SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brunelle* [2010] QCA 140
PARTIES:	**R** **v** **BRUNELLE, Richard Allen** (applicant)
FILE NO/S:	CA No 58 of 2010 SC No 30 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2010
JUDGES:	Holmes and Muir JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence is granted.** **2. Appeal allowed and the sentence is set aside.** **3. In lieu, the applicant is sentenced to two years' imprisonment suspended after serving a period of three months' imprisonment, and the applicant must not commit another offence punishable by imprisonment within a period of three years to avoid being dealt with for the suspended term of imprisonment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of supplying the dangerous drug cannabis sativa and was sentenced to three years' imprisonment suspended after nine months – where applicant entered an early plea of guilty and had no prior criminal history – where applicant provided substantial cooperation with police – where applicant's admissions disclosed the offence and the extent of his offending – where applicant provided statements about two alleged murders – where no cannabis sativa was supplied and no drugs were distributed as a result of the applicant's offending – whether sentence was manifestly excessive

R v Boyle [1995] QCA 396, considered
R v Brienza [2010] QCA 15, considered
R v Broad & Prior [2010] QCA 53, considered
R v Daetz (2003) 139 A Crim R 398; [2003] NSWCCA 216, considered
R v Davidson; ex parte A-G (Qld) [2009] QCA 283, considered
R v Hannigan [2009] 2 Qd R 331; [2009] QCA 40, considered
R v Murray [2006] QCA 154, considered
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, considered

COUNSEL: P E Smith for the applicant
M B Lehane for the respondent

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

[1] **HOLMES JA**: I agree with the reasons of Muir JA and Mullins J and with the orders proposed.

[2] **MUIR JA:** I agree with the reasons of Mullins J and with the orders she proposes. I agree in particular that counsel's emphasis on the hearing on the mitigating effect of the applicant's co-operation with authorities in relation to the murders distracted attention from his free and full confession and its mitigating effect. It may be that some evidence of the fictitious drug transaction and of the appellant's role in it may have come to light, but proof of his offending was likely to be difficult. The applicant could have attempted to minimise the scale of the fictitious dealing and his role in it but did not.

[3] **MULLINS J:** On 17 March 2010 the applicant pleaded guilty to one count of supplying the dangerous drug cannabis sativa on 23 January 2009. He was sentenced to imprisonment for three years to be suspended after nine months, with an operational period of three years.

Facts of the offence

[4] In late 2008 the applicant was in financial difficulties. He was expecting a reduction in the hours that he worked for his regular employer. He occasionally worked for an old friend Mr A who had an earthmoving business in partnership with Mr B. In early December 2008 Mr A told the applicant that he was growing cannabis on a property he had inherited from his grandparents and that, if the applicant wanted to make some extra cash, he could sell cannabis for him and keep a percentage of the profits. Mr A told the applicant that he had 160 pounds of cannabis and that the applicant could sell each pound for $3,000 and keep $500 for his cut.

[5] About a week later the applicant told a work mate who occasionally supplied the applicant with personal amounts of cannabis that he could get some cheap cannabis and they could make some money on it. They agreed to talk about it after the

Christmas holidays. The work mate did not return to work after the holidays and in mid January 2009 the applicant went around to his house. He found that he was overseas and spoke to his flat mate Mr Smith. The applicant mentioned that he had about 20 pounds of cannabis to dispose of, but could probably do more. Smith said that he would give his mate in Cairns a call. He did so and told the applicant that his mate would take 80 pounds (about 35 kilograms) at $2,600 per pound and could be in Brisbane on 19 January 2009. Smith said that he would take $100 per pound, leaving $200,000 for the sellers. The applicant called Mr A to tell him of the proposal and Mr A said he would have the drugs ready for 19 January 2009 and that the applicant would make $40,000 out of the deal.

[6] The deal did not go ahead on 19 January 2009, because of Smith's failure to organise it with his mate. The applicant went with Mr A and Mr B (who was involved with Mr A in the proposed deal) to Smith's house. Mr A and Mr B remained in the car while the applicant went into the house to speak to Smith and convey the anger of Mr A and Mr B about the failed deal and urged Smith to organise it. Smith called his mate and then told the applicant that they could do the deal on 23 January 2009.

[7] On 21 January 2009 Smith contacted the applicant to obtain a sample from the sellers which the applicant facilitated. Smith then told the applicant the sample was not big enough and the applicant liaised with Mr A and eventually Smith spoke directly with Mr A about the sample.

[8] At about 7:30pm on 23 January 2009 the applicant went to Smith's house and was introduced to his mate who had $100,000 with him to pay for half of the drugs on that night and would pay for the remainder of the drugs the next day. The applicant confirmed with Mr A that was acceptable. Arrangements were made for the applicant to bring Smith and his mate to the meeting point with Mr A and Mr B. The applicant sighted the cash and ensured that Smith's mate had no weapons. The plan was that Smith and his mate would drive with the applicant to a meeting place which was a short distance from Mr A's house where they would pick up Mr A and Mr B and drive back to Mr A's house to make the exchange. They drove to the meeting point in Smith's mate's vehicle. The applicant got out of the front passenger seat and sat in the back with Smith to allow room for Mr A to sit in the front and give directions to Smith's mate. Mr A opened the front passenger door and Mr B opened the rear passenger door and the applicant introduced them to Smith and his mate. Mr B then fired several shots which killed Smith and his mate. One bullet accidentally hit the applicant above the right knee.

[9] Mr A and Mr B did not have any cannabis sativa to sell. The applicant was duped by Mr A about the existence of the cannabis sativa. The proposed deal was a ploy by Mr A and Mr B to steal the cash from the buyers to which the applicant was not privy.

[10] After the shooting the applicant remained in the company of Mr A and Mr B while they removed the bodies and dumped the vehicle in which the shooting had taken place. The applicant asked to be taken to a hospital and, shortly before midnight, he was let out on the side of the road by Mr A and Mr B and told to tell the authorities that he got shot while walking home from the RSL. The applicant immediately called 000 and the police and ambulance arrived. At that time the applicant gave the story of being shot by an unknown person while walking home. When the applicant woke up after surgery the next day, he asked to see the police again.

When they attended, they recorded a conversation with the applicant in which he admitted his involvement in the drug deal and told them about the shootings and identified the parties. He signed a statement and gave a subsequent interview and further statement at the request of the police.

[11] At the sentencing hearing, the prosecutor made a submission that "while a lot of the detail of [the applicant's] involvement would not have been known except for his admissions, it's not a case of the kind that there would be no evidence at all against him to implicate him in this offence but for his admissions." For the purpose of this application, counsel for the applicant and the respondent conveyed to the court that it was an agreed fact that, prior to the admissions made by the applicant on 24 January 2009, Smith and his Cairns mate had been reported missing to the police and the police had information that the applicant was the last person seen with Smith and his mate. It was also agreed that, apart from this information, there was no evidence in the possession of the police implicating the applicant in the supply offence, and the first time the police became aware of the details of the supply offence and the killings was the applicant's admissions on 24 January 2009.

[12] Even though Mr A had no drugs to sell, the acts undertaken by the applicant in endeavouring to organise the sale of drugs by Mr A and Mr B to Smith's mate amounted to the offence of supply of cannabis sativa on the part of the applicant.

The applicant's history

[13] The applicant was 28 years old at the time he committed the offence and had no prior criminal history. He had a good work history and produced references to the court from his employer and a friend.

[14] The injury that the applicant sustained in the shooting was serious in that the bullet that hit him transected the artery in his leg and left him with an ischaemic limb and, if treatment had been delayed any longer, he may have suffered a limb amputation or been left with a functionless limb. He underwent an arterial bypass graft and required skin grafting for the wound. He was hospitalised for 19 days and made a good physical recovery. He may require graft revisions or an arterial bypass graft in the future.

[15] The applicant's counsel explained at the sentencing hearing that the applicant's cooperation with the police in making the admissions on 24 January 2009 enabled the police to progress the investigation into the two persons who had been reported missing that resulted in the police interviewing Mr A and Mr B during which they themselves made admissions. By the time the applicant was sentenced, the committal hearing in respect of the charges against Mr A and Mr B for murder was part heard and the applicant was to give evidence against them when the committal hearing resumed. The applicant's counsel described the applicant as "struggling with the demons in his mind" caused by his involvement in the events that resulted in the killing of two men.

The sentence

[16] Both the prosecutor and the applicant's counsel at the sentencing hearing were unable to find any directly comparable sentences. Although acknowledging that it was not a directly comparable sentence and concerned a more serious offence involving greater criminality on the part of the offender, the prosecutor relied on *R v*

Brienza [2010] QCA 15 (*Brienza*) in order to fix a starting point of six years from which it was submitted that a discount should be applied for the applicant's cooperation and that a suspension of the sentence imposed after serving one-quarter of the term in prison was then appropriate. The applicant's counsel suggested that a head sentence in the order of four years' imprisonment should be imposed, but that to reflect the mitigating factors, including the significant cooperation with the authorities from which true remorse could be inferred, the sentence should be wholly suspended. There was no evidence before the court from the Department of Corrective Services of the nature of that relied on in *York v The Queen* (2005) 225 CLR 466, but the applicant's counsel did rely on the obvious risks to the applicant from imprisonment as a result of his giving evidence against Mr A and Mr B.

[17] The learned sentencing judge noted that the applicant had no prior criminal history, had cooperated fully with the authorities and there was an early indication of an intention to plead guilty. The applicant's criminality was described by the sentencing judge in terms of deliberately and actively involving himself in facilitating the commercial supply of a very large quantity of cannabis sativa and that his motivation was purely commercial, in that the applicant was seeking $40,000 in order to relieve his financial problems. The sentencing judge noted that the applicant's role "surpassed that of an ordinary courier because your role extended to arranging for the Cairns purchaser, through the offices of Smith, and other dealings, including arrangements for the supply of a sample and so on, all of this taking place over a period from early December 2008 to the end of January 2009." The sentencing judge noted that it was relevant in the end that no cannabis sativa was in fact obtained or let into the community.

[18] The sentencing judge accepted that *Brienza* was of some degree of comparability, but could be distinguished to the extent that the charge was trafficking over a period of 11 months during which Brienza distributed on a wholesale basis some 70 pounds of cannabis sativa via 12 transactions into the community. The sentencing judge therefore selected a term of five years as the starting point for arriving at the applicant's sentence.

[19] The sentencing judge gave the applicant benefit for the high degree of cooperation with the authorities, including identifying two alleged murderers and the giving of evidence against them at their committal proceedings. This reduced the starting point of five years' imprisonment to a period of three years. The sentencing judge then took into account the additional mitigating circumstances of the lack of a prior criminal history, the applicant's age, the timely plea of guilty, the fact that the applicant witnessed two killings with an inevitably adverse consequence on his state of mind, that the applicant sustained a serious injury from which he had made a good recovery, and the good prospects of rehabilitation to limit the period in actual custody to nine months.

Whether the sentence is manifestly excessive

[20] Mr Smith of counsel (who appeared for the applicant on the application for leave to appeal against sentence, but was not the applicant's counsel at the sentencing hearing) submitted that insufficient account was taken of the following factors: (a) the injury sustained by the applicant; (b) the applicant's freely given confession; (c) the applicant's cooperation with the police; and (d) there were no drugs involved in the deal.

[21] With respect to the serious injury that the applicant sustained, the infliction of the injury was one of the facts relevant to the circumstances of the offence, and the consequences of the injury (particularly the lengthy hospitalisation and the possibility of future surgery) were relevant to the applicant's personal circumstances. The injury could not be characterised, however, as extra-curial punishment inflicted by a victim or another person seeking retribution or revenge, as discussed in *R v Daetz* (2003) 139 A Crim R 398 at [62], *R v Hannigan* [2009] QCA 40 at [25], and *R v Davidson; ex parte Attorney-General (Qld)* [2009] QCA 283 at 4-5 and did not require additional acknowledgment in the setting of the sentence on that basis.

[22] The other factors relied on by the applicant were relevant to determining the period of imprisonment that was appropriate for the offending, but for the substantial cooperation, and the allowance for that substantial cooperation.

[23] It was unfortunate that both counsel before the sentencing judge limited their submissions on other sentences to *Brienza*. Even though not directly comparable, a number of other sentences were referred to this court on the hearing of the application for leave to appeal against sentence. The following sentences provide some assistance.

[24] The offender in *R v Boyle* [1995] QCA 396 was 43 years old when he entered a late plea of guilty to possession of cannabis sativa in a quantity exceeding 500 grams. The offender was involved as a courier in transporting approximately 23.5 kilograms, having a wholesale value of $120,000, from Cairns to Brisbane. He was to be paid $200 per kilogram. He was sentenced to three years' imprisonment without any amelioration of the sentence.

[25] In *R v Broad & Prior* [2010] QCA 53, the offender Prior pleaded guilty to trafficking in cannabis sativa. The cannabis sativa was transported from South Australia to Queensland and Prior's role was to act as a warehouseman of the drugs. He collected them from the person who transported them to Queensland and held them overnight until their collection the next day by Broad and then passed over payment from Broad to the transporter. Prior was paid $500 to $600 for his involvement on each occasion he collected drugs and there were eight occasions. On his arrest he provided evidence against himself, but not against others involved in the enterprise. His motivation for his involvement was financial. On appeal, his sentence was reduced to four years, with a parole eligibility date set after 10 months.

[26] The offender in *R v Murray* [2006] QCA 154 (*Murray*) pleaded guilty to one count of supplying another schedule 2 drug, ecstasy, in circumstances where Murray facilitated the transaction by introducing the agent of the seller of 6,000 ecstasy tablets for $116,000 to the agent of the purchaser who was one Warren. Each of Murray, Warren and the agent of the seller received $1,000 from the transaction. Murray was sentenced at the same time for his involvement in two counts of supply and one count of possession of ecstasy committed about one year later. He was sentenced for the earlier supply count on the basis that the sentence reflected the overall criminality of his involvement in all the offences. He was sentenced to imprisonment for six years, with a recommendation for eligibility for parole after serving two years of the sentence. Of more relevance to the applicant's matter is the sentence given to the co-offender Warren who was involved only as agent for the

purchaser in the first supply offence committed by Murray. His sentence was referred to in *Murray* at [5]. He was sentenced to imprisonment for four years, suspended after serving one year, for an operational period of four years. Reference to the actual sentencing remarks (*R v Warren*, unreported, SC 1058 of 2005, Brisbane, Byrne J) reveals that Warren was 31 years old when he offended, had no prior convictions, and was considered unlikely to reoffend.

[27] Although the applicant had to be sentenced on the basis that he was involved in facilitating a supply of 80 pounds of cannabis sativa for a significant reward of $40,000, the fact that there were no drugs to be supplied, and none were distributed as a result of his offending, was a relevant factor, as was acknowledged by the sentencing judge, but it also had to be taken into account in moderating the comparability of other sentences where actual supplies of drugs occurred. Accepting that the applicant's motivation was financial and his conduct showed his willingness to be involved in a significant commercial transaction involving cannabis sativa, his involvement was limited to a period of about one month, but concentrated in the week or so leading up to the meeting where he expected the drugs to be exchanged for the cash. I have therefore concluded that, even before allowance for the applicant's cooperation, the starting point for the sentence could not have exceeded four years' imprisonment.

[28] What was emphasised before the sentencing judge was the applicant's cooperation with the police from the time he made his admissions on 24 January 2009, including his willingness to give evidence against Mr A and Mr B. What was not emphasised before the sentencing judge, but is apparent on this application for leave to appeal against sentence, particularly with attention being given by counsel to the precise statement of what was known by the police at the time that the applicant made his admissions, is that the serious aspects of the applicant's offending were disclosed by him. As the prosecutor before the sentencing judge noted, the applicant's position was not strictly within *AB v The Queen* (1999) 198 CLR 111, in the sense that it could not be said that the supply offence would never have been revealed, but for the applicant's confession. The confession made on 24 January 2009 may have brought the supply offence to light at that time, but the existing information that the police had at that time about the missing men would inevitably have resulted in further investigations. There was also an element of self-preservation by the applicant in making the disclosures to the police. In addition, if the applicant had not been forthright about his presence due to the arranging of a drug deal, he may have been investigated by the police as to what happened to the missing men. Nevertheless, in making allowance for the applicant's cooperation, some weight had to be given in his favour for the public interest served by his confession that disclosed the extent of his conduct in facilitating the transaction and that he expected to receive a significant sum for doing so, which were critical facts to determining the criminality of his offending. His cooperation with the authorities otherwise in relation to Mr A and Mr B was substantial.

[29] On the basis of the additional material and submissions that were put before this court, the sentence that was imposed by the sentencing judge was manifestly excessive. The applicant has been in custody since being sentenced. In the circumstances, the sentence should be reduced to imprisonment of two years, suspended after serving a period of three months, for an operational period of three years.

Orders

[30] I propose the following orders:

1. Application for leave to appeal against sentence is granted.
2. Appeal allowed and the sentence is set aside.
3. In lieu, the applicant is sentenced to two years' imprisonment suspended after serving a period of three months' imprisonment, and the applicant must not commit another offence punishable by imprisonment within a period of three years to avoid being dealt with for the suspended term of imprisonment.