SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davenport* [2018] QCA 330
PARTIES:	**R** **v** **DAVENPORT, Douglas James** (applicant)
FILE NO/S:	CA No 24 of 2018 SC No 1402 of 2016 SC No 1525 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 15 January 2018 (Martin J)
DELIVERED ON:	30 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2018
JUDGES:	Morrison and Philippides and McMurdo JJA
ORDER:	**The application for leave to appeal be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant pleaded guilty to a number of serious drug offences – where the applicant was sentenced to an overall period of imprisonment of 11 years and nine months – where the longest term of imprisonment was nine years and nine months imposed for an offence of trafficking in methylamphetamine and heroin – where no parole eligibility date was set – where the applicant's trafficking was part of an enterprise directed by Dang – where the applicant was subordinate to Dang, but still engaged in the trafficking at a "managerial level" – where Dang was sentenced to 10 years and six months' imprisonment, attracting a serious violent offence declaration and a non-parole period of 80 per cent of the head sentence –where the applicant supplied drugs to Cao – where Cao was sentenced for trafficking to nine years' imprisonment, with an early parole eligibility date taking into account time spent in immigration detention – where Cao's trafficking was not part of the same enterprise as the applicant's – whether there was disparity between the sentence imposed on the applicant for the trafficking offence and the sentences imposed on Cao and Dang

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where the applicant engaged in drug trafficking to support his own addiction – where there was evidence at the time of sentence that the applicant had been collecting methadone prescriptions, working full time and volunteering – where the sentencing judge remarked that the applicant's reoffending on bail suggested that his prospects of rehabilitation were not obvious – where the sentencing judge reduced the notional head sentence to take into account undeclarable presentence custody and other mitigating factors – whether the sentencing judge gave insufficient discount for the applicant's plea of guilty and prospects of rehabilitation

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Carlisle [2017] QCA 258, considered
R v KAQ; *Ex parte Attorney-General (Qld)* (2015) 253 A Crim R 201; [2015] QCA 98, cited

COUNSEL: M Horvath with B K Buckley for the applicant
C Cook for the respondent

SOLICITORS: Dib & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the reasons of McMurdo JA and the order his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with the order proposed for the reasons given by McMurdo JA.

[3] **McMURDO JA:** The applicant pleaded guilty to a number of serious drug offences, for which he received various sentences resulting in a period of imprisonment of 11 years and nine months. The longest of the terms was one of nine years and nine months' imprisonment for an offence of trafficking in methylamphetamine and heroin. No parole eligibility date was set, so that he will be eligible for parole after serving five years and 10 and a half months from when his sentence was imposed. He applies for leave to appeal against those sentences, seeking that his term for the trafficking offence be reduced to one of nine years' imprisonment and that he be eligible for parole on 15 January 2022, being four years from the date of the sentence.

[4] The offences were charged on two indictments. One indictment charged the trafficking count, which was committed in a period from 15 January 2015 to 29 July 2015, one count of supplying a dangerous drug on 19 December 2014 and, on 28 July 2015, two counts of possession of a dangerous drug (methylamphetamine and heroin) in excess of 200 grams and one count of possession of things used in connection with the trafficking. For the offence of supplying a drug, he was sentenced to 18 months imprisonment to be served concurrently with the nine years and nine months imposed

for the trafficking offence. Convictions were recorded for the possession offences but there was no further punishment.

[5] On the other indictment, there were two counts of possessing a dangerous drug in excess of 2 grams (methylamphetamine in one case and heroin in the other), one count of possessing the drug ephedrine and one count of possessing things used in connection with the possession of a dangerous drug. For the counts involving methylamphetamine and heroin, he was sentenced to two years' imprisonment and on each of the other counts, one year of imprisonment. Those four terms were ordered to be served concurrently with each other, and cumulatively upon the sentences imposed for the offences on the other indictment.

[6] The applicant's trafficking was revealed by intercepts and telephone calls with a co-offender, Mr Cao. It was the applicant's supply to Cao which was the supply offence committed in December 2014. The nature and extent of the trafficking was recorded in a schedule of facts which was tendered at the sentencing hearing.

[7] The trafficking was part of an enterprise which was directed, largely from Sydney by a man called Dang. He arranged for drugs to be hidden inside cars which were then transported from Sydney to Brisbane, where the applicant and another man called Rowe removed the drugs. The applicant would then supply the drugs to four regular users on a wholesale basis, including Cao. On occasions he supplied other customers in wholesale quantities and 15 of them were identified. Most commonly the amounts were supplied in quantities of seven grams or 14 grams, but on several occasions 28 grams. The applicant supplied Cao with methylamphetamine and heroin on about 30 occasions, in amounts ranging from 3.5 to 28 grams. The judge said that an indication of the quantity of drugs that was being sold in this trafficking could be obtained from the results of a search undertaken of the vacant house on 28 July 2015. In one of the vehicles parked there, a substance was found which contained 428 grams of pure methylamphetamine. In another place in the house, a pillowcase was found to contain pellets of a substance which contained 213 grams of pure heroin.

[8] The applicant spoke to Dang almost daily, reporting on the progress of his sales and sometimes discussing payments which were due from the applicant's customers. Dang arranged for two houses to be used by the applicant, one where the applicant was allowed to live as a reward for his endeavours, and the other which was a vacant house used to store the cars and the drugs.

[9] The sentencing judge accepted that the benefits received by the applicant were not large, and consisted of the use of the house where he lived and cash for living expenses and quantities of heroin to satisfy the applicant's own addiction. However, as his Honour said, the trafficking went beyond that which was necessary to satisfy the applicant's drug use, and he was "engaged at a managerial level in that [he] organised the receipt of the drugs into Queensland and their distribution".

[10] The judge's description of the applicant's involvement as being at a managerial level was accurate. The applicant had to account to Dang for his sales and receipts. The judge said that whilst the applicant did take directions from Dang, he was "primarily responsible for what occurred in Brisbane". Dang occasionally came to Brisbane to direct the enterprise, and he also pleaded guilty to trafficking in this State.

[11] The applicant was on bail for the trafficking and supply offences when he committed the further offences in December 2015. When the same house which Dang had provided for the applicant's residence was searched on 18 December 2015, he was found to be in possession of 16 grams of pure methylamphetamine and nearly three grams of pure heroin, together with items such as unused clip seal bags and tick sheets. The judge accepted that there was a "clear commercial element" in these offences, rejecting a submission that this offending could be explained by the applicant's drug addiction.

[12] The judge referred to the sentence imposed on Cao, which he said was of immediate relevance. Cao was sentenced for trafficking in methylamphetamine and heroin over a period of nine months, for which he was sentenced to nine years' imprisonment, with a parole eligibility date fixed at a point some 14 months after the date of sentencing. That early eligibility date was explained by the fact that Cao had spent 644 days in immigration detention as a result of his offence. Taking that period into account, Cao was required to serve about 35 months in custody before being eligible for release. Cao had previously been convicted of trafficking in dangerous drugs in 2002, for which he had been sentenced to eight years' imprisonment. Having regard to that history, the judge who sentenced Cao this time around said that he would have imposed a sentence of at least 10 years, had there not been the long period spent in immigration detention. It can be seen then that Cao received a lower head sentence and a considerably lower non-parole period, than in the applicant's case.

[13] The applicant was sentenced on 15 January 2018, before Dang was sentenced by another judge on 3 April 2018. Dang pleaded guilty to one count of trafficking in several schedule one drugs, for which he was sentenced to a term of 10 years and six months' imprisonment. That sentence required a declaration that he had committed a serious violent offence, so that he would not be eligible for parole until he had served 80 per cent of that term. Dang's application for leave to appeal was not heard with this case. Upon the premise that Dang's sentence would not be varied, it was argued for the applicant here that there was a disparity between his sentence and that one, because he was Dang's subordinate in the enterprise.

[14] The applicant was aged 35 and 36 at the time of the offences and was 38 years old when sentenced. He had previous convictions in Queensland and New South Wales for drug offences, although not as serious as the trafficking offence in this case. The applicant's counsel told the sentencing judge that the applicant had ceased using heroin, had been in regular employment and had the support of his family. The judge observed that there were no drug tests which would give weight to the submission that he had ceased to use heroin.

[15] The applicant had spent 261 days in custody which could not be declared, but which the judge said that he would take into account. His Honour said that for the trafficking offence alone, a sentence of 10 and half years would be appropriate, and for the second set of offences, considered alone, an appropriate sentence would be two and half years, cumulative upon the sentences for the earlier offences. But the judge discounted those terms as follows:

> "There is, though, the issue of the time you have spent in custody, and how that can be acknowledged. It could be applied to the trafficking sentence, or the sentence for the second set of offences, or both. Consistent with the submissions made on your behalf, I intend to reduce the sentence for trafficking below the 10 years, to take into

> account the time served and your guilty plea. That provides a significant advantage to you by removing the 80 per cent non-parole period, and, given your overall criminality, I do not think any further reduction is warranted. I must also consider the totality principle, and I have moderated the sentences to take that into account."

[16] Having regard to the pre-sentence custody of 261 days which could not be declared, the sentence imposed for the trafficking offence was equivalent to a head sentence of nearly 10 years and six months with an eligibility for parole at about five years and seven months. With the addition of the sentences for the second set of offences, the outcome overall was equivalent to a period of imprisonment of nearly 12 years and six months with an eligibility for parole at about six years and seven months.

[17] The original ground of appeal was that "the sentence is manifestly excessive". However that ground was abandoned and replaced with three proposed grounds of appeal which were expressed as follows:

> "(1) The notional head sentence for the trafficking offence of ten and a half years' imprisonment was manifestly excessive because it was based on the errors of:
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> (a) the Applicant's level of involvement, motivation and benefit from the syndicate; and
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> (b) starting with Quang Phu Cao's sentence of nine years' imprisonment for trafficking as a comparable sentence.
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> (2) The final head sentence for the trafficking offence of nine years and nine months' imprisonment took inadequate account of the Applicant's mitigating factors of a timely plea, the undeclared pre-sentence custody and his prospects of rehabilitation, and lacks parity with Mr Cao's sentence.
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> (3) The learned sentencing judged erred by failing to set a parole eligibility date given the effect of the cumulative sentence."

[18] Because there is some overlap between the complaints in the first and second of those grounds, they may be considered together. One of those complaints is that there was disparity between the sentence for the trafficking offence and the sentence imposed in Mr Cao's case. It was suggested that Mr Cao was at the same level in the enterprise as the applicant and that Mr Cao had the feature of a previous conviction for drug trafficking, yet he received a lighter sentence. However that submission misstates the criminality of Mr Cao. He was supplied drugs by the applicant, who acquired them from Dang. Contrary to what was first suggested in the applicant's oral submissions, the evidence did not demonstrate that Mr Dang also supplied Mr Cao, and not at an equal level in the enterprise. Further, it is far from clear that Mr Cao and the applicant should be seen as participants in the same criminal enterprise, for whom the parity principle would apply at all.[1] Clearly the applicant and Dang were in the same enterprise, but Cao was simply a regular customer of the applicant. Cao's trafficking period was between 11 June 2014 and

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1 *Green v The Queen* (2011) 244 CLR 462 at 474 [30]; [2011] HCA 49.

20 March 2015, compared with the applicant's trafficking period which was between 15 January 2015 and 29 July 2015.

[19] The next complaint is that the judge erred in assessing the applicant's level of involvement, motivation and benefit from the syndicate. As to his involvement, it is said that the activities performed by the applicant were visiting the house where the drugs were kept, collecting the drugs, selling them and collecting the money and passing on the money to Mr Dang. But the judge did not say otherwise. On any view, the applicant's involvement was more than that of, say, a courier. As to his motivation and benefit, again the judge did not misunderstand the circumstances. He accepted that the applicant was rewarded by free housing, drugs for his own use and some cash for living expenses. In effect, he was trafficking to provide a modest income and a ready supply of drugs for his own addiction.

[20] Another complaint is that the judge misunderstood the applicant's prospects of rehabilitation. At one point in the sentencing remarks, the judge said that the applicant's offending on bail suggested that the prospects of rehabilitation were not obvious. It is said that the judge overlooked the fact that the applicant had tried to get a drug screen, but that there had been some error at the clinic and so that none was available. Further, it is said that there was evidence that at the time of his sentence, the applicant had been collecting his methadone prescriptions, working full time and doing some volunteer work at the RSPCA, and that he had references from his employers and that organisation. But in my view, the judge was not obliged to act upon the premise, as his counsel had told the judge, that the applicant had not returned to heroin since his release on bail. As the judge said, there were no drug screens which would give weight to that submission.

[21] The applicant's submissions placed particular emphasis upon statements by Applegarth J in giving the leading judgment in *R v Carlisle*.[2] That offender was sentenced to 10 years' imprisonment for an offence of trafficking in dangerous drugs, automatically attracting a serious violent offence declaration. This Court reduced the sentence to nine years' imprisonment and set aside the declaration, fixing a parole eligibility date which required him to spend at least four years in custody. He had spent just over a year in pre-sentence custody which could not be declared. The essential question was whether an effective sentence of 11 years' imprisonment, requiring him to serve nine years before being eligible for parole, was manifestly excessive.[3] Applegarth J set out a detailed and helpful description of comparable cases for an offence of trafficking in circumstances such as the present case, which I would readily adopt.

[22] Applegarth J found particular assistance from this Court's decision in *R v KAQ*; *Ex parte Attorney-General (Qld)*.[4] That was a case, as he described it, of an offender who was not a principal, but who was involved in a major drug trafficking operation over a period of 12.5 months. That offender was sentenced under s 13A of the *Penalties and Sentences Act* 1992 (Qld) so that in that case it was the indicative sentence, and not the actual sentence, which was relevant as a yardstick. Precisely what was the indicative sentence in *KAQ* does not appear from the published judgment of the Court, but the Attorney's argument was that it was manifestly inadequate because it ought to have been at least 10 years. The majority (Holmes and

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2 [2017] QCA 258.
3 Ibid at [34].
4 [2015] QCA 98.

Fraser JJA) rejected that argument and dismissed the Attorney's appeal. Holmes JA observed that although the amounts of drugs and money which KAQ was involved in moving were extraordinary, his actual role in doing so was at a low level, by collecting money and delivering drugs and working for wages.[5] In those respects, the present case could be regarded as comparable. There were further mitigating factors in that case, even before the operation of s 13A: that offender was aged only 25 years at the time, had no significant criminal record, had cooperated in identifying his own involvement and had been psychologically assessed as representing a very low risk of re-offending. Given those circumstances, Holmes JA said that although "[his] involvement might have attracted a sentence around the ten year mark", the indicative sentence was one which would have been within the proper exercise of the sentencing discretion.[6]

[23] In *Carlisle*, Applegarth J regarded that offender's case as comparable to that of *KAQ*, and said that the case before him warranted a sentence of not more than ten years before account was taken of the pre-sentence custody.[7]

[24] However the submissions for the applicant in the present case overstate the effect to be given to *Carlisle*. It cannot be thought that the Court in that case was holding that in any case involving a drug trafficker involved in a large scale operation, but in a managerial role for relatively little reward, the maximum head sentence could be ten years. There was no tension between the reasoning in *Carlisle* and that of the sentencing judge in the present case.

[25] Another complaint, which is made in the applicant's submissions although not the subject of a ground of appeal, is that there was a disparity between the applicant's sentence and that imposed on Dang. It is said that the applicant could have a justifiable sense of grievance when comparing his sentence to Dang's sentence, given their different roles in the enterprise. That submission might have some force if regard was to be had only to the head sentences. However the non-parole period must also be considered in assessing whether there is a disparity.[8] For the trafficking offence, the effective non-parole period in the applicant's case is five years and seven months. In Dang's case, it is more than eight and half years.[9] The applicant could not have a justifiable sense of grievance when comparing his sentence with that in Dang's case.

[26] A further argument for the applicant was put in this way. The judge (correctly) reduced the notional head sentence of 10 and a half years by the 261 days of pre-sentence custody which could not be declared. That reduced the notional head sentence to nine years, nine months and two weeks' imprisonment. Therefore, it could be seen that the judge allowed only two weeks for the mitigating factors of a timely plea of guilty and the applicant's prospects of rehabilitation. However that analysis of the judge's reasons cannot be accepted. The judge said that he was reducing the sentence for trafficking below ten years to take into account both the time already served and the plea of guilty. As his Honour pointed out, that reduction provided a significant advantage to the applicant, by avoiding the compulsory 80 per cent non-parole period. Therefore it cannot be thought that the

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5 Ibid at [7].
6 Ibid at [15].
7 [2017] QCA 258 at [105] and [109].
8 *Postiglione v The Queen* (1997) 189 CLR 295 at 302 per Dawson and Gaudron JJ; [1997] HCA 26.
9 80 per cent of 10.5 years plus 53 days of pre-sentence custody which could not be declared.

judge gave an insufficient discount for the plea of guilty and any prospects of rehabilitation.

[27] As to the third ground of appeal as set out above, it was argued that a parole eligibility date should have been set at some point before the half way mark because otherwise the effect is "a manifestly excessive and crushing sentence". That cannot be accepted. The sentences for the later offences were correctly cumulative upon those for the trafficking and other earlier offences. None of the sentences was manifestly excessive and those sentences, taken together with parole eligibility at the halfway mark, are not crushing or excessive.

[28] I would order that the application for leave to appeal be refused.