SUPREME COURT OF QUEENSLAND

CITATION:	*R v Olssen* [2018] QCA 114
PARTIES:	**R** **v** **OLSSEN, Matthew Francis** (appellant/applicant)
FILE NO/S:	CA No 297 of 2016 SC No 86 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Townsville – Date of Conviction & Sentence: 21 October 2016 (Holmes CJ)
DELIVERED ON:	8 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2017
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant/applicant was convicted after a two day trial of one count of trafficking in a dangerous drug, one count of possessing a dangerous drug exceeding 200 grams (methylamphetamine) and one count of supplying a dangerous drug (methylamphetamine) – where three separate transactions were relied upon by the Crown to form the count of trafficking – where one of those transactions involved a witness who picked up a package but did not look at the contents of that package – where the Crown submitted below that there was strong evidence to suggest that what was inside that package was an illegal substance and in particular, the dangerous drug methylamphetamine – whether the evidence adduced in relation to this transaction was insufficient to prove that it involved a dangerous drug CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the trafficking offence was a serious one encompassing three to

four months in which there were three incidents when substantial quantities of methylamphetamine were supplied – where the appellant/applicant was sentenced to nine years imprisonment for that offence – where counsel for the appellant/applicant submitted on appeal that (i) parity considerations meant that nine years was excessive; (ii) the learned sentencing judge gave no indication of her intention to set a parole eligibility date beyond 50 per cent of the head sentence and (iii) inadequate reasons were given for the setting of that parole eligibility date – whether the appellant/applicant was denied procedural fairness and the sentencing discretion miscarried

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
R v AAH & AAG (2009) 198 A Crim R 1; [2009] QCA 321, followed
R v CBM [2015] 1 Qd R 165; [2014] QCA 212, distinguished
R v Doolan [2014] QCA 246, distinguished

COUNSEL: A Vasta QC for the appellant/applicant
D Meredith for the respondent

SOLICITORS: Malouf Criminal Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** On 21 October 2016, after a two-day trial, the appellant was convicted and sentenced in respect of three drug-related offences:

(a) count 1: trafficking in a dangerous drug – nine years imprisonment;

(b) count 2: possessing a dangerous drug exceeding 200 grams (methylamphetamine) – conviction recorded but not further punished;

(c) count 3: supplying a dangerous drug (methylamphetamine) – convicted but not further punished; and

(d) parole eligibility set after serving six and a half years imprisonment.

[4] The appellant appeals against this conviction, and seeks leave to appeal against this sentence. The appeal against conviction is on the ground that the evidence adduced in relation to the first of three transactions relied upon by the Crown in respect of count 1 was insufficient to prove that it involved the dangerous drug methylamphetamine. The ground advanced in respect of the application for leave to appeal against the sentence is that there were three specific errors relating to parity and the imposition of a parole eligibility date beyond 50 per cent of the head sentence.

Facts in relation to the first transaction in count 1

[5] Some formal admissions were made[1] in relation to the first transaction. They were that:

(a) on 12 July 2011 a passenger by the name of Stewart Grainger was scheduled to travel by plane from Townsville to Brisbane, leaving at 8.35 am and arriving at 10.20 am;

(b) on 12 July a passenger by the name of Stewart Grainger travelled from Brisbane to Townsville by bus, departing at 2.00 pm and arriving on 13 July 2011 at 1.35 pm; a ticket for the journey was purchased by Grainger at Roma Street Station; and

(c) on 14 July 2011 a money order in the sum of $2,500 was purchased in the name of Stewart Grainger; the money order was made payable to "Matt Olsen" and payable at "Australia Fair".

Evidence of Grainger

[6] Grainger gave evidence that he knew a person by the name of Peter Heilbronn, who was the owner of a business in Townsville. He took a trip on behalf of Heilbronn in July 2011 to Brisbane. There he met a man called "Matt Olssen", the appellant. He had previously met the appellant at a nightclub in Townsville.[2]

[7] When asked to recall the conversation with Heilbronn it was in these terms:

> "Now, the trip that we're talking about, how did that trip come about; how did you come to go on that trip? --- Peter Heilbronn asked me if I wanted to do a trip to Brisbane.
>
> Okay. Now, did he tell you why you were going to Brisbane?---Yes.
>
> And what did he say to you about why you were going?---It was to pick up drugs.
>
> Okay. Did you ask him what drugs it was?---Yes.
>
> And did he give you a response?---Yes.
>
> And what was his response?---He said it was something to do with my habit, because I had an amphetamine habit at the time.
>
> Okay. So he said it was something to do with your habit ---Yep.
>
> And at the time you were using amphetamines heavily?---Yes.
>
> Okay. And how long had you been using amphetamines heavily for?--- Six months or a year."[3]

[8] Grainger gave evidence that he flew down, taking $10,000 in cash which had been given to him by Heilbronn. Heilbronn told Grainger that he was to give the $10,000 to the appellant. The $10,000 was provided to him "wrapped up as a present".

[9] Grainger said that he went to the mall in Brisbane, as directed by Heilbronn, and to Hungry Jacks to meet the appellant. His account of what then happened was in these terms:

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1 Appeal Book (**AB**) 167.
2 AB 62.
3 AB 63 ll 1-21.

> "And where in Hungry Jacks did you meet Matt Olssen?---Upstairs.
>
> Okay. Now, when you were with Matt Olssen in Hungry Jacks, did you speak to anybody else?---I spoke to Peter Heilbronn on the phone.
>
> Okay, on the phone. And whose phone was that, do you remember?---Matt Olssen's, I think.
>
> Did you give Matt Olssen anything in Hungry Jacks?---Yes, $10,000.
>
> Okay. And, again, was that upstairs?---Yes.
>
> Any particular place upstairs?---In the bathroom.
>
> Now, after that, or after you gave him the money, what did you then do?---We then went into a car park.
>
> And where was the car park?---It was attached to one of the shopping centres in the Brisbane mall.
>
> Okay. Was it a multi-level car park?---Yes.
>
> Okay. Did you go on a particular level, if you can recall?---I don't recall, sorry.
>
> Now, in the car park, what transpired between you and Mr Olssen?---Mr Olssen gave me a massage-type sports machine and I stuck it in my bag.
>
> Okay. Were you carrying a bag?---Yes.
>
> And what type of bag was it?---A large travel bag.
>
> And if we can talk about the massage machine, are you able to describe it for the members of the jury?---It was some kind of a sporting machine or massage machine, it was about a foot wide by about a foot high."[4]

[10] Grainger then made his way to the Roma Street Station where he took the bus to Townsville. On his way back to Townsville he got off at the Alligator Creek Roadhouse where he was picked up by a man called Jeffrey Alexander. Alexander drove him to Heilbronn's house where he and Alexander tried to open the machine with some screw drivers. They were unsuccessful, and then drove to where Heilbronn was and dropped the machine off to him. Grainger said he was paid $2,500 for making the trip to Brisbane and back.[5]

[11] In cross-examination Grainger was asked to clarify the comment in his evidence in chief, where he said that he had been using amphetamines for six months or a year. Having established that Grainger used cannabis regularly, this exchange then occurred:[6]

> "Right. And not only were you using cannabis, you also used methylamphetamines?---Yes.

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4 AB 64 l 17 to AB 65 l 12.
5 AB 66 l 19.
6 AB 79 ll 16-21.

> And you'd indicated to Mr Crane here that your usage of methylamphetamines was, what, for six months or so, or how long did you use methylamphetamines for---?---For long periods.
>
> ---When you first start using – pardon?---Long periods."

[12] Later in cross-examination he was asked about the conversation with Heilbronn concerning the contents of the parcel he was to collect from the appellant in Brisbane. The exchange was as follows:

> "And as to what was in there, you can't say that there wasn't cannabis inside that – that parcel, because you didn't see it?---I don't believe there was cannabis in there, no.
>
> You don't know?---No, I don't know, but---
>
> I'm going to suggest, can you categorically state there wasn't cannabis inside that parcel you took back?---Yes.
>
> All right. And that was because you believed Mr Heilbronn was describing your methylamphetamine addiction not your cannabis addiction?---That's right."[7]

[13] During the course of his evidence Grainger identified several recordings which had been made during telephone intercepts on Heilbronn's mobile telephone. In the first, at 10.21 am on 12 July 2011, Heilbronn called Grainger to ask how he was going. Grainger told him that he had just landed in Brisbane.[8] Referring to somebody, Heilbronn told Grainger "Well, just give him a quick doodle, just let him know you're here". Grainger identified that call as being between himself and Heilbronn.

[14] The next call was identified as being between Heilbronn and the appellant. Part of that call involved the appellant handing his phone to Grainger so that Grainger could speak to Heilbronn. The next telephone conversation was at 11.36 am on 12 July 2011.[9] The opening conversation was between the appellant and Heilbronn, with the appellant saying that he had not seen Grainger before, and Heilbronn reminding him that he had: "Remember at the, at the um, the globey". The reference to "globey" was to the nightclub in Townsville of which the appellant had been a part-owner and where Grainger had worked as a disc jockey. The conversation continued with the appellant evidently complaining about the amount of money, saying "Yeah well this is down two and a half too", and Heilbronn responding: "… yeah, yeah, yeah, yeah, yeah, yeah, … that's all he had handy you know what I mean". Then the appellant asked Heilbronn: "Hey ah whats the go he never brought that other job with him either" and Heilbronn told the appellant "That's a whole different kettle of fish".

[15] As that conversation progressed, the appellant put Grainger on the phone to speak to Heilbronn, saying "I'll just throw him on the phone quickly". Grainger then spoke with Heilbronn, who told him "Alright, yeah just do what you gotta do and um, be careful". Heilbronn also instructed Grainger "Just give us a buzz when ya, couple of hours from that, you know where ya, or an hour from … where we said".

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7 AB 87 ll 15-25.
8 AB 290.
9 AB 293-294.

[16] Grainger identified the voices on that phone call as being himself, Heilbronn and the appellant. Further, in cross-examination Grainger repudiated the suggestion that on 12 July he did not actually meet with the appellant.[10]

[17] After Grainger had returned to Townsville the evidence included a number of intercepted telephone calls between Heilbronn and his supplier[11] in relation to Heilbronn paying the extra $2,500. The instructions were that the money had to go to Southport. That evidence coincided with the admissions in relation to the money order.[12]

[18] In a conversation intercepted on 14 July 2011 Heilbronn and the appellant referred to the machine which Grainger took back to Townsville. The appellant told Heilbronn to make sure he kept the machine because "it cost me three hundred bucks".[13]

[19] As Grainger travelled back to Townsville on the bus he made a number of phone calls to Heilbronn which were intercepted. In those calls he reported to Heilbronn where he was and how much longer it would be until he arrived. For example, at 10.32 am he reported that he was in Bowen and would probably be a bit over an hour or an hour and half until arrival.[14] At 11.47 am he reported that they had not yet reached Ayr,[15] and at 12.48 pm he reported that he thought they were about 20 minutes away from arriving. Heilbronn told Grainger to go with Alexander, who was going to drive to Heilbronn's place ("He's gonna go up to my joint first"), and that Grainger was to then "come up over here and I'll … pay ya".[16] Grainger's evidence was that he was paid $2,500 for making the trip.[17]

Count 3 – the second transaction

[20] Count 3 was the supply of methylamphetamine to Alexander on 26 August 2011. The appellant was found guilty on that count, and no appeal ground challenges that verdict. That fact is important as count 3 is the second transaction in the trafficking charge.

[21] The admissions contained relevant information about this count or transaction:[18]

(a) on 26 August 2011 Alexander travelled from Townsville to Brisbane by plane;

(b) contacts in Alexander's phone revealed a number saved under the name "matty" or "Mattt";

(c) on the same day at approximately 9.30 am Alexander received a text message from "Mattt", asking "R u in city mate".

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10 AB 87 l 27.

11 Given the money order payable to Matt Olssen (paragraph (c) above) and Grainger's evidence, the jury could infer that this was the appellant.

12 Telephone conversations on 13 July 2011, AB 301-302; AB 305. Telephone intercept on 14 July 2011, AB 310-311.

13 AB 309.

14 AB 297.

15 AB 298.

16 AB 299.

17 AB 66 l 19.

18 AB 167-168.

(d) on 27 August 2011 Alexander was arrested at the Magnetic Island ferry terminal with an esky in which was a container with a screw top lid; within the esky were four individually wrapped blocks of methylamphetamine, each weighing about one pound; the total weight was about 1.8kg and the total weight of pure methylamphetamine was 318.4g;

[22] Alexander was called by the defence. His evidence was that on 26 November 2014 he pleaded guilty to the possession of four pounds of methylamphetamine, that being the drugs intercepted at the Magnetic Island ferry terminal. He said that Heilbronn asked him to do a run to south east Queensland on about 26 August 2011, and he caught a flight to Brisbane from Townsville on that day.[19] He said that after landing in Brisbane he got on a train and went straight to Nambour where he collected a few pounds of marijuana and took it back to Townsville on a bus.[20] He said that the methylamphetamine intercepted at Magnetic Island came into his possession on the morning he got back from Brisbane, when a friend dropped it off to him in Townsville.[21] He denied meeting, seeing or speaking to the appellant.

[23] In cross-examination Alexander disagreed that he picked up four pounds of methylamphetamine when in Brisbane on 26 August. However, Alexander agreed that at his sentencing his counsel addressed the court on the basis that the acts on 26 and 27 August 2011 were "the facilitation of the transportation of the four pounds of methylamphetamine to Brisbane to Townsville".[22]

Count 1 – third transaction – supply to Bruniera

[24] The particulars of this transaction was that the appellant supplied methylamphetamine sourced or facilitated, or conducted the actual supply of methylamphetamine to a one Christopher Bruniera on 24 September 2011.

[25] Bruniera's evidence was that he had pleaded guilty to two counts of possession of methylamphetamine relating to the transportation of those drugs in September 2011.[23] On his evidence the events occurred because a person called Safi asked him to go to Brisbane to collect some drugs. Bruniera collected some money from Safi and then drove to Brisbane. Upon arrival in the Brisbane CBD he met a male person. That person was in Bruniera's car for no more than 20 minutes and gave Bruniera a package of marijuana.[24] He said he could tell it was marijuana from the smell. He said his destination with the cannabis was Rockhampton, where he met another person, called Wolf. He gave the marijuana to Wolf and that Wolf gave him the methylamphetamine.[25]

[26] Bruniera said that he used some methylamphetamine himself in Rockhampton while with Wolf. Later he left for the drive to Townsville, taking an inland route through Emerald, Clermont and Charters Towers. Later, after his arrest in Townsville, he told police that he had buried the methylamphetamine in Charters Towers because he was scared.

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19 AB 104.
20 AB 105.
21 AB 106.
22 AB 109 ll 15-27.
23 AB 91.
24 AB 93.
25 AB 93-94.

[27] In cross-examination Bruniera said that he could not be sure what was in the package he collected in Brisbane as it was all wrapped up and he did not see it.[26]

[28] Bruniera agreed in cross-examination that he had previously given evidence that what he received in Brisbane was "like, a little sack wrapped up in, like, a cloth".[27] He agreed that he did not tell the police or anyone else that he had traded a quantity of cannabis for methylamphetamine, and said it was because he was trying to look after Wolf.[28] He denied that he got the methylamphetamine from the appellant, or had his phone number or spoke to him on the phone.[29]

[29] The admissions in respect of Bruniera included the following:

(a) in September 2011 he transported a quantity of drugs from Brisbane to Townsville on behalf of Safi;

(b) he collected the drugs in Brisbane and travelled down and back by car; on the way back to Brisbane he stopped over in Rockhampton;

(c) on his arrival in Brisbane he arranged a meeting in the Brisbane CBD, where he met a male person described as "maybe mid-20s to mid-30s roughly"; that person got into Bruniera's vehicle and left a sack wrapped in cloth in the car;

(d) on the way back, at Charters Towers, Bruniera got scared and buried the drugs;

(e) when he was intercepted by police on 26 September 2011 on the Flinders Highway heading towards Townsville, they located a small amount of methylamphetamine in his car, and seized his phone;

(f) he instructed police where he had buried the drugs in Charters Towers and they were recovered; there was about 322g of methylamphetamine substance, with a calculated weight of methylamphetamine at 58.980g; and

(g) there was an exchange of contacts between Bruniera's phone and another number; those exchanges were between 3.56 pm and 5.34 pm on 24 September 2011 and again at 5.34 on 25 September 2011.

Submissions - Conviction

[30] Mr Vasta QC, appearing for the appellant, submitted that all three transactions relied upon by the Crown were part of the trafficking charge. However, the first incident when Grainger went to Brisbane to collect a package from the appellant (or the Grainger transaction) was not made the subject matter of a separate charge of either supplying a dangerous drug or possessing a dangerous drug. It was submitted that the evidence in respect of the first transaction was insufficient to prove that the transaction involved the transfer of a dangerous drug. The only evidence relevant to what the package contained came from Grainger, and he did not look at the contents.

[31] It was further submitted that if the evidence adduced in relation to the Grainger transaction was insufficient to prove that the contents of the parcel was a dangerous

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26 AB 96-97.
27 AB 100 ll 21-24.
28 AB 101.
29 AB 102.

drug, that evidence was then irrelevant and should not have been led. Consequently, the leading of that evidence created prejudice to the appellant's case as it impermissibly bolstered the evidence relevant to the trafficking count. Without that evidence one could not be satisfied that the jury would have convicted the appellant on the trafficking count. Alternatively, the state of that evidence meant that the whole evidence concerning count 1 was unsafe and unsatisfactory.

[32] Mr Meredith, appearing for the Crown, submitted that there was strong evidence of the arrangement between Heilbronn and the appellant. Heilbronn directed Grainger to travel to Brisbane, pay the money to a man identified as the appellant, who would then give him a package. The telephone intercepts reveal the acts done in concert between Heilbronn and the appellant. It was submitted that there was strong evidence from which to conclude that the package given to Grainger in Brisbane contained an illegal substance. That evidence included the instructions to Grainger to travel to Brisbane by air and return by bus, spending only a few hours in Brisbane; the handing over of cash in the toilet at Hungry Jacks; the delivery of the package which was supposedly only a massage machine; the fact that he was paid $2,500 to make the trip; the conversations with Heilbronn when Grainger was told that the drugs he was collecting were "something to do with my habit", which was a methylamphetamine habit; and the fact that the machine in the package only cost $300, when $10,000 in cash was handed over for it, and then an additional $2,500 sent later.

[33] It was submitted that once it was reasonable to conclude that the package contained an illegal substance, it was reasonable to conclude that it was a drug and methylamphetamine. That was supported by the seizures of methylamphetamine which was supplied to Alexander and Bruniera by the appellant. In each of those cases the appellant used a courier supplied by the buyer, on two occasions the courier being an associate of Heilbronn and on the third, an associate of Safi. It was submitted that the series of calls between Heilbronn and the appellant and between Safi and his supplier, supported the conclusion that the appellant was the supplier on all occasions, and that the drug was methylamphetamine. Therefore no improper prejudice had been suffered by the appellant.

Discussion

[34] The approach on the appeal against conviction accepts that the jury could have been satisfied beyond reasonable doubt of the second and third transaction in respect of count 1. That is to say, the approach on ground 1 effectively concedes that it was open to the jury to be satisfied beyond reasonable doubt that:

(a) the appellant supplied methylamphetamine to Alexander on 26 August 2011; that it consisted of four blocks of methylamphetamine, each of one pound; the total weight was about 1.8kg and the total weight of pure methylamphetamine was 318.4g; and

(b) the appellant supplied methylamphetamine to Bruniera on 24 September 2011; apart from the small amount in Bruniera's car, the total weight was 322.571g, with a calculated weight of methylamphetamine at 58.980g.

[35] That being the case, the jury had evidence which they could accept to the requisite standard that the appellant supplied methylamphetamine to Alexander, acting as

a courier for Heilbronn, and supplied methylamphetamine to Bruniera, acting as a courier for Safi.

[36] In my respectful view it was open to the jury to find beyond reasonable doubt that the parcel collected by Grainger in Brisbane contained dangerous drugs, and in particular methylamphetamine. If the jury accepted Grainger's evidence then they could have accepted the following:

(a) that he was asked to fly to Brisbane, collect a parcel from a man at Hungry Jacks and immediately get on a bus back to Townsville;

(b) that he was collecting drugs;

(c) that the drugs were to do with his methylamphetamine habit;

(d) having met the appellant they both went to the toilet where the money was handed over, and then went to a car park where the package was handed to Grainger;

(e) the $10,000 handed over was short by $2,500;

(f) the machine handed to Grainger only cost $300;

(g) Grainger was paid $2,500 to make the trip;

(h) while he was with the appellant, Grainger was told by Heilbronn to do what he had to do, but to be careful and to call Heilbronn when he (Grainger) was close to Townsville; and

(i) the trip was undertaken on the instructions of Heilbronn.

[37] That evidence would, in my view, lead to the conclusion that the package collected in Brisbane from the appellant was a package of dangerous drugs, and almost certainly methylamphetamine. The value of what was collected was not the machine, which was worth only $300. To suggest that $10,000 in cash which was handed in a clandestine way, in the course of a short stop on a return trip to Townsville, and when the contents had been identified at least as drugs, and were to be handed to Heilbronn, was payment for anything other than dangerous drugs is fanciful.

[38] Once that evidence was combined with the other transactions with Alexander and Bruniera, there was, in my view, sufficient evidence for the jury to be satisfied beyond reasonable doubt that the drugs supplied by the appellant to Grainger on 12 July 2011 were not only dangerous, but also methylamphetamine.

[39] This ground lacks merit.

Ground 2 – misdirection on propensity

[40] During the appeal leave was granted to the appellant to raise a new ground, that there was a misdirection to the jury in respect of their use of the evidence for counts 2 and 3. Mr Vasta QC formulated the ground as: the learned trial judge erred in failing to give a direction that each of the charges in counts 2 and 3 should have been viewed separately and that the evidence in relation to each of those charges ought not to have been considered admissible, either in respect of the consideration

of guilt in relation to counts 2 and 3, or in relation to the first transaction in count 1 (the Grainger transaction).

Submissions

[41] Relying on *R v Doolan*[30] and *R v CBM*[31] it was submitted that the learned trial judge told the jury that the Crown case was that the drug in the Grainger transaction was methylamphetamine and that was consistent with the later seizures of methylamphetamine from Bruniera and Alexander.[32] The evidence of the three transactions were, it was accepted, relevant to the trafficking count but it was submitted that the evidence was not cross-admissible either as to the parties involved or the drug supplied.

[42] It was accepted that the learned trial judge correctly directed that each count had to be considered separately, but the contention was that her Honour did not direct that the evidence in each was not cross-admissible. That produced a miscarriage of justice in that the failure created the danger that the jury reasoned that the appellant had a propensity to supply methylamphetamine in counts 2 and 3, and therefore supplied methylamphetamine in the Grainger transaction.

[43] For the Crown Mr Meredith submitted that this was not a case where propensity evidence was relevant, but the identity of the drugs supplied to Grainger depended on inference drawn in a circumstantial case. Therefore there was no need to make the direction contended.

Discussion

[44] In my respectful view, the contentions on this ground should be rejected.

[45] The trial was conducted, from the defence point of view, on one real point, namely that the appellant could not be shown to be the supplier in any case, and (relevantly) the Grainger transaction. True it is that an attack was made on the proof that the Grainger transaction involved methylamphetamine as opposed to anything else, but the real thrust was as to identity.

[46] The learned trial judge reminded the jury of that fact during the summing up:[33]

> "And plainly enough, whoever gave the methylamphetamine to the courier … possessed it before it was given to him, and the giving of it to him would be a supply. There's no suggestion either possession or supply was done lawfully. Again, the real question for you is whether it was [the appellant] who did those things."

[47] Trial counsel for the appellant acknowledged as much during the sentencing submissions when he referred to the trial as "effectively a single point trial".[34] The trial was not concerned with any issue of propensity. That was not raised at any point by counsel or the learned trial judge. For that reason *R v Doolan* and *R v CBM* are distinguishable. Each concerned the directions needed to prevent a jury from impermissibly

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30 *R v Doolan* [2014] QCA 246.
31 *R v CBM* [2014] QCA 212.
32 AB 133.
33 AB 136.
34 AB 157 l 19.

reasoning that the accused's propensity on one count meant he was guilty on another.[35]

[48] However, if the jury accepted that the appellant was the supplier to Grainger then the fact that the drug supplied on counts 2 and 3 was methylamphetamine was admissible as circumstantial evidence as to the identity of the drug supplied in the Grainger transaction. When viewed with Grainger's evidence that (i) what he was collecting was drugs, (ii) the transaction was connected with his methylamphetamine addiction, and (iii) the cash handed over was vastly in excess of the value of the massage machine in the package, the later supplies were admissible to support the inference as to the identity of the drug supplied.

[49] In any event, the particulars of count 1 did not stipulate that the drugs supplied to Grainger were methylamphetamine, but rather that they were simply a dangerous drug. True it is that the Crown ultimately relied on that as a possibility because of Grainger's evidence, and addressed on that basis (as reflected in the summing up), but given the particulars and that the only real issue in the case was as to identity, it is not surprising that defence counsel did not see the need to press for a direction such as is contended. For the reasons above such a direction would likely have deflected the jury from its proper task.

[50] The learned trial judge directed the jury that each charge had to be considered separately, that the evidence on each charge had to be evaluated separately from the others, and that the jury had to be satisfied beyond reasonable doubt on each charge.[36] No complaint was made as to that direction.

[51] In my view, this ground lacks merit.

Conclusion on appeal against conviction

[52] The appeal against conviction should be dismissed.

Application for leave to appeal against the sentence

[53] The three issues on the application for leave to appeal against sentence were: (i) that parity considerations meant that nine years was excessive; (ii) that the learned sentencing judge gave no indication of her intention to set a parole eligibility date beyond 50 per cent of the head sentence of nine years, and (iii) inadequate reasons were given for setting the parole eligibility date.

Submissions

[54] Mr Vasta QC submitted that at no stage did the learned sentencing judge foreshadow that the parole eligibility date might be set higher than the halfway mark. Nor, it was said, was the possibility of a serious violent offence declaration (**SVO**) part of the consideration. The consequence was that the appellant was denied procedural fairness and the sentencing discretion miscarried.

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35 See *Doolan* at [32] "… should also have directed the jury that the evidence in support of one count must not be treated as tending to prove an inclination by the appellant towards the conduct alleged in the other count". See *CBM* at [51] "… such a direction should in this case have incorporated a warning not to engage in impermissible propensity reasoning".

36 AB 136-137.

[55] Further, it was submitted that the learned sentencing judge did not give any reasons for the imposition of a parole eligibility date beyond the halfway point.

[56] For the Crown, Mr Meredith submitted that for a serious trafficking offence, concerning methylamphetamine as the jury evidently accepted, a sentence above 10 years was always possible and therefore the possibility and impact of an SVO would have always been part of defence counsel's consideration. Given that the appellant went to trial and the 10 year sentence on the co-offender, Safi, was the result of a plea of guilty, two things followed: (i) parity considerations were heavily influenced by the fact that Safi's sentence was the product of his plea, meaning that it would not automatically follow that the appellant would get less than 10 years, and (ii) if parity considerations meant that the appellant's head sentence was reduced below the 10 years or more that otherwise would have been imposed, therefore giving him the benefit of not serving 80 per cent under an SVO, the way in which the seriousness of the offending could be balanced against the appellant's cooperation with the administration of justice (principally by the extensive admissions that reduced the time of the trial) was by treating the benefit as coming off the head sentence and increasing the parole eligibility date beyond 50 per cent. The exchanges between the learned sentencing judge and defence counsel showed that defence counsel recognised that.

Discussion

[57] The trafficking offence was a serious one. It encompassed a period of three to four months in which there were three incidents when substantial quantities of methylamphetamine were supplied.

[58] The Alexander transaction was four pounds, a total of 1.8kg with 318.4 grams pure. The purity was above street level deals, and the street level sales from it on a point basis could have totalled $900,000. If sold by the ounce it would attract about $540,000. The learned sentencing judge held that the appellant was a wholesaler, and therefore supplies wholesale would have attracted a value of between $240,000 and $280,000.

[59] The Bruniera transaction was 322.571 grams, with 58.98 grams pure. The purchase price was, the learned sentencing judge held, likely to have been about $40,000. Its purity level was above that of street level deals. At $50 per point the sale price was more than $161,000. Sold by the gram it was worth about $97,000.

[60] The Grainger transaction involved an unknown quantity but it was accepted by the learned sentencing judge to be a commercial quantity. Grainger handed over $12,000 but the purchase price was likely higher.

[61] Others in the drug network had already been sentenced when the appellant's sentence was imposed. Heilbronn, a wholesaler in the network, was sentenced to 11 years after a 17 day trial. He trafficked in cannabis and methylamphetamine over a six and a-half month period. He had done seven cannabis runs, and sold the drugs in pound lots. The four pounds seized from Alexander at the Magnetic Island Ferry terminal were Heilbronn's drugs.

[62] Safi was sentenced to 10 years after a plea of guilty. He trafficked over two periods. The first was nine months in 2011, and the second (while he was on bail) was over eight days in November 2012. In the first period the transactions included that of Bruniera. The value of the drugs was between $150,000 and $200,000.

[63] Alexander, a mere courier, was sentenced to seven years. In addition to the methylamphetamine transaction he was involved in several supplies of cannabis. The learned sentencing judge correctly held that no parity issue arose with respect to his sentence.

Parity

[64] The appellant's submissions are that the learned trial judge erred in assessing his criminality as just below that of Heilbronn, contending that it was "much lower".[37]

[65] In *Green v The Queen*[38] it was held that the parity principle is designed to ensure equality before the law, and takes into account that equal justice according to law generally requires that "like cases be treated alike" and that there be "differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law".[39]

[66] In *R v AAH & AAG*,[40] Fraser JA referred to the parity principle in this way:

> "I record my respectful agreement with Chesterman JA's remarks about the parity principle, to which White J has also referred. In that respect, in *Lowe v The Queen* (1984) 154 CLR 606 the High Court held that equal justice requires that, as between co-offenders, there should not be a marked disparity between their sentences which gives rise to a justifiable sense of grievance; if such a disparity arises the more severe sentence should be reduced even if it is otherwise within the permissible range of sentences. In *Postiglione v The Queen* (1997) 189 CLR 295 Dawson and Gaudron JJ pointed out that the parity principle raises a question which does not merely concern the imposition of different sentences for the same offence, but rather one which concerns the due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality.
>
> In *Postiglione* Kirby J insisted that perfect consistency between the sentences of co-offenders is not necessary and that a sentence is to be reviewed only where the disparity is such as to engender a 'justifiable sense of grievance' on the part of the prisoner or 'give the appearance that justice has not been done'. (The quoted words were those of Gibbs CJ in *Lowe v The Queen* at 610). Gummow J put the test in similar, although perhaps even more demanding terms, in the same case (*Postiglione* at 323):
>
> > "The principle for which *Lowe* is authority appears to be that the Court of Criminal Appeal intervenes where the difference between the two sentences is manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done".

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37 Appeal outline at [13].
38 (2011) 244 CLR 462; [2011] HCA 49.
39 *Green* at 473 [28].
40 (2009) 198 A Crim R 1; [2009] QCA 321.

> Put another way, the question is whether an objective comparison of the sentences reveals what Mason J called (in *Lowe v The Queen* at 611) a 'badge of unfairness'."[41]

[67] There are similarities between the criminality of the appellant and that of Heilbronn. Each was a wholesaler of drugs, working in the same network. Each used couriers and each trafficked in methylamphetamine; in Heilbronn's case, also in cannabis. Each conducted a number of drug runs: Heilbronn seven, with the last one aborted; the appellant, three. Two of the runs were common, Alexander's four pounds seized at the ferry, and Grainger's supply in Brisbane. Heilbronn was sentenced on the basis that the Grainger transaction was methylamphetamine.

[68] But there are some differences. In Heilbronn's case there was evidence of an interest in cannabis supplies. Heilbronn was more prolific and over a slightly longer period. The Bruniera supply did not concern Heilbronn. Heilbronn was on bail when he committed further offences in 2013, and he was found in possession of a commercial quantity of drugs. However, his sentence was expressly on the basis that the 2013 offences did not influence it.

[69] Such differences as there are do not, in my respectful view, compel the conclusion that the appellant's criminality was "much lower" than Heilbronn. They were each wholesalers dealing in methylamphetamine, in the same network, and with common transactions forming part of the supply chain. The differences noted above are differences of degree, not so much as of the order of the criminality.

[70] In any event there was a difference in the sentences imposed, reflecting parity issues. Heilbronn received 11 years, which attracted an SVO meaning that he had to serve 80 per cent. The appellant received nine years, a 20 per cent reduction on Heilbronn's sentence, and he avoided the mandatory 80 per cent.

[71] In my view, an objective comparison of the sentences does not reveal what Mason J called a "badge of unfairness". I am unpersuaded that there was relevant error in this respect.

Failure to notify intention re the parole eligibility date

[72] The exchanges between the learned sentencing judge and counsel are important to a resolution of this issue.

[73] Trial counsel for the Crown contended that a 10 year sentence was open.[42] If that submission was accepted then an SVO would follow automatically. It was therefore a live issue that the appellant might be required to serve more than 50 per cent of the head sentence.

[74] Defence counsel made several points as to the appellant's offending, preparatory to his submission that the appropriate sentence was eight to nine years. They were that: (i) the evidence of what was actually paid was $25,500 (the $12,500 by Grainger, and the $13,000 by Bruniera); (ii) the actual trafficking transactions were between 24 June and 26 September 2011; (iii) the Alexander and Bruniera

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41 *AAH & AAG* at [9]-[10] and [21]-[22].

42 AB 152 l 1.

transactions were ones where the drugs were seized and therefore there were no sales of them; and (iv) he was really a middle-man to Safi and Heilbronn.[43]

[75] However, defence counsel could not have assumed that his submission would be successful, and therefore there remained the chance that a higher sentence would be imposed, and it could be 10 years or more.

[76] Further, it was self-evident that this was a sentencing following a trial where no remorse was shown or suggested, even though there was cooperation in streamlining the trial, and delay not attributable to the appellant. Consequently there was no guarantee that the parole eligibility date that could rationally be obtained was one lower than 50 per cent of the head sentence.

[77] The course of submissions by defence counsel included an unsuccessful attempt to portray the appellant as merely an employee of Heilbronn.[44] Counsel then turned to the sentence imposed on Safi. A submission was made that Safi's offending was "far more serious" than the appellant's offending, "leaving to one side the plea of guilty" by Safi.[45] That prompted this response from the learned sentencing judge:[46]

> "Yes, but it's always very difficult to leave that plea to one side. Because of the nature of these where you're getting a serious violent offender declaration, that there's very little way to accommodate that except in the head sentence."

[78] In my respectful view, that signalled the possibility that if the sentence ended up at 10 years, thus attracting an SVO, the only way to factor in the lesser level of offending as between the appellant and Safi, and thus deal with parity issues, was to adjust the head sentence, not necessarily make any adjustment to the parole eligibility date.

[79] Counsel understood the comment that way, it seems, as he immediately turned to the issue of parity.[47] It was submitted that the appellant's sentence should be less than that of Safi (10 years with an SVO) and in the eight to nine year bracket.[48]

[80] Then followed this exchange with the learned sentencing judge:[49]

> "JUDGE: You can't just say he should be less than Safi and stop at that, because you've also got the counterbalancing factor that Safi's a plea. So you can't say less than 10 just on the basis of that.
>
> COUNSEL: I'm just saying on the parity aspect. Even taking into account the plea of guilty, your Honour, so far as Safi is concerned you have the very aggravating features of committing - - -
>
> JUDGE: I understand what you say about Safi being more serious.
>
> COUNSEL: Yes.

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43 AB 156-157.
44 AB 159.
45 AB 159.
46 AB 159 l 44.
47 AB 160.
48 AB 160 ll 5-10.
49 AB 160 ll 12-41; emphasis added.

> JUDGE: But if what you're saying to me is Safi gets 10, it follows your client gets less, that won't work.
>
> COUNSEL: No. No. Even taking into account the factors that could be taken into account on Safi's favour, the offending – even considering that – placed Safi's case in a far more serious category than the offending, including the fact that he went to trial, of Mr Olssen, your Honour. I'm submitting that … Mr Olssen's case … even taking into account the plea of not guilty – rests somewhere between eight and nine years, but **I would also ask your Honour to take into account the cooperation with the administration of justice and the delay aspect of it in either reducing the head sentence or recommending an earlier parole**.
>
> JUDGE: **Earlier than what?**
>
> COUNSEL: Well, … if your Honour concludes nine years was appropriate – **your Honour can take it into account in one of two ways, obviously, and either taking it off the head sentence or further ameliorating it so far as a recommendation for parole**, but I don't think I can take that any further."

[81] There are a number of matters that emerge from that exchange and the learned sentencing judge's comment referred to in paragraph [77] above. First, the learned sentencing judge plainly indicated that parity considerations were heavily influenced by the fact that the sentence in Safi was the product of a plea of guilty. The sentence of 10 years in Safi's case would have been higher had it been imposed after a trial. The sort of discount often granted for a timely plea of guilty might suggest that a sentence as high as 12 or 13 years was possible. That was the implication behind the learned sentencing judge's comment that just because Safi had a sentence of 10 years it did not follow that the appellant would get less.

[82] Secondly, that being the case, it would have been clear to defence counsel that there was still a possibility of a sentence of 10 years, thus attracting an SVO. Carried with that was the prospect of the appellant being required to serve more than 50 per cent of the head sentence.

[83] Thirdly, as defence counsel recognised, one option to achieve the appropriate balance from a parity point of view was to reduce the head sentence instead of an earlier parole date. In my view, it was clear that if that option was followed, the consequence might well be that the head sentence was reduced from what it would have been, solely for consideration of parity considerations, but if no change was made to the original 50 per cent halfway point for parole eligibility, the period to be served as a proportion of the total would increase beyond 50 per cent.

[84] Fourthly, this was a sentence being imposed after a trial. Apart from the streamlining of the trial by way of admissions, there was no remorse or other mitigating factor that would obviously warrant the parole eligibility date being set otherwise than at the halfway mark. That being the case, the learned sentencing judge's response to the suggestion of earlier parole, namely "earlier than what?", signified a date otherwise than at the halfway mark.

[85] In my respectful view, the matters referred to above show that there was always a prospect of the appellant serving more than 50 per cent of the head sentence, and that prospect was confronted by defence counsel.

Failure to give reasons

[86] The final matter raised on the application was that the learned sentencing judge did not give adequate reasons for her conclusion that the time served before parole eligibility should be beyond the halfway mark. I do not accept that contention. The passages referred to in paragraphs [73] to [80] above make it plain that it was the consideration of parity issues that led to the adjustment of the sentence imposed on the appellant, when compared to that imposed on Heilbronn or Safi, which led to the amelioration of the head sentence, but not the time served. As the learned sentencing judge said in her reasons, the appellant's criminality was "just below the level of Heilbronn's", and the parity considerations arose particularly with Heilbronn, and to a lesser extent with Safi. The sentence imposed on Heilbronn (who went to trial) was 11 years which, with the SVO, led to him not being eligible for parole for eight years and eight months. The learned sentencing judge said:

> "It seems to me I have to balance these things: the requirement for parity; the fact that you co-operated by making admissions which shortened a trial, which could have gone for some weeks, to three days; and the fact of the delay so that this matter has been hanging over your head for five years, which it's accepted is no fault of yours. It seems to me that balancing all those features, the proper sentence is one of nine years' imprisonment with parole eligibility after six and a half years in respect of the trafficking count."[50]

[87] In my view, the learned sentencing judge gave adequate reasons for the sentence imposed.

Conclusion on the application for leave to appeal against sentence

[88] I do not consider the grounds advanced have any real merit. I would refuse the application for leave to appeal against sentence.

Disposition

[89] I would propose the following orders:

1. The appeal against conviction is dismissed.
2. The application for leave to appeal against sentence is refused.

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50 AB 164 ll 23-29.