

SUPREME COURT OF QUEENSLAND

CITATION: *R v Mills* [2021] QCA 59

PARTIES: **R**
v
MILLS, Andrew Gareth
(applicant)

FILE NO/S: CA No 302 of 2020
SC No 1709 of 2019

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 20 July 2020
(Bond J)

DELIVERED ON: 29 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 15 March 2021

JUDGES: Fraser, McMurdo and Mullins JJA

ORDER: **Application for leave to appeal refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to possessing the dangerous drug methylamphetamine in excess of two grams – where the sentencing judge found that the applicant’s purpose in possessing the methylamphetamine was partially commercial – where the applicant was a heavy drug user – where the applicant possessed a large amount of methylamphetamine with a high level of purity – where the applicant could not explain the source of a large sum of money found in his possession on the day that the police executed the search warrant – whether the sentencing judge erred in concluding that the possession of the methylamphetamine was held partly for a commercial purpose

Evidence Act 1977 (Qld), s 132C

R v Carrall [2018] QCA 355, cited
R v Strbak [2019] QCA 42, cited
Strbak v The Queen (2020) 267 CLR 494; [2020] HCA 10, cited

COUNSEL: C F C Wilson for the applicant
D Nardone for the respondent

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

- [1] **FRASER JA:** I agree with the reasons for judgment of Mullins JA and the order proposed by her Honour.
- [2] **McMURDO JA:** I agree with Mullins JA.
- [3] **MULLINS JA:** Mr Mills pleaded guilty to possessing the dangerous drug methylamphetamine in excess of two grams (count 1), possessing the dangerous drug 3,4-methylenedioxymethamphetamine in excess of two grams (count 2), possessing the dangerous drug 3,4-methylenedioxyamphetamine (count 3), possessing the dangerous drug cocaine (count 4), possessing the dangerous drug heroin (count 5), possessing a relevant substance 1,4-butanediol (count 6) and possessing a relevant substance 4-hydroxybutanoic acid lactone (count 7). The offences were all committed on 19 March 2019.
- [4] The prosecution had alleged that the possession of the methylamphetamine was for a commercial purpose and that was disputed by Mr Mills. He gave evidence at the sentencing hearing. The learned sentencing judge found that possession of the methylamphetamine was for a commercial purpose. The sentencing judge accepted that the possession was not solely for a commercial purpose, as it was also for personal use as Mr Mills was a heavy drug user.
- [5] Mr Mills was sentenced on 20 July 2020 to imprisonment for three years for count 1, imprisonment for two years for count 2, and imprisonment for six months for each of the other counts. A parole release date was fixed at 16 April 2021 which was after Mr Mills served nine months, taking into account the pre-sentence custody that was declared. A serious drug offence certificate was issued in relation to count 1, because of the finding of fact made by the sentencing judge that the possession of methylamphetamine with the circumstance of aggravation was with a commercial purpose.
- [6] The applicant applies for leave to appeal. The ground that was pursued was that the sentencing judge erred in finding Mr Mills' purpose in possessing the methylamphetamine was commercial to any extent and that therefore the sentencing discretion miscarried on the basis of that finding.

The circumstances of the offending

- [7] The police executed a search warrant at Mr Mills' residence on 19 March 2019. Mr Mills declared he had illicit drugs and drug items in his bedroom to which he directed police. The police found a black box next to Mr Mills' bed that contained clip seal bags holding a variety of substances and one used glass pipe wrapped in bubble wrap. The clip seal bag that held a large amount of white crystal substance weighing 94 grams contained a pure amount of 70.88 grams of methylamphetamine (at 75.4% purity). Another clip seal bag that held an amount of off-white crystal substance weighing 12.06 grams was found on analysis to contain 0.205 grams of pure methylamphetamine (at 1.7 per cent purity) and MDMA was also detected in the gross substance. Count 1 concerned the gross amount of substance of 106 grams of which 71.09 grams was pure methylamphetamine.

- [8] Another clip seal bag that held a small amount of off-white crystal substance had a gross weight of 12.06 grams and on analysis contained a pure amount of MDMA of 8.5 grams (at 70.5 per cent purity). Methylamphetamine was also detected in that substance. There were two tablets in another clip seal plastic bag that weighed 0.4 grams which on analysis contained 0.1 grams of MDMA. The total weight of the pure MDMA found was therefore 8.6 grams in the gross substance of 12.46 grams and this was the subject of count 2.
- [9] The four round tablets found in another clip seal bag that were the subject of count 3 had a gross weight of 4.675 grams and on analysis were found to contain 0.49 grams of pure MDA (at 10.5 per cent purity). There was cocaine in another clip seal bag that had a gross weight of 1.536 grams and the purity was not tested (count 4). Another clip seal bag held off-white compressed substance that weighed 0.112 grams and heroin was detected in it (count 5).
- [10] The police located in a cabinet in the ensuite two plastic bottles holding a clear liquid substance that weighed 1,093.6 grams in which 1,4-butanediol was detected (count 6). A glass bottle in the same cabinet held a clear liquid substance that weighed 397.6 grams in which 4-hydroxybutanoic acid lactone (which is also known as gamma-butyrolactone or GBL) was detected (count 7). Mr Mills told the police that the bottles in the cabinet contained GBL that he used to go to sleep.
- [11] In a black bag at the end of Mr Mills' bed, the police found the sum of \$22,110 in various denominations which Mr Mills told the police was money he owed to a "loan shark".
- [12] The police located on top of Mr Mills' bedside table, and seized, a set of digital scales and a quantity of small clip seal bags. They located and seized an automatic money counting machine in the kitchen pantry. At the conclusion of the search, Mr Mills participated in a record of interview (exhibit 8) in which he said that he borrowed money from a person "during Christmas to pay for my solicitor's bills" and that it was a "documented loan". He said he owed the loan shark \$20,000 in principal and \$2,000 in interest.

Mr Mills' evidence

- [13] Mr Mills' evidence-in-chief included the following. He produced his notices of assessment for years ended 30 June 2018 and 2019 that showed he respectively had taxable incomes of \$132,579 and \$173,441 and, in addition, he earned income that was not taxable in Australia from HiFX, as a result of buying and selling US currency.
- [14] At the time the search warrant was executed, he predominantly used ice and GBL. He used the GBL to sleep and he used the "ice" to keep up with day to day life. He had two young children for whom he was the fulltime carer and one of whom had a medical issue. During the week he would be working from 6 am until about 11 pm taking calls and on the weekend he would work anywhere from between 7 am until 5 pm. He was using the methylamphetamine daily and anywhere from 1.75 to 3 grams.
- [15] He purchased the methylamphetamine of which he was found in possession in early February or late January 2019 for himself. He spent about \$14,000 or \$15,000 on

the purchase. He purchased a large amount as he wanted to be able to have it there when he needed it and he did not have time in his schedule to go out to find it. Purchasing a large quantity makes it cheaper. He would purchase the quantity he needed every couple of months. He had put together the sum of \$22,100 to pay out the loan that he had from the loan shark. He had obtained the loan of \$20,000 around Christmas 2018, but could not remember what the purpose of the loan was for. He said it could have been for anything. When reminded that he had told police that it was for legal bills, he said that "It would have been to pay partial fees ... for the solicitor". Mr Mills confirmed the entry in his bank statement (exhibit 10) for 11 December 2018 for a credit of \$20,000 that was described as "Transfer From Oz Dairy Private Loan" was the proceeds of the loan. The interest was \$1,000 per week and the sum of \$22,110 was all to be repaid to the lender, as he was \$3,000 to \$4,000 behind in payments. Mr Mills could show from another statement in exhibit 10 that he repaid the loan by a payment made of \$23,000 on 1 April 2019 and explained that the deposit to the same account of \$20,000 came from his business account into which his employer deposited money.

- [16] Mr Mills explained that he had the small packets of clip seal bags and the scales for shooting up, as he would use the scales to proportion out how much he wanted to inject and use the bag to mix up the drug with water before injecting the ice. The money counter was in the storeroom in the kitchen and packaged up with a lot of other items that Mr Mills had not unpacked from when he moved to that address at least six months earlier. The cardboard box in which the money counter was found was taped closed. He had bought the money counter about a year prior to the move for the novelty. He purchased it from Wish online.
- [17] Mr Mills did not hold any of the drugs for the purpose of selling it or giving it to other people. He said "It was predominately for my – it was just for my use". He also used the scales when purchasing drugs to make sure he was "not getting ripped off".
- [18] Mr Mills' evidence in cross-examination included the following. Mr Mills agreed that he had told police in the interview that he was earning \$250,000 per year from his employment with CIH. His income had been put up at the end of December 2018 and he was earning \$5,800 per fortnight clear. Mr Mills had told the police in the interview that he did not have any employment other than CIH and did not receive any other payments from anywhere else. He conceded in cross-examination that he did not tell them about the money he got from HiFX, but he did not put that down as an income. He had a bit going through his head at the time he was being questioned and he "just misplaced my mind" when he told police he did not receive any other payments. He did not accept that he was not truthful, when he said he did not have any other sources of income outside CIH as he used CIH to make money with HiFX. Mr Mills confirmed that apart from CIH and HiFX, he did not have other sources of income that he did not tell the police about.
- [19] Mr Mills did not receive a contract from the loan shark, but a text message saying that if he agreed to the interest rate and the terms of the loan, the loan shark would put the money into Mr Mills' account which is what happened. It was not a lie when Mr Mills told the police that he had documentation in relation to the loan, as he had the text messages. After he received the sum of \$20,000 into his account, he withdrew it in cash the next day by two withdrawals, each of \$10,000. Mr Mills' use of methylamphetamine increased to two grams per day from about December

2018 or January 2019 onwards when his workload increased. He either smoked or injected it. He was a heavy drug user and, apart from the methylamphetamine, purchased the other drugs as he needed them. He would consume MDMA on the weekends and sometimes he would use cocaine a couple of times a week for a change. Using drugs every day was a big part of his life. He would buy four ounces of methylamphetamine and that would last him about two months. He paid for the drugs upfront in cash. He withdrew money all the time, so he had it there, so when he needed it, he was able to buy drugs. He obtained the cash by withdrawing \$2,000 at a time when he went past an ATM. He always had large sums of cash on him as it “makes life easy”. Because he always had large amounts of cash on him, he thought a money counter “would be cool” and he bought one. The novelty wore off when the thing did not work, so he just put it away.

The sentencing judge’s findings

- [20] The sentencing judge accepted that, if the only evidence was the facts set out in the schedule of facts, the inference that the possession of the methylamphetamine was for a commercial purpose would be “absolutely compelling”. The sentencing judge referred to the evidence that was put before the court by the applicant and supported by the report of psychologist Dr Hatzipetrou that Mr Mills suffers from a severe polysubstance abuse disorder and that explained the array of dangerous drugs and relevant substances and the presence of scales and clip seal bags.
- [21] The sentencing judge noted that, in respect of Mr Mills’ sources and disposition of income, the evidence was not compelling. There were the bank statements covering the period 13 August 2018 to 12 May 2019 for Mr Mills’ savings account, but there were other accounts that he had for which bank statements were not produced. The sentencing judge observed he did not have a complete understanding of Mr Mills’ cash flow. The sentencing judge accepted the evidence of Mr Mills that he was earning in the order of \$250,000 gross per year which gave him an after tax net income of \$5,800 per fortnight that was supported by the bank statements. The bank statements supported the obtaining of a loan on 11 December 2018 for which Mr Mills agreed to pay interest of the rate of \$1,000 per week. The bank statements showed that the sum of \$20,000 was withdrawn in cash on 12 December 2018 which was the day after the loan was received, but Mr Mills still had at the time of the search on 19 March 2019 the sum of \$22,110 which he said was for the repayment of that loan. The difficulty that the sentencing judge had with that explanation was that the significant quantity of methylamphetamine which was purchased in late January or early February 2019 would have cost Mr Mills between \$14,000 and \$15,000. The sentencing judge therefore described Mr Mills’ explanation as having “a number of gaps in it” and it did not demonstrate that there was enough money coming in to explain the outcome of still having \$22,110 in cash on 19 March 2019.
- [22] The sentencing judge recognised (as required by s 132C of the *Evidence Act* 1977 (Qld)) that the prosecution had the onus of persuading him to find commerciality on the balance of probabilities, but having regard to the fact that the finding would adversely affect Mr Mills’ personal circumstance in terms of the extent of the actual imprisonment to which he might be exposed on being sentenced. (The finding would also adversely affect Mr Mills, in that it would result in a serious drug offence certificate issuing for count 1.) The sentencing judge expressed the question that he had to decide in these terms:

“The question then is whether the explanation he’s given me is sufficient such that when I evaluate all the evidence presently before me, I should regard it as inappropriate to draw the inference that I’ve been asked to draw by the Crown”.

- [23] The sentencing judge then concluded that, although some aspects of the circumstances identified by the prosecution were sufficiently explained by Mr Mills’ evidence, the sentencing judge did not think they all were and noted that he was still left with the circumstances of a large quantity of drugs at a high level of purity, a large amount of cash, and a money counting machine which, although it was sealed at the time of the raid and not found at the same location with the money or the drugs, did not mean it was not used either then or another occasion.
- [24] The sentencing judge was not persuaded as to the adequacy of the explanation given by the evidence of Mr Mills and was prepared to infer, and find, that Mr Mills’ possession of methylamphetamine was for a commercial purpose. In the sentencing remarks, the sentencing judge clarified that he was not making a finding that the possession was solely for a commercial purpose, as he accepted that Mr Mills was a heavy drug user and the possession was significantly for that purpose, but it was also for a commercial purpose.

Mr Mills’ submissions

- [25] Mr Wilson of counsel who appears for Mr Mills (and also appeared for him on the sentencing hearing) concedes that there was no misapplication of the onus or standard of proof by the sentencing judge, except possibly in relation to the money counting machine. That was an appropriate concession. Although the sentencing judge did analyse the evidence by reference to whether the explanations of Mr Mills were adequate, the starting point without any explanations from Mr Mills was an overwhelming case for commerciality due to the quantity of methylamphetamine (106 grams of gross substance) and the purity of the larger of the two quantities (94 grams of gross substance at 75.4 per cent purity).
- [26] Mr Wilson submits that otherwise the findings of the sentencing judge are accepted by Mr Mills and what is challenged is the conclusion on those facts that the possession of the methylamphetamine was partly for a commercial purpose. The detailed submissions put by Mr Wilson do suggest, however, that Mr Mills is also challenging the finding of fact in relation to the conclusion of the primary judge that the source of the sum of \$22,110 was not explained. The submission by Mr Mills that the sentencing judge should have reached the opposite conclusion as to commerciality was based on the following factors:
- (a) the large amount of methylamphetamine was explained by Mr Mills’ substantial habit of two grams per day and his habit of purchasing in bulk amounts;
 - (b) the high level of purity was consistent with the purchase in bulk;
 - (c) the amount of cash was explained from the loan he obtained in December 2018 and that nothing located with the cash suggested it was proceeds of drug sales; and
 - (d) whilst Mr Mills’ account of how he came by the money counting machine was rejected, the location of the machine and the fact that it was sealed up

meant no inference could be drawn that it was connected with the commercial dissemination of the drugs in count 1.

- [27] Both before the sentencing judge and on the hearing of this application, Mr Wilson endeavoured to show by reference to an analysis of Mr Mills' bank statements that there was sufficient cash withdrawn between November 2018 and 14 March 2019 from Mr Mills' account to fund the purchase of the large quantity of methylamphetamine for \$14,000 to \$15,000 in late January or early February 2019 and to amass the cash of \$22,110 that Mr Mills said he was holding to repay the loan shark. Before the sentencing judge, it was pointed out that the bank statements for the period from 13 November 2018 until 19 March 2019 showed the sum of \$22,000 withdrawn from ATMs. A more detailed analysis was done for the purpose of this application that showed a net total of ATM withdrawals and "cardless" cash of \$27,150 (exclusive of the withdrawal of the loan funds from the loan shark).
- [28] It was therefore on the basis of the factors identified in Mr Mills' submissions that the submission was put that the prosecution did not discharge its onus of proving commerciality in respect of the possession of the methylamphetamine. Apart from the money counting machine, Mr Mills was in substance challenging an antecedent finding of the sentencing judge (the source of the cash in the sum of \$22,110 was not explained) on which the sentencing judge based the conclusion of commerciality.

The respondent's submissions

- [29] In view of the manner in which the application is argued on behalf of Mr Mills, the respondent also focuses on the antecedent finding and submits that, as the sentencing judge found, the evidence before the sentencing judge did not explain a source for the sum of \$22,110 that would displace the inference that was otherwise consistent with the quantity of methylamphetamine found in Mr Mills' possession that it was sourced from drugs. Apart from the purchase price of the large quantity of methylamphetamine of which he was found in possession, Mr Mills was also paying interest to the loan shark of \$1,000 per week, and as his ultimate repayment of the loan to the loan shark on 1 April 2019 showed, he repaid the principal of \$20,000 and interest of \$3,000. He therefore had to source another \$13,000 interest over the period until the repayment of the loan. Mr Mills did not say that he used the proceeds of the loan from the loan shark to purchase methylamphetamine, but Mr Mills did say that he was also purchasing four ounces of methylamphetamine that would last him two months which suggested another purchase that had to be funded two months prior to late January or early February 2019.

Did the sentencing judge err in finding the possession was partly commercial?

- [30] Mr Nardone of counsel on behalf of the respondent relied on the approach to an appeal against a sentencing judge's findings of fact set out in *R v Carrall* [2018] QCA 355 at [10]. Neither party sought to make submissions on the question left open in *R v Strbak* [2019] QCA 42 at [21]-[29], as to whether the nature of an appeal against a finding of fact made by a sentencing judge which may not be as restrictive as that suggested in *Carrall*. Although *Strbak* was overturned by the High Court in *Strbak v The Queen* (2020) 267 CLR 494, the issue of the test to be applied before setting aside a sentencing judge's finding of fact was not traversed by the High Court.

- [31] In the absence of submissions on this aspect, it is prudent to approach the test for interfering with a finding of fact made by a sentencing judge on the basis of the less restrictive view, referred to by McMurdo JA in *Strbak* at [29] which is that a mistake of fact that was material to the sentencing may be sufficient to warrant an appeal, rather than the more restrictive view that an appeal will not result in interference with a sentencing judge's finding of fact unless the finding was not reasonably open or it was the product of legal error.
- [32] On the basis of the evidence of Mr Mills and state of the financial information presented to the sentencing judge, no error can be shown in the finding by the sentencing judge that there was not enough money coming in during the relevant period to explain the sources of the sum of \$22,110 in cash that was found in Mr Mills' possession on the day police executed the search warrant.
- [33] There was an absence of evidence often present in commercial drug possession cases, such as phone conversations, "tick" sheets or accounting records. Possession of the money counting machine was an unusual aspect. In view of the sentencing judge's rejection of the explanation for its purchase, the possession of the money counting machine was a matter that the sentencing judge was entitled to take into account, but the significance of the money counting machine was immaterial in comparison with the quantity and quality of the methylamphetamine in conjunction with the possession of the large amount of cash.
- [34] The applicant has not shown that any relevant error was made by the sentencing judge in the findings of fact that supported the sentencing judge's conclusion that the possession of the methylamphetamine was held partly for a commercial purpose.

Order

- [35] It follows the order should be:
Application for leave to appeal refused.