SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bush (No 2)* [2018] QCA 46
PARTIES:	**R** **v** **BUSH, William Myles** (applicant)
FILE NO/S:	CA No 109 of 2015 SC No 100 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 1 June 2015 (Philippides J)
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2017
JUDGES:	Sofronoff P and Morrison JA and Douglas J
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 – where the applicant was convicted after trial of trafficking in MDMA, methylamphetamine and cannabis on count one – where the applicant was 31 to 39 years of age at the time of the offending – where the period of trafficking was four years – where the applicant was sentenced to imprisonment for 13 years – where the applicant contends the sentencing judge failed to have regard to comparable cases – where comparable cases were distinguished with regard to whether an early plea of guilty was made, the level of trafficking, the length of the trafficking period and the age of the offender – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where the applicant contends the sentencing judge erred in finding the applicant had engaged in trafficking activities over a particular period of time – where it was submitted that there was not an adequate evidentiary basis for that finding – where the sentencing judge was prepared to act on the evidence of a particular witness – where the credibility of that witness was contested – whether it was open to the sentencing judge to

make that finding of fact

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where a schedule of facts was used at the sentence hearing which added to the facts established at the trial – where the applicant contends facts which were not established by the evidence at trial were placed before the sentencing judge – where it was contended that these additional facts were inadmissible – where the sentencing judge did not in fact refer to those facts in contention – where the sentencing judge used their discretion to determine facts relevant to the sentencing – whether the sentencing judge's discretion miscarried

R v Bost [2014] QCA 264, distinguished
R v Brown [2015] QCA 225, distinguished
R v Christensen [2002] QCA 113, distinguished
Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym) (2017) 91 ALJR 1063; [2017] HCA 41, cited
R v Gordon [2016] QCA 10, distinguished
R v Markovski [2009] QCA 299, followed
R v Rodd; Ex parte Attorney-General (Qld) [2008] QCA 341, distinguished
R v Tout [2012] QCA 296, cited

COUNSEL: T A Ryan for the applicant
G J Cummings for the respondent

SOLICITORS: Howden Saggers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** Over about seven years the applicant trafficked in dangerous drugs, specifically methylamphetamine, cannabis and 3,4-methylenedioxymethamphetamine (MDMA or ecstasy). Not even his arrest and release on bail dampened his enthusiasm for the business. Eventually he was caught and charged, leading to a five day trial.

[2] On 3 March 2014 the applicant was convicted of the following offences:

(a) count 1: trafficking in MDMA, methylamphetamine and cannabis between 31 December 2003 and 12 April 2011;

(b) count 2: possession of methandienone on 24 June 2009;

(c) count 3: possession of cannabis in excess of 500g on 24 June 2009;

(d) count 4: possession of three reaction vessels on 24 July 2009;

(e) count 5: possession of cannabis in excess of 500g on 24 July 2009;

(f) count 6: possession of MDMA in excess of 200g on 24 July 2009;

(g) count 7: possession of testosterone on 24 July 2009; and

(h) count 8: possession of testosterone on 12 April 2011.

[3] At the sentencing hearing the applicant also pleaded guilty to two summary charges, namely possession of a vehicle suspected of having been used in connection with a drug offence, and possession of property (money in the sum of $62,000) suspected of having been used in connection with a drug offence.

[4] On 1 June 2015 the applicant was sentenced to the following:

(a) count 1: trafficking – 13 years' imprisonment, with a declaration that it was a serious violent offence;

(b) count 2: 6 months' imprisonment;

(c) count 4: 12 months' imprisonment;

(d) counts 7 and 8: 6 months' imprisonment; and

(e) counts 3, 5 and 6: convicted and not further punished.

[5] The applicant seeks leave to appeal against his sentence on the trafficking count, on the following grounds:

(a) ground 1: the sentence is manifestly excessive;

(b) ground 2: the learned sentencing judge erred in finding that the applicant engaged in trafficking activities between the time of his release from custody in 2004 and 2006; and

(c) ground 3: facts which were adverse to the applicant and which were not established by the evidence adduced at trial were placed before the learned sentencing judge and, as a consequence, the sentencing discretion miscarried.

The circumstances of the offending conduct

[6] The circumstances involved in the applicant's offending are set out below. They are taken from the synopsis in paragraphs [1]-[37] of *R v Bush (No 1)*,[1] modified to reflect the agreed schedule of facts tendered at the sentencing hearing, as well as the findings by the learned sentencing judge, both as to additional matters raised in the sentencing hearing, and in respect of disputed facts at the sentencing hearing.[2]

[7] In early 2009 the applicant became a person of interest to the police, who commenced surveillance by telephone intercepts and physical surveillance, including a tracking device in a car.

[8] On 24 June 2009 a car driven by the applicant was intercepted by police. The passenger, and registered owner of the car, was one Gerald Panganiban. The applicant's business cards and key cards were in the car.

[9] In the car the police found a black container holding 195 tablets, which proved to be the steroid methandienone, weighing 22.634 grams. They were the applicant's tablets and the applicant admitted at the trial that he was involved in selling testosterone steroids. The applicant used injectable steroids.

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1 *R v Bush (No 1)* [2018] QCA 45.

2 It is not necessary nor desirable to repeat the entirety of the facts contained in the agreed schedule. What is set out is intended to convey the substantive parts.

[10] Behind the airbag compartment they found a packet containing $62,000 in cash. Both the applicant and Panganiban denied knowledge of the money. However, the applicant's DNA was found on the interior of the airbag compartment cover. Panganiban's fingerprint was found on the inside surface of the plastic tape that secured the package of money.

[11] Three mobile phones were found in the car, one registered to Panganiban and the others in false names.

[12] In the boot was found a black plastic bag that contained 10 plastic packages, each containing about 443 to 445 grams (or about one pound) of cannabis. The weight of the cannabis was 4,409.6 grams, which was about 10 times the prescribed *Drugs Misuse Act* Schedule 3 quantity. The cannabis was for a commercial purpose. It had a street value of $29,000 to $44,000 depending on the quality of the drug. Harbas later told police he was expecting nine pounds of cannabis to be supplied to him by the applicant.

[13] Police searched the applicant's house, which featured security cameras monitoring both inside and outside, and the street perimeter. Police found a small amount of cannabis consistent with personal use. The applicant's partner claimed that as hers. Two further mobile phones were found, apart from one that belonged to the applicant's partner.

[14] Panganiban's flat and a garage at the unit block he occupied were searched. In the unit they found $3,400 cash, and vacuum bags similar to those holding the cannabis in the car boot.

[15] A month later police used keys found in the intercepted car to open another garage which Panganiban had been using, in the same unit block. He attended that garage frequently, sometimes with the applicant. Inside police found three glass chemical flasks (reaction vessels) and a surface condenser. These vessels were of a kind commonly used to manufacture methylamphetamine or MDMA. The vessels did not test positive for drugs, and it was accepted that there was no proof that they had already been used to manufacture drugs, though it was contended that was the purpose. There were other items (glassware, a funnel, lids and rods) consistent with items that could be used for drug production.

[16] The garage also held a refrigerator which contained bottles and vials of Stanazol, testosterone propionate and testosterone. The applicant later admitted that the fridge and its contents were his. The Crown could not refute that some may have been for the applicant's personal use.

[17] A workbench in the garage contained a hidden space in which were eight heat-sealed bags of cannabis, with a weight of 35,559 grams, bagged in lots of about 442 to 450 grams (about one pound). That was seven times the schedule 3 quantity and it had a street value of $23,000 to $35,000 depending on the quality of the drug. It was found to be for a commercial purpose.

[18] In another work bench there were 5,741 pills, weighing 1,333.613 grams. Analysis showed that to contain 265.409 grams of MDMA (ecstasy). That was 132 times the schedule 3 quantity, with a potential yield of between $68,000 to $230,000 depending on whether the pills were sold in bulk or in lesser quantities. This was for a commercial purpose.

[19] Some months later police arrested one Saffet Harbas. He immediately confessed to being a drug trafficker and began telling police all he knew. Police found plastic tubs of methylamphetamine at his house, as well as scales that could be used to weigh the drug. He admitted to trafficking in methylamphetamine, ecstasy and cannabis. He produced to police a sawn-off shotgun and a rifle with an attached silencer. He explained to police that he was one of the applicant's drug couriers or "runners".

[20] Harbas had been buying cannabis, methylamphetamine and ecstasy pills for re-sale from a particular supplier whose business had been interrupted by imprisonment. That dealer had introduced Harbas to the applicant in April 2009 as an alternative supplier.

[21] The applicant and Panganiban met Harbas, the applicant introducing Panganiban to Harbas as one of his runners. The applicant agreed to supply cannabis to Harbas in amounts of five to ten pounds a week. The applicant told Harbas that Panganiban would actually deliver the drugs. The applicant gave Harbas codes that he was to use in text messages to Panganiban. He was told to frame his messages so that they were "gay", by which Harbas meant that the messages should simulate a romantic relationship. However, a four digit number was also to be inserted. The position of a zero in that number would signify the particular drug being requested. So, in the first position a zero would signify methylamphetamine. In the second position it would signify MDMA (ecstasy tablets), in the third position the zero would signify cocaine, and in the fourth it would signify cannabis.

[22] The applicant told Harbas that Panganiban took a percentage of the profits of the business.

[23] Using a phone registered in the name David Tyler, Harbas requested supplies of cannabis, and Panganiban delivered them in "pound" lots in the car which was later intercepted. This was consistent with the 450 gram parcels that had been found in that car. Harbas also purchased ecstasy pills in lots of 100, cocaine in quarter-ounce parcels, and methylamphetamine in four-ounce lots. He made these purchases on credit. Between April and June 2009, when the applicant was arrested, Harbas bought thousands of dollars' worth of these drugs from the applicant.

[24] The police surveillance and the tracking device that had been attached to the car showed that the applicant and Panganiban spent most days of the week together travelling from place to place.

[25] At the end of 2009 the applicant moved from the Sunshine Coast to premises in northern New South Wales which were owned by one Luke Bracken. Bracken had met the applicant in about 2009. Harbas and his girlfriend had helped the applicant move his possessions to his new home. From that point on Harbas began to work directly for the applicant as a runner. The applicant introduced him to his customers, and supplied him with quantities of methylamphetamine contained in larger Tupperware-like containers. Harbas would dilute the drug with an inert substance and package it into four-ounce lots, and deliver those as directed by the applicant. Each four-ounce package was sold by him for $10,000. On one specific occasion Harbas drove to the applicant's home and took delivery of 2,000 ecstasy tablets.

[26] Harbas was intercepted by police driving back from collecting MDMA tablets from the applicant in New South Wales. He had 2,057 MDMA tablets, weighing 490.159 grams of which 161.057 grams was MDMA.

[27] Up to the applicant's arrest in mid-2009 Harbas was buying five to ten pounds of cannabis at a time, and selling over five pounds a week. After December 2009 and into 2010 the applicant asked Harbas to help him run the business. The applicant stored three to four pounds of methylamphetamine at Harbas' house at any one time. Once he started working for the applicant Harbas did not buy cannabis but the harder drugs, methylamphetamine and MDMA.

[28] Harbas was charged and pleaded guilty and, after a successful appeal against sentence, he was ordered to be imprisoned for five years with a period of actual custody of one year.

[29] Another drug dealer, Shane Ronan, bought drugs for re-sale from the applicant. He would buy half or full ounces of methylamphetamine as well as cannabis every two weeks or so. He would then re-sell these drugs in smaller quantities. The applicant was his primary source of supply for methylamphetamine. He also bought ecstasy tablets by the hundreds from him as well as cocaine. He would contact the applicant by text message and would usually receive a response and delivery very quickly. Panganiban had been introduced to him as the applicant's runner and it was he who delivered the drugs.

[30] Ronan had been arrested and he too had become an informant into the applicant's activities. Ronan gave evidence of the applicant's trafficking in the periods before and after his arrest. Ronan's evidence was that the applicant was trafficking in cannabis, speed and ecstasy from as early as January 2004. He purchased about eight one-pound bags of cannabis from the applicant for $3,800 and $4,000 a bag. He also purchased methylamphetamine in quantities of an ounce or half-ounce before he (Ronan) went to jail in 2004, but then in smaller amounts (after his release in November 2004) starting around 2006. Eventually his drug use escalated to the point where he was buying an ounce one or two times a month. Ronan paid the applicant $3,000 per ounce of methylamphetamine prior to 2008, then more (up to $10,000 an ounce) later, though he purchased lesser quantities at that price. He was buying $2,000 of the drug (a couple of grams) each fortnight, and sometimes more.

[31] Ronan said he saw the applicant with kilogram tubs or buckets of methylamphetamine, though it was not clear if that was a reference to the capacity of the tub/bucket or the amount of the drug in it.

[32] Ronan also purchased MDMA (ecstasy) tablets from the applicant, in quantities of 100 to 500 a time, from as early as 2004. He paid $13 to $15 per tablet, the price depending on the quantity and quality. He saw the applicant in possession of such tablets in quantities of 1,000 to 2,000.

[33] In November 2009 the applicant moved to Buderim. Police searched the house in April 2011, finding a quantity of testosterone and some burnt money. It was accepted the testosterone was for the applicant's personal use.

[34] Ronan said that the applicant had runners other than him, referring to a person called Jason as well as Panganiban and Harbas.

[35] The applicant had worked for some time for a company owned by Celeste Cocomero and her husband. They conducted a stonemasonry business. He ceased

working for the company in about 2008. The applicant then approached Mrs Cocomero and asked her to agree to accept sums of cash from him which she would reimburse from her company's bank account to simulate the payment of wages. He told her that the purpose of this scheme was to enable him to demonstrate to a financier that he was employed on a full time basis. The applicant and Mrs Cocomero did this and she handled between $7,000 and $10,000 in this way.

[36] For many years the applicant had maintained an account with a Flight Centre branch office. A ledger produced at the trial showed transactions between 2001 and 2010 involving many thousands of dollars being spent by the applicant on international travel by him and his partner. In about 2007 he told his travel agent at Flight Centre that he was concerned that his travel records might be divulged. He asked the agent to change the name on the account to "William Burns". The account was thereafter conducted under this pseudonym.

[37] The applicant's income and expenses for the period 1 July 2007 to the end of June 2009 were analysed by an accountant. The analysis showed that, taking into account the applicant's known sources of income and his evident expenditure, he had cash income from unknown sources of at least $66,000. This figure did not take into account the $62,000 which had been found in the car when he was arrested.

[38] When the applicant moved onto the property owned by Mr Bracken, the applicant gave him a duffle bag stuffed with $50 and $100 bills. Mr Bracken estimated that there was at least $10,000 in the bag.[3] The applicant asked him to keep it for him. He did so and later returned it when the applicant asked for it.

[39] The phones found in the intercepted car revealed many contacts between the applicant and Panganiban, Harbas and Ronan, and others. The applicant admitted that he had used a phone registered to one West. The applicant had also used a phone registered in the name of Hethfield and another in the name of Steiner.

[40] As an indication of the extent of use of the various phones held by the applicant and Panganiban, between 18 January 2009 and 29 June 2009 there was no contact between the three phones utilised by the applicant, and none between the three phones utilised by Panganiban. However, there were 874 messages and one call between the phones identified as having been utilised by the applicant and those of Panganiban. Not all numbers were utilised over that period, and the applicant and Panganiban would regularly change the number they used.

[41] On 5 April 2009 the applicant used one of these phones to send a text to a sex-worker to arrange a tryst. He asked her to book a room for them at the Emporium Hotel in Brisbane, for which he said he would pay. The applicant retained her services, paid her a sum in the order of $3,000 and also paid for the hotel. On the following day she texted him:

> "Would lov to get 60 to 100 dvd. must b gd quail (sic) prefer rate 5 out of 5."

[42] The applicant responded that he would be in touch.

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[3] At the trial the evidence was that the bag contained at least $10,000 but that Mr Bracken could not say how much more than that. However the jury were addressed by defence counsel on the basis that it contained $100,000. The agreed schedule of facts for the sentencing hearing matched the trial evidence.

[43] These phones were also used to exchange messages with Panganiban. The texts were expressed in a code that, once examined and exposed, implied that those who used it were engaged in an illicit enterprise that they tried to disguise. Thus, the applicant admitted that he commonly used the terms "office", "depot", "workshop" and "job site" as codes for places that he frequented but which were not any of those things. Neither the applicant nor Panganiban had tools of trade, nor were ever observed dressed in work attire. The "workshop" was in fact the garage in which the refrigerator, steroids, cannabis and ecstasy were found. The work theme was used by the applicant and Panganiban when discussing drugs themselves ("nails" and "cement"), although other terms were used by reference to tipping comps, dog food, fishing equipment, hourly rates or other units.

[44] Thus, the applicant texted Panganiban as follows:

> APPLICANT: "im just near plaza … Where you at. … U have a spare labourer with u?"
>
> PANGNIBAN: "No i have to back to the workshop to see who is available."

[45] On another occasion they texted:

> PANGAIBAN: "Is everyone on the 4.2 margin head start for this week's tipping comp."
>
> APPLICANT: "i think he may b 4.3, just feel him out everyone else, started tips @ 4.2."

[46] This last exchange was a reference to the price of a pound of cannabis, namely $4,200 or $4,300. The evidence at the trial was that the market price for a pound of cannabis at the time was about $4,000.

[47] The applicant's phone was then used almost immediately to text Harbas's phone:

> "He is gonna txt u soon."

[48] The applicant could not explain why he used the code when speaking to Panganiban.

[49] One of the phones found in the car had been used to arrange the meeting with the sex-worker. One of the others, registered in the name of one Baker, showed text exchanges with another phone found in the car but registered in the name of Hethfield. These text messages evidenced the arrangement to pick up the user of the Baker phone at the "job site".

[50] The applicant, the Hethfield phone, Panganiban, and the Baker phone were all in the car when it was intercepted. The inference was that these phones had been used by the applicant and Panganiban respectively to arrange for the applicant to collect Panganiban for the trip which police had interrupted.

[51] Numerous messages between these phones and others, that made no sense having regard to the applicant's actual circumstances, but which were capable of being interpreted as coded messages about drug sales, were produced. There were many of these kinds of messages exchanged between the applicant, Panganiban, Harbas and Ronan. There were also hundreds of instances of phone calls between them.

[52] There was no evidence that after Panganiban's arrest he returned to trafficking. The applicant continued trafficking in dangerous drugs while on bail (even when he moved to New South Wales), replacing Panganiban's position in the trafficking structure with Harbas.

Antecedents

[53] The learned sentencing judge set out the applicant's antecedents focussing principally upon his criminal history.

[54] The applicant was born on 7 March 1972 in New South Wales, and was 42 years old when convicted and 43 when sentenced. He was 31 to 39 years of age at the time of the offending with respect to the trafficking count.

[55] He had a criminal history in New South Wales with convictions over the period of 1990 to 1994 including drug offences for which he was fined, on one occasion being put on a recognisance, and on another sentenced to periodic detention.

[56] He also had a Queensland criminal history:

(a) on 13 April 2007 he was convicted of possessing dangerous drugs, which offence was committed in October 2006 when he was intercepted at the airport, having returned from Adelaide, and found in possession of a small amount of cocaine; he was placed on a recognisance with no conviction being recorded; that offence occurred during the period of the trafficking;

(b) on 22 February 2011 he was convicted of possessing property, a smoking pipe suspected of having been used in the commission of a drug offence; he was fined with no conviction being recorded; that offending also occurred towards the end of the trafficking period and whilst on bail; and

(c) on 22 June 2012, subsequent to the offending before the court and whilst on bail for the present offending, he committed an offence of "contravene direction or requirement," in respect of which he was fined with no conviction being recorded.

[57] He also had an extensive traffic history in Queensland including entries over the offending period. He was sentenced for speeding and driving under the influence of drugs with periods of suspension of his licence.

Approach of the learned sentencing judge

[58] The learned sentencing judge set out the circumstances of the offending conduct in some detail, though not replicating all that was contained in the agreed schedule of facts. As will appear, her Honour also dealt with the contested facts, largely concerned with the scope and duration of the trafficking.

[59] Various comparable cases were urged for her Honour's consideration, including *R v Markovski*,[4] *R v Nabhan; R v Kostopoulos*,[5] *R v Mustafa*,[6] *R v Rodd; Ex parte*

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4 [2009] QCA 299.
5 [2007] QCA 266.
6 [2006] QCA 231.

Attorney-General (Qld),[7] *R v Raciti*,[8] *R v Feakes*,[9] *R v Prendergast*,[10] *R v McDougall and Collas*.[11] Her Honour referred to each.

[60] Her Honour also referred to the following matters:

(a) the applicant's criminal history (described as being not of significance), traffic history and personal circumstances;

(b) that no issues of parity arose concerning the sentences imposed on Harbas and Ronan;

(c) the need for condign punishment reflecting the community's condemnation of the illicit drug trade;

(d) that no weapons or violence had been involved;

(e) the psychological reports revealing drug dependence; however, the applicant reported to the psychologists that his trafficking was only in cannabis and steroids, which was not frank; and

(f) the "very belated" expression of remorse.

Discussion

Ground 1 – manifest excess

[61] There were two bases for this ground. The first was simply that the sentence was manifestly excessive having regard to comparable cases. The second was ground 2, which is dealt with separately below.

Applicant's submissions – ground 1

[62] For the applicant it was submitted that making due allowance for the fact that the applicant was convicted after a trial, the sentences imposed on other offenders for drug trafficking offences at a wholesale level, such as *R v Christensen*,[12] *R v Brown*,[13] and *R v Gordon*,[14] each of whom continued to re-offend while on bail, support the contention that a sentence of no greater than 10 to 11 years imprisonment was appropriate in the case of the present applicant where his predominant wholesale trafficking activities occurred between 2008 and 2010.

[63] The offending committed in *Rodd* was objectively more serious because he engaged in what was described as gangster style violence. In the case of *R v Bost*,[15] the trafficking activities were at a high level, even though they were for a shorter period of time than in this case. It was submitted that in comparison, a sentence of 13 years imprisonment imposed even after a trial, is manifestly excessive.

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7 [2008] QCA 341.
8 [2004] QCA 359.
9 [2009] QCA 376.
10 [2012] QCA 164.
11 [2006] QCA 365.
12 [2002] QCA 113.
13 [2015] QCA 225.
14 [2016] QCA 10.
15 [2014] QCA 264.

[64] Notwithstanding the observations of the members of this Court in *R v Rodd*[16] concerning the appropriate notional starting point after discounting for a plea of guilty, a comparison with the sentences imposed on other offenders whose conduct is objectively worse than the applicant's conduct, would lead the Court to reduce the sentence imposed in relation to Count 1.

[65] It was submitted that the sentence to be imposed for the trafficking offence charged in Count 1 ought to have been between 10-11 years imprisonment.

Respondent's submissions – ground 1

[66] For the Crown it was submitted that there was no manifest error or misapplication of principle.[17] Further, that an examination of the various yardsticks confirmed that the imposition of a sentence of 13 years' imprisonment was within the appropriate exercise of the discretion and not manifestly excessive.

[67] *R v Raciti*[18] involved a comparable level of offending but over a shorter period. Making due allowance for the applicant's longer duration of trafficking, the nature of his venture and association with Panganiban and Harbas in particular, the quantity and value of drugs that passed through his hands and his conviction after trial, the outcome in *Raciti* operates as a useful yardstick supporting the sentence imposed.

[68] If the applicant's scale and nature of offending is compared with that in *R v Markovski*[19] no error is apparent. There 15 years' imprisonment was imposed for trafficking in ecstasy and cocaine over an eight month period, by an offender who was highly placed in the drug distribution network, dealing in wholesale amounts. *Markovski* established a benchmark for such trafficking at 11-13 years' imprisonment where there is a plea of guilty.

[69] It was submitted that *R v Nabhan; R v Kostopoulos*[20] was distinguishable, because of: the plea of guilty; previous convictions for possession of drugs for a commercial purpose; he was on a suspended sentence; there was violence. However, given the scale of offending was greater but over a shorter period, nothing in that case suggests manifest excess here.

[70] *Rodd* was distinguishable because it was an Attorney-General's appeal, the period was shorter than that of the applicant, and violence and threats of violence were involved. Further, in light of the Court's comments that a sentence of 12 or 13 years imprisonment would have been appropriate in *Rodd* if the sentence were proceeding afresh,[21] the sentence imposed upon the Appellant after a trial is not excessive.

[71] There were reasons to distinguish each of *Christensen*,[22] *Brown*,[23] *Gordon*[24] and *Bost*,[25] none of which supported the contention of manifest excess.

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16 [2008] QCA 341 at 8 [23].
17 Referring to *House v The King* (1936) 55 CLR 499, 505.
18 [2004] QCA 359.
19 [2009] QCA 299.
20 [2007] QCA 266.
21 *R v Rodd; Ex parte Attorney-General (Qld)* [2008] QCA 341 at 8 [25] and 9 [28].
22 The trafficking was in schedule 2 drugs, not schedule 1; the Court observed that a sentence as high as 13 to 14 years could have been imposed, before consideration of the plea of guilty.
23 The offender was much younger, the period was shorter, and it was a guilty plea.
24 The offender was much younger, the period was shorter and it was a guilty plea.

[72] It was submitted that there was no manifest error or misapplication of principle. An examination of the submissions and remarks reveal not only a discussion of relevant considerations but an accommodation of them. In considering the appropriate sentence the learned sentencing judge weighed all the relevant factors in coming to that particular penalty.[26] The judge did not permit extraneous or irrelevant matters to guide or affect her. The judge did not fail to take into account any material consideration effecting the sentence to be imposed.

Discussion – ground 1

[73] When considering the question of whether a sentence is manifestly excessive, one must bear in mind what was said in *R v Tout*:[27]

> "…a contention that the sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is 'unreasonable or plainly unjust': *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]."

[74] Furthermore, there is no one single correct sentence. Judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the relevant statutory regime.[28] In respect of sentences for manslaughter, because the circumstances are infinitely wide the sentencing judge's discretion is comparatively wide.[29]

[75] Recently the High Court in *Director of Public Prosecutions v Dalgliesh (a pseudonym)*[30] said:

> "While the instinctive synthesis must be informed by each of the factors listed in s 5(2) (of the Sentencing Act), the extent to which each factor bears upon the case is inevitably a matter for judgment. The process of instinctive synthesis thus allows a measure of discretion to the sentencing judge. The discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances. Nevertheless, it is well understood that a sentence may be so clearly unjust, because it is either manifestly inadequate or manifestly excessive, that it may be inferred that the sentencing discretion has miscarried. The question raised for determination by the Court of Appeal in the present case was whether the sentence imposed on the respondent was manifestly inadequate."

[76] As will become apparent there is limited utility in referring to so-called comparable cases if all they do is establish that in different cases sentences different from the subject sentence were imposed, and that all this Court decided was that such

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25 This was a guilty plea and there were greater mitigating factors including a high degree of cooperation with the authorities.

26 Reliance was placed on *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

27 [2012] QCA 296 at [8].

28 *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27], per Kiefel CJ, Bell and Keane JJ.

29 *R v Mooka* [2007] QCA 36, per de Jersey CJ, Williams JA concurring.

30 (2017) 91 ALJR 1063; [2017] HCA 41 at [7].

sentences were not manifestly excessive. Of more utility are cases where this Court has laid down some relevant principle, delineated the yardsticks for particular offending, or re-sentenced.

[77] With that in mind, if comparisons with other cases are to be attempted it is important to properly characterise the offending conduct. Taking the agreed schedule of facts and what was said by the learned sentencing judge it can be summarized below.

Circumstances of the trafficking

[78] The applicant was at the head of his drug distribution network, using a number of employees or "runners" to deliver and collect drugs, and handle money transactions. Four such runners were identified, though not operating at the same time. The applicant also delivered drugs himself.

[79] The trafficking was at a wholesale level, and over a period of seven years and three months, though varying in intensity from time to time. It commenced in January 2004 and ended in April 2011. It involved methylamphetamine, cannabis and MDMA. The applicant determined the price. Sales were sometimes on credit. The applicant had at least 10 customers.

[80] The method used by the business involved codes so that transactions could be disguised, and multiple mobile phones, some of which were in false names. Phones were switched regularly, again to disguise the transactions.

[81] The sums involved are indicated by what the runners said. Ronan regularly paid $3,800 to $4,000 per pound of cannabis. Harbas estimated that he paid the applicant about $250,000 between December 2009 and September 2010. The sums involved are also indicated by the cash discovered: secreted in the airbag compartment of a car was $62,000; in one runner's house was $3,400. There was also the cash of at least $10,000 observed by Bracken.

[82] The quantities of the drugs involved, and their value, are indicated by what the runners said, and what was discovered from time to time.

[83] Ronan bought about eight pounds of cannabis in 2004, and methylamphetamine in varying quantities from 2004, increasing from 2006 after a lull during and after his imprisonment. By 2006 he was buying at least an ounce of methylamphetamine once or twice a month from 2006 to 2008. He paid $3,000 per ounce. From 2008 he bought less because the quality improved and the price went up, but was still buying about $2,000 worth per fortnight. He bought the drugs partly to on-sell.

[84] Ronan also purchased MDMA tablets in quantities of 100 to 500 at a time, from 2004. He paid $13 to $15 per tablet. He on-sold the tablets. On his release from custody in November 2004 his purchasing did not immediately re-commence. Ronan also obtained cannabis from another runner, Harbas. He saw the applicant in possession of MDMA tablets in quantities of about 1,000 to 2,000.

[85] From 2009 Harbas regularly bought methylamphetamine, cannabis and MDMA tablets from the applicant. Until the applicant's arrest in June 2009 he bought five to ten pounds of cannabis at a time, and was selling five pounds a week. Harbas's role included storing, collecting and delivering drugs. Once he started working for

the applicant (when another runner was arrested) he no longer purchased cannabis, but only the harder drugs (methylamphetamine and MDMA). The methylamphetamine would be delivered to him in 16 ounce lots. He would break it into smaller lots, cryovac the bags and store it. He sold one-ounce lots to others on the applicant's behalf, as well as MDMA tablets. Harbas sold to four regular customers.

[86] Discoveries included: (i) 10 one-pound bags of cannabis in the boot of the car, with a street value of between $29,000 and $44,000; (ii) 5,741 MDMA pills, weighing 1.3 kilograms, containing 265.4 grams pure MDMA, and with a street value of between $69,000 and $230,000; (iii) 8 one-pound heat-sealed bags of cannabis weighing 3.55 kilograms, with a street value of between $24,000 and $36,000; (iv) 2,057 MDMA tablets, weighing 490 grams and containing 161 grams pure MDMA.

[87] Discoveries were also made of equipment with the potential for manufacturing drugs.

[88] The applicant's house was equipped with a security camera system so that the inside and outside of the house was monitored, as well as the street perimeter. He used two garages to store drugs.

[89] False records were generated to pretend that those involved were carrying out trade or building work. The codes used words to perpetuate that falsehood, referring to places as "the office", the "depot", the "job site" and the "workshop", when none of those places were that. Drugs were referred to as "equipment", "labourers", "cement" or "nails".

[90] Telephone records showed a large number of drug-related messages passing between the applicant and his runners. For example in one six month period there were 874 such messages.

[91] The applicant continued trafficking after he was released on bail on 25 June 2009.

[92] Financial analysis showed the applicant had unexplained profit of at least $66,000, not counting the $62,000 found in the car. A runner, Panganiban, had unexplained profit of at least $90,000. The applicant made a payment through a travel agency under a false name, in the sum of $270,073; that was at least in part from the trafficking.

The comparable cases

[93] I do not consider that *Christensen*[31] compels the conclusion that the sentence imposed on the applicant was manifestly excessive. There are some limited similarities to this case: the offender was mature (40 at the sentence) with a criminal history of little relevance; the trafficking was described as large scale; it continued while he was on bail. But that is where it ends. He did not go to trial but pleaded guilty. The offence involved only one drug (methylamphetamine), not three. He produced the methylamphetamine, but there was no suggestion of that offender being the principal of a business that employed runners, nor is it clear that it was at a wholesale level. Further, the period was four years, much lower than the seven years here.

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31 [2002] QCA 113.

[94] More importantly Williams JA said:[32]

> "It seems to me that given the magnitude of the operation, the starting point could well have been a sentence as high as 13 or 14 years if one took into the calculation of the head sentence the fact that the trafficking had been carried on after the applicant had been arrested and released on bail on two occasions."

[95] *Christensen* was handed down in 2002, and there have been more recent cases to which reference can be made. Further, the applicant here not only went to trial, indicating no remorse whatever, he disputed matters even through the sentencing process, particularly in an attempt to limit the period of his offending. Given that, the observation by Williams JA suggests that a 13 year sentence is not manifestly excessive.

[96] *Brown*[33] involved a younger offender (23 to 24 at the time of offending) who pleaded guilty to trafficking in methylamphetamine, MDMA and MDEA over a 19 month period. He had a relatively minor and largely irrelevant criminal history. He received a nine year sentence. Much of the trafficking occurred while he was on bail, it was wholesale and "moderately serious".

[97] Whilst there are some similarities with the present case the significant differences are that the period was very much shorter, the offender was very much younger, and he pleaded guilty. In the course of the reasons the Court referred to *R v Johnson*[34] where, once again, the point was made that the more serious cases can attract sentences of 12 to 13 years before mitigating factors are taken into account.[35] Reference was also made to *R v McGinniss*,[36] where Fraser JA said:

> "The Court has recently analysed the relevant sentencing decisions: see *R v Galeano* at [26]-[31], *R v Ryan* [2014] QCA 78 at [43]-[45], and *R v Johnson* at [43]-[46]. As I observed in *R v Safi* [2015] QCA 13 those analyses indicate that, whilst each sentence requires an exercise of discretion with reference to the facts and circumstances of the case, for substantial trafficking in a Schedule 1 dangerous drug of the order of the applicant's trafficking, offenders who have pleaded guilty and invoked a range of mitigating factors have commonly been sentenced to terms of imprisonment of between 10 and 12 years (with the automatic declaration that the offence was a serious violent one)."

[98] Those matters are sufficient to demonstrate that Brown does not support the proposition that the applicant's sentence is manifestly excessive.

[99] *Gordon*[37] concerned trafficking over four (cannabis and methylamphetamine) or five years (methylamphetamine alone). He pleaded guilty and was sentenced to 10 years' imprisonment (on the five year trafficking charge). He was 21 at the start of

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32 *Christensen* at 5; McMurdo P and Muir J concurring.
33 [2015] QCA 225.
34 [2007] QCA 433 at [17].
35 *Brown* at [50].
36 [2015] QCA 34 at [11], referred to in *Brown* at [46]. Citations omitted.
37 [2016] QCA 10.

the offending, and 26 at sentencing. He had previous drug related convictions. Part of the trafficking was while he was on bail. The trafficking was at wholesale level but not very profitable.

[100] The Court held that the sentence was not manifestly excessive, that being the only question for determination. In the course of his reasons Gotterson JA referred to the observations of de Jersey CJ and White AJA in *R v Rodd; Ex parte Attorney-General (Qld)*,[38] that "a sentence of 12 or 13 years imprisonment would have been appropriate, in the event that the sentencing were proceeding afresh at first instance". *Rodd* involved an addict's plea of guilty to trafficking in methylamphetamine at a wholesale level over a shorter period of two years, while on bail, but accompanied by actual and threatened violence.

[101] Those matters show that the conclusion that the sentence in *Gordon* was not manifestly excessive does little to advance the contention that the applicant's sentence was relevantly in error.

[102] *Bost*[39] is of little utility. It concerned a plea of guilty to trafficking in methylamphetamine over about 32 months. It was large scale, wholesale and lucrative, and involved Bost's employment of various persons to carry out the business. He was younger (25 to 27 at the offending and 30 at sentence). However, the principal issue before this Court was whether the sentencing judge should have imposed a serious violent offence declaration.

[103] Of more utility is *R v Markovski*,[40] a sentence imposed after a trial on convictions for trafficking in cocaine and ecstasy over an eight month period. He was sentenced to 15 years' imprisonment. He was 47 to 48 at the time of the offences, and 52 at sentence. He had an irrelevant criminal history. He was highly placed in the drug distribution network, and dealing in wholesale amounts. Though the profits could not be ascertained the learned sentencing judge described the offending this way: "trafficking at a very high level … in wholesale amounts of cocaine and ecstasy … for the obvious motive of making profits … over eight months".

[104] Keane JA said:[41]

> "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."

[105] The cases to which his Honour was referring were *R v Omer-Noori*,[42] *R v Elizalde*,[43] *R v Klasan*,[44] and *R v Slivo*.[45]

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38 [2008] QCA 341 at [25] and [28].
39 [2014] QCA 264.
40 [2009] QCA 299.
41 *Markovski* at [53], Fraser JA and Jones J concurring.
42 [2006] QCA 311.
43 [2006] QCA 330.
44 [2007] QCA 268.
45 [2007] QCA 64.

[106] The applicant's trafficking, summarized at paragraphs [78] to [92] above put the applicant into that category where even if he had pleaded guilty he could have anticipated a sentence as high as 13 years. That sentence, imposed after a trial and where there are no mitigating factors that can be pointed to that have not already been taken into account by the learned sentencing judge, cannot be said to be manifestly excessive.

[107] This ground has no merit.

Ground 2 - engaged in trafficking between release from custody in 2004 and 2006

[108] This ground concerned a finding by the learned sentencing judge expressed in these terms:[46]

> "I am satisfied that the commencement of the trafficking period was early 2004. I do accept, however, that there was a lesser trafficking in the period up to 2006. As I mentioned, I note Ronan's incarceration and his evidence of limited dealings up to that period. As your counsel submitted, the offending in question in terms of an increase in the trafficking commenced from a period later than that."

Applicant's submissions – ground 2

[109] For the applicant it was submitted that there was not an adequate evidentiary basis for the finding. The applicant's counsel placed reliance on material advanced to the Court on behalf of Ronan at the time of Ronan's sentence hearing, that Ronan had not used drugs in the period following his imprisonment in 2004 until 2008.

[110] Given that Ronan's drug trafficking activities were directly connected to his own drug use, it was submitted that the Court would find that there was insufficient evidence of the applicant's drug trafficking activities with Ronan in the period between 2004 and 2008 and that the applicant should only be sentenced for his activities between 2008 and 2010.

[111] In the sentencing remarks, the learned sentencing judge was prepared to act on the evidence of Ronan in relation to a period of trafficking by the applicant in early 2004 and added "I do accept however that there was a lesser trafficking in the period up to 2006".

[112] Ronan's evidence at trial was that he resumed acquiring illicit drugs from the applicant in 2006 after he bumped into him. Ronan said this was after his addiction resumed in 2006. Ronan also testified that there were a few years where he did not see the applicant: "a couple of years and then I bumped into him at the surf club". The concessions made by Ronan did not support the finding made by the learned trial judge.

Respondent's submissions – ground 2

[113] For the respondent it was submitted that there was a satisfactory evidentiary basis for the finding, including those matters noted below.

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46 AB 125 line 45 to AB 126 line 2; see also AB 126 line 35.

[114] Ronan gave evidence that: he had known the applicant for about 10 years; he was introduced to him as someone from whom he could buy drugs including marijuana, speed, cocaine and ecstasy; and he commenced purchasing mainly speed and sometimes cannabis from the applicant once a fortnight.

[115] Ronan confirmed under cross-examination that he had met the applicant a little before 2003, before rejecting a suggestion the first meeting was later at a surf club around 2008 by explaining that he bumped into the applicant at the club having met him on the earlier occasion. Ronan placed his reconnection with the applicant elsewhere in the evidence at around 2006 by reference to his re-establishing his drug habit around that time. Ronan further referred to that chronology when cross-examined about his own history in relation to drugs, confirming that he met the applicant in the period between his appearance in Court in 2000 and 2004.

[116] Ronan differentiated his earlier dealings with the applicant by reference to the applicant later introducing him to Panganiban, then later again to Harbas. That was distinct from his recollection that "right back at the start" there was another person, named Jason, who the applicant introduced as an employee. That evidence was consistent with evidence given by Harbas about statements made to him by the applicant about other persons, including one called Jason, who had previously worked for him.

[117] Other evidence supported the conclusion that the applicant was involved in trafficking drugs prior to mid-2008: for example, evidence of significant unexplained income for the period 1 July 2007 to 24 June 2009 and evidence from the agent at Flight Centre that he was approached by the applicant in about June 2007 and asked to store the applicant's travel details under a false name for privacy reasons.

Discussion – ground 2

[118] A schedule of facts established at the trial was tendered at the sentence hearing. As the learned sentencing judge found, there was no challenge to their accuracy.[47] Her Honour then confronted the task of any necessary fact finding in the areas of disputed fact.

[119] Her Honour summarised the factual disputes:[48]

> "The factual dispute as to the trafficking as outlined in your Counsel's written submissions, and in oral argument, were as follows: (1) whether, as the Crown alleged, you were trafficking in cannabis to a greater extent than that which you admitted to on your own evidence; (2) whether you trafficked in methylamphetamine to an extent greater than described by you and Shane Martin; (3) whether your level of trafficking in MDMA was to the extent described by Harbas in his evidence; (4) whether you engaged Panganiban, and later Harbas, as runners in your trafficking business and (5) the date at which the court should find your trafficking commenced and to which date it continued."

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47 AB 120 line 35.

48 AB 122-123 line 40.

[120] Having reviewed the competing submissions as to the contested facts, the learned sentencing judge made the following findings:

(a) the applicant was not a credible witness, and therefore her Honour was not prepared to proceed on the basis that the cannabis trafficking was restricted to that described by the applicant;[49]

(b) her Honour was not prepared to proceed on the basis that the methylamphetamine trafficking was street-level or confined to that described by a witness, Shane Martin;[50]

(c) her Honour rejected the proposition that the trafficking in MDMA was limited to commercial quantities in July 2009;[51]

(d) the applicant's evidence as to the basis of his association with Harbas and Ronan was rejected; the evidence of Harbas was not rejected;[52]

(e) the jury verdict of acquittal on the cocaine charge was not indicative of the jury's unwillingness to accept Harbas, but simply that the jury obeyed the directions as to being satisfied beyond reasonable doubt;[53] the verdicts were, consistently with the evidence of Harbas and Ronan, that the trafficking was in methylamphetamine, MDMA and cannabis; their evidence was supported by other evidence;[54]

(f) the verdicts indicated that the jury considered the relationship between the applicant and Panganiban to include a commercial association with drugs;[55] and

(g) the verdicts indicated a rejection of the applicant's evidence that his trafficking was restricted to steroids and cannabis.

[121] The learned sentencing judge accepted the Crown's submissions as to the evident basis of the jury verdicts. That was that the jury did not consider the applicant's evidence compelling in light of the Crown case, namely that the applicant was in possession of, and trafficking in, MDMA in July 2009, and trafficking in methylamphetamine.[56]

[122] That answered the first four points raised in the passage set forth in paragraph [119] above.

[123] As to the remaining question, the date at which the court should find the trafficking commenced and to which date it continued, the learned sentencing judge made these observations as to the evidence:[57]

(a) Ronan's evidence was that he started buying drugs from the applicant before his sentence in February 2004;

(b) however, he was in custody for much of 2004, being released in November 2004;

(c) after his release he did not return to his previous level of purchases for some time;

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49 AB 125 lines 7-10.
50 AB 125 lines 10-12.
51 AB 125 line 13.
52 AB 125 line 14.
53 AB 125 line 20 and AB 124 lines 24-28.
54 AB 125 line 20 and AB 124 line 43 to AB 125 line 5.
55 AB 125 line 20 and AB 124 line 16.
56 AB 125 line 20 and AB 123 lines 40-47.
57 AB 125 lines 25-37.

(d) but he had been dealing with the applicant well before he was introduced to Panganiban, including a time when the applicant had used another runner called Jason; the applicant admitted he knew a drug seller called Jason but denied he was the applicant's runner.

[124] The learned sentencing judge then made these findings:[58]

> "In relation to the start date of the trafficking, to the extent that Ronan was at times unclear on some matters relating to dates and timeframes, I accept the Crown's submission that regard has to be given to the fact that some of that lack of clarity is attributable to the passage of time, and that it is not indicative of Ronan being dishonest or wholly unreliable. I am, on balance, prepared to act on the evidence of Ronan in relation to the early period of the trafficking as a factual basis for the sentence to be imposed. I am satisfied that the commencement of the trafficking period was early 2004. I do accept, however, that there was a lesser trafficking in the period up to 2006. As I mentioned, I note Ronan's incarceration and his evidence of limited dealings up to that period. As your counsel submitted, the offending in question in terms of an increase in the trafficking commenced from a period later than that."

[125] Resolution of this ground requires some analysis of the evidence from Ronan, as the learned sentencing judge rejected that of the applicant, a position not challenged on this application.

[126] Of some note is the submission made on the applicant's behalf at the sentencing hearing:[59]

> "I've already said that if it's accepted that [the applicant] was trafficking prior to 2008, then your Honour would accept that that was for a very short period prior to Mr Ronan's incarceration in 2004."

[127] One of the applicant's submissions was that a passage from this Court's decision on Ronan's appeal, *R v RAR*,[60] should weigh against the evidence of Ronan in this trial. The passage is:

> "[25] It was suggested to the sentencing judge that the applicant did not use drugs during his period of imprisonment following the 2004 sentence, and until 2008. In 2008 one of the applicant's siblings died in a motor vehicle accident. As a result the applicant returned to drugs "in a big way". It was described in these terms:
>
> > "In terms of his drug use, it was significant. [He is] not able to estimate to what extent, but at the time that he was first arrested, he was in a very bad way …"."

[128] That submission should be rejected. The fact that a submission made on Ronan's behalf some time before his evidence at the trial differs from that evidence does not

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58 AB 125 line 39 to AB 126 line 2.
59 AB 97 line 34.
60 [2014] QCA 312 at [25].

lead to a conclusion that the evidence at trial is to be rejected. Unless Ronan was confronted with the discrepancy at the trial it has little impact. The submission made is also explicable as being the product of some counsel's understanding of what was said, as opposed to actual fact.

[129] Ronan's evidence at the trial, as to when he started dealing with the applicant, can be summarized this way:[61]

(a) as at the trial he had known the applicant for about 10 years;[62] that evidence was given in February 2014, so it was open to conclude he meant early 2004;

(b) he was introduced to the applicant as someone Ronan could buy drugs from, specifically speed, marijuana, cocaine and ecstasy;[63]

(c) before he met the applicant Ronan was a seller of the drugs marijuana, speed and ecstasy;[64]

(d) after he met the applicant he purchased drugs from him, specifically speed and marijuana;[65]

(e) "right back at the start" the applicant had a person called Jason working for him supplying drugs;[66]

(f) he continued to deal with the applicant up until Ronan's arrest in 2011;[67]

(g) an answer he gave about purchasing marijuana from the applicant was referrable to "before I went to jail the first time";[68] he first went to jail in 2004;[69]

(h) he met the applicant "a little before 2003", and denied that he only met him about six years before the trial, i.e. 2008; he said he bumped into the applicant at the Kawana Surf Club, but "I already knew him before that"; he had met the applicant and bought drugs from him prior to six years ago (2008); he knew the applicant "way beforehand" than the six years being suggested;[70]

(i) when he bumped into him at the surf club he (Ronan) had not seen the applicant for a few years, or a couple of years; but the applicant first started selling to him "about 13 years ago";[71]

(j) he told police that he had purchased drugs from the applicant over a 10 year period;[72]

(k) when he came out of custody at the end of 2004 he tried to stay clean of drugs, but "started to develop [his] addiction again" in 2006;[73]

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61 References to his evidence are from the Appeal Book in CA 203 of 2014.
62 AB 275 line 39.
63 AB 275 lines 20, 36-37.
64 AB 276 lines 7-14.
65 AB 276 lines 23-28, AB 277 lines 15-45.
66 AB 280 lines 6-12, AB 281 lines 4-7.
67 AB 285 line 24.
68 AB 294 lines 43-47.
69 AB 302 lines 20-22, AB 317 line 41.
70 AB 296 lines 29-42, AB 301 lines 17-22.
71 AB 302 lines 5-13.
72 AB 308 line 41 to AB 309 line 12.
73 AB 309 lines 14-20.

(l) he bumped into the applicant again in 2006 and his initial purchases were in smaller amounts than before;[74] and

(m) he met the applicant before he went to jail in 2004, and purchased drugs from him prior to going to jail in 2004.[75]

[130] Once the learned sentencing judge found that Ronan's evidence should be accepted, there was an ample evidentiary foundation for the findings in paragraphs [123] and [124] above. It was conceded on this application that it was open to the learned sentencing judge to accept their evidence and make those findings.[76] Ronan's concessions as to the period when he had not seen the applicant before bumping into him at the surf club did nothing to detract from his primary evidence that he knew the applicant by 2004 and bought drugs from him from that time.

[131] Equally the fact that Ronan was in jail for part of 2004 does not mean that there was no basis for the learned sentencing judge to conclude that trafficking probably continued in the interim. Accepting Ronan's evidence, the applicant was trafficking in early 2004 using another runner called Jason, and was still trafficking when Ronan got out of jail later that year. There was no suggestion that the applicant had been in jail in the interim.

[132] There is no merit in this ground.

Ground 3 - facts adverse to the applicant and not established at the trial

[133] This ground concerned a schedule of facts used at the sentence hearing, which added to the facts established at the trial.

Applicant's submissions

[134] The applicant's submission was that at the sentence hearing on 8 May 2015, which took place 15 months after the trial, a schedule of facts was tendered, paragraph 91 of which contained a series of facts which were not established at the trial. Those extra facts were:

(a) two months prior to his arrest in 2009 the applicant had organised for 300 pounds of cannabis to be delivered up in a truck from South Australia, but it was intercepted by police;

(b) after his arrest in 2009 the applicant referred to having lost $690,000 as a result of the police;

(c) the applicant had received a Commodore as payment for a $25,000 drug debt and had sold the car for $18,000;

(d) the applicant had taken another station wagon as payment for a drug debt owed by someone who worked at Ultra Tune in Caloundra;

(e) a shop owner at Buderim owed him $12,000-$15,000; and

(f) another person from Kawana owed him $6,000.

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74 AB 314 lines 4-19.
75 AB 317 line 43 to AB 318 line 2.
76 Appeal transcript 2-67 lines 4-9.

[135] During the hearing before this Court another fact listed in paragraph 98 was identified as being said by the applicant to Harbas, namely that he (the applicant) had spent as much as $500,000 on first class travel. It was accepted that Harbas did not give that evidence at trial.

[136] It was submitted that the facts upon which the applicant should have been sentenced were those established at the trial. The additional material was inadmissible and therefore the sentencing discretion miscarried, even though the learned sentencing judge did not refer to those facts.

Respondent's submissions

[137] For the Crown it was submitted that the fact that the agreed statement of facts contained the extra facts in paragraphs 91 and 98, and they were not given at the trial, was irrelevant. As long as the sentencing judge handed down a sentence consistently with the jury's verdict then the minutiae of the activity was irrelevant. The facts on sentencing are not confined to those at the trial.

[138] Further, not only did defence counsel accept that those facts were accurate, she made the express submission to the learned sentencing judge that her Honour should look outside the trial evidence.[77]

[139] Given the delay between the sentencing hearing on 12 May 2015 and when the sentence was handed down on 1 June 2015, it was inconceivable that the learned sentencing judge had not examined the trial record, rather than the summary schedule.

Discussion – ground 3

[140] The applicant's contentions on this ground suffer from several difficulties.

[141] First, the statements referred to were put into a schedule of facts tendered to the learned sentencing judge. There was no objection to their inclusion by the legal representatives appearing for the applicant. It is the case that counsel appearing on the sentence was different from the trial counsel, however that cannot be said of the solicitor who represented the applicant.[78] It is also accepted that the facts referred to were not, in fact, given in evidence by Harbas at the trial. Nonetheless the schedule was agreed, and one can infer, on instructions. Her Honour referred to the fact that the correctness of the schedule was not in dispute.[79]

[142] Secondly, no reference to those facts was made by the learned sentencing judge. Her Honour set out the circumstances of the offending in considerable detail, from the agreed schedule but not including all that was set out in that schedule. For example the agreed schedule contained considerable detail of the evidence of Harbas and Ronan, including the detail of text messages, much of which her Honour did not find necessary to refer to for the purposes of sentencing.

[143] Her Honour adverted to part of her task in this way:[80]

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77 Referring to a passage at AB 83 line 25 to AB 84 line 15.
78 Brisbane Criminal Lawyers represented the applicant at both the trial and the sentence hearing.
79 AB 120 line 36.
80 AB 120 lines 36-40.

> "I am required to form my own view of the facts where a finding of fact is necessary for sentencing and has not been resolved by the verdict of the jury. My findings of fact must not be inconsistent with the verdicts of the jury. In making my determination the relevant evidence is that which was before the jury for their determination on the trial."

[144] That was the approach urged by both sides at the sentence hearing. Given that statement it cannot be doubted that her Honour approached the task of identifying the facts relevant for sentencing purposes with some considerable care. Those facts did not include those that were the subject of this ground.[81]

[145] Thirdly, the facts to which objection was taken were included in a schedule, about which the applicant's counsel knew and accepted that some facts in it did not come from the trial evidence, but rather from evidence given on the *voir dire*. However, subject to checking some minor matter, the learned sentencing judge was told that there was no issue as to its correctness.[82] Moreover, that was said by counsel for the applicant after having taken time to check items in the schedule. For example, even at the sentence hearing there was a residual dispute about the content of paragraphs 57 and 58 of the schedule. The applicant's counsel was granted time to finally check it, and announced that there was no issue.[83]

[146] More importantly, there is no doubt that the facts in the schedule, quite apart from the identified ones in paragraphs 91 and 98, went beyond the evidence at trial. That was specifically said in relation to paragraphs 57 and 58.[84]

[147] In terms of the identified items in paragraphs 91 and 98, it is true to say that Harbas did not give that evidence at the trial but the facts in the schedule were admitted to be true before the learned sentencing judge. If they were to be challenged as untrue or inadmissible at the sentencing hearing then they would have become disputed facts about which evidence from, say, the applicant could have been given. If they were now to be said to be untrue, or inadmissible, then some basis for that would have to be shown. No attempt was made to do that, beyond pointing to the fact that Harbas did not give that evidence at the trial.

[148] Fourthly, the learned sentencing judge was confronted with a contested sentencing hearing in which a central contention for the applicant was that the evidence of Harbas and Ronan should be rejected as unreliable and not capable of supporting a finding of trafficking over the period or to the extent asserted by them.[85] The Crown's contention was that the wholesale rejection of Harbas and Ronan was not warranted, and that the whole of the evidence at the trial had to be considered.[86] In dealing with the contentions her Honour said: "I have carefully assessed the evidence of Ronan and Harbas, mindful of the matters to which your counsel has pointed…".[87]

[149] In our view there is no demonstrated basis to doubt that her Honour did just that, that is, carefully assess the trial evidence of Harbas and Ronan, and that was the

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81 In fact, the Crown's outline referred to many paragraphs of the agreed schedule when outlining the circumstances of the offending, but paragraphs 91 and 98 were not referred to.

82 AB 21 lines 4-29.

83 AB 78 line 40 to AB 80 line 35.

84 AB 78 line 43.

85 AB 124 lines 30-41.

86 AB 124 line 43 to AB 125 line 5.

87 AB 125 line 17.

primary source of consideration rather than the summary in the schedule. After all, there was a considerable delay between conviction and sentence, and in the sentence hearing itself, which commenced on 8 May 2015 and concluded on 12 May 2015. There was then another period of delay until 1 June 2015 when the sentence was handed down. It is, in our view, very difficult to conclude that in the interim the learned sentencing judge did not examine the trial evidence in detail. Her sentencing remarks suggest that she clearly did. If that be so, as we consider it is, then the identified items in paragraphs 91 and 98 of the schedule, to which objection is taken, fall away as they were not part of the evidence considered.

[150] In our view there is no merit in this ground.

Disposition

[151] For the reasons expressed above, we would refuse the application for leave to appeal.