SUPREME COURT OF QUEENSLAND

CITATION:	*R v Abbott* [2017] QCA 57
PARTIES:	**R** **v** **ABBOTT, Matthew Lewis** (applicant)
FILE NO/S:	CA No 293 of 2016 SC No 32 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Date of Sentence: 11 October 2016
DELIVERED ON:	7 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2017
JUDGES:	Fraser and Philippides and McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his plea of guilty of trafficking in dangerous drugs (count 1), possessing a dangerous drug in excess of two grams (counts 2, 3 and 5), supplying a dangerous drugs (count 4), possessing a dangerous drug (count 6), possessing a mobile phone that had been used in connection with trafficking (count 7) and 10 summary offences – where the applicant was sentenced to 10 years imprisonment on count 1 and eight years imprisonment on count 5 with no further punishment in relation to counts 2-4 and 6-7 – where the applicant was intercepted by police at the airport in possession of 130.347 grams of pure methylamphetamine and 1.132 grams of pure cocaine – where the applicant trafficked wholesale methylamphetamine and cocaine for an active period of six and a half months – where the applicant reengaged in trafficking whilst on bail – where the applicant's offending did not involve violent conduct – where the applicant had been convicted of two prior drug offences – whether the applicant's sentence was comparable to that of another individual to whom he supplied

wholesale quantities of methylamphetamine and cocaine – whether the sentence was manifestly excessive

R v Borowicz [2016] QCA 211, considered
R v Bradforth [2003] QCA 183, considered
R v Briggs [2012] QCA 291, considered
R v Feakes [2009] QCA 376, considered
R v Rodd; Ex parte Attorney-General (Qld) [2008] QCA 341, cited

COUNSEL: The applicant appeared on his own behalf
V A Loury QC for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the order proposed by her Honour.

[2] **PHILIPPIDES JA:** The applicant was convicted on his plea on 11 October 2016 to trafficking in dangerous drugs (count 1); possessing a dangerous drug in excess of two grams (counts 2, 3 and 5); supplying a dangerous drug (count 4); possessing a dangerous drug (count 6); possessing a mobile phone that had been used in connection with trafficking (count 7); and 10 summary offences.

[3] He was sentenced to concurrent terms as follows: 10 years imprisonment on count 1; eight years imprisonment on count 5; and convicted but not further punished on counts 2-4 and 6-7. The applicant seeks leave to appeal against the sentence imposed on count 1 on the basis that it is manifestly excessive.

The circumstances of the offending

[4] The circumstances of the offending are as follows. The applicant was charged with trafficking at a wholesale level in methylamphetamine and cocaine. Although the trafficking period charged was some 17 months (between 15 March 2014 and 26 August 2015), the prosecution's submissions as to sentence were based on an active period of trafficking of some six and a half months.

[5] The applicant was sentenced on the basis that he was a party to the trafficking enterprise of Matthew John Andrew in that he was one of Andrew's suppliers of methylamphetamine and cocaine from 15 March until 18 September 2014 when Andrew was arrested. An example of the supply of drugs to Andrew was a supply of a little short of two ounces (60 grams) of methylamphetamine for around $24,000 in April 2014. Andrew paid the applicant in amounts exceeding $10,000 on multiple occasions. Andrew himself sold at least 133 grams of methylamphetamine over a five month period.

[6] The applicant was arrested by police on 18 September 2014 (when Andrew was arrested) and released on bail. At that time, he was found to be in possession of 7.637 grams of pure methylamphetamine and 3.999 grams of pure cocaine.

[7] Whilst on bail, on 25 August 2015, the applicant was intercepted by police at the airport in possession of in excess of 191 grams of substance containing 130.347

grams of pure methylamphetamine. That product was strapped to his thighs. He also had a small quantity of cocaine (1.132 grams pure). The applicant had arranged to sell the methylamphetamine for $25,500 and was in the process of delivering it when arrested.

[8] The applicant's mobile phone also seized on 25 August 2015, revealed a "tick sheet" which indicated continued trafficking in dangerous drugs after his initial arrest in September 2014. The "tick sheet" revealed that seven people owed the applicant money ($33,000) for methylamphetamine.

Sentencing remarks

[9] The sentencing judge observed that, while the dates set out in the indictment covered a trafficking period of about 17 months, so far as the evidence was able to demonstrate, the applicant was engaged in a business of trafficking for an active period of about six and a half months. The applicant was the person above Andrew in the chain of distribution. The applicant was involved in the supply of very large quantities of drugs, much larger than that which Andrew supplied to his customers. The conduct concerning the applicant's possession at the airport on 25 August 2015 of 130 grams of pure methylamphetamine and 1.132 grams of pure cocaine, reflected the nature of the applicant's trafficking. At that time, the applicant had been released on bail after being arrested in September 2014. The applicant had thus reengaged in trafficking in a very substantial way.

[10] Although, the applicant was a wholesale supplier to Andrew, he was not his only supplier. Nevertheless, he did supply "nearly 165 grams of methylamphetamine" which was a "huge quantity". The total amount of drugs involved could not be accurately identified, but it was known that at times thousands of dollars were owed to the applicant. The applicant's operation was thus a substantial one involving large amounts of money and drugs over a significant period. The sentencing judge accepted, however, that there was no evidence against the applicant that he had used or threatened violence.

[11] The sentencing judge noted that the applicant's criminal history contained two drug offences and was therefore relevant, but did not place a great deal of weight on it. One concerned offending over 20 years previously involving a small amount of cannabis. The other concerned offending on 6 September 2014, during the trafficking period but before the applicant's arrest.

[12] The sentencing judge took into account that the applicant pleaded guilty in a timely way. The applicant was an intelligent man with many skills who had succumbed to the use of drugs when his mother died and had struggled with an addiction. The applicant had a difficult background. He had lost everything in the global financial crisis and fell into depression as a result.

[13] In sentencing the applicant, the sentencing judge had regard to parity considerations with respect to the sentence imposed on Andrew. His Honour considered that the quantities of drugs and money involved in the applicant's offending were greater than in Andrew's case. Although the aspect of violence present in Andrew's case was not present in the applicant's case, the sentencing judge placed emphasis on the fact that the applicant was above Andrew in the chain of distribution, being a wholesale supplier of drugs to Andrew. Taking into account those matters, the

sentencing judge determined that a sentence of 10 years imprisonment, which was comparable to that imposed on Andrew, was appropriate.

Matters relied on by the applicant

[14] The applicant submitted that the sentence was unduly harsh and excessive given his background, the circumstances leading up to the offence and the absence of violence. The applicant submitted that the sentence imposed, including the serious violent offender and serious drug offender orders, was not warranted in his circumstances. The applicant contended for a head sentence of eight to nine years (which would enable the applicant to apply for parole before serving a mandatory 80 per cent of the sentence) with parole eligibility after three or four years.

[15] In making those submissions, the applicant relied on *R v Briggs*,[1] *R v Rodd; ex parte Attorney-General (Qld)*[2] and *R v Borowicz*,[3] contending there was significant similarity between his case and those cases, when regard was had to his plea, the absence of violence, his remorse and his willingness and efforts to rehabilitate himself. The applicant referred to his personal circumstances, emphasising his remorse, that he had an offer of employment awaiting him upon his release from prison and his commitments to his family that he needed to protect and care for.

Discussion

[16] It is apparent that the sentencing judge was particularly mindful to have regard to the parity principle as relevant to the exercise of the sentencing discretion, the applicant being sentenced on the basis that he was a party to Andrew's trafficking, his Honour was also mindful that the applicant reengaged in trafficking after Andrew's arrest for a significant period. In that respect, the sentencing judge was required to consider the relevant differences in each of the applicant's and Andrew's cases and to make due allowance for them.

[17] I accept the respondent's submission that the sentencing judge was correct in regarding the appropriate sentence to be imposed upon the applicant as one being comparable to Andrew's. Whilst in Andrew's case there was violence threatened and actually used, which was a feature not present in the applicant's case, the level of the applicant's involvement in trafficking was significantly higher than Andrew's. In addition to the applicant being Andrew's wholesale supplier (most significantly, whilst the applicant was on bail for trafficking in two schedule 1 drugs), his continued involvement in the trade of drugs while on bail was an aggravating factor. The applicant arranged to sell 191 grams of substance containing 130.347 grams of pure methylamphetamine, a very significant transaction.

[18] As the respondent submitted, that transaction was at a level not seen in the comparable decisions to which the sentencing judge was referred or to which the applicant now refers. The applicant's trafficking at a high level over a significant period of time clearly warranted a heavy, deterrent penalty.

[19] The decision of *Rodd* relied upon by the applicant does not establish that the 10 year sentence imposed on the applicant is manifestly excessive. *Rodd* concerned an Attorney-General's appeal. While the Court of Appeal stated that a sentence of 12

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1 [2012] QCA 291.
2 [2008] QCA 341.
3 [2016] QCA 211.

or 13 years would have been an appropriate sentence; the sentence was only increased to one of 10 years imprisonment, in accordance with the sentence sought by the appellant Attorney-General. That comparative does not therefore assist the applicant.

[20] Nor does *Briggs* support the applicant. There a sentence of eight years imprisonment with parole eligibility after three years imposed was not interfered with. There are significant features which distinguish that case from the present case. Briggs was sentenced for trafficking in one schedule 1 drug (methylamphetamine), whereas the applicant's offending concerned trafficking in two schedule 1 drugs. Briggs' trafficking (over 38 weeks) concerned street level dealing whereas the applicant trafficked at a wholesale level. Further, Briggs did not have the aggravating feature of having continued to offend in a similar way whilst on bail. Therefore, *Briggs* does not indicate the sentence imposed on the applicant was manifestly excessive.

[21] *Borowicz* concerned a sentence of five years imprisonment suspended after one year and eight months for trafficking over a six month period in three drugs (methylamphetamine, MDMA and cannabis), with lesser sentences imposed for other drug offending. The sentence proceeded on the basis that the offender there had derived a profit of about $5,400 to $7,200 over the trafficking period. The offender had a limited prior history of drug offending. The loss of employment was the trigger for his drug habit which he funded from the proceeds of his trafficking. That case concerned considerably less serious offending, in terms of the quantity of drugs involved, by an offender whose drug addiction was the motivation for his offending. That case provides no assistance as a comparative.

[22] The respondent referred the Court to *R v Bradforth*[4] *and R v Feakes*[5] in support of its contention that a sentence of 10 years imprisonment was within a proper exercise of the sentencing discretion. The sentence imposed on appeal in *Bradforth* of 10 years imprisonment concerned trafficking over a 12 month period by an offender who had continued to offend whilst on bail. That offender did not, however, have substantial sums of money either in his possession or in his bank accounts and was trafficking largely at a street level, although there were commercial aspects to his conduct.

[23] *Feakes* trafficked in one schedule 1 and two schedule 2 drugs over six months. *Feakes* had supplied significant quantities of cocaine, MDMA and MDEA to a covert police officer. The minimum benefit to him was approximately $56,000. He had made significant efforts to rehabilitate himself, had a dysfunctional upbringing and had not reoffended for the three years he had been on bail. He was sentenced to 10 years imprisonment. McMurdo P[6] undertook a comprehensive review of comparable sentences, concluding that a range of 10 to 12 years imprisonment was ordinarily imposed on mature offenders who have pleaded guilty to trafficking. *Feakes* supports the contention that the sentence imposed on the applicant for the trafficking offence was within the sound exercise of the sentencing discretion.

Order

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4 [2003] QCA 183.
5 [2009] QCA 376.
6 [2009] QCA 376 at [33].

[24] In my view, the sentence imposed in respect of the trafficking count was well within the sentencing discretion. The application for leave to appeal against sentence should be refused.

[25] **McMURDO JA:** I agree with Philippides JA.