SUPREME COURT OF QUEENSLAND

CITATION:	*R v King* [2020] QCA 9
PARTIES:	**R** **v** **KING, Jon Robert** (applicant)
FILE NO/S:	CA No 136 of 2019 SC No 17 of 2019 SC No 42 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns – Date of Sentence: 18 April 2019 (Applegarth J)
DELIVERED EX TEMPORE ON:	4 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2020
JUDGES:	Sofronoff P and Morrison and Mullins JJA
ORDER:	**Application for leave to appeal 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 own plea of guilty of four counts on an indictment and seven summary offences – where the indictable offences were as follows: trafficking in a dangerous drug, methylamphetamine; two counts of possession of a dangerous drug, methylamphetamine; and possession of things used in the commission of a crime – where the summary offences were all drug-related – where the applicant was sentenced on the trafficking offence to imprisonment for a period of nine years – where the applicant challenges his sentence on the basis that it was manifestly excessive, centrally because the parole eligibility date should have been set earlier than it was – whether the sentence was unreasonable and cannot be supported having regard to the evidence – whether the learned sentencing judge made a wrong decision on a question of law – whether there has been a miscarriage of justice – whether the sentence imposed was manifestly excessive *R v Abbott* [2017] QCA 57, distinguished

R v Berry [2017] QCA 271, considered
R v Corbett [2018] QCA 341, considered
R v Gordon [2016] QCA 10, distinguished
R v Miller [2013] QCA 346, distinguished
R v Strutt [2017] QCA 195, distinguished
R v Tran; Ex parte Attorney-General (Qld) [2018] QCA 22, distinguished

COUNSEL: The applicant appeared on his own behalf
M P Le Grand for the respondent

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

SOFRONOFF P: Justice Morrison will give his reasons first. Have a seat, Mr King.

MORRISON JA: On 18 April 2019, the applicant pleaded guilty to four counts on an indictment and seven summary offences. The indictable offences were as follows:

(a) Trafficking in a dangerous drug, methylamphetamine, between 31 December 2016 and 9 September 2017,

(b) Two counts of possession of a dangerous drug, methylamphetamine, on 8 September 2017, and

(c) Possession of things used in commission of a crime.

The summary offences were all drug-related, consisting of two counts of possession of property suspected of having been used in connection with the commission of a drug offence, two counts of possession of utensils or pipes that had been used, failure to take reasonable care and precautions in respect of a syringe or needle, possession of utensils or pipes for use in the commission of a drug offence, and possession of property suspected of having been acquired for the purpose of committing a drug offence.

The applicant was sentenced on the trafficking offence to imprisonment for a period of nine years. A total of 587 days of pre-sentence custody was declared as time served, a parole eligibility date was fixed at 8 March 2022. On all other counts, the applicant was convicted and not further punished.

The applicant challenges his sentence on the basis that its severity had not been expected, and he was under the impression that if he pleaded guilty, he would only have to serve one third. In his written outline, the grounds have been expanded – the sentence was unreasonable and cannot be supported having regard to the evidence, the learned sentencing judge made a wrong decision on a question of law, and there has been a miscarriage of justice. The grounds essentially amount to a contention that the sentence imposed was manifestly excessive, centrally because the parole eligibility date should have been set earlier than it was. The applicant contends that he should have only served one third of his sentence before becoming eligible for parole. Reliance is placed on the decision of this Court in *R v Berry* [2017] QCA 271 and to the courses undertaken by the applicant whilst in custody, which, it is said, point to a degree of rehabilitation and improvement in future prospects.

The applicant was part of a wider trafficking enterprise which involved sourcing methylamphetamine from suppliers in Sydney and transporting one kilogram, 35 ounce, parcels of methylamphetamine on flights to Cairns and elsewhere. The records assembled by the police investigation showed that the overall trafficking enterprise involved regular, sometimes twice daily, flights between Sydney, Cairns, Brisbane and Coolangatta. The applicant's suppliers undertook those flights in order to transfer methylamphetamine from Sydney to their purchasers, including the applicant.

The applicant carried on his own methylamphetamine trafficking business over a period of eight months and one week. His supplies came from three particular traffickers who imported the methylamphetamine from Sydney to Cairns. Occasionally the applicant used other suppliers. The suppliers had only a limited involvement in his business. He had at least 77 customers, the majority of whom were also unlawfully trafficking in methylamphetamine by supplying customers of their own. Some of his customers worked for the applicant by actively sourcing sales on his behalf to increase profits.

The applicant regularly communicated with other mid-level wholesale suppliers about collecting money from their respective street dealers in anticipation of sourcing more

methylamphetamine. On each occasion of supply to him, the applicant took an average of two to four ounces of methylamphetamine. It was supplied at $6,500 per ounce on credit and to be repaid before acquiring more. On occasion the applicant acquired greater quantities, up to six ounces.

The applicant used a BlackBerry phone and encrypted messaging to avoid detection. Wickr messages between the applicant and his suppliers revealed that he had negotiated prices for five ounces and 10 ounces at a time, for which he was quoted $6,000 and $5,500 respectively. After acquiring methylamphetamine, the applicant informed his customers that he was ready to supply. He communicated with them using a number of methods, on the phone or via SMS messages or encrypted messages.

He supplied customers primarily from his storage shed but also from his de facto partner's house, at public venues or hotel rooms. Most of his customers were regulars and simply visited him at the shed without having to contact him in advance or to ask anything more than whether he was "at work" or available to visit.

Quantities supplied by the applicant to his customers could not be determined other than by inference. He frequently supplied quantities of 1.7 grams for between 500 and 600 dollars and 3.5 grams for between $1,000 and $1,200. He also supplied quarter ounces, half ounces and full ounces to customers for between $7,000 and $7,500. In May 2017, the applicant entered into discussions with one customer to supply four to five ounces on a weekly basis.

After having supplied his customers, the applicant redirected his attention to collecting money from those he had supplied on credit. He would not continue to supply for a customer if they did not repay their debt, and on some occasions the applicant directly threatened customers who did not pay, including threatening to break the legs of one customer. He also threatened to pass on debts to debt enforcers and did pass on names to a person arranging for the debt enforcer.

The applicant's pattern of supply continued on a daily basis throughout his trafficking period of eight months and one week. The applicant used his de facto partner's house to store money and drugs and used her to arrange for deliveries of money so that suppliers could be paid.

On 8 September 2017, police searched the applicant's shed, where they found two clip seal bags containing methylamphetamine with gross weights of 0.019 grams and 0.303 grams. In the shed they also found a large quantity of drug paraphernalia, including clip seal bags, flavouring, digital scales, ice smoking utensils and tick sheets. The applicant's partner's house was also searched on 8 September 2017. Five clip seal bags containing methylamphetamine with a gross combined weight of 0.966 grams and a calculated pure weight of 0.614 grams were found. The purity ranged from 70 to 76 per cent in four of the bags and 35.9 per cent in one bag. Police also found a mobile phone used in connection with the trafficking. In addition, police found $16,850 in cash, tick sheets, digital scales, clip seal bags, a security system, a bong, an ice pipe and straw, a hypodermic syringe and needle, and a paintball gun.

The applicant's criminal history commenced in 2013 when he was convicted of trafficking in cannabis and sentenced to two years' imprisonment suspended after serving three months. The sentencing remarks on that occasion referred to the fact that the applicant had participated "in a major cannabis trafficking operation" over a period of nine months. His involvement consisted mainly of driving the principal dealer to the supplier to collect drugs. He was paid a certain amount per trip and also conducted errands for the principal dealer. The applicant was 28 years old at the time of that offending.

The 2013 sentencing remarks record some of the applicant's history. He was educated to year 10, qualified as a carpenter and had a good work history until the global financial crisis. He had been in a relationship as a result of which he then had a two and a half year old son.

The applicant had two subsequent convictions in 2016 and 2017, the first for possession of utensils and pipes, and the second for possession of a knife. A number of references were tendered before the learned sentencing judge, exhibit 7. They referred to his untroubled

upbringing and good history of reliable employment, then a downward spiral through drug activity. His mother expressed the view that the applicant was sincerely remorseful for his mistakes and desperate to make amends.

Three certificates were also tendered attesting to the applicant's completion of programs whilst in custody. A Corrective Services report summarised those matters noting the applicant's good attendance, contribution and progression in recognising the negativity of his past behaviour, and the need for a change for his future personal development.

In the course of submissions by the applicant's counsel, the learned sentencing judge was told some further detail about the applicant without objection. The applicant had been using up to one gram of methylamphetamine per day. His drug abuse had improved dramatically whilst in custody. At the time of sentencing, he had two children, one an eight year old son and the other a 16 month old daughter. Referring to the courses which the applicant had performed, the learned sentencing judge was told that the applicant was undertaking a diploma in engineering and working in the prison kitchen.

The learned sentencing judge noted the applicant's plea of guilty to all offences. His Honour summarised the nature of the offending and noted the size of the trafficking operation which, by inference, indicated purchases of methylamphetamine at over $800,000 and profits between $66,000 and $400,000. His Honour did not make a finding about the profit, simply noting that it:

> "…may have been in the tens of thousand dollars, it may have been in the order of a few hundred thousand dollars."

His Honour also took into account the applicant's personal details, including his young children, his great work ethic, and his history of good and ethical work following completion of schooling. His Honour also noted the applicant's previous conviction for cannabis trafficking and the fact that the present offending was committed after the applicant had spent time in prison for that offence. For that reason, deterrence, including personal deterrence, was a major consideration. However, the applicant's performance in prison meant that personal deterrence did not loom as large in his case.

His Honour considered the authorities put forward, noting that *R v Corbett* [2018] QCA 341 was a useful comparative. His Honour found distinguishing features in relation to the remaining authorities, *R v Strutt* [2017] QCA 195, *R v Abbott* [2017] QCA 57, *R v Gordon* [2016] QCA 10, *R v Miller* [2013] QCA 346, and *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22. Having done so, his Honour concluded that the range of appropriate sentences for the applicant was between nine and possibly 11 years, depending on the starting point. If the sentence was 10 years, his Honour noted that there would be an automatic serious violent offence declaration. His Honour then noted the various factors to be balanced, including it was wholesale trafficking with a commercial element by someone who was not young who had a previous trafficking conviction, the steps taken by the applicant towards his own rehabilitation, and the fact that his rehabilitation was likely to be aided by an earlier parole date than would be the case under a sentence of 10 years where a non-parole period of eight years would have to be served.

On that basis, his Honour concluded that a head sentence of nine years should be imposed, noting that but for the plea of guilty, it would have been "well over 10 years" and "11 or possibly 12 years". His Honour noted that the guilty plea not only reduced the head sentence by two years but enabled the applicant to avoid an automatic serious violent offence declaration. However, with that benefit, the applicant was not to get an additional benefit by receiving an early parole eligibility date. In that respect, his Honour had been referred to this Court's decision in *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22.

I am unable to conclude that the sentence imposed was manifestly excessive. The applicant was a mature man, 32 to 33 years old, with a previous conviction for trafficking in cannabis when he embarked upon wholesale trafficking in methylamphetamine over a period of more than eight months. The trafficking was described as mid-level but involved substantial quantities, all of which were on-sold to other traffickers. Notwithstanding that the operation may have assisted to feed the applicant's own habit, the trafficking had a substantial commercial component. The trafficking only ceased when police operations detected the offending.

It is true that since that time the applicant has put some effort into rehabilitative steps whilst in custody, but that was taken into account by the learned sentencing judge, as were the references attesting to his good character.

The applicant received a head sentence which gave a substantial discount for the plea of guilty, reducing the sentence from a start point of up to 11 years. If that start point was justifiable, the applicant gained a significant benefit that his sentence would not attract an automatic serious violent offence declaration. The learned sentencing judge recognised that as being one which would aid in steps to rehabilitation. There could be no doubt that is so.

The authorities referred to by his Honour support the sentence imposed. In particular, *R v Corbett* stands as an appropriate yardstick. Corbett trafficked in methylamphetamine over a much shorter period of about six weeks, at lower quantities, and only to 14 customers. He was a mature offender who had a more substantial criminal history than the applicant. The starting point for the sentencing judge in Corbett's case was 11 years imprisonment before taking into account mitigating features.

That starting point was considered appropriate by this Court, which reviewed, amongst other cases, *R v Strutt* and *R v Abbott*, where sentences of 10 years' imprisonment have been imposed. This Court observed that *Abbott* and *Strutt* involved periods of trafficking close to the six month mark and offending whilst on bail or suspended sentence. Having observed that a starting point significantly higher than 11 years had been identified in *Abbott* and *Strutt* and that the resulting sentences in each case were "significantly more onerous" than the nine years imposed in *Corbett*, this Court observed that:

> "*Abbott* and *Strutt* are consistent with the starting point of a sentencing judge in this case, of 11 years' imprisonment."

The conclusion in *Corbett* was that cases such as *Abbott* and *Strutt* did not demonstrate that a nine year sentence was outside the bounds of proper sentencing discretion. Ultimately the Court considered that the sentence of nine years was within discretion. Further, the fact that the applicant there was a mature man who had a previous conviction for commercial possession was held to reduce the significance of the prospects of rehabilitation.

The comments in *Corbett* and those relating to *Abbott* and *Strutt* provide an ample foundation for concluding that the start point of 11 years in this case was appropriate, and the sentence ultimately imposed on the applicant was not manifestly excessive.

Further, insofar as the parole eligibility date is concerned, in my view, the learned sentencing judge's decision not to give what would have been a double benefit for the guilty plea by reducing the parole eligibility date cannot be said to have miscarried. This Court's decision in *R v Tran; Ex parte Attorney-General (Qld)* is authority for the proposition that in some instances where a sentence imposed for trafficking in dangerous drugs would have been, but for the guilty plea, 10 years or more, but has been reduced below 10 years because of the guilty plea, there may be a basis for affording a double benefit for the guilty plea in the form of a further reduction of the non-parole period, but there must be some circumstances to warrant such an approach.

The factors weighing against that course in *Corbett* were the offender's mature age, the fact that his trafficking was substantial and for commercial profit, the late plea of guilty, his failure to appear at the initial sentence date, and the absence of genuine remorse. The applicant is a mature-age offender with a previous conviction and sentence of imprisonment for trafficking who conducted an intensive trafficking operation at a wholesale level for commercial profit. The applicant's performance on various courses whilst in custody signified, in the learned sentencing judge's view, steps towards rehabilitation, but that was taken into account in reducing what would otherwise have been a sentence of 10 years. It cannot be demonstrated that the learned sentencing judge erred in concluding that the circumstances did not warrant the double benefit identified in *Tran*.

The applicant has referred to the decision in *R v Berry* [2017] QCA 271 as supporting the conclusion that his sentence was manifestly excessive. I am unable to agree with that contention. The original sentence in *Berry* was 10 years and two months in respect of the offence of trafficking in several dangerous drugs over a period of about 14 months. The offender was described by this Court as "youthful", being between 24 and 25 at the time of

offending. The trafficking was substantial in nature and accompanied by violence and intimidation in the enforcement of debts.

However, the features which this Court considered were significant and which warranted a reduction in the sentence to nine years focused on the fact that Berry was a youthful offender who had made sincere efforts towards rehabilitation signified by two particular matters – first, pathology reports which showed the absence of any drug or alcohol in his system, and his period of drug-free employment while on bail. As this Court said, a head sentence of less than 10 years was appropriate in the case of a youthful offender, even one who trafficked at a wholesale level, in cases in which a real and voluntary effort at rehabilitation has been made. That is not the case for the applicant, although it is true to say that his participation in courses whilst in custody has signified an attempt at rehabilitation. Finally, there are the distinguishing features in that however bad Berry's trafficking was, it was not at the level of the applicant's offending, nor did he have a previous conviction for trafficking. In the circumstances, I would refuse the application for leave to appeal.

SOFRONOFF P: I agree.

MULLINS JA: I agree.

SOFRONOFF P: The application for leave to appeal is refused. Thank you for your assistance, Mr Hunt.

MR HUNT: Thank you, your Honour.

APPLICANT: Thank you.