SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAQ; R v KAQ; Ex parte Attorney-General (Qld)* [2015] QCA 98
PARTIES:	**In CA No 190 of 2014:** **R** **v** **KAQ** (applicant) **In CA No 191 of 2014:** **R** **v** **KAQ** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 190 of 2014 CA No 191 of 2014 SC No 349 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 24 June 2014
DELIVERED ON:	5 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2014
JUDGES:	Holmes and Fraser JJA and Dalton J Separate reasons for judgment of each member of the Court, Holmes and Fraser JJA concurring as to the orders made, Dalton J dissenting in part
ORDERS:	**1. Refuse the application for leave to appeal.** **2. Dismiss the Attorney-General's appeal against sentence.** **3. Order that the confidential reasons for judgment (unredacted) handed down to the parties today be not further published, a copy thereof be placed in a sealed envelope together with the transcript of that part of the proceeding which was not conducted in Open Court and that envelope be opened only by order of the Court.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the convicted person applies for leave to appeal against sentence – where the Attorney-General (Qld) appeals against sentence – where the applicant pled guilty to trafficking in a dangerous drug for 12 and a half months and two counts of possessing a dangerous drug – where the applicant was given a head sentence of five years, suspended after two years with an operational period of five years – where the applicant co-operated with police under s 13A – where the applicant was entitled to credit pursuant to *AB v The Queen* (1999) 198 CLR 111 – where the applicant had an unusual role in the trafficking operation – where the applicant acted as more than a courier but had little involvement in management – where the applicant submitted that the sentence was manifestly excessive – where the appellant submitted that the sentence was manifestly inadequate – whether the application to appeal against sentence should be allowed – whether the appeal against sentence should be allowed

Penalties and Sentences Act 1992 (Qld), s 9(2), s 13A

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Adams [2009] QCA 56, cited
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, considered
R v Bradforth [2003] QCA 183, considered
R v Chen [2008] QCA 332, considered
R v Cooney [2004] QCA 244, considered
R v D & Attorney-General of Queensland [1995] QCA 332, cited
R v Dang [1999] QCA 414, considered
R v Falconi [2014] QCA 230, considered
R v Harbas [2013] QCA 159, considered
R v Ianculescu [2000] 2 Qd R 521; [1999] QCA 439, considered
R v Johnson [2014] QCA 79, considered
R v Ly & Kyprianou [2008] QCA 149, considered
R v M [2002] 1 Qd R 520; [2001] QCA 131, cited
R v Rizk [2004] QCA 382, cited
R v Rizk & Raciti [2004] QCA 359, considered
R v SBI [2009] QCA 73, cited
R v WAW [2013] QCA 22, cited
R v Webber (2000) 114 A Crim R 381; [2000] QCA 316, cited
R v Westphal [2009] QCA 223, considered
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, cited

COUNSEL: A M Nelson for the applicant/respondent
M R Byrne QC, with S J Farnden, for the respondent/appellant

SOLICITORS: Whitehead & Associates Solicitors for the applicant/respondent
Director of Public Prosecutions (Queensland) for the respondent/appellant

[1] **HOLMES JA:** As will be apparent, parts of the judgments in this matter which concern issues raised under s 13A of the *Penalties and Sentences Act* 1992 (Qld) have been redacted. I have had the advantage of reading the reasons of Dalton J and agree with her that the application for leave to appeal is unmeritorious, for the reasons she has given. However, I have reached a different view as to the proper outcome of the appeal by the Attorney-General.

[2] The only ground in the Attorney-General's notice of appeal was manifest inadequacy, but in submissions, complaint was also made of three specific errors. The first was that the sentencing judge had wrongly apprehended that there was a "real prospect that [KAQ would] be kept in isolation while [he was] in prison". But I do not think that the sentencing judge's observation necessarily indicates a perception that KAQ could be placed in isolation for the *entirety* of his sentence. Another reading of his Honour's words is that he was adverting to the possibility of its occurring from time to time should a risk arise. That would be consistent with the Queensland Corrective Services Commission letter to which Dalton J has referred, which said:

> "At times, offenders may also be placed on Safety Orders which allows for the effective isolation of an offender from all other offenders."

I see no reason to construe his Honour's statement as involving the misapprehension for which the Attorney-General contends.

[3] The second and third errors entailed his Honour's failure to refer to the case of *R v Ianculescu*[1] in his sentencing remarks and his alleged failure to appreciate that in the case of *R v Westphal,*[2] to which he did refer, parole eligibility was deferred until six years had been served. I doubt that the omission to allude to *Ianculescu* and to Westphal's parole eligibility means more than that in a lengthy review of the cases his Honour overlooked mentioning those details, which it was not incumbent on him to set out. It does not bear an inference that he was oblivious to them. He had both the cases and summaries of them in the prosecutor's submissions.

[4] However, the Attorney-General's attack was principally on the indicative sentence [redacted] to which the sentencing judge then applied the discount for s 13A co-operation. It was said that it should have exceeded ten years imprisonment, thus attracting a serious violence offence declaration. Reliance was placed on the cases of *Westphal*, *Ianculescu, R v Johnson,*[3] *R v Raciti,*[4] *R v Adams,*[5] *R v Cooney*[6] and *R v Chen.*[7] Dalton J has helpfully summarised most of those cases, and I will not repeat the process. It is important in making comparisons to recognise the differences between the involvement of the offenders in those cases and KAQ's role.

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1 *R v Ianculecsu* [2000] 2 Qd R 521.
2 *R v Westphal* [2009] QCA 223.
3 [2014] QCA 79.
4 [2004] QCA 359.
5 [2009] QCA 56.
6 [2004] QCA 244.
7 [2008] QCA 332.

[5] KAQ undertook some nine sales to two customers. Unlike Dalton J, I consider the sentencing judge's finding, that his role in making those sales was

> "more that of an agent, making sales by direction of your principal on a commission, rather than someone conducting independently, his own business of selling drugs",

was open on what was put before his Honour. The agreed schedule of facts refers to the amounts KAQ received as a commission of $1,000 per ounce of ice sold. All of the methylamphetamine he supplied in the nine transactions in question came from Ta; Ta fixed the price; and when one of the customers failed to pay, Ta, instead of treating the debt as KAQ's responsibility, stepped in to ensure that it was paid.

[6] Thereafter, KAQ's role in Ta's operations was to deliver drugs and collect cash for which he was paid a wage, with bonuses for longer trips, and to rent a storage shed. Those tasks were performed over about four and a half months. The courier role involved collection of something of the order of $1.5 million and delivery of drugs of an estimated value of between $4.6 million and $4.8 million. KAQ's own income from his activities, however, was calculated (presumably on his account) at some $30,000, which accorded with a calculation of his unsourced income over the relevant period of about $35,000. He was 25 years old at the relevant times. His criminal record consisted of a charge of soliciting, with no conviction recorded. The aggravating circumstances often seen, of repeated offending while on bail or parole, or other court orders, were absent in this case.

[7] It is difficult to find much of assistance by way of comparable sentences, because while the amounts of drugs and money KAQ was involved in moving were extraordinary, his actual role in doing so was at a low level; he collected money and delivered drugs, working for wages. Most of the comparatives pointed to here involved offenders who were trafficking on their own account. In *R v Johnson*, the applicant was an active trafficker, selling a variety of drugs on his own account, and with one of his customers depositing more than $1.5 million into his supplier's bank account. *Ianculescu* involved trafficking over about 18 months but the amounts of drugs (heroin, methylamphetamine and cocaine) which could be proved to have been supplied were relatively limited. The applicant in *Assurson*[8] ran a much smaller operation than that in which KAQ was involved, but operated on his own account. The applicant in *Adams* was a principal in a syndicate producing methylamphetamine and trafficking it; he continued to traffic after he had been charged with possession. *Chen* seems to have been offered by the Attorney-General as an example of the sentence that might have been expected had KAQ been dealing on his own account with the amounts of money and drugs which passed through his hands.

[8] The Attorney-General referred to *R v Raciti*, but KAQ's role seems to me closer to that of Raciti's co-accused, the applicant in *R v Rizk*.[9] He had pleaded guilty to trafficking in and possessing 3,4-methylenedioxymethamphetamine (MDMA, or ecstasy). He worked for Raciti, obtaining large amounts of ecstasy from suppliers at Raciti's direction and distributing it to others. He pleaded guilty to trafficking over a period of between two and a half and three months. The transaction which he was apprehended carrying out involved the purchase of 5,063 ecstasy tablets of 31.7 per cent purity for which he had paid $87,500. He was 25 years old and was said to be addicted to ecstasy,

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8 [2007] QCA 273.
9 [2004] QCA 382.

although the motivation for his offending was commercial gain. His sentence of eight years imprisonment was reduced to six years with a recommendation for parole after two years. In the present case, the proportions of the drugs and money proved (largely through KAQ's own admissions) to have been involved in the operation are, of course, much greater, and warranted a significantly higher sentence.

[9] The facts in *R v Falconi*[10] bore some resemblance to the circumstances of the present case in terms of the quantity of drugs moved and the role of the applicant in doing so, although the drug involved, cannabis, was a much less pernicious one than the methylamphetamine involved here. That applicant was a courier described by the court as "an integral member of a large scale commercial operation trafficking in cannabis".[11] On at least 14 occasions between August 2011 and April 2012, he had transported cannabis from Melbourne to the Gold Coast, working with a co-offender who travelled ahead to look out for police activity. The applicant helped to move over 700 pounds of cannabis with a street value of $2.24 million. He was paid in cash for each trip and earned about $100,000. In addition, he was charged with production of a cannabis crop which he had harvested; police found more than ten kilograms being dried in his unit. He was sentenced on what seems to have been a rather charitable basis, that it was for his personal use.

[10] The applicant in *Falconi* was a man in his mid-forties who had a criminal history. It included a sentence of three and a half years imprisonment for assault with intent to steal and threatening violence while pretending to be armed, and another of six years imprisonment for robbery with violence, with 18 months cumulative imprisonment for deprivation of liberty. He applied for an extension of time within which to seek leave to appeal against a sentence of four and a half years imprisonment with parole eligibility after 18 months imposed on that offence and another sentence imposed separately and cumulatively in respect of a Commonwealth offence. His application was refused, the Court observing that the sentence on the State offences was moderate and was generally supported by other cases.

[11] I do not think that the sentences imposed in *Westphal* and *Harbas*[12] demonstrate inadequacy in the indicative sentence in the present case. The applicant in *Westphal* faced two counts of trafficking in methylamphetamine, the first over a period of 14 and a half months, the second for a month. Although he maintained he was selling for someone else at a commission of $1,000 per transaction, he arranged and conducted the sales, to a street level dealer. His involvement was akin to that of KAQ's in the nine transactions on which the latter received commission, albeit with greater autonomy, but in Westphal's case it extended over the entire period of his trafficking. It was accepted that the figure of $215,000, calculated on his unearned income, reflected his personal benefit from his sales; on his claim of receiving $1,000 per transaction, he was, plainly, a busy man. That applicant was in his late 20's and had previous convictions for possession of small quantities of cannabis in a commercial context. The only information given to the sentencing judge about his personal circumstances and background was that he had worked in legitimate occupations after his release from custody. In the absence of any mitigating feature apart from his guilty plea and admissions, his sentence of ten years imprisonment before allowance for other co-operation was not inconsistent with a starting point [redacted] for KAQ.

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10 [2014] QCA 230.
11 At [8].
12 *R v Harbas* [2013] QCA 159.

[12] The sentence of the applicant in *Westphal* was reduced, in light of his co-operation, although only to nine years with parole eligibility after six years. But his assistance was not at the level entailed in KAQ's s 13A undertakings. Westphal had given some information about a particular target, which was not shown to have had any consequence, and attended a meeting at which a covert police officer bought methylamphetamine from a dealer. He then declined to assist further, having been threatened. That activity was certainly risky, but it resulted only in one charge of supply.

[13] In my view, the applicant in *Harbas* was a more serious offender and a less promising candidate for parole than KAQ. He was trafficking on his own account in a variety of drugs: amphetamines, LSD, MDMA and cannabis, producing his own cannabis, and making handsome profits. His criminal history included previous drug convictions, including a production, and for some of his offending he was on bail. The sentencing judge's starting point for his sentence, [redacted], was not surprisingly, unchallenged; but I do not think it is disproportionate to a starting point in the present case [redacted]. This Court, however, considered that a discount of two to three years ought to have been given for Harbas' self-incrimination. The police found him in a possession of a large quantity of ecstasy tablets and were aware of his sales of LSD, but not his trafficking in amphetamines and cannabis, of which he gave considerable detail in interviews. His s 13A co-operation was such that a more significant discounting of his sentence than that of KAQ, to five years suspended after 12 months, is readily explained.

[14] It is the case, as Dalton J has observed, that the sentencing judge seems in one respect to have blurred the distinction between past and future co-operation in relation to providing information. That error was not of itself said to warrant any re-exercise of discretion, and it is not, in my view, of any consequence in determining the adequacy of either the indicative sentence or the sentence ultimately imposed. Having regard to the sentencing patterns disclosed by the comparable matters to which Dalton J has set out in detail and the cases to which I have referred, I consider that [redacted] was a proper starting point for sentence before discount for the s 13A undertaking in this case.

[15] KAQ's involvement might have attracted a sentence around the ten year mark, notwithstanding his low-level role, given the quantities of money and drugs which he collected and delivered, together with the fact that for a period he was directly engaged in a limited dealing in drugs for his own reward. But as his Honour observed, his cooperation in identifying his own involvement, enabling the police to establish the quantities of drugs and cash in the operations, was a significant mitigating factor justifying a lower head sentence [redacted]. Another matter which would properly have been considered in that regard was his provision of information about financing and manufacturing of drugs by associates of his co-accused, which apparently did not result in any prosecution, but was nonetheless worthy of some recognition. Added to that were further features justifying early eligibility for parole: KAQ's youth, his plea of guilty on an ex officio indictment; his lack of previous convictions; and the psychological assessment of him as a very low risk of re-offending. Those factors in combination made a sentence [redacted] one which was within a proper exercise of the sentencing discretion.

[16] The Attorney-General's focus was principally on the adequacy of the indicative sentence, but I should say that I do not consider that there was anything untoward in the further reduction granted to recognise KAQ's s 13A undertakings. [Redacted]. There is a recognised public interest in encouraging co-operation of the kind.[13] [Redacted].

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13 *Malvaso v The Queen* (1989) 168 CLR 227 at 239.

[17] I would dismiss the Attorney-General's appeal against sentence.

[18] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.

[19] **DALTON J:** There are two appeals from the sentence in this case. The Attorney-General appeals on the ground that the sentence was manifestly inadequate. KAQ seeks leave to appeal on the ground that it was manifestly excessive.

[20] KAQ pleaded guilty to trafficking in dangerous drugs (methyl-amphetamine, cannabis and cocaine) over 12.5 months between 31 January 2012 and 14 February 2013 and was given a sentence of five years, suspended after two years, with an operational period of five years. He received concurrent sentences of three years and six months for possessing methyl-amphetamine in excess of 200 grams; two years for possession of MDMA in excess of two grams, and six months for possession of a weapon.

[21] The business of trafficking was wholesale. KAQ undertook some wholesale trafficking on his own account. He also transported and collected extremely large amounts of drugs and money to assist a co-accused, Ta.

[22] KAQ had two customers of his own. To one he sold, on four separate occasions, an ounce of methyl-amphetamine. Each ounce cost the customer $11,000. KAQ made $1,000 profit on each ounce. He paid the remainder of the purchase price to Ta. He sold his second customer two and three-quarter ounces of methyl-amphetamine in amounts of one-quarter and one-half an ounce, and on one occasion, of one ounce. The total price of the drugs KAQ sold to his own customers was $66,000. His profit was $6,750. The drugs sold to these customers had a purity ranging between 55-74 per cent. KAQ's customers on-sold the drugs they bought from him, including to law enforcement participants, as it turned out.

[23] Between October 2012 and 14 February 2013, KAQ was paid by Ta to deliver drugs to Ta's customers and collect money from them. KAQ dealt with eight of Ta's customers. He delivered somewhere between 14.2 and 15.2 kilograms of substance containing methyl-amphetamine; over 62 kilograms of cannabis; two ounces of substance containing cocaine, and a sample of MDMA. He collected at least $1.5 million in drug debts for Ta during this period. KAQ hired a shed where he stored Ta's drugs and gun. Police surveillance showed that KAQ moved drugs to and from the shed between October 2012 and 9 February 2013. Police searched it on 9 February 2013 and found almost two kilograms of pure methyl-amphetamine in three kilograms of powder; 78 grams of pure cocaine in 194 grams of powder, and eight grams of MDMA in 22 grams of powder, together with a handgun.

[24] The conservative wholesale value of the drugs delivered by KAQ for Ta was $4.6 - 4.8 million. The drugs in the shed were worth an additional $1.14 million.

[25] Compared to the value of the drugs involved, KAQ made little money from his work for Ta. He was paid $1,000 per week to work for Ta, and was paid bonuses of $3,000 on two occasions when he delivered drugs to Western Australia. In total, he received around $30,000. Of this, $6,750 was profit on his own dealing, and the rest was by way of wages and bonuses from Ta.

[26] Police surveillance showed that, after they realised the shed had been searched, KAQ and Ta discussed fleeing the country. KAQ initially refused to be interviewed, but then gave statements to police. In June 2013 KAQ asked for an *ex officio* indictment

to be presented. The trial, had it run, might have extended over three weeks. There was therefore time and resource saving. The plea also reflected remorse. KAQ was thus entitled to full credit for an early plea.

[27] KAQ was aged between 25 and 26 at the time of the trafficking. He had a minor criminal history, which was irrelevant for the purposes of his sentence. His family immigrated to Australia when he was young, and there was some further instability as the family moved about after that.

[28] It was accepted by the Crown that Ta and KAQ were childhood friends and that there was some degree of manipulation by Ta in having KAQ co-operate with him. The movement of massive amounts of drugs and money was clearly done as part of Ta's business, rather than on KAQ's own behalf. The Crown also conceded that the trafficking to KAQ's own two customers arose in part from suggestions made by Ta: as to the initial supply, and as to the price and the amount of profit KAQ made. Nonetheless the two customers were known to KAQ, not Ta, and the agreed schedule of facts described them as KAQ's own customers – AB 39 and 40. I do not think it was correct to characterise KAQ as "more of an agent, making sales by direction of your principal on a commission", as the primary judge did at AB 29.

[29] KAQ did not use drugs himself.[14] There was a suggestion that KAQ was influenced by a sense of camaraderie with Ta and the excitement of the illegal activity.[15] Ta lived a lavish lifestyle and KAQ participated in that.[16] A psychologist gave the opinion that KAQ was vulnerable to manipulation. That opinion was based on KAQ's account that his father was an abusive alcoholic who was violent to his mother, and that KAQ became distant from his ethnic community because the community tolerated that violence. In those circumstances, the psychologist thought that Ta provided KAQ with a sense of belonging.[17] In a letter written to the sentencing judge KAQ said that his reasons for being involved were "purely financial as well as being accepted in the social group" including Ta.

[30] While it is difficult to understand KAQ's motive for offending, that curiosity has little relevance to the sentence which should be imposed. In discussing the role of addiction this Court said in *R v Dang*:

> "… a distinction is made, in sentencing drug dealers, between an addict who deals merely to feed his or her own addiction and one who is not an addict but who deals solely for profit; and that that distinction will tend towards a lower sentence for those in the first category than those in the second.
>
> … this distinction is no more than one of many factors which must be considered in sentencing an offender. Other factors may counter balance or outweigh it. … It cannot be said … that, invariably, the sentencing range for addict offenders is lower than that for non-addict offenders."[18]

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14 Supplementary Record Book, p 33.

15 AB 20 and Supplementary Record Book, p 7, and the psychologist's report at AB 71 ff.

16 Supplementary Record Book, pp 25-26.

17 I confess to some scepticism about this theory. KAQ also told the psychologist he had returned to live with his father and mother since he was granted bail and he reported being close to his parents and that contact with them "keeps me sane" – Supplementary Record Book, p 74. Further, that contact with his parents was one of the positive factors of being on the witness protection program – Supplementary Record Book, p 78. Also the facts in the psychologist's report do not sit entirely happily with the sentencing judge's findings that KAQ came from a good family background.

18 [1999] QCA 414, [7]-[8].

[31] KAQ was not an addict and not entitled to leniency in that regard. He is not entitled to leniency because he might have struck a better bargain with Ta as to his remuneration, or because a personality which derives excitement from serious offending is somehow less culpable than one which prefers a monetary reward. It may be recognised in his favour that KAQ was not at managerial level in this criminal network. However, in the context of offending of this scale, over this length of time, it cannot assist a 25 year old man to propound psychological theories, well short of any diagnosable illness, to explain his attraction to major criminals and a large scale criminal enterprise.

[32] KAQ was on bail awaiting sentence. He did not re-offend while on bail. He completed some qualifications in personal training.[19] Before the offending he had a trade qualification. He volunteered with an organisation called Youth Space dealing with troubled teenagers, for a period of two weeks, apparently on the advice of his solicitors. His not re-offending is significant, but the other two matters are not something which could play any real part in considering what sentence should be imposed for offending on this scale.

[33] The CMC assessed KAQ at a moderately high risk to his own safety because of his co-operation. On bail he had been in a witness protection program and there was an implicit suggestion, but no more, that he might be put in protective custody in jail.[20] It was KAQ's choice to enter witness protection. While under protection, he was isolated from some of his family[21] and friends and had been unable to work. He reported twice daily to police.

[34] KAQ was entitled to some credit pursuant to the principles in *AB v The Queen*;[22] for informing, and for giving undertakings within s 13A of the *Penalties and Sentences Act*. The Crown accepted that co-operation as to KAQ's own activities; his past co-operation as to the activities of others, and his promised future co-operation relevant to s 13A, were all substantial and comprehensive.[23]

[35] KAQ gave detailed statements to police as to his own trafficking. However, this was not a case, such as *R v Harbas*[24] where, but for the information given by the defendant, the police would have had no trafficking case. The police had a strong case against KAQ as to his involvement in a massive drug trafficking operation. The police had independent evidence of his involvement in Ta's business from telephone intercepts (November 2012 onwards) and video surveillance of the storage shed (October 2012 onwards). Police knew of KAQ's trips to Western Australia independently of his admissions, although they did not know the amounts of money which he collected there. KAQ told police that 35 pounds of cannabis were hidden in a false fuel tank on one trip to Western Australia, but police had independent evidence as to the amount of drugs transported on the second occasion.[25] Police had video surveillance evidence which showed large amounts of cash and large amounts of drugs in relation to KAQ's dealings with Ta's customers. KAQ's admissions as to the amounts of drugs and cash assisted the Crown case, and assisted the Crown case by explaining the background to what the video surveillance showed.[26]

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19 AB 22-23. The letter from KAQ to the trial judge did not say "business" but "fitness" – see Supplementary Record Book, p 61.

20 Supplementary Record Book, pp 69-70.

21 See footnote 4 above. KAQ had free access to his parents at least. The evidence was unclear as to what other limitations were placed on his contact with his family and friends.

22 (1999) 198 CLR 111.

23 Supplementary Record Book, pp 32-33.

24 [2013] QCA 159, [5]; cf *AB v The Queen* at [26] and [113] – [114].

25 Supplementary Record Book, p 30.

26 Supplementary Record Book, p 32.

[36] KAQ's own two customers sold drugs supplied by him to law enforcement participants and police had information as to all those supplies. That is, police had detected his dealing from February 2012, almost as soon as it began.[27]

[37] As well as information about his own activities, KAQ gave statements to the police implicating 11 people in offending. Five of those 11 people had been charged, although it could not be said that the charges were solely as a result of the information given by KAQ; police had a deal of independent surveillance evidence as to the operation.

[38] As to co-operation relevant to s 13A, [redacted].[28]

Argument on Behalf of the Attorney-General

[39] The Attorney accepted the need to demonstrate the type of error identified in *House v The King*[29] and contended that the open Court sentence was so disproportionate to the gravity of the offending, notwithstanding the matters in favour of KAQ, that it was an affront to community standards and manifestly inadequate. The Crown argued that the indicative sentence for the trafficking count was manifestly inadequate. As part of this, the Crown submitted that the sentencing judge misunderstood the comparable authorities. [Redacted].

[40] The Attorney ran a second point: that the sentencing judge wrongly found that there was "a real prospect" that KAQ would be kept in isolation in prison, when the evidence did not go that far. The sentencing judge's findings in this respect were that, "In view of the risk, it will be necessary, when you spend time in prison, for an assessment to be made about what has to be done to protect you". That is certainly a finding which is correct and justified on the evidence. The judge continued, "There is a real prospect that you will be kept in isolation while you are in prison for that purpose". It is that finding which the Crown challenges.

[41] The only evidence as to that latter finding was a letter from Acting Commissioner Mark Rallings of the Queensland Corrective Services Commission in response to a letter from KAQ's erstwhile lawyers. It gave general advice as to how Queensland Corrective Services deals with prisoners needing protection, and then said:

> "In the circumstances outlined in your letter, should your client be subject to a custodial sentence, QCS would contact the CMC Witness Protection Unit for the purposes of verifying information and documenting known threats to your client. Checks would then be undertaken to identify the current placement of any offenders who may pose a direct threat to your client. This information would be shared on a need to know basis with QCS senior management and intelligence staff for the purposes of determining the best placement for your client.
>
> Upon reception your client would be interviewed by QCS intelligence staff as a further check and verification of any perceived threats and your client would receive specific advice on how to report any threat which may arise at anytime during their incarceration."

[42] When this is read with the other evidence as to risk, see [44] below, it appears that the sentencing judge would have been justified in finding that there was a real prospect that KAQ would be kept in protective custody in prison. There was no

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27 Supplementary Record Book, pp 31-32.
28 Supplementary Record Book, p 36.
29 (1936) 55 CLR 499, 504-505.

evidence which would enable an assessment of how likely that prospect was, or as to how much time KAQ might spend in protective custody. There was no evidence of any real prospect that KAQ would be placed in isolation for any substantial period. The evidence was that "protection prisoners and mainstream prisoners are not located in the same units, transported or allowed to associate at any time." and that "At times, offenders may be placed on Safety Orders which allows for the effective isolation of an offender from all other offenders. Safety Orders, which are used as an immediate risk mitigation strategy, are subject to ongoing review with a view to minimising the unnecessary isolation of offenders."[30] In this respect I do think that the sentencing judge's findings went beyond the evidence.

Argument on Behalf of the Applicant

[43] KAQ complained that the sentence was manifestly excessive because it was not wholly suspended. [Redacted].

[44] It was also argued that the sentencing judge failed to appreciate the gravity of risk to KAQ as a consequence of his informing. The submission acknowledged that there was no direct evidence of risk, such as there was in *York v The Queen*.[31] It was contended that [redacted] his risk was higher than had been accepted by the sentencing judge. [Redacted]. In truth, the applicant was asking that an inference be drawn as to risk in the absence of concrete evidence.

[45] As to risk, the sentencing judge said:

> [Redacted].

[46] In my opinion, the sentencing judge took as generous a view of the risk to the applicant as was available on the evidence. The fact of the matter is there was no evidence such as that in *York* or, for that matter, as in *Harbas*, see below at [70] and [71]. Further, as outlined at footnote 17 above, I think the sentencing judge overstated the effect of restrictions on the applicant contacting his own family on witness protection.

Sentencing Informers

[47] Co-operation which involves implicating others in criminal activity is capable of producing "a significant discount in sentencing, quite apart from the discount obtained by persons who plead guilty".[32] This approach affords an inducement to others to provide such co-operation. However, "Although the discount for cooperation must be discernible, and worthwhile, the adjusted sentence must nevertheless reflect the seriousness of the offence which is being punished".[33] The sentence imposed should not "be so disproportionate to the gravity of the offence and the personal circumstances of the offender as to affront community standards", nor should it "be so great as to over-reach the need for sufficient punishment or to encourage false allegations".[34]

Error Below and Resentencing

[48] The provisions of s 13A of the *Penalties and Sentences Act* require that the reduction for s 13A co-operation is identified separately, rather than forming an undifferentiated

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30 Supplementary Record Book, pp 69-70.

31 (2005) 225 CLR 466.

32 *R v Webber* [2000] QCA 316, [16].

33 *Webber*, above, [5] cited in *R v WAW* [2013] QCA 22, [24], [49] and [73], and in *R v SBI* [2009] QCA 73, [26].

34 *R v D*, Queensland Court of Appeal judgment delivered 4 August 1995; cited in *R v Ianculescu* [1999] QCA 439, [1], [5], [6] per Pincus JA.

part of the synthesis involved in fixing a just sentence.[35] However, s 13A co-operation is not to be valued differently from other kinds of co-operation which are relevant, for example, pursuant to s 9(2)(i) and (p) of the *Penalties and Sentences Act*.[36] It is not necessarily more valuable than other types of co-operation: "an offender who has actually given co-operation might well, depending on the circumstances, be entitled to a greater discount than a person who has merely promised to co-operate". Further the fact that there is a discount to be identified separately does not mean that all relevant matters are not considered together and determined according to what is a just sentence overall.

[49] It is apparent from the hearing below that the sentencing judge, with the acquiescence of counsel, was concerned that KAQ's co-operation with authorities generally, rather than just his providing undertakings pursuant to s 13A of the *Penalties and Sentences Act*, was discussed in closed Court. Flowing from that, was a blurring between the reduction in sentence given for co-operation which involved informing, and co-operation which involved giving undertakings pursuant to s 13A. In open Court the sentencing judge noted KAQ's "… very extensive co-operation with the authorities. In particular, you have made extensive admissions about your own involvement in all the offences with which you have been charged. Your full admissions have added considerable detail to what the authorities knew from other sources, including surveillance and telephone intercepts." That is, the sentencing judge mentioned *AB* type co-operation. The sentencing judge then mentioned KAQ's guilty pleas – AB 30. He did not mention in open Court KAQ's co-operation with authorities in informing, outside s 13A. [Redacted].

[50] The sentencing judge took account of the appellant's early plea and *AB* type co-operation in open Court and then, in closed Court, recorded an indicative sentence, having regard to past co-operation with authorities in the nature of informing, and promised s 13A co-operation. This approach did not comply with what is required by s 13A of the *Penalties and Sentences Act*.[37]

[51] Apart from this, in my view, the sentence imposed in open Court was manifestly inadequate and, even allowing for all the factors in KAQ's favour, was so disproportionate to the gravity of his offending that this Court ought to interfere. KAQ moved or stored drugs worth $5.74 million wholesale. He collected drug debts of $1.5 million. His role in a very large criminal network was unusual – he was not a manager or a partner, but he was much more than a courier. He was not an addict. He participated for gain, financial and otherwise. As well as this major offending, KAQ dealt in significant quantities of wholesale drug on his own account. That lesser offending was, of itself, deserving of a sentence of around eight years after a plea, and before discounting for co-operation.[38] I also take the view that the indicative sentence was fixed at a level which would be manifestly inadequate.

[52] I bear in mind that this is an Attorney's appeal and that the Court should be moderate in imposing a new sentence. [Redacted].

[53] [Redacted], I would impose a sentence of seven years, with parole eligibility at four-and-one-half years. I now turn to discuss the case law which, in my view, supports those sentences.

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35 *R v M* [2002] 1 Qd R 520, [13]; *Harbas* (above), [19]; cf *X v R* [2001] QCA 498; *R v SBI* [2009] QCA 73, [34]ff.

36 *R v Ianculescu* [2000] 2 Qd R 521, 522 per Pincus JA who made the point, "In an endeavour to suppress the thought, which might be prevalent, that there is some unique virtue in promised co-operation falling within s 13A; there is not."

37 *R v Harbas* (above), [17]-[20].

38 See [56]-[58] below.

Difficulties in Finding Comparative Sentences

[54] The unusual features of KAQ's offending are that: (i) he was not an addict, nor someone who offended for only commercial motives, and (ii) that he was involved in such extremely large transactions, not (for the majority of the offending) on his own behalf, but on Ta's behalf. There was a wide gulf between the criminality of Ta (who, if he was not the principal of the business in which KAQ worked, was certainly close to the principal) and KAQ, who had little role in management. Nonetheless, given his trafficking on his own account in wholesale quantities of drugs, and his renting and having access to the shed and its contents, KAQ was more than a courier, even a trusted courier. Because of these features, it was common ground that there were no closely comparable cases.

[55] In my view assistance can be gained from three types of cases:

(a) Cases which involve facts comparable to the offending which KAQ undertook on his own behalf: *R v Cooney*; *R v Assurson*, and *R v Ianculescu*. These cases reveal sentences of between eight-and-one-half years to 10 years on a plea.

(b) Cases which involve facts where the defendant trafficked on a scale comparable to KAQ, but on his own account: *R v Chen*; *R v Truong and Nguyen*; *R v Nabhan and Kostopoulos*; *R v Omer-Noori*, and *R v Markovski*. These cases reveal sentences of between 13 and 16 years on a plea.

(c) The cases of *R v Bradforth*; *R v Raciti*; *R v Ly & Kyprianou*; *R v Westphal*; *R v Johnson* and *R v Harbas*. These cases all share the common distinctions with KAQ's case that, while those defendants were involved with very significantly less drug than KAQ, they were dealing either on their own account or at a managerial level. The group of cases reveals sentences of between 10 and 12 years after a plea.

The two most comparable, *Westphal* and *Harbas*, yield sentences of nine and five years respectively after allowance for extraordinary co-operation involving *AB* type discounting; the incrimination of others, and s 13A co-operation.

Using *Harbas* as a comparator introduces another significant difficulty. Because that case concerned a discount for s 13A co-operation, much of the reasons are not published, but contained in an annexure private to the parties. The parties to this appeal did not have the unpublished reasons. Nor apparently did the sentencing judge.[39] Those unpublished reasons were only produced on the hearing of this appeal because of commonality between the bench in this case and in *Harbas*. Although it is the most relevant comparator in a difficult case, it cannot be fully discussed in these reasons.

(a) Cases Comparable to KAQ's own Trafficking

[56] The Crown relied on the case of *R v Cooney*.[40] Cooney was a 30 year old man who had some criminal history, including a term of imprisonment for 12 months for supplying cannabis. He had become addicted to cocaine and owed $8,000 to his supplier. He could not pay, and he acted as a courier on one occasion to cancel that debt. He carried $50,000 from Sydney to Cairns, where he bought 641 grams of pure cocaine contained in 900 grams of powder. He admitted all that, but was not prepared

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39 The sentencing judge was a member of this Court in *Harbas*, but no reference was made to the case below.

40 [2004] QCA 244.

to further co-operate. He was sentenced to eight-and-a-half years imprisonment, with a recommendation for parole at three-and-one-half years. This Court refused to interfere. The President said that the sentence reflected "both the applicant's serious criminal involvement in the insidious cocaine drug trade and also the moderation justified by his personal circumstances, his limited role in the offence as a courier, his addiction, his efforts at and prospects of rehabilitation and his plea of guilty".

[57] *R v Assurson*[41] involved a 23 year old man who trafficked over a six week period for a profit of $30,000. The trafficking was in a variety of Schedule 1 drugs. Assurson had a relatively minor criminal history. He was sentenced on a plea. This Court said "… the appropriate range after trial was 12 to 13 years imprisonment. In those circumstances it was not seriously challenged in this Court that after this applicant's plea of guilty a head sentence of nine years imprisonment was clearly within range." – [19]. The Court of Appeal interfered with the sentence to reduce the amount of time which the defendant had to serve before becoming eligible for parole to five-and-one-half years (rather than 80 per cent).

[58] The Crown relied on the case of *R v Ianculescu*.[42] Ianculescu was sentenced to 10 years for trafficking in heroin, cocaine and methyl-amphetamine. He was sentenced on his own plea; had some criminal history, including convictions for violence and drugs, although not of the worst kind, and had given co-operation to the authorities. There was evidence of 12 supplies of heroin. The powder supplied had a relatively low purity – between 14.4 and 43.9 per cent. As well, there was evidence of two supplies of cocaine. The total amounts of money changing hands were: $52,500 for heroin; $900 for methyl-amphetamine and $3,500 for cocaine. Ianculescu provided assistance to the authorities which was not pursuant to s 13A of the *Penalties and Sentences Act* and was described by the Court as not insignificant, but limited because it did not produce useful results.[43] Nonetheless, it was acknowledged that Ianculescu was entitled to a reduction in sentence because of the co-operation. The Court refused to interfere with a 10 year sentence imposed after the judge started with a 12 or 13 year sentence and discounted that for both the plea and the applicant's co-operation.

(b) Trafficking on a Large Scale on Defendant's Own Behalf

[59] Where offenders traffic in the quantity of drugs involved in this case, either on their own behalf, or at management level within the hierarchy of a criminal syndicate, the cases show that they receive sentences of 18 to 20 years reduced to 13 to 16 years to reflect a plea. Cases of this kind were reviewed in *R v Chen*.[44] Chen trafficked in Schedule 1 drugs over a period of one year and nine months. Chen had an amount of $2.1 million unexplained income over the period of the trafficking. That amount was not all profit: $1.8 million was paid into his supplier's bank account. He employed two men to distribute drugs for him. Even though the period of trafficking was nine months longer than KAQ's, the amount of drug involved was still less than half of the amount of drug KAQ transported and stored for Ta. However, Chen was either in business on his own behalf or at managerial level in a syndicate. He was 26 years old with some minor criminal history, and entitled to the benefit of an early plea. Notwithstanding addiction, Chen conducted "a substantial and sophisticated operation with the purpose of making money" – [13]. The sentencing judge took 18 to 20 years as

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41 [2007] QCA 273.
42 [2000] 2 Qd R 521.
43 See p 522 and p 525.
44 [2008] QCA 332.

a starting point and imposed a sentence of 14 years when these mitigating factors were taken into account. The Court of Appeal refused to interfere. The sentence was comparable to those imposed in *R v Truong and Nguyen*;[45] *R v Nabhan*; *R v Kostopoulos*[46] and *R v Omer-Noori*.[47] In discussing those cases, the Court of Appeal recognised that, "dealing on such a scale [meant that] a sentence of 16 years imprisonment, even taking into account a plea of guilty, was within the appropriate range." – [21]. The facts of, and sentence imposed in, *R v Markovski*[48] fit comfortably within this group of sentences.

(c) Trafficking Lesser Amounts of Drug on Defendant's Own Behalf

[60] *R v Bradforth*[49] is a case where this Court reduced a trafficking sentence from 12 years to 10.[50] Bradforth had served nine months on remand, which could not be declared. So in fact, in using the case as a comparison, the sentences were closer to 13 years and 11 years respectively. Bradforth was 24 to 25 years old. He pled to trafficking over a period of one year. The trafficking was in cocaine, methyl-amphetamine and MDMA. He had some significant criminal history, although not for drug offending. Bradforth was in business on his own account. He was selling somewhere above street level and had an assistant. Bradforth was found in possession of MDMA worth $48,000 on the street, and a tick book with 10 names in it. The figure $7,740 was written beside one of the 10 names. Bradforth was not an addict, although he was a drug user and had been led into selling as a result of that use. He was motivated by financial gain. There was no evidence of wealth or a lavish lifestyle.

[61] This Court followed *Bradforth* in *R v Raciti*.[51] Raciti was re-sentenced, by this Court, to 11 years on his own plea for trafficking in cocaine, methyl-amphetamine and MDMA. The period of trafficking was four months. This was a shorter period than the trafficking in *Bradforth*, but Raciti was older (39 to 40 years old); had previous drug convictions; was on probation for the whole of the trafficking, and on bail for some of it. There were indications as to the level of trafficking from three transactions: a purchase of 6,000 MDMA tablets for $117,000; a purchase of 5,000 tablets for $50,000 and another purchase for an amount of $87,500.

[62] In *R v Ly & Kyprianou*[52] this Court refused to interfere with sentences of 12 years and 10-and-one-half years for heroin trafficking. Ly was 27 to 28 years old at the time of trafficking. He pled to trafficking at a wholesale level over 11 months. He had a significant number of past offences of violence, including one which attracted imprisonment for one year. He had a "top level managerial role" in a significant heroin trafficking business. The business operated by Ly and (at a less managerial level) Kyprianou, sold heroin by the ounce for around $7,000-$7,600. There was evidence of three dealings in amounts of 350 grams of powder; one sold for $68,000, and another for $62,000. At the time police searched the syndicate's premises, they found three amounts of

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45 [2001] QCA 98.
46 [2007] QCA 266.
47 [2006] QCA 311.
48 [2009] QCA 299.
49 [2003] QCA 183.
50 Bradforth was charged with other offending which took place while he was on bail for the trafficking. However the Court in *Bradforth* was careful to impose independent sentences rather than let the trafficking sentence reflect the overall criminality of all the conduct for the reason that s 161C of the *Penalties and Sentences Act* imposed a mandatory non-parole period if the sentence was 10 years or more.
51 [2004] QCA 359.
52 [2008] QCA 149.

powder: 204 grams containing 49 grams pure heroin; 209 grams containing 35 grams pure heroin, and 83 grams of powder containing 15.3 grams of pure heroin. Neither Ly nor Kyprianou were addicts. Kyprianou had returned to Australia knowing he would be charged (but in circumstances where he had a wife and property in Australia).

[63] *R v Westphal*[53] involved a 27 to 28 year old man who trafficked in methyl-amphetamine for a period of 14.5 months. He co-operated with police; gave them information upon which to base the trafficking charge against him and pled guilty. Like KAQ he acted as a middle man. He told police that he estimated he supplied one person, T, with between $20,000 and $50,000 worth of methyl-amphetamine per week. T was a street level dealer and addict. Over the period of trafficking, this meant Westphal estimated he supplied between $1.24 million and $3.1 million worth of drug. While that is an enormous amount of drug, it is still less than the monetary value of the drug which KAQ moved and stored for Ta (between $5.74 million and $5.94 million at wholesale values). Westphal was paid $1,000 per transaction and he was sentenced on the basis that he made $215,000 from his trafficking on the basis of an unexplained income analysis.[54]

[64] Westphal was originally sentenced to 10 years for trafficking. On appeal he adduced new evidence as to assistance given to the police. It was substantial and not confined to information, but including Westphal's being involved in an undercover operation which exposed him to real risk at the time, and possibly in the future. This Court concluded that the 10 year sentence imposed at first instance was, "while not manifestly excessive, at the higher end of an appropriate range" – [40] – and, having regard to the new evidence, substituted a sentence of nine years, with parole eligibility at six years.

[65] *Bradforth* and *Westphal* were cited with approval in *R v Johnson*.[55] Johnson pled guilty to eight months trafficking in a variety of Schedule 1 drugs. He was 24 to 25 years old at the time, with a relatively minor criminal history. The offending was in breach of an intensive correction order. He trafficked significantly in wholesale quantities. Johnson and one other person, Tucker, (together) paid monies totalling $1.5 million to Johnson's supplier during the eight month period of trafficking. While Johnson seems to have been in business on his own account, he was working closely with two suppliers and one other man, Tucker. Johnson ran a single point on appeal: he had evidence not adduced below that he was drug addicted at the time of the offending. The Court of Appeal refused to interfere saying, "Even accepting the new evidence that he was drug addicted at the time of his offending and taking into account his comparative youth, co-operation and plea of guilty, a sentence of less than 10 years imprisonment would have been manifestly inadequate for such a serious trafficking offence" – [46].

[66] The case of *R v Harbas*[56] is comparable in many respects to the present case. Harbas was 28 to 29 years old at the time of significant trafficking in Schedule 1 drugs. He pled to that and to producing (cannabis); three counts of possessing dangerous drugs, three counts of possessing things used in connection with trafficking (including a very expensive pill press) and two counts of possessing a weapon. Harbas was intercepted with 2,000 MDMA tablets (161 grams pure) in his car. He had been intercepted because police knew he was trafficking in LSD in quantities of 100-200 tablets. A search of his home revealed relatively minor amounts of various drugs and three firearms.

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53 [2009] QCA 223.

54 In fact he was charged with two counts of trafficking and some of that income was relevant to the second count, not the one the subject of the sentence I discuss in these reasons.

55 [2014] QCA 79.

56 [2013] QCA 159.

[67] In a record-of-interview Harbas admitted trafficking in amphetamine, MDMA and LSD for a period of 12 months on a large scale on the Sunshine Coast, North Queensland and in the Northern Territory, and sometimes acting as a debt collector for his own supplier. He admitted producing and trafficking in cannabis over a 22 month period, selling between half a pound and a pound of drug per week. His admissions were to the effect that at its peak (not the whole period) his business turned over between $10,000 and $20,000 per week. He never made more than $2,000 profit per week.

[68] Harbas had a criminal history which included three convictions for possession of cannabis and a conviction for producing cannabis when he was 29 years old (during the time of the trafficking so that for the last part of the trafficking he was on bail). The Crown accepted that Harbas was addicted to both cannabis and cocaine, but he was trafficking for profit. Harbas produced evidence showing that he had tested negative for drugs whilst awaiting sentence. He had completed a TAFE course because he was functionally illiterate and obtained employment having disclosed his criminal history to his employer. This Court described "unusually impressive evidence of rehabilitation" – [13]. KAQ did not re-offend on bail, but did not show any significant evidence of steps taken to reduce the likelihood of his offending in the future.

[69] Harbas co-operated to an extraordinary degree with police. [Redacted].

[70] [Redacted].

[71] Harbas's period of trafficking was longer than KAQ's and he had a relevant criminal history. He was in business on his own account. Those features are worse than aspects of KAQ's offending. However, extensive though Harbas's drug trafficking was, it involved less drugs and less money than the drugs and money which KAQ personally moved and stored as part of Ta's operation. Both Harbas and KAQ were entitled to leniency under the principles in *AB v The Queen*, but Harbas's incrimination of himself was of far greater significance than KAQ's. But for his own admissions, Harbas would have been charged with possession of 161 grams of pure MDMA and supplying relatively small amounts of LSD. Had KAQ not co-operated by making admissions about his own conduct, he still would have been charged with trafficking in enormous amounts of Schedule 1 drugs. KAQ's informing was significant, but in a very real way it was less significant than the co-operation and information Harbas gave. [Redacted].

[72] Both Harbas and KAQ were entitled to real discounting of their sentences because of their s 13A co-operation. It is difficult to compare the value of the s 13A co-operation as between the cases. [Redacted].

[73] [Redacted]. The sentence in *Harbas* was five years, with a period of actual custody suspended after 12 months. The Court commented on the very marked reduction these successive discounts produced, but said that the case was "quite exceptional" – [30]. As discussed, the facts in *Harbas* compare favourably to the present case in terms of rehabilitation; *AB* discount; type of informing and past co-operation and risk as a result of informing.

Disposition

[74] I would: allow the appeal by the Attorney-General; sentence KAQ to seven years imprisonment with parole eligibility fixed at four-and-one-half years; otherwise not interfere with the sentences below, and refuse the application for leave to appeal as unmeritorious.