SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stamatov* [2017] QCA 158
PARTIES:	**R** **v** **STAMATOV, Alexander** (applicant)
FILE NO/S:	CA No 110 of 2017 SC No 5 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Date of Sentence: 22 May 2017
DELIVERED ON:	28 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2017
JUDGES:	Gotterson JA and Atkinson and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence granted.** **2. The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – RELATIVE HARM OF DRUGS – where the applicant was convicted of trafficking in dangerous drugs, mainly steroids – where he submitted that a distinction should be made between steroids and other dangerous drugs, such as methamphetamine, in Schedule 1 of the *Drugs Misuse Act* 1986 (Qld) – where the sentencing judge concluded he was not permitted to make such a distinction – whether it is permissible to distinguish between the harmfulness of steroids and other Schedule 1 drugs, particularly methamphetamine, for the purpose of sentencing for the offence of trafficking CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – whether the sentencing judge determined that "exceptional circumstances" had to be shown before a sentence not involving actual imprisonment could be imposed for trafficking in a Schedule 1 drug – whether determining that "exceptional circumstances" had to be shown fettered the

sentencing discretion

Drugs Misuse Act 1986 (Qld), s 5
Penalties and Sentences Act 1992 (Qld)
Serious and Organised Crime Legislation Amendment Act 2016 (Qld)

Adams v The Queen (2008) 234 CLR 143; [2008] HCA 15, considered
Aytugrul v The Queen (2012) 247 CLR 170; [2012] HCA 15, cited
Ibbs v The Queen (1987) 163 CLR 447; [1987] HCA 46, cited
Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, cited
R v Bradforth [2003] QCA 183, cited
R v Dowel; Ex parte Attorney-General (Qld) [2013] QCA 8, cited
R v Hooper; ex parte Cth DPP [2008] QCA 308, cited
R v Pidoto and O'Dea (2006) 14 VR 269; [2006] VSCA 185, discussed
R v Ritzau [2017] QCA 17, explained
Reynolds v Wilkinson (1948) 51 WALR 17; [1948] WALawRp 1, cited
Western Australia v Higgins (2008) 200 A Crim R 302; [2008] WASCA 157, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: B J Power for the applicant
C W Heaton QC for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[2] **ATKINSON J:** I agree with the orders proposed by Applegarth J and with his Honour's reasons.

[3] **APPLEGARTH J:** The applicant pleaded guilty to trafficking in dangerous drugs, mainly steroids. On 22 May 2017 he was sentenced to three years' imprisonment, with a parole release date after six months had been served. According to the applicant, the learned sentencing judge erred:

(a) in concluding that he was not permitted to distinguish between steroids and other Schedule 1 dangerous drugs for the purpose of sentencing for the offence of trafficking in a dangerous drug; and

(b) in fettering his discretion by determining that "exceptional circumstances" had to be shown before a sentence not involving actual imprisonment could be imposed for trafficking in a Schedule 1 dangerous drug.

The circumstances of the offence

[4] On 20 April 2015 police executed a search warrant at the applicant's home and located drugs and drug-related paraphernalia. They also seized the applicant's mobile phone, which contained messages that suggested his involvement in trafficking dangerous drugs.

[5] The messages indicated that for approximately five months the applicant sold drugs to seven men who shared his interest in body-building. Though the text messages indicated the possible sale of a number of Schedule 1 drugs, the applicant mainly trafficked steroids. He was using steroids at the time, and openly discussed his use with his customers, and drew upon his experience to give advice about the best method for their use.

[6] The applicant participated in a police interview, during which some admissions were made, although he attempted to minimise the extent of his conduct.

[7] The prosecution was unable to particularise the profit made from trafficking. The learned sentencing judge proceeded on the basis that any profit may have been nominal.

[8] The Schedule 1 drugs which the applicant trafficked included nandrolone, testosterone, trenbolone, sustanon 250, methamphetamine and MDMA.

The applicant

[9] The applicant was aged 28 and 29 at the time of the offence and 31 at the time of sentence. He had a criminal history in both Victoria and Queensland. In 2011 he was convicted of using and possessing amphetamines, for which he was placed on a drug diversion program, and otherwise discharged. Following this, he moved to Queensland. His Queensland criminal history includes various drug-related summary offences. He also had a traffic history, which includes four counts of unlicensed driving.

[10] After being charged with the offence that is the subject of this appeal, the applicant left Gladstone and relocated to the Sunshine Coast, where he achieved both a graduate certificate in business administration and a master of business administration in a relatively short time. The applicant is involved in ventures to develop and exploit an invention designed to convert solar energy to electricity.

A late plea

[11] The indictment was presented in February 2016, and during 2016 the applicant was represented by different firms. After January 2017 he represented himself before the learned sentencing judge a number of times, who came to appreciate the fact that the applicant is "clearly an intelligent man". In his sentencing remarks the judge was perplexed as to the course which the applicant took of allowing the matter to proceed to trial. The prosecution and the Court were only notified of the plea the day before the trial was due to start. The sentencing judge remarked:

> "As the prosecution rightly point out, that reflects on the view I can take as to remorse, rehabilitation, acceptance of responsibility, all those features."

The sentencing hearing

[12] Counsel who then appeared for the applicant argued that a distinction should be made between steroids and non-steroidal dangerous drugs in Schedule 1 of the *Drugs Misuse Act* 1986 (Qld), based on the relative harm the drug inflicts on users and society. The harm caused by a particular drug was submitted to be a relevant consideration for sentencing purposes.

[13] Very limited evidence was placed before the judge about the harm which steroids do, compared with other Schedule 1 drugs, such as methamphetamine, heroin, MDMA and cocaine. Two documents were tendered at the hearing. The first was a January 2017 document titled "Queensland Methamphetamine Paper" published by Queensland Health. The second was a seven page Anabolic Steroids fact sheet, available from the website of the New South Wales Health Department, a few pages of which described the risks associated with using those drugs. As the sentencing judge noted in the course of the hearing, before any view could be taken about the harmful effects of methamphetamine compared to steroids, a great deal more evidence would be required than the couple of documents provided.

[14] The applicant's counsel at the time also argued that "plenty is known of the damage that methamphetamine does to the community", whereas less is known about the damage that steroids inflict on the community generally. As a result, and despite steroids being classified as a Schedule 1 dangerous drug, the appropriate punishment for trafficking in steroids was submitted to be less than for trafficking in methamphetamine.

[15] Counsel for the respondent relied on *Adams v The Queen*, which states that generalisations which seek to differentiate between the evils of the illegal trade in different drugs are to be approached with caution, particularly when they are not sustained by evidence or material of which judicial notice can be taken.[1] The evidence before the sentencing judge did not permit any meaningful distinction to be drawn between the steroidal drugs in Schedule 1 and other drugs in Schedule 1. Having had little notice of the argument advanced by counsel who appeared for the applicant at the sentencing hearing, counsel for the prosecution referred to some information about trends which reported a dramatic increase in the importation of steroids, and therefore suggested that the use of steroids had become more prevalent.

[16] Moreover, reliance was placed upon the fact that various steroidal drugs had been included in Schedule 1 in 2014 and that the explanatory notes concerning those amendments explained that they were designed to strengthen the penalties for offences involving anabolic-androgenic steroids so as to be "similar to those applying to other dangerous drugs such as methamphetamine and ecstasy".[2]

[17] As for submissions at the sentencing hearing which related to the proposed second ground of appeal about "exceptional circumstances", counsel referred to comparable cases, and these included *R v Ritzau*.[3] The applicant's counsel stated that "certainly *Ritzau* confirms the principle that wholly suspended sentences are available in exceptional circumstances". Counsel for the applicant who appears on the present application submitted that counsel at the hearing thereby led the learned sentencing judge into error.

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1 (2008) 234 CLR 143 at 147 [9] (*"Adams"*).
2 Explanatory Notes, *Safe Night Out Legislation Amendment Bill* 2014 (Qld) 2.
3 [2017] QCA 17.

The sentencing remarks

[18] It is necessary to refer to the *ex tempore* sentencing remarks only with respect to the proposed two grounds of appeal.

[19] The learned sentencing judge doubted the submission that steroids should be treated differently to other Schedule 1 drugs such as methamphetamine because of the absence of a factual basis for that submission. The material before the judge included the side effects stated in the fact sheet from New South Wales, which accorded with what the sentencing judge described as his own rather limited knowledge of the potential side effects. The side effects recorded in the fact sheet were limited to the harm to an individual who takes such a drug and they included serious health problems such as abnormal heart rhythms, high blood pressure, heart attacks, permanent liver damage, liver tumours, diabetes and aggressiveness in men. After noting the evidence about the side effects, the learned sentencing judge continued:

> "The point is that Parliament has set a standard. That is, they have put the drug onto schedule 1 of the *Drugs Misuse Act* and, having done so, Parliament has told us of the view that we the Courts are to take to the harm that this [drug] causes. It is not limited to the harm to the individual, of course. The harm is to individuals and society and to society in various ways."

[20] After referring to the decision of the High Court in *Adams v The Queen*, his Honour stated:

> "For my part, Parliament has placed these drugs on schedule 1 of the Act. Parliament clearly intended that the penalties that are applicable to other schedule 1 drugs should apply here. That is the point of putting the drug on schedule 1 and that is the approach that I am required to take."

[21] The applicant's circumstances and the circumstances of the offending were considered by the sentencing judge. His Honour referred to the cases to which he had been taken by counsel for the applicant of exceptional circumstances, which were said to "almost always involve people who are young, first offenders with, on occasions, limited criminality in their conduct". The judge observed in relation to the circumstances of the present case that "it seems to me these circumstances are far from exceptional". Consideration was given to single judge decisions involving trafficking in steroids, including decisions in which defendants had been granted immediate release on parole or wholly suspended sentences. In conclusion the learned sentencing judge stated:

> "It seems to me that the appropriate sentence here should reflect what is typical for schedule 1 drugs. In *Scott*, Justice Keane pointed out that typically the range of a sentence that would be appropriate would be between three and five years' imprisonment. Here, it seems to be that range applies. I sentence you to three years' imprisonment. I have given serious consideration to Mr Heelan's submissions but it seems to be the circumstances are not exceptional, and it is necessary that you serve a period of actual custody."

The relative harm issue

[22] Two decisions of the High Court feature in the parties' submissions. They are *Adams v The Queen* and *Ibbs v The Queen.*[4]

[23] Central to the first ground of the proposed appeal is the authority of *Adams*, and whether it may be distinguished on the ground that it concerned a "quantity-based penalty regime".[5]

Adams v The Queen

[24] Mr Adams was convicted in 2004 of having possession of a prohibited import, namely a "commercial quantity" of MDMA, commonly known as ecstasy. He argued that the trial judge erred in observing that, generally speaking, importing or possessing ecstasy is taken as seriously for sentencing purposes as importing or possessing heroin.[6] He argued that he should be resentenced on the basis that the MDMA or ecstasy that he was found in possession of "is less harmful to users and society than heroin".[7]

[25] The High Court rejected this argument. It is appropriate to quote in full [9] and most of [10] of the joint judgment of Gleeson CJ, Hayne, Crennan and Kiefel JJ:

> "[9] The appellant's entire argument is based on the factual assertion that 'MDMA … is less harmful to users and to society than heroin.' The quantities in contemplation for the purposes of that comparison are unspecified. How much MDMA is being compared with how much heroin? Other aspects of the meaning of the proposition are equally unclear. Harm to users and society is a protean concept. Counsel had understandable difficulty explaining exactly what the proposition means, let alone demonstrating, by evidence available to the sentencing judge or matters of which a court could take judicial notice, that it was true. What kinds of user, and what kinds of harm to society, are under consideration? The social evils of trading in illicit drugs extend far beyond the physical consequences to individual consumers. As the Victorian Court of Appeal pointed out in *R v Pidoto and O'Dea*,[8] 'questions arise as to whether the perniciousness of a substance is to be assessed by reference to the potential consequences of its ingestion for the user, or its effect upon the user's behaviour and social interactions, or the overall social and economic costs to the community.' Furthermore, in relation to some of these matters, scientific knowledge changes, and opinions differ, over time. Generalisations which seek to differentiate between the evils of the illegal trade in heroin and MDMA are to be approached with caution, and in the present case are not sustained by evidence, or material of which judicial notice can be taken.

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4 (1987) 163 CLR 447 ("*Ibbs*").
5 *Adams* at 146 [2].
6 At 147 [6].
7 Ibid.
8 (2006) 14 VR 269 at 282 [59].

> [10] An equally serious difficulty for the appellant's argument is in seeking to reconcile it with the scheme of the *Customs Act* in relation to penalties. In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable foundation for such an approach) cuts across the legislative scheme."

[26] In a separate judgment, Heydon J concluded that Mr Adams had not demonstrated that MDMA was "less harmful than heroin".[9]

The general principle stated in *Ibbs v The Queen*

[27] The mere fact that an offence, which may be committed in a variety of forms, carries a single maximum penalty does not require a sentencing court to treat each form of the offence as being equally serious. This general proposition is supported by *Ibbs v The Queen*, in which the High Court was concerned with the offence of sexual penetration without consent. Sexual penetration was defined in the *Criminal Code* 1913 (WA) as including a variety of conduct. The High Court stated:

> "When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case."[10]

The Court quoted the statement of Dwyer CJ in *Reynolds v Wilkinson*[11] that:

> "Crimes bearing the same general description have not equally evil content or characteristics, and offenders also differ in themselves."

[28] The correctness of *Ibbs* was not questioned in *Adams*. The joint judgment in *Adams* stated:

> "**Of course, the fixing of a maximum penalty is not the end of the matter, as was emphasised in *Ibbs v The Queen***.[12] But there is nothing in the *Customs Act*, or the evidence, or the demonstrated state of available knowledge or opinion, which requires or permits a court to sentence on the basis that possessing a commercial quantity of MDMA is in some way less anti-social than possessing a commercial quantity of heroin."[13] (emphasis added)

The applicant's submissions on the relative harm issue

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9 *Adams* at 149-150 [16].
10 *Ibbs* at 452.
11 (1948) 51 WALR 17 at 18.
12 (1987) 163 CLR 447.
13 *Adams* at 148 [11].

[29] The applicant relies on the general principle stated in *Ibbs*. He seeks to distinguish *Adams* on the basis of the scheme of the legislation considered in that case. The *Customs Act* adopted what was described in *Adams* as a "quantity-based regime".[14] That regime defined "trafficable" and "commercial" quantities of certain drugs. For example, the commercial quantity for cocaine was 2 kilograms, for heroin it was 1.5 kilograms and for MDMA it was 0.5 kilograms. As to that regime, the High Court observed:

> "This legislative approach, which recognises the financial rewards available from dealing in illicit drugs, thus differentiates between various narcotic substances in designating the trafficable and commercial quantities, but applies the same penalty regime to the quantities so designated. It may be contrasted with legislation in New Zealand and Canada, which grades drugs according to a legislative perception of their harmfulness, and prescribes penalties based on harmfulness rather than quantities."[15]

[30] According to the applicant, the appellant in *Adams*, in arguing that MDMA should be regarded as less serious than heroin, was attempting to reverse the scheme of the *Customs Act*. By contrast, the *Drugs Misuse Act* 1986 does not provide a quantity-based penalty regime for the offence of trafficking in dangerous drugs. The Act does not specify a trafficable amount for each drug or create quantity-based trafficking offences by, for example, defining the amount of a specific drug which will constitute a "commercial quantity" or a "large commercial quantity" for the purposes of a trafficking offence.[16] Because the *Drugs Misuse Act* 1986 does not contain the kind of quantity-based system considered in *Adams* or in regimes which operate in some other jurisdictions, the applicant submits that the general principle stated in *Ibbs* applies to a consideration of at least trafficking in steroids when compared to other Schedule 1 drugs.

[31] More generally, the applicant relies upon the sentencing principles contained in s 9 of the *Penalties and Sentences Act* 1992 (Qld) which might permit different considerations to apply between trafficking in methamphetamine and trafficking in steroids:

- "the nature of the offence and how serious the offence was, including – (i) any physical, mental or emotional harm done to a victim …" (s 9(2)(c));
- "any damage, injury or loss caused by the offender" (s 9(2)(e));
- "the prevalence of the offence" (s 9(2)(h)); and
- "any other relevant circumstance" (s 9(2)(r)).

These matters are submitted to permit consideration of the relative effects on the user and upon society of methamphetamine and steroids.

[32] There is no challenge to the learned sentencing judge's observations about the state of the factual basis to draw any such distinction. The applicant's failure to establish, as a matter of fact, that steroids are less harmful than methamphetamine,

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14 At 146 [2].

15 At 146 [3], footnotes omitted.

16 c.f. *R v Pidoto and O'Dea* (2006) 14 VR 269 which considered the Victorian quantity-based trafficking offences.

might be said to make this aspect of the proposed appeal academic, in that, if it was permissible to take account of relative harmfulness, the applicant would not be able to show that to do so would make any difference to his sentence.[17] The sentencing judge is submitted to have erred on a point of principle in:

(a) relying on *Adams* which involved a different legislative scheme; and

(b) concluding that the inclusion of steroids in Schedule 1 required him to treat them and all other Schedule 1 drugs equally.

The respondent's submissions on the relative harm issue

[33] The respondent acknowledges that the process of sentencing necessarily involves the assessment of all the relevant circumstances, so as to arrive at a just sentence in accordance with the governing principles contained in s 9 of the *Penalties and Sentences Act* 1992. It submits that the relative seriousness of criminal offending is generally considered by reference to the maximum penalty imposed by the legislature for particular offending. In having regard to the nature and seriousness of the offence, the statutory regime of the *Drugs Misuse Act* 1986 (Qld) assumes importance. Prohibited dangerous drugs are classified by reference to their inclusion in schedules. According to the respondent, the "relative seriousness of one drug as opposed to another has been determined by Parliament and is reflected in the classification of the drug by its inclusion in either Schedule 1 or Schedule 2".

[34] The respondent submits that under the Queensland legislative regime, there is no basis upon which to distinguish between the various drugs within a particular schedule.

[35] Reliance is placed upon the decision of the Court of Appeal of Victoria in *R v Pidoto and O'Dea* which, in the context of the Victorian quantity-based trafficking scheme, concluded that "As a matter of statutory construction, the harmfulness of the drug is irrelevant to the exercise of the sentencing discretion".[18] Whilst the Queensland legislative scheme is different and does not fix the maximum penalty according to the quantity of drug trafficked, a similar conclusion is said to apply, as a matter of statutory construction.

[36] As to the applicant's reliance upon *Ibbs*, the respondent submits that the applicable statute, in defining "sexual penetration", encompassed several different types of conduct. The maximum penalty was not prescribed as an appropriate penalty for the worst type of case falling within each of the respective categories of sexual penetration.[19]

Legislative schemes and harm

[37] It is convenient on occasions to characterise legislation as adopting a "quantity-based penalty scheme"[20] or a "harm-based classification of drugs".[21] However, labels may be misleading.

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17 *Adams* at 149-150 [16].

18 At 271 [3] per Maxwell P, Buchanan, Vincent and Eames JJA; the other member of the Court, Calloway JA did not join in this conclusion.

19 *Ibbs* at 452.

20 *Adams* at 146 [2].

21 *R v Pidoto and O'Dea* at 271 [6].

[38] Any legislation which penalises possession or other conduct with respect to specified dangerous drugs according to the quantity of the drug is making a statement about the harm or the relative degree of harm of dealing in those drugs above a certain amount.

[39] Harm may come in many forms. These include harm to the health of users, to the welfare of families of users, to the personal safety of citizens, to the victims of property crimes that are committed to feed drug addictions, and to the social fabric of entire communities.

[40] It should not be assumed that the classification of dangerous drugs into different categories under a "harm-based classification" system is based simply on an assessment of the harm that a drug may cause to users. It may involve a broader assessment of social harm, including the prevalence or expected future prevalence of a dangerous drug. Ultimately, the placing of drugs in particular categories is a policy-based legislative decision, rather than a classification based upon a scientifically-based scale of harm. Even a "harm-based classification of drugs", which applies the recommendations of expert advisory committees, is based upon an expert assessment of harmfulness which may extend beyond matters of science and medicine.

[41] A particular legislative regime may structure penalties for an offence according to both the quantity of a specified drug and the classification of that drug as a Class A, Class B or Class C drug, according to the harms associated with it.[22] In this way, legislation may be a hybrid of a "quantity-based penalty scheme" and a "harm-based classification of drugs".

[42] Where an offence, such as trafficking in a dangerous drug, contains no scheme of graduated penalties based on quantity, the quantity of the drug will be one of many factors taken into account in a particular case in determining an appropriate penalty.[23]

The legislative scheme which applied in this case

[43] The applicant was charged with the offence of trafficking in a dangerous drug. Section 5 of the *Drugs Misuse Act* 1986 creates such an offence. At the relevant time, the maximum penalty for such an offence depended upon the kind of drug – with a higher maximum penalty for trafficking in a Schedule 1 drug than in a Schedule 2 dangerous drug. At the relevant time the provision stated:

> "**5 Trafficking in dangerous drugs**
>
> (1) A person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime.
>
> Maximum penalty –

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22 See the discussion of the United Kingdom and New Zealand legislation in *R v Pidoto and O'Dea* at 274-277 [25] – [36].

23 See the statement of general principle in *Wong v The Queen* (2001) 207 CLR 584 at 607-608 [64] about the features, including the quantity of drug involved, which are used to differentiate between particular cases; and see *R v Bradforth* [2003] QCA 183 at [29] in which the quantity of drugs was stated to be a major determinant of penalty in trafficking cases.

(a) If the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 – 25 years imprisonment; or

(b) If the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 – 20 years imprisonment."

[44] More recent amendments to the Act now provide for the same maximum penalty for trafficking in any dangerous drug.[24]

[45] Unlike the "quantity-based" provisions considered in *R v Pidoto and O'Dea*, the Queensland provisions prohibiting trafficking in a dangerous drug do not create separate offences depending on the amount of drug that is trafficked.

[46] Consistent with the general principle in *Ibbs*, within the offence of trafficking in dangerous drugs there is a variety of forms of conduct. The legislative regime which applied to the applicant's offending provided different maximum penalties, depending on whether the drug being trafficked was a Schedule 1 or a Schedule 2 drug, with such a classification being based on harm. However, even within those legislated categories, the offence of trafficking included a variety of forms, including whether the conduct was engaged in purely for commercial gain or to feed a drug addiction.[25] The general principle in *Ibbs* applies so that such a difference determines the sentence.

[47] It is unnecessary in this case to consider the application of the *Ibbs* principle to recently enacted laws which do not distinguish for the purpose of the maximum penalty between trafficking in a Schedule 1 drug and trafficking in a Schedule 2 drug.

[48] Prior to 6 September 2014,[26] prohibited steroid drugs were included in Schedule 2. Amendments to the *Drugs Misuse Act*, which came into force on 6 September 2014, included a variety of steroidal drugs in Schedule 1. The explanatory notes to the amending legislation explain that the amendments were intended to strengthen penalties for offences involving anabolic-androgenic steroids so as to make them "similar to those applied to other dangerous drugs such as methamphetamine and ecstasy".[27]

R v Pidoto and O'Dea

[49] This Victorian case, like the subsequent High Court case of *Adams*, concerned a quantity-based legislative scheme. Under the Victorian legislation, trafficking offences were defined by quantity (e.g. "commercial quantity", "large commercial quantity") with a maximum penalty set accordingly. The Victorian Court of Appeal contrasted that scheme with a "harm-based classification of trafficking offences". The joint judgment of Maxwell P, Buchanan, Vincent and Eames JJA concluded that in the absence of a comprehensive harm-based ranking, covering the full range of drugs of dependence and all the relevant indicia of harmfulness, "it is simply not possible for an individual sentencing judge to assess the degree of harm attributable

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24 *Serious and Organised Crime Legislation Amendment Act* 2016 (Qld).
25 *R v Bradforth* [2003] QCA 183 at [29].
26 This pre-dates the alleged trafficking period between 8 November 2014 and 20 April 2015.
27 Explanatory Notes, *Safe Night Out Legislation Amendment Bill* 2014 (Qld) 2.

to a particular drug of dependence, less still to decide whether that degree of harm is to be regarded as an aggravating or a mitigating factor".[28]

[50] The joint judgment distinguished *Ibbs* on the basis that the relevant trafficking offence was not "defined to include any of several categories of conduct".[29] The structure of the Victorian trafficking provisions led the Court to conclude that "other things being equal, trafficking in a commercial quantity of drug of dependence A is no more or less serious than trafficking in a commercial quantity of drug of dependence B".[30] In that statutory context, and on the proper construction of the quantity-based trafficking provisions, the joint judgment concluded that:

> "… there is no scope for the court, in sentencing an offender for an offence created by one of those sections, to consider the (relative) harmfulness of the drug in question. That is, Parliament did not intend judges to undertake that task."[31]

[51] The other member of the Court, Callaway JA, agreed with the other members of the Court's identification of the difficulties faced by sentencing judges "in forming a reliable opinion about the relative harmfulness of trafficking in different kinds of drugs of dependence".[32] However, Callaway JA was not "sufficiently persuaded to travel the whole distance and join in the judgment".[33] His Honour also expressed no opinion as to whether *Ibbs* was relevantly distinguishable, but stated that:

> "… it cannot be too strongly emphasised that the mere fact that Parliament fixes the same maximum penalty for a particular offence that comprises several categories, or may be committed in different ways, does not involve a legislative judgment that all those categories, or all of those ways of committing the offence, are of equal gravity".[34]

Is *Adams* distinguishable because it concerned a quantity-based system?

[52] In *Adams* the High Court recognised the difficulty of establishing a suitable factual foundation for a "judicially constructed harm-based gradation of penalties". The Court also adopted what was said in *R v Pidoto and O'Dea* about the possible factors by reference to which "the perniciousness of a substance is to be assessed".[35] The High Court in *Adams* was not required to express a view as to whether, under a legislatively constructed harm-based system, rather than a quantity-based regime, a court could "never" consider the relative harmfulness of the drug in question. Instead, as noted, the appellant's argument in *Adams* about MDMA being less harmful to users and to society than heroin was rejected because:

(a) "harm" has an imprecise meaning;

(b) such generalisations are to be approached with caution, particularly when not sustained by evidence or when not a matter about which judicial notice can be taken; and

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28 *R v Pidoto and O'Dea* at 277 [35].
29 At 278 [38].
30 At 278 [39]. A similar analysis appears in *R v Poon* (2003) 56 NSWLR 284 at 295 [42] – [43].
31 At 278 [42].
32 At 289 [95].
33 At 289 [95].
34 At 289 [97].
35 *Adams* at 147-148 [9] citing *R v Pidoto and O'Dea* at 282 [59].

(c) a judicially constructed harm-based gradation has the potential to cut across the quantity-based legislative scheme.

[53] As to the last point, a quantity-based legislative scheme creating offences of possession may provide that possession of a certain quantity of Drug A (say 2 kilograms) should attract the same maximum penalty as, say, 1.5 kilograms of Drug B. A quantity-based scheme for trafficking offences involves similar gradations of seriousness. To permit under such a quantity-based system arguments about the relative harm of Drug A and Drug B, and to argue, more specifically, that 2 kilograms of Drug A is less harmful than 1.5 kilograms of Drug B would be inconsistent with the legislative scheme.

[54] Whilst the fact of the quantity-based scheme was an important part of the High Court's reasoning in *Adams*, the decision establishes more general propositions that are relevant to the issue which arises in this case in the context of a different legislative scheme. They include:

(a) judicial deference to legislative assessments of the seriousness and relative seriousness of certain drugs; and

(b) limitations on courts in general, and individual sentencing judges in particular, in making informed assessments about the relative evils of certain drugs.

[55] Although the statutory regime in *Adams* was different, a similar issue of statutory construction arises as to whether there is anything in the statute which requires or permits a court to sentence on the basis that the relevant conduct in respect of one prohibited drug is in some way less anti-social than the same conduct in respect of another drug.

Legislative intent

[56] The applicant contends that under the Queensland legislative scheme, which differs from the quantity-based scheme considered in *Adams*, it is permissible, for the purpose of sentencing for the offence of trafficking in a dangerous drug, to compare the relative harm of the drug trafficked. Acceptance or rejection of this submission depends upon the specific statutory context. For example, where Parliament has adopted a system of categorising drugs in different classes, such as Schedule 1 and Schedule 2, and adopted a different maximum penalty for trafficking in Schedule 1 drugs to that for trafficking in Schedule 2 drugs, one may conclude that Parliament intended trafficking in a Schedule 1 drug to be more severely punished than trafficking in a Schedule 2 drug "all other things being equal".[36] In such a legislative context, the Parliament may be said to have made a general statement about the relative harmfulness of Schedule 1 and Schedule 2 drugs, without attempting to make a statement about the quantity of a particular Schedule 2 drug which would equate in terms of harmfulness to a certain quantity of a particular Schedule 1 drug.

[57] Where Parliament has stated that trafficking in certain drugs should attract the same or similar penalties (as well as be subject to the same maximum penalty) deference to legislative assessments of relevant harm is required. In such a circumstance the

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[36] This term, drawn from *R v Pidoto and O'Dea* at 282 [9], tends to beg the question of what quantity of Drug A is being compared with Drug B.

Court should not proceed on the basis that one such drug is in some way less anti-social than another drug, since Parliament has indicated that offending conduct in respect of both drugs should attract the same or a similar penalty.

[58] In the present case, the intent of Parliament, as reflected in the enactment of the 2014 amendments which included numerous steroids in Schedule 1, and as reflected in the explanatory notes to the amending legislation, is that penalties for offences involving those steroids are to be "similar to those applying to other dangerous drugs such as methamphetamine and ecstasy".[37]

The practical difficulties confronting the suggested task

[59] Even absent such a statement of legislative intent, *Adams* points to the difficulty of judicial attempts to make a reliable assessment of the relative harmfulness of specific drugs. The difficulty exists for many reasons including:

(a) the lack of clarity about the kinds of harm being assessed;

(b) the need to approach generalisations with caution; and

(c) the need for current, reliable information as an evidentiary base if the matter is not a matter about which judicial notice may be taken.[38]

[60] The suggested task for a sentencing judge in a case such as this is not only to assess the relative harmfulness of certain drugs. It involves a comparison between the harmfulness of *trafficking* in different drugs. Such an assessment may involve assessment of complex issues such as the involvement of organised crime in trafficking in certain prohibited drugs, the prevalence of such conduct, and complex issues of social policy.

[61] In *R v Pidoto and O'Dea*,[39] the Victorian Court of Appeal addressed some of the difficulties associated with the task of forming views about the relative harmfulness of a particular drug and in assessing the seriousness of trafficking in that drug, based upon the characteristics of that substance. The difficulties included:

(a) the perniciousness of a substance may be assessed by reference to a variety of social evils extending beyond the physical and psychological consequences to individual consumers;

(b) that few judges can claim any degree of expertise concerning the social and other costs to the community, or the psychological or physical consequences, of the ingestion of even the most commonly encountered drugs;

(c) new substances and combinations of substances about which little, if any, experience exists, appear with regularity;

(d) reliance on information obtained anecdotally by individual judges should not be elevated to apparent knowledge, based on experience; and

(e) whilst the collective experience of judges may make a valuable contribution to the creation of a harm-based system, the individual and collective experience of judges about the perceived characteristics of particular drugs

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37 Explanatory Notes, *Safe Night Out Legislation Amendment Bill* 2014 (Qld) 2.

38 The scope for judicial notice was recently considered by Professors Hamer and Edmond, 'Judicial notice: beyond adversarialism and into the exogenous zone' (2016) 25(3) *Griffith Law Review* 291.

39 At 279-282 [49] – [61].

> does not afford a basis upon which a court may form, let alone act on, a view about the relative harmfulness of a particular drug.

[62] Callaway JA agreed with these observations and added:

> "It may be that … drug offences have to be treated differently from other offences where it is commonplace to take into account degrees of seriousness and for seriousness to include harmful effects on the community at large."[40]

[63] Any invitation to a sentencing judge to embark upon an assessment of the relative harm of methamphetamine and steroids, on the basis of extremely limited evidence and limited experience, runs contrary to the cautionary remarks of the High Court in *Adams*. The difficulties are compounded by the variety of steroids contained in Schedule 1. Part 2 of Schedule 1 lists 65 named 'Steroid Drugs' followed by the words "Any other anabolic and androgenic steroidal agent". There may be differences in the characteristics, including the side effects, of the named steroids and it would be wrong to generalise that they all cause the same kinds of harm and in equal measure.

[64] Any assessment of relative harm based on a judge's experience encounters the problem that judges, like other people, draw on information that can be easily called to mind. Yet recent and familiar experiences may be unrepresentative of general experience.[41] In the present context, Judge A may have done four cases in which each of the defendants had no criminal record, and trafficked in steroids by supplying them to friends at a gym who had a mutual interest in body-building. Judge B over the same period may have decided four steroid trafficking cases in which each defendant had a criminal record, including offences of violence, and trafficked as part of a criminal organisation. Based on their experiences, Judge A and Judge B are likely to have different views about the crime of trafficking in steroids, and its prevalence. Their respective, limited experiences may be unrepresentative of the offence in general and the background of offenders.

Three reasons to not distinguish between steroids and methamphetamine

[65] Three substantial reasons exist as to why the sentencing judge in this case was entitled to conclude that he should not attempt to determine whether a distinction should be drawn between steroids and other Schedule 1 dangerous drugs, particularly methamphetamine, for the purpose of sentencing for the offence of trafficking. The first is the need to respect the legislative intent associated with the inclusion of various steroidal substances in Schedule 1, and the stated purpose of the relevant 2014 amendment. The second is the need to defer to a legislative assessment of relative harmfulness, including an assessment that the evils associated with certain steroids justified their classification with other Schedule 1 drugs so as to attract the same maximum penalty. The third is the practically impossible task of reaching any informed view about the relative harm of steroids and other Schedule 1 drugs in the absence of a suitable and reliable evidentiary base.

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40 At [95].

41 See the influential article by Tversky and Kahneman, "Judgment under Uncertainty: Heuristics and Biases" (1974) 185(4175) *Science* 1124 at 1127-1128 concerning the availability heuristic. Its application in judicial decision-making is discussed by Burns, "Judges, Common Sense and Judicial Cognition" (2016) 25(3) *Griffith Law Review* 319 at 330-331.

[66] The third reason reflects the caution in *Adams* about embarking upon such a task in the absence of suitable evidence or facts of which judicial notice can be taken. Whilst a court should not shy away from a difficult task when required to undertake it, a court should not embark upon a difficult or practically impossible task unless required to do so.

[67] The second reason reflects a related, but different concern: the limitations on courts in general, and individual sentencing judges in particular, in making informed assessments about the relative evils of prohibited drugs. The point is institutional deference to legislators who are assumed to make decisions about the classification of drugs on the basis of extensive evidence and expert advice, not readily available to courts which decide individual cases.

[68] The first reason is more fundamental. It is not concerned only with whether a court is *required* to embark upon the task of considering the relative harmfulness of certain drugs. It concerns whether a judge is *permitted* to undertake such a task, where to do so may be inconsistent with the intention of Parliament. The Parliament of Queensland explained that the 2014 amendments to the *Drugs Misuse Act* 1986 and the *Drugs Misuse Regulation* 1997 were intended to strengthen penalties involving anabolic-androgenic steroids so that they were "similar to those applying to other dangerous drugs such as methamphetamine and ecstasy". It would be inconsistent with the intent of Parliament to reach a determination, based on a judicial assessment of relative harm, that trafficking in steroids should not attract similar penalties to those applying to trafficking in methamphetamine.

[69] The statement of legislative intent in 2014 that trafficking and other drug offences in relation to anabolic-androgenic steroids should attract similar penalties to those applying to methamphetamine is sufficient, in the circumstances, to dispose of the applicant's contention that the sentencing judge was permitted to sentence on the basis that trafficking in steroids was a less serious category of committing the offence than trafficking in methamphetamine.

Is relative harmfulness irrelevant to the sentencing discretion?

[70] The issue which this Court is required to decide in this case may be framed as an issue of statutory interpretation, namely whether the statute, properly construed and having regard to the intention of Parliament, permits a sentencing judge to embark upon the task of assessing relative harm as between steroids and methamphetamine. In my view, the 2014 amendments make clear that such a task was not intended to be undertaken so as to reach some general conclusion about the relative harm of steroids and other Schedule 1 dangerous drugs, such as methamphetamine.

[71] The primary function of a court, including an appellate court, is to decide the instant case. In an appropriate case, an appellate court may "decide more far reaching questions of law and practice".[42] The first ground of the proposed appeal requires a decision about whether the sentencing judge was permitted to make a distinction for the purpose of sentencing between trafficking in steroids and trafficking in other Schedule 1 dangerous drugs such as methamphetamine. My conclusion is that he was not. That conclusion relates to the Queensland legislative scheme for the offence of trafficking as it stood at the relevant time. It does not relate to different

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42 *R v Pidoto and O'Dea* at 289 [95].

issues in different specific legislative contexts arising in respect of the *Drugs Misuse Act*. It is based principally upon the legislative intent of the 2014 amendments in relation to steroids.

[72] Other parts of my reasons, following the guidance contained in *Adams*, support the conclusion that the sentencing judge was not permitted in the circumstances, let alone required, to embark upon an assessment of relative harmfulness on the basis of inadequate evidence and limited experience. *Adams* guides all courts as to why the task of assessing relative harm is ill-defined. In addition, judges ordinarily will lack the tools and materials to complete such a task.

[73] A statutory "harm-based classification" of dangerous drugs into one of two categories should be interpreted for what it is: general classifications based on legislative assessments of a range of harms and social policies. Absent some clear legislative statement, such a classification scheme should not be taken as a definitive statement that each drug within a particular classification is equal in terms of its harmfulness. Instead, it is a statement about the relative seriousness of dangerous drugs under a penalty regime, and a legislative indication of the broad equivalence of dangerous drugs which are placed in the same category for the purpose of sentencing.

[74] I decline, because it is not necessary for the purpose of deciding the instant case, to state an unqualified rule of preclusion of the kind stated in the joint judgment of the Victorian Court of Appeal in *R v Pidoto and O'Dea* that, as a matter of statutory construction, the harmfulness of the drug is irrelevant to the exercise of the sentencing discretion.[43]

[75] The joint judgment concluded that there is "no scope for the court, in sentencing an offender [for the offence of trafficking in a dangerous drug], to consider the (relative) harmfulness of the drug in question."[44] I note:

(a) this conclusion turned on the proper construction of Victoria's quantity-based provisions;

(b) the joint judgment rested on a conclusion about Parliamentary intent, namely that in a quantity-based system Parliament did not intend judges to undertake that task.

[76] Under a different legislative scheme the general principle in *Ibbs* may permit, at least in theory, distinctions to be made between certain drugs and their harmfulness.

[77] The members of the Court who concluded that "it is never relevant to consider the harmfulness of the drug in question"[45] recognised that this conclusion "cuts across the conventional understanding that considerations of the relative harm of the drug trafficked are relevant to sentencing".[46] The reservation expressed by Callaway JA in the same case was based upon that conventional understanding and the general principle found in *Ibbs*. The mere fact that Parliament fixes the same maximum penalty for a particular offence that may be committed in different ways does not involve a legislative judgment that all the ways of committing the offence are of equal gravity.[47]

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43 *R v Pidoto and O'Dea* at 271 [3].
44 At 278 [42].
45 At 203 [64].
46 Ibid.
47 At 289 [97].

[78] My reasons for determining the first ground of this appeal do not contain a statement of general principle that under the Queensland legislation it is never relevant to consider the harmfulness or relative harmfulness of the drug in question. I am not persuaded that such a conclusion follows as a matter of statutory interpretation.

[79] The present issue is not governed by the conclusions reached by courts in other state jurisdictions which construed different laws. The point was not decided by *Adams*, which construed a different legislative scheme, based on quantity. In *Western Australia v Higgins*,[48] Steytler P (with whom McLure and Miller JJA agreed) considered the scheme of the Western Australian legislation and its significant differences from the legislation in other jurisdictions. In that legislative context, the conclusion was reached that "relative harm to users, although not a mandatory irrelevant consideration, will not ordinarily be a factor to which much weight should, or can, be given."[49]

[80] Applying the guidance provided by *Adams* in a different statutory context, one starts, as a matter of statutory construction, with the proposition that for the purpose of sentencing for the offence of trafficking, the Queensland Parliament provided the same maximum penalty for trafficking in any dangerous drug contained in Schedule 1 and that the statutory scheme treats drugs in Schedule 1 as warranting similar penalties. A similar general observation may be made in respect of drugs within Schedule 2. This is because each drug within a particular category or schedule has been assessed to have a similar potential for harm and to warrant the same maximum penalty.

[81] A further general proposition is that it is generally impermissible, or at least unwise, to attempt any assessment of the relative harm of dangerous drugs within the same classification. This is because:

(a) generalisations based on insufficient evidence or which are not the province of judicial notice should be approached with caution, particularly where "harm" has an uncertain meaning; and

(b) it is generally beyond the scope of the judicial process to make the kind of assessments of relative harm that would be required for such an exercise to produce a reliable determination.

[82] These general propositions suggest that it will be rare for a judge to embark upon the task of assessing the relative harmfulness of dangerous drugs that are in the same schedule. However, I do not go so far as to say that under the Queensland Act it will never be relevant to consider the relative harmfulness of drugs which are contained in the same schedule. For example, it would be surprising if, immediately before the legislative changes which transferred methamphetamine from Schedule 2 to Schedule 1 came into force in 2001, a court could not have relied on the same scientific and other evidence which led the legislature to make those changes. At such a time and in such a circumstance, it may have been permissible for a court to reach a view about the harmfulness of methamphetamine and its relative harmfulness compared to some other drugs in Schedule 2.

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48 (2008) 200 A Crim R 302.

49 At 337 [102].

[83] Finally, it is necessary to clarify that the issue in this case, as in *Adams* and as in *R v Pidoto and O'Dea*, is essentially about relative harmfulness. The joint judgment in *R v Pidoto and O'Dea* noted that its conclusion that the Parliament did not intend judges to consider the relative harmfulness of the drugs in question did not:

> "… prevent the sentencing court from taking into account evidence as to the harm caused by the particular conduct of which the offender has been convicted. The harm attributable to the conduct in question is as relevant as any other factor peculiar to the offending or the offender."[50]

An informed judiciary

[84] In my view, it would have been impermissible and inappropriate for the sentencing judge to embark on the task of attempting to assess the relative harmfulness of steroids and methamphetamine for the purpose of sentencing in this case. This does not mean that judges are not to be assisted in the task of sentencing individuals in a particular case by having reliable sources of current information about dangerous drugs and the harms caused by them, including harms to the physical and psychological health of users.

[85] Members of the judiciary are expected to make informed decisions based on the factual record, matters which are the proper subject of judicial notice and, in a more general sense, their knowledge and experience. Such knowledge and experience may be gained through experience in other cases, judicial education or access to apparently reliable information from other sources. Reliance upon experience and knowledge gained from such sources presents a range of issues, including issues of natural justice or fairness.[51] The legal framework which governs judicial reliance upon knowledge and experience obtained in other cases and from sources other than the factual record in the case at hand is often unclear.[52]

[86] The evidence placed before the sentencing judge in this case to make an assessment of the relative harm of steroids and methamphetamine was limited in the extreme. The learned sentencing judge, like many other trial judges, had limited experience in sentencing cases involving steroids and reliance upon such limited experience, or even more extensive experience, is problematic. Had the sentencing judge decided to embark upon research in advance of the sentencing hearing or in the course of the sentencing hearing in order to better inform himself about steroids, a significant issue would have arisen as to the propriety of doing so, including the need to inform the parties of his intention to do so, and the results of any research. Any research undertaken by legal representatives or, if allowed, by an individual judicial officer, encounters the problems of self-selection and accessing dated or unreliable information. Even current and reliable learning in reputable journals and other publications may be directed to a readership with scientific or other specialist expertise, and be in a form which lawyers are ill-equipped to properly understand or interpret.

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50 At 278 [43].

51 *Aytugrul v The Queen* (2012) 247 CLR 170 at 184 [21], 203 [74].

52 See generally "Judicial Decision-Making and 'Outside' Extra-Legal Knowledge" (2016) 25(3), *Griffith Law Review* 283.

[87] If in individual cases sentencing judges are to base decisions about the harm which a particular drug does to users and others, as part of determining the harm caused by the criminal conduct which is being punished, then ideally information about that harm should be available from a reliable source, known to the parties. Materials about dangerous drugs, suitably updated and obtained from reliable scientific and other sources, might be presented in a similar form to a Benchbook which is publicly available. Materials in such a form would be preferable to simple fact sheets which the parties or the judge locate. Without access to substantial and reliable material about commonly encountered issues, such as the nature and effects of steroids, "judges may base their decisions on their own subjective, untested and weakly informed empirical intuitions – this is likely to be less transparent and to bring a worse outcome".[53]

Summary of conclusions – first ground of appeal

[88] The first ground of appeal raises a specific issue and a broader issue.

[89] The specific issue is whether it is permissible to distinguish between steroids and other Schedule 1 drugs, particularly methamphetamine, for the purpose of sentencing for the offence of trafficking. That question is answered by the 2014 amendments which intended that penalties for offences involving steroids be similar to those applying to other dangerous drugs contained in Schedule 1, such as methamphetamine.

[90] The broader issue is whether a sentencing judge should embark on the task of attempting to compare the relative harm of drugs in the same schedule. In my view, a sentencing judge:

(a) should not do so if this runs counter to a legislative statement of equivalence of the kind made in 2014 about steroids and methamphetamine; and

(b) should not do so unless the task is required and possible to complete.

Rarely, if ever, should the task be embarked on due to:

- imprecision in what is meant by "harm";
- deference to legislative assessments of relative harmfulness, and recognition of the advantages which legislatures have over courts in making assessments of relative harm between dangerous drugs; and
- the absence of a suitable evidentiary basis to complete the task if the matter is not something about which judicial notice may be taken.

[91] It is not necessary, for the purpose of deciding the issues raised by this appeal, to decide whether, as a matter of construction, it is *never* relevant to consider the relative harm of dangerous drugs in the same schedule. I decline to decide the point. As a matter of statutory construction, the general classification of dangerous drugs into two categories for the purpose of sentencing is based on the legislative assessment of relative harm between drugs in Schedule 1 and drugs in Schedule 2. Such a legislative scheme leaves open, at least in theory, the application of the general principle in *Ibbs* with respect to drugs within the same schedule. In practice, however, and for the reasons summarised in the previous paragraph, rarely,

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53 Hamer and Edmond supra at 305.

if ever, will it be possible for a sentencing judge to undertake the task of assessing relative harm.

[92] The learned sentencing judge was correct to adopt the position that he was not permitted to make a distinction for the purposes of sentencing between steroids and methamphetamine based on an assessment of their relative harm.

The exceptional circumstances issue

[93] Counsel who appeared for the respondent before this Court accepted, without hesitation, that exceptional circumstances do not have to be shown before a sentence not involving actual imprisonment may be imposed for trafficking in Schedule 1 dangerous drugs. He submitted, however, that the learned sentencing judge did not fetter his discretion by applying such a rule. Instead, in stating "the circumstances are not exceptional", the sentencing judge was simply describing his assessment of the circumstances of this case, and adopting the language used in other cases and the language that was adopted by both counsel in the course of submissions.

[94] In *R v Dowel; Ex parte Attorney-General (Qld)*,[54] Muir JA (with whom Fraser JA and Dalton J agreed) stated:

> "[16] Counsel for the appellant correctly emphasised the heinous nature of trafficking in drugs such as those under consideration. That users of such drugs may be physically and mentally harmed by them and liable to harm others when under their influence is merely an aspect of the social corrosion promoted by their production, consumption and distribution. The Legislature, in response to the problem, has provided a high maximum penalty for trafficking in Schedule 1 drugs (25 years imprisonment) and the Courts regard general deterrence as an important consideration in sentencing for such offending. Consequently, as the sentencing judge recognised, non-custodial sentences for trafficking offences tend to be imposed only in exceptional circumstances."

[95] As counsel for the applicant noted in his written submissions, Muir JA was making an observation about sentencing trends. This is apparent from the use of the word "tend" in the final sentence. Muir JA was not suggesting a limitation upon a sentencing judge's discretion of the kind which exists when a statute requires "exceptional circumstances". That *Dowel* did not create an "exceptional circumstances" standard to be met is confirmed by the later statement of Muir JA that:

> "… even in drug trafficking cases there is no inflexible rule necessitating the imposition of a custodial sentence. Each sentence must be imposed by reference to the facts of the case in light of the relevant statutory requirements, sentencing principles and standards derived from statute, decided cases and comparable sentencing decisions."[55]

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54 [2013] QCA 8 at [16] ("*Dowel*").

55 At [21].

[96] The words "exceptional circumstances" were used by Morrison JA in *R v Ritzau*[56] in the course of discussing comparable cases:

> "Immediate release on parole or immediate suspension is appropriate 'only in exceptional circumstances', to use the phrase in *Dowel* at [16]."

This should be understood simply as a restatement of *Dowel* at [16]. The last sentence of [16] in *Dowel* was an observation about sentencing trends, not the statement of a rule.

[97] The sentencing remarks in this case were delivered *ex tempore*. That context is important because, as has been said in other cases, it is not appropriate to "parse and analyse judgments given on an *ex tempore* basis" by judges who have a considerable caseload.[57] Imprecision of language in an *ex tempore* judgment can have less significance than it might have in a reserved judgment.

[98] There is considerable force in the respondent's submission about the way the sentencing judge's remarks should be interpreted. In this case deterrence, denunciation and the seriousness of the offending favoured a period of actual custody. In saying "the circumstances are not exceptional" the sentencing judge was capturing in simple language the fact that the circumstances in combination did not justify a sentence which did not include a period of actual custody.

[99] The language is also open to the interpretation that the judge, in reliance upon the submissions of defence counsel that "certainly *Ritzau* confirms the principle that wholly suspended sentences are available in exceptional circumstances", erred in concluding that exceptional circumstances had to be shown.

[100] The considerations are finely balanced. I conclude that the sentencing judge was led into error by counsel in this regard. However, for the reasons which follow, that conclusion does not result in the applicant not being required to serve a period of actual custody.

The most appropriate sentence in re-exercising the sentencing discretion

[101] The applicant does not suggest that this Court should impose less than a three year sentence. Instead, he submits that the particular circumstances of the case make it appropriate that the sentence of three years' imprisonment should be suspended after the period which the applicant has presently served in custody, or that the applicant be released on parole as at the date of judgment.

[102] The applicant's submissions point to the fact that the trafficking was limited to a group of seven persons known to the applicant, who was a user of steroids. The applicant was not shown to have derived any profit. It was possible that any profit was minimal.

[103] These and other matters justified a sentence of three years rather than a higher sentence in the range of three to five years which is common in cases of trafficking by drug users in small quantities in Schedule 1 drugs over a relatively limited period for little or no monetary profit.

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56 [2017] QCA 17 at [36].

57 *R v Hooper; ex parte Cth DPP* [2008] QCA 308 at [23] citing *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92 at 102 [49].

[104] The material placed before the sentencing judge, particularly the fact sheet about steroids, was evidence of the physical harm which they may cause to users and others who suffer as a result of their side effects, including aggressiveness. The categorisation of the kinds of steroids in which the applicant traded as a Schedule 1 drug is a legislative assessment of their harm and that they should attract similar penalties to comparable cases of trafficking in other Schedule 1 drugs.

[105] The applicant had a limited criminal history and put forward evidence of his rehabilitation as at the date of the sentence. As the sentencing judge noted, he had "excellent rehabilitative prospects".

[106] Such favourable matters, coupled with a timely plea of guilty, are often reflected in a parole release date or suspension after one third of the term of imprisonment. Here, the plea was not an early plea. As the sentencing judge remarked, its lateness was not indicative of remorse or an acceptance of responsibility.

[107] In all the circumstances, it is appropriate for the applicant to serve a period of actual custody. His good prospects of rehabilitation and the favourable matters said about his character, work ethic and assistance to others, should be reflected in his being required to serve less than one third of the term of imprisonment in actual custody. An appropriate period of actual custody is six months.

Conclusion

[108] The first ground of appeal raises a question of some general importance, although I would decide that question contrary to the applicant's submissions. The second ground of appeal has merit and also justifies the grant of leave to appeal. In an independent exercise of the sentencing discretion, I conclude that an appropriate sentence is that the applicant be imprisoned for a period of three years and be released on parole after serving six months. Since this is the sentence which was imposed upon him, consistently with *Kentwell v The Queen*[58], the applicant need not be resentenced. His appeal against sentence should be dismissed. I would order:

(1) Leave to appeal against sentence granted;

(2) The appeal is dismissed.

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58 (2014) 252 CLR 601 at 618 [43].