SUPREME COURT OF QUEENSLAND

CITATION:	*R v Eaton* [2019] QCA 147
PARTIES:	**R** **v** **EATON, Grant Anthony** (applicant)
FILE NO/S:	CA No 306 of 2018 SC No 737 of 2018 SC No 1564 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 31 October 2018 (Boddice J)
DELIVERED ON:	30 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2019
JUDGES:	Fraser and Morrison and Philippides JJA
ORDER:	**Application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – DRUG OFFENCES – DEALING AND DISTRIBUTION OF DRUGS – TRAFFICKING OR SALE AND SUPPLY – where the applicant was convicted on seven counts related to the trafficking, supply and possession of dangerous drugs – where the applicant was also charged with eight summary offences, all drug related – where the applicant was convicted for the trafficking and possession of dangerous drugs including: cannabis, methylamphetamine, 3,4 methylenedioxymethylamphetamine (MDMA) and Lysergide (LSD) – where the applicant was sentenced to nine years' imprisonment for count 1, nine months imprisonment for count 7 and six months imprisonment on each of counts 2 and 3 with a parole eligibility date set after serving three years and five months – where the applicant was convicted on all other counts and not further punished – whether the offences warranted the sentence imposed CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant challenges the sentence imposed on the ground that the sentence of nine years' imprisonment was manifestly excessive – where the applicant submits that the learned sentencing judge proceeded

to sentence on the basis that the appropriate starting point for the sentence was approximately 10 years, if not more – where it was contended the starting point of the sentence was higher than it ought to have been, and in that sense, the learned sentencing judge was led into error – where it is contended that the applicant's sentence was markedly and unacceptably higher than that of the co-offender – where the applicant submits that in respect of the authorities cited, the learned sentencing judge was led into error in receiving and applying submissions – where it is contended that the sentencing discretion miscarried because the learned sentencing judge acted on a wrong principle – whether the learned sentencing judge erred in his sentencing of the applicant

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant contends that the parity principle is applicable – where it was submitted that there was an unacceptable disparity between the sentence imposed upon the applicant and that of his co-offender – where the applicant contends that the sentence was manifestly excessive and markedly and unacceptably higher than that of the co-offender – where there were differences in the extent, length of time and degree of sophistication in the offending conduct of the applicant and the co-offender – whether or not the applicant and the co-offender are co-offenders in the way that would attract the parity principle

Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Delander [2019] QCA 69, followed
R v Feakes [2009] QCA 376, mentioned
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: C C Minnery for the applicant
D I Balic for the respondent

SOLICITORS: A W Bale & Sons Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** On 31 October 2018, the applicant was convicted on seven counts related to the trafficking, supply and possession of dangerous drugs. A summary of the charges is as follows:

(a) count 1 – trafficking in dangerous drugs (methylamphetamine and cannabis) between 8 February 2016 and 19 March 2017;

(b) count 2 – supplying the dangerous drug Lysergide,[1] on 21 June 2016;

(c) count 3 – possession of the dangerous drug Lysergide, on 3 August 2016;

(d) count 4 – possession of the dangerous drug methylamphetamine, on 3 August 2016;

(e) count 5 – possession of the dangerous drugs cannabis, methylamphetamine, and 3,4 methylenedioxymethylamphetamine,[2] on 12 December 2016;

(f) count 6 – possession of methylamphetamine exceeding 2 grams, on 2 February 2018;

(g) count 7 – possession of the dangerous drugs MDMA and methylamphetamine, on 2 February 2017;

(h) count 8 – possession of the dangerous drug methylamphetamine exceeding 2 grams, on 18 March 2018; and

(i) count 9 – possession of a quantity of Australian currency obtained from trafficking in dangerous drugs.

[3] The applicant was also charged with eight summary offences, all drug related. The sentences imposed were: count 1, nine years' imprisonment; count 7, nine months imprisonment; counts 2 and 3, each six months imprisonment with a parole eligibility date set after serving three years and five months; and on all other counts the applicant was convicted and not further punished.

[4] The applicant challenges the sentences imposed upon him on three grounds:

(a) that the sentence of nine years' imprisonment was manifestly excessive;

(b) that the sentencing discretion miscarried because the learned sentencing judge acted on a wrong principle; and

(c) that there was an unacceptable disparity between the sentence imposed upon the applicant and that of his co-offender (Ms Harvey).

Agreed facts

[5] The applicant was sentenced on the basis of an agreed schedule of facts.[3] That schedule first set out the nine counts listed above, noting that the maximum penalty applicable to counts 1 (trafficking) and 6 and 8 (possession of dangerous drugs in excess of two grams) was 25 years' imprisonment. The maximum for count 9 (possessing property obtained from trafficking) was 20 years' imprisonment, and 15 years' imprisonment for the other counts.

[6] On 9 February 2016, police located an advertisement posted by the applicant on the "Craigslist" website, which used terminology consistent with that of methylamphetamine and cannabis. A law enforcement participant (LEP) was assigned and used a false name (Jones) when communicating with the applicant.

[7] In March 2016, police commenced an operation investigating on-line drug activity, and the applicant was one of its principal targets. It was suspected that the applicant

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1 Lysergide is known as LSD.
2 Called MDMA.
3 Appeal Book (AB) 49.

was trafficking in methylamphetamine. During the operation police used a number of investigative techniques including covert electronic and physical surveillance to infiltrate the applicant's network. Police obtained warrants to intercept two mobile phone numbers utilised by the applicant.

Count 1 - trafficking

[8] The applicant unlawfully carried on the business of trafficking in methylamphetamine and cannabis between 8 February 2016 and 19 March 2017. He operated his business with the assistance of Harvey. He supplied up to one ounce of methylamphetamine and multiple ounces of cannabis on a daily basis. During the trafficking period he received requests for MDMA, cocaine and LSD. The applicant occasionally arranged the supply of these drugs to customers, on request.

[9] Throughout the trafficking period, the applicant's preferred method of communication was through the encrypted phone application "Wickr", which automatically deletes communications after a specified time. The extent of the applicant's trafficking business was therefore limited to telephone intercepts and covert operations conducted by the police.

[10] The applicant's trafficking was best characterised as high-end street-level, involving frequent supplies of methylamphetamine and cannabis. The applicant engaged two associates to deliver drugs and collect money on his behalf, which assisted the operation of the business. The applicant paid these associates with small quantities of drugs.

Sourcing drugs

[11] The applicant sourced drugs from a supplier called Anderton, and Harvey. On some occasions the applicant supplied Anderton and Harvey with drugs. The applicant sourced or attempted to source up to 10 ounces of methylamphetamine and up to one pound of cannabis at a time, for example:

(a) on 18 May 2016, the applicant sourced one pound of cannabis from Anderton for $2,800;

(b) on 20 May 2016, the applicant contacted Anderton and requested eight ounces of methylamphetamine for $47,500; Anderton later advised the applicant that he was able to reduce the price of eight ounces to $45,000; it is not known if the transaction took place;

(c) on 21 May 2016, the applicant requested four ounces of methylamphetamine from Harvey; the applicant stated that if the price was reasonable he would purchase that quantity "every week to week and a half"; the applicant advised that he was willing to pay up to $4,750 per ounce; Harvey contacted her supplier who agreed to supply the drugs at that price; Harvey relayed this information to the applicant, who advised that he had engaged someone else; it is inferred that he was referring to Anderton;

(d) on 22 June 2016, the applicant contacted Harvey and requested seven ounces of methylamphetamine; Harvey sourced the drugs and arranged to have them delivered to her house;

(e) on 24 June 2016, the applicant requested one pound of cannabis from Anderton; Anderton advised the cost would be $2,400; the applicant requested a cheaper price and stated that if they offered a cheaper price he would be become

a regular customer; the applicant further advised that he went through one pound of cannabis a week; and

(f) on 12 November 2016, the applicant contacted Harvey and requested a price for 10 ounces of methylamphetamine; Harvey informed the applicant that the price quoted from her supplier was $40,000; it is not known if the transaction took place.

Customers and transactions

[12] The applicant supplied up to one ounce of methylamphetamine and up to one pound of cannabis to customers at a time. He supplied drugs to approximately 25 customers throughout the trafficking period on an almost daily basis. He also supplied methylamphetamine and MDMA to two LEP officers on 12 occasions.

[13] On 12 March 2016, the applicant informed LEP Jones that during "busy times" he would see up to 40-50 customers in a two hour period. The telephone intercepts do not suggest that the applicant's trafficking business was this lucrative. However, the applicant advertised drugs on Craigslist and provided his Wickr username as the method of contact. The applicant's estimate is entirely possible, given he was advertising to the community at large.

Advertising

[14] Throughout the trafficking period the applicant would send his customers a pricelist for a range of drugs and quantities. The applicant sent the pricelist to customers approximately every two weeks. The list contained the following:

Drug	**Quantity**	**Price**
Methylamphetamine ("Rock")	0.1 grams (p)	$70.00
	0.5 grams ("HG")	$260.00
	1 gram ("G")	$450.00
	1.75 grams ("HB")	$650.00
	3.5 grams ("BALL")	$1050.00
	½ ounce (14 grams) ("HOZ")	$3200.00
	1 ounce (28 grams) ("OZ")	$5900.00
Methylamphetamine ("Speed")	0.1 grams ("p")	$60.00
Cannabis ("Weed")	1.25 grams	$25.00
	3 grams	$50.00
	7 grams ("Q")	$100.00
	½ ounce (14 grams) ("HOZ")	$180.00
	1 ounce (28 grams) ("OZ")	$320.00
MDMA	0.1 grams ("p")	$50.00
	0.5 grams ("HG")	$200.00
	1 gram ("G")	$380.00
	1.75 grams ("HB")	$600.00
MDMA in tablet form ("Pills/Pingaz")	1 x pill ("ea")	$30.00
	10 x pills ("10 pack")	$250.00
Cocaine	Unknown Quantity ("bag")	$100.00
	0.5 grams ("HG")	$250.00
Lysergide ("caps")	1 x capsule "each"	$40.00
	1 x capsules "10 pack"	$250.00

[15] Between 9 February 2016 and 17 June 2016, the applicant advertised drugs on 33 occasions via the website *craigslist.com.au*. The advertisements included the

applicant's Wickr username, pickup and delivery schedules, and associated prices. For example, the applicant offered free delivery for orders over $200 and charged a $15 delivery fee for orders under $200. Examples of the advertisements on Craigslist are as follows:

(a) "Garden ROCK'S [sic] and more for sale …";

(b) "Amazing cold "ROCK'S [sic] for sale … full range of sizes and also other produces [sic]…"

(c) "TOP QUALITY total brand new batch of amazing crystal clear rock's [sic] have just arrived …"

(d) "Top Quality ROCK'S [sic] and MORE in BRISANE [sic]/IPSWICH …"

(e) "Strieve [sic] to always have the best around … 100% reliable and available 24/7"; and

(f) "New batch of quality new batch of quality Rock, MD mulch and Green turf …".

[16] The advertisements illustrate that the applicant had the ability to supply varying quantifies of methylamphetamine and cannabis to the community at large on various occasions.

LEP information

[17] On 9 February 2016, LEP Jones contacted the applicant by Wickr in response to the Craigslist advertisement. The LEP requested half a gram of methylamphetamine. The applicant and LEP Jones met at an Aldi supermarket carpark. The LEP paid $280 and the applicant supplied the drugs. Whilst the transaction took place, the applicant spoke about his business to the LEP, informing her that he was capable of servicing 40 to 50 customers every two hours. The applicant referred to the Aldi store at Mt Gravatt as his "home base".

[18] The applicant informed the LEP that he sold cannabis in larger quantities and had the ability to sell up to one ounce of methylamphetamine at a time. The applicant further stated that he would only supply a "half ball" (1.7 grams) to first time customers. After the first transaction he would then agree to supply up to one ounce. The applicant also provided advice in relation to concealing the drugs when travelling so as to avoid police detection.

[19] The applicant continued to supply to his two LEP officers on a further 10 occasions until 21 June 2016. The LEP sourced between 0.1 grams and 1.75 grams of methylamphetamine on these occasions, totalling an amount of $4,500 which was paid to the applicant.

Arrest

[20] On 12 December 2016, the applicant was arrested in respect of count 5, and on that occasion his mobile phone was seized and messages of interest were photographed.

[21] Counts 2 to 9 on the indictment were particulars of the trafficking enterprise.

Count 2: supplying a dangerous drug on 21 June 2016

[22] On 20 June 2016, the applicant was contacted by an ongoing LEP contact whom the applicant believed to be a customer. On that date the LEP requested "ACID" from the applicant. This was a request to obtain the dangerous drug LSD.

[23] The applicant confirmed that he could obtain it, but he had to "order it in", and said that it would cost $1,250 for 100mls.

[24] At approximately 5.50 pm on 21 June 2016, the applicant met with the LEP and handed him a package weighing 2.040 grams, in exchange for $1,250. This substance was tested and found to contain 0.08 grams of pure LSD, with a purity percentage of 0.4 per cent.

Counts 3-4: possessing dangerous drugs on 3 August 2016

[25] On 3 August 2016 police attended the Main Street Motel in Kangaroo Point in response to reports that someone had jumped off a balcony. Police arrived at the applicant's room and spoke with a person called Taiters.

[26] Mr Taiters advised that he had arrived at the applicant's room early in the morning after meeting the applicant on the online dating app named "Grindr". At approximately 5.45 pm three unidentified males came to the room, which prompted the applicant to jump off the balcony. The males were armed with bats and kept asking "where are the drugs, this cunt owes me money", and words to that effect.

[27] Police searched the room and located the following: a set of digital scales;[4] 4.429g of substance, in which LSD was detected;[5] and 1.717g of substance, of which 1.306g was methylamphetamine (at a purity of 76.1 per cent).[6]

[28] The applicant was apprehended on 8 August 2016 in the Princess Alexandra Hospital where he exercised his right to silence. The applicant was charged and released on bail.

Summary offence: contravened direction or requirement between 25 November 2016 and 2 December 2016[7]

[29] On 24 November 2016, the applicant was directed by Morningside Police to provide his identifying particulars within seven days. The applicant did not comply with the direction and did not provide his identifying particulars. Police located the applicant on 12 December 2016 and he was subsequently charged and released on bail.

Count 5: possessing a dangerous drug on 12 December 2016

[30] On 12 December 2016, the applicant was identified as staying at the Treasury Casino in Brisbane City. At that the time the applicant was wanted on an outstanding warrant for failing to appear in the Magistrates Court.

[31] Police located the applicant and conducted a search of the room he was staying in. They located the following items: five unused clip-seal bags, a set of digital scales,

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4 The subject of summary charge 2.
5 This was the subject of count 3.
6 This was the subject of count 4.
7 Summary charge 5.

scale weights, a pencil case and two mobile phones;[8] 0.066 grams of substance, in which MDMA was detected; 1.958 grams of substance, in which methylamphetamine was detected; and 44 grams of cannabis.

[32] The applicant was arrested on the outstanding warrant and also charged for possession of drugs. He was then released on bail.

Summary offence: failure to appeal in accordance with bail undertaking[9]

[33] On 28 November 2016, the applicant was granted a bail undertaking by the Brisbane Magistrates Court in relation to another matter. The undertaking required the applicant to attend court on 10 January 2017. The applicant did not appear at the Brisbane Magistrates Court as required. The applicant was arrested and charged on 2 February 2017.

Counts 6 and 7

[34] On 2 February 2017, police received information concerning the applicant, and drug activity at a unit in the city. At 2.00 pm that day the police executed a search of the unit and detained the applicant and another person who had been there. Police conducted the search and located the following items:

(a) $17,250 in Australian currency;[10]

(b) six glass pipes and three broken glass pipes;[11]

(c) two sets of electronic scales;[12]

(d) one Apple Macbook Pro laptop and one Apple iPad;[13]

(e) a red plastic container containing eight clip-seal bags with methylamphetamine; this was tested to weigh 29.285g with purity ranging between 75 per cent and 75.6 per cent, for a total pure amount of 21.036g;[14]

(f) 338g of cannabis in multiple clip-seal bags located inside a black pencil case, eight tablets in a single clip-seal bag weighing 0.337g of MDMA and 1.469g of 3,4 Methylenedioxymethylamphetamine (**MDMA**), located in a single clip-seal bag.[15]

[35] The applicant also possessed a quantity of unused clip-seal bags. The Crown alleged that the applicant was in possession of the methylamphetamine for commercial purposes. The applicant was charged and released on bail.

Counts 8 and 9

[36] At 8.10 pm, police were conducting surveillance on Adelaide Street in Brisbane when they observed a driver on his mobile phone. Police intercepted the vehicle and noticed that the passenger appeared nervous. Police subsequently detained the

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8 The subject of summary charge 4.
9 The subject of summary charge 10.
10 The subject of summary charge 4.
11 The subject of summary charge 5.
12 The subject of summary charge 6.
13 The subject of summary charge 9.
14 The subject of summary charge 6.
15 The subject of summary charge 7.

applicant and the other person for the purposes of a search. Police searched the applicant and located $2,820 in cash on his person.[16]

[37] Police searched the vehicle and located the following items inside a black bag which was in the applicant's possession:

(a) 15 clip-seal bags containing small quantities of methylamphetamine; the total substance weight was 11.238g of which 3.584g was pure methylamphetamine (purity: 31.9 per cent);[17] and

(b) $300 in cash.[18]

[38] The Crown alleged that the applicant was in possession of the methylamphetamine for commercial purposes. He was arrested and exercised his right to silence. He was subsequently remanded in custody until 21 August 2017 when he was granted Supreme Court bail.

Approach of the learned sentencing judge

[39] The learned sentencing judge commenced by listing the various counts upon which the applicant was to be sentenced, noting his early plea of guilty to those offences. His Honour accepted the pleas of guilty as evidencing cooperation with the administration of justice.

[40] His Honour characterised the offending as serious and "high-end street-level trafficking in dangerous drugs", namely methylamphetamine and cannabis, over a period of slightly in excess of 12 months. His Honour noted that level of sophistication in the applicant's operation, advertising on Craigslist and using Wickr as the method of communication.[19] His Honour considered that the level of sophistication aggravated the offending. His Honour also noted the fact that the applicant had associates who would deliver drugs and collect money on his behalf.

[41] His Honour then set out a deal of the detail found in the agreed schedule of facts noting that the magnitude of the applicant's operation was signified by the amount of cash, drug paraphernalia, 338 grams of cannabis and 21 grams of methylamphetamine found on the applicant on 2 February 2017. His Honour found that those quantities and cash were "a clear indication of the magnitude of your operation at a period close to the end of the trafficking period".[20] His Honour also found that the possession of drugs on the occasion when the applicant was intercepted on 18 March 2017 constituted possession for commercial purposes as part of the trafficking operation.

[42] His Honour noted that the possession of significant quantities of methylamphetamine and cash occurred one month after the applicant had been released on bail, which indicated that the applicant was "far from a person who was remorseful for your conduct", but engaged "in a substantial operation which was producing profits and you were not going to be desisting because police happened to intercept you".[21]

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16 Count 9.
17 Count 8.
18 Count 9: the total cash located on the applicant and in the car was $3,120.
19 AB 43 line 30.
20 AB 44 line 4.
21 AB 44 lines 18 – 20.

[43] His Honour then recounted the applicant's personal circumstances noting that he was 36 to 37 years of age at the time of offending, and 38 at the time of sentence. His Honour also noted that though the criminal history was limited, it did have some relevant entries upon it. The sentencing remarks then deal with personal circumstances of the applicant and his struggle with gender identity when he was young, and bullying he suffered at school. His Honour referred to what had been said in a psychologist's report on the applicant's behalf. His Honour noted that whilst he took those matters into account "they do not explain why he became a high-end street-level drug trafficker at a mature age".[22]

[44] His Honour then noted that the material tendered on behalf of the applicant indicated that he had taken "very significant steps to address [his] offending behaviour".

[45] Those steps included a period in a drug rehabilitation centre and counselling, both of those steps having some success. His Honour also noted that it had been 18 months since the offences were committed and it was not alleged that the applicant was still engaging in drug related activity. His Honour felt those matters "suggest your prospects of rehabilitation are good".

[46] His Honour then referred to the need to balance the various sentencing factors including the need to punish but nonetheless encourage prospects of rehabilitation, deter others as well as the applicant, indicate the community's denunciation of the conduct, and protect the community. His Honour referred again to the good prospects of rehabilitation and the "very significant steps you have taken" in that regard.[23] His Honour went on:[24]

> "They cannot, however, completely overwhelm what was high-end street-level for a period in excess of 12 months with the level of sophistication I have been referred to. They cannot overcome the fact that despite coming to the attention of the authorities, you were once again found in possession of a significant quantity of drugs and cash. I am satisfied that there is a need for the sentence I impose to contain within it a significant aspect of deterrence. The matters in your favour – and, in particular, your good prospects of rehabilitation – satisfy me that notwithstanding the high-end street-level trafficking engaged in at that level of sophistication, a sentence of 10 years imprisonment would not properly reflect your efforts and successfully efforts and rehabilitation. I am satisfied that in order to properly reflect those matters I should discount what otherwise would be a sentence of that magnitude to reflect that cooperation. As a consequence, you will not be facing what would be an automatic declaration of a serious violent offence, which would require you to serve 80 per cent of the sentence.
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> In those circumstances, you ought not to be the beneficiary of, in effect, a double benefit in respect of the date of eligibility for parole. I do accept, however, that your extreme steps towards rehabilitation which have been successful, would justify that you should receive

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22 AB 44 line 33.
23 AB 45 lines 12-14.
24 AB 45 lines 16-37.

> some additional benefit, but it should not be in the category of the one-third mark of that sentence."

[47] On that basis his Honour imposed a sentence of nine years' imprisonment with parole eligibility fixed at the four year mark. Allowing for the 143 days that the applicant had served in pre-sentence custody, which was declared, the parole eligibility date was brought back by about five months to three years and seven months. His Honour then allowed an additional discount to reflect the time which the applicant had served in a rehabilitation facility. However, his Honour did not proceed on equating that with imprisonment and therefore it was not a full discount for the time. That meant that his Honour fixed parole eligibility at 30 March 2022, after serving three years and five months.

Submissions

[48] The applicant submitted that the learned sentencing judge proceeded to sentence on the basis that the appropriate starting point for the sentence was approximately 10 years, if not more. Based upon the authorities to which the prosecutor referred, namely *R v Bradforth*,[25] *R v Rodd; Ex parte Attorney-General*,[26] *R v Feakes*[27] and *R v Safi*,[28] the starting point for the sentence was higher than it ought to have been, and in that sense, the learned sentencing judge was led into error. As a consequence the sentence was manifestly excessive and markedly and unacceptably higher than that of the co-offender Harvey. It was submitted that the Crown's authorities involved offending on a more significant scale than that of the applicant who was supplying to street-level or end-users, and only on a limited basis at a wholesale level. In respect of the authorities cited, the learned sentencing judge was led into error in receiving submissions, accepting them and acting on the basis that *Feakes* was comparable offending to that of the applicant or that the applicant committed offences of comparable seriousness to that in *Feakes*. That error led, it was submitted, to his Honour applying an incorrect principle, namely that in paragraph [33] of *Feakes*, that the sentence ought not be less than 10 years and up to 12 years.[29] That meant the starting point for the sentence was too high.

[49] As to the contention based on lack of parity with the sentence imposed on Harvey, who was sentenced to five years imprisonment wholly suspended, it was submitted that the applicant would have a justifiable sense of grievance. Harvey was older than the applicant, and sentenced on the basis of 189 instances of supplying drugs to a customer base of 53. She had minor but relevant criminal history and presented with good prospects of rehabilitation. Harvey was sentenced on the basis of having "cooperated in other ways" with authorities and it seemed her cooperation meant she was sentenced on the basis of the application of s 13A of the *Penalties and Sentences Act* 1992 (Qld).

[50] Finally, by reference to various authorities, including *Bradforth*, *Rodd*, *Safi* and *Feakes*, the sentence was said to be manifestly excessive.

[51] For the respondent, it was submitted that the applicant's offending had the hallmarks of frequency of sales combined with extensive advertising, and the

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25 [2003] QCA 183.
26 [2008] QCA 341.
27 [2009] QCA 376.
28 [2015] QCA 13.
29 See *R v Nunn* [2019] QCA 100.

deployment of two associates, which suggested an intricate enterprise with fore-thought and preparation. Some of the offending occurred while on bail which was an aggravating feature. It was submitted that the learned sentencing judge did not proceed on an erroneous principle, and the yard sticks established by other cases indicated that the start point was appropriate. Error was not established by reference to other authorities that might produce different sentences, even markedly so.

[52] It was submitted that the applicant engaged in frequent high-level drug activity in schedule 1 drugs. The learned sentencing judge reduced the sentence to one which avoided a serious violent offence declaration, which meant that the reduction was in a practical sense, very significant.

[53] In relation to the sentence imposed on Harvey, it was submitted that there could be no justifiable sense of grievance because of the differences between the applicant and Harvey. Her trafficking period and level of trafficking was different from that of the applicant. Moreover, she was an addict which drove her offending which, of itself, was relatively unsophisticated compared to that of the applicant. There were also closed Court considerations that affected the sentence.

[54] Finally, the respondent contended that by reference to *Feakes* and *R v Delander*,[30] the sentence could not be said to be manifestly excessive.

Discussion

[55] In my view, the contention that the learned sentencing judge proceeded on an incorrect principle, and therefore commenced with a start point for the sentence that was too high, cannot be sustained. There are a number of reasons for that conclusion.

[56] First, it is true that the prosecutor referred to *Feakes* when he told his Honour he would go "straight to the bottom line in terms of the Crown's submission".[31] The prosecutor quoted from the reasons of McMurdo P in *Feakes*:[32]

> "My analysis of the comparable cases relied on by Feakes and the respondent in this application demonstrate that, absent extraordinary circumstances, in cases of trafficking in sch 1 drugs on a scale like the present offence, the sentence imposed on mature offenders who have pleaded guilty is ordinarily in the range of 10 to 12 years imprisonment."

[57] However, in the course of submissions by counsel for the applicant at the sentencing, his Honour was referred to *Bradforth* where a similar statement was made by Thomas JA at [25]. That was followed by the submission that "that statement of principle relates to more serious offending than [the applicant's] offending.[33] His Honour responded:[34]

> "I think, on the authorities, high-end street level trafficking over a period in excess of 12 months could well fit into the category of a

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30 [2019] QCA 69.
31 AB 31 line 12.
32 *Feakes* at [33].
33 AB 37 line 16.
34 AB 37 lines 19-21.

> case that could – could justify a sentence in the order of 10 to 12 years."

[58] His Honour then referred to authorities more recent than *Feakes* or *Bradforth*, specifically *R v Tran; Ex parte Attorney-General*,[35] and went on:

> "But in any event, the fact is that since the decision in *Barbaro* by the High Court, these are just yardsticks. The idea of a range doesn't really exist anymore."[36]

[59] In the sentencing remarks themselves there is no suggestion that the learned sentencing judge was influenced by *Feakes* or any so-called principle, and certainly not by any suggestion of a "range", the notion of which had been dispelled by his Honour in the course of argument. Rather his Honour focussed on a characterisation of the seriousness of the offending. That is what his Honour referred to as being the high-end street-level trafficking over a period of 12 months with a level of sophistication, and continuing after being arrested and released on bail. When his Honour referred to that summary,[37] it was in the context of his analysis of the prospects of rehabilitation, and how they might impact upon the sentence. It was in that context that his Honour said that the mitigating factors satisfied him that notwithstanding the level of trafficking and the level of sophistication, "a sentence of 10 years imprisonment would not properly reflect your efforts and successful efforts at rehabilitation".[38] The way his Honour reflected the mitigating factors was to "discount what otherwise would be a sentence of that magnitude".[39] None of what his Honour said indicated that he was proceeding on some erroneous view as to a so-called "principle" in *Feakes*. Indeed, his Honour would have been well aware that the comments of McMurdo P in *Feakes* were not adopted by the other members of the Court.[40]

[60] Secondly, it is evident from the sentencing remarks that one of the factors in the learned sentencing judge's consideration was that a sentence of 10 years would attract a serious violent offence declaration, requiring the applicant to serve 80 per cent of the term. That is evidence in the passage referred to paragraph [46] above. On their plain meaning those remarks signify that as part of the overall intuitive synthesis in which his Honour was engaging, it was considered that a sentence of 10 years would not provide sufficient recognition for the mitigating features, and in particular the applicant's successful efforts at rehabilitation. There was no mechanical exercise, with a defined start point and some form of stepped discounts. It was one overall process in his Honour's attempt to arrive at a just sentence which, balancing the various factors, recognised the serious level of trafficking in dangerous drugs, but also recognised the mitigating features.

Parity issues with Harvey

[61] The principle from which this contention relies was that set out by the High Court in *Postiglione v The Queen*:[41]

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35 [2018] QCA 22.
36 AB 37 lines 30-32.
37 AB 45 lines 16-21.
38 AB 45 line 25.
39 AB 45 lines 28-29.
40 Fryberg J at [39], Fraser JA concurring.
41 (1997) 189 CLR 295 at 301, 302.

> "The parity principle upon which the argument in this Court was mainly based as an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to "a justifiable sense of grievance". If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.
>
> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of 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."

[62] Reference to the material concerning Harvey and the sentence imposed upon her reveals that there are a number of differences between her case and that of the applicant.

[63] First, Harvey was charged with trafficking over a shorter period of time, 11 months as opposed to 13 months. Further, the charges that Harvey faced were limited by comparison to those to which the applicant pleaded guilty. Harvey had one charge of trafficking, one charge of unlawful possession of methylamphetamine exceeding 2 grams and one charge of possessions of items used in relation to drug offences. By contrast the applicant faced one trafficking charge, two charges of possession of dangerous drugs in excessive of 2 grams, two charges of possession and one charge of supplying a dangerous drug. In addition there were the various summary offences.

[64] Secondly, Harvey's sentencing proceeded upon the basis that she was an addict and the trafficking was to satisfy that addiction. Whilst there was material showing that the applicant had been an addict, there is no such suggestion that his trafficking was simply to meet those needs rather than to make profit.

[65] Thirdly, when police searched Harvey's premises, she made a number of admissions as to ownership and the contents of clip-seal bags containing amphetamines. Even that level of co-operation was absent in the applicant's case.

[66] Fourthly, Harvey's trafficking was facilitated by her use of a telephone, but she did not use the application Wickr to disguise her activities. As a consequence the police investigation was able to recover a deal of information about her conduct from those phones. In that sense, Harvey's trafficking was at a much less sophisticated level than that of the applicant.

[67] Fifthly, whilst it is true to say that Harvey supplied drugs to various people, one of which was the applicant on occasions, her trafficking was not accompanied by the

applicant's entrepreneurial approach, in which he advertised by way of a pricelist, and offered free delivery for orders over $200. An indicator of the unsophisticated nature of her conduct was that the conversations on the telephones were "often loosely coded or not coded at all".

[68] Sixthly, in the case of Harvey the mitigating features included that she was the mother to a two year old girl, which she whom she shared very close bond. That mitigating feature is absent in the case of the applicant.

[69] Seventhly, reference to the schedule of facts upon which Harvey was sentenced reveals that she was not truly a co-offender with the applicant. It is the case that on a number of occasions she had contact with the applicant and they supplied drugs to one another. However, Harvey had her own customers and the vast bulk of the instances of supply in her case were neither to nor from the applicant. Thus was she not involved in the applicant's business except for the occasional supply of drugs. Except for their joint transactions each of them conducted their own business of trafficking, at their own level of sophistication or otherwise, and with their own motivation, in Harvey's case to meet her addiction, and in the applicant's case profit as well. They are not co-offenders in the way that would attract the parity principle.

[70] [Redacted].

Was the sentence manifestly excessive?

[71] In order to establish that the sentence is manifestly excessive, this Court must be satisfied that there "must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons".[42] The mere fact that the sentence imposed is different from other sentences, and even markedly different from other sentences, does not establish that it is manifestly excessive.[43] As was said by this Court in *R v MCT*:[44]

> "To succeed on an application based on manifest excess, it is not enough to establish that the sentence imposed was different, or even markedly different, from sentences imposed in other matters. 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". Consistently with accepted understanding that there is no 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 statutory regime that applies."

[72] In *R v Delander*[45] this Court considered a sentence imposed for unlawful trafficking in dangerous drugs over a period of eight months. The drugs concerned were methylamphetamine and MDMA, and the offender (aged 32 to 33 at the time of offending and 35 at sentencing) was sentenced to nine years' imprisonment with parole eligibility fixed after four and a-half years. The head sentence was not challenged but it was contended that the parole eligibility date should have been much less. Whilst that limits the utility of *Delander* there are still aspects that assist.

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42 *Wong v The Queen* (2001) 207 CLR 584 at [58].
43 *Wong* at [58].
44 [2018] QCA 189 at [240]; internal footnotes omitted.
45 [2019] QCA 69.

[73] That offender had 18 customers to whom he supplied drugs on 31 occasions over the eight months. He took active steps to hide his offences. The business was a sophisticated one, involving the leasing of a shed to store drugs, and the engagement of someone to sell and deliver drugs. Significant profits were generated, enabling the offender to afford living expenses and luxury goods for himself and his partner. The offender also faced charges over possession of weapons, though there was no suggestion they were used in his trafficking business.

[74] One significant feature of *Delander* was that he provided significant co-operation to the police, identifying the locations of large amounts of explosives and weapons and encouraging another person to reveal the location of explosives. After consideration of a number of authorities this Court declined to interfere in the sentence.

[75] The authorities to which regard was had in *Delander* included a number where sentences of 10 years were not overturned on appeal:

(a) *R v Strutt*[46] was a trafficking case involving 21 offences and two weapons offences; the trafficking was over a period of five months and involved substantial quantities of methylamphetamine, and relatively small quantities of cocaine and ecstasy, with the business being conducted at a wholesale and retail level; the offences had been committed in breach of a suspended sentence; there was evidence of rehabilitation in relation to the offender's addiction, and a plea of guilty; the Court referred to the comments of Fraser JA in *R v McGiniss*[47] that offenders "who have pleaded guilty (to trafficking) have commonly been sentenced to terms of imprisonment between and ten and 12 years", even though those offenders had mitigating circumstances;

(b) *R v Feakes*,[48] where a 10 year sentence was imposed in respect of a six month period of trafficking; the offender had made significant efforts to rehabilitating himself, pleaded guilty, had a dysfunctional upbringing, and had not reoffended for three years while he had been on bail;

(c) *R v Abbott*[49] where a sentence of 10 years was imposed for trafficking had a wholesale level in methylamphetamine and cocaine for a period of some 17 months, of which the active period was six and a-half months; that offender continued to offend while on bail and his operation was a substantial one involving large amounts of money and drugs over a significant period; the offender had a minor criminal history, pleaded guilty in a timely way, and had a difficult background; he was also an addict; and

(d) *R v Corbett*[50] which involved a sentence of nine years' imprisonment for trafficking over two months; the trafficking was in methylamphetamine and a significant amount was discovered, in excess of two hundred grams pure; the trafficking was for profit and personal use and there were significant mitigating factors; the offender was an addict who had taken steps towards his rehabilitation while in custody; the sentence of nine years was not disturbed.

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46 [2017] QCA 195.
47 [2015] QCA 34 at 11.
48 [2009] QCA 376.
49 [2017] QCA 57.
50 [2018] QCA 341.

[76] The authorities referred to above support to the proposition that the sentence imposed upon the applicant was not manifestly excessive.

[77] Counsel for the applicant contended that *R v Bradforth*[51] was a more serious case of trafficking and therefore provided no guidance. I respectfully disagree. It involved a 26 year old drug trafficker, who trafficked in cocaine, MDMA and methylamphetamine over a period of 12 months. He was also found in possession of a number of different drugs. He was initially sentenced on each count to 12 years imprisonment, which on the trafficking count attracted a declaration that it was a serious violent offence. The applicant was found in possession of over 1,300 tablets of MDMA, 63.398 grams of cocaine and 7.379 grams of methylamphetamine. He had apparently been selling drugs for the previous 12 months with enough success that he gave up his job as a plasterer, to concentrate on the trafficking. His supply was not to end users in the sense of drug addicts. He employed an assistant, but little was known about the nature and extent of that employment. It was conceded that the drug selling activities constituted "a large business". This Court found that there were plainly commercial aspects of the trafficking which had been motivated by financial gain, at least to a degree. But there was scant evidence of substantial profitability or trappings of wealth and some evidence to suggest that the trafficking was actuated by desire to feed the drug addiction. The offender had a minor criminal history with no drug convictions. This Court intervened and reduced the sentence from 12 years to 10 years, leaving in place the declaration of serious violent offence.

[78] Contrary to the submissions on behalf of the applicant, the trafficking in *Bradforth* is not so disproportionate to that in the applicant's case as to render the decision of little utility. True it is that the supply was not to end users, but otherwise it bore similarity to that of the applicant. In my view, the differences between *Bradforth* and the applicant's case supports the imposition of nine years for the applicant.

[79] The applicant's trafficking was described as high-end street-level, but it was a sophisticated operation, involving an entrepreneurial approach of advertising a "menu" of drugs, offering incentives to buy, and employing two assistants to deliver drugs and collect money. The offending was serious and persistent, the applicant continuing even after he had been arrested and released on bail on several occasions. His operation was also characterised by the steps taken to conceal not only the details but the level of the business, by using the Wickr application on phones so that incriminating details would be automatically deleted. The approach was quite brazen, given that the applicant openly advertised his products (albeit using a loose code), safe in the knowledge that responses would be deleted by the Wickr application. As was accepted by the learned sentencing judge, the motivation was, at least in part, profit. The applicant had engaged in significant acts of rehabilitation, which was to his credit, but full allowance for those steps was made by the learned sentencing judge.

[80] I am unable to reach the conclusion that the applicant's sentence can be demonstrated to be manifestly excessive.

Conclusion

[81] For the reasons given above, the application for leave to appeal should be refused.

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51 [2003] QCA 183.

[82] **PHILIPPIDES JA:** I agree.