SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kalaja* [2017] QCA 123
PARTIES:	**R** **v** **KALAJA, Peter Frank** (applicant)
FILE NO/S:	CA No 240 of 2016 SC No 738 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 19 August 2016
DELIVERED ON:	9 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2017
JUDGES:	Fraser JA and Mullins and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Sentence varied by substituting a sentence of imprisonment of five years 10 months for the sentence of imprisonment of seven years on count 1.** **4. The other sentences and orders made on the sentencing on 19 August 2016 are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the defendant pleaded guilty to one count of trafficking cannabis over a period of two and one-half months and two counts of supplying cannabis (that were particulars of the trafficking) – where the defendant was the courier of 100 pounds of cannabis for the principal of a large drug enterprise and acquired $130,000 worth of cannabis from the principal for sale to his own customers – where the defendant had pre-sentence custody of about four months that was not declarable – where the sentence was imprisonment for seven years with parole eligibility after serving 20 months in custody – whether sentence was manifestly excessive *Karpinski v R* (2011) 32 VR 85; [2011] VSCA 94, considered *R v Brienza* [2010] QCA 15, considered

R v Broad & Prior [2010] QCA 53, considered
R v Cannon [2005] QCA 41, considered
R v Church [2015] QCA 24, considered
R v Fabre [2008] QCA 386, considered
R v Falconi [2014] QCA 230, distinguished
R v Kalaja [2002] QCA 508, related
R v KAQ [2015] QCA 98, considered
R v Orley [2013] QCA 119, considered
R v Parsons & Sanders [1999] QCA 402, distinguished
R v RAR (2014) 246 A Crim R 509; [2014] QCA 312, distinguished
R v Skedgwell [1999] 2 Qd R 97; [1998] QCA 93, considered
R v Ta [2016] QCA 305, considered
R v Tout [2012] QCA 296, considered

COUNSEL: A J Kimmins for the applicant
V A Loury QC for the respondent

SOLICITORS: Rostron Carlyle Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Mullins J. I agree with those reasons and with the orders proposed by her Honour.

[2] **MULLINS J:** Mr Kalaja pleaded guilty to one count of trafficking in cannabis between 30 September 2012 and 14 February 2013, and two counts of supplying cannabis. On the same indictment he went to trial on two further counts and was acquitted. On 19 August 2016, Mr Kalaja was sentenced for the trafficking count to imprisonment for seven years with parole eligibility fixed at 18 April 2018 (after serving 20 months in custody). He was convicted of the two supply counts committed on 30 November 2012 and 4 January 2013 (which were particulars of the trafficking), but not further punished.

[3] Mr Kalaja applies for leave to appeal against sentence on the ground it was manifestly excessive.

Mr Kalaja's antecedents

[4] Mr Kalaja was 36 years old when sentenced and was 33 years old at the time of the offending.

[5] He had a relevant prior entry in his criminal history. He was sentenced in the Supreme Court on 13 September 2002 to possessing cannabis sativa in excess of 500 grams (where there was a commercial aspect to the possession), two counts of supplying cannabis sativa, possessing a sum of money obtained from supplying that cannabis sativa, knowing that the money had been so obtained, and one count of possessing a motor vehicle and a mobile telephone used in connection with the commission of the crime of supplying cannabis sativa. These offences were committed on 12 September 2001. Mr Kalaja pleaded guilty and was sentenced to concurrent terms of imprisonment of 18 months to be suspended after serving six months with an

operational period of three years. His application for leave to appeal against sentence was unsuccessful: *R v Kalaja* [2002] QCA 508.

[6] A gap in his criminal history followed until he was dealt with in the Magistrates Court in June 2010 for possessing dangerous drugs. It was relatively minor offending, as no conviction was recorded and he entered into a recognisance in the sum of $300 to be of good behaviour for four months, in conjunction with drug diversion. He was fined $400 in the Local Court in Sydney for common assault committed on 5 August 2012. He was dealt with then in the Magistrates Court on 27 February 2013 for two serious assaults, but no conviction was recorded, he was fined $300, and ordered to pay total compensation of $2,250. Those assaults were committed on 19 August 2012, so that he was on bail for those serious assaults when the subject trafficking was committed. After being charged with the trafficking in September 2014, he was dealt with in the Magistrates Court for breach of bail condition committed on 16 February 2015 which related to failing to appear at the committal hearing for the subject charges, but he handed himself in to the authorities, no conviction was recorded for the breach of bail, and he was released absolutely.

[7] Mr Kalaja was charged with other offences for which he was held on remand from 27 April 2016. It appears from the pre-sentence custody certificate that he was also held in custody from 30 June 2016 for a period of 50 days to the day of sentencing for the offences that are the subject of this application, but there was no period of pre-sentence custody that related only to the offences on the indictment that included the subject trafficking and supply offences. None of the pre-sentence custody that was calculated as 115 days from 27 April 2016 (or almost four months) was therefore declarable when he was sentenced for the trafficking and supply offences.

Circumstances of the offending

[8] Although the dates particularised in the count of trafficking were between 30 September 2012 and 14 February 2013, the sentence proceeded on the basis that Mr Kalaja's trafficking commenced on 30 November 2012, making the period of trafficking two and one-half months.

[9] One Mr Ta was the focus of the police operation that brought Mr Kalaja's activities to the attention of the police. At the close of that operation on 13 February 2013, the police seized the CCTV system operating at Mr Ta's residence. Mr Kalaja was recorded on the CCTV attending Mr Ta's premises on a number of occasions. Relevantly on 30 November 2012 Mr Kalaja delivered a suitcase containing 30 to 35 pound bags of cannabis to Mr Ta's residence. That cannabis was loaded into a vehicle by others at Mr Ta's residence that was then driven by a courier for delivery to Western Australia for sale.

[10] On 4 January 2013 Mr Kalaja delivered two large suitcases containing cannabis to Mr Ta's residence. Another associate (the associate) of Mr Ta is then seen on the CCTV attending at Mr Ta's residence and then delivering one suitcase to another person. Mr Ta told the associate that the cannabis in the suitcase was worth $105,000. It was part of the prosecution case that was consistent with the suitcase containing between 26 and 37 pounds of cannabis. The second suitcase was stored at the storage shed for a week and then the associate of Mr Ta delivered it to the same person at the direction of Mr Ta. (On the hearing of this application Mr Kimmins of counsel on behalf of Mr Kalaja conceded that if the average of the estimated cannabis in each of

those two suitcases of 32.5 pounds was taken into account, it meant that the total cannabis that was couriered by Mr Kalaja to Mr Ta on 30 November 2012 and 4 January 2013 was 100 pounds.) It was the deliveries on those two dates by Mr Kalaja to Mr Ta that were the subject of the supply counts.

[11] Apart from these two deliveries of cannabis, the sentencing for trafficking proceeded on the basis that Mr Kalaja acquired cannabis on credit from Mr Ta and owed Mr Ta $132,250. That debt was the subject of intercepted telephone messages between Mr Ta and the associate during the period between 8 and 14 January 2013. There was evidence that Mr Kalaja had a customer base to whom he sold cannabis and Mr Kalaja was not in a position to repay the debt to Mr Ta, because he was having trouble getting the funds from people who owed him money. The precise size of the customer base was not identified, apart from Mr Kalaja having more than one customer.

[12] A financial analysis was conducted in relation to the accounts of Mr Kalaja and only the sum of $1,100 was identified as potential unsourced income.

Sentencing remarks

[13] The learned sentencing judge accepted that although the pleas of guilty to the trafficking and supplies of cannabis were not entered until the arraignment at trial on 30 June 2016, Mr Kalaja was acquitted of the two charges to which he pleaded not guilty at the trial and Mr Kalaja should in the circumstances receive the benefit of the level of cooperation reflected by the guilty pleas The sentencing judge referred to the trafficking over a period of three and one-half months in large quantities of cannabis, having a large value. (The period of three and one-half months was in excess of the period identified by the prosecution, but nothing relevantly arises on this application in relation to that error.)

[14] Trafficking in cannabis after being sentenced to imprisonment for drug offences was an aggravating feature. It was also noted that Mr Kalaja had acquired some of the cannabis "on tick" to make a profit in relation to selling it, but in respect of the balance of the cannabis, he was more in the nature of a courier and there was no evidence that he had a proprietary interest in that. As Mr Kalaja was both a proprietor and a courier, not much of a distinction should be made between these roles. There was no evidence that Mr Kalaja was an addict when he offended, so the sentencing judge found that Mr Kalaja trafficked for profit which was also an aggravating feature.

[15] After referring to Mr Kalaja's antecedents, the sentencing judge noted Mr Kalaja had over the years a significant involvement in looking after his father who had a significant mental illness, but that could have limited effect only on the sentence, having regard to the aggravating features. The sentencing judge referred to the references in Mr Kalaja's favour and accepted that Mr Kalaja's contrition was genuine.

[16] The sentencing judge expressly took into account the 50 days shown as pre-sentence custody in the pre-sentence custody certificate for the subject offences and expressly noted he had regard to the fact that Mr Kalaja had been in custody for 115 days in total as a consequence of other offences which was not time that could be "properly … taken into account in its totality," but the sentencing judge then stated that he did "have regard to the fact that you have been in custody now since 27 April".

[17] The sentencing judge did not accept *R v Falconi* [2014] QCA 230 as a comparable, as the sentence imposed on that offender "was clearly affected by the fact that there

had to be consideration to the totality principle when having regard to the sentence being imposed for other offences".

[18] The sentencing judge emphasised the need for general and personal deterrence in Mr Kalaja's case. Recognition was given to the expiry of the trafficking period over three years prior to the date of sentence and there was "not a suggestion that [Mr Kalaja had] committed further offences since that time", apart from the breach of bail in 2015.

[19] The sentencing judge concluded:

> "Balancing all of those matters, I am satisfied the appropriate head sentence is seven years' imprisonment. It was a very serious operation – sophisticated, involving large quantities and large potential profits. However, your pleas of guilty, if they are to be properly reflected, the 50 days that you have served in custody which is properly to be taking into account and your personal circumstances, satisfy me I should set the parole eligibility date at 20 months' imprisonment which is approximately eight months less than would be the one-third mark. It is specifically to have regard to what is, effectively, almost two months in custody in respect of these offences and also to properly reflect the other matters to which I have referred."

Submissions on behalf of Mr Kalaja

[20] It is conceded appropriately on behalf of Mr Kalaja that the sentencing judge had taken the pre-sentence custody of almost four months into account in reducing the period to be served before the date fixed for eligibility for parole.

[21] The aggravating circumstance of the prior conviction for drug offences was diminished by the time that had passed between that earlier offending in September 2001 and the commencement of the subject trafficking on 20 November 2012, so that the sentencing judge placed excessive weight on the 2002 convictions.

[22] Before the sentencing judge, Mr Kalaja's counsel had sought to distinguish the sentences of others in Mr Ta's network for more serious offending, including the sentence imposed on Mr Ta's brother for trafficking in cannabis and methylamphetamine over a period of four and one-half months, and the indicative sentence that would have been imposed on the associate for much more serious offending (*R v KAQ* [2015] QCA 98), but for the fact he was sentenced under s 13A of the *Penalties and Sentences Act* 1992 (Qld) (the Act).

[23] On this application after Mr Ta's brother was unsuccessful in his application to appeal against his sentence (*R v Ta* [2016] QCA 305), Mr Kimmins of counsel on behalf of Mr Kalaja relied on the sentence of imprisonment of seven years with parole eligibility after two years imposed on Mr Ta's brother for trafficking in both schedule 1 and 2 drugs, as supporting the submission that the head sentence imposed on Mr Kalaja for trafficking in a schedule 2 drug only over a shorter period was manifestly excessive.

[24] Mr Kimmins disputes the sentencing judge's dismissal of *Falconi* as a relevant comparable, on the basis that Holmes JA (as the Chief Justice then was) (with whom Fraser JA agreed) relied on *Falconi* as a comparable in *KAQ* at [9]-[10]:

> "[9] The facts in *R v Falconi* 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'. 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.
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> [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." (*footnotes omitted*)

[25] It is submitted that the majority in *Falconi* did not disregard the sentence imposed on the offender for trafficking in cannabis of imprisonment of four and one-half years on the basis the offender at the same time was sentenced separately for the Commonwealth offence of conspiracy to defraud that was imposed partly cumulatively on the sentence for the trafficking offence.

[26] Apart from *Falconi* and *Ta*, Mr Kalaja relies on *R v Church* [2015] QCA 24, *R v RAR* (2014) 246 A Crim R 509, *R v Broad & Prior* [2010] QCA 53 and *R v Orley* [2013] QCA 119.

[27] The majority in *Church* allowed the appeal on sentence on the basis of an error made by the sentencing judge in deciding the extent of drugs trafficked and re-sentenced the offender for trafficking in cannabis sativa and methylamphetamine (over a period of three and one-half months) to six years' imprisonment with a parole eligibility date fixed after serving two years in custody. The offender's extensive criminal history and his offending while on bail and in custody were referred to at [51] as aggravating features. The offender had commented in intercepted conversations that he could move 35 pounds a week and he was moving over 20 pounds of cannabis a week. It was noted at [54] that the quantity of drugs trafficked was not able to be ascertained

with precision, but the offender was trafficking "in significant amounts of cannabis" and the telephone intercepts revealed he "appeared to be near the top of the chain of distribution" for the trafficking. There was also no dispute that the offender's trafficking in methylamphetamine was at a low level. His offending was to sustain his drug addiction, but was still more serious than Mr Kalaja's offending.

[28] The offender in *RAR* who was sentenced under s 13A of the Act pleaded guilty to trafficking in cannabis sativa over a period of two months and one week and trafficking in methylamphetamine over a much longer period. Counsel for Mr Kalaja relies on the reduction of the sentence of imprisonment for the trafficking in methylamphetamine on appeal from seven years with parole eligibility after three years to six years with parole eligibility after two years.

[29] Mr Broad's appeal in *Broad & Prior* against the sentence of seven years' imprisonment with parole eligibility after two years and three months for trafficking in cannabis over a period of almost four months was unsuccessful. Mr Broad was involved in organising six deliveries of large quantities of cannabis sativa from South Australia to Queensland for which there was evidence that up to 267 pounds was delivered. Telephone intercepts showed that Mr Broad sourced between 122 and 222 pounds of cannabis over the trafficking period. Mr Broad's offending was much more serious than that of Mr Kalaja.

[30] The offender in *Orley* was sentenced after trial for trafficking in cannabis over a period of three months to imprisonment for six years with no date fixed for eligibility for parole. The sentence proceeded on the basis the offender had dealt in at least 150 pounds of cannabis that had a street value of more than $450,000. The offender was 55 years old at the time of the offending with some criminal history and had a significant gambling habit.

[31] The ultimate submission by reference to these comparable sentences is that Mr Kalaja should have been sentenced in the range of five to six years' imprisonment with eligibility for parole after serving 15 to 18 months, having regard to the pre-sentence custody of 115 days.

Submissions on behalf of the respondent

[32] Ms Loury of Queen's Counsel on behalf of the respondent relies on the approach in *R v Tout* [2012] QCA 296 at [8] to the effect that a contention that the sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases, but the difference must be due to either a misapplication of principle or that the sentence is "unreasonable or plainly unjust", in reliance on *Hili v The Queen* (2010) 242 CLR 520 at [58]-[59].

[33] *Falconi* was of limited assistance only to the sentencing judge, as it was an application for an extension of time within which to apply for leave to appeal against sentence and all the decision of the court demonstrated was that there were no prospects of showing that the sentence was manifestly excessive. In addition, the offender was sentenced for the drug offences on the basis he was a courier only.

[34] *Church* can be distinguished on the basis that the offender in that case was motivated by his drug addiction, whereas Mr Kalaja was commercially motivated. The offender had, after being charged, engaged in acts that promoted his rehabilitation (at [56]).

[35] *RAR* is also of limited assistance, because the reduction of the sentence on the appeal was due to the offender's self-incrimination to offences otherwise unknown to the authorities and his past cooperation.

[36] The sentence of six years' imprisonment imposed on the offender in *Orley* after trial was explicable by the sentencing judge's express reference to the appropriate range being six to seven years, but the actual sentence imposed was at the lower end of the range, because of the impact that the sentence of imprisonment would have on the offender's chronically ill wife. The offender was a wholesaler in a distribution network in which others were higher up (at [17]).

[37] The circumstances of Mr Broad in *Broad & Prior* were "broadly comparable" to Mr Kalaja's offending. Mr Broad was described as receiving amounts of cannabis from 122 pounds to 222 pounds which he sold as a principal. He had a substantial criminal history including six convictions for possessing or producing drugs.

[38] The sentence imposed on Mr Kalaja sits comfortably with *R v Brienza* [2010] QCA 15 where an application for leave to appeal against a sentence of six years' imprisonment with parole eligibility after one-third of the sentence was refused. The offender had supplied 70 pounds of cannabis in 12 transactions and was involved in what was described as an extensive wholesale commercial operation over a 12 month period. His motivation was commercial, he had no relevant criminal history, and had undiagnosed depression.

[39] Although the objective seriousness of the offending by Mr Parsons in *R v Parsons & Sanders* [1999] QCA 402 was more serious than Mr Kalaja's offending, the sentence imposed on Mr Kalaja is consistent with the sentencing of Mr Parsons. Mr Parsons was sentenced to imprisonment for eight years with parole after serving three and one-half years for trafficking in cannabis over a period of four months. Mr Parsons was the head of a chain of distribution. He had a substantial criminal history that involved nine occasions of sentences of imprisonment for offending other than drug offences.

[40] The sentence imposed on Mr Kalaja was not so markedly different as those imposed in the comparable cases, as to be characterised as "unreasonable or plainly unjust".

Was the sentence manifestly excessive?

[41] The sentencing judge's reason for rejecting *Falconi* as a comparable may not be justified, but *Falconi* is of limited use as a comparable, as the sentence imposed in that case for trafficking in cannabis remains effectively a sentence at first instance that was recognised as "moderate", when the offender's application for extension of time to appeal against the sentence was refused.

[42] *RAR* is of no assistance as the offending and the circumstances of the offender are so different from those applicable to Mr Kalaja plus the application of s 13A of the Act in *RAR* to preclude any meaningful comparison. *Parsons* is also of no real assistance, apart from the obvious conclusion that the offender in that case (whose sentence was higher than for Mr Kalaja) fell within a different and more serious category of offending.

[43] The offender in *Ta* was sentenced on the basis of participating in his brother's drug trafficking enterprise over the period of four and one-half months by hiring a storage

shed with the associate that was used to store drugs, receiving on various occasions money from the associate, driving the associate to collect money, checking homes and cars for electronic surveillance devices, and accessing money in the safe at his brother's home. The amount of money handled by the offender was "in the hundreds of thousands". He earned unexplained income during the trafficking period of about $25,000 to $30,000. He was 24 years old at the time of the offending and had depended on his brother to protect him from bullying throughout schooling and then to assist him with jobs. The offender did not make any decisions on his own account, but did menial tasks to facilitate Mr Ta's large scale trafficking business. Although the offender's age, personal circumstances and antecedents were more favourable than for Mr Kalaja, the offender's criminality was much more serious and the fact that his head sentence was the same as Mr Kalaja is of some relevance.

[44] *Church* is a more serious example of trafficking than Mr Kalaja's offending. The offender in *Church* was of similar age to Mr Kalaja. On the basis of moving 20 pounds of cannabis each week at $3,000 per pound (which was the amount discussed in the course of the intercepted calls referred to at [29]), that offender's trafficking in cannabis was more serous than Mr Kalaja's sale of $130,000 worth of cannabis coupled with his couriering another 100 pounds of cannabis for Mr Ta. The mitigating features of the offender in *Church* were greater than those in Mr Kalaja's favour, but not sufficient to warrant the disparity in the sentence between that imposed in *Church* on appeal and Mr Kalaja's sentence.

[45] The statement of facts in *Broad & Prior*, in so far as they related to Mr Broad, were not entirely clear. Although the six deliveries of cannabis in a total quantity of 267 pounds is referred to at [16] as submitted by Mr Kimmins, the deliveries were not solely to Mr Broad who appears to have been sentenced for his trafficking in respect of that part of the quantity delivered to him of between 122 and 222 pounds which he onsold. That still put his offending as more serious than that of Mr Kalaja.

[46] The offending in *Orley* was objectively more serious than Mr Kalaja's offending. There were mitigating factors in *Brienza* that the offender ceased trafficking of his own volition and had no relevant criminal history, but he was described at [25] as "acting in his own right as a drug wholesaler" rather than as a courier.

[47] Even allowing for Mr Kalaja's relevant criminal history and that his involvement in trafficking in cannabis was commercially motivated, his sentencing had to proceed on the basis that the trafficking was over a relatively short period of time and only the smaller portion of the cannabis that was trafficked was on his own account, with the balance being trafficked by him as a courier in the larger enterprise of Mr Ta. The sentences imposed in *Ta*, *Church*, *Orley* and *Brienza* and that imposed on Mr Broad in *Broad & Prior* overwhelmingly point to a sentence of six years for Mr Kalaja's offending that takes into account his circumstances. It is true that the sentencing judge had mitigated the sentence of seven years by fixing the date for eligibility for parole after Mr Kalaja had served 20 months in custody, but that mitigation reflected the guilty plea and was partly due to the non-declarable pre-sentence custody. Despite the mitigation of the head sentence of seven years by the beneficial date that was fixed for eligibility for parole, the comparable sentences support the conclusion that the overall sentence is manifestly excessive.

[48] The sentencing judge made it clear that he made full allowance for the 50 days spent in custody from 30 June 2016 on account of the subject charges, as well as the charges

which remained outstanding for which Mr Kalaja was taken into custody on 27 April 2016. The period between 27 April and 30 June 2016 where Mr Kalaja was held in relation to those outstanding charges would theoretically be declarable in respect of any sentence for those outstanding charges, if he were ultimately convicted of those charges, as it appears he was on remand during that period for those outstanding charges alone. When Mr Kalaja was sentenced on 19 August 2016, it remained a matter of speculation as to what would happen ultimately in respect of those outstanding charges. Consistent with the approach in *R v Skedgwell* [1999] 2 Qd R 97, it was not inappropriate (although not mandatory) to take into account on the sentence imposed for the trafficking in cannabis the custody that was served between 27 April and 30 June 2016. See also *R v Cannon* [2005] QCA 41 at [7], [14] and [20]-[21] and *R v Fabre* [2008] QCA 386 at [14]-[15], and the rationale for taking such a period into account that was canvassed, but not determined, in *Karpinski v R* (2011) 32 VR 85 at [48]-[55]. On the approach the sentencing judge took to the pre-sentence custody of 115 days, if Mr Kalaja were to be convicted of the outstanding charges, the allowance made for the period would need to be factored into any future sentencing for the outstanding charges.

[49] In this regard, I propose to follow the same approach of the sentencing judge in giving credit for the pre-sentence custody of 115 days in fixing the date for eligibility for parole. But for the 50 days for which Mr Kalaja was held on remand specifically in respect of the trafficking in cannabis charge, I would have imposed a sentence of six years' imprisonment with the date for eligibility for parole fixed after serving one-third of that sentence less the period of 115 days (rounded to four months) which results in eligibility for parole after serving 20 months in custody. In addition, I would recognise the period of 50 days held on remand in relation to the trafficking in cannabis by taking two months off the head sentence. That results in a sentence for the trafficking of five years ten months with the same date for eligibility of parole of 18 April 2018 that was determined by the sentencing judge.

Orders

[50] The orders I propose are:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. Sentence varied by substituting a sentence of imprisonment of five years 10 months for the sentence of imprisonment of seven years on count 1.
4. The other sentences and orders made on the sentencing on 19 August 2016 are otherwise confirmed.

[51] **FLANAGAN J:** I agree with the orders proposed by Mullins J and with her Honour's reasons.