SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carlisle* [2017] QCA 258
PARTIES:	**R** **v** **CARLISLE, Nathan** (applicant)
FILE NO/S:	CA No 55 of 2017 SC No 1038 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 2 March 2017 (Daubney J)
DELIVERED ON:	3 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2017
JUDGES:	Gotterson and Morrison JJA and Applegarth J
ORDERS:	**1. Leave to appeal granted.** **2. Appeal against sentence allowed.** **3. Sentence varied by reducing the 10 years term of imprisonment imposed on Count 1 to 9 years and set aside the automatic serious violent offence declaration.** **4. A parole eligibility date of 24 February 2020 be fixed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to ten years' imprisonment for drug trafficking – where the applicant submits that the nominal sentence adopted by the sentencing judge was manifestly excessive and did not reflect the criminality of the offending – where the applicant submits the reduction of two years from the nominal sentence of 12 years' imprisonment was a manifestly inadequate reduction for his very early guilty plea and the one year served in pre-sentence custody – whether the sentence was manifestly excessive in all the circumstances *Penalties and Sentences Act* 1992 (Qld), s 13A, s 159A *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited

R v Barker [2015] QCA 215, cited
R v Bradforth [2003] QCA 183, cited
R v Chen [2008] QCA 332, cited
R v Fabre [2008] QCA 386, cited
R v Gordon [2016] QCA 10, cited
R v Houkamau [2016] QCA 328, cited
R v Jacobs [2016] QCA 28, cited
R v KAQ; R v KAQ; Ex parte Attorney-General (Qld) (2015) 253 A Crim R 201; [2015] QCA 98, cited
R v Markovski [2009] QCA 299, cited
R v Marshall [1993] 2 Qd R 307; [1992] QCA 155, cited
R v Milos [2014] QCA 314, cited
R v Nabhan; R v Kostopoulos [2007] QCA 266, cited
R v Raciti [2004] QCA 359, cited
R v Rizk [2004] QCA 382, cited
R v Skedgwell [1999] 2 Qd R 97; [1998] QCA 93, cited
R v Versac [2014] QCA 181, cited
R v Westphal [2009] QCA 223, cited
R v Wishart and Jenkins [1994] 2 Qd R 421; [1993] QCA 563, cited

COUNSEL: P Davis QC, with A J Kimmins, for the applicant
G J Cummings for the respondent

SOLICITORS: Grigor 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] **MORRISON JA:** I have read the reasons of Applegarth J and agree with those reasons and the orders his Honour proposes.

[3] **APPLEGARTH J:** The applicant pleaded guilty to trafficking in dangerous drugs and six other counts related to that offence. He was sentenced to 10 years' imprisonment on the trafficking count, with convictions recorded but no further penalty imposed on the other counts. The sentence imposed on the trafficking count automatically attracted a serious violent offence declaration, requiring the applicant to serve 80 per cent of the term of imprisonment before being eligible for parole.

Grounds of appeal

[4] The applicant seeks leave to appeal against his sentence on the following grounds:

1. The nominal sentence of 12 years' imprisonment stated by the trial judge in the course of the sentencing remarks was manifestly excessive and did not reflect the criminality of the offending.

2. The reduction of two years from the nominal sentence of 12 years' imprisonment was a manifestly inadequate reduction for the mitigating circumstances and time served in pre-sentence custody.

3. For those reasons and generally, the sentence is manifestly excessive.

The circumstances of the offending

[5] The applicant was engaged by an unidentified principal to be in charge of large quantities of drugs and cash held in two storage sheds on the Gold Coast, which were rented in the applicant's name commencing 27 June 2015. During the trafficking period, which ended on 20 February 2016, the applicant regularly entered the storage sheds by using a security code. Logs proved that one shed had been accessed 73 times and the other 137 times during the trafficking period.

[6] When police executed search warrants at each of the two storage sheds on 19 February 2016 they found large quantities of MDMA and other drugs. A sports bag in one of the sheds contained $426,000 in cash, most of which had been placed in bags and cryovaced. An unloaded .22 calibre revolver inside a plastic bag was also found in that shed.

[7] Later that day police searched the other shed and found clip seal bags containing a large number of tablets along with clip seal bags containing powder. Police also found a tick sheet with nine different names and various numbers next to each name which was said to be "consistent with the defendant having at least 9 different customers". This phrasing is open to the interpretation that the applicant conducted his own business, as well as being engaged in the unidentified principal's business. However, the sentence proceeded on the basis that while he owned certain Schedule 2 drugs that were found in the shed, he worked for the principal of the significant operation that used the two sheds to traffic in wholesale amounts of MDMA and, to a lesser level, methylamphetamine and other drugs.

[8] The prosecution case was that the applicant did more than regularly take drugs and money to the sheds to store and repackage. The tick sheets were consistent with the applicant also engaging in the sale of drugs on behalf of his principal. It was not said that the applicant was the only person working in the operation.

[9] The trafficking charge (Count 1) charged the period of between 26 June 2015 and 20 February 2016, which covered the day before the applicant leased the sheds and the day after police executed the search warrants.

[10] Count 2 charged the applicant with possession of MDMA, namely 25.936 kilograms, which yielded 3.573 kilograms of pure MDMA. The level of purity ranged from 8.5 per cent to 20.1 per cent.

[11] Count 3 charged the applicant with possession of methylamphetamine. The total quantity of substance was 27.592 grams, which yielded 17.571 grams of methylamphetamine, having a purity ranging between 62.7 per cent and 69.8 per cent.

[12] Count 4 related to possession of Schedule 2 drugs. They included Alprazolam, Clonazepam and Diazepam, which are benzodiazepines used to treat anxiety disorders. The applicant did not have a prescription for these drugs. Other Schedule 2 drugs found at the shed consisted of 99 tablets, being drugs that are designed to mimic or produce similar hallucinogenic effects to LSD.

[13] Counts 5 and 6 charged the applicant with possession of things used in connection with trafficking and included two digital scales and a cryovac machine.

[14] Count 7 charged the applicant with possession of a Category H weapon, namely the .22 calibre handgun. It was not alleged that this handgun was used as part of the trafficking business, and sentencing proceeded on the basis that the applicant had not placed it in the shed and had not used it.

An early plea

[15] The applicant was not present when the search warrants were executed on 19 February 2016 at each shed. He was arrested on 22 February 2016 in Sydney, extradited to Queensland and taken into custody on 24 February 2016. He declined to be interviewed. However, he advised, effectively from the outset, that there would be a plea of guilty. The prosecutor accepted that it was an early plea of guilty, with any delay in the sentence due to the need to undertake drug analysis and seek CCTV recordings.

Pre-sentence custody

[16] By the time the applicant came to be sentenced on 2 March 2017, he had spent just over a year in custody, but that period could not be declared pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) because he had been remanded in relation to other offences. The hearing proceeded on the basis that account should be taken of the pre-sentence custody, and the learned sentencing judge indicated that he intended to take "full account of the fact that you have now spent more than a year in custody."

Personal circumstances

[17] The applicant was aged 29 at the date of the offences and aged 30 at the date of sentence. His parents separated when he was aged 10. He began using cannabis at the age of 15. He left school during Year 12 and joined the workforce. He gained employment as a trade assistant and later as a painter. However, his cannabis use affected his capacity to complete tasks.

[18] He stopped using cannabis regularly in his early 20s but began using ecstasy. After being released on parole he ceased using drugs for a few years, but started using "ice" in around 2012. His habit quickly progressed to a daily pattern where he would consume up to seven grams per week. This caused significant insomnia and he would use benzodiazepines or other drugs to sleep and to counter the effects of methamphetamine so as to lead as normal a life as possible.

[19] The applicant has been in a relationship for about 15 years with his fiancée. They lived together for about seven years. His partner was not aware of the extent of his drug taking and disapproved of his use of methamphetamine.

[20] The applicant worked in a laser tattoo removal business and was working to obtain equity in it. However, he lost his investment when the lease on the business was cancelled and an expensive machine which had been acquired for $120,000 was sold for $30,000. This led to an escalation in his anxiety and depression and an increase in his drug use.

[21] It was not suggested that the applicant had any trappings of wealth. He and his partner rented their accommodation and there was no evidence that he owned a motor vehicle or other assets.

[22] Despite his earlier involvement in the criminal justice system, the applicant had not undergone effective treatment in the community for his drug problem. Psychological reports relied upon at sentence reported methylamphetamine and other drug use disorders in early remission in a controlled environment, as well as major depression and a mild to severe anxiety disorder.

Criminal history

[23] Consistent with the applicant's resort to drugs over the years, he has a criminal history. On 17 September 2010 he was sentenced to two and a half years' imprisonment with parole release after six months for supplying Schedule 1 drugs. He was aged 24 at the date of the offence. He entered a plea of guilty and was sentenced on the basis of his prospects of rehabilitation.

[24] On 3 November 2010 he was fined for committing four offences, including two drug offences committed whilst on bail in relation to the matters which had been dealt with on 17 September 2010.

[25] On 8 May 2012 he was sentenced to nine months' imprisonment cumulative upon the sentence imposed on 17 September 2010 for possession of a dangerous drug in excess of two grams and possession of a dangerous drug on 15 September 2010 (two days before being sentenced on 17 September 2010). The possession of those Schedule 1 drugs was found to be for personal use, as "a wayward attempt" on the applicant's part to deal with the approaching sentence of imprisonment that he was expecting two days later.

[26] The sentencing judge concluded that if the applicant had been sentenced for all of the offences on 17 September 2010, then the head sentence probably would have been in the order of three and a half years, but it was unlikely that the actual time served would have been significantly more than the period actually imposed. By the time the applicant came to be sentenced on 8 May 2012, he had completed his parole satisfactorily, had taken steps to re-establish a business and had the opportunity for further employment with his father. These were seen as indications that his prospects for rehabilitation, as assessed by the Court on 17 September 2010, were well-placed. After imposing additional sentences of nine months on each count to be served cumulatively upon the sentences imposed on 17 September 2010, the sentencing judge ordered that the applicant be released on parole on 16 March 2013.

[27] In August 2013, he committed a drink driving offence and returned a presumptive positive result to cocaine. The presence of benzoylecgonine and cocaine were confirmed in a toxicology report, leading to his parole being suspended on 5 September 2013. He was released on 16 October 2013 and thereafter complied with his parole order and completed required interventions until his parole was completed on 20 December 2013.

Recent steps towards rehabilitation

[28] After being arrested in February 2016 and detoxifying in prison whilst awaiting sentence, the applicant gained a belated insight into his past drug use and how his addiction and selfishness had affected others, including his family and his supportive fiancée. He completed a number of courses and earned the trust of the correctional authorities as a mentor in a program which provides support to new or vulnerable prisoners. He plans to undertake further study whilst in jail in the hope that a normal life awaits him when he is released. A letter he wrote to the sentencing judge did not seek leniency, and acknowledged his responsibility for his actions and the damage he had caused others.

The sentence

[29] The learned sentencing judge stated the relevant facts and correctly characterised the applicant's conduct as engagement in "a very significant and serious drug trafficking operation", whilst taking account of the applicant's drug addiction at the time.

[30] Counsel for the applicant at sentence submitted that an appropriate starting point would be a head sentence of nine years' imprisonment, which would then be reduced to a head sentence of eight years to take account of pre-sentence custody. Counsel also relied upon the very early plea of guilty to seek a parole eligibility date after a period of two and a half years, taking account of the 12 months spent in custody. Particular reliance was placed by counsel upon *R v KAQ*.[1] However, the learned sentencing judge found that case was factually quite different and had the added feature of a sentence that was affected by the operation of s 13A of the *Penalties and Sentences Act* 1992 (Qld).

[31] Reference was made by the sentencing judge to other decisions which were said to all turn on their facts, with some of them involving sentences after trial, different amounts of drugs or different levels of participation. The learned sentencing judge concluded that it was sufficient on a review of the authorities to say that they revealed that engagement in serious drug trafficking on the level in which the applicant was engaged "calls for a head sentence in a range of 10 to 15 years' imprisonment".

[32] The learned sentencing judge continued:

> "In your case, having regard to the authorities, having regard to the serious nature of the offending – I have already referred to the bulk quantity of drugs involved – the finding of the significant quantity of cash on the premises, and the finding of the firearms on the premises, which, again, is an aggravating feature of the offending I have decided that the appropriate starting point, having regard, also, to your criminal history, would be the imposition of a sentence of 12 years' imprisonment.
>
> That, however, needs to be discounted to have regard to a number of factors. One is the fact that you entered a very early plea and, at least in that regard, indicated an intention to assist in the administration of justice. The other matter, of course, that I need to take into account is that you have spent, as I have already said several times, more than just over a year in custody. But that is time that cannot be declared. I need

---

1 [2015] QCA 98.

> to take that into account in a way that appropriately reflects the head sentence and, also, has some meaningful impact on the non-parole period.
>
> In all the circumstances, then, I have decided that the appropriate head sentence to be imposed on you for your offending is one of 10 years' imprisonment. It follows that there will be an automatic serious violent offender declaration."

[33] If full account was taken of the one year of pre-sentence custody which could not be declared, then the sentence of 10 years' imprisonment with an automatic serious violent offence declaration was an effective sentence of at least 11 years, with a non-parole period of nine years.

The issues

[34] While the applicant's grounds of appeal consist of the three parts I have quoted at the start of these reasons, the essential issue is as follows. Is an effective sentence of 11 years' imprisonment, which requires the applicant to serve nine years before being eligible for parole, manifestly excessive, particularly when regard is had to his early guilty plea?

The applicant's submissions on appeal

[35] The applicant accepts that the learned sentencing judge was not required to apply a mathematical discount for matters in mitigation, such as the early guilty plea. To do so would have been inconsistent with the "instinctive synthesis" approach to sentencing.[2] The applicant does not submit that it was an error for the sentencing judge to explain the sentence in the way he did, namely that the appropriate starting point, having regard to the offending and the applicant's criminal history, was of a sentence of 12 years' imprisonment, which would need to be discounted to have regard to a number of factors, including a "very early plea", and also to take into account the period of just over a year spent in custody. Instead, the applicant submits that the contents of the explanation show an error in the sentencing process.

[36] The process of reasoning, as explained, is said to demonstrate two errors:

(a) The nominal head sentence is too high; and

(b) The mitigating circumstances and time served were not adequately reflected in a reduction of the head sentence of 12 years.

[37] The applicant was not the principal of the trafficking business and while he obviously achieved personal gain, he was a paid assistant to the principal. The comparable sentences were submitted to justify a head sentence of about nine to 10 years' imprisonment, before mitigating circumstances and time served were taken into account, not a nominal sentence of 12 years.

[38] The comparable cases relied upon by the respondent on the appeal to support the sentence which was imposed were submitted by the applicant to be either cases

---

2 *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39].

involving sentences after a trial or more serious offending. The applicant urges a sentence of seven to eight years after account is taken of the early plea and time served.

The respondent's submissions on appeal

[39] The respondent submits that the sentencing judge did not engage in a two-stage sentencing process, and, instead, arrived at a just sentence after taking into account a broad range of factors.

[40] According to the respondent, the sentencing judge took full account of the pre-sentence custody which could not be declared, considered the need for personal and general deterrence, balanced a number of factors and took account of the fact that a sentence of 10 years' imprisonment or more would attract a serious violent offence declaration.

[41] The applicant deliberately involved himself, despite past opportunities at rehabilitation, in a managerial position in a high volume wholesaling business. The only real matter in mitigation was his early plea. The comparable decisions are do not show the sentence to be manifestly excessive.

[42] In summary, the respondent submits that while the sentence imposed is a "heavy sentence", it was open to the sentencing judge in a just exercise of the sentencing discretion.

Taking account of pre-sentence custody and mitigating circumstances

[43] It is convenient to first consider the second aspect of the grounds of appeal, namely that a reduction of two years from the nominal sentence was a "manifestly inadequate reduction for the mitigating circumstances and time served in pre-sentence custody". I shall assume for the purpose of this argument that, contrary to the applicant's contention, a "starting point" or nominal sentence of 12 years was appropriate.

[44] The sentencing remarks might be said to adopt a "two-stage" approach to sentencing. However, labels such as "two-stage" or "instinctive synthesis" need to be understood. As Gleeson CJ, Gummow, Hayne and Callinan JJ observed in *Markarian v The Queen*:[3]

> "An invitation to a sentencing judge to engage in a process of 'instinctive synthesis', as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression 'instinctive synthesis' may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends."

[45] The requirement to take full account of the applicant's pre-sentence custody which could not be declared made it appropriate to disclose how account was taken of this 12 month period in arriving at a head sentence which triggered an automatic serious violent offence declaration. The learned sentencing judge's reasoning explained that, taking account of the year the applicant had spent in custody and mitigating factors,

---

3 (2005) 228 CLR 357 at 375 [39].

particularly a "very early plea", led to the imposition of a sentence of 10 years' imprisonment, when otherwise there would have been a sentence of 12 years.

[46] It was appropriate to take account of the 12 month period of pre-sentence custody. Although it is not mandatory, it is generally desirable to take into account periods of pre-sentence custody which are not declarable under s 159A of the *Penalties and Sentences Act* 1992 (Qld) at the first opportunity.[4] In this case, the learned Crown prosecutor at sentence conceded that, consistent with the principles in *R v Skedgwell*[5] and *R v Fabre*,[6] the time spent in custody should be taken into account by "a proportionate reduction of the sentence otherwise imposed". The prosecutor's written submissions and oral submissions were made at a time when the applicant had served 11 months in custody. On that basis, and on the assumption that a serious violent offence declaration would be made, the submission was that a reduction of the head sentence by one year and two months would reduce the period of time that the defendant was required to serve in custody before being eligible for parole by a period close to the 344 days then spent on remand.

[47] The applicant was sentenced on 2 March 2017, by which time he had served just over a year in custody. If a sentence of less than 10 years is imposed and there is no declaration of a serious violent offence, parole is available at the halfway point of the sentence. In reliance on authorities decided before the enactment of the *Penalties and Sentences Act* 1992 (Qld) which enables pre-sentence custody to be declared as time served, the applicant submits that in such a case two days ought to be taken from the head sentence for every day served in pre-sentence custody. On that basis, the reduction from the head sentence would be two years. However, even if a serious violent offence declaration is made, the applicant submits that "one year in prison is worth one year and three months off the head sentence".

[48] If the applicant is correct on this last point then allowing a deduction from the nominal head sentence of twelve years of two years, with one year and three months of that two year period reflecting time served, means that the only allowance for mitigating circumstances, particularly a very early plea, was nine months.

[49] It is unnecessary to go to old cases in any detail. Support can be found in some of them for the proposition that "a day in custody before sentencing was for some purposes treated as the equivalent of two days after sentence".[7] In *R v Marshall*,[8] Macrossan CJ stated that allowance for pre-sentence custody time should be given by deducting from the head sentence otherwise properly imposable a period equal to twice the pre-sentence time. Davies JA and Williams J reached a similar conclusion when they held that it would be a wrong exercise of discretion, in other than exceptional cases, to fail to give credit for approximately double the time actually spent in custody awaiting sentence. The practice of allowing approximately double the time actually spent in custody was said to reflect the operation of s 166(2)(b) of the *Corrective Services Act* 1988 (Qld). However, in *R v Wishart and Jenkins*,[9] Thomas J explained

---

4 *R v Fabre* [2008] QCA 386 at [14].
5 [1999] 2 Qd R 97.
6 [2008] QCA 386.
7 *R v Skedgwell* [1999] 2 Qd R 97 at 99.
8 [1993] 2 Qd R 307 at 312.
9 [1994] 2 Qd R 421 at 428-429.

why the so-called "doubling exercise" was mathematically flawed and was generally to be avoided in favour of following this approach to prospective sentencing:

> "The head sentence is the sentence properly imposable less the time actually served up to the time of sentence; and the non-parole period is half the sentence properly imposable less the time actually served up to the time of sentence."[10]

These statements of approach were made in the context of legislation providing for parole release after serving half of a sentence.

[50] In any event, in a typical case in which account is taken of a period of pre-sentence custody which is not declarable, the practice is that the pre-sentence custody is taken into account in fixing both the head sentence and the non-parole period. The term "backdating" is a loose expression which is used in this context to refer to the necessary adjustment to a parole eligibility date and to the sentence which otherwise would be imposed. It does not require an applicant to be given "double credit" by the sentence properly imposable being reduced by twice the period which cannot be declared under s 159A. As *R v Houkamau*[11] illustrates, in arriving at the sentence, account is taken of the pre-sentence custody in full. It is not doubled.

[51] The respondent, citing *R v Houkamau*[12], accepts that taking account of non-declarable pre-sentence custody may be achieved by first determining what is a just sentence, and then notionally backdating the head sentence and the parole date.

[52] The exercise of taking account of non-declarable pre-sentence custody may become complicated in a case in which a serious violent offence declaration is made. For example, absent a serious violent offence declaration, a sentence of 12 years' imprisonment would be reduced to 11 years on account of a year of pre-sentence custody which cannot be declared, and what would otherwise be a parole eligibility date after six years (one half of the effective sentence of 12 years) would be reduced by one year to arrive at a non-parole period of five years. However, a serious violent offence declaration for such an 11 year sentence would not result in a parole eligibility date after five years. It would create parole eligibility after serving 80 per cent of an 11 year sentence.

[53] In a case such as the present, a sentence of 10 years' imprisonment with a requirement to serve eight years before being eligible for parole, when adjusted for a one year period of pre-sentence custody which cannot be declared yields an effective non-parole period of nine years. If the head sentence of 10 years is the result of an adjustment of one year, then one would arrive at an effective head sentence of 11 years with an effective non-parole period of nine years, being more than 80 per cent. An alternative effective sentence in such a case, so as to arrive at an 80 per cent non-parole period, would be to conclude that the sentence imposed of 10 years with a non-parole period of eight years was the result of an effective sentence of 11 years and three months, with an effective non-parole period of nine years. On this approach the adjustment to the head sentence would be one year and three months.

[54] It is unnecessary for present purposes to decide whether, in a case such as this where a period of one year pre-sentence custody should be taken into account, one arrives at the

---

10 At 429.
11 [2016] QCA 328.
12 Ibid.

sentence by deducting one year from the sentence properly imposable or whether the adjustment should be one year and three months. The sentencing judge did not indicate which approach he took but said that he intended to take full account of the pre-sentence custody. It should be assumed that, consistent with the authorities, his Honour did so in arriving at a head sentence which triggered an automatic serious violent offence declaration and a requirement to serve at least eight years before being eligible for parole. This was the equivalent of a non-parole period of nine years once account was taken for non-declarable pre-sentence custody.

[55] If the effective head sentence was 11 years and three months then, as the applicant submits, the allowance for mitigating circumstances, including a very early plea, was nine months. If, instead, the effective head sentence was 11 years then the allowance for mitigating circumstances was one year. Either way, there appears to have been an inadequate reduction for the very early plea of guilty.

[56] If the nominal sentence of 12 years was appropriate before account was taken of mitigating circumstances, particularly the early plea, and an adjustment is made for the period of 12 months spent in pre-sentence custody, then the applicant would appear to be correct in contending that there was an inadequate reduction on account of the guilty plea. It was reflected in a discount of only nine months or possibly one year.

[57] It might be possible to justify a sentence of 10 years' imprisonment with a requirement to serve eight years before being eligible for parole as not being manifestly excessive if the 12 year starting point adopted by the learned sentencing judge was too favourable to the applicant. However, the comparable cases do not support this conclusion.

Comparable cases

[58] The comparable cases provide yardsticks and require consideration of whether they concern:

- similar offending in terms of the scale of operation;
- offenders who were principals or who played a subordinate and more managerial role in the business of drug trafficking;
- offenders who engaged in drug trafficking purely for profit or also to support an addiction;
- sentences imposed after trial or after a plea of guilty.

R v KAQ; ex parte Attorney-General (Qld)[13]

[59] Of the various cases cited by the parties, this decision provides the closest factual similarity in terms of an offender who was not a principal, but who was involved in a major drug trafficking operation. It differs from the present case, however, in that KAQ provided extensive co-operation, including an undertaking which resulted in his being sentenced pursuant to s 13A of the *Penalties and Sentences Act*. Therefore, the indicative sentence, not the actual sentence, stated by the sentencing judge in that case, provides the point of comparison.

---

13 [2015] QCA 98.

[60] KAQ pleaded guilty to trafficking in dangerous drugs (methylamaphetamine, cannabis and cocaine) over a period of 12.5 months. He received a sentence of five years, suspended after two years, with concurrent sentences for other offences including possession of drugs and possession of a weapon. The Attorney-General appealed on the ground that the indicative sentence to which the sentencing judge then applied a discount for s 13A co-operation was inadequate and should have been 10 years or more, thus attracting a serious violent offence declaration. KAQ sought leave to appeal on the ground that his sentence was manifestly excessive.

[61] KAQ had been a childhood friend of Ta, and assisted Ta in a wholesale trafficking business. His main role in Ta's operations was to deliver drugs and collect cash for which he was paid a wage, with bonuses for longer trips, and to rent a storage shed. KAQ delivered large quantities of different drugs and collected at least $1.5 million in drug debts during a period of four and a half months. The conservative wholesale value of the drugs delivered by KAQ for Ta was $4.6 to $4.8 million. Police searched the shed which KAQ hired and found almost two kilograms of pure methylamphetamine in three kilograms of powder, 78 grams of pure cocaine in 194 grams of powder, and eight grams of MDMA in 22 grams of powder, together with a handgun. The drugs in the shed were worth $1.14 million.

[62] KAQ's activities were not at a "managerial level" in Ta's criminal network.[14] Compared to the value of the drugs involved, KAQ made little money from his work for Ta. In total, he received around $30,000.

[63] In addition, KAQ undertook sales to certain customers. Dalton J (in dissent) characterised these as sales to his own customers. Holmes JA (with whom Fraser JA agreed) concluded that it was open to the sentencing judge to find that in making those sales, he was more of an agent, making sales by direction of his principal on a commission, rather than someone independently conducting his own business of selling drugs. In any event, in selling to these two customers on nine occasions, he made a profit of $6,750.

[64] KAQ was aged between 25 and 26 at the time of the trafficking. He had a minor criminal history. He did not use drugs. He appeared to have been influenced by Ta, who lived a lavish lifestyle, and KAQ participated in it.

[65] KAQ's co-operation was extensive. He gave detailed statements to police about his own trafficking, implicated 11 people in the offending and, as noted, gave s 13A undertakings.

[66] Holmes JA, in addressing the Attorney-General's challenge to the indicative sentence and the cases relied upon, noted that there were important differences between the involvement of the offenders in those cases and KAQ's role. The comparable sentences were not of much assistance because:

> "… while the amounts of drugs and money KAQ was involved in moving were extraordinary, his actual role in doing so was at a low level; he collected money and delivered drugs, working for wages.

---

[14] At [31].

> Most of the comparatives pointed to here involved offenders who were trafficking on their own account."[15]

[67] After analysing various authorities, Holmes JA observed:

> "KAQ's involvement might have attracted a sentence around the ten year mark, notwithstanding his low-level role, given the quantities of money and drugs which he collected and delivered, together with the fact that for a period he was directly engaged in a limited dealing in drugs for his own reward. But as his Honour observed, his cooperation in identifying his own involvement, enabling the police to establish the quantities of drugs and cash in the operations, was a significant mitigating factor justifying a lower head sentence [redacted]."[16]

KAQ's provision of information, his youth, his plea of guilty on an ex officio indictment and his lack of previous convictions were factors which, in combination, made the indicative sentence one which was within a proper exercise of the sentencing discretion.

[68] Dalton J dissented and would have allowed the Attorney-General's appeal by sentencing KAQ to seven years' imprisonment with parole eligibility at four and a half years. Her Honour noted that certain unusual features of KAQ's offending meant that there were no closely comparable cases. He was not an addict, was involved in extremely large transactions and engaged in other transactions. He had "little role in management". Because there were no closely comparable cases, Dalton J considered that assistance could be gained from three types of cases:

(a) cases which involve facts comparable to the offending which KAQ undertook on his own behalf, which reveal sentences of between eight-and-one-half years to 10 years on a plea;

(b) cases which involve facts where the defendant trafficked on a scale comparable to KAQ, but on his own account, which reveal sentences of between 13 and 16 years on a plea; and

(c) other cases in which the defendants, unlike KAQ, were dealing either on their own account or at a managerial level, in which the defendants were involved with significantly less drugs than KAQ. These cases reveal sentences of between 10 and 12 years after a plea.

[69] The Court's decision in *KAQ* is authority for the proposition that, absent his extensive co-operation, KAQ might have attracted a sentence around the 10 year mark and that the indicative sentence of less than 10 years was one which was within a proper exercise of the sentencing discretion.

[70] It then becomes necessary to compare the facts of this case to that of KAQ. KAQ was slightly younger than the applicant and had no relevant criminal history. As against that, his offending was not to support a drug addiction. Their roles were similar in delivering drugs, collecting money and hiring a shed in which the principal's drugs were stored. The reward which the applicant received for these tasks is unknown and

---

15 At [7].
16 At [15].

therefore cannot be compared with the weekly wage which KAQ earned or the other amounts he received. However, the applicant seemingly had nothing to show for whatever money or drugs he received by way of payment. He had no signs of wealth and did not live a lavish lifestyle.

[71] In both cases the offender was not a principal, and there is no evidence that either had a management role in the trafficking business. Each performed an essential and significant task of delivering drugs and collecting cash, as well as being involved in some sales.

[72] The scale of the operation in *KAQ* and the scale of the operation in this case are difficult to compare. In some cases the scale of trade, in terms of turnover or profit, may be revealed by information gained by police in the course of an investigation, or from disclosures of offenders or analysis of unexplained income. The conservative wholesale value of the drugs delivered by KAQ was $4.6 - $4.8 million. No comparable figure can be arrived at concerning the turnover of the business in which the applicant worked.

[73] One cannot say if the $426,000 in cash found at the shed represented accumulated profit of the principal over the trafficking period, or working capital to fund further drug purchases. All that can be said is that the trafficking was a large scale, wholesale operation.

[74] The MDMA tablets found at the premises the applicant leased on behalf of the principal were not counted. But based on their weight there may have been 70,000 and 104,000 tablets which, if sold in quantities of 1,000 at $12 each, would have had a value between $622,000 and $1.88 million. The ounce of methylamphetamine had an average value of $7,000. As noted, the drugs found in the premises which KAQ leased on behalf of Ta had a total value of $1.14 million.

[75] Considering the points of similarity and difference, the applicant's criminality and that of KAQ's is broadly similar. *KAQ* supports a similar sentence of around the 10 year mark before account is taken of pre-sentence custody.

[76] KAQ cannot be viewed in isolation. The fact that the effective sentence imposed upon the applicant of 11 years or more with a non-parole period of nine years is much harsher than the indicative sentence stated in KAQ of less than 10 years with parole eligibility after one-third does not, in itself, demonstrate that the applicant's sentence is manifestly excessive.

Other cases relied upon by the applicant

[77] The applicant relied upon three other cases. The cases are not closely comparable and concern principals who pleaded guilty.

[78] In *R v Jacobs*,[17] the applicant was sentenced to 10 years' imprisonment for trafficking methylamphetamine. He was also charged with lesser offences including producing methylamphetamine, possessing methylapmhetamine and heroin, procuring misconduct by a public officer, and on a separate indictment, extortion, burglary and

---

17 [2016] QCA 28.

stealing. He was aged 50 at the time of offending and had a relevant prior criminal history that included a 14 year sentence for trafficking, and convictions of supplying and possessing dangerous drugs. The trafficking period was eight months, during which he completed 260 transactions, and derived unexplained income in excess of $280,000. When considering the sentence, the Court took into account the scale of the applicant's trafficking (stating he had 'control of a criminal enterprise' which involved production at various locations and multiple people working for him) his serious criminal history, that he engaged in serious offending to enforce drug debts and that he offended whilst subject to suspended terms of imprisonment. The terms of imprisonment were not disturbed on appeal.

[79] In *R v Barker*[18] a 45 year old man was sentenced to 10 years for trafficking methylamphetamine. Police identified 38 transactions over a seven month trafficking period. A forensic accountant reported the applicant had more than $1.7 million in unexplained income from the period of January 2008 to April 2009. A search of his home revealed $995,250 in cash. He was not drug dependent and was motivated by financial gain. He pleaded guilty, and this was taken into account in reduction of his sentence. The applicant sought leave to appeal on a number of grounds, including that the sentence was manifestly excessive. The Court found that the sentence was not manifestly excessive and the application was refused.

[80] In *R v Gordon*[19] the question was whether a 10 year head sentence for the offences of trafficking cannabis and methylamphetamine was manifestly excessive. The trafficking was over a five year period, commencing in late 2009. When a search warrant was executed in 2014, a tick list found showed that the applicant was owed $258,000. The search revealed production facilities, including a pill press, and cannabis with a street value of $703,000. A further $50,000 in cash was found in a bag. The applicant was 26 years of age at the time of the sentence, and had a relatively minor criminal history. He argued that the sentencing judge had failed to take into account his age at the time of offending, the absence of violence in any of his offending, and the absence of evidence that money from trafficking was used to fund an extravagant lifestyle or accumulate assets. The Court found these matters had been taken in to account and that there was a level of sophistication to the business, including operating laboratories, using couriers and employing others. The application for leave to appeal was refused.

Cases relied upon by the respondent

[81] The respondent relied upon a number of cases, none of which are closely comparable.

[82] In *R v Milos*,[20] the defendant was sentenced on 14 counts, including possession of methylamphetamine, MDMA, heroin, producing methylamphetamine and trafficking methylamphetamine for which he received a head sentence of 13 years' imprisonment. He was aged 31 at the time of the offending and 34 at sentence. He had a previous trafficking conviction from when he was aged 21 to 22, and subsequent drug-related convictions. The case against him was based primarily on circumstantial evidence. He trafficked over a seven month period. Searches of units which he was alleged to have occupied on different dates resulted in the discovery of various drugs and large

---

18 [2015] QCA 215.
19 [2016] QCA 10.
20 [2014] QCA 314.

quantities of cash. The trafficking count relied on this evidence, and evidence of a witness who said he had personally observed about 50 or 60 transactions at an apartment. He also gave evidence of travelling to Sydney on two occasions to obtain drugs or drug related goods on behalf of the appellant. Milos' appeal against his conviction was dismissed. He also argued that his sentence was manifestly excessive. Taking into account that he had engaged in substantial trafficking at a relative high level of authority within a drug distribution network, had relevant previous convictions, continued trafficking whilst on bail, did not enter a plea of guilty and offered no cooperation or contrition, this Court dismissed the application.

[83] In *R v Nabhan; R v Kostopoulos*,[21] co-defendants were each charged with trafficking a variety of dangerous drugs, namely cocaine, methlyamphetamine, MDMA and GHB. Nabhan was aged 34 at the time of offending and had a minor criminal history. The sentencing judge noted that whilst he was in all respects a subordinate to Kostopoulos, there were instances where he trafficked independently, including where he arranged the purchase of five kilograms of cocaine and 14,000 ecstasy tablets. After initially pleading guilty when the matter was listed for trial, Nabhan attempted to withdraw the plea and this served to "diminish the benefit" that might otherwise flowed to him had there been a timely plea of guilty. His plea was not considered timely, and he had offended whilst on bail. He was sentenced to 13 years' imprisonment. Kostopoulos was aged 41, had a relevant criminal history and pleaded on the eve of his trial after substantial negotiations took place. This Court observed that he had a "sophisticated and well-resourced operation" and that he "used threats of physical violence to recover business debts." He had a number of people working for him, and controlled and financed the trafficking operation. It was also noted that he conducted this extensive criminal enterprise while at liberty on a suspended sentence. He was sentenced to 15 years' imprisonment. Both defendants appealed on the grounds that their sentences were manifestly excessive. Both applications were refused.

[84] In *R v Markovski*[22] the defendant was convicted of possessing cocaine, and trafficking cocaine, methylamphetamine and MDMA over an eight month period. He was sentenced to 15 years' imprisonment. He argued that his sentence was manifestly excessive. He was aged 47 at the time of the offences, with a criminal history "of little relevance". The sentencing judge found that he was highly placed in the drug distribution network, dealt in wholesale amounts, was driven by profit, and demonstrated no remorse. The Court noted that "the circumstance that the appellant has a good work history and a relatively good record is of little moment where the offences for which the appellant was sentenced involved an organised criminal enterprise conducted for profit." The Court concluded that:

> "Decisions of this Court show that in cases of substantial trafficking at a relatively high level in the drug distribution network, a sentence between 11 and 13 years imprisonment is the appropriate range where the offender is entitled to the benefit of a plea of guilty. The appellant was not entitled to that benefit. The sentence which was imposed was within the appropriate range of sentence for trafficking of this order of seriousness."[23]

---

21 [2007] QCA 266.
22 [2009] QCA 299.
23 At [53].

Markovski was not entitled to the benefit of a plea of guilty and the application for leave to appeal against sentence was refused.

[85] Each of these cases, which was relied upon by the respondent in written and oral submissions, involved more serious offending than the applicant's and are otherwise distinguishable:

(a) Milos had a more serious criminal history, having been convicted for trafficking when he was 21 to 22 years of age, for which he received a seven year sentence. He was a substantial trafficker at a relatively high level in a drug distribution network. He did not plead guilty.

(b) Kostopoulos financed and controlled the operation and used a number of people as warehouse keepers, salespersons and couriers. He was said to be "sophisticated and well resourced"[24] and at "the highest level of drug trafficking".[25] The drugs found by police were worth millions of dollars. His plea was on the eve of trial.

(c) Nabhan was "in a sense subordinate to Kostopoulos" but it was not challenged that he was "a major player"[26]. In addition, to supplying Kostopoulos he carried on independent drug activities. His plea was late.

(d) Markovski was convicted after a trial and the sentencing judge found an absence of remorse on his part. He was sentenced on the basis that he was "highly placed in the drug distribution network".

[86] Reliance also was placed upon *R v Versac*,[27] which involved a significant trafficker of drugs who had $1.14 million from unsourced income, including $635,000 cash found in his possession at the time of his apprehension. He was convicted after trial of trafficking in heroin, other drug offences, possession of a weapon and dangerous operation of a motor vehicle. A head sentence of 10 years and six months was imposed but the effective sentence was 12 years and two months when account was taken of pre-sentence custody. He challenged the sentence on the ground it was manifestly excessive, and was comparable to that given to the principal in a trafficking business. However, this Court found that contention was "hollow" given the level of the trafficking, the substantial financial benefit established by the accounting evidence, the profit motivation, the lack of frankness, the absence of remorse, and the relevant criminal history. The application for an extension of time within which to apply for leave to appeal against his sentence was refused.

[87] Other cases can be cited in which principals in substantial drug trafficking operations have received effective sentences of 11 years' imprisonment,[28] or sentences of around 10 years. Further references to other cases involving offenders who were principals or involved at a managerial level in large scale drug trafficking operations is unnecessary since limited assistance can be gained from these cases. The most comparable case remains *KAQ*. The cases upon which the respondent relies to sustain the effective sentence

---

24 [2007] QCA 266 at [19].
25 At [20].
26 At [18].
27 [2014] QCA 181.
28 *R v Raciti* [2004] QCA 359.

in this case were more serious, involving either principals or sentences after trial, or both.

Guidance from other cases

[88] Reliance on cases where there was no plea of guilt, a late plea or a purported withdrawal of a late guilty plea, is problematic. If, for example, there had been an early plea of guilt by offenders such as Milos, Kostopoulos, Nabhan, Markovski and Versac, then it probably would have been recognised by a reduction in the head sentence. The extent of the reduction (and its implication for parole eligibility depending upon whether the sentence, so reduced, was one of less than 10 years) is uncertain. Therefore, their head sentences do not permit a direct comparison between a sentence with the benefit of an early plea of guilty and the applicant's effective sentence of 11 years or more on such a plea. One can say, however, that if those offenders had pleaded then their sentences would be closer, perhaps substantially closer, to 10 years.

[89] Reliance on these cases and also on cases of principals or "senior managers" of large scale drug operations who pleaded guilty are problematic for the reasons this Court expressed in *KAQ*. They do not provide a close comparison for an offender like KAQ or the applicant in this case who performed a subsidiary role on behalf of a principal. How does one compare the principal or "major player"[29] of an operation who earns hundreds of thousands of dollars with a subordinate of a different operation who is paid very little or an uncertain amount?

[90] Clearly, a subordinate like KAQ and the applicant in this case should receive a shorter sentence than the principal or senior manager of the same or a similar large scale operation.

[91] Labels in this context are not very helpful. KAQ was involved in trafficking an extraordinary amount of money and drugs, but his "actual role in doing so was at the low level",[30] and in that role he was working for wages. To label him a courier, even a trusted courier, was incomplete because he rented the shed and had access to its contents and he also engaged in sales. But this did not place him at "a managerial level" in the criminal network. The same may be said of the applicant. No organisational chart exists of the operation which he helped facilitate and, apparently due to fear, he did not disclose the identity of his principal or other persons who he may have known in that organisation. Rather than label the applicant a foot soldier, a poorly paid operations manager or anything else, one must return to what he did: lease the sheds, transport money and drugs and make sales to some customers of the business. He was motivated by financial gain, given his misfortune and the need to support his own addiction. The cash found at the shed seemingly belonged to the principal. The extent of the applicant's "wage" either in cash or drugs or both, is unknown. But this, and the absence of wealth or unexplained income, distinguishes the applicant's case from other cases in which principals or other senior operatives in drug trafficking organisations were shown to have derived substantial profits or large incomes.

[92] Some guidance can be obtained from such cases and it is unnecessary to repeat the analysis of authorities undertaken by Holmes JA or by Dalton J in *KAQ*. In discussing

---

29 *R v Nabhan; R v Kostopoulos* [2007] QCA 26 at [18].

30 *KAQ* at [7].

cases in which the defendant trafficked on a large scale on his own behalf, Dalton J noted, by way of summary, that these cases "reveal sentences of between 13 and 16 years on a plea".[31] One of the cited cases, *Chen*,[32] involved trafficking in Schedule 1 drugs on an extraordinary scale. For example, Chen had an amount of $1.2 million unexplained income over the period of his trafficking. The sentencing judge took 18 to 20 years as a starting point and imposed a sentence of 14 years to take account of mitigating factors, particularly the benefit of an early plea. Cases such as *Chen* suggest that a timely guilty plea will be reflected by way of a substantial reduction of the head sentence where the result remains a sentence of 10 years or more so as to automatically attract a serious violent offence declaration.

[93] The cited cases indicate that when the principals of large scale drug operations like *Jacobs*, *Barker*, and *Gordon* plead, they often receive sentences of around 10 years, and when they do not plead, or plead very late, they receive sentences of 13 years (*Milos*), 13 years (*Nabhan*, a late plea which he sought to withdraw), 15 years (*Markovski*) and 12 years (*Versac*).

[94] On that basis, the starting point for a subordinate like the applicant should be substantially less than 13 to 16 years without the benefit of a plea.

[95] Cases of trafficking by defendants on their own account in apparently smaller operations than the one in which the applicant was engaged cluster around the 10 year mark. *Bradforth*[33] is an example of an effective sentence of 11 years for someone who was 24 to 25 years old, with a significant criminal history and who was in business on his own account. He was not an addict but a drug user.

[96] The analysis by Holmes JA and Dalton J of *Westphal*[34] in *KAQ*[35] is instructive. Westphal supplied between $1.24 and $3.1 million of drugs over a period of 14.5 months. He provided information to the police which assisted the authorities to frame a trafficking charge against him, and he pleaded guilty. He was described as "a middle man", was paid $1,000 per transaction and was sentenced on the basis that he made $215,000 from his trafficking. He was originally sentenced to 10 years for trafficking but in the light of further evidence concerning co-operation, this was reduced to nine years with parole eligibility after six. This Court concluded that the original 10 year sentence "was, while not manifestly excessive, at the high end of an appropriate range".[36] It is hard to see that the applicant's conduct was any worse than the conduct of Westphal and, as noted, unlike Westphal, there is no evidence of an unexplained income.

[97] Some limited assistance can be obtained from cases of subordinates to smaller operations such as *R v Rizk*.[37] He worked for his co-accused, Raciti[38], and obtained large amounts of ecstasy from suppliers at Raciti's direction and distributed it to others. He pleaded guilty to trafficking over a period of between two and a half and three months. He was apprehended with more than 5,000 ecstasy tablets for which he had paid $87,500. He was aged 25 and addicted to ecstasy. His sentence of eight years'

---

31 *KAQ* at [55](b). I note that in regard to *R v Markovski* there was not a plea.
32 [2008] QCA 332.
33 [2003] QCA 183.
34 [2009] QCA 223.
35 At [12] and [63] – [64].
36 *Westphal* at [40].
37 [2004] QCA 382.
38 See *R v Raciti* [2004] QCA 359.

imprisonment was reduced to six years with a recommendation for parole after two years. The applicant's trafficking period is much longer and the total quantity of drugs and cash which he transported on behalf of his principal would seem to be significantly larger than the amounts which Rizk assisted Raciti to traffic. However, the case remains instructive as to a sentence for a subordinate in a smaller scale drug trafficking operation.

[98] The learned sentencing judge referred to the fact that the authorities revealed that engagement in serious drug trafficking on the level in which the applicant was engaged calls for a head sentence in a range of 10 to 15 years' imprisonment. The analysis of the authorities undertaken by Holmes JA and by Dalton J in *KAQ*, and the analysis appearing in these reasons indicates that the range of 10 to 15 years includes the principals of major drug trafficking operations without the benefit of a plea, and that, depending upon the scale of the operation, principals of substantial drug trafficking operations often receive sentences of around 10 years or slightly more when they plead.

[99] As noted, the subsidiary, though essential, role of the kind performed by someone like KAQ or the applicant in a major drug trafficking operation warrants a sentence substantially less than that imposed on the the principal or manager of such an operation. However, in the applicant's case, this begs the question of the sentence that would be imposed on his unidentified principal if more was known about the operation, its turnover and its profit. Based on the comparative cases, it seems that after a plea the sentence for the principal would be more than 10 years, but probably substantially less than 15 years. On that basis, the appropriate sentence for the applicant, as a subsidiary, would be less again.

[100] Having discussed comparable authorities, one returns to KAQ as the closest comparator, the indicative sentence, on a plea of guilty, whilst redacted, must have been less than 10 years since the Attorney-General complained that it was not more, so as to attract an automatic serious violent offence declaration. The observations of Holmes JA in *KAQ*[39] indicate that KAQ's guilty plea (and other mitigating circumstances) justified early eligibility for parole. KAQ collected and delivered an extraordinary quantity of drugs and money and was engaged in selling drugs for his own reward. He was not a drug user. Unlike the applicant, he had no relevant criminal history. Overall his offending is comparable to that of the applicant and favours a sentence around the 10 year mark.

[101] I have had regard to KAQ and other comparable cases as yardsticks in determining an appropriate sentence for the applicant, given his subsidiary role in a major trafficking operation, his relevant, though not extensive, criminal history, his addiction to methylamphetamine at the time of his offending, the absence of evidence of the actual payments in drugs or money he received from his work and the absence of unexplained income or signs of wealth. Like many offenders, but unlike KAQ, the applicant was motivated by the need to earn money or drugs or both. One cannot say whether he was poorly paid for the risks he ran or reasonably paid. There simply is no evidence of his income and he seemed to have nothing to show for his work.

---

39 At [15].

[102] The comparable cases, and *KAQ* in particular, do not suggest that, the learned sentencing judge's starting point of 12 years without the benefit of a guilty plea was too favourable to him.

Conclusion: inadequate reduction for a very early guilty plea

[103] If, contrary to the applicant's first ground of appeal, a nominal sentence of 12 years' imprisonment before account was taken of mitigating circumstances was not manifestly excessive, then a reduction of only nine months or possibly one year from that starting point on account of mitigating circumstances was manifestly inadequate, particularly for a "very early plea". It led to an effective sentence of 11 years or slightly more, and a non-parole period of nine years once account is taken of pre-sentence custody. If only a slightly greater discount had been given for the very early plea then an actual sentence of less than 10 years would have been imposed and the applicant would not have received an automatic serious violent offence declaration. The error in making a manifestly inadequate reduction on account of a very early plea had significant consequences. The learned sentencing judge's transparent reasons reveal this error and warrant the grant of leave to appeal. In my view, the applicant has established the second ground of his appeal.

The first ground of appeal: was a 12 year nominal sentence or starting point manifestly excessive?

[104] My conclusion as to the second ground of appeal makes it strictly unnecessary to decide the first ground. The analysis of comparative cases indicates that the starting point was a very high one, and placed the applicant in the same league as principals in significant drug trafficking operations like Versac who did not plead. To conclude that the starting point of 12 years' imprisonment is high or even excessive does not necessarily make it "manifestly excessive". That issue need not be determined because, in my view, the effect of the starting point, coupled with the inadequate reduction, resulted in a sentence which was manifestly excessive.

An effective sentence of 11 years' imprisonment with a non-parole period of nine years was manifestly excessive in the circumstances

[105] The second ground of appeal having been established, it is convenient to address the essential issue of whether an effective sentence of 11 years (or possibly 11 years and three months) which requires the applicant to serve nine years before being eligible for parole, is manifestly excessive. Having regard to the yardsticks, particularly:

- KAQ's indicative sentence of less than 10 years with an early parole eligibility date on account of his guilty plea;
- principals of large drug trafficking operations;
- subordinates in smaller operations than the one the applicant worked in;

one arrives, in my view, at a sentence of not more than 10 years before account is taken of pre-sentence custody.

[106] The similarity between *KAQ* and the applicant in terms of offending, as well as similarities and differences in their personal circumstances, supports an effective sentence close to the indicative sentence for KAQ, namely slightly less than 10 years. If, however, a similar process of reasoning is adopted to that of the sentencing judge in

arriving at a nominal sentence before account is taken of the guilty plea and that nominal sentence is 10 years or more, then the very early guilty plea would be recognised by a substantial reduction from a nominal sentence of not more than 12 years. Either way, one arrives at a sentence of slightly less than 10 years.

[107] If a sentence of 10 years' imprisonment was arrived at after taking account of a guilty plea, then account would need to be taken of the one year in pre-sentence custody, reducing it to a sentence of nine years. A reduction on account of pre-sentence custody would still be in order, notwithstanding that its effect would be that the applicant was not subject to an automatic serious violence offence declaration. This is because:

(a) the prosecution agreed that the pre-sentence custody should be taken into account in arriving at a head sentence; and

(b) there is no suggestion that the applicant's pre-sentence custody was "banked" by him and that he delayed the sentencing hearing so as to avoid an automatic serious violence offence declaration when account was taken of undeclarable pre-sentence custody.

If one was to adopt a sentence of 10 years before account is taken of pre-sentence custody, then the fact that the reduced sentence does not trigger an automatic serious violent offence declaration might be considered in the exercise of a discretion to nevertheless impose a serious violent offence declaration or, more generally, in fixing a parole eligibility date.

[108] Upon analysis of the comparable cases, I conclude that, as a result of inadequate account being taken of the applicant's very early plea of guilt, he did not receive a sentence of less than 10 years. The consequence was an automatic non-parole period of nine years rather than a non-parole period appropriate to a head sentence of less than 10 years. This resulted in a manifestly excessive sentence.

Resentencing

[109] For the reasons given, a sentence of slightly less than 10 years seems appropriate before account is taken of pre-sentence custody. In cases of this kind, much depends upon whether a sentence is reached after taking the early plea of guilty into account in reducing what would otherwise be a sentence of more than 10 years (the approach adopted by the learned sentencing judge) or whether the sentence is simply arrived at (as in KAQ's indicative sentence) with the early guilty plea to being taken into account principally in fixing a parole eligibility date. If the former applies, then the real benefit of the early plea of guilty is not simply the reduction of a few years from the otherwise indicated sentence. It extends to not being subject to an automatic serious violent offence declaration. In such a case the offender cannot necessarily expect to have the double benefit of an early plea of guilty also resulting in parole eligibility after serving one third.

[110] A sentence of nine years before account is taken of pre-sentence custody is open, principally on the strength of a comparison with KAQ. However I consider that an effective sentence of ten years is appropriate in all the circumstances. Once account is taken of pre-sentence custody, one arrives at a sentence of nine years.

[111] Whilst the offence of trafficking is a "serious violent offence", I do not consider that a serious violent offence declaration is necessary in order to ensure a just sentence. A serious violent offence declaration is not necessary to reflect the seriousness of the conduct. Its seriousness is reflected in the substantial term of imprisonment. The applicant was not the principal of the business and there is no evidence that he was responsible for procuring any firearms or that he used them. The imposition of a serious violent offence declaration as a matter of discretion would result in an excessive sentence in all the circumstances.

[112] As to parole eligibility, the applicant's early plea of guilt remains relevant even if account is taken of it in a general sense in arriving at an appropriate head sentence. Having taken the plea of guilty into account in arriving at an effective sentence of nine years, I do not consider that the applicant should be eligible for parole at the usual one third point on account of his early plea. His substantial steps towards his own rehabilitation whilst on remand are deserving of recognition. Although a subsidiary in the operation, and an addict, he played an essential role in a major trafficking operation. Considerations of personal deterrence, general deterrence and denunciation justify parole eligibility later than the usual one third point. I consider he should be required to serve four years in custody before being eligible for parole. The applicant was taken into custody on 24 February 2016 and accordingly his parole eligibility date should be 24 February 2020.

[113] I propose the following orders:

1. Leave to appeal granted.

2. Appeal against sentence allowed.

3. Sentence varied by reducing the 10 years term of imprisonment imposed on Count 1 to 9 years and set aside the automatic serious violent offence declaration.

4. A parole eligibility date of 24 February 2020 be fixed.