# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Ta* [2016] QCA 305 |
| PARTIES: | **R**<br>**v**<br>**TA, Lam Quoc**<br>(applicant) |
| FILE NO/S: | CA No 307 of 2015<br>SC No 961 of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane – Date of Sentence: 3 December 2015 |
| DELIVERED ON: | 18 November 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 June 2016 |
| JUDGES: | Fraser and Philip McMurdo JJA and Peter Lyons J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **The application for leave to appeal against sentence is refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INQADEQUATE – where the applicant pleaded guilty to one count of trafficking in a dangerous drug – where the applicant was sentenced to seven years imprisonment with a parole eligibility date after two years – where the applicant was also sentenced to concurrent terms of 12 months imprisonment, 18 months imprisonment, and 18 months imprisonment for three counts of possessing dangerous drugs to which he had also pleaded guilty – where the applicant submits that sentencing decisions concerning his co-offenders demonstrate that the applicant's sentence is manifestly excessive and that it should be reduced under the parity principle – where the applicant submits that an appropriate sentence is four years imprisonment suspended after 12 months, for an operational period of five years, for the trafficking count, with lesser concurrent sentences on the other counts – whether the applicant's sentence is manifestly excessive<br><br>*R v Dibb*, unreported, Supreme Court of Queensland, |

SC No 857 of 2014, Mullins J, 2 November 2013, related
*R v Falconi* [2014] QCA 230, cited
*R v KAQ; R v KAQ; Ex parte Attorney-General (Qld)* [2015] QCA 98, related
*R v OS* [2016] QCA 278, cited
*R v Yates* [2006] QCA 101, cited

COUNSEL: A J Kimmins for the appellant
V A Loury for the respondent

SOLICITORS: Lawler Magill for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant pleaded guilty to one count of trafficking in a dangerous drug between 24 September 2012 and 13 February 2013. For that offence he was sentenced to seven years imprisonment with a parole eligibility date after two years. He was sentenced to concurrent terms of 12 months imprisonment, 18 months imprisonment, and 18 months imprisonment for three counts of possessing dangerous drugs on 9 and 12 February 2013, to which he also pleaded guilty. The applicant has applied for leave to appeal upon the ground that the sentence is manifestly excessive. He contends that an appropriate sentence is four and a half years imprisonment suspended after 12 months, for an operational period of five years, for the trafficking count, with lesser concurrent sentences on the other counts.

[2] The applicant's arguments primarily rely upon comparisons with decisions concerning his co-offenders in *R v KAQ; R v KAQ; Ex parte Attorney-General (Qld)*[1] (in which this Court held that the sentence was not manifestly inadequate or manifestly excessive) and *R v Dibb*[2] (a sentence by the same judge who sentenced the applicant). Those sentences took into account a factor which was not present in the applicant's case, his co-offenders' undertakings to cooperate with the authorities under s 13A of the *Penalties and Sentences Act* 1992. The applicant relies only upon the indicative sentences pronounced in closed court, which took into account all relevant sentencing considerations other than the undertakings of future cooperation.

[3] The applicant's main argument is that, when regard is had to the differences in the circumstances of each case, the indicative sentence in *KAQ* [redacted] demonstrates both that the applicant's sentence is manifestly excessive and that it should be reduced under the "parity principle".[3]

[4] The parity principle was recently explained, with reference to authorities, by Atkinson J (with whose reasons Morrison and Philip McMurdo JJA agreed) in *R v OS*:[4]

> "The leading High Court authority on the parity principle is *Lowe v The Queen*. The basis for the principle is set out in the judgment of Mason J:

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1 [2015] QCA 98.
2 Unreported, Mullins J, 2 November 2015 (Indictment No 857 of 2014).
3 Transcript 24 June 2016 at 1 – 11.
4 [2016] QCA 278 at [51] – [55]. Citations omitted.

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."

The effect of this principle on sentence appeals was set out by Mason J at 613-614:

> "… a court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate."

The parity principle applies to both the first sentence imposed as well as to later sentences imposed upon a co-offender. As Brennan J held in *Jones v The Queen*:

> "It is erroneous to regard the principle of comparability of sentences laid down in *Lowe* as incapable of application in favour of the first of two or more co-offenders to be sentenced."

The parity principle was further explained by the High Court in *Postiglione v The Queen* where Dawson and Gaudron JJ held:

> "The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowances should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to 'a justifiable sense of grievance'. If there is, the sentence in issue shall be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.
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> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of

> criminality. The different circumstances involved in this case, namely, the fact that Savvas was the principal organiser in both conspiracies and that Postiglione rendered significant assistance to police and prosecuting authorities, clearly require that Postiglione receive a markedly lesser sentence than that imposed on Savvas." (Citations omitted)

It follows, as this Court held in *R v Floyd*:

> "[M]arked disparity in the sentences imposed upon an applicant for leave to appeal against sentence and his or her co-offenders is an appropriate ground of appeal where an applicant can demonstrate an objectively justifiable sense of grievance, whether the applicant was sentenced before or after his co-offenders.""

[5] The applicant also argues that *KAQ* authoritatively demonstrates that the indicative sentence pronounced in *Dibb* [redacted] is manifestly excessive and therefore not relevant to questions of parity concerning the applicant's sentence, but the applicant's offending should have attracted a less severe sentence than the offending in *Dibb*. The applicant attributes only limited weight to these arguments, because the Court's decision in *KAQ* must be given precedence over *Dibb* when deciding whether the applicant's sentence is manifestly excessive or requires adjustment under the parity principle. For that reason, the focus of these reasons is upon the related questions whether the applicant's sentence is manifestly excessive or out of parity with the indicative sentence in *KAQ*.

**Circumstances of the offences and the applicant's personal circumstances**

[6] The applicant was sentenced upon the basis of facts set out in a schedule, with some qualifications arising out of the parties' submissions.

[7] The applicant participated in a drug trafficking enterprise planned and directed by his older brother, Piet "Bruce" Ta, during a period of about four and a half months. Bruce trafficked from February 2012 but there was no evidence of the applicant's involvement until a shed was rented in late September 2012. There was also no evidence of the applicant making decisions independently or directing others to carry out tasks in the business. The applicant must have been aware of the scale of the business and profited from the assistance he provided to Bruce. His knowledge of the business was demonstrated by: close interactions with Bruce and multiple occasions on which the applicant accessed a safe at Bruce's home; intercepted communications on 9 January 2013 when the applicant asked KAQ if KAQ needed to come and see him for a cash collection while Bruce was overseas; on 13 January 2013 in text messages between KAQ and Bruce advising cash in hand, Bruce telling KAQ to tell the applicant to check and let Bruce know; on 5 February 2013 when the applicant told Bruce that the applicant needed to speak in person concerning another man when Bruce asked "cash" the applicant said he didn't want to talk about it on the phone; on 11 February 2013 when Bruce asked the applicant if he had paid "international"; and, on the same date when Bruce asked the applicant how much the "company" owed him and they discussed amounts of $50,000-$55,000.

[8] The applicant assisted by: hiring the storage shed with KAQ in late September 2012 knowing it would be used to store drugs; receiving on various occasions money from KAQ that had been collected by him while Bruce was overseas; driving KAQ to collect money from customers of the business; making sure the business was

"safe" by checking homes and cars for electronic surveillance devices; and, accessing and storing money in the safe at Bruce's home. The following details are taken from the schedule:

**Shed:** The applicant was a co-signatory of the lease with KAQ. (There was an unresolved conflict in the parties' submissions at the sentence hearing whether the applicant possessed the access code and key to the padlock.[5]) There is no evidence that the applicant went to or accessed the shed[6] but he must have been aware that Bruce was using the shed to store drugs; even if the applicant was not aware of the nature and quantity of the drugs stores in the shed he is liable for the variety of drugs found pursuant to s 8 of the *Criminal Code* (Qld).

**Receiving money:** Bruce was overseas for about 10 days in January 2013. During this time KAQ collected money from customers and delivered it to the applicant. On 14 January 2013 KAQ collected what he was told was $250,000 from David Stott, delivered it to the applicant, and later received a message from Bruce that the amount was $218,000: the applicant must have counted the money and told Bruce how much was there. While Bruce was overseas KAQ collected $120,000 from Bing Cosca, which KAQ gave to the applicant when they met at the applicant's house. The applicant was also with Bruce at a casino in January 2013 when they met Dibb who delivered to them approximately $100,000. With the exception of the amount of $218,000, the applicant did not appear to count the money. He may not have been aware of the precise amount provided but knew he was receiving large sums of cash. On 6 January 2013 he can be seen checking the contents of the safe then immediately using his telephone – seemingly to send a message. The applicant was aware generally of the contents of the safe. It appears that Bruce was careful to separate the money and drug aspects of the business. Only money was stored in the safe and was handled by Bruce and the applicant. The drugs were stored in the shed by KAQ and handled by him.

**Driving KAQ:** On 6 December 2012 KAQ and the applicant were having dinner when Bruce instructed KAQ to drive to Coomera to collect money from David Stott. The applicant drove KAQ who collected $80,000-$100,000. They returned to Brisbane and gave the money to Bruce. In January 2013, the applicant assisted in fixing the vehicle used by Dibb to run drugs to Western Australia. When it was repaired the applicant helped KAQ deliver the packed vehicle to Dibb for him to drive to Western Australia. The applicant knew the car had been modified and was being used to run drugs.

**Checking for surveillance:** On 4 December 2012 the applicant called KAQ and told him to "bring the car over as there was a guy coming over in 10". About half an hour later CCTV at the house recorded an unknown male checking around the garage and cars, including KAQ's car, apparently looking for surveillance devices. He stayed for more than an hour and can be seen carrying boxes of equipment into the house.

**Accessing money:** CCTV footage at Bruce's home records the applicant frequently accessing the safe. The footage revealed more than 20 occasions when the applicant accessed the safe to add or remove money or inspect the contents. (The prosecutor added that the CCTV showed that the applicant accessed the safe on at least a dozen occasions between October 2012 and the period in January 2013 when Bruce Ta

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5 AB 21.

6 AB 15.

was away: the applicant looked in the safe, put things in it, and took things out of it.[7]) He must have been aware of its contents. On 6 January 2013 he accessed the safe minutes after KAQ delivered money and while his brother was overseas. He can be seen looking into the safe and using his phone as he leaves the garage. It is a reasonable inference that he was reporting the contents of the safe to his brother. On 16 January 2013 the applicant is recorded retrieving bags (probably money rather than drugs) from the safe and giving them to a drug courier.

[9] The schedule stated that the applicant's role was very much subordinate to that of Bruce. He had knowledge of the business and knowingly provided material assistance, having formed the common unlawful purpose to traffic in dangerous drugs. It was a probable consequence that a variety of drugs would be traded. The prosecution asserted that the circumstances of the applicant's close involvement compelled the conclusion that he was aware both cannabis and methylamphetamine were being sold.

[10] The schedule stated that: the applicant was in possession of the drugs found in the storage shed and in the vehicle in February 2013, both as a probable consequence of the unlawful common purpose and by operation of section 129(1)(c) of the *Drugs Misuse Act*; and the applicant participated in an unlawful common purpose and knowingly assisted in the trafficking enterprise that dealt in wholesale amounts and made hundreds of thousands of dollars. The amount of money handled by the applicant would have also been in the hundreds of thousands. While he may not have been aware of the specific amount he must have realised the amounts of cash received were very large. The applicant earned unexplained income during the trafficking period of about $25,000 to $30,000.[8]

[11] During the police investigation the shed used by Bruce and KAQ to store drugs was searched by police. Inside the shed police found 3.021 kilograms of substance containing 1.935 kilograms of pure methylamphetamine (64 per cent purity), 194.147 grams of a substance containing 78.153 grams of pure cocaine (40 per cent purity) and 22.043 grams of substance containing 8.089 grams of MDMA (36.7 per cent purity). The value of the drugs exceeded $1 million. The applicant was not specifically aware of the type or quantity of drugs stored in the shed as Bruce was careful to keep the money and drug aspects of his business separate.

[12] Dibb was employed by Bruce to transport drugs to Western Australia and return cash to Bruce. The drugs were transported in a vehicle in which a fuel tank had been altered to create a secret compartment for storage of the drugs. The applicant was aware of that. He had driven KAQ on occasions when the vehicle was delivered to Dibb for him to transport drugs. One such trip was organised for 12 February 2003. Police intercepted the car and a search located 11 separate bags together containing about 301.236 grams of substance containing about 180.929 grams of pure methylamphetamine inside a PVC container in the concealed fuel tank under the spare tyre; 6.781 kilograms of cannabis head concealed in the hidden fuel tank, two separate bags of cannabis totalling 12.434 kilograms in a suit case, and an ounce of methylamphetamine and a small amount of cocaine were found in the glove box (for which the applicant was not responsible). The applicant may not have known the precise weights of the concealed drugs but he knew enough to be liable for knowing

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7 AB 30.
8 AB 13.

there were more than 500 grams of cannabis and 200 grams of methylamphetamine.[9]

[13] The applicant was arrested and declined a police interview. KAQ provided several statements to police. He was cross-examined by the applicant's legal representatives at committal proceedings. After the matter was listed for trial, in about October 2015 the applicant indicated a willingness to plead guilty to amended charges.

[14] The sentencing judge was informed that the applicant was 24 years of age at the time he offended and 27 when sentenced. He had previously been convicted of a minor offence, which the sentencing judge regarded as irrelevant for the sentence. The applicant was the youngest of four siblings. The sentencing judge accepted that the applicant had depended on his brother Bruce to protect him from bullying throughout schooling, the applicant had difficulty in obtaining paid employment because he was not considered very bright, he worked for his brother in a scaffolding business, and misguided family loyalty coupled with the applicant's inability to look after himself without the assistance of his brother resulted in the applicant allowing himself to be involved in very serious criminal activity.

[15] The sentencing judge accepted that the presentation of a new indictment on the date of sentence was the applicant's first opportunity to plead to amended charges that were significantly less serious than those in the indictment originally presented. The sentencing judge accepted that although this was a late plea, there was a considerable utilitarian benefit in the plea. The sentencing judge took that benefit and the applicant's personal circumstances into account in fixing eligibility for parole at slightly less than one third of the head sentence.

[16] The sentencing judge accepted that the applicant did not make any decisions on his own account but by doing the menial tasks he undertook he facilitated his brother's trafficking business. The sentencing judge considered that the term of seven years imprisonment gave some weight to the applicant's role as a "minion" whilst acknowledging that this role was in a significant trafficking business and the applicant could not have been ignorant of the large scale nature of that business.

**Consideration**

[17] The period of the trafficking offence was about 12 and a half months in *KAQ*, four months and three weeks for the applicant, and four and a half months in *Dibb*. The applicant argues that in this respect his trafficking offence was nevertheless less serious than the trafficking offence in *Dibb* because the start date of the applicant's trafficking period was when he co-signed the lease for the shed, no particular offending by the applicant thereafter was identified in the Crown case until late October 2012 (when the applicant first accessed the safe), and there was thus a period of about four to six weeks when there was no noted aiding or assisting in the trafficking enterprise. This point should not be given much weight. The applicant pleaded guilty to carrying on the business of unlawfully trafficking in dangerous drugs between 24 September 2012 and 13 February 2013. At the sentence hearing the applicant's counsel did not challenge the prosecutor's submission that the applicant's involvement was "over the period of the trafficking that's alleged in the indictment"[10] and the applicant's counsel accepted that it was a probable consequence

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9 AB 15.
10 AB 30.

of the applicant aiding Bruce, KAQ, and Dibb in the trafficking enterprise that drugs would be stored in the shed.[11] So far as the period of trafficking is concerned, KAQ's offence was more serious than the applicant's offence but there was not much difference between the applicant's offence and Dibb's offence.

[18] KAQ earned income during the 12 and a half months of his offence of between about $30,000 and $35,000,[12] the applicant had unexplained income during his trafficking period of about four months and three weeks of between about $25,000 and $30,000, and Dibb had unsourced income during his period of trafficking of four and a half months of about $23,000. The applicant submits that the money he received was put into his account by his brother and may have included wages for the applicant's work in his brother's scaffolding business. At the sentence hearing, however, counsel for the applicant ultimately did not seek to challenge the prosecutor's submission that about $25,000 to $30,000 in the period of trafficking "really can only be explained as being proceeds from the enterprise."[13] After submitting that the applicant's brother was responsible for paying the applicant money, the applicant did not knowingly take possession of "cash" associated with the drug business, and "… he was paid by his brother for working in the scaffolding business…", the applicant's counsel submitted that the applicant was "… given money, obviously, for involving himself here, so I'm not arguing with the figures, but it was – his brother paid him cash. He didn't ask questions where it came from." The sentencing judge was entitled to conclude that the applicant's unexplained income of about $25,000 to $30,000 was derived from the trafficking business. Upon that footing, KAQ received only a little more money than the applicant received for his participation during a much shorter period.

[19] Whilst Dibb may have received less money than the applicant, the sentencing judge found that his unexplained income of $23,000 was consistent with his instructions to his lawyers that he was paid in cannabis rather than cash. It is therefore difficult to compare their degrees of culpability with reference to the value of money each received from their trafficking offence.

[20] KAQ trafficked in methylamphetamine, cocaine, MDMA, and cannabis, the applicant was liable as a party to Bruce's trafficking "in a variety of drugs, being cannabis and methylamphetamine in particular",[14] and Dibb was found to be criminally responsible for trafficking only in cannabis. (Methylamphetamine was also transported in the vehicle driven by Dibb, but the prosecutor conceded that Dibb thought that he was transporting cannabis.) Accordingly, as the sentencing judge took this into account, the maximum penalty for Dibb's offence was 20 years imprisonment, rather than the maximum penalty of 25 years imprisonment for the offences committed by the applicant and KAQ. It was open to the sentencing judge to regard this factor as justifying leniency in Dibb's sentence compared with the indicative sentences for KAQ and the applicant. The applicant does not contend to the contrary.

[21] In addition to KAQ participating in Bruce's trafficking as described in the next paragraph, KAQ made wholesale sales of varying quantities of methylamphetamine

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11 AB 21–22.
12 [2015] QCA 98 at [6].
13 AB 13.
14 AB 14.

totalling six and three quarter ounces of pure methylamphetamine[15] to his own customers who on-sold the drugs to individuals including law enforcement participants.[16] For those sales, the total price was $66,000, the total profit made by KAQ was $6,750, and he accounted to Bruce for the balance of the wholesale price of the drugs. The applicant submits that a person who trafficked on his or her own behalf in that way might possibly be sentenced to seven years with a minimum custodial period of two years. The premise that KAQ trafficked on his own behalf does not accurately reflect the basis upon which he was sentenced. In *KAQ* the Court upheld a finding that, in the sales to his customers, KAQ acted as an agent making sales on commission by direction of Bruce rather than as someone conducting an independent business of selling drugs: Bruce supplied all of the methylamphetamine, fixed the price of the sales to KAQ's customers, and, when those customers failed to pay, assumed responsibility for recovering the payment.[17]

[22] KAQ was also paid by Bruce to deliver about 14 to 15 kilograms of substance containing methylamphetamine, more than 62 kilograms of cannabis, two ounces of a substance containing cocaine, and a sample of MDMA.[18] When police searched the shed on 9 February 2013 they found almost two kilograms of pure methylamphetamine in three kilograms of powder, 78 grams of pure cocaine in 194 grams of powder, eight grams of MDMA in 22 grams of powder, and a handgun. The drugs delivered for Bruce had a wholesale value estimated at between $4.6 – 4.8 million and the drugs found in the shed were worth an additional $1.14 million. KAQ also acted as a courier to collect something in the order of $1.5 million in cash for Bruce. The applicant submits, by way of contrast, that it was accepted at the sentence hearing that the applicant did not touch the drugs at any stage. The applicant also submits that his conduct in driving KAQ on two occasions pales into insignificance when compared with the extent of the deliveries of drug made by KAQ between October 2012 and February 2013, and that his aiding overall was miniscule in comparison with KAQ's criminality, taking into account that the particulars of the applicant's aiding all involved KAQ.

[23] In assessing these submissions it is necessary to bear these matters in mind:

(a) The schedule of facts referred to more than 20 occasions when the applicant accessed Bruce's safe to add or remove money or to inspect the contents of the safe, and the applicant's counsel did not seek to challenge the prosecutor's submission that the CCTV footage showed that, in addition to the applicant's involvement in collecting money while Bruce was overseas in January, there were "at least a dozen occasions between late October of 2012 and that period in January of 2013 when Bruce was away when [the applicant] is accessing the safe, looking in it, putting things in it, taking things out of it…".[19]

(b) The applicant submits that the applicant collected only $440,000, but that does not reflect the full extent of the applicant's knowing involvement in his brother's dealings with money in the course of his

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15 I proceed on this basis, although it is not entirely clear that there was this much pure methylamphetamine, rather than this much substance containing between 55 and 74 per cent of the drug (as was the case for the on-sales): AB 51.

16 [2015] QCA 98 at [22].

17 [2015] QCA 98 at [5] and [18]; Dalton J dissenting, at [28].

18 [2015] QCA 98 at [23].

19 AB 30.

trafficking. The evidence did not show exactly how much money the applicant knew was received by Bruce or exactly how much passed through the applicant's hands, but on one occasion when the applicant's brother was overseas KAQ delivered cash to the applicant which he must have counted as being $218,000, the applicant received $120,000 on another occasion, the applicant was with Bruce when Dibb delivered approximately $100,000, the applicant and KAQ gave Bruce $80,000 – $100,000 on 6 December 2012, and the applicant gave an unknown amount of what was probably money to a drug courier on 16 January 2013.

(c) The applicant was liable as a party to Bruce's criminal enterprise in trafficking cannabis and methylamphetamine, the applicant handled very large sums of money and he knew that large quantities of drugs were being moved through Bruce's business and that his brother was receiving large sums of cash.[20] Although the sentencing judge described the applicant's role as that of a "minion", the sentencing judge also took into account that the applicant knowingly participated "in a significant trafficking business of which you could not have been ignorant as to the large-scale nature."[21]

(d) As the applicant submits, the totality of the identified activities of the applicant seem less significant than the totality of the identified activities of KAQ, but the applicant engaged in activities of a kind which revealed his position of trust in his brother's trafficking enterprise, including being a co-signatory with KAQ on the shed lease, having frequent access to the safe, giving bags (probably of money) from the safe to a drug courier, and checking for surveillance devices at Bruce's home, including by requiring KAQ to bring his vehicle to be checked.

(e) In *KAQ* the Court held that, whilst KAQ was involved in moving extraordinary amounts of drugs and money, "his actual role in doing so was at a low level; he collected money and delivered drugs, working for wages."[22]

[24] I have no difficulty in accepting that KAQ was more culpable than the applicant, but the fact that the applicant knew that he was assisting a very substantial drug trafficking enterprise tends to reduce the significance of the fact that his conduct was generally menial and less extensive overall than in KAQ's case. For all of these reasons, the difference between their criminality was not nearly as substantial as was submitted for the applicant.

[25] It is necessary also to take into account each offender's personal circumstances. The applicant and KAQ were of similar ages (KAQ was 25 years old at the relevant times and the applicant was 24 years old), KAQ's criminal record consisted only of a charge of soliciting with no conviction recorded, and the applicant had previously been convicted only of committing a public nuisance. These aspects of their personal circumstances did not of themselves require any material difference between their sentences.

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20 AB 33–34.
21 AB 35.
22 [2015] QCA 98 at [7], [18].

[26] The applicant argues that his culpability was largely a function of misplaced family loyalty and inability to look after himself without the assistance of his brother, whereas KAQ and Dibb had no reason to be involved other than greed and self-interest. The sentencing judge took that into account in the applicant's sentence, finding that the applicant "always acted under the instruction of your brother; that anything you did, you did because he asked you",[23] and the applicant's offending resulted from misguided family loyalty and his apparent inability to look after himself without the assistance of his brother.[24] On the other hand, the applicant was not entitled to leniency on account of cooperation with authorities, other than by entering a plea of guilty which, although not early, had significant utilitarian value, whereas the sentence in *KAQ* took into account his cooperation with the authorities by identifying his own involvement, thereby enabling the police to establish the quantities of drugs and cash in the operations, his plea of guilty on an *ex officio* indictment, and the evidence of a psychological assessment that he was a very low risk of re-offending.[25]

[27] The applicant cites *R v Falconi*[26] as support for his contention that his sentence is manifestly excessive. The refusal of *Falconi's* application for an extension of time within which to seek leave to appeal against the sentence of four and a half years imprisonment with parole eligibility after 18 months does not shed light upon the appropriate penalty for the applicant's offending, particularly in circumstances in which Falconi's offences involved only cannabis and that decision was taken into account in *KAQ*.[27] The applicant also relies upon *R v Yates*,[28] in which a sentence of four and a half years imprisonment to be suspended after fifteen months with an operational period of five years was adjusted on appeal by reducing the period before suspension to nine months. That variation took into account new evidence that there was some risk to that offender's safety in the prison system.[29] That was a less serious example of trafficking; a 25 year old offender trafficked in drugs, including methylamphetamine, on a much smaller scale than the trafficking which the applicant aided,[30] a psychiatrist opined that the offender had a history of methylamphetamine use and cannabis dependence but the offender appeared to drug-abstinent at the time of sentence,[31] the offender's mother was said to be in a dominant position in respect of her, and the applicant's mental state made her susceptible to falling in with her mother's unlawful activities.[32] In those circumstances, the Court's conclusion that the head sentence of four and a half years imprisonment imposed by the sentencing judge was not excessive[33] does not support the applicant's contention that his sentence is manifestly excessive.

[28] I would hold that *KAQ* does not indicate, and it is not the case, that the applicant's sentence is manifestly excessive. If the parity principle is potentially applicable in a comparison between a sentence and an indicative sentence pronounced in closed court under s 13A of the *Penalties and Sentences Act* 1992, it does not supply a

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23 AB 33.
24 AB 35.
25 [2015] QCA 98 at [15].
26 [2014] QCA 230.
27 [2015] QCA 98 at [9]–[10].
28 [2006] QCA 101.
29 [2006] QCA 101 at [32].
30 [2006] QCA 101 at [8].
31 [2006] QCA 101 at [10].
32 [2006] QCA 101 at [14]–[15].
33 [2006] QCA 101 at [30].

ground for adjusting the applicant's sentence. That is so because the difference between the applicant's sentence and the indicative sentence in *KAQ* is explicable by differences between the circumstances of the offences and the offenders' personal circumstances.

[29] Dibb was sentenced upon the basis that on three occasions he transported and delivered to a person in Western Australia what Dibb thought was only cannabis, the total weight of the drug was about 60 kilograms, he organised for a friend unknowingly to transport cannabis on one occasion, and he collected and delivered cash to Bruce or KAQ on behalf of Bruce.[34] The applicant argues that the sentencing judge inaccurately characterised the applicant's offending as being more serious than that of Dibb. The sentencing judge did not do so. Her Honour made tentative remarks to that effect during argument,[35] but after hearing argument imposed a sentence which was slightly more lenient than Dibb's indicative sentence. I accept the submission for the respondent that their overall culpability was similar. There were, of course, differences in the nature of the assistance given by the applicant and that given by Dibb, and it may be inferred that the total value of the reward earned by Dibb by participating in the trafficking exceeded the unexplained income of the applicant, but the limited involvement of Dibb in the overall trafficking enterprise, the fact that Dibb was kept ignorant of the trafficking of the Schedule 1 drug to which the applicant was a party, and the consequentially higher maximum penalty to which the applicant was exposed by his offending, combine to make it difficult to conclude that the sentencing judge erred by imposing upon the applicant a sentence which was similar to the indicative head sentence in *Dibb*.

[30] The applicant relies upon the circumstances that Dibb was 43 years old when he offended, he had a previous criminal history for drug offending, and his plea of guilty was not an early one. The significance of those circumstances is reduced by the facts that the sentencing judge in *Dibb* allowed him some credit for his co-operation in the administration of justice by entering the plea of guilty, his previous drug convictions had been for producing cannabis about 15 years earlier, for which he was ultimately ordered to do community service, the last entry on his criminal history was in June 1998, and his sentence also took into account that he had been an extremely hard worker and he had already embarked on his own rehabilitation through the way in which he threw himself into work after being charged. Also bearing in mind that the period before parole eligibility under Dibb's indicative sentence is a little longer than the period before parole eligibility under the applicant's sentence, the differences in their personal circumstances were not inadequately reflected in their sentences.

[31] Again assuming that the parity principle is potentially applicable in a comparison between a sentence and an indicative sentence pronounced in closed court, I conclude that the result of a comparison between the applicant's sentence and the indicative sentence in *Dibb* does not call for the application of that principle.

**Proposed order**

[32] I would refuse the application for leave to appeal against sentence.

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34 AB 45–46.

35 AB 18–21.

[33] **PHILIP McMURDO JA:** I agree with Fraser JA.

[34] **PETER LYONS J:** I have had the advantage of reading in draft the reasons for judgment of Fraser JA. I agree with them and the orders proposed by his Honour.