SUPREME COURT OF QUEENSLAND

CITATION:	*R v Verhagen; Ex parte Attorney-General (Qld)* [2018] QCA 142
PARTIES:	**R** **v** **VERHAGEN, Michael Scott** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 55 of 2018 DC No 705 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 23 February 2018 (Butler SC DCJ)
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2018
JUDGES:	Sofronoff P and Gotterson JA and Boddice J
ORDERS:	**1. The appeal against sentence be allowed.** **2. The sentences below be set aside.** **3. The respondent be sentenced to four and a half years imprisonment on count 3 of the indictment, and 12 months imprisonment in respect of each of counts 4 and 5 of that indictment.** **4. The sentence of imprisonment on count 3 of the indictment be suspended after the respondent has served 20 months imprisonment, for an operational period of five years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the Attorney-General appeals against the respondent's sentence – where the Attorney-General submits that the sentence was manifestly inadequate – where the respondent was found guilty by a jury of one count of trafficking in dangerous drugs, one count of possessing dangerous drugs, and one count of possessing property obtained from trafficking – where the respondent was sentenced to three years

imprisonment in respect of the trafficking count, and one year imprisonment in respect of each of the possession counts – where the respondent's periods of imprisonment were suspended by the sentencing judge after six months were served – where the offences related to a synthetic cannabis product – where the respondent sold the dangerous drug in the course of his legitimate business as a tobacconist – where the drug was declared a dangerous drug under Schedule 2 of the *Drugs Misuse Act* 1986 (Qld) from 5 April 2013 – where the respondent was found to have knowledge that the drug was an illegal drug at the time of the trafficking – where the trafficking was for monetary benefit – whether the aggravating and mitigating features were appropriately reflected in the sentence – where the respondent had shown limited cooperation with authorities – where the respondent had attempted to conceal the sales of the dangerous drug – where the respondent had not plead guilty, and instead was subject of a trial – where the respondent had no prior convictions, was of good character and work history, and would experience financial hardship as a consequence of incarceration – whether the sentencing judge erred in the exercise of his sentencing discretion – whether the sentence should be set aside and a different sentence be imposed

Criminal Code (Qld), s 699A(1)
Drugs Misuse Act 1986 (Qld), sch 2

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, applied
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
R v Harris [2018] QCA 7, followed
R v Hill, Bakir, Gray & Broad; ex parte Cth DPP (2011) 212 A Crim R 359; [2011] QCA 306, applied
R v Johnson (2015) 255 A Crim R 73; [2015] QCA 171, cited
R v Kalaja [2017] QCA 123, followed
R v Slingsby, unreported, McMeekin J, SC No 50 of 2016, 9 June 2016, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, applied

COUNSEL: C Heaton QC for the appellant
A J Glynn QC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
A W Bale & Son for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Boddice J and the orders his Honour proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.

[3] **BODDICE J:** On 22 February 2018, a jury found the respondent not guilty of two counts of trafficking in dangerous drugs, but guilty of one count of trafficking in dangerous drugs, one count of possessing dangerous drugs, and one count of possessing property obtained from trafficking. All of the offences were committed between 4 April 2013 and 3 September 2014.

[4] On 23 February 2018, the respondent was sentenced to imprisonment for three years in respect of the trafficking count and imprisonment of one year in respect of each of the remaining counts. The sentences of imprisonment were ordered to be served concurrently. It was further ordered that the sentences be suspended after serving six months imprisonment, for an operational period of three years.

[5] The Attorney-General for the State of Queensland appeals these sentences. The ground of appeal is that the sentence imposed in respect of the trafficking count is manifestly inadequate.

Background

[6] The respondent was born on 14 November 1976. He is a businessman with no previous convictions. All of the offences related to a synthetic cannabis product. The respondent had sold synthetic cannabis products in the course of his legitimate business operation as a tobacconist for a significant period.

[7] That particular drug was declared a dangerous drug under Schedule 2 of the *Drugs Misuse Act* 1986 from 5 April 2013. It was not in dispute at the trial that for the whole of the trafficking period the synthetic cannabis product sold by the respondent was a dangerous drug.

Sentencing judge

[8] The sentencing judge observed that the acquittals on the first two counts of trafficking were understandable having regard to the necessity for the Crown to prove the exact active compounds which constituted those dangerous drugs. That difficulty did not pertain to the remaining count of trafficking in dangerous drugs, which related to the synthetic cannabis product Buddha Express which contained dangerous drugs.

[9] The sentencing judge observed that the respondent was to be sentenced on the basis he had recorded the product Buddha Express in the accounting records of his tobacconist business under a different name and had traded in that product for a period of 11 months from 1 October 2013 to 1 September 2014. The product was packaged in three gram lots, in small plastic bags. There had been 337 sales of that product over that 11 month period.

[10] Based on the weight of the packets, those total sales constituted 26.9 kilograms of leaf material. However, as some packets did not contain three grams, the sentencing judge assumed something in the order of 25 kilograms of leaf material was involved in the sale of those packets. The leaf material was sprayed with a fabricated man-made chemical solution to provide it with the chemical properties which give an effect similar to that of natural cannabis or to THC in natural cannabis.

[11] The product was popular with customers, who paid $59.99 a packet. Multiplication of the number of packets in the sales records revealed gross sales over that 11 month period of $527,389.48. The sentencing judge noted that when police searched, they found a quantity of Buddha Express product. There were 285 packets at three grams a packet. There was also found a sum of money which the respondent admitted to police he had obtained from sales of the Buddha Express product.

[12] The sentencing judge found the respondent knew that product contained a dangerous drug and sentenced the respondent on the basis he was trading in the drug when he knew it was illegal. The sentencing judge considered it not irrelevant, however, that a number of the compounds had only become unlawful in April 2013, some six months prior to the offending period and in circumstances where the respondent was running a legitimate tobacconist business.

[13] In a period of 19 months, the tobacconist business had a turnover of $17.75 million, much of that in respect of tobacco products. The profit margin on those products was low. The amount that would have been turned over in the period of the trafficking count was in the order of $10 to $11 million. The half a million dollars turnover in the Buddha Express product was a lucrative though small component of what was a significant business. The respondent, in addition, had a seafood shop where he stored the Buddha Express product.

[14] The sentencing judge observed the sale of this product was so attractive that the respondent found it hard to desist from continuing in selling that product after it had become illegal six months earlier. It may well be that some of the product sold by the respondent during the trafficking period may have been in his possession before it became illegal, although that seemed unlikely. The Crown position was that the respondent had been selling a product labelled Black Widow up until 1 October 2013 and Buddha Express thereafter. The sentencing judge found, as a matter of fact, that the respondent must have sourced some of that product at a time after the commencement of the trafficking period.

[15] The sentencing judge sentenced the respondent on the basis he had been running a business selling synthetic cannabinoids or similar product that was not unlawful and had continued to do so after it became unlawful, to his knowledge. The respondent had also taken some steps but not very significant steps to try and minimise the possibilities that authorities might be alerted to the fact he was selling a synthetic cannabinoid.

[16] The respondent had introduced a card system so that trusted customers who had been given the barcode card were able to purchase the illegal product. Cards were found by the police on the execution of a search warrant. Those cards brought up a product named Fun Time. Those cards were stored with the Buddha Express drugs. The sentencing judge found that as part of the process of minimising the chances of being detected the respondent used the term Fun Time rather than Buddha Express so as not to record the exact name of the product in his accounting records. Further, the product was stored in the seafood store rather than the tobacconist store.

[17] The sentencing judge observed that the respondent, when interviewed by police, had given answers which were in part truthful and had cooperated to the extent of admitting ownership of the Buddha Express product and as to how it was found and

as to some limited sales. However, he lied about relevant facts, including about not having sold Buddha Express over the previous year.

[18] The respondent told police he had no records of the sale of the Buddha Express product when, in truth, the Fun Time records were records of the sale of that product. Further, the respondent was selling those dangerous drugs for a commercial purpose when he knew the customers were buying it because it was a synthetic cannabinoid. The respondent did so out of greed, because he was not prepared to stop the benefits that were coming from the sale of this lucrative aspect of his business.

[19] The sentencing judge observed the respondent came before the court with no previous convictions, but could not receive the benefits of a person who had pleaded guilty and who could not demonstrate remorse. His cooperation with police was very limited and only to the extent that the police already had knowledge of that information or the ability to ascertain that information. That differentiated the respondent from cases where genuine cooperation was given to police. Further, there was a very significant course of conduct over an 11 month period for a large amount of money, relevant to factors on sentence.

[20] The sentencing judge observed that as synthetic cannabinoid was a Schedule 2 drug, it was to be treated no differently to any other Schedule 2 drug. However, the sentencing judge considered that the best assistance came from a consideration of previous authorities involving synthetic cannabinoids. Factors such as the quantity of the drug and value of the drug were relevant factors to be taken into account.

[21] In mitigation, the sentencing judge observed the respondent was a good worker who had built up a successful business. He was a married man who had reared two children to adulthood. He was well regarded within the community. Unlike many offenders who come before the court, he did not have a background typical of a person dealing in large quantities of illegal drugs. He was a shop-owner in the business of selling synthetic cannabinoid products at a time when they were not unlawful in Queensland who, upon those products becoming unlawful, continued to sell those products as part of his lucrative sales business.

[22] The sentencing judge took into account the fact that the sentence and the process of police investigation and court proceedings would result in substantial financial hardship and place his successful business at risk. Further, the respondent had already suffered considerable financial disadvantage because of the loss of his computer records resulting in a Tax Department fine of $100,000.

[23] Allowing for all of those factors, the sentencing judge observed that personal deterrence was not a critical consideration but that general deterrence was called for, particularly where the respondent had continued for almost a year in selling a drug well after it was declared illegal. Balancing the mitigating factors, including some evidence of ill health, the sentencing judge imposed an overall head sentence of three years imprisonment, to be suspended after serving six months, for an operational period of three years.

Submissions

[24] The Attorney-General submits that whilst the process of sentencing involves an extremely wide discretion, the sentence imposed on the respondent so failed to

reflect the serious nature of his offending as to be unreasonable and plainly unjust in the circumstances, thereby giving rise to an inference the sentencing discretion had miscarried.

[25] Whilst the circumstances of offending relating to synthetic cannabinoids is of relatively recent criminality, with few comparable cases, regard to the limited comparable authority and authorities in relation to cannabis traffickers demonstrates the sentence imposed on the respondent was manifestly inadequate. The respondent had engaged in high volume, high profit, illegal conduct, knowing of its illegality. He had developed a system of some sophistication, designed to minimise the risk of discovery of that illegal activity. Such conduct warranted a penalty of four to six years imprisonment.

[26] The Attorney-General submits that the imposition of a suspended sentence after only serving a period of six months evidenced the miscarriage of that sentencing discretion. Such a sentence involved unwarranted leniency in circumstances where the conduct was engaged in for a purely commercial purpose, motivated by greed. There was very limited cooperation and no evidence of remorse. Notwithstanding the factors in mitigation such as a lack of criminal history, good working history, otherwise good character, and evidence of financial hardship and a substantial fine from the Taxation Department due to the loss of his computer records, there was no basis to provide other than a moderate reduction on the time to be required to be served in custody in accordance with the legislation.

[27] The respondent submits there is no basis to conclude the sentencing discretion miscarried in the present case. The sentencing judge had regard both to the aggravating and mitigating features. The weight to be given to those features was a matter for the sentencing judge, who had a wide discretion. A consideration of comparable cases supported the imposition of a head sentence of three years imprisonment.

[28] Further, in circumstances where the respondent was acquitted of two counts of trafficking at trial, had no criminal history and had suffered a substantial fine as a consequence of the loss of records seized in the course of the investigation, there was no error in the exercise of the discretion to suspend that sentence after serving six months imprisonment.

[29] Finally, the respondent submits that before this Court can interfere with the exercise of the sentencing Judge's discretion on a Crown appeal, error must be demonstrated on the part of the sentencing judge. As no such error has been demonstrated, the appeal should be dismissed.

Consideration

[30] Before this Court can interfere with a sentence under s 669A(1) of the *Criminal Code*, it is necessary that error be demonstrated on the part of the sentencing judge.[1] This approach is consistent with a recognition that Crown appeals against sentence are exceptional.[2] Such error is not shown simply because the sentence is markedly different from other sentences that have been imposed in other cases.[3] However, manifest error can be shown where the sentence imposed is 'out of the range of

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1 *R v Hill, Bakir, Gray & Broad; ex parte Cth DPP* [2011] QCA 306 at [23].
2 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [16].
3 *Wong v The Queen* (2001) 207 CLR 584 at [58].

sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it.'[4] Intervention is warranted where the difference is such that in all of the circumstances it must be concluded that there was a misapplication of principles.[5]

[31] The respondent's conduct involved persistent and systematic sales of illegal products over a period of 11 months under the guise of his legitimate tobacconist business, in circumstances where he had been aware for some months that the sale of the product was illegal. The respondent pursued that conduct motivated by greed in order to receive the benefit of significant profits. The business records recorded gross sales of $527,389.48. The profit was approximately $178,000. It was a lucrative trade, involving multiple sales per day.

[32] In addition to that conduct, the respondent conducted the operation specifically knowing of its illegality and with the level of sophistication designed to disguise the existence of that business from law enforcement authorities. The respondent recorded the product in his business records under a false name. He stored the product at his seafood outlet rather than his tobacconist outlet. He developed a barcode system for trusted customers to purchase the product. Even when detected he evidenced no remorse, making limited admissions of matters likely to be established by the police and deliberately lying as to the magnitude of his illegal conduct.

[33] Such conduct was deserving of the imposition of a substantial period of imprisonment. Whilst the need for personal deterrence may not have been great, having regard to the respondent's lack of criminal history, likely financial hardship as a consequence of this incarceration, and otherwise good character and working history, the need for general deterrence loomed large. Offenders who engage in the unlawful business of trafficking in dangerous drugs purely for commercial profit, and not because they had a drug addiction of their own to fund, require particular deterrence.

[34] Offenders who engaged in the sale of cannabis consistent with a wholesaler in the magnitude and duration of the conduct undertaken by the respondent would attract sentences of five to six years imprisonment, on pleas of guilty.[6] Whilst trafficking in synthetic cannabis in the context of a tobacconist business is materially different to the type of offending of drug traffickers selling on a wholesale basis to suppliers, knowing that they will be on-selling to customers, the respondent's conduct involved a high number of sales per day to multiple customers.

[35] The sentence of three years imprisonment manifestly failed to reflect the serious nature of that offending. That failure was of a magnitude to constitute a sentence so out of range as to give rise to an inference that the sentencing discretion has miscarried in the present case.

[36] That miscarriage is evidenced by that sentence of imprisonment being suspended after the respondent had served six months, for an operational period of three years. The respondent did not have the benefit of cooperation with the authorities by way of pleas of guilty. Any cooperation with the investigation was limited. He deliberately lied in respect of some aspects of his conduct. He evidenced no remorse.

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4 *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [60].
5 *Wong v The Queen* (2001) 207 CLR 584 at [58].
6 *R v Harris* [2018] QCA 7; *R v Kalaja* [2017] QCA 123.

[37] Allowing for those factors, a decision to suspend the sentence after the respondent had served one-sixth of that sentence was manifestly inconsistent with a proper exercise of the sentencing discretion.

[38] Further, in imposing that sentence, the sentencing judge erroneously placed reliance upon the sentences imposed on traffickers of synthetic cannabis in *R v Johnson*[7] and *R v Slingsby*.[8]

[39] Johnson, a tobacconist, engaged in trafficking over a three week period of $5,000 worth of stock he had purchased before synthetic cannabis had been made a dangerous drug. His criminality was based solely on his own admissions. His sentence, imposed on appeal, of nine months imprisonment wholly suspended for two years reflected the extremely brief trafficking period, the modest amounts of sales and his significant cooperation by way of admissions, without which the Crown would not have been able to prove the charge of trafficking. Johnson also pleaded guilty.

[40] The circumstances of *Johnson* were so markedly different to the conduct of the respondent such as to constitute no comparable authority at all.

[41] Slingsby trafficked in synthetic cannabis over a period of nine months. She also supplied cannabis on two occasions and ecstasy on three occasions. Whilst those aspects were aggravating features of Slingsby's conduct, and Slingsby had a criminal history albeit dated, Slingsby co-operated fully. She had entered early pleas of guilty. Her conduct did not include deliberate concealment by falsification of records. It occurred in the context of a failing business, not in addition to an already lucrative legitimate business. The sentence of three years imprisonment suspended forthwith reflected her cooperation. No such co-operation existed in the respondent's case.

[42] As the sentencing discretion miscarried, it is necessary to re-exercise that discretion.

[43] Having regard to the persistent illegal conduct engaged in by the respondent for profit and motivated by pure greed, and the level of sophistication involved in such conduct, designed to hide that unlawful activity from detection, a head sentence in the order of four and a half to five years imprisonment was warranted in the respondent's case. Allowing for the fact that this is a Crown appeal against sentence, it is appropriate to set that sentence at the lower end, namely four and a half years imprisonment.

[44] Although the respondent does not have the benefit of cooperation with the administration of justice and has shown no remorse, his personal circumstances and the limited factors by way of mitigation support a suspension at a period earlier than serving one-half of that sentence. The limited nature of those mitigating features do not, however, justify a suspension as early as one-third of that sentence.

[45] Having regard to the respondent's lack of prior criminal history, otherwise good character, age and personal circumstances, it is appropriate to order that the sentence of imprisonment on the count of trafficking be suspended after the respondent has served 20 months imprisonment, for an operational period of five years.

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7 [2015] QCA 171.

8 Unreported, McMeekin J, SC No 50 of 2016, 9 June 2016.

Order

[46] I would order:

1. The appeal against sentence be allowed.

2. The sentences below be set aside.

3. The respondent be sentenced to four and a half years imprisonment on count 3 of the indictment, and 12 months imprisonment in respect of each of counts 4 and 5 of that indictment.

4. The sentence of imprisonment on count 3 of the indictment be suspended after the respondent has served 20 months imprisonment, for an operational period of five years.