

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA No. 273 of 2002

Applicant: Ho Sum Lau

Respondent: The Queen

Applicant's Submissions

The Offence and Original Sentence

1. On 21 August 2002 the applicant, who had pleaded guilty to 4 counts of production of a dangerous drug (methylamphetamine) [max. penalty -15 years imprisonment, s.8 (e) *Drugs Misuse Act* 1986 (“the Act”)]¹, was sentenced by Helman J in the Supreme Court at Brisbane to 3 years’ imprisonment, which imprisonment was to be suspended after 9 months²: **R1C&D**.

The Conduct

2. The applicant is a chemist. He owned and operated a pharmacy at Rochedale.³ He was licensed to sell Sudafed⁴ and iodine. He was caught in a police undercover operation selling Sudafed to a police officer and a police agent on three separate occasions [counts 1-3] and on one other occasion [count 4] he ‘agreed’ to sell some

¹ The conduct was committed when methylamphetamine was still a second schedule drug.

² Pursuant to section 144 of the *Penalties & Sentences Act* (Qld) for an operational period of 5 years.

³ Para. 8.4 of the applicant’s **Sentence Submissions** – 20 August 2002 and R47 L155

⁴ Sudafed is a pharmaceutical product that can be sold over the counter by qualified and registered chemists. It contains pseudoephedrine which can be used to produce methylamphetamine.

more.⁵ At the time of each sale he had been told by the purchasers, and believed, that they intended to unlawfully produce methylamphetamine with these products. However no dangerous drug was in fact produced and no production was even attempted. In fact there was never a risk of this as the purchasers' representations were, of course, false.⁶

3. On 19 August 2002, upon arraignment, the applicant pleaded not guilty. In the absence of the jury, the trial judge ruled that the applicant's conduct fell within the definition of "*produce*" as extended by subparagraph (c) in section 4 of the Act. His Honour adopted the analogous approach taken in *R v. Miller* [1990] 2 Qd R 566 and ruled that the offence of production was committed when the pharmaceutical products were sold with the belief that they would be used to produce a dangerous drug, even if that belief was mistaken and falsely induced by unlawful conduct: **R41 L30: Attachment 1.**
4. On 20 August 2002, after this ruling the applicant pleaded guilty: **R42-43.** The Crown Prosecutor and His Honour accepted this as a timely plea: **R97 L55 – R98 L10.**⁷

⁵ 240 boxes containing 90 Sudafed tablets were sold. He sold about 3 litres of iodine. R48 - 49

⁶ The applicant had been targeted as he was on a list of pharmacists that had been observed to have sold a proportionally higher than usual volume of Sudafed in preceding years: R47 L50; R 48 L36 - 39

⁷ It was submitted below as such- Paras. 6 & 7 of the applicant's **Sentence Submissions** – 20 August 2002:

"6. It is a recent plea and follows a second arraignment. However the crown prosecutor has known for some time that Lau would not dispute *any* fact alleged by the Crown. This resulted in the truncation of the list of any witnesses that might have been inconvenienced in relation to otherwise preparing a trial. Lau contested guilt solely by seeking to question the Crown's construction of a definition in the Act which had not previously, at least to the knowledge of senior counsel who argued it and those instructing him, been raised in a Queensland court before. 7. Lau fully appreciates that his conduct was morally deficient. Indeed, on Sunday 18 August 2002, upon being advised by his lawyers for the first time that his conduct was undoubtedly criminal, particularly having regard to section 10(1)(a) of the Act as construed in *R v Miller* [1990] 2 Qd R 566 per Thomas J at 575, he instructed that he was willing to plead guilty to that offence and an approach was made to the Crown. Overall Lau's approach at trial significantly reduced its duration. He has shown a sufficient "*willingness to facilitate the course of justice*" [*Cameron v*

Grounds of Appeal

5. Two points are sought to be raised in this application:
 - 5.1. Firstly, that the sentencing judge erred in not taking into proper account the fact that the applicant was induced by police who were themselves acting unlawfully: **R94, L18-25**.
 - 5.2. Second, that the sentencing judge erred in not taking into proper account the fact that no dangerous drugs were in fact produced and that there was no prospect of any such drug being produced in fact: **R96, L1-10**.

The unlawful conduct of the police

6. Applying His Honour's interpretation of the s.4 definition, it must follow that the police and the police agent were also guilty of production. The applicant's criminal conduct, i.e. selling with knowledge, was induced by their conduct. There is no suggestion that the applicant sold these products, with such a belief, to anyone else.⁸ The sentencing judge was referred to a number of appellate decisions in relation to this feature including: *Rahme* (1991) 53 A Crim R 8; *R v Thompson* [2000] NSWCCA 294; *R v Butcher* [2001] NSWCCA 188; *Swift* (1999) 105 A Crim R 279 and *White* (unreported) CA 56 of 1992. It was submitted below that the following 'broad' principles could be deduced from these cases:

- “7.1 if an offender has been induced by police into committing an offence it may be a mitigating factor;
- 7.2 whether it will have a mitigating affect and the degree of discount will depend upon an assessment of the offender's core criminality including:
 - 7.2.1 whether there was evidence of earlier criminal conduct;
 - 7.2.2 whether there was independent criminal propensity, preparation or will;
 - 7.2.3 the question of whether the offender was similarly offending other than the transactions with the operative, that is, whether the operative's conduct enables a snapshot of the offender's conduct or is the totality of it ;
 - 7.2.4 the degree of encouragement brought to bear upon the offender;
 - 7.2.5 the extent to which the offender was a willing participant; and

The Queen (2002) 76 ALJR 382 at 385, 386] to attract the Crown Prosecutor's concession that for all relevant purposes he has entered a timely guilty plea.”

⁸ The applicant was under police surveillance: Par. 8 of the applicant's **Supplementary Submissions** – 21 August 2002.

7.2.6 the effect of the encouragement upon the total criminality, that is what degree of criminality would have otherwise been involved, if at all.”⁹

7. The applicant submitted below that he was entitled to some distinct reduction in penalty given the circumstances surrounding his conduct.¹⁰ However, principally relying upon what was said by King CJ in *R v Mandica* (1980) 24 SASR 394 at 403¹¹, His Honour found that the applicant was “*only too ready to commit the offences to which you have pleaded guilty*”: **R94 L1 -25**. The applicant disputes the correctness of this finding.
8. The applicant’s liability for the offence was created by the police agents informing him that they were intending to produce drugs with the pharmaceutical drugs. It is most unlikely that any *actual* producer of dangerous drugs would ever impart that information to a commercial vendor of core products or drug production paraphernalia.
9. The salient aspects of the evidence on this point are:-
 - 9.1. The applicant has very good antecedents and had operated a legitimate business as a chemist for more than 12 years.¹² He had no prior criminal history.
 - 9.2. There is no evidence of any unlawful sales by the applicant of any similar or other pharmaceutical products to anyone else.¹³

⁹ Para. 7 of the **Applicant’s Supplementary Submissions** – 21 August 2002

¹⁰ Para. 11 of the **Applicant’s Sentence Submissions**: 20 August 2002 and paras. 1-9 of the **Applicant’s Supplementary Submissions** – 21 August 2002.

¹¹ Per King CJ with whom Jacobs and Mohr JJ agreed:
 “This ground of leniency does not exist, however, where the effect of the police trap is not to encourage a person to commit an offence which he would not have otherwise committed, but merely to detect and obtain evidence against an offender who is only too ready to commit the offence.”

¹² See para. 8 of the **Applicant’s Sentence Submissions**: 20 August 2002

¹³ R32 L5 and R40 L30: “*His Honour: Yes, but there isn’t evidence here of any prior dealing, is there? Mr Nicholson: No, your Honour*”

- 9.3. He had been “*induced*” by the police agents to commit the specific offences: they spoke the words that proffered the information which caused the belief which was an essential element of the offence.
- 9.4. The police officer and agent initiated every contact, including phone calls to place orders which could not always be filled by the applicant. They set the time frame for delivery. They increased their orders. They offered to pay and in fact paid above ‘market price’. They controlled all of the ‘arrangements’ with the applicant: **R78**.
- 9.5. The applicant was rarely more than monosyllabic throughout these ‘conversations’. In fact he is quite servile, obsequious and agreeable to most that is put to him: **R78**.¹⁴
10. In light of this evidence His Honour’s finding that the applicant was “*only too ready to commit the offences ...*” was not reasonably open on the evidence, indeed it is contrary to it: s.132C *Evidence Act 1977*.

The impossibility of any drugs actually being produced

11. The applicant pleaded guilty to the offence of “*producing*” methylamphetamine. His criminal liability arises from a statutory definition that extends the ordinary meaning of “*production*” rendering him a “*producer*”. This is so even though no such drugs were or could ever have been produced. Reliance was also placed below upon the New Zealand Court of Appeal decision in *R v. Brown* [1978] 2 NZLR 174 at 182-3:

“But respectfully disagreeing with the Judge, we think it material for sentencing purposes that the offers could not have resulted in the actual drug supply of scheduled narcotics. After all, it is the misuse of such drugs against which the legislation is ultimately aimed. Although the case is not quite on all fours on the facts, we note that in *R v Masters* (1974) 15 CCC (2d) 142, the Ontario Court of Appeal held that, notwithstanding that the distinction between a substance truly a narcotic and one merely held out as such was immaterial under the Canadian Statute to the question of conviction, it could be relevant in sentencing. While saying that even for sentencing purposes there might very well be cases where no distinction should be made, in that case they held that the trial judge was in error

¹⁴ See also aspects of Dr Wilkie’s Report: R 108-110.

in dealing with the matter as though the appellant had in fact sold heroin. The revised the sentence accordingly.”

12. In *Brown* the offender had sold substances that he believed to be LSD to an undercover police officer. Upon analysis it was found not to be LSD but a substance that was not even a scheduled dangerous drug. In *Masters* (1974) 15 CCC (2d) 142, the offender sold a substance to a police officer falsely representing that it was heroin when in fact it was not. There was no evidence that Masters believed he was selling heroin; indeed the evidence was consistent with his attempting to perpetrate a fraud.¹⁵ Both *Brown* and *Masters* were found guilty of supplying dangerous drugs when in fact they had not. In each case the New Zealand and Ontario Courts of Appeal upheld the convictions but effectively halved the original sentences to take into account this feature. The facts in *Brown* are of course closer to the present than *Masters*.
13. There is only one other sentence in Queensland for similar conduct as that committed by the applicant and where these features of inducement and impossibility were present: *R v Lim* (unreported) Philippides J, 31 January 2001 where a sentence of 2 years imprisonment to be suspended after 8 months was imposed. The Crown Prosecutor below relied primarily on this decision and submitted that a harsher sentence was due because of the larger amount of Sudafed tablets that had been sold than in *Lim*: **R 58-60**. The approach taken in *Lim* was to compare cases involving actual production of methylamphetamine against the notional potential that could be produced from the amount of Sudafed sold. Seemingly, Her Honour was not asked to consider either of the points raised in this application: **R71 L30**¹⁶ & **R96 L15-20**¹⁷.

¹⁵ At p. 144.

¹⁶ **R71 L30:**

Helman J: “It does seem that in *Lim*’s case these features were not explicitly considered in any rate.”

Mr Nicholson (DPP): “No, your Honour.”

¹⁷ **R96 L15 – 20**

Helman J: “Those features of this case, which were probably also features of a case of *R v Lim*, which came before Philippides J on 31 January 2001, were not dealt with by her Honour and it is reasonable to assume were not made the subject of submissions.”

See Attachment 2 (Sentencing Remarks, *Lim* per Philippides J).

14. It was submitted below that the applicant's criminality should be regarded as less than that of an actual producer of methylamphetamine and that the sentence imposed in *Lim* was in this sense *per in curiam*.

“...the approach taken in *R v. Adrian Lim* should be given limited regard.

18. The approach taken by *Lim*'s counsel as can be gleaned from the cases said to have been put before the court pointed to the shame and self punishment already sustained: *Moyse* (1998) 38 A Crim R 169.¹⁸ There is a less clear reference to *Powell* (1999) 108 A Crim R 448. There did not however appear to be any attempt to distinguish *Lim*'s conduct from cases where drugs were actually being or had been produced. Defence counsel also made a concession that a gaol term was appropriate but submitted that it should be wholly suspended. The sentencing judge was referred by the Crown to the Western Australian decision of *Chee Kean Johnny Lim v. The Queen* [1999] WASCCA 296¹⁹ (6 years imprisonment), a New South Wales decision of *S 111 A Crim R 225*²⁰ (3 years imprisonment plus and additional term of 1 year) and the South Australian decision *Ziemek* SACCA, 19 June 1996²¹ (3 ½ yrs with a recommendation for release after 18 months). The Crown urged a gaol term in the range of 2 to 3 years. Her Honour correctly noted that these cases concerned production at a much later stage or, one might say, at a stage closer to the final product. In each case actual production was involved.

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- ¹⁸ *Moyse* was a police inspector convicted of dealing in drugs. He was sentenced to 21 years gaol.
- ¹⁹ This *Lim* actually manufactured methylamphetamine by taking over his parents' house and setting up a clandestine laboratory. He made 5 successful attempts of actually producing amphetamines of high concentrations. The sentencing judge calculated that he had produced 60 times the traffickable amount of amphetamine. He was manufacturing in order to make a profit. He had a friend that would supply the drugs that he manufactured. He was sentenced on the basis of the amount of the drug that he had actually manufactured.
- ²⁰ *S* was convicted of knowingly having taken part in the manufacture of not less than a commercial quantity of methylamphetamine. At one site he was involved in the organisation and transport of equipment and some chemicals, the commencement of the manufacturing process and the recruitment of others to assist. At the second site for the operation, he made regular attendances, monitored the process and manufactured at least one item of equipment. It was an actual and sophisticated manufacturing process. It was his second offence and was committed whilst he was on bail. Indeed he was involved in these operations during the currency of his trial on other charges of knowingly taking part in the manufacture of another dangerous drug known as Nexus. He had been a user of drugs and had co-operated with information against others. In NSW the maximum penalty is life imprisonment.
- ²¹ In *Lim* this case was referred to as *Siemek*. *Ziemek* was a highly qualified industrial chemist who was recruited due to his knowledge of the manufacturing process. He did most of the work in setting up the laboratory. He saw his function as providing the skill to produce dangerous drugs and train others. He did in fact produce some amounts of ecstasy and some basic substances to produce amphetamine. His motivation was to make money. The maximum penalty in South Australia is 25 years.

None of these cases were of any real assistance to Her Honour, in fact misled her. Her Honour imposed a sentence of 2 years with a recommendation for parole after 8 months.”²²

15. That submission is maintained.²³ As is the submission that these points of mitigation should have resulted in a significant reduction proximate to a halving of the sentence that might be appropriate had production been completed or even actually attempted.²⁴

16. His Honour rejected these submissions:

“I am not persuaded in the least by that submission, because, as I have said, the focus of the provisions which apply to your case is upon the state of mind of this offender and your criminality is not less because, unknown to you, you were

²² Lim would have been released by now.

²³ Although the penultimate sentence might have been better expressed as: “...*these cases did not fully inform Her Honour.*”

²⁴ See Para.12 of the **Applicant’s Sentence Submissions**: 20 August 2002:

12. “It is not sound to seek to compare Lau’s conduct with actual drug production. In the analogous situation where a person offers to supply a dangerous drug, believing it to be a dangerous drug when it was not, the courts have recognised that whilst that issue does not change an offender’s culpability, it does have a bearing on penalty. See *R v. Brown* [1978] 2 NZLR 174 at 182²⁴ and *Regina v. Masters* 15 C.C.C. (2d) 142 at 144. In each case the appeal court effectively halved the penalty imposed below but for this feature. In this jurisdiction section 9(2)(c) and (e) of the Penalties & Sentences Act embrace these concepts as does section 9(4)(a) which does not have strict application.”

and

Para. 10-12 of the **Applicant’s Supplementary Submissions** : 21 August 2002:

“10. The second issue that bears clarification is that which was contained in paragraph 12 of the earlier submissions viz., the approach taken in *R v. Brown* [1978] 2 NZLR 174 at 182. Overnight research attempts have not revealed decisions of the Queensland Court considering this approach. Part of the explanation might be the due to the development on these issues as raised in *R v. Ward, Marles and Graham* [1989] 1 Qd R 194 at 196 & 197. In that case Carter J, with whom both Kneipp and Demack JJ agreed, held that section 4(3) of the Act which has now been deleted “*does not create the offences of attempting or conspiracy but is designed to extend the application of certain parts of the Act.*” Since the offence that had been established by the police was an “attempt” to possess due the intervention of police, leniency in sentence required by section 536 of the Code was warranted. Section 44A was then inserted into the *Drugs Misuse Act* as a result of this decision.

11. However the approach taken in *Brown* (supra) has been adopted in section 9(2) of the *Penalties & Sentences Act 1992* particularly subparagraphs 9(2)(c) and (e):

(c) *the nature of the offence and how serious the offence was including any physical or emotional harm to a victim:*

(e) *any damage, injury or loss caused by the offender.*

12. The Court must have regard to the fact that no drugs were ever produced or ever going to be produced by the criminal conduct of Lau. A discount of a substantial kind akin to a halving of any otherwise appropriate sentence is warranted.”

providing, or agreeing to provide, the pharmaceutical products for a non-existent manufacture”: **R96 L1-10**

17. Whilst His Honour is correct in identifying that the focus of the provisions in the Act is upon the “*state of mind*” of an offender, so it was in both *Masters* and *Brown*. It could not be properly submitted, for example, that a person who intends only to produce say 100gms of a 2nd schedule drug but ends up actually producing 100kgs of a 1st schedule drugs should be sentenced only upon what he intended to do and ignore what he actually did. Although the applicant was recklessly indifferent to the production of dangerous drugs by others for which he should be punished, that criminality is different from a commercial producer and distributor of dangerous drugs into the community. The rationale underpinning the New Zealand Court of Appeal’s approach in *Masters* as adopted in *Brown* should be preferred. A clear distinction is warranted.
18. Section 117²⁵ of the Act was inserted, it is said,²⁶ following the decision in *R v. Ward, Marles & Graham* [1989] 1 Qd R 196.²⁷ The section however does no more than make clear that a person convicted of attempting to commit a drug offence is liable to the same maximum penalty as one who actually commits the offence.²⁸ The general principles of sentencing as they affect assessment of culpability must still apply including for example ss.9(c) and (e) of the *Penalties & Sentences Act*. The degree of overall criminal culpability must necessarily still be assessed upon the ‘quality’ of the attempt to actually produce drugs. In this case it was, as has been demonstrated, a most futile attempt at production by a person with little appreciation of the

²⁵ At the time of insertion into the Act section 117 was enumerated as section 44A. The renumbering occurred in subsequent amending Acts.

²⁶ See annotations to this section and the Second Reading Speeches, Drug Misuse Act Amendment Bill, Hansard, 20 October p.1691 at pp.1694 & 3988:
“The effect of the amendment will be to increase the maximum penalty that can be imposed in respect of attempts relating to drug offences.”

²⁷ Carter J traced the history of drug offence legislation demonstrating that the *Health Act*, which had previously covered the field, had specific offences of “attempted...” possession etc with specific penalties whereas the *Drugs Misuse Act* did not, thus the need to resort to ss 535 & 536 etc of the *Criminal Code*.

²⁸ Moreover the applicant was not convicted of an “attempt”, rather, he pleaded guilty to the substantive offence of production.

seriousness of the conduct: **R79 L9 -30**. There was no actual risk of harm to others from his actions.

Grant of Leave

19. It is submitted that the identified errors, which involve important and novel (in this jurisdiction) sentencing principles, warrant the grant of this Court's leave to appeal.

Sentence that should now be imposed

20. The sentencing judge correctly identified the need for the deterrence of other chemists from similar conduct. However this factor should not outweigh other important features in the case. Deterrence of such other pharmacists is achieved by the bringing of criminal charges; as pharmacists are unlikely, one would think, to otherwise be part of the criminal element. Thus the shame associated with such a charge is likely to have a significant deterrent effect: **R97 L28-35, R120-2, R124**.
21. The detail in the applicant's Sentence Submissions of 20 August 2002 and associated documents demonstrate that the applicant has otherwise been a good citizen.²⁹ There are important factors of distinction between the applicant and actual producers of dangerous drugs. His conduct should not be equated with that which is imposed upon actual producers of dangerous drugs by speculating how much could notionally have been produced from the amount of one core substance sold by the applicant needed to produce the drug.³⁰ This approach is reflected in the distinction between the maximum penalties in ss.8(d) and (e) by reference to amounts of drugs actually produced: *Boyd* [2001] QCA 421 at p.8.³¹

²⁹ Dr Wilkie's Report: R105 - 110, Dr Stoker's Report R 111 – 119 and References: R 120 -124

³⁰ This was in essence done in *Lim*. Also it is not merely a matter of timing as in cases involving actual production; rather Lau was never going to be involved in drug production *per se*.

³¹ *Boyd* at p.8 per Williams JA:

"...the circumstances of aggravation can only be made out when the actual quantity of the drug exceeds the prescribed amount."

22. The penalty that should now be imposed, adopting the approach taken in *Masters* and *Brown*, is a sentence of around 18 months imprisonment with an order for suspension after say 4½ months.

Andrew Boe
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12 November 2002