SUPREME COURT OF QUEENSLAND

CITATION:	*R v Field* [2017] QCA 188
PARTIES:	**R** **v** **FIELD, Allan John** (applicant)
FILE NO/S:	CA No 338 of 2016 SC No 1387 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 16 November 2016 (Atkinson J)
DELIVERED ON:	1 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2017
JUDGES:	Sofronoff P and Gotterson and McMurdo JJA
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to three drug related offences including unlawful trafficking in methylamphetamine and amphetamine and was sentenced to five years and six months' imprisonment – where the applicant is eligible for parole after serving 18 months' imprisonment – where the applicant contends he had demonstrated meaningful steps towards rehabilitation in the three and a half year period between arrest and sentencing – where the applicant submits his sentence should have been suspended rather than an earlier than usual parole eligibility date set – where, under the *Penalties and Sentences Act* 1992 (Qld), a suspended sentence may only be imposed for terms of imprisonment of five years or less – whether the sentence was manifestly excessive CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – NATURE OF DISCRETION – WHEN OBJECTION NOT TAKEN – where a note signed by the applicant was tendered at the sentencing hearing which implied that he had ceased using drugs – where the Crown made no challenge to this evidence – where the learned sentencing judge expressed

scepticism about the implication and sought supporting evidence – where defence counsel did not supplement the letter with further evidence or make an assertion that the applicant was drug free – whether the implication was an unchallenged allegation of fact under the *Evidence Act* 1977 (Qld) s 132C(2) – whether the learned sentencing judge erred in the exercise of her discretion

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant was a commercial partner in a trafficking business – where two of the applicant's co-offenders were sentenced to terms of imprisonment of seven years and nine months and seven years respectively – where a related offender was found to have been a party to the trafficking rather than a partner in the business enterprise and was sentenced to four years' imprisonment – where the learned sentencing judge found the applicant's offending fell "somewhere between" the co-offenders and the related offender – where the applicant contends his offending was not "that much more serious" than that of the related offender – whether the sentence adequately addresses parity considerations – whether the sentence was manifestly excessive

Evidence Act 1977 (Qld), 132C(2)
Penalties and Sentences Act 1992 (Qld), s 144(1)

Law v Deed [1970] SASR 374, cited
R v Alt (2013) 236 A Crim R 486; [2013] QCA 343, cited
R v Galeano [2013] 2 Qd R 464; [2013] QCA 51, cited
R v Maitland [1963] SASR 332, cited
R v Olbrich (1999) 199 CLR 270; [1999] HCA 54, followed
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Storey [1998] 1 VR 359; (1997) 89 A Crim R 519, cited
R v Welsh [1983] 1 Qd R 592, cited
R v Wong (1995) 16 WAR 219, cited
Salisbury v The Queen (1994) 12 WAR 452; (1994) 76 A Crim R 565, approved
Swinburne v David Syme & Co [1909] VLR 550; [1909] ArgusLawRp 113, approved
Taylor v Ellis [1956] VLR 457; [1956] VicLawRp 72, approved
Weaver v Samuels [1971] SASR 116, approved
Weininger v The Queen (2003) 212 CLR 629; [2003] HCA 14, cited

COUNSEL: D R Mackenzie for the applicant
J A Wooldridge for the respondent

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

[1] **SOFRONOFF P and GOTTERSON JA:** On 16 November 2016 at the Supreme Court at Brisbane, the applicant, Allan John Field, pleaded guilty to three drug related offences. The offences alleged in the respective counts were:

Count 1	An offence against s 5(A) of the *Drugs Misuse Act* 1986 (Qld) ("DMA") of unlawfully trafficking in methylamphetamine and amphetamine between 29 January 2013 and 5 July 2013
Count 2	An offence against s 9 of the DMA of unlawfully possessing cannabis and lysergide
Count 3	An offence against s 7(1)(a) of the DMA of possessing a sum of money obtained from trafficking in a dangerous drug and knowing it to have been obtained from the trafficking

Counts 2 and 3 were alleged to have been committed on 4 July 2013.

[2] The applicant was sentenced to five years and six months' imprisonment on Count 1. He was convicted and not further punished for Counts 2 and 3. The Court ordered that the applicant be eligible for parole on 14 May 2018 after serving 18 months' imprisonment. On 13 December 2016, the applicant filed an application for leave to appeal to this Court against the sentence.

Circumstances of the offending

[3] The circumstances of the offending were set out in an agreed Schedule of Facts[1] which was tendered by the prosecution.[2]

[4] A police operation called "Operation Kilo Deacon" commencing in August 2012 targeted drug offending by Outlaw Motorcycle Gangs ("OMCGs") in the Sunshine Coast region. The applicant, together with Michael Smith, Joshua Carew and Stephen Lee, were targets of the investigation. At the time of the offending, the applicant and Lee were members of the Black Uhlans OMCG. Smith and Carew were members of the Rebels OMCG.

[5] Police investigations revealed that on numerous occasions between January and July 2013, the applicant and Carew acquired and supplied amphetamine and methylamphetamine. Both Smith and Lee were also involved in the supply and distribution of these drugs.

[6] On 11 March 2013, the police conducted a search of Carew's residence. Through that search and through information already gathered by police, it was revealed that the applicant and Carew were commercial partners in the distribution of drugs throughout Rockhampton, Gladstone and the Sunshine Coast. A "tick list" located at Carew's residence suggested the pair expected to derive a profit of $27,025 from their enterprise. The applicant owed Carew $3,725. After repayment of the debt from his equal share of the profit, $9,787.50 was to be distributed to the applicant and $13,512.50 to Carew.

[7] During the search of Carew's residence, the police also found 5.798 grams of pure methylamphetamine within 11.504 grams of a crystalline substance, 5.017 grams of

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1 Exhibit 3: AB40.

2 AB28.

amphetamine within 60.457 grams of crystalline substance, $147,850 cash, methylsulfonylmethane (MSM) and Epsom salts. If sold in the form in which it was found, the combined value of the methylamphetamine and amphetamine was estimated between $9,500 and $36,500.

[8] On 4 July 2013, police executed a search warrant at the applicant's residence where $69,550 was located in a cloth bag pushed to the rear of a recliner seat.[3] Two envelopes containing $4,300 and $3,900 were also found. It was alleged that the cash was obtained from trafficking. The search further uncovered 12 to 16 grams of cannabis and four tabs of lysergide.

Applicant's personal circumstances and history of offending

[9] The applicant was 38 years of age at the time of the offending. He was 42 years old when he was sentenced. The applicant's history of offending began in 1993 when the applicant was aged 18. With the exception of a conviction for grievous bodily harm in 1996, his criminal history included mostly minor offences where fines were imposed. Four previous convictions related to drug offences involving mostly cannabis, but more recently methylamphetamine and lysergide. While on bail in 2014 for the current offending, the applicant was convicted of breaching a bail condition and possessing a knife in a public place.

[10] The applicant was a concreter by trade, but was preventing from carrying out his profession after sustaining an injury from a motorcycle accident in December 2013. Since then, however, he gained employment in a motorcycle shop.

Sentencing remarks

[11] In her sentencing remarks, the learned sentencing judge outlined the events in which the offending occurred. Having done so her Honour took into account the applicant's personal circumstances as outlined above. She observed that the applicant had "a very longstanding drug problem". He had "fallen into the temptation" of making money from trafficking both to support his own habit and for profit.[4]

[12] Her Honour noted the sentences of the applicant's co-offenders, Smith and Carew,[5] and considered their offending to be more serious than that of the applicant. She also referred to the sentence imposed on Paul Lansdowne who also had been apprehended as a result of the same police operation. Lansdowne was charged with having been a party to the trafficking rather than having been a partner in the business enterprise that undertook it. Smith and Carew were sentenced to terms of imprisonment of seven years and nine months[6] and seven years[7] respectively. Lansdowne received a sentence of four years, suspended after serving two years.[8]

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3 There was some debate over whether this money belonged to the applicant. Despite making reference to an intercepted telephone communication between the applicant and Lee that suggested the money belonged to the latter, the learned sentencing judge made no finding on its ownership: AB25 ll27-37.

4 AB25 l46 – AB26 l2.

5 At the time of sentence, Smith and Carew had been sentenced, but Lee had not.

6 Exhibit 6 p 5 ll20-21: AB52.

7 Exhibit 7 p 6 ll41-23: AB62.

8 At Lansdowne's sentence, the learned sentencing judge noted that had he not spent 37 days in solitary confinement, the sentence imposed would have been four years and four months. Exhibit 8: AB67-68.

The learned sentencing judge remarked that the applicant's offending fell "somewhere between them".[9]

[13] The learned sentencing judge acknowledged that the applicant had not lived a "lavish lifestyle". Notwithstanding, she emphasised the seriousness of trafficking in Schedule 1 drugs and the importance of general deterrence in the applicant's case.[10] By way of mitigation, her Honour took into account the applicant's albeit late plea of guilty and his recent employment.

[14] Her Honour also took into account a note written by the applicant in which he claimed to have "distanced [himself] from [his] old lifestyle". Although not expressly stated, the note implied that the applicant had ceased his drug use over the course of the three year period between his arrest and eventual sentencing.[11] Her Honour observed that, despite this implication, the applicant had failed to provide any independent evidence that he had given up the use of drugs. The treatment of the note is considered later in these reasons.

[15] In relation to parole eligibility, the learned sentencing judge observed that the offending had occurred prior to the change in the *Drugs Misuse Act* 1986 (Qld), which, had it applied, would have set parole eligibility at 80 per cent of the term of imprisonment.[12] Having regard to the applicant's steps towards rehabilitation, his return to paid employment and his responsibility for his young family, her Honour set a parole eligibility date at some four months shorter than a third of his term of imprisonment.[13]

The ground of appeal

[16] The applicant seeks leave to appeal against his sentence on the ground that it is manifestly excessive. As his counsel put it, the applicant's principal complaint is that he does not have the certainty of a release date that would be given by a suspension of the sentence.[14] His sentence should have been suspended rather than an earlier than usual parole eligibility date set.[15] His desired outcome is a sentence of five years' imprisonment suspended after 18 months with an operational period of five years.[16]

[17] The applicant was, of course, sentenced under a regime which permits the imposition of a suspended sentence for terms of imprisonment of five years or less only.[17] For him to attain his desired sentence, he would first have to succeed in establishing that the sentence is manifestly excessive and then persuade the Court to resentence him to a term of five years or less. He would also have to persuade the Court to suspend the sentence rather than set a parole eligibility date.

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9 AB26 ll15-16.
10 Ibid ll38 – 41.
11 Exhibit 9: AB69. The applicant said: "The company that I now keep are proudly against drugs".
12 *Corrective Services Act* 2006 (Qld) s 182A(3), applicable to offences occurring on or after 13 August 2013: *Drugs Misuse Act* 1986 (Qld) s 145.
13 AB26 ll43-48.
14 Application Transcript ("AT") 1-2 ll20-26.
15 Applicant's Outline of Submissions, para 13.1.
16 Ibid para 15.
17 *Penalties and Sentences Act* 1992 (Qld) s 144(1).

[18] The applicant advanced the following propositions which, is was submitted, justify a conclusion that the sentence is manifestly excessive:[18]

(a) he was heavily addicted to illicit substances during the offending period and there was an absence of any "cynical commercialism" on his behalf;

(b) he had demonstrated, over the interval of time between the offending and sentence, meaningful steps towards rehabilitation;

(c) he had a more limited role in the trafficking than his co-offenders, Smith and Carew, and his offending "was not that much more serious" than that of Lansdowne; and

(d) there was no specific reason provided for adopting a head sentence of five and a half years, nor was there any reference to other comparable sentencing decisions.

It is convenient to deal with these matters in order, addressing (c) and (d) together.

[19] **Drug addiction and commercial motivation:** This proposition was not developed by substantial written or oral submissions. Notwithstanding that, we note that the applicant's "longstanding drug problem" and "fairly humble lifestyle" were mentioned specifically in the sentencing remarks.[19]

[20] Furthermore, we accept the respondent's submission that the connection to OMCGs, the tick list and the cash together indicated a significant commercial nature to the trafficking enterprise.[20] Whilst the trafficking may not have been highly profitable, it was clearly distinguishable from street level dealing directed at sustaining the dealer's own drug habit. The learned sentencing judge did not misapprehend the role that these factors were to play in exercising the sentencing discretion.

[21] **Delay and rehabilitation:** In oral submissions, counsel for the applicant submitted that the delay of three and a half years between his client's arrest and sentence was a significant sentencing factor. He contended that this lapse of time was important because "there was uncontradicted evidence of police visits during that time to the applicant's house, no drug convictions, a letter from the applicant himself indicating that he abstained from drug use (Exhibit 11), evidence that he had employment and evidence that he had family support".[21] It was further contended that the learned sentencing judge was "fixated on the absence of drug analysis certificates" during that period and that that had led her to favour parole over a suspended sentence.[22]

[22] In written submissions, counsel for the applicant submitted that drug certificates would have cost $100 per month and that to have obtained them over some 40 months "would not have been an inexpensive exercise".[23] No allegation of or evidence of cost was adduced at sentence or on this application.

[23] As to rehabilitation, during the sentence hearing, counsel for the applicant tendered the note to which we have referred. It is necessary to set it out in full:

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18 Applicant's Outline of Submissions, paras 13.2-13.4.
19 AB25 l46, AB26 l39.
20 Respondent's Outline of Submissions, para 8.8.
21 AT1-2 ll36-40.
22 Ibid ll44-47.
23 Applicant's Outline of Submissions, para 13.1.

> "Since 2013 I have completly [sic] distanced myself from my old lifestyle, I left it for a life were [sic] my family comes first and always will. I know I am a much better person now and make much better choices in everything I do. Every day my goal is to be the best role model I can be for my three young boys M 10yrs, S 6yrs and B 2yrs. This change in lifestyle has made me a better husband and father and made my self [sic] and my wifes [sic] realtionship [sic] much stronger and its [sic] easy to see how much we love and support eachother [sic].
>
> Looking back its [sic] shocking to see how being a frequent sometimes daily drug user had such a negative impact on my life and the people around me, which I am now extremely embarressed [sic] and ashamed of. The last three years has been a slow journey but always heading the right direction [sic]. My wife Jasmine has been the main provider of income for our family after myself recovering from a motorocycle [sic] accident in December 2013. The accident ended my career as a concretor, [sic] Concreting had been my main employment since leaving school. Recently a good friend and well respected business owner in Noosa area Mike Manassee has given me full time employment at his motorcycle shop in Noosa. I do everything from metal polishing, mechanical and maintance [sic] work on motorcycles and customer service. To me this job has been a dream come true as it has always been the job that I wanted and have a great passion for. I can now be the main provider for my family which will allow my wife to go to university to study to become a nurse.
>
> The company that I now keep proudly are against drugs and that has made myself and my familys [sic] life so much happier and helped me to be a person who can now look in the mirror and be proud."

[24] By his plea of guilty upon the basis of the agreed Statements of Facts, the applicant accepted the elements of the offence and that he had committed the offence as part of a business within OMCGs. By the note that his counsel tendered he acknowledged that during the period of the commission of the offence he had been a "frequent sometimes daily drug user" in a way that had a "negative impact" on his life and the people around him. In fact it was, it seems, common ground that the applicant had had a serious addiction. In the course of her sentencing remarks, the learned sentencing judge said:[24]

> "It appears clear from all of that that you have a very longstanding drug problem. You have been using drugs for a very long time and it is inevitable that someone who has a long-term use of drugs will be tempted to make the money that trafficking in drugs might give them both to support their own habit and also just for the profit. You appear to have fallen into the temptation."

[25] According to the applicant's note, the delay in sentencing has given him an opportunity to begin a process of rehabilitation. He said he had "completly [sic] distanced [himself] from [his] old lifestyle" and now keeps company with people who "proudly are against drugs".

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24 AB25 l46 – AB26 l2.

[26] The note implies, but does not actually state, that the applicant has given up drugs. As recorded above, the note does not state that he has not taken illicit drugs in the last three years. Nor does it explain the facts of the "slow journey" that he has followed that has led to freedom from drugs.

[27] Some drugs are notoriously hard to kick and methylamphetamine, the drug in which the applicant trafficked, is one of these. Even with the aid of professional assistance, the course of drug rehabilitation can be difficult and uncertain. Yet the note says nothing about this significant matter.

[28] In these circumstances, it was natural for her Honour to raise a question whether the applicant was intending to put before the Court anything to support the mere implication in the note. The following exchange occurred:[25]

> "HER HONOUR: Sure. But if he wants me to act on the basis he's given up the use of drugs, it's easy enough to provide evidence. If there isn't any, I obviously express some scepticism about that.
>
> MR REID: Well, I understand your Honour's scepticism in that regard, but I don't have any analysis---
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> HER HONOUR: Right.
>
> MR REID: ---to place before you. There are, obviously, issues in relation to providing that sort of documentation, because it is – well, in the sense that it not inexpensive to---
>
> HER HONOUR: No, I understand that. But look, Mr Reid, there's no doubt it will affect the sentence I impose.
>
> MR REID: Yes.
>
> HER HONOUR: Because I'm - you know, I'm - it's not one where I say, "Well, this is obviously the right sentence." There's a range here.
>
> MR REID: Yes.
>
> HER HONOUR: And where he falls within that range will be affected by that. Now, does he want the opportunity to get any urine testing done, or not?
>
> MR REID: Could I just have some instructions---
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> HER HONOUR: Sure.
>
> MR REID: ---taken in regards to that. That, of course, could only be achieved if your Honour were to adjourn the sentence and---
>
> HER HONOUR: I would have to.
>
> MR REID: ---to allow him bail---
>
> HER HONOUR: Yes.
>
> MR REID: ---for a period of time.
>
> HER HONOUR: Sure. If I did that.

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25 Sentencing Transcript ("ST") 1-14 l12 – 1-15 l7: AB18-19.

MR REID: Thank you."

[29] The applicant's counsel sought instructions but did not seek an adjournment to permit the applicant to be drug tested or to gather any other material in support of the submission that he was drug free. He did not seek to call him as a witness.

[30] Nevertheless, exchanges during submissions showed that her Honour was prepared to accept the applicant's statements in his note that he had left his associates in the gang of which he had been a member, had moved on with his life otherwise and was now in steady employment. The sentence hearing concluded with the following:[26]

> "HER HONOUR: Yes I think he needs parole. And fortunately, because of the time when the offences were committed, I can do that. What I might be inclined to do, Mr Reid, is give him the head sentence which I think is the right sentence, which is a little more than the one you suggested, but make the parole eligibility date earlier.
>
> MR REID: Very well.
>
> HER HONOUR: Which give him a long time on parole, which would be very useful, I think, because he will be drug tested on parole.
>
> MR REID: Yes. And if the matters that he's spoken of in his letter are correct, and I understand your Honour's concerns about them, then he has an opportunity---
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> HER HONOUR: It won't be a problem.
>
> MR REID: ---to prove it.
>
> HER HONOUR: Yes. Okay. Thanks."

[31] Her Honour then dealt with the content of the applicant's note as follows:[27]

> "I have also taken into account the letter which you have written where you talk about distancing yourself from your old lifestyle and the negativity of your frequent, sometimes daily, use of drugs. Of course, any punishment imposed upon you will have an effect on your wife and children and that is a dreadful thing, particularly for the three boys who no doubt look to you as a role model. You will have to have the strength to show them that this is not the road they should travel down.
>
> I take into account that, notwithstanding that you had a motorcycle accident in December 2013 which prevented you from continuing earning an income as a concreter, you now have employment in a motorcycle shop. Unfortunately, you have not been able to provide any evidence other than your assertion that you have completely given up the use of drugs but, of course, that is critical to your future and the future of your family."

[32] It is against this background of facts of how the sentence hearing was conducted that the applicant now contends that the learned sentencing judge had been obliged

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26 ST1-17 l36 – 1-18 l8; AB21-22.

27 AB26 ll24-36.

to accept the implication in this letter that he had fully shaken off his former drug habit.

[33] Section 132C of the *Evidence Act* 1977 provides, relevantly:

> "132C Fact Finding on sentencing
>
> (1) This section applies to any sentencing procedure in a criminal proceeding.
>
> (2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.
>
> (3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.
>
> (4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.
>
> …"

[34] Section 132C(3) puts an end to the debate that persisted for a long time concerning whether, at common law, facts relevant to sentence had to be proved and whether they had to be proved to the criminal standard or the civil standard.[28] Almost all sentence hearings are conducted upon the basis that nobody calls evidence as if the process of sentencing involved a second trial, this time concerning the issue of penalty. As Gleeson CJ, Gaudron, Hayne and Callinan JJ said in *R v Olbrich*:[29]

> "References to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in sentencing proceedings; there is no such joinder of issue."

[35] Section 132C(2) assumes that, in the absence of circumstances requiring proof, the Court should proceed in the traditional manner to act upon allegations made from the Bar table. This appeal raises the question when may a sentencing judge decline to act upon a matter that is not expressly put into controversy.

[36] There can be no dispute that the use of the word "may" in s 132C signifies that a sentencing judge need not necessarily act upon an allegation even if it is admitted or not challenged.[30] This must be so for as Pidgeon J observed in *Salisbury v The Queen*:[31]

> "It cannot be said that the mere fact that the applicant expounds [a fact] makes it obligatory for his Honour to accept it in the absence of any other evidence. Such a proposition would give to any defendant, who is prepared to lie, a means of escaping proper punishment. … There is no requirement for the sentencing judge to contemplate the most mitigating circumstances he could, requiring anything further to be proved by the Crown. In many instances the Crown would not be

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28 See eg *R v Storey* [1998] 1 VR 359; (1997) 89 A Crim R 519.

29 [1999] HCA 54; (1999) 199 CLR 270 at [25].

30 With respect to s 132C(3), this Court held in *R v Alt* [2013] QCA 343; (2013) 236 A Crim R 486 that "may" does not mean "must".

31 (1994) 12 WAR 452 at 477; (1994) 76 A Crim R 565 at 590.

> able to discharge such an onus by reason of not knowing the nature of the criminal enterprise."

[37] That passage was cited with approval by Ipp J in *R v Wong*.[32]

[38] The principle that a court need not accept uncontradicted and unchallenged evidence is an old one that applies to all proceedings. In *Swinburne v David Syme & Co*[33] Madden CJ said:

> "These cases laid down the principle to which I most stoutly adhere, that where evidence is given on one side which is conclusive of the matter, which is in itself inherently probable and not unreasonable or improbable, and where it is not contradicted by evidence on the other side, the tribunal which hears it is bound to accept it. Because if it were otherwise the decision would be a matter of caprice, a mere matter of prejudice, so that some Judge might say – "I do not like this person or this kind of thing". But in all cases where the evidence is probable and is sworn to, and is not contradicted, it ought to be accepted. But it is an equally certain proposition that no Judge and no tribunal is bound to accept evidence which is in itself inherently improbable and unreasonable, which is hesitating, doubting, shuffling, inconclusive, and unconvincing. That is no proof at all. The Judge is entitled to waive it aside, whether it is contradicted or not contradicted."

[39] In *R v Welsh*[34] Campbell CJ, Matthews and McPherson JJ said that if differing versions of relevant events have like probability then that one of them which is favourable to the accused should be accepted. To a similar effect, in *Law v Deed*[35] Bray CJ said that it was the duty of a court to act upon the version of the facts which, within the bounds of reasonable possibility, is most favourable to the accused in the absence of actual proof.

[40] A sentence hearing is different in fundamental ways from a trial of the kind that Madden CJ was considering. However, the principle remains applicable. A judge is not bound to accept an allegation made from the Bar table if there is reason to doubt it.

[41] Courts have, from time to time, adverted to the possibility that assertions will not be accepted even in the absence of challenge from an opposing party. Thus, in *Olbrich*[36] Gleeson CJ, Gaudron, Hayne and Callinan JJ said:

> "Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it. (We say "if necessary" because the calling of evidence would be required only if the asserted fact was controverted

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32 (1995) 16 WAR 219 at 227-228; Franklyn and Anderson JJ agreed.
33 [1909] VLR 550 at 565-567.
34 [1983] 1 Qd R 592 at 595.
35 [1970] SASR 374 at 377; see also *R v Maitland* [1963] SASR 332 at 335 per Bray CJ.
36 [1999] HCA 54; (1999) 199 CLR 270 at [25].

> or **if the judge was not prepared to act on the assertion**.) (emphasis added)

[42] In *Weaver v Samuels*[37] Bray CJ said:

> "…if the defendant alleges circumstances of mitigation peculiarly within his knowledge which the prosecution is not in a position to negative, again his version must be accepted 'within the bounds of reasonable possibility' and if the court is minded to reject it as beyond those bounds, it must at least give him an opportunity to support his story by his oath if he so desires."

[43] In *Taylor v Ellis*[38] Sholl J said:

> "It would be a strange thing to say that [judges] are bound to accept any particular explanation preferred by a witness merely because it is uncontradicted and there is nothing in the rest of the evidence plainly inconsistent with it. The more dishonest a witness, the more plausible he may be likely to make a false explanation calculated to assist or exculpate him or someone whose cause he favours. … It is all a matter of forming a human judgment of the veracity of other humans. In the decision of any disputed issue of fact, judicial experience of the extent to which self-persuasion, enthusiasm, fear, self-interest, kinship, partisanship (rational or irrational), or mere cynicism may affect veracity, and of the extent to which that effect may vary according to the type of moral issue involved, may properly and usefully be referred to."

[44] *Weaver v Samuels* and *Taylor v Ellis* are consistent with the passage from *Olbrich* quoted above. So too are the dicta from *Welsh* and from *Law v Deed* set out earlier. In previous cases this Court has also acted in accordance with this approach. Thus, in *R v Galeano*[39] Gotterson JA, with whom McMurdo P agreed, said:

> "The provision does not require the sentencing judge to make findings that accord with such facts where some evidence is adduced in support of them and none is adduced to contradict them. As with the general law, the provision allows flexibility to make, or refrain from making, findings, having regard to the strength and integrity of the evidence that is adduced."

[45] As *Olbrich* and other cases recognise, there will be cases in which allegations of fact, while not necessarily implausible (or "hesitating, doubting, shuffling, inconclusive, and unconvincing"[40]), might not be of a kind that, without more, require acceptance by a judge.[41] The present case was of that kind. Her Honour almost immediately raised her doubts about the implication upon which she had been asked to act and before the prosecution had an opportunity to do so. That she did so did not surprise the applicant's counsel, as appears from the passages from the transcript set out above. For the reasons given above, her doubts must have

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37 [1971] SASR 116 at 119.
38 [1956] VicLawRp 72; [1956] VLR 457 at 465.
39 [2013] 2 Qd R 464; [2013] QCA 51 at [46].
40 *Swinburne v David Syme & Co* [1909] VLR 550.
41 see e.g. *Weininger v The Queen* (2003) 212 CLR 629; [2003] HCA 14 at [20] and [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

been based upon considerations that were obvious to everyone and, for that reason, it was a not unreasonable attitude for her Honour to adopt.

[46] The applicant's note only *implied* complete rehabilitation but it did not say so in terms, although it might have done. It gave no explanation about how the applicant had gone about reaching that state of freedom from addictive drugs nor did it give any description of the actual process involved. Of course, the assertion was not a matter that could be contradicted by the prosecution by any immediate response. On the contrary, it was a matter that was peculiarly within the applicant's own knowledge. One might readily accept the applicant's counsel's explanation for his omission to furnish analysis certificates at the hearing because of the expense of such a course; however, there has been no explanation for the applicant's failure to take the opportunity that her Honour offered, consistently with the proper practice suggested by Bray CJ in *Weaver*, to give the applicant a chance to put actual facts before the Court to back up his assertion. This is particularly significant because the matter was one that had been raised by the applicant in the first instance and it was something that he himself regarded as important to mitigate the length of any prison term he would have to serve. Yet, despite all of this, it was left as a mere implication upon which the learned judge was invited to act and upon which, the applicant now says, she had to act.

[47] In the circumstances of this case, her Honour was presented with an allegation of fact in respect of which an experienced criminal judge, as her Honour is, was bound to entertain some reservations. That did not conclude the matter for it was also open to her Honour to accept the content of the note on its face when read in the most favourable way to the applicant. However, having raised the issue of the absence of any support for the implied allegation of fact put before her, and after the applicant has not taken up the opportunity to back up his submission either by the obtaining of evidence of analysis or even by going into the witness box to swear to the truth of his assertions, there was no obligation upon the learned sentencing judge to sentence the applicant upon the assumption that the inference he asked her to draw was true and her Honour was not wrong to decline to do so.

[48] A sentencing judge is not obliged to accept assertions made from the Bar table even if the prosecution leads no evidence to the contrary and even if the prosecution is silent about the matter. However, the judge's inclination to reject such a matter of asserted fact must be made known to the offender and a reasonable opportunity must be offered to make good what has only been asserted. Even when evidence has been tendered to prove the contentious fact, a judge is not obliged by the statute to accept such proof. However, in all cases, whether involving mere assertions of fact or involving evidence called to prove such an assertion, the usual principles that govern a judge's acceptance or rejection of disputed facts apply including that the judge's decision must be justified by reasons.

[49] A significant interval of time between arrest and sentence was common to both the applicant's case and to those of Smith, Carew and Lansdowne. Thus none of them is distinguishable from the others on account of the delay in sentencing. We note that Lee was sentenced after the applicant.

[50] **Parity and sentencing range:** The applicant's thesis is that his offending was not noticeably more serious than that of Lansdowne. It is convenient to consider the latter's circumstances first.

[51] Lansdowne was sentenced to four years' imprisonment, suspended after two years. According to the sentencing judge in that case, Lansdowne acted as a "conduit for supplies of methylamphetamine" which was then manufactured by Carew.[42] Factors taken into account in sentencing included that Lansdowne had unsourced income of $14,300 over the trafficking period, was 58 years old at the time of sentencing and had a minor criminal history including previous drug offences.[43] But for 37 days spent in solitary confinement, the sentence imposed would have been four years and four months.

[52] Counsel for the applicant contended that, as a "junior partner" to the trafficking, the applicant's offending was not so different from that of Lansdowne. The characterisation of Lansdowne as a party to the trafficking as opposed to a partner was, according to counsel, "somewhat contrived".[44] It was nevertheless a finding of fact made by the sentencing judge in Lansdowne's case that he acted as a facilitator to those engaged in the business; there was no indication that Lansdowne was someone carrying on a trafficking enterprise himself.[45] This can be contrasted with evidence in the applicant's case, including the significant amount of cash located at his residence and the "tick list" found at Carew's home which further implicated him as a business partner.

[53] Given these differences, we do not accept that the applicant's offending was only marginally more serious than that of Lansdowne. It was markedly more serious so far as the nature of his participation in the drug trafficking was concerned.

[54] It is unnecessary to consider in any detail the offending of Smith and Carew. It is common ground that their offending was more serious than that of the applicant's. Her Honour recognised it as such. The applicant's sentence is significantly less severe than their sentences.

[55] In our view, the sentence imposed on the applicant of five and a half years' imprisonment adequately addressed parity considerations. It is true that her Honour did not refer to other sentencing decisions in her remarks. However, it was unnecessary for her to have done so.

Disposition

[56] In *R v Pham*,[46] French CJ, Keane and Nettle JJ emphasised that appellate intervention on the ground of manifest excessiveness is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that had been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

[57] I am quite unpersuaded that the applicant's sentence bespeaks a misapplication of principle on the part of the learned sentencing judge. To the contrary, the sentence is one that was appropriate to his offending and other relevant sentencing factors. Further, we would specifically reject the suggestion made by the applicant's counsel that an inference could perhaps be drawn that her Honour deliberately set the sentence at five and a half years for the purpose of precluding a suspension of it. As

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42 Exhibit 8: AB66.
43 Ibid 65-66.
44 Applicant's Outline of Submissions, para 13.3.
45 Exhibit 8: AB66.
46 [2015] HCA 39; (2015) 256 CLR 550 at [28].

noted, the material before her Honour at sentence supported the setting of a parole eligibility date whether or not the sentence exceeded five years.

[58] This application for leave to appeal against sentence must therefore be refused.

Order

[59] We would propose the following order:

1. Application for leave to appeal against sentence refused.

[59] **McMURDO JA:** I agree with the President and Gotterson JA that, in the facts and circumstances described by the sentencing judge, the sentence was not manifestly excessive. However in my view, the judge erred in not accepting unchallenged evidence that the applicant was no longer using drugs.

[60] As I read the document signed by the applicant, which was tendered in evidence at the sentencing hearing, it represented that the applicant was no longer using drugs. It is true that it contains no specific statement that he was not a drug user. However, as the counsel for the respondent in this Court agreed, that was the tenor of the document and that was the "positive submission put on his behalf"[47] to the sentencing judge. Further that was her Honour's understanding of the submission.[48]

[61] The sentencing judge expressed scepticism about this submission. She was not prepared to accept that the applicant had stopped his drug use. Although the judge said that she had taken into account the applicant's document, in her sentencing remarks the judge said:

> "Unfortunately, you have not been able to provide any evidence other than your assertion that you have completely given up the use of drugs, but, of course, that is critical to your future and the future of your family."

[62] The applicant's "assertion" he had given up drugs, as the judge understood it to be, was an allegation of fact within s 132C of the *Evidence Act* 1977 (Qld). The allegation was not challenged. By s 132C(2) the sentencing judge was entitled to act upon it. The judge was not bound to do so. But there had to be some reason for rejecting the evidence.

[63] There was support for the evidence from the fact that the applicant had been on bail for about three and half years, regularly reporting to police throughout that time, with police sometimes coming to his home and without any recorded incident of drug use. From the judge's statement which I have just set out, it appears that the applicant's evidence was rejected because it was not supported by evidence of drug testing. Undoubtedly, evidence of that kind, demonstrating that when tested the applicant was drug free, would have assisted his case. During the hearing, the sentencing judge said that with such evidence, his case would warrant a lighter sentence. However the absence of that evidence was not a reason to reject the evidence which the judge did have. The fact that he was not drug tested did not show that more probably than not, he was still a drug user.

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47 Transcript of appeal hearing at T1-8.

48 Transcript of the sentencing hearing at T1-13 to T1-15 and the sentencing remarks.

[64] In that respect, in my respectful opinion, the sentencing judge erred in the exercise of her discretion. I would grant leave to appeal and set aside the sentence which was imposed. The fact that the applicant was drug free is a substantial mitigating factor, warranting a relatively lower head sentence. It also affects whether, in this case, parole is appropriate, rather than a partially suspended sentence. I would impose a sentence of four and half years' imprisonment, suspended after 18 months.