

# DISTRICT COURT OF QUEENSLAND

CITATION: *R v Starkey* [2019] QDC 240

PARTIES: **THE QUEEN**  
(respondent)  
v  
**TRACEY THOMAS STARKEY**  
(applicant)

FILE NO: Indictment 174/17 and bench charge sheets 496/18

DIVISION: Criminal

PROCEEDING: Contested Sentence

ORIGINATING COURT: District Court  
Maroochydore

DELIVERED ON: 2 December 2019

DELIVERED AT: Maroochydore

HEARING DATE: 29 November 2019

JUDGE: Cash QC DCJ

ORDERS: **Count 1: imprisonment for three years;**  
**Count 2: imprisonment for two years;**  
**Count 4: imprisonment for one year;**  
**Count 7: imprisonment for one year;**  
**Count 8: imprisonment for four months;**  
**For the summary offence of unlawfully possessing a category “B” weapon the defendant is imprisoned for six months;**  
**For the summary offence of unlawfully possessing a category “A” weapon the defendant is imprisoned for six months;**  
**For the summary offence of unlawfully possessing fireworks the defendant is imprisoned for one month;**  
**For the summary offence of unlawfully possessing ammunition the defendant is imprisoned for one month;**  
**All of the terms of imprisonment are to be served concurrently.**  
**Order that all terms of imprisonment be suspended immediately and the defendant must not to commit an offence punishable by imprisonment for a period of four years.**  
**Declare the defendant has spent 23 days in pre-sentence custody between 31 May 2016 and 22 June 2016. Declare this to be time already served under the sentences imposed.**

CATCHWORDS: CRIMINAL LAW – SENTENCE - CONTESTED – where the defendant was found transporting a large amount of

cannabis – where the defendant was found with more than \$12,000 in cash – where defendant admits the transportation of cannabis amounts to trafficking – where defendant denies transporting cannabis on more than one occasion – dispute as to facts

*Evidence Act 1977* (Qld), s 132C

*Penalties and Sentences Act 1992* (Qld), s 9(2)(a)

*Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-363

*R v L; Ex parte Attorney-General (Qld)* [1996] 2 Qd R 63; [1995] QCA 444

*R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175

COUNSEL: K Milbourne for the prosecution  
M McCarthy for the defendant

SOLICITORS: Office of the Director of Public Prosecutions for the prosecution  
Anderson Fredericks Turner for the defendant

## Introduction

- [1] In late May 2016 the defendant was driving a hire car near Milmerran. He was stopped by police. In the boot of the hire car was 20 pounds of cannabis packaged in 10 sealed bags of two pounds each. The defendant's wallet contained \$955 in cash. The defendant was arrested and declined to be interviewed. Police searched his home at Kings Beach the same day. In a walk-in wardrobe they found about 200 grams of loose cannabis. In a hallway cupboard they found \$12,000 in the pocket of a jacket and two sealed bags of cannabis, each weighing a pound. In another residence associated with the defendant police found a few grams of cannabis.
- [2] The defendant admits he trafficked in cannabis and possessed the cannabis found at his home. He says he did so because an acquaintance of his, known only as "Shifty", persuaded the defendant to collect cannabis from Victoria on this one occasion in return for a payment of cannabis.
- [3] The prosecution dispute this. They allege that the defendant transported cannabis on more than one occasion and profited financially from his efforts. In support of this contention the prosecution rely upon an analysis of the defendant's finances and the records of a hire car company. The former is said to show an excess of expenditure over identified income in the tens of thousands of dollars. The latter shows the defendant hired and drove cars distances of more than 2000 kilometres eight times between January 2014 and May 2016.
- [4] For the reasons that follow, while I think the defendant may have trafficked in cannabis to a greater extent than he admits, the evidence is not sufficient to persuade me the prosecution contentions are correct.

## Legal Principles

- [5] Section 132C of the *Evidence Act 1977* provides that where a fact is alleged but is not admitted or is challenged, I can only act on the allegation if I am satisfied on the balance of probabilities the allegation is true. The degree of satisfaction varies

according the adverse consequences to the defendant if the allegation were found to be true. The words of the section paraphrase the well-known words of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-363. Correctly understood, the words do not create a third standard of proof in addition to the civil and criminal standards. Rather they reflect that “the nature of the issue necessarily affects the process by which reasonable satisfaction is attained”.<sup>1</sup> Satisfaction of the occurrence of a trivial event may be reached on material that would be insufficient in the case of a more serious allegation.

### **Procedural history**

- [6] The indictment was presented in June 2017. It alleged eight counts. The matter came to be listed for trial in late April 2018. Instead of a trial the defendant pled guilty to unlawfully possessing the cannabis in the car (Count 2), unlawfully the possessing the cannabis at Kings Beach (Count 4), unlawfully possessing a rifle found at Kings Beach (Count 7) and unlawfully possessing the small amount of cannabis found at the defendant’s other address at Diamond Valley (Count 8). The defendant pled not guilty to trafficking (Count 1), possessing the \$955 in his wallet knowing it to be the proceeds of trafficking (Count 3), possessing the \$12,000 at Kings Beach knowing it to be the proceeds of trafficking (Count 5) and possessing some scales and other items alleged to have been used in connection with trafficking (Count 6). These charges were listed for trial in September 2018.
- [7] Once again a trial did not take place. Instead the defendant pled guilty to trafficking (Count 1) and the prosecution discontinued Counts 3, 5 and 6.<sup>2</sup> The defendant identified he disputed the facts to be alleged by the prosecution and the matter was listed for sentence later in 2018. This hearing did not proceed and was adjourned at the request of the parties for hearing in April 2019. This hearing did not proceed and was adjourned at the request of the parties for hearing in September 2019. This hearing was also adjourned at the request of the parties and the matter listed for sentence on 29 November 2019. Contrary to the common saying, the fourth time proved to be the charm and the hearing proceeded. On this occasion the defendant also pled guilty to four summary offences. Those offences were the unlawful possession of a category “A” weapon, the unlawful possession of a category “B” weapon, unlawfully possessing fireworks and unlawfully possessing ammunition.

### **Evidence**

- [8] The defendant did not dispute any of the facts outlined in the document tendered by the prosecution titled “Contested Sentence Statement of Agreed Facts”.<sup>3</sup> Relevantly, the facts include the matters summarised above as well as estimates of the value of the cannabis. The police search of the home at Kings Beach also revealed the three firearms the subject of the indictment (a semi-automatic rifle) and summary charges (a bolt action rifle and an antique looking musket), as well as fireworks and ammunition. The prosecution does not allege the firearms or ammunition were connected to the drug offences.

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<sup>1</sup> *Briginshaw*, 363.

<sup>2</sup> I note that while the prosecution chose not ask a jury to return a verdict on the charges that related to the money found in the defendant’s possession, it persisted in the allegation that the money was the proceeds of trafficking.

<sup>3</sup> The defendant did not admit the opinion expressed in the last sentence of page 4 but as it happens this opinion is not relevant to the determination of this matter.

- [9] It was agreed that hire car records show the defendant took hire cars for eight trips exceeding 2000 kilometres between January 2014 and May 2016. Five of these trips covered a distance of more than 3000 kilometres. The shortest hire period was 97 hours (four days) and the longest ten days. As well as the long trips, the defendant hired a car, a minibus and trucks over shorter times and distances. The prosecution also tendered a statement by Senior Financial Analyst employed by the Queensland Police Service, Daniel Tracey. Mr Tracey gave evidence at the hearing. The effect of Mr Tracey's uncontested evidence was that an analysis of the defendant's financial records indicate he had available cash in excess of his apparent income. This "unsourced income" amounted to about \$48,000 for the period 28 January 2014 to 31 May 2016, or \$36,000 for the period 14 March 2015 to 31 May 2016. Both of these figures included the nearly \$13,000 in the defendant's possession when he was arrested on 31 May 2016. If this money is set aside, the amounts equate to about \$300 per week in the case of the longer period and \$370 per week for the shorter.
- [10] The defendant gave evidence. He said that he was transporting cannabis as a result of a request by an acquaintance he knew only as "Shifty". The defendant testified that he saw Shifty at Corbould Park one Friday soon before his arrest. Shifty offered to sell the defendant some "pot". The defendant bought a pound. Shifty asked if the defendant would undertake a trip to Victoria to bring back cannabis, in return for which he would receive another pound of cannabis. The defendant agreed. He met Shifty again the next day and paid for one pound of cannabis. Shifty gave the defendant two pounds, which were the bags later found by police at Kings Beach. Shifty also gave the defendant a GPS device pre-programmed to an address in Victoria. The defendant drove to Victoria where the cannabis was loaded into the boot of his hire car and he returned to Queensland where he was stopped by police.
- [11] The defendant said he did not know Shifty's real name. He had met him maybe four times before, including an occasion near the New South Wales/Victoria border when Shifty gave the defendant some cannabis. The defendant said the \$955 in his wallet when he was detained was a mix of pension money or gambling winnings. The defendant indicated he was a frequent and reasonably successful punter. He said the \$12,000 found at Kings Beach was from an amount of \$15,000 given to him by a doting Aunt before she passed away. He explained keeping such a large amount at home as the result of paranoia that if he put it in the bank the government would reduce or cut off his pension. The defendant was on a disability support pension but supplemented this by doing odd jobs such as garden maintenance or minor mechanical repairs. This would net him a couple of hundred dollars per week.
- [12] The defendant explained his pattern of hiring cars as being to visit family and friends in Melbourne and north Queensland. His son lives at Airlie Beach (or Proserpine) and his partner had family in Frankston, Victoria. The defendant used hire cars as he would get a rate around \$30 per day which was cheaper, safer and more reliable than using his old cars which were V8s and not fully insured. Some trips were brief. The defendant identified one trip in particular in March 2016 as being to Eungella near Mackay to watch his son in a four-wheel-drive race.
- [13] Around the time of the offences the defendant was in the habit of baking cannabis in cookies or muffins. He smoked cannabis only rarely. He said a pound of cannabis would last him a month or two. When asked why he did not tell the police about Shifty, the defendant said he understood the right to silence as indicating it would be better for him not to talk at all.

- [14] The defendant also relied upon a psychologist's report. The opinions in the report were not challenged by the prosecution. Relevantly, the defendant was found to have cognitive functioning in the borderline range. In the psychologist's opinion the defendant had "reduced capacity for abstract reasoning, mental flexibility, planning and impulse control" as well as difficulty in "focusing and sustaining attention and manipulating information in working memory, encoding and retaining newly learned information". These things made the defendant a "socially naïve and vulnerable individual".

### **Discussion and findings**

- [15] The opinion of the psychologist is relevant to my assessment of the defendant's evidence. Aspects of his evidence that might seem implausible (such as agreeing so readily to transport cannabis) become less so in light of his cognitive difficulties. So too his inability to recall specific detail becomes a matter of less significance. His psychological makeup may raise a concern about his ability to be a reliable historian.
- [16] The prosecution rely upon four circumstances that are said to compel the conclusion the defendant transported cannabis on more than one occasion. First, his arrest while transporting 20 pounds of cannabis in May 2016; secondly, the eight trips of more than 2000 kilometres in hire cars; thirdly, the excess of "unsourced income"; and fourthly, the broadly similar packaging of the cannabis in the car compared to that found at Kings Beach. The last point may be dealt with briefly. The prosecution lead no evidence that the cannabis had been packaged using the same machine. Even if the packaging were the same, it is not inconsistent with the defendant's testimony that Shifty was the common link. In reality only three of the four matters relied upon by the prosecution might tend to implicate the defendant.
- [17] Considered collectively these three matters raise at least a suspicion that when the defendant used hire cars for long distance trips on earlier occasions he was transporting cannabis. Absent some innocent explanation for these circumstance such a conclusion would be attractive. But the evidence of the defendant provides an innocent explanation for these circumstances. As was conceded by the prosecutor, I could only find for the prosecution if I rejected the evidence of the defendant. What, then, would warrant rejection of his evidence?
- [18] There was nothing about the manner in which the defendant gave his evidence that might cause doubt about its veracity. He did not contradict himself nor was he contradicted by other evidence. The prosecution points to what it submits is the inherent implausibility of the story, involving as it does mysterious punters, generous Aunts and frequent long distance driving. Such may be accepted as being unlikely, or even improbable. But I do not accept that the defendant's account is of events that are so inherently improbable that I should reject his testimony. What he described might be unlikely, but it was not illogical. A feature of his evidence that seemed authentic was his recollection of the trip to Eungella. Records indicate he drove this hire car 2157 kilometres over a week. The distance from the Sunshine Coast to Eungella is about 1000 kilometres. It seems inconsistent with the defendant's limited cognitive capacity to conclude the defendant made this up.
- [19] As I have noted, there is no evidence to contradict the defendant. I do not know what the defendant's family might say about his claims to have visited in hire cars. I do

not know if “Shifty” can be shown to be a real person. To my knowledge these investigations were not undertaken. It seems likely that with only moderate effort police could have determined if a seasoned punter known as “Shifty” frequented Corbould Park or the Golden Beach Tavern. In the end I have to assess the defendant’s testimony measured only against ideas of plausibility and likelihood.

- [20] I remain suspicious that the defendant was involved in transporting cannabis to a greater extent than he admits. But suspicion is not satisfaction. I am not actually persuaded that the defendant transported cannabis on other occasions or that the money in his possession was the proceeds of trafficking.
- [21] It follows that the defendant is to be sentenced on the basis that he agreed to transport cannabis on one occasion for Shifty in exchange for a pound of cannabis. The cannabis found at his home was for his personal use and the firearms, explosives and ammunition were unconnected to the drug offences.

### **Considerations on sentence**

- [22] The defendant is 56 years old. He was 52 when he was arrested. In 1981 he was convicted of stealing and in 2003 of breaching a domestic violence protection order. He has no other convictions. After his arrest the defendant was held in custody for 23 days before being released on bail.
- [23] The defendant has four adult children. He separated from the mother of the children many years ago. The defendant’s own parents were alcoholics and separated when he was young. He struggled at school, not learning to read and write until he had children of his own. Leaving school early, the defendant worked as a baker and subsequently in a variety of sales or labouring roles. In 2000 he was assaulted and suffered injury to his head and neck. As a result he receives a disability support pension. The defendant drinks more than is probably healthy but no longer takes cannabis.
- [24] In the defendant’s favour, he pled guilty, although at a relatively late stage of the proceedings. His personal culpability for the offence of trafficking is at the lower end: he was not the instigator or the organiser of the enterprise. To the extent that he disputed the allegations he was justified in doing so. Against that is the undoubted seriousness of the offences. 20 pounds is a lot of cannabis. It was worth perhaps \$60,000. There is a need to deter generally people who might be tempted to help others carry out trafficking on this scale, and to denounce what the defendant did. As well I am to sentence the defendant for the unrelated *Weapons Act* offences. An important consideration is that the defendant is entitled to the benefit of the principle that imprisonment should be considered a sentence of last resort, and orders that allow him to stay in the community are to be preferred.<sup>4</sup>
- [25] I was referred to three cases: *Brienza* [2010] QCA 15; *Broad & Prior* [2010] QCA 53 and *Peters* [2012] QCA 325. *Brienza* was a more serious case as was *Broad*. *Prior’s* offending was dissimilar to the present case. *Peters* was perhaps closest but involved transporting cannabis on more than one occasion. None of these cases involved a precisely similar set of circumstances.

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<sup>4</sup> *Penalties and Sentences Act 1992*, section 9(2)(a).

- [26] The prosecution contended that if the defendant were to be sentenced on the basis for which he contended, he should be sentenced to imprisonment for four years with parole eligibility after a third of the sentence. The defendant submitted the appropriate sentence fell between two and half to three years' imprisonment which should be suspended immediately. In this regard the defendant placed particular reliance on his rehabilitation since his arrest in 2016.<sup>5</sup> He no longer takes cannabis and has not committed any offence in the three and half years since his arrest.
- [27] In my view a sentence of four years' imprisonment is not supported by the authorities cited by the prosecution. The defendant's culpability falls somewhat below that of *Peters*, who was sentenced to three and a half years' imprisonment. Reflecting all of the defendant's criminal conduct,<sup>6</sup> a sentence of three years' imprisonment is, in my view, appropriate. The absence of any previous relevant convictions, the defendant's personal culpability and the absence of unlawful conduct since arrest combine with the period of three weeks in custody after arrest to warrant a sentence that does not involve immediate imprisonment. The effect of the sentences I will impose will be imprisonment for three years wholly suspended for four years.

### Orders

- [28] Count 1: imprisonment for three years;
- [29] Count 2: imprisonment for two years;
- [30] Count 4: imprisonment for one year;
- [31] Count 7: imprisonment for one year;
- [32] Count 8: imprisonment for four months;
- [33] For the summary offence of unlawfully possessing a category "B" weapon the defendant is imprisoned for six months. For the summary offence of unlawfully possessing a category "A" weapon the defendant is imprisoned for six months. For the summary offence of unlawfully possessing fireworks the defendant is imprisoned for one month. For the summary offence of unlawfully possessing ammunition the defendant is imprisoned for one month.
- [34] All of the terms of imprisonment I have imposed are to be served concurrently. I order that all terms of imprisonment be suspended immediately and the defendant must not to commit an offence punishable by imprisonment for a period of four years.
- [35] I declare the defendant has spent 23 days in pre-sentence custody between 31 May 2016 and 22 June 2016. I declare this to be time already served under the sentences I have imposed.

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<sup>5</sup> *R v L; Ex parte Attorney-General (Qld)* [1996] 2 Qd R 63; [1995] QCA 444.

<sup>6</sup> *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175.