SUPREME COURT OF QUEENSLAND

CITATION:	*R v Liu* [2024] QCA 58
PARTIES:	**R** **v** **LIU, Yu** (applicant)
FILE NO/S:	CA No 15 of 2023 SC No 1223 of 2021 SC No 1433 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 6 February 2023 (Crowley J)
DELIVERED ON:	19 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2023
JUDGES:	Dalton and Boddice JJA and Bradley J
ORDERS:	**1. The application for leave to appeal against sentence is allowed.** **2. The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was trafficking in dangerous drugs – where the applicant was charged with attempted murder, which was reduced to a charge of malicious act with intent (s 317 of the *Criminal Code*) – where the sentencing judge imposed cumulative sentences of six years imprisonment for each of the two offences – where Part 9A of the *Penalties and Sentences Act 1992* (Qld) applied, meaning the applicant was eligible for parole after nine and one half years CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was young at the time of offending and had two minor prior convictions – where the applicant trafficked drugs into the prison system and while on bail – where the violent offending was premeditated and its consequences were severe – where the sentencing judge fixed eight years as an appropriate

sentence for the trafficking and separately, for the malicious act with intent – where a two years reduction was made to each of the sentences to account for totality considerations – whether the applicant's youth and prospects for rehabilitation outweighed the seriousness of the offending such that the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – ERROR IN FACT-FINDING – where the applicant made statements to a law enforcement participant (LEP) about the drug trafficking while at a watch house – where the applicant lied to the LEP about his conduct, seemingly to exaggerate his criminal credentials – where the applicant submitted that this lie undermined other things he said to the LEP so that the sentencing judge should not have sentenced the applicant based on things he said about the scale of the trafficking – whether there was a fact-finding error made by the sentencing judge

Drugs Misuse Act 1986 (Qld), s 6(2)(d)
Penalties and Sentences Act 1992 (Qld), part 9A, s 9(2)(c)

Azzopardi v R (2011) 35 VR 43; [2011] VSCA 372, considered
Director of Public Prosecutions (Vic) v Grabovac [1998] 1 VR 664; (1997) 92 A Crim R 258, cited
Jarvis v The Queen (1993) 20 WAR 201, considered
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Amery [2011] QCA 383, considered
R v BDZ [2023] QCA 59, cited
R v Berry [2017] QCA 271, considered
R v Cole [1998] QCA 205, considered
R v Davis [2015] QCA 139, considered
R v Duong (2015) 255 A Crim R 78; [2015] QCA 170, considered
R v Feakes [2009] QCA 376, considered
R v Griffith [2000] QCA 435, considered
R v KAX (2020) 285 A Crim R 81; [2020] QCA 218, considered
R v Latemore [2016] QCA 110, considered
R v McGinniss [2015] QCA 34, considered
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Reardon [2006] QCA 225, considered
R v Strutt [2017] QCA 195, considered
R v Warne [2015] QCA 9, considered
R v Whittaker [2011] QCA 237, considered

COUNSEL: S C Holt KC, with L Dawson, for the applicant
C L Birkett for the respondent

SOLICITORS: Phillips Crawford Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **DALTON JA:** This is an application for leave to appeal against sentence. I would allow the application because substantial questions are sought to be raised on the appeal; I will therefore refer to the applicant as the appellant. Ultimately however, I would dismiss the appeal because I do not think that either specific error or manifest excess has been demonstrated in the sentence below.

[2] The appellant was 21-22 years old at the time of offending. He was sentenced to six years imprisonment on each of two serious offences. These sentences were ordered to be served cumulatively. As both sentences were imposed for offences which are mentioned in Sch 1 to the *Penalties and Sentences Act 1992* (Qld), and the cumulative period of imprisonment was one of 10 years or more, s 161C(2)(b)(i) of that Act meant that Pt 9A applied, with the result that the primary judge was not able to determine a parole eligibility date which he considered appropriate to this offender for this offending. The Act provided that the appellant was not to become eligible for parole until he had served 80% of his sentence. Here, this meant that the appellant was eligible for parole after nine and one half years. He had served considerable time in pre-sentence custody, so that he would have been 32 years old when he became eligible for parole under the sentence imposed by the primary judge.

The Offending

First Arrest

[3] At the time of offending the appellant was unemployed and lived with his mother and stepfather. He had minor Magistrates Court convictions for drugs and unlawful possession of weapons.

[4] Police executed a search warrant on the appellant's home on 10 November 2019. They were investigating an attempted murder. They found nothing of significance in relation to that offence. However, the police search found 258.40 grams of substance in which there was 185 grams of MDMA (71% purity). It also located 4.82 grams of white powder in which there was 0.66 grams of cocaine (13.8% purity). Further, they found 85 grams of Flualprazolam (an analogue of Alprazolam). Small amounts of cannabis and prescription drugs were also located, as were two different types of cutting agents, clip seal bags and digital scales. Seven .22 calibre bullets were located. Hidden in one of the appellant's shoes was $11,900. In a fridge, wrapped in a pair of shorts, was another $21,850. A tick sheet recording debts of over $9,000 was located. The appellant had $1,215 in his wallet. There was evidence on the appellant's computer that he was trafficking in dangerous drugs.

[5] The appellant was taken to a police station. He refused to be interviewed without seeing a solicitor. A solicitor could not be found, so he was charged with drug offences and given police bail.

Second Arrest

[6] Investigations into the appellant's involvement in an attempted murder continued, and on 3 April 2020 (about five months later), the appellant was arrested and charged with attempted murder. The attempted murder charge relied upon events which had happened on 6 November 2019, four days prior to the appellant's first arrest. The appellant continued to traffick, on bail, during the almost five months between the first and second arrests. The charge of attempted murder was later reduced to a charge of malicious act with intent (s 317 *Criminal Code*).

Particulars of Violent Offending

[7] The complainant was a 52 year old grandmother living with her two adult children (20 and 22 years old) and a granddaughter (2 years old). At 10.00 pm on 6 November 2019 all these family members were at home; the complainant was watching television. The wooden front door to the house was open, but a security screen door was locked. The complainant heard a noise outside the house and went to the screen door. At the door she saw someone with a black balaclava over his face and a gun in his right hand. The gun was raised and pointed directly at her face. The complainant moved to close the wooden door, but before she could, she heard a loud bang and fell to the floor. A car outside accelerated away at high speed.

[8] The complainant had facial injuries. She lost consciousness very quickly. Her children called 000. She was taken to hospital where she was admitted to intensive care. She remained in hospital for just over two weeks. She originally could not eat or talk, but has significantly regained those abilities after surgery.[1] She has permanent scarring to her face and permanent damage to her jaw and tongue. She suffers from nightmares and fear, while at home but also while out. She startles and is hypervigilant. The shooting was in the family home where the complainant had the right to feel safe. It disrupted the family living arrangements, which never resumed. The complainant's son went to live with his father. The complainant, her daughter and granddaughter went to live with the complainant's mother. This was difficult for them all, particularly in circumstances where the complainant needed considerable care for quite some time.

[9] On sentence the Crown conceded that it could not prove that the appellant was the shooter. More than one person was present during the shooting, ie., at least one person was waiting in a car owned by the appellant outside the house. The sentence proceeded on the basis that the appellant was at least present at the scene of the shooting. Moreover, the shooting came about because the appellant was motivated to take revenge on one of his criminal associates. This associate believed that the appellant had stolen some property from him. He went to the appellant's home, tied the appellant up and searched for the property, which he found. During this episode the appellant said words to the effect of "you're dead". The sentence proceeded on the basis that the appellant was instrumental in the formation of the common unlawful purpose of using a firearm to inflict serious harm and maim by firing a gun at his target. The Crown was able to prove that it was the appellant who determined on the address where retaliation was to be carried out. Unfortunately however, it was the wrong address; the retaliation was meant for someone who did not live at, and was not associated with, the complainant, her family, or her house.

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[1] The agreed statement of facts refers to two reconstructive surgeries, but the victim impact statement refers to six.

[10] The Crown was able to prove that the appellant consulted one of his friends (then in custody) about taking retribution on 5 and 6 November 2019 because the two men discussed his doing so during calls which were recorded by the prison Arunta system. The appellant's friend encouraged him to "cool off". The Crown could also prove statements by the appellant earlier in the evening of 6 November 2019 to another person to the effect that "I'll take care of them, I'll shoot her" and "Don't worry, I've got a gun, it's only a small one".

[11] After the shooting, and after his first arrest, the appellant spoke to his incarcerated friend and was recorded saying "They have nothing to tie me to the attempt murder … They have no case against me … I didn't get caught I got snitched …". When his incarcerated friend rebuked him for not listening to the advice he had previously given, the appellant said "No … Nothing would have been done for ages. I wouldn't have got my shit back neither … No, fuck. What do you mean … I wouldn't have got my shit back and I wanted pay back …".

[12] After the second arrest, the police placed law enforcement participants (LEPs) in the appellant's cell at the watchhouse. To these men the appellant said of the attempted murder charge, "Oh just some fuckin' drama, bro. We've had, had to do some retaliation and shit, bro. It wasn't with us [indistinct] dealin' with us so it was like, yeah, sweet, I might be able to beat it." At another point in the conversation the appellant dishonestly said to the undercover policemen that it "Wasn't even us, bro. … Cops are just tryna pin it on us" and dishonestly said that he had run through the house and stolen a couple of things from the person who was shot.

Particulars of the Drug Offending

[13] The appellant pled guilty to one count of supplying cannabis on 20 January 2019 and another on 21 April 2019. These supplies preceded a period of trafficking in dangerous drugs (MDMA, cocaine, Buprenorphine and cannabis) for 196 days (just over six months) beginning 22 September 2019 and ending 4 April 2020. The trafficking was serious: it involved trafficking in wholesale amounts of a schedule 1 drug (MDMA); trafficking Buprenorphine into prisons in significant amounts, and trafficking in cocaine and cannabis at street level.

[14] The trafficking seems to have been conducted in large part via Snapchat. Police were unable to analyse one of the appellant's phones. The appellant is recorded in a prison telephone call saying that another phone contained details of the trafficking but the police had not found it and "won't be able to pin me for anything". During conversations with LEPs the appellant said that he would procure half a kilogram of MDMA each fortnight which he would sell primarily in ounce quantities (28 grams). He stated that the lowest amount he would deal in was an eight-ball (3.5 grams) because anything less was not worth the effort. The appellant said he made $10,000 profit from each half kilo of MDMA that he sold.

[15] The trafficking in cocaine (a second schedule 1 drug) was at street level, and was for a slightly shorter period (9 November 2019 – 4 April 2020), a period of 147 days or about five months. The appellant told one of the LEPs that he sold high quality imported cocaine for $550 a gram, and that he placed a 20% profit margin on it.

[16] The appellant trafficked Buprenorphine (Subutex) into the prison system for the period between 8 November 2019 and 27 March 2020, a period of 140 days or over four and a half months. A text message on the appellant's phone described a photo of $16,000 in cash as "all my subby money from inside" and said that he had received this money as profits from "one of the Hells Angels". The defendant admitted that he made $60,000 in profit from this aspect of the business and that he sold one strip of Subutex for $100.

[17] The appellant trafficked in street level supplies of cannabis between 22 September 2019 and 27 March 2020, a period of 188 days or just over six months. There was a text message on his phone discussing prices for a quarter of a pound, half a pound and a pound of this drug. A supply of a quarter of a pound for $950 was discussed and the appellant said that the supplier would have an additional four pounds of cannabis set aside for them as "we have the cash". The message was accompanied by a video of him holding a large bundle of cash.

[18] The Crown could identify 29 customers of the trafficking business. There was a message that a particular customer was hiding from the appellant because "he owes me heaps … owes me a fair bit of coin"; and that he wanted to break that customer's legs.

Grounds of Appeal

[19] The appellant argued that there had been a specific error by the sentencing judge. That was not so, as explained in the reasons given by Bradley J. The second ground of appeal was that the sentence imposed was manifestly excessive. In my opinion, it was not.

[20] The appellant conceded that the sentence imposed below would have been appropriate had the appellant been older and without prospects of rehabilitation. The appeal was on the basis that the length of sentence imposed by the judge below was crushing because of the effect of the provisions in Pt 9A of the *Penalties and Sentences Act*.

[21] The discussion of principle in the case of *Azzopardi v R*[2] in the Victorian Court of Appeal is helpful in considering the matters which arise in this case because the Victorian Court of Appeal was concerned with factual matters which produced the same type of legal issue as emerges in this case:

> "The applicants, who were all young offenders, engaged in persistent and grave criminal conduct. This appeal against their sentences principally raises the questions whether the mitigating influence of their youth had been expunged because of the extent and seriousness of their criminality and whether upon a proper understanding of the principle of totality, the imposition of lesser sentences was required." – [1].

Youth

[22] The appellant's previous convictions were barely relevant. His immigration to Australia as a child was a disruptive event that forms part of the background material relevant to assessing his criminal behaviour, but it cannot be a strongly

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2 (2011) 35 VR 43.

influential factor in sentencing for offences of this magnitude. His childhood was not of the gravely prejudicial kind the Courts sometimes see. The appellant's youth was relevant in considering his criminality and his prospects for rehabilitation.[3] His plea of guilty was timely; the sentencing judge accepted that it evidenced remorse and that independently of the plea, the appellant was remorseful. That the appellant had undertaken courses in jail and had plans to live a law-abiding future was relevant because it bore upon remorse and upon prospects of rehabilitation.

Criminality

[23] As recognised in the above quotation from *Azzopardi*, it can be difficult to give extensive weight to the sort of personal factors just discussed in a case where the offending is very serious. Here, the criminality of both the violent offending and the drug offending was high. So far as the violent offending is concerned, its consequences were very severe, and it is well established that the severity of a sentence imposed will be very much influenced by the consequences of the offending.[4] Not only were the criminal acts involved in the offending very serious, the appellant's state of mind at and about the time of the offending is very much against him. So far as the malicious act is concerned, the appellant was engaged in taking retribution, after having made a threat to kill. So far as the trafficking is concerned, his motive was cynical: money making. During the trafficking period he boasted about his profits and his connections with criminals. The appellant trafficked for almost five months on bail: his previous arrest for drug offences did not stop him; nor did his knowledge that the police were investigating him for an attempted murder. He was friends with criminals. He expressed no remorse about the violent offending soon after it had occurred, and no remorse when he was speaking to the LEPs in the watchhouse several months later. To the contrary, he expressed anti-social attitudes. He did not co-operate with the police in any way, and boasted that his non-co-operation might frustrate the police investigation.

Approach to Sentencing: Individual Sentences

[24] The court in *Azzopardi* discussed the approach where a court is sentencing for more than one offence: "It is always necessary to fix an appropriate sentence for each offence before considering questions of cumulation, concurrence and totality and the mitigating effects of youth must be considered at all stages." – [54]. The sentencing judge here did exactly that. He fixed eight years as an appropriate sentence for the trafficking (with lesser concurrent sentences for the other drug offending), and separately, for the malicious act with intent. There is no question that each of those starting points was appropriate; I give my reasons for that view.

Drug Offending

Supply of Drugs into Prisons

[25] Supplying dangerous drugs to a person within a correctional facility is an aggravated supply – s 6(2)(d) *Drugs Misuse Act 1986* (Qld). The courts impose condign sentences even for very small supplies into prison. In *R v Cole*[5] a 22 year old who supplied 1.3 grams of cannabis to her jailed brother was sentenced

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3 *R v Horne* [2005] QCA 218.
4 *R v BDZ* [2023] QCA 59, [15], and see s 9(2)(c) of the *Penalties and Sentences Act 1992* (Qld).
5 [1998] QCA 205.

to 18 months imprisonment with parole after three months. The court said, "The offence is a significant one because the Courts have an obligation to ensure that drugs are not taken into prison". *Cole* was cited with approval in *R v Reardon*.[6] *Reardon* concerned the supply of 0.033 grams of heroin to a prisoner. Reardon was a 36 year old woman who had a seriously adverse upbringing and was addicted to drugs. This Court refused to interfere with a sentence of six months imprisonment. Relevantly here, the Court said, "Most importantly, … she freely chose to supply the heroin to a prison inmate in circumstances which involved a deliberate defiance of the due administration of justice".

[26] In *R v Davis*[7] this Court cited both *Cole* and *Reardon*. The facts in *Davis* were unusual in that the applicant for leave to appeal sentence, while incarcerated, had for a period of 14 days "engaged in attempts to arrange for himself to be supplied with … buprenorphine" – [10]. He was sentenced on the basis that he engaged in acts preparatory to the supply of a dangerous drug to a person in a correctional centre (himself). Davis's antecedents were not comparable with the appellant's, but the statement of principle at [21] of *Davis* is relevant here: "The offence of seeking to import drugs into prison by a person who is incarcerated in that prison is very serious. As the learned sentencing judge quite rightly pointed out, this offence serves to disrupt discipline and tends to frustrate attempts to rehabilitate others with drug problems".

[27] The appellant, of course, was not charged with an aggravated supply of dangerous drugs to a person within a correctional facility, but was charged with trafficking, which included trafficking into prisons. The amount of drug he supplied into prisons during the course of this trafficking is orders of magnitude greater than the amount of drug discussed in the above cases. Independently of everything else, this aspect of the appellant's trafficking meant that he was deserving of a condign sentence.

Trafficking at a Moderate Level on Own Account

[28] The starting point for the primary judge's sentence on the trafficking must be *R v Feakes*.[8] Feakes was 30 and 31 at the time of trafficking. He had a relevant but minor criminal history and he pled guilty to trafficking in cocaine, as well as MDMA and MDEA, which were at that time schedule 2 drugs. Feakes trafficked for seven months on his own account. His trafficking was for monetary gain. Feakes did not traffic while on bail, as the appellant did, and he did not traffic into prisons, as the appellant did. Feakes' trafficking consisted of 11 supplies; the appellant could be shown to have 29 customers. Feakes trafficked in a lesser number of drugs than the appellant; a lesser number of schedule 1 drugs than the appellant, and the amount of drug sold was very much less: Feakes supplied only 32 grams of schedule 1 drugs and less than half a kilo total of all schedule 2 drugs. In short, the offending in *Feakes* was significantly less than the offending by the appellant. So far as personal circumstances are concerned, Feakes was older than the appellant. He had a timely plea of guilty. Feakes had what this Court called a "grossly dysfunctional upbringing", but was able to show "impressive" efforts at

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6 [2006] QCA 225.
7 [2015] QCA 139.
8 [2009] QCA 376. In *R v KAX* [2020] QCA 218, [37], this Court acknowledged the currency of the guidance given in *Feakes*.

overcoming his dependence on drugs "so that he has promising prospects of rehabilitation when he is released from custody" – [35].

[29] Feakes was sentenced to 10 years imprisonment. On appeal, this Court noted that Pt 9A of the *Penalties and Sentences Act* had the effect that Feakes would serve 80% of his sentence. Nonetheless the Court refused to interfere, saying that the sentence imposed at first instance was not manifestly excessive. The judgment in *Feakes* contains considerable discussion of comparable cases, including the cases of *R v Assurson*[9] and *R v Elizalde*,[10] both of which are factually similar as to the age of the offender here – 23 years in *Assurson* and 25 years in *Elizalde*. McMurdo P said:

> "[33] My analysis of the comparable cases relied on by Feakes and the respondent in this application demonstrate that, absent extraordinary circumstances, in cases of trafficking in sch 1 drugs on a scale like the present offence, the sentence imposed on mature offenders who have pleaded guilty is ordinarily in the range of 10 to 12 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to a slightly lesser term of imprisonment in the range of eight to nine years: see, for example, *Assurson* (aged 23) and *Elizalde* (aged 25). As I noted earlier in these reasons, the practical effect of a sentence of less than 10 years imprisonment where there is no declaration that the offence is a serious violent offence takes on disproportionate significance."

[30] Contrary to the appellant's submissions, there was nothing inapt in using *Feakes* as an important comparator and, moreover, an important case in establishing sentencing parameters for this type of trafficking. Feakes' offending was considerably less than the appellant's drug offending; but the appellant was younger; both had prospects of rehabilitation. I consider that the eight year starting point adopted by the primary judge on the trafficking count was well within range.

Violent Offending

[31] As to the malicious act with intent, the personal violence was not spontaneous. It was more than simply deliberate; it was a premeditated, organised, planned act. It was a vengeful act. It comprised gun violence in company (whoever the shooter was) and it involved a violation of the complainant's home. It caused very serious injury and permanent harm.

[32] The Crown relied upon *R v Latemore*.[11] In my view that was a case of comparable, but lesser, offending. Latemore was 51. He was drinking at a hotel. He took a dislike to another patron of the hotel. He made enquiries about where he lived. He followed him home after the hotel closed. That involved driving about 17 kilometres. Once there, he confronted the complainant and struck him twice to the head with a metal pole. He fractured his skull. The complainant underwent neurosurgery and brain injury rehabilitation. He had ongoing cognitive changes and post-traumatic epilepsy. There was a late plea, but the sentencing judge accepted that Latemore was genuinely remorseful. Latemore had a good work history, good references, and good prospects for rehabilitation. He had a previous conviction for

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9 [2007] QCA 273.
10 [2006] QCA 330.
11 [2016] QCA 110.

violence. This Court refused to interfere with a nine year head sentence, but set aside an order that there be parole after five years and substituted an order that there be parole after four.

[33] The other comparative sentence relied upon by the Crown was *R v Whittaker*.[12] It was also lesser offending than the appellant's. Whittaker punched a man in a nightclub and security officers intervened. Whittaker threatened the officers at the time, and then some three hours later, with a hood over his head to conceal his identity, Whittaker followed one of the security guards when he finished work and stabbed him twice in his upper back. The victim required surgery for a collapsed lung and remained in hospital for two weeks. After a month or two he fully recovered. Whittaker was 21 at the time and suffered from post-traumatic stress disorder. He was sentenced to eight years imprisonment with a serious violent offender declaration, meaning that he was to serve 80% of that sentence. The Court of Appeal refused to extend time for an appeal. The basis of the decision was partly because no good reason was shown for delay, but also because the merits of the appeal were poor. As to the merits, President McMurdo remarked that, "The sentence imposed was a severe one but the offence he committed was deserving of a very significant punishment. The maximum penalty was life imprisonment." – [21].

[34] The eight year starting point adopted by the primary judge for the violent offending was well within range.

Approach to Sentencing: Totality Considerations

[35] After having fixed two appropriate sentences for the individual crimes of trafficking and malicious act, questions as to cumulation or concurrence arose. The sentencing judge expressly recognised that the sentence he imposed had to be one which was "a just and appropriate measure of the total criminality" involved in the appellant's offending and that the sentence "also must be one which would ultimately not be a crushing sentence". In discussing matters which bore on this tension, the sentencing judge specifically referred to the appellant's age and the "positive steps" which he had taken towards rehabilitation in custody. The sentencing judge explained, correctly in my view, that it was not possible to impose sentences which paid proper regard to the objective seriousness of the offending unless the two individual sentences were cumulated. Further, he recognised that the violent offending was of a different nature from the drug offending, and separated from it in time. In those circumstances, he chose to impose cumulative sentences of six years each on the counts of trafficking and malicious act with intent. In the context of the sentencing remarks, it is obvious that the two years reduction made to each of the individual eight year sentences was to account for totality considerations in circumstances where the sentencing judge was concerned that, because of the appellant's youth and prospects for rehabilitation, the overall sentence he imposed ought not be crushing.

[36] The trafficking and the personal violence were both serious examples of their type; each warranted a condign sentence, and they were separate types of offending which took place on separate occasions. In my view this was not an appropriate case to apply the principle in *R v Nagy*,[13] because to inflate the sentence on either count to reflect the totality of the offending would necessarily result in such a

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12 [2011] QCA 237.

13 [2004] 1 Qd R 63.

significant inflation that the sentence, and the appellant's criminal record, would be distorted.

[37] Had two wholly concurrent sentences of eight years been imposed, the resulting sentence would have been insufficient to recognise the criminality of the two separate types of offending. It is not possible under the State sentencing regime to impose partially cumulative sentences. Thus, the only appropriate approach for the sentencing judge here was to do as he did and impose cumulative sentences.

[38] In any case where cumulative sentences are imposed, it will be part of the task of the sentencing court to consider whether or not unmodified accumulation of the sentences produces "an appropriate relativity between the totality of the criminality and the totality of the sentences."[14] More often than not, the sum of cumulative sentences will be reduced downwards "to produce an ultimate aggregate which is less than that which would be arrived at by a straightforward adding-up of the terms appropriate for the offences if each were viewed alone."[15] This reduction under the totality principle is part of the instinctive synthesis. It is necessarily a flexible process. It defies "precision either of description or implementation".[16] Accordingly, whether the total effective sentence offends the principle of totality is often "a matter of impression".[17]

[39] When imposing a long sentence on a young offender, prospects of rehabilitation and the young person's prospects of living a law-abiding life in the future must loom large. Once a sentence satisfies the proper principles of punishment, denunciation and protection of the community, that is enough; a longer sentence is not justified and, particularly in the case of a young person, might do harm because it takes away a young person's hope for the future.[18] In that regard, reference is often had to the need to avoid a crushing sentence.

[40] In my view, the sentencing judge made a significant and sufficient reduction in the individual sentences for trafficking and for malicious act to arrive at a sentence which recognised the appellant's youth, but also the reality and serious nature of his offending. The real gravamen of the appellant's complaint is that he will spend nine and a half years in prison before becoming eligible for parole. That is the result of the legislation. As the cases of *Feakes* and *Whittaker* (above) recognise, where Pt 9A of the *Penalties and Sentences Act* applies, it has the effect that eligibility for parole will be determined by the legislation. In cases of serious offending, it will result in long non-parole periods, but that does not permit such a reduction of a head sentence that it is no longer a just and appropriate sentence for the offending.[19] There was no error of fact or law made by the sentencing judge. He proceeded conventionally, in accordance with the approach in *Azzopardi*. He did not fail to consider the appellant's youth and prospects for rehabilitation at the time of fixing individual sentences, nor did he fail to consider this factor in reducing the individual sentences to allow for the effects of totality. He had also to bear in mind the appellant's very serious offending. The sentence imposed below was not

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14 Street CJ in *R v Holder and Johnston* [1983] 3 NSWLR 245, 260, cited in *Azzopardi* (above), [59].
15 *Azzopardi* (above), [59].
16 *Postiglione v The Queen* (1997) 189 CLR 295, 340, cited in *Azzopardi* (above), [57].
17 *Azzopardi* (above), [58].
18 *Magee v R* [1980] WAR 117, cited in *Azzopardi* (above), [61].
19 *R v Daphney* [1999] QCA 69, cited in *R v Crossley* [1999] QCA 223; and *R v McDougall and Collas* [2007] 2 Qd R 87, 95 at [18], cited in *R v Smith* [2022] QCA 89, [14].

unreasonable, nor was it plainly unjust. I cannot infer there was a failure to properly exercise the sentencing discretion.

[41] **BODDICE JA:** I have read the draft judgment of Bradley J.

[42] I agree, for the reasons given by Bradley J, that there was no fact finding error made by the sentencing judge.

[43] However, I agree with Dalton JA that the imposition of cumulative sentences of 6 years' imprisonment for each of the offences of malicious act with intent and trafficking in dangerous drugs, with the consequence that each offence attracted a serious violent offence declaration necessitating that the applicant serve 80 per cent of that 12 year sentence before becoming eligible for parole, did not result in a sentence that was plainly unjust or unreasonable. Such sentences also do not evidence any misapplication of principle.

[44] Dalton JA's comprehensive summary of the circumstances of the applicant's offending, his mitigating factors and the comparable authorities, allows me to briefly state my reasons.

[45] In coming to the conclusion that the sentences were not manifestly excessive, there are a number of relevant considerations.

[46] First, the offence of malicious act with intent was, objectively, very serious. The applicant had another use a firearm in retaliation for previous conduct inflicted upon the applicant. Whilst it was not established that the applicant used the firearm himself, his moral culpability for the offence was high. Further, the consequences were grave. A completely innocent bystander was shot in the face, causing long-term injury. The nature of that offence is properly to be described as outside the norm warranting a declaration that it is a conviction of a serious violent offence.

[47] Second, absent the significant mitigating factors of the applicant's youth, lack of relevant criminal history, steps towards rehabilitation and timely plea of guilty, such serious violent offending would warrant a sentence of at least 8 years imprisonment.

[48] Having regard to those significant mitigating factors and the aggravating consequence of the declaration that the conviction is a conviction of a serious violent offence, a sentence for that criminality of 6 years imprisonment was within a sound exercise of the sentencing discretion.

[49] Third, the offence of trafficking also involved serious criminality. The trafficking, over a period in excess of five months, involved wholesale quantities of MDMA and street level quantities of three other dangerous drugs. The trafficking period included offending after the applicant had been released on bail. One of the drugs was trafficked for several months within the correctional system, a significant aggravating circumstance. Substantial sums of money were found in the applicant's possession.

[50] Whilst the trafficking was committed by a relatively young man with a very limited criminal history for drug offending and the applicant entered a timely plea of guilty evidencing genuine remorse and had taken significant steps towards rehabilitation, that offending, of itself, warranted a sentence in the order of 8 years' imprisonment.

[51] Fourth, as the sentence for trafficking is properly to be imposed cumulatively, having regard to the distinct nature of each occasion of offending, the sentence must be moderated to allow for an overall head sentence which properly reflects the applicant's total criminality, having regard to his mitigating factors.

[52] That circumstance, together with the applicant's significant mitigating factors, warranted a substantial reduction in the sentence for trafficking. Whilst it would have been open for the sentencing judge to have reduced the sentence for trafficking to, perhaps, 5 year's imprisonment, the sentence of 6 years' imprisonment fell within a sound exercise of the sentencing discretion.

Orders

[53] I would order:

1. Leave to appeal be granted.

2. The appeal be dismissed.

[54] **BRADLEY J:** As the Court is agreed the applicant should have leave to appeal, I will also refer to him as the appellant. The appellant carried on the business of unlawfully trafficking in dangerous drugs between 22 September 2019 and 4 April 2020. This involved wholesale quantities of MDMA and street-level quantities of cocaine, cannabis, and buprenorphine.[20]

[55] On the evening of 6 November 2019, during the trafficking period, the appellant was present with others outside a home in Morayfield when an unidentified person shot a woman in the face through the front screen door. Those outside, including the unknown shooter, were acting on the appellant's motive. He was instrumental in the group forming a common unlawful purpose of inflicting serious harm on a person, envisaging the use of a firearm. The shooter fired the shot intending to maim the victim. The victim was a completely innocent bystander and not the group's intended target. She suffered a long-term injury. This was a probable consequence of the group's common unlawful purpose. The appellant's conduct was a malicious act with intent.

[56] On 10 November 2019, also during the trafficking period, police executed a search warrant at the appellant's mother's home, where he lived. He was found in possession of 185.02g of MDMA, and a clip seal bag of white powder containing 0.66g of cocaine. These were all found in a fridge in the garage. He had $34,965 in cash—found spread across a shoe, his shorts, and his wallet—and he had purchased a second-hand BMW sedan with trafficking proceeds. A water bottle of liquid containing the tranquiliser flualprazolam[21] was found next to his bed.

[57] Some months before the trafficking period, on 20 January 2019 and on 21 April 2019, the appellant exchanged messages with two others about the supply of cannabis. These were deemed supplies.

Guilty pleas and sentence

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20 MDMA and cocaine are dangerous drugs listed in schedule 1 of the *Drugs Misuse Regulation 1987* (Qld). Cannabis and buprenorphine are dangerous drugs listed in schedule 2 of the regulation.

21 An analogue of the dangerous drug alprazolam, which is listed in schedule 2 of the regulation.

[58] The appellant was aged 21 and 22 years when he committed these offences.[22] On 4 November 2022, he was arraigned and entered a guilty plea to each of them. He had a single prior entry on his criminal history.[23]

[59] On 6 February 2023, aged 25, the appellant was sentenced to a total of 12 years' imprisonment for the above offending. He must serve 80% of the 12 years in custody (about nine years, and seven months) before he will be eligible to apply for parole.

[60] The appellant's effective 12-year sentence arises in this way.

(a) He was sentenced to six years' imprisonment for the malicious act, six years' for trafficking, 12 months' for each of the two supplies, and six months' for possession of seven bullets, for which he did not have the necessary authority to possess under the *Explosives Act 1999* (Qld). He was convicted but not further punished for possession of dangerous drugs (flualprazolam, MDMA, cocaine, and cannabis), and possession of the cash, the BMW sedan, and a grinder, digital scales and clip seal bags, on the basis all these were particulars of his trafficking offence.

(b) He was ordered to serve the sentences imposed for the trafficking, supplies, and possession of the bullets concurrently with each other, but cumulatively with the sentence imposed for the malicious act.

(c) Section 317 of the *Criminal Code* (Qld) creates the offence of malicious act, and s 5 of the *Drugs Misuse Act 1986* (Qld) creates the offence of trafficking in dangerous drugs. Each is a provision mentioned in schedule 1 of the *Penalties and Sentences Act 1992* (Qld) (**PSA**). By operation of ss 161A(a) and 161C(2) of the PSA, the appellant was taken to have been convicted and sentenced to 10 or more years' imprisonment for an offence against a provision mentioned in schedule 1 of the PSA. It followed that the conviction for the malicious act and that for trafficking were each a conviction of a serious violent offence. The sentencing judge made a declaration to that effect.

[61] On 18 July 2023, this Court amended the verdict and judgment record to remove reference to the appellant's convictions for the three summary offences (possession of cannabis, the bullets, and the grinder, digital scales and clip seal bags). He had not been arraigned on these charges, and I have not referred to these charges in these reasons. No submission was put that this error affected the balance of the sentence below.

Proposed grounds of appeal

[62] The appellant seeks leave to appeal against the sentence on two grounds. First, the appellant says the sentencing judge made an error in fact-finding about the scale of the trafficking. Second, the appellant says the sentence imposed was manifestly excessive.

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22 His 22nd birthday was in October 2019.

23 He was dealt with in the Magistrates Court in August 2019 for possessing a restricted drug and unlawfully possessing a weapon in July 2019. No conviction was recorded, and he was placed on a six-month good behaviour bond with a recognisance of $500.

Ground 1 – fact-finding error

[63] The appellant contends that, at the sentencing hearing, his defence counsel challenged the truth of some matters the appellant told a law enforcement participant (**LEP**). The appellant submits the sentencing judge wrongly accepted those matters as true.

Agreed statements of facts

[64] An agreed statement of facts was tendered for the dangerous drug counts.[24] Another agreed statement was tendered for the malicious act count. The two statements described the circumstances in which the appellant made admissions to the LEP.

[65] Early on 3 April 2020, the appellant was arrested and taken to Brisbane City Watchhouse. At 8.30 am, the LEP was placed in the appellant's cell. This was before the appellant was able to speak with his solicitor. While in the cell, the LEP engaged the appellant in conversation, and the appellant spoke to the LEP about the trafficking.

[66] The dangerous drugs-related statement of facts included the following matters:

> "During admissions to an LEP the defendant stated he would procure half a kilogram of MDMA each fortnight which he would on-sell primarily in ounce quantities (28 grams). The defendant further stated that the lowest he would deal in was an 8-ball (3.5 grams) quantity and anything less than this was *'not worth the effort ... too much salesmanship'*.
>
> During the admissions the defendant also admitted to supplying an ounce of MDMA to customers in the Cairns region.
>
> The defendant admitted to making $10,000 profit from each half kilogram of MDMA.
>
> … During admissions to an LEP the defendant admitted to selling high quality, imported cocaine. The defendant stated he would sell one gram of cocaine for $550 and placed a 20% profit margin on it.
>
> … In total, 29 known customers were able to be identified from the defendant's Facebook account, phone messages, tick sheet, and admissions to the LEP."

[67] The repeated use of the phrases "during admissions" and "during the admissions", in the statement of facts, is unhelpful. A statement of facts should set out the relevant facts with appropriate clarity. These unsatisfactory aspects of the statement of facts were clarified in the Crown's written and oral submissions.

[68] From the malicious act statement of facts, it appears that, shortly after he said these things to the LEP, the appellant was removed from the cell and allowed to contact his solicitor. After taking advice, he told police he declined to be interviewed. The appellant was then returned to the cell with the LEP, who again engaged him in conversation and attempted to extract further admissions.

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24 This statement also set out the factual basis for the summary charges.

[69] On 26 November 2021, the appellant applied to exclude admissions made to the LEP about the malicious act count. The application was dismissed on 10 February 2022. There was no application to exclude any admissions about the trafficking count.

The defence counsel's submission to the sentencing judge

[70] This proposed ground of appeal relies on the following passage from defence counsel's oral submissions to the sentencing judge:

> "It's true that his trafficking, as indicated by the Crown in their outline, was a fluctuating role as a wholesale supplier. It is unclear about the amount of profit but it's certainly the case that there hasn't been any asset forfeiture orders other than the cash found at the time of the police search warrant. And the BMW vehicle, which is accepted by the Crown upon my instructions as well, that that was worth $10,000. So it was a second-hand vehicle purchased by a 22 year old for $10,000 is not out of the ordinary.
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> The police didn't seek, of course, to do any financial analysis of any bank accounts. There's no unexplained wealth applications. He was living at his mother's house, and he was 22. There might be considered, perhaps, but some puffery at play and it's, for example, talking to the LEP in the cells indicating that he was selling high-quality imported cocaine, which of course, at the time, he possessed only 4.82 grams of cocaine which was at a purity of 13.8 per cent.[25] So incredibly low. And there's no particular – certainly not backing away from the statements against interest that he made to the LEP about half kilos fortnightly, etcetera, there's no definitive timeframe that's attributed to those either.
>
> It's just relevant to some of the other cases that the Crown have sought to rely upon for the trafficking where … the applicants in the cases have been the target of significant operations. And certainly, a lot more is known of their involvement, those around them, and are able to be far more accurate about what they were dealing and selling at the time. Whilst there is, of course, the use of things like Snapchat which would tend to hide those sorts of matters, there isn't the resultant outcome of him having living any kind of life of luxury at this relevant time."

[71] The appellant lied to the LEP about another matter, perhaps to exaggerate his criminal credentials, telling the LEP that, after the malicious act, he ran through the victim's house and stole a couple of things. On the Crown case, he did not enter the house or steal anything from it. For the appellant it was submitted that this lie undermined the other things said to the LEP such that the sentencing judge should not have sentenced the appellant based on things he said about the scale of the trafficking.

The factual basis of the sentence

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25 The dangerous drugs-related statement of facts refers to: "A clip seal bag containing 4.82 grams of white powder, in which forensic analysis detected 0.66 grams of cocaine (13.8% purity)…".

[72] The appellant was sentenced on the basis he had trafficked in different drugs, over overlapping periods of 195 days (MDMA), 188 days (cannabis), 147 days (cocaine), and 140 days (buprenorphine). The trafficking continued after 10 November 2019, when the appellant was released on police bail. He had 29 known customers and a "tick sheet" listing eight names with respective debts totalling $9,050. The appellant told the LEP he was acquiring half-kilogram quantities and selling it in one-ounce (28-gram) or 3.5-gram quantities. On this basis, the MDMA business was wholesale and profitable, and that was said to be his motivation. The trafficking in the other drugs was at street-level.

[73] These matters were within the facts agreed by the appellant. In written and oral submissions, the Crown clearly adopted them as admitted facts, some told to the LEP and others from the appellant's boasts made to others.

[74] The circumstances in which the appellant described his trafficking to the LEP, and the absence of other evidence of its scale, extent or profitability, might make the admissions noted in the statement of facts less compelling. The same might have been said of the parts of the statement of facts about buprenorphine trafficking, which were drawn from the appellant's text messages about supplying "one of the Hells Angels". However, defence counsel did not dispute any of these facts or ask the sentencing judge to resolve any dispute about them. In written submissions, defence counsel told the sentencing judge, "There are two schedules of fact which set out the allegations. Those schedules are agreed and accepted by Mr Liu." There was no other reference to the schedules in the defence material for the sentencing hearing.

[75] The oral submissions put for the appellant at the sentencing hearing, noted in paragraph [70] above, were directed to distinguishing the appellant's offending from that of the offenders in other cases raised by the Crown as potential sentencing yardsticks.

[76] There was no factual contest before the sentencing judge. The circumstances did not call for a ruling in accordance with s 132C of the *Evidence Act 1977* (Qld).

[77] I would not grant the appellant leave to pursue the first proposed ground of appeal, as there was no fact-finding error by the sentencing judge.

Ground 2 – manifestly excessive sentence

[78] The second proposed ground of appeal is that the sentence was manifestly excessive.

[79] In *R v Pham*,[26] French CJ, Keane and Nettle JJ emphasised that intervention on this second proposed ground:

> "… is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."[27]

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26 (2015) 256 CLR 550.

27 Ibid, 559 [28], citing *Wong v The Queen* (2001) 207 CLR 584, 605 [58] and *Barbaro v The Queen* (2014) 253 CLR 58, 79 [61].

[80] It is appropriate to consider the relevant sentencing factors, the cases put before the sentencing judge as comparable, and, because of the particular construction of the sentence, the effect of cumulation of the two longest sentences and the effect of the serious violent offence declarations on the relationship between the total sentence and the appellant's overall criminality, and related considerations.

The relevant sentencing factors

[81] The sentencing judge identified the following relevant factors.

(a) The appellant had "a strict and traditional Chinese upbring" and was "raised in a pro-social family environment." He was born in China, the second of two children. His father has not been a part of his life since infancy. His mother placed him and his older sister in the care of his paternal grandparents so she could earn a living to support the family. He saw his mother once or twice a year in this period. He completed schooling to year six in China. In 2009, aged 11, he moved to Australia with his mother and sister. He completed his schooling (including an English as a second language program in primary school), graduating at the end of year 12 in 2015. He enjoyed and excelled at mathematics. After school, he qualified as a personal trainer, worked for a large supermarket, and "on and off" as a concreter.

(b) In high school, the appellant "began to develop some attitudinal and behavioural difficulties". As a young adult, he "began moving away from" the values of his strict upbringing "and towards an older antisocial peer group which normalised and glamourised a criminal lifestyle." His "identity developed thus far as a young adult has been largely influenced by negative peer influence and their associated behaviours."

(c) The appellant's guilty pleas were timely, of "utilitarian value in that they have saved the time and expense of a trial" and demonstrated a "willingness … to facilitate the course of justice."

(d) The guilty pleas were accepted as "an expression of remorse", as were the appellant's "efforts at rehabilitation whilst in custody."

(e) The extent of other courses and units the appellant had undertaken while in custody was noted.[28]

(f) The appellant planned to complete a university degree in business and commerce, and to then assist his mother in managing her physiotherapy business, with a view to ultimately opening his own business. The psychologist assessed these plans as realistic and achievable. The sentencing judge remarked that, "it does appear to me that that is so and that you are working towards a future." A document from the University of Southern Queensland recorded that, between semester 3 in 2020 and semester 2 in

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[28] The appellant completed: Yourtown Kicking Habits Program, a five-week low intensity program on alcohol and other drugs (12 October 2020); TAFE Queensland unit titled "Prepare to work safely in the construction industry" (26 October 2020); BSI Learning units titled "Provide responsible service of alcohol" (11 November 2021) and "Use hygienic practices for food safety" (14 January 2022); School of Distance Education Pre-Employment Program (7 February 2022); Axiom College Certificate III in Supply Chain Operations (14 November 2022); Emmaus Correspondence School courses titled "Who is the Greatest Man Alive?" (7 November 2022), "Men Who Met Jesus" (13 December 2022), and "The Bible – What's In It For You" (20 January 2023). The applicant also attended four sessions of Narcotics Anonymous and two sessions of Alcoholics Anonymous before these programs were discontinued by Queensland Corrective Services.

2022, while in custody, the appellant had completed six units in the tertiary preparation program, achieving two high distinctions, two distinctions, and two passes, for a grade point average of 5.67. He was also enrolled in another unit in semester 3 of 2022. The sentencing judge remarked:

> "I accept that not only whilst in custody have you been using your time productively to occupy your time on remand, but that you are also doing so for the purposes of ultimately obtaining a future for yourself which will be a productive one and a law-abiding one. I accept that you have positive prospects, therefore, of rehabilitation and that your rehabilitation has commenced. In particular, I am of that view not only for the courses and things you have done in custody but also having regard to your age and your absence of prior convictions."

(g) A psychologist assessed the appellant as having "good rehabilitative prospects", a "reasonably low risk for future violent offending", and a "positive trajectory" that would be supported by "the structured support offered by conditions of a community-based order as part of any sentencing regime".

"Comparable" cases

[82] The nature of the appellant's offending meant that the sentencing judge was taken to cases involving malicious acts with intent and others involving trafficking in dangerous drugs.

[83] In considering these cases, one must be conscious that even a markedly different sentence in cases said to be "comparable" does not justify appellate intervention.[29] A decision that a particular sentence is manifestly inadequate or excessive depends on all the factors relevant to the particular sentence, not on a comparison with a predetermined "range" of available sentences.[30]

The malicious act cases

[84] The Crown referred the sentencing judge to four decisions of this Court as relevant to the sentence to be imposed for the offence of malicious act with intent:

(a) In *R v Whittaker* [2011] QCA 237, the 21-year-old offender returned to a night club at 3 am and stabbed a security officer twice in the back. He was sentenced to eight years' imprisonment, and the offence was declared to be a serious violent offence. This Court refused the self-represented offender an extension of time to appeal against the sentence on the proposed ground that it was manifestly excessive.[31]

(b) In *R v Amery* [2011] QCA 383, soon after being arrested and issued with a temporary domestic violence order, the 47-year-old offender, with an extensive criminal history, returned home and struck his partner twice in the head with a 10lb sledgehammer as she lay in bed. He pleaded guilty to

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29 *Wong* (above), [58] (Gaudron, Gummow and Hayne JJ).

30 *R v Goodwin; ex parte Attorney-General (Qld)* [2014] QCA 345, [5] (Fraser JA).

31 In *Whittaker*, the offender had earlier abandoned an application for leave to appeal and sought to extend time to re-make his application about 19 months after his sentence.

grievous bodily harm with intent and was sentenced to eight years' imprisonment with no order as to parole eligibility. On appeal, the sentence was reduced to seven years and seven months' imprisonment with parole eligibility after three years.

(c) In *R v Warne* [2015] QCA 9 the 20-year-old offender,[32] with a relevant criminal history, was sentenced to seven years' imprisonment for grievous bodily harm with intent. After breaking into a house, he told two of his three companions to get a gun and shoot an occupant. The victim was hit in his right forearm. The offender was sentenced to seven years for burglary by breaking, whilst armed and in company, to be served concurrently with the other sentences. His parole eligibility date was fixed after serving 13 months' imprisonment. It was reduced from 18 months to take account of an additional 10 months in custody, served as part of earlier sentences when his parole was cancelled. The sentence was upheld on appeal.

(d) In *R v Latemore* [2016] QCA 110, the 51-year-old defendant struck his victim twice in the head with a metal pole. The two had argued at a hotel earlier in the day. The offender went looking for the victim at about 10.30 pm and drove about 17km to the victim's house, where he committed the offence of doing grievous bodily harm with intent. He was sentenced to nine years' imprisonment. On appeal, his head sentence was not altered, but he was granted parole eligibility after four years.

[85] Of these decisions, only *Whittaker* and *Warne* involved a youthful offender. The offending in *Warne* is closer to the appellant's offending than that in *Whittaker*.

[86] Defence counsel referred the sentencing judge to *Warne* only, submitting that the injury caused by the offender in *Warne* was less significant, but the offender's criminal history was more serious than the appellant's single entry with no conviction recorded.

[87] With respect, the six-year sentence for the malicious act with intent imposed by the sentencing judge is appropriately less onerous than the seven years imposed in *Warne*, the nearest to being comparable of the cited decisions. However, the serious violent offence declaration requires the appellant to serve at least 4.8 years in custody. That is more than four times the 13 month "non-parole" period in *Warne*.

Trafficking cases

[88] The Crown relied on the following decisions of this Court as reference points for sentencing the appellant for trafficking:

(a) In *R v Griffith* [2000] QCA 435, the 40-year-old defendant, with a very long and serious criminal history, pleaded guilty during his trial to possession of cannabis and to supply of heroin and methylamphetamine to prisoners on two dates. His sentence of three and a half years' imprisonment was not disturbed on appeal.

(b) In *R v Feakes* [2009] QCA 376, the defendant was aged 30 and 31 at the time of the offending. He was sentenced to 10 years' imprisonment for trafficking in cocaine, MDMA and 3,4-Methylenedioxyethylamphetamine (MDEA) over

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32 He was 20 years and 10 months of age.

about seven months. It was declared to be a serious violent offence. While trafficking, he supplied drugs on 11 occasions to covert operatives, totalling approximately 32g of cocaine, almost 5,000 tablets containing approximately 330g of MDMA (then a schedule 2 drug), and approximately 110g of MDEA (also a schedule 2 drug). The sentence was imposed on a global basis for the trafficking, for producing about 5kg of cannabis in a well-advanced hydroponic setup in a locked room, and for possessing 9.983g of pure cocaine and 3.683g of pure MDMA. He had a minor criminal history. The sentence was not disturbed on appeal.

(c) In *R v McGinniss* [2015] QCA 34, the 26-year-old defendant pleaded guilty and was sentenced for trafficking in methylamphetamine over a seven-month period and for possession of 404.325g of pure crystallised methylamphetamine. He worked for a drug syndicate and over six deliveries supplied about three kilograms of dangerous drugs in wholesale quantities to customers in Brisbane and two provincial cities. He supplied small amounts of methylamphetamine to three regular customers and multiple ounces to his other regular customers. He was sentenced to 10 years' imprisonment for the trafficking, with an automatic serious violent offence declaration, and eight years for the possession to be served concurrently. The sentence was not disturbed on appeal.

(d) In *R v Duong* [2015] QCA 170, after a trial, the defendant was sentenced to nine years' imprisonment with no order as to parole eligibility. The sentence was for possession and intention to supply a substance that contained 204.391g of methylamphetamine. It was not a trafficking case. Duong was aged 29 at the time of his offending. He had previous convictions for armed robbery in company, unlawful wounding, and deprivation of liberty, for which he had been sentenced to six years' imprisonment. The sentence was not disturbed on appeal.

(e) In *R v Strutt* [2017] QCA 195, the defendant was aged 27 at the time of the offending. He was sentenced to 10 years' imprisonment, with an automatic serious violent offence declaration, for trafficking in substantial quantities of methylamphetamine and cannabis, over about five months, as well as trafficking in comparatively insignificant amounts of cocaine and MDMA (in the pill form commonly known as "ecstasy"). The trafficking business included a laboratory producing methylamphetamine. It generated a substantial income. A conservative approximation of his total turnover was in the order of $150,000 to $208,000, based on an estimate that he trafficked 392.5g of methylamphetamine and 3.7kg of cannabis over the period. He was living a financially lucrative lifestyle. The defendant had prior convictions for trafficking and possession. He was under suspended sentences and on probation for those offences when he engaged in the relevant trafficking. The sentence was not disturbed on appeal.

(f) In *R v Berry* [2017] QCA 271, the defendant was aged 24 to 25 when he trafficked in wholesale quantities of crystallised methylamphetamine, MDMA, and lysergide over 14½ months. On appeal, his sentence was reduced from 10 years and two months' imprisonment (with eligibility after about 8 years) to 9 years' imprisonment with parole eligibility after serving four years. His revenue during the trafficking period was at least $154,445 and involved over 200 supplies. He received $138,000 in cash from 93

identified supplies. He supplied dangerous drugs to at least 23 different people. He knew that five of these people, who purchased larger amounts of drugs from him, were involved in the supply of drugs to others. He used violence and intimidation to enforce payments of debts. He was motivated to traffic in drugs to make money to earn a living and to feed his own addiction.

(g) In *R v KAX* [2020] QCA 218, the defendant was 31 during the trafficking period. On appeal, his sentence for wholesale trafficking in methylamphetamine, MDMA, and cannabis over five months was reduced from imprisonment for 10 years and 10 months to imprisonment for nine years and 10 months. The serious violent offence declaration was set aside.

[89] The prosecutor submitted that, based on these cases, the sentencing judge might adopt "a notional starting point of eight years" for the trafficking offences.

[90] None of these cases involved a trafficker as youthful as the appellant. In *Berry*, Sofronoff P noted that:

> "… youthful offenders who plead guilty and who have demonstrated sincere efforts towards rehabilitation and, at least, early success at fighting addiction have received significantly lesser terms of actual imprisonment than their older and less pliable colleagues in this industry."[33]

[91] His Honour explained:

> "Youth can be relied upon to explain offending by reason of immaturity and lack of wisdom. Youth also holds hope that the life to follow will not be wasted. This hope becomes promise when an offender shows sincere efforts to lead a decent life."[34]

[92] The offenders in *McGinniss* and *Berry* were nearest to the appellant in age. The trafficking in each of those cases was objectively much more serious than the appellant's trafficking. McGinniss was part of a large organised criminal enterprise. Berry trafficked wholesale quantities of two schedule 1 drugs and cannabis more than twice as long as the appellant. There was detailed information about Berry's significant trafficking revenue, not merely the boasts of an immature, young man in text messages and discussions in custody initiated by an LEP.

[93] Before the sentencing judge, defence counsel submitted a sentence of seven to eight years could be appropriate for the appellant's trafficking. This submission was not put on the basis that the trafficking offence would be declared a serious violent offence.

[94] The appellant's six-year sentence for trafficking is less punitive than the 10 years in *McGinniss* and the nine years in *Berry*; again, with respect, appropriately. However, the appellant will be required to serve longer in custody than either of these offenders.

Totality considerations

[95] Unlike the offenders in these malicious act and trafficking cases, the appellant committed both these serious offences. The sentencing judge had to consider the

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33 *R v Berry* [2017] QCA 271, [19] (Gotterson and Philippides JJA agreeing).

34 Ibid [23].

effect of sentencing the appellant for two such offences on the ultimate effective sentence to be imposed.

[96] In *Postiglione v The Queen*, McHugh J explained:

> "The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. In *Kelly v The Queen*[35] O'Loughlin J, sitting in the Full Court of the Federal Court of Australia, applied the following unreported remarks of King CJ in *R v Rossi*[36]:
>
> > 'There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect.'
>
> The application of the totality principle therefore requires an evaluation of the overall criminality involved in all the offences with which the prisoner is charged. Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences."[37]

[97] McHugh J cited *Mill v The Queen*[38] as authority for the first sentence of the passage quoted above. In *Mill*, the High Court dealt with the application of the totality principle in this way:

> "Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."[39]

[98] In *Director of Public Prosecutions (Vic) v Grabovac*, Ormiston JA expressed the view that:

> "… though concurrency is to be preferred, a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a 'crushing' sentence."[40]

[99] In *Jarvis v The Queen*, Ipp J described a sentence as "crushing":

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35 (1992) 33 FCR 536, 541.
36 (1988) 142 LSJS 451; [1988] SASC 644.
37 (1997) 189 CLR 295, 307-308, also citing *R v Holder* [1983] 3 NSWLR 245, 260.
38 (1988) 166 CLR 59 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).
39 Ibid, 63.
40 [1998] 1 VR 664, 680.

> "… when it leaves the offender with no hope for the future; or when it would provoke a feeling of hopelessness in the defendant if and when he is released; or where it destroys a reasonable expectation of useful life after release".[41]

[100] Ipp J posited an explanation for the place of the "crushing effect" in the context of sentencing principles, considering it as an aspect of the totality principle:

> "[I]n taking a 'last look' at the total imprisonment imposed, the court will continue to apply the principle that the sentence should be proportionate to the degree of criminality involved. That principle is, after all, basic to the law of sentencing. The crushing effect of a term of imprisonment is merely one of the mitigating factors that is to be taken into account when determining whether a particular term of imprisonment is proportionate to the criminality evinced.
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> …
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> What then is the explanation for the phenomenon that it is not unusual for an overall term of imprisonment to be reduced even though the individual sentences are proportionate to the gravity of the particular crimes for which they were imposed? In my opinion the reason for such a reduction is that the severity of a term of imprisonment increases exponentially as it increases in length. Thus, for example, whereas a sentence of seven years may be appropriate for one set of crimes and a sentence of eight years may be appropriate for another set of crimes, a sentence of 15 years for both sets may be out of proportion to the degree of criminality involved, simply because of the additional severity brought about by the significantly longer period the defendant will be required to spend in prison."[42]

[101] Unlike the position in some other jurisdictions, the PSA did not permit the sentencing judge to direct that one sentence be served partially concurrently with another or that it be served from a date commencing after the commencement of another sentence imposed on the same day. His Honour could only have given effect to the totality principle, and avoided any crushing effect, by reducing one or more of the sentences to be served cumulatively, or by increasing the sentence for the most serious offence to reflect the total criminality of the offending and ordering the appellant to serve any imprisonment for the other offences concurrently with that for the most serious offence.

[102] The sentencing judge was alert to the totality principle and to the possible crushing effect of the sentence. Before considering the submissions made about the appropriate sentence, his Honour had remarked:

> "As I am sentencing you for a number of offences today, the ultimate sentence that I must impose upon you must be a sentence that reflects the total criminality involved in the offences that you have

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41 (1993) 20 WAR 201, 205. A similar formulation was adopted by the Victorian Court of Appeal in *R v Yates* [1985] VR 41, 48 (Young CJ, Starke, Crockett and Hampel JJ) and *R v Kerbatieh* (2005) 155 A Crim R 367, 395 [125] (Chernov and Nettle JJA), and noted by Morrison JA in this Court in *R v Kendrick* (2015) 249 A Crim R 176, 188 [40].

42 Ibid, 206-207 (Murray J agreeing).

> committed. It must be a just and appropriate measure of the total criminality. It must also be one which would ultimately not be a crushing sentence. But the sentence must have regard to the matters I have already outlined and the sentencing purposes that I have discussed."

[103] The sentencing judge summarised the submissions on sentence put at the hearing:

> "In terms of the submissions made as to the appropriate sentence, the Crown submits that for the malicious act offence the cases that have been provided by the Crown suggest a sentence in the range of seven to nine years would be appropriate and here the Crown submits that the appropriate sentence would be within the middle of that range, at the least. The Crown submits in terms of the drug offending, the trafficking offence would ordinarily of itself justify a sentence of eight to nine years, and again points to the relevant cases said to support that range.
>
> The Crown further submits that a sentence ultimately in excess of 10 years is inevitable and, therefore, a serious violent offender declaration will follow. The Crown submits ultimately a sentence of no less than 12 years' imprisonment would be the appropriate sentence, and that I would proceed perhaps by imposing cumulative sentences as between the two most serious counts, the trafficking offence and the malicious act count, to arrive at an appropriate sentence.
>
> On your behalf it is submitted that I would not impose cumulative sentences but that I might consider imposing a sentence for the malicious act count with a lesser concurrent sentence for the trafficking offence, but with the sentence overall for the malicious act offence being one that represents the global criminality for all offending being a sentence of less than 10 years, thus not engaging the mandatory serious violent offender declaration, and it would then be open to me to impose a parole eligibility date somewhere perhaps within the range of up to four years."

[104] His Honour then explained:

> "… I do not accept the submission made on your behalf that I ought to proceed by way of a sentence for the malicious act offence which would be a global sentence for all criminality, and a lesser concurrent sentence for your trafficking offence.
>
> In my assessment to proceed that way would simply not pay proper regard to the objective seriousness of the offending on each of the serious offences that I have discussed which you have committed. Whilst there is some overlap, as it was within the same time period each of the offences being committed, the offending was of a different nature, each being objectively serious in its own right, each being unrelated other than perhaps being explained by at the time your descent into negative peer Influences, glamourised criminality and associated behaviour. In my view to proceed as submitted by your counsel would grossly fail to reflect the need for punishment

> and general deterrence, notwithstanding, as I have indicated, that I do still place some weight on ensuring rehabilitation is an aspect of your sentencing.
>
> In those circumstances I will impose cumulative sentences."

[105] His Honour chose between the two options presented by the parties, adopting that proposed by the Crown. The sentence was then pronounced.

Was the sentence manifestly excessive?

[106] The Crown submissions to the sentencing judge dealt with totality only in terms of whether the sentences should be "structured" globally or as two cumulative sentences. The Crown made no submissions on the possible crushing effect of a cumulative sentence. The Crown's ultimate submission urged the sentencing judge "to consider cumulative terms of perhaps six to seven years" for each of the two most serious offences.

[107] In pronouncing the sentences for which the Crown had submitted, the sentencing judge might be taken to have considered and adopted the maximum reduction proposed by the Crown, namely that each of the operative sentences should be reduced from a range of seven to nine years to six to seven years.

[108] In my respectful view, imposing such onerous punishment on this youthful offender did not reflect his cooperation by pleading guilty, his remorse, his concerted efforts at rehabilitation, and his prospects for continued rehabilitation with a positive trajectory that would be supported by an appropriate period under a community-based order.

[109] In the sentencing remarks, there was no express consideration of the need to have regard "not only to the head sentence, but to the minimum time required to be served in custody."[43] Nor was there consideration of how the severity of the term of imprisonment would increase exponentially as it increased in length.

[110] In my respectful view, the effective total sentence of 12 years' imprisonment (to serve at least nine years and seven months in custody) is unreasonable and plainly unjust when one considers: the appropriate relativity between the sentence and the overall criminality involved in the appellant's offending; the likely effect of such a total sentence on the appellant's hope for the future and his state of mind when he would be released after being in custody from the age of 22 to the age of 32 or 33; and the likely effect on his expectation of a useful and law-abiding life after release.

[111] On this basis, I would set aside the sentence imposed on 6 February 2023.

[112] It would then fall to this Court to re-sentence the appellant.

Re-sentencing

[113] His Honour's decision to make the appellant serve the two longest sentences cumulatively was, with respect, consistent with principle. In exercising the sentencing discretion afresh, I would seek to mitigate the onerous nature and potentially crushing effect of cumulative sentences, without altering his Honour's framework.

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43 *R v Degn* (2021) 7 QR 190, 195 [10] (Holmes CJ; Morrison and Mullins JJA agreeing).

Malicious act sentence

[114] With respect, correctly, the sentencing judge found the malicious act offence to be objectively a very serious offence. Although not the shooter, the appellant's moral culpability for the offence was high. The offence was violent and outside the norm. The injury suffered by the complainant was grave and enduring. Like the sentencing judge, I would declare the appellant's conviction for malicious act with intent to be a conviction of a serious violent offence.

[115] Such serious violent offending would warrant a sentence of at least eight years' imprisonment, absent the significant mitigating factors including the appellant's youth, lack of relevant criminal history, remorse, steps towards rehabilitation, prospects for continued rehabilitation, and timely plea of guilty.

[116] Having regard to the significant mitigating factors, and taking account of the consequences of the serious violent offence declaration, and the other relevant matters noted above, the appropriate sentence for the malicious act offence is six years' imprisonment. I would confirm the sentence imposed by the sentencing judge.

Trafficking sentence

[117] The appellant committed the trafficking offence over about five months. He trafficked in wholesale quantities of MDMA and street level quantities of three other dangerous drugs. He offended after his release on police bail. He possessed a significant sum of money and quantity of MDMA when police executed a search warrant at his mother's house. Absent the same mitigating factors noted above, it would warrant a sentence of eight to ten years.

[118] Those mitigating factors—and the circumstance that the sentence would be served cumulatively with the six-year sentence for a serious violent offence—require a substantial reduction to ensure the total effective head sentence appropriately reflects the totality of the appellant's criminality and to avoid it having a crushing effect on a relatively young offender with remorse, who has taken steps towards rehabilitation (and has good prospects for continued rehabilitation), has entered a timely guilty plea, and has a very limited history for drug offending.

[119] I would sentence the appellant to imprisonment for three years and six months on the trafficking count and order that he serve the sentence cumulatively on the sentence for the malicious act.

Other sentences

[120] There was no submission impeaching the sentence for each of the other offences. With respect, there was no error in the sentencing judge's orders. For each, I would confirm the sentence imposed by the sentencing judge. Each would be served concurrently with the trafficking sentence.

Presentence custody

[121] On 3 April 2020, the appellant was arrested and detained in custody. On 1 May 2020, there was a registry committal for the dangerous drug-related charges. On 11 September 2020, an indictment was presented for the drug-related counts.

[122] On 15 April 2021, a year after his arrest, the appellant was committed for trial on attempted murder. On 10 September 2021, the Crown Prosecutor presented an indictment charging the appellant with attempted murder and the alternative count of malicious act with intent.

[123] On 4 November 2022, after a submission for the appellant, a new indictment was presented correcting the trafficking dates. The appellant immediately entered his guilty pleas to the drug-related counts and the malicious act count. The Crown entered a nolle prosequi and the appellant was discharged on the count of attempted murder.

[124] By 6 February 2023, when he was sentenced, the appellant had spent 1,039 days in pre-sentence custody, about two years and 10 months. This period included all the COVID-19 lockdown periods during which correctional centres were under stage 2, 3, or 4 restrictions with access to open air, visitors, lawyers, and medical care restricted or denied.

[125] Like the sentencing judge, I would declare the period the appellant had served in custody between 3 April 2020 and the date the sentence is imposed as time taken to be imprisonment already served under the sentences imposed.

Parole eligibility date

[126] In fixing a parole eligibility date, I would consider the effect of declaring the malicious act to be a serious violent offence, the appellant's relative youth, the utility of his guilty pleas, and the other mitigating factors noted above.

[127] I would give some weight to the lengthy delay in bringing the matter to a conclusion, and the restricted nature of the appellant's pre-sentence custody.

[128] Having regard to the matters identified above, including the serious violent offence declaration, I would fix 28 January 2025 as the date the appellant is eligible for parole.

Effective total sentence

[129] The effective total sentence would be imprisonment for nine years and six months, with a minimum period of almost four years and 10 months in custody before the appellant would be eligible for parole.

Proposed Orders

[130] For the reasons set out above, I would order:

1. Leave to appeal against sentence be granted.
2. The appeal against sentence be allowed.
3. On indictment 1223 of 2021, the sentence imposed by the sentencing judge in respect of the offence of malicious act with intent be confirmed.
4. It is declared that the conviction on indictment 1223 of 2021, for the offence of malicious act with intent, is a conviction of a serious violent offence.

5. On indictment 1433 of 2022, in respect of count 3, the appellant be sentenced to three years and six months' imprisonment.

6. The sentences imposed by the sentencing judge in respect of counts 1, 2, 4, 5, 6, 7, and 8 on indictment 1433 of 2022 be confirmed.

7. The sentences imposed in respect of indictment 1433 of 2022 be served concurrently with each other but cumulatively upon the sentence imposed in respect of indictment 1223 of 2021.

8. It is declared that 1,039 days spent in pre-sentence custody between 3 April 2020 and 5 February 2023, as well as the time spent in custody between 6 February 2023 and the date this decision is handed down, be deemed time already served under the sentence.

9. The appellant's parole eligibility date be fixed at 28 January 2025.