendant provided, or because they did not act upon it, nevertheless it is clear that the "actual usefulness of the cooperation to the authorities" is a relevant consideration in determining the reduced sentence[8].

[15] In *Cartwright*, their Honours stated, "the discount will rarely be substantial unless the offender discloses everything which he knows"[9]. That statement is to be understood in context. It immediately follows the statement that the defendant would not receive any discount where the defendant has tailored the disclosure so as to reveal only the information which the defendant knows is already in the possession of the authorities. A defendant may well provide substantial, valuable information about the offending of a number of people, and provide an undertaking to cooperate in proceedings brought against them. However, that defendant might not be prepared to provide cooperation about another person involved in the offending, because the defendant has grave fears for his welfare and safety. It would be contrary to the "high public policy" previously referred to, to say that in such a case, the sentence should not be reduced.

[16] In the present case, the sentence should have reflected the fact that the applicant has provided cooperation in the past, and has given an undertaking to do so in the future. That is so, notwithstanding an absence of cooperation in relation to the applicant's own offending and other related offending. There were reasons in the present case why such cooperation as the applicant could have given on these matters would not have been particularly significant, in any event.

**Sentencing decisions**

[17] It is necessary to give separate consideration to the cases referred to by the parties. The first is *Feakes*. Mr Feakes pleaded guilty to trafficking in a number of drugs: cocaine, 3,4-methylenedioxymethamphetamine, and 3,4-methylenedioxyethylamphetamine. The period of trafficking was about six months. Mr Feakes also pleaded guilty to one count of producing cannabis sativa in excess of 500 grams, and one count of possessing a number of drugs in excess of specified quantities. His pleas of guilty

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6 *Cartwright* at 253.

7 At 252.

8 *de Figueiredo* at [41] and the cases there cited; see also the passage earlier cited from *Gladkowski*.

9 *Cartwright* at 252.

resulted in a sentence of 10 years imprisonment on the trafficking charge, with a declaration that he was convicted of a serious violent offence; with lesser concurrent sentences for the other two charges. At the time of the offending he was 30 and 31 years of age. He had some relevant, but minor, criminal history. The trafficking commenced during the last seven days of a good behaviour bond, when he was subject to "drug diversion". The minimum benefit from the drug related activity was said to be $56,199.66; with slightly in excess of $115,000 passing through his hands during the trafficking period. His activities were commercially motivated, and involved considerable quantities of illegal drugs.

[18] After a review of the authorities, McMurdo P stated that "absent extraordinary circumstances, in cases of trafficking in sch 1 drugs on a scale like the present offence, the sentence imposed on mature offenders who have pleaded guilty is ordinarily in the range of 10 to 12 years imprisonment"[10]. The range might be a little lower for younger offenders without a significant criminal history and with excellent rehabilitative prospects. Mr Feakes was said to have impressive mitigating factors. His upbringing was said to be "grossly dysfunctional"; and he had promising prospects of rehabilitation on release[11]. However, the sentence was held not to be manifestly excessive.

[19] Mr Feakes's offending was aggravated by the fact that he commenced trafficking while on a good behaviour bond. His criminality was also affected by the production offence. However, his offending occurred over a shorter period of time and involved a substantially lower turnover than the present case. He had the disadvantage of a dysfunctional upbringing as a mitigating factor. He did not assist the authorities in relation to the offending of other people.

[20] The defendant in *R v Assurson*[12] had pleaded guilty to trafficking in methylamphetamine, cocaine, and 3,4-methylenedioxymethamphetamine; and to some other drug offences. On the count of trafficking, he was sentenced to a term of nine years imprisonment, with a declaration that he was convicted of a serious violent offence, thus becoming eligible for parole only after serving 7.2 years in custody. On appeal, the declaration was set aside, with a parole eligibility date fixed after five and a half years in custody, representing more than half of the term of imprisonment under the head sentence.

[21] The trafficking occurred over a six week period, with a profit of some $29,900. The evidence showed the defendant to be a producer as well as a dealer, living off the proceeds of drug dealing. He was also a reasonably substantial user of drugs. There was evidence relating to the use of violence by the defendant in order to collect payments.

[22] The defendant's plea of guilty was relatively late. He had been aged 23 at the time of the offending. He had a relatively minor criminal history, though he had been placed on 18 months supervision in New South Wales for possessing a restricted substance.

[23] The defendant had been involved in extensive discussions about the supply of pre-cursor chemicals, in substantial quantities; and other transactions including one with a potential profit of $200,000. Notwithstanding the prospect of larger transactions than had occurred, it was said that the defendant should not be punished for what might have been achieved if his trafficking had continued.

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10 *Feakes* at [33].

11 At [35].

12 [2007] QCA 273 (*Assurson*).

[24] The extent of this defendant's trafficking activities is substantially less than the trafficking activities in the present case. Aggravating features in that case, not found in the present case, were that that defendant was prepared to resort to violence to recover payment for drugs, and the fact that he had reoffended whilst on bail. The case did not involve cooperation in relation to the offending of others. The benefit of the plea of guilty was substantially reduced because of its lateness. The defendant's relatively young age was not expressly identified as a mitigating factor. Keane JA, agreeing with Williams JA as to the order fixing the parole eligibility date at a time well after the mid point of the term imposed under the head sentence, relied in part on the need for personal deterrence[13].

[25] In *R v Westphal*[14] the defendant had pleaded guilty to two counts of trafficking in methylamphatmine and to a number of other drug related offences. On the first trafficking count he was sentenced to a term of imprisonment of 10 years, with a serious violent offence declaration. On the second trafficking count, he was sentenced to a term of imprisonment of five years. Lesser terms of imprisonment were imposed for the other drug related offences. It would appear that all of these sentences were to be served concurrently.

[26] The defendant was supplying a person who was described as a "street level dealer and addict" in quantities of an ounce, at $5,000. The street dealer had clients "as many as two hundred in number"[15]. The defendant had provided the dealer with drugs worth between $20,000 and $50,000 a week. However, he was a middle man, and was paid $1,000 for each transaction. The trafficking the subject of the first count covered a period of some 14 and a half months. The second period of trafficking was about a month. A financial analysis revealed that this defendant had spent $215,000 which could not be accounted for, other than from his trafficking activities.

[27] This defendant was aged from 27 to 29 over the period of his offending. His criminal history revealed a number of other offences, including a count of possessing, supplying and producing drugs, and another offence of possessing drugs. With respect to his own consumption of drugs, he was described as "a user, but not an addict"[16]. When arrested, he made admissions as to his dealings in methylamphetamine.

[28] On the hearing of the appeal, the defendant relied on the fact that he had given assistance to police in relation to the offending of a drug dealer (it would seem this was not his principal, who was unnamed[17]). He claimed that he had told the barrister who had represented him at the sentence hearing of this assistance, but the barrister had not put it before the court. This claim was rejected. It was, however, accepted that he had provided police with assistance, which included participation in an undercover operation, with exposure to some real risk. The defendant declined to provide further assistance. Another person was subsequently charged with trafficking, but on the basis of evidence obtained independently of this defendant. The head sentence of 10 years imprisonment was not regarded as being manifestly excessive, though at the higher end of the scale, for the level of offending[18]. However, it was considered that his cooperation warranted some reduction of this sentence; and accordingly a sentence of nine years imprisonment was imposed on the first trafficking count, with a parole eligibility date fixed at after approximately six years.

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13 *Assurson* at [29].
14 [2009] QCA 223 (*Westphal*).
15 See *Westphal* at [2].
16 At [9].
17 Compare [3] with [13] and [17].
18 See at [40].

[29] The trafficking in *Westphal* covered a total period somewhat longer than in the present case. Both the amount that this defendant received for his activities as a middle man and the description of the transactions would suggest that, at least in monetary terms, the scale of the trafficking in that case was significantly greater than in the present case. Moreover, it occurred at a higher level. The personal benefit to the defendant appears to have been somewhat greater than that derived by the applicant. That defendant's criminality may nevertheless be regarded as not so high as that of a principal, he being only a middle man. The cooperation provided by that defendant did not extend to the provision of evidence in support of the trafficking charge ultimately brought against the dealer[19].

[30] The submissions on behalf of the applicant made reference to a number of other sentencing decisions. I shall refer to them briefly. The first of them is *R v Ly and Kyprianou*[20]. These defendants had pleaded guilty to trafficking in heroin. Mr Ly was sentenced to 12 years imprisonment, and Mr Kyprianou to a term of 10 years and six months. In each case they were declared to have been convicted of a serious violent offence. They applied unsuccessfully for leave to appeal against their sentences.

[31] It is difficult to develop a clear picture of the scope of the trafficking of these two defendants, from the judgment. The trafficking occurred over a period of almost a year. The operation was described as "sophisticated"[21]. Two transactions were specifically referred to, one being the sale of a 350 gram block of heroin for $68,000, and another being the sale of a similar sized block for $62,000 (both in early 2004). Subsequently 204.187 grams of powder (equivalent to 49.137 grams pure heroin) was found in the possession of a person to whom some of that heroin was sent. On another occasion, 209 grams of powder (equivalent to 34.9 grams pure heroin) was found in the possession of a person to whom Mr Ly had arranged that heroin be sent. On another occasion, a quantity of white rock weighing 83.8 grams (equivalent to 15.379 grams pure heroin) was found at a house which, as a result of arrangements made by Mr Ly, was used as a drug storage and distribution point for the business. The business was conducted by a syndicate, of which Mr Ly was the leader. Mr Kyprianou managed the day to day operations, which involved the use of a number of "runners" who had been employed by Mr Ly[22]. The activities of these defendants therefore were at a higher level than the activities of the present applicant; and they involved several other persons in their trafficking business.

[32] Mr Ly was aged 27 and 28 during the period of the offending. He had a not insubstantial criminal history, with some drug offending, though most of his offending involved violence or wilful damage to property. Mr Kyprianou was aged 25 and 26 at the time of the trafficking. He had a relatively minor criminal history. He had voluntarily returned to Australia to face the charges against him, when, it seems, he could not have been compelled to do so.

[33] In *R v Boyd*[23] the defendant unsuccessfully applied for an extension of time to appeal against his sentence. He had pleaded guilty to one count of trafficking in methylamphetamine and ecstasy. The trafficking continued over a period of 10 months. It was carried out in conjunction with another person, Mr Williams. There was

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19 See at [17].
20 [2008] QCA 149 (*Ly*).
21 *Ly* at [25].
22 At [7].
23 [2013] QCA 335 (*Boyd*).

evidence of sales of drugs for amounts totalling about $450,000, with about $300,000 actually received. There was also evidence that the defendant had been in possession of substantial quantities of drugs: three pounds of amphetamine, 5,000 to 10,000 ecstasy tablets, and 10 pounds of cannabis. He had also been seen with a large amount of cash, up to $50,000, as well as weapons. A search of his premises, and the execution of a warrant, resulted in the finding of almost $90,000 in cash; and quantities of drugs, including methylamphetamine with a potential street value of between $7,000 and $10,000. There was evidence showing that he was prepared to continue the trafficking business when released on bail.

[34] It was not suggested that this defendant was a young person. He had no criminal history. This defendant had had some unfortunate life experiences. His 12 month old son had died in suspicious circumstances while in the care of the defendant's mother, resulting in the defendant becoming estranged from his mother. He had lost the sight of one eye in a glassing incident, affecting his ability to work. After these events he turned to drug use. Nevertheless, he was said to have "worthwhile prospects of rehabilitation"; and he had given early notification of his intention to plead guilty[24]. On arrest, he had not agreed to an interview; nor did he provide assistance in relation to the offending of other persons. The sentence imposed at first instance was a term of imprisonment of eight years, with his parole eligibility date fixed at two years and eight months.

[35] The scale of the trafficking in *Boyd* might be regarded as broadly comparable with, though possibly greater than, that in the present case. Mr Boyd's absence of a criminal history, and his personal circumstances, made his position somewhat different to that of the applicant.

[36] The defendant in *R v Miller*[25] had pleaded guilty to a count of trafficking in methylamphetamine, MDMA, gamma-hydroxybutyric acid and cocaine; and to a number of other drug related offences. On the trafficking count he was sentenced to a term of imprisonment of eight years, with lesser concurrent terms for the other offences. His parole eligibility date was fixed at two years and eight months. He unsuccessfully applied for leave to appeal against this sentence. The principal focus of the appeal was the parole eligibility date.

[37] The trafficking occurred over a period of eight months. The defendant had some 39 clients. The turnover was said to be "tens of thousands of dollars"[26]. The defendant was involved in trafficking for profit, although the reasons record him as having a long standing drug addiction[27].

[38] The defendant was between 24 and 27 at the time of the offending. He had a lengthy criminal history, including a period of actual imprisonment. He had committed offences subsequent to the offending the subject of the application. His plea of guilty came after a committal hearing, and after the matter had been listed for trial. While there were apparently some signs of attempts at rehabilitation, his further offending reduced the significance of this[28].

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24 *Boyd* at [37].
25 [2013] QCA 346 (*Miller*).
26 *Miller* at [7].
27 But see [3].
28 See at [20].

[39] Although there were aggravating features in Mr Miller's case, his trafficking was substantially less significant than that of the present applicant.

[40] *R v Cunniffe*[29] was a contested sentence at first instance. The defendant pleaded guilty to charges, the most significant of which was trafficking in methylamphetamine, MDMA and cannabis between 31 July 2010 and 7 April 2012, a period of about 20 months. An accounting analysis identified that some $114,000 had been deposited in bank accounts, for which no source was revealed. In addition, on three occasions on which the defendant had come to police attention, he had in his possession a total of $52,690 in cash. This was not reflected in the analysis, though some of this money may have been the result of his carrying on a concreting business.

[41] He was aged from 35 to 37 over the period of the offending. He had a criminal history dating from 1992, including an occasion when he was sentenced to six months imprisonment in May of 2012. However, there appeared to be some connexion between the conduct that resulted in that sentence, and the conduct which resulted in the trafficking and other charges. Much of the trafficking occurred while the defendant was on bail. His plea of guilty was early; although the evidence of his remorse and cooperation with the administration of justice was regarded by Dalton J as "something of a mixed bag"[30]. Her Honour would have imposed a sentence of six years in respect of the trafficking, but reduced that to five years and six months in view of the earlier sentence based on related conducted. The parole eligibility date was fixed at two years from the commencement of the sentence. Again, there is some broad comparability between the scale of trafficking in *Cunniffe's* case, and that in the present case.

**Sentence**

[42] It was necessary for the Court to reconsider the sentence to be imposed on the applicant.

[43] The applicant was entitled to a significant reduction of the sentence which would otherwise have been imposed, by reason of his past cooperation. In addition, he was entitled to a reduction of the penalty by reason of the undertaking given under s 13A of the PS Act. Having regard to the cases discussed earlier, and the circumstances of the present case including the applicant's cooperation relating to the offending of others, an appropriate sentence is a term of imprisonment of eight years, with a parole eligibility date after five years and six months. Such a sentence sufficiently reflects the serious nature of the offending, and would not be an affront to community standards, when the mitigating circumstances of the case are taken into account.

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29 [2013] QSC 330 (*Cunniffe*).

30 *Cunniffe* at 16.