SUPREME COURT OF QUEENSLAND

CITATION:	*R v PBH* [2021] QCA 38
PARTIES:	**R** **v** **PBH** (applicant)
FILE NO/S:	CA No 349 of 2019 SC No 97 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns – Date of Sentence: 28 November 2019 (Henry J)
DELIVERED ON:	5 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2021
JUDGES:	Sofronoff P and McMurdo JA and Boddice J
ORDERS:	**1. The application for leave to appeal against sentence be granted and the appeal be allowed.** **2. The sentence assessed under s 13A(7) of the *Penalties and Sentences Act* be varied to a term of 13 years' imprisonment comprised of a base component of six years and a mandatory component of seven years, pursuant to s 161R of the Act.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – INTERPRETATION OF SENTENCING PROVISIONS – where the applicant pleaded guilty to trafficking dangerous drugs – where the applicant pleaded guilty to the circumstance of aggravation that he was a participant in a criminal organisation within the meaning of s 161P of the *Penalties and Sentences Act* 1992 (Qld) – where s 161R of the *Penalties and Sentence Act* 1992 (Qld) was engaged – where the applicant cooperated with authorities and gave an undertaking to cooperate in the future – where the sentencing judge sentenced the applicant in open court and gave an indicative sentence in closed court pursuant to the procedure in s 13A of the *Penalties and Sentences Act* 1992 (Qld) – whether the indicative sentence must include the "mandatory component" required by s 161R – whether s 161S wholly displaces the operation of s 161R – whether the ultimate sentence was manifestly excessive CRIMINAL LAW – SENTENCE – INTERPRETATION OF SENTENCING PROVISIONS – where the applicant pleaded

guilty to trafficking dangerous drugs – where the applicant pleaded guilty to the circumstance of aggravation that he was a participant in a criminal organisation within the meaning of s 161P of the *Penalties and Sentences Act* 1992 (Qld) – where s 161R of the *Penalties and Sentence Act* 1992 (Qld) was engaged – where the applicant cooperated with authorities and gave an undertaking to cooperate in the future – where the sentencing judge sentenced the applicant in open court and gave an indicative sentence in closed court pursuant to the procedure in s 13A of the *Penalties and Sentences Act* 1992 (Qld) – whether the sentencing judge allowed for past cooperation in fixing the indicative sentence – whether the court has the power to alter an indicative sentence – whether the ultimate sentence should be altered

Penalties and Sentences Act 1992 (Qld), s 9(2)(i), s 9(2)(r), s 13A, s 13B, s 161P, s 161R, s 161S, s 188

R v Ianculescu [2000] 2 Qd R 521; [1999] QCA 439, considered
R v JAA [2019] 3 Qd R 242; [2018] QCA 365, considered
R v McGrath [2002] 1 Qd R 520; [2001] QCA 131, considered

COUNSEL: B J Power for the applicant
S Hedge for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the orders proposed.

[2] **McMURDO JA:** This is an application for leave to appeal against a sentence, imposed in the Trial Division, for an offence of trafficking in schedule 1 dangerous drugs, committed with a serious organised crime circumstance of aggravation.[1] The sentence was a term of six years' imprisonment, with eligibility for parole after the applicant had served two years.

[3] That sentence was imposed under s 13A of the *Penalties and Sentences Act* 1992 (Qld). The sentence which would have been imposed, but for the reduction under s 13A, (commonly called the "indicative sentence") was a term of 16 years, which would have included a "mandatory component" of seven years' imprisonment pursuant to s 161R(2)(b) of the Act. The sentencing judge reduced that sentence because, in the terms of s 161S of the Act, the applicant had undertaken to cooperate in proceedings about a major criminal offence, in which his cooperation would be of significant use.

[4] There is no issue in this case as to whether s 161S permitted the judge to reduce the indicative sentence, as he did. Rather, the principal argument for the applicant is that the judge erred in law in fixing the indicative sentence, because he held that the indicative sentence had to include the mandatory component according to s 161R.

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1 *Penalties and Sentences Act* 1992 (Qld) s 161P, s 161Q.

The applicant's argument is that where, as in this case, s 161S is engaged, the operation of s 161R, in any way, is displaced. Consequently, it is said, the ultimate sentence was excessive, because it was the product of an indicative sentence which was excessive.

[5] For the reasons that follow, that argument must be rejected. However the applicant's other argument, which is that, under s 13A, the judge incorrectly discounted the indicative sentence for past as well as future cooperation, should be accepted.

Sections 13A and 13B of the Penalties and Sentences Act

[6] Section 13A is premised upon the relevance, as a mitigating factor, of an offender's cooperation which is promised in a proceeding about an offence other than that for which the offender is then being sentenced.[2] As Pincus JA said in *R v Ianculescu*,[3] s 13A is largely a procedural provision, and he identified (what is now) s 9(2)(r)[4] of the Act as the source of the court's obligation to have regard to future cooperation. In the same way, the principal function of s 13B is procedural. Section 13B is premised upon the relevance of past cooperation as a mitigating factor. As Pincus JA observed in *Ianculescu*, the source of the court's duty to have regard to past cooperation is s 9(2)(i).

[7] The procedure under s 13A requires the judge or magistrate to state, in closed court, the sentence which would have been imposed, but for the reduction on account of the offender's undertaking to cooperate. There is no corresponding requirement in the procedure under s 13B. The relevance of the indicative sentence is that if the offender, without reasonable excuse, fails to cooperate in accordance with their undertaking, the offender is liable to be resentenced, by reference to the indicative sentence, under s 188(4) of the Act. More specifically, if the offender has completely failed to cooperate, the Court must resentence the offender "having regard to" the sentence that would otherwise have been imposed if an undertaking under s 13A had not been given.[5]

[8] Section 13B can apply only if s 13A does not apply for the sentence.[6] There will be cases where an offender has both given assistance to a law enforcement agency, in relation to another offender or offenders, and also provided an undertaking to provide further assistance. In such cases, if the sentence is to be reduced because of the undertaking, the procedure to be followed is that prescribed by s 13A, and the offender's past assistance will be a mitigating factor in the assessment of the indicative sentence. This is because the indicative sentence, according to s 13A(7)(b), is the sentence which would have been imposed but for the reduction on account of the *promised* assistance. As this Court said in *R v McGrath*,[7] an indicative sentence that took into account account both past and future co-operation would place an offender at risk of losing the benefit of credit they had already earned, were they to be re-sentenced under s 188.[8]

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2 *Penalties and Sentences Act* 1992 (Qld) s 13A(1).
3 [1999] QCA 439; [2000] 2 Qd R 521 at 522 [4].
4 Then s 9(2)(p).
5 *Penalties and Sentences Act* 1992 (Qld) s 188(4)(a).
6 *Penalties and Sentences Act* 1992 (Qld) s 13B(1)(b).
7 [2001] QCA 131; [2002] 1 Qd R 520 at 524 [13].
8 See also *R v Harbas* [2013] QCA 159 at [18]-[19].

Sections 161R and 161S

[9] Part 9D of the Act is entitled Serious and Organised Crime. It includes s 161R, which applies to the sentencing of an offender convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation. It is unnecessary to discuss the provisions[9] which define the necessary conditions for that circumstance of aggravation to exist. In this case, it is accepted that, subject to the effect of s 161S, the applicant was to be sentenced according to s 161R.

[10] Section 161R otherwise provides:

> "(2) The court must impose on the offender a term of imprisonment consisting of the following components—
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> (a) a sentence of imprisonment for the prescribed offence imposed under the law apart from this part and without regard to the following (the ***base component***)—
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> (i) the sentence that must be imposed on the offender under paragraph (b);
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> (ii) the control order that must be made for the offender under section 161V;
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> (b) (other than if a sentence of life imprisonment is imposed as the base component or the offender is already serving a term of life imprisonment) a sentence of imprisonment (the ***mandatory component***) for the lesser of the following periods—
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> (i) 7 years;
>
> (ii) the period of imprisonment provided for under the maximum penalty for the prescribed offence.
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> *Note—*
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> See the *Corrective Services Act* 2006, sections 181(2A) and (2B) and 181A(3) and (4) in relation to the parole eligibility date of an offender whose sentence under this subsection does not include a mandatory component.
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> (3) The mandatory component—
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> (a) must be ordered to be served cumulatively with the base component; and
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> (b) despite any other provision of this Act under which another sentence may be ordered, must be ordered to be served wholly in a corrective services facility; and
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> (c) must not be mitigated or reduced under this Act or another Act or any law.
>
> (4) Also, if the offender is serving, or has been sentenced to serve, imprisonment for another offence, the mandatory component must be ordered to be served cumulatively with the imprisonment for the other offence.

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9 *Penalties and Sentences Act* 1992 (Qld) s 161O, s 161P and s 161Q.

(5) Despite subsection (3)(a), if the base component does not require the offender to immediately serve a sentence of imprisonment in a corrective services facility—

(a) the offender is to immediately begin to serve the mandatory component; and

(b) the base component is to have effect, so far as practicable, at the end of the mandatory component.

(6) If the court is sentencing the offender for more than 1 prescribed offence committed with a serious organised crime circumstance of aggravation, the court must impose the mandatory component for only 1 of the offences.

(7) When deciding which prescribed offence to use for imposing the mandatory component, the court must choose the offence that will result in the offender serving the longest period of imprisonment available under this Act or another Act for the offences."

[11] The mandatory requirements of s 161R are qualified by s 161S, where that section applies. Section 161S provides:

"(1) Subject to subsections (2) and (3), sections 13A and 13B apply for the sentencing of an offender who is convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation.

(2) For section 13A, an offender mentioned in subsection (1) is taken to have undertaken to cooperate with law enforcement agencies in a proceeding about an offence, including a confiscation proceeding, only if—

(a) the offender has undertaken to cooperate with law enforcement agencies in a proceeding about a major criminal offence; and

(b) the court is satisfied the cooperation will be of significant use in a proceeding about a major criminal offence.

(3) For section 13B, an offender mentioned in subsection (1) is taken to have significantly cooperated with a law enforcement agency in its investigations about an offence or a confiscation proceeding only if—

(a) the offender has significantly cooperated with a law enforcement agency in its investigations about a major criminal offence; and

(b) the court is satisfied the cooperation has been, is or will be of significant use to the law enforcement agency or another law enforcement agency in its investigations about a major criminal offence.

(4) This section applies despite section 161R(3) or (4).

(5) In this section—

major criminal offence means an indictable offence for which the maximum penalty is at least 5 years imprisonment."

[12] In cases within s 161S(2) such as the present one, s 13A will "apply" for the sentencing of an offender who is convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation, "despite section 161R(3) or (4)." In cases within s 161S(3), s 13B will "apply" in the same way.

[13] By their terms, s 13A or s 13B can "apply" only where a sentence is to be reduced for future or past cooperation. The evident intention of s 161S is to preserve the court's discretionary power to reduce a sentence for future or past cooperation. Section 161S is intended to avoid the tension, which otherwise would exist under the Act, between the court's powers to reduce a sentence in circumstances which would engage s 13A or s 13B, and the mandatory provisions of s 161R. The question here is the extent to which s 161S qualifies the effect of s 161R.

[14] Where s 161S applies, the court may order that the "mandatory component", as required by s 161R(2), need not be served cumulatively with the base component[10] or wholly in a corrective services facility.[11] However, there is a question of whether the imposition of the mandatory component itself may be reduced. In *R v JAA*,[12] an interpretation of s 161S, by which a court could vary the impact of paragraphs (a) and (b) of s 161R(3), but not the mandatory component itself, was raised by Brown J without expressing a concluded view. The requirement for the mandatory component comes from s 161R(2), rather than in s 161R(3) or (4). In *JAA*, it was said that "curiously, s 161S applies despite ss 161R(3) and 161R(4)" and that it did not apply "despite s 161R(2)."[13]

[15] However, it is s 161R(3) which provides that "the mandatory component … must not be mitigated or reduced under this Act or another Act or any law". Section 161S is to apply despite that provision also, so that the power to reduce a sentence in circumstances which would engage s 13A or s 13B, may be exercised to mitigate or reduce the mandatory component itself. There is no reason to read the reference in s 161S(4) as excluding paragraph (c) of s 161R(3).

[16] Where a court acts under s 13A, it is reducing "the sentence it would otherwise have imposed" but for the offender's undertaking.[14] Plainly, the sentence which would have been imposed, but for the undertaking, is not itself to be mitigated or reduced on account of the undertaking of future cooperation. The sentence which would have been imposed will be that which the Act, including s 161R, would have required.

[17] The argument for the applicant is that s 161S goes further, and should be given the effect of wholly displacing the operation of s 161R. Otherwise, it is said, there would be cases where an offender could not be given the benefit of both their past and future cooperation.

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10 s 161R(3)(a).
11 s 161R(3)(b).
12 [2018] QCA 365; [2019] 3 Qd R 242 at 253 [104] per Brown J (Sofronoff P and Douglas J agreeing).
13 Ibid.
14 s 13A(7)(b); s 188(4).

[18] That argument proceeds as follows. Where s 13B applies, it may be used to reduce a sentence by reducing the mandatory component as well as the base component. However s 13B cannot apply where s 13A applies.[15] Therefore, where s 13A is engaged, the mandatory component of the sentence could be reduced only for future cooperation, and not for any past cooperation. In cases outside s 161R, the offender's past cooperation would still be a mitigating factor,[16] and in cases within s 161R, it could be still used to reduce the base component. Nevertheless, in cases where the base component was relatively small compared with the mandatory component, the court could be prevented from giving an appropriate credit for the offender's past cooperation, unless s 161S is interpreted as wholly displacing an operation of s 161R.

[19] The argument cannot be accepted. It is necessary at this point to say more about the effect, upon its proper interpretation, of s 161S(1). It provides that ss 13A and 13B "apply" for the sentencing of an offender of this category. As discussed earlier, they are largely procedural provisions. The procedures which they prescribe are relevant only where a court is mitigating the sentence for the offender's cooperation, pursuant to s 9. The text of s 161S(1), that ss 13A and 13B will "apply", means that a court's duty to mitigate the sentence for an offender's cooperation is to apply in the sentencing of an offender under Part 9D. It also means that the procedure under s 13A, or in a case involving only past cooperation, the procedure under s 13B, is to be followed.

[20] Consequently, in a case involving both future and past cooperation, the court remains able and bound to give appropriate credit for cooperation of both kinds, whilst following the procedure prescribed by s 13A. The indicative sentence, to be assessed under s 13A(7), will be that which would have been imposed but for the undertaking of future cooperation. The indicative sentence will be affected by any past cooperation, just as it would be in a case outside Part 9D. The past cooperation could be used, in an appropriate case, to reduce both the base and mandatory components.

[21] This interpretation of the text of s 161S(1) avoids the anomaly suggested by the applicant's argument. On any view, s 161S is intended to preserve the court's power to mitigate a sentence for past or future cooperation. An interpretation of s 161S, by which the "mandatory component" could be mitigated for either past or future cooperation, but not for both, should be avoided if that can be done consistently with the text. As I have explained, that can be done by the meaning which should be given to the words "sections 13A and 13B will apply" in s 161S(1).

[22] The applicant's argument that s 161R is wholly displaced by s 161S, where it applies, is premised on an interpretation of s 161S(1) which should be rejected. Section 161R operates subject to the sentence being mitigated for past and/or future cooperation. The sentencing judge was required to state the indicative sentence, for which s 161R was relevant. The first ground of appeal fails.

[23] The second ground of appeal is that the judge did not allow for past cooperation in the indicative sentence. In his sentencing remarks in open court, the judge said that the applicant had provided "some special cooperation", for which the result, by law, was that a mandatory component of seven years "does not apply in your

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15 s 13B(1)(b).

16 s 9(2)(i).

circumstance". As should appear, that was a misstatement of the effect of s 161S. Section 161R(2) still applied, subject to the indicative sentence being mitigated for past cooperation, and the ultimate sentence being reduced for future cooperation.

[24] Again in open court, his Honour said that there were aspects of the criminal enterprise, in which the applicant was a participant, which the applicant did not know about, but that "on the other hand such knowledge as you did have must have inevitably had some value to the police." That appears to have been an acknowledgment of his cooperation, to that point in time, in assisting in the investigation and prosecution of other offenders. And the confidential evidence received by the judge disclosed the use by the prosecution, prior to this sentence hearing, in the prosecution of co-offenders by the applicant's statement being served as part of their briefs of evidence. By the time the applicant was sentenced, two of his co-offenders had been sentenced. It fairly appears, therefore, that there had been significant past cooperation, as well as an undertaking to cooperate in the future.

[25] Although the judge referred to that past cooperation, in his sentencing remarks in open court, it cannot be inferred that his Honour gave credit for it in assessing the indicative sentence. His remarks in closed court indicate that he took that cooperation, together with the undertaking, into account in fixing the sentence which he ultimately imposed. I am persuaded that his Honour erred in fixing the indicative sentence, by not giving the applicant credit for his past assistance.

[26] As is submitted for the applicant, this Court is able to vary an indicative sentence: see *R v McGrath*.[17] Because no credit was given for past cooperation, this Court should reach its own conclusion as to the indicative sentence. This may have little practical effect upon the applicant, because any other offender may have been dealt with by now, and if no further cooperation is required, the indicative sentence may not matter. Nevertheless, an error has been demonstrated which warrants the indicative sentence being reconsidered.

[27] There is no reason to reconsider the actual sentence, however. It is not argued that the actual sentence is manifestly excessive. The error, according to this ground, affected only the indicative sentence, and in my opinion, the ultimate sentence fairly allowed for past and future cooperation.

[28] In my conclusion, the indicative sentence should be varied by substituting a term of imprisonment of 13 years, consisting of a base component of six years and the mandatory component of seven years. The ultimate sentence should remain, as the judge ordered, as one of six years, with eligibility for parole after two years. I would order as follows:

1. The application for leave to appeal against sentence be granted and the appeal be allowed.

2. The sentence assessed under s 13A(7) of the *Penalties and Sentences Act* be varied to a term of 13 years' imprisonment comprised of a base component of six years and a mandatory component of seven years, pursuant to s 161R of the Act.

[29] **BODDICE J:** I agree with McMurdo JA.

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17 [2002] 1 Qd R 520 at 525 [15].