SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cumner* [2020] QCA 54
PARTIES:	**R** **v** **CUMNER, Scott Andrew** (applicant)
FILE NO/S:	CA No 277 of 2019 SC No 43 of 2018 SC No 97 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Toowoomba – Date of Sentence: 8 October 2019 (Applegarth J)
DELIVERED ON:	27 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2020
JUDGES:	Morrison JA and Bond and Callaghan JJ
ORDER:	**Application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced, on his pleas of guilty, in relation to a number of drug related offences consisting of trafficking in methylamphetamine and possession of methylamphetamine and cannabis – where he was also sentenced in respect of his unlawful possession of a motor vehicle which had been modified so as to obscure its ownership – where a sentence of nine years and five months' imprisonment was imposed for count 1 – where counts 2 to 7 were imposed on the basis that those offences were all part of the trafficking offence – where the sentence for unlawful possession of a motor vehicle was made concurrent on that imposed for the trafficking – whether the sentence is manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where a parole eligibility date was fixed, after serving six years – where the sentence took into account two separate periods of pre-sentence custody, neither of which could be declared as time served – whether the learned sentencing judge erred in dealing with two factual matters –

where the second specific error relied upon was the contention that the learned sentencing judge formulated both the head sentence and parole eligibility date with direct proportionality to what would have been imposed had a sentence of 10 years or over been available, without the non-declarable pre-sentence custody – where this was said to be inconsistent with previous approaches applied by this Court in *R v Carlisle* and *R v Tran; Ex parte Attorney-General (Qld)* – whether the learned sentencing judge's state of satisfaction was left unclear in respect of the two factual matters – whether reliance upon the two factual matters as aggravating features was not permissible under s 132C of the *Evidence Act* 1977 (Qld)

Evidence Act 1977 (Qld), s 132C

R v Carlisle [2017] QCA 258, considered
R v Castner [2018] QCA 265, cited
R v Feakes [2009] QCA 376, cited
R v Tran; Ex parte Attorney-General (Qld) [2018] QCA 22, cited

COUNSEL: A J Kimmins for the applicant
M J Hynes for the respondent

SOLICITORS: Lawler Magill for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** On 8 October 2019 the applicant was sentenced, on his pleas of guilty, in relation to a number of drug related offences consisting of trafficking in methylamphetamine and possession of methylamphetamine and cannabis. He was also sentenced in respect of his unlawful possession of a motor vehicle (a prime mover truck) which had been modified so as to obscure its ownership.

[2] The offences and the sentences imposed in respect of the offences were as follows:

Count 1	Trafficking in methylamphetamine	9 years and 5 months' imprisonment
Count 2	Possession of a dangerous drug (methylamphetamine) >2.0 grams	Convicted and not further punished
Counts 3 and 5	Possession of a dangerous drug (methylamphetamine and cannabis)	Convicted and not further punished
Count 4	Possession of a category R weapon (a taser)	Convicted and not further punished
Count 6	Possession of a dangerous drug (cannabis) >500 grams	Convicted and not further punished
Count 7	Possession of a dangerous drug (methylamphetamine) >200 grams	Convicted and not further punished
Count 1 (Indictment No 97/19)	Unlawful possession of a motor vehicle	2 years' imprisonment

[3] The sentences on counts 2 to 7 were imposed on the basis that those offences were all part of the trafficking offence. The sentence for unlawful possession of a motor

vehicle was made concurrent on that imposed for the trafficking. A parole eligibility date was fixed at 7 October 2025, after serving six years. The sentence took into account two separate periods of pre-sentence custody, totalling 959 days, neither of which could be declared as time served.

[4] The applicant challenges his sentence on the basis that (i) it is manifestly excessive, and (ii) that the learned sentencing judge erred in two specific ways which resulted in an excessive sentence being imposed, namely:

(a) the learned sentencing judge sentenced on a factual basis not reasonably open on the state of the evidence at sentence; and

(b) his Honour erred in the approach to setting a parole eligibility date, in that impermissible emphasis was based on achieving a parole eligibility date commensurate with a nominal sentence above 10 years, rather than achieving a just sentence in all of the circumstances.

Circumstances of the offending

[5] The facts were set out in an agreed schedule.

[6] The applicant was identified as a person of interest in a police operation targeting people involved in the suspected unlawful supply of dangerous drugs in the Dalby area. Telecommunications intercepts were made in respect of the applicant's mobile telephone between 4 November 2015 and 29 June 2016. Messages and conversations were monitored, and police executed a number of search warrants and performed tactical interceptions. The intercepted communications identified the supply and possession of dangerous drugs and weapons.

[7] The police operation closed on 24 August 2016 when a search warrant was executed at the applicant's address. Police located a large quantity of stolen property and other drug paraphernalia, together with more than 200 grams of pure methylamphetamine, approximately 1.61 kilograms of cannabis, and various weapons, all of which were buried just over the applicant's fence line.

[8] Between 13 March 2015 and 25 August 2016 the applicant trafficked in methylamphetamine at both wholesale and street levels. Many of the particulars, including amounts that were supplied and the profit made, were unknown because conversations were coded or undetected. However, telephone interceptions revealed that the applicant would supply customers with methylamphetamine in various quantities, including "balls", "half balls", half grams and a "quarter". The applicant supplied methylamphetamine to at least 35 customers on at least 29 occasions. That figure was a conservative estimate based on contact with customers and the people the applicant pursued to pay their debts.

[9] The telephone intercepts revealed requests for the "same as last time", "the normal", "same parts", "usual amount", and requests for a "hb" or a "ball". One customer requested what an "ouncey" was worth, the applicant replying "not on this phone".

[10] Many of the supplies occurred at the applicant's house, through his partner, Ms Welldon, with her calling him to say that a particular customer was there and the applicant directing her what to give them or where to find it.

[11] That the applicant supplied at times at a street level was evidenced by small amounts on intercepted customers. However, the applicant had ready access to larger amounts of drugs, and was found in possession of 33.347 grams of methylamphetamine (21.001 grams pure) at his house on 2 July 2015. That was three and a-half months after police seized more than $60,000 from him, $59,970 of which had been hidden in the engine bay of his vehicle. The 33.347 grams of methylamphetamine appeared to have already been broken up into pre-made balls (3.5 grams) and half grams in clip seal bags. There were also large amounts including over 8 grams and over 16 grams. During the final search and closure of the police operation substantial amounts of methylamphetamine and cannabis were located just over the fence line of the applicant's property.

[12] Calls and texts during the interception period occurred at least every few days, and included customers requesting drugs, the applicant telling them to contact him on his other phone, or the applicant chasing debts. On at least 26 occasions the applicant instructed the person he was talking to or sending text messages to, to contact him on his other phone, and made repeated references to not being able to talk on the phone, and that the police would be listening. On one occasion the applicant referred to listening on the "scanner", and that police had been hectic.

[13] The interceptions revealed that the applicant regularly chased customers for outstanding debts, and continually threatened violence to those who had not paid, including threatening punches in the face, chopping off fingers, kicking teeth in, and breaking legs. Over a six month period between November 2015 and May 2016, the applicant chased customers for approximately $23,000.

[14] The interceptions also revealed some discussions about weapons, with the applicant objecting to specific things being mentioned and saying "you might as well ring the cops and tell them first".

[15] The interceptions also revealed a discussion of items being hidden, and instructions to Ms Welldon and to himself as to where items had been hidden.

[16] On 14 March 2015 (the starting date of the trafficking period) the applicant and Ms Welldon were intercepted at Dalby in the applicant's vehicle. He was driving. Police reported him to be agitated and acting nervously. He had $1,200 in his wallet which was on the driver's side dashboard. During a search of the car, $59,970 (mostly in $50 notes) was located within plastic bags concealed in the engine bay. The applicant told police that $800 of the $1,200 was for labouring work, and the balance had been withdrawn from his bank. He told police that the $59,970 was not his and he could not explain how it ended up in his car.

[17] On 2 July 2015 police executed a search warrant at the applicant's address. The applicant and several other men were intercepted in a shed. In his pockets police found two round plastic containers with lids (each containing a quantity of white crystal substance), a black container containing five small clip seal bags each containing a quantity of white crystal substance, $3,000 in cash and two mobile phones. The applicant told police the white crystal was "ice", that he believed he had about 10 grams of it, and it was worth $10,000. He told police that he had bought the substance from someone else and it was for himself. He told police the $3,000 in cash was from selling firewood.

[18] On a workbench in the shed police located a container holding a large quantity of white crystals. The applicant admitted it was his, and it was MSM.[1] Subsequent analysis confirmed that the substance was MSM, weighing 65.738 grams.

[19] Analysis of the white crystal substance in the containers revealed that it contained methylamphetamine. The total weight of 33.347 grams contained a calculated weight of 21.001 grams of pure methylamphetamine (with an average purity of 63.4 per cent). The plastic containers and clip seal bags contained varying weights from 10.428 grams down to 3.5 grams approximately, and three smaller amounts of about 0.5 grams.

[20] Police also located two sets of electronic scales, three glass pipes, a crossbow and (outside the main shed) a stolen vehicle hoist.[2]

[21] The applicant was arrested but declined to participate in an interview, and was charged and remanded in custody. He was granted bail the following day, 3 July 2015.

[22] Based on the amounts and high purity of methylamphetamine, together with it being packaged in separate bags, and the amount of cash located, the Crown alleged that the applicant possessed the drugs for a commercial purpose. There was no challenge to that at sentencing. The drugs had a street value of between $3,930 and $66,694, depending upon the quantities in which it was sold.

[23] On 1 April 2016 police monitored conversations in which the applicant agreed to supply a customer with methylamphetamine the following day. A search warrant executed at the intended location revealed a number of drug items including a clip seal bag with 0.3 grams of methylamphetamine, and another one with 0.6 grams of methylamphetamine.

[24] On 12 April 2016 police intercepted a vehicle[3] being driven by the applicant, and occupied by another man. The applicant had a glass pipe in his possession and the other man had about 7 grams of methylamphetamine in his underpants. Later that day intercepted telephone conversations revealed a discussion between the applicant and Ms Welldon in which the applicant said that the interception was his fault and a story was concocted so that Ms Welldon would confess and thereby let the other man off. A later conversation that day revealed the applicant telling another man that police were probably going through all of his messages and phone calls, and police were probably listening to his calls.

[25] On 3 June 2016 police intercepted a Mack truck driven by the applicant. A roadside drug test returned a positive indication for drugs. The applicant admitted to recent drug use and a search revealed a quantity of white crystal. A personal search revealed a small plastic container inside the front of the applicant's underpants, which contained a small quantity of amphetamine. Analysis revealed that the white crystal in the truck was approximately 0.136 grams of methylamphetamine.[4]

[26] On 24 August 2016 police executed a search warrant at the applicant's address. They located a number of items of drug paraphernalia including two mobile phones,

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1 Methylsulfonylmethane, a cutting agent.
2 These items were the subject of summary charges not dealt with at the sentencing.
3 A white Mack prime mover with trailers attached.
4 This was the subject of count 3.

clip seal bags, two sets of digital scales, a weight for the scales, cut straws, three notebooks and a small plastic container with white residue in it.[5] Police also found a Torch style Taser device.[6]

[27] A search of the property and its surrounds, including the shed and an attached shipping container, revealed two "Spud guns" and 13 Queensland registration plates,[7] and a clip seal bag containing about 6 grams of cannabis.[8]

[28] On the eastern side of the neighbouring property, within 10 metres of the applicant's boundary fence, weapons were found buried. This included a camouflage rifle case containing a loaded Savage rifle, live shotgun shells and rifle ammunition, and an ammunition box containing an assortment of live ammunition.[9]

[29] On the northern end of the applicant's property, again within metres of the boundary, police found items buried including a drum containing three cryovac bags of green leafy material, various rifles and shotguns, a large metal box with an assortment of ammunition,[10] and another ammunition container containing a substantial quantity of white crystal rock substance in heat sealed packaging.

[30] Analysis of the green leafy material, which was contained within three clip seal bags inside a heat sealed plastic bag, revealed that it was 1.61 kilograms of cannabis.[11] Analysis of the white crystal rock substance revealed a total of 1,169.7 grams, with a calculated weight of 813.0 grams of methylamphetamine,[12] with a purity ranging between 68.2 per cent and 71.9 per cent. The methylamphetamine was packed inside a clip seal bag which held nine other clip seal bags with varying amounts of white crystal in each. One bag held 336.3 grams, two of the bags held 166 grams each, and six of the bags held 82 grams each.

[31] Police also located a further ammunition box, another case containing clip seal bags with quantities of tablets and explosives, and a metal case containing a box lab. Various weapons were also located during the search, including a set of nunchukas, knuckle dusters, a laser pointer, and some other items suspected of being tainted property.[13]

[32] The applicant admitted that he was the owner of the spud guns, and said he used them for shooting tennis balls. He admitted the knuckle dusters were his, as were the tasers. He denied any knowledge of the buried drugs and ammunition but admitted that he "may have" handled some of the weapons.

[33] The cannabis was worth between $7,800 and $14,185 if sold on a per pound basis. The methylamphetamine was worth between $180,000 and $398,000 if sold on a per pound basis, and more if sold in smaller amounts.

[34] The applicant was arrested. He declined to participate in an interview with police and was charged and remanded in custody. About nine months later, on 19 May 2017, he was granted bail. That bail was revoked on 21 November 2017.

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5 These items were the subject of summary charges not dealt with at the sentencing.
6 This was the subject of count 4.
7 The subject of summary charges not dealt with at the sentencing.
8 The cannabis was the subject of count 5.
9 The weapons and ammunition were not the subject of charges dealt with at the sentencing.
10 The weapons and ammunition were not the subject of charges dealt with at the sentencing.
11 The subject of count 6.
12 The subject of count 7.
13 These weapons and the other items were the subject of summary charges not dealt with at the sentencing.

[35] On 18 October 2016 police executed another search warrant at the applicant's address. They found and seized a heat sealer from inside the house. Forensic analysis revealed a match between that heat sealer and one of the heat sealed bags which contained a large quantity of the cannabis, which had been buried. The applicant admitted the heat sealer was his.

Applicant's criminal history

[36] The applicant's criminal history commenced in 1984, when he was 16 years old. Between then and 1987 he was convicted of wilful and unlawful damage to property, possession of a prohibited plant and a pipe used in connection with smoking dangerous drugs, and consuming liquor on a road. Between 2001 and 2004 there were a number of convictions for breach of domestic violence orders. In 2006 and 2010 there were convictions for possession of dangerous drugs, possession of utensils used in relation to drugs, possession of property suspected of having been acquired for use in relation to drugs, possessing or publishing instructions about producing drugs, and receiving stolen property or tainted property. The applicant was also convicted of assault occasioning bodily harm in 2010, and threatening violence. Drug offences continued in 2011 and 2012, accompanied by convictions for making threats over a carriage service and assaulting police officers. Convictions in 2014 concerned the receiving of tainted property, unlawful possession of stolen property, breach of bail and possessing utensils or pipes used in relation to drugs. The last two convictions on the applicant's record were for breach of bail conditions on 8 August 2017 and 31 October 2017.

[37] The applicant was 47 and 48 at the time of his offending, and 51 at the time of sentence. The learned sentencing judge was told that he had a long standing addiction to methylamphetamine.

[38] The learned sentencing judge was told that Ms Welldon, who had co-operated with police, had been sentenced on the basis that she was merely an assistant in the trafficking business, and that the applicant was the principal. Ms Welldon was sentenced to eight years' imprisonment.

[39] During the course of submissions at the sentencing hearing, counsel for the applicant conveyed his instructions that the large amount of cannabis and methylamphetamine buried slightly off the edge of his property "was occasions where he was storing those drugs for other people".[14] It was said that "the drugs that he was storing for others weren't for use in his trafficking business although they are associated through his trafficking".[15] In that respect the learned sentencing judge observed that there was no evidence that he was storing the drugs for others, nor was there any such evidence from Ms Welldon, both points accepted by the applicant's then counsel.[16] The Crown made it clear that it was their case that those drugs were possessed by the applicant for sale in his trafficking business.[17]

[40] The learned sentencing judge was told, without objection, that the applicant had two children, one of whom was about 23 or 24 years old and was in court to support

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14 Appeal Book (**AB**) 27 line 10.
15 AB 27 line 24.
16 AB 28 lines 18-33.
17 AB 28 lines 37-41.

him. He also has a 16 month old daughter with Ms Welldon. The applicant was educated to grade 10, and had been self-employed as a truck driver since 1989. For the last 20 years he has had an addiction to ice and speed.

[41] In the course of submissions at the sentencing hearing, having been told that the applicant was working as a truck driver at the time of his offences, the learned sentencing judge observed that "if he's a truck driver and has got trucks, one inference is that he's involved in the transportation of drugs".[18] Counsel for the applicant submitted that there was no support for that inference, other than the fact that he was a truck driver and had large amounts of drugs in his possession, and that there had been no suggestion of such a thing in the telephone interceptions.[19] As submissions continued counsel for the applicant resisted such an inference being drawn. The learned sentencing judge observed that "… even on your instructions that he's storing a lot, that puts him in a different category to someone who's storing it for themselves. But it's a big time activity".[20] That proposition was accepted by counsel for the applicant.

[42] In respect of the likely sentence to be imposed for the offence of unlawful possession of the prime mover truck, the Crown indicated a sentence close to two years, and counsel for the applicant agreed with that.[21]

Approach of the learned sentencing judge

[43] The learned sentencing judge outlined the nature of the offending, drawn from the agreed schedule of facts. In the course of that recitation his Honour observed that one of the factors upon which the sentence would be based was the objective scale of offending, characterised by his Honour by reference to the $60,000 in cash held by the applicant at the start of the trafficking period and the possession of "massive quantities of drugs" at the end. His Honour also noted that about four months later various trafficking items were located by police in the applicant's house, including the heat sealer used to seal packages of cannabis which had been buried.

[44] His Honour said the duration of the trafficking was another factor, it having occupied almost 18 months, and ending only when the applicant went into custody. Further, the motivation was "well beyond what must have been needed to feed your own habit".

[45] An aggravating feature was the applicant's persistence in "trafficking drugs despite police intervention, despite police intercepting you or your customers", showing a "brazen disregard for the law".

[46] The learned sentencing judge also referred to the fact that the 35 customers and 29 occasions of supply were a conservative estimate, and that the applicant chased people for debts, threatening to injure them.

[47] Finally, his Honour referred to the fact that the 813 grams of methylamphetamine would have potentially yielded hundreds of thousands of dollars, depending on the way in which it was sold.

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18 AB 30 line 24.
19 AB 30 lines 27-33.
20 AB 31 lines 31-33.
21 AB 34 line 46 to AB 35 line 5.

[48] Other features taken into account by the learned sentencing judge included:

(a) the revocation of the applicant's bail;

(b) the plea of guilty was not an early plea, and did not indicate any remorse; nor was there any other indication of any remorse;

(c) that the applicant was 47 and 48 at the time of offending and 51 at sentencing;

(d) the applicant's personal circumstances including his children and his addiction to methylamphetamine;

(e) that the applicant was playing an important part in completely destabilising the Queensland community and the community around Dalby by his drug trafficking, for which he should be "severely punished";

(f) the applicant's criminal history which was long, but "not the most serious criminal history";

(g) that the applicant was entitled to some benefit for his guilty plea, both in reduction of a head sentence and factoring it into the parole eligibility date; and

(h) whilst the telephone intercepts provided a window into the scale of the trafficking, they were intercepts on only one of the phones used by the applicant.

[49] The learned sentencing judge also referred to the plea of guilty to unlawful possession of the prime mover truck, and the fact that the applicant had carried out modifications to conceal its identity and true ownership.

[50] The learned sentencing judge reviewed various comparable cases including *R v Carlisle*,[22] *R v Feakes*,[23] *R v Nabhan; R v Kostopoulos*[24] and *R v Markovski*.[25] His Honour also referred to the fact that the applicant's partner had received a sentence of eight years when her involvement in the trafficking was not at the same level as that of the applicant, her guilty plea was timely and she provided a high level of co-operation.

[51] The learned sentencing judge observed that the scale of the applicant's trafficking justified a sentence with a starting point of 12 years, before taking into account other matters. His Honour went on:[26]

> "If I was to sentence you at the bottom end of a 10 to 12-year range, having regard to your plea, and then simply sentence you at that point, you would be required to serve 80 per cent, or eight years, in prison before being eligible for parole. There would be no good reason, given the aggravating circumstances as well as the few mitigating ones, as to why any sentence that is imposed upon you should be less than 10 years, which would require you to serve eight years. It would then fall to me to impose a cumulative sentence for your unlawful possession of a motor vehicle. As I said, as a standalone, that would justify a sentence of three years

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22 [2017] QCA 258.
23 [2009] QCA 376.
24 [2007] QCA 266.
25 [2009] QCA 299.
26 AB 44 lines 24-33.

> imprisonment. To take account of totality considerations, I will ameliorate that to a sentence of two years, which brings a sentence of at least 10 years back up to a sentence of at least 12 years."

[52] Having made those observations the learned sentencing judge then discussed the imposition of the sentences for trafficking and for unlawful possession of a motor vehicle:[27]

> "You have been in custody now for approximately two years, seven months. I am unable to declare the 269 days spent between 24 August 2016 and 19 May 2017 and a further period of 690 days spent between 17 November 2017 and 7 October 2019 as time served. That is a total period of 959 days, or, as I said, a period of about two years and seven months. It would have been much better if all matters against you had been disposed of today, but they cannot be. In accordance with the Court of Appeal authorities, unless there is good reason not to, I should take that pre-sentence custody into account. I am going to take it into account and give you full account for it. You do not get the benefit of it on any other occasion. And so to deduct a period of two years and seven months from a notional sentence of 12 years, one arrives at nine years and five months. For the unlawful use of a motor vehicle, there would be a non-parole period of eight months on a two-year sentence, and so the non-parole period effectively would have been one of eight years on a 10-year sentence and a further eight months on the unlawful possession of a motor vehicle, being a total non-parole period of eight years and eight months. If I deduct two years and seven months from that, being the non-declarable time, one arrives at a period of a little over six years. Therefore, I consider that the most appropriate head sentence to reflect your overall criminality is a sentence of nine years and five months, and to give you a parole eligibility date six years from today, which will be 7 October 2025."

Consideration

[53] The applicant contends that the learned sentencing judge erred in dealing with two factual matters, and that his Honour's state of satisfaction was left unclear in respect of them and thus reliance upon them as aggravating features was not permissible under s 132C of the *Evidence Act* 1977 (Qld).

[54] The first of these factual matters was said to be the inference that the applicant was able to transport the drugs due to his transportation background. This submission refers to a passage in the sentencing remarks where his Honour was dealing with the question of the drugs that had been buried on or near the applicant's property. The relevant passages in the exchange during submissions are set out in paragraph [41] above.

[55] The applicant contends in this respect, as well as whether the applicant was storing the drugs on his own behalf or for someone else, that the factual matters "were

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27 AB 44 line 35 to AB 45 line 4.

either directly found adverse to the Applicant, or … the state of his Honour's satisfaction was left unclear".[28]

[56] In my view, this contention cannot be sustained. When the learned sentencing judge dealt with these matters in his remarks, his Honour noted that the suggestion of the drugs being stored for others was a matter conveyed by counsel's instructions but that "there is no evidence of that", and "no evidence from Ms Welldon in her statement to support the proposition".[29] His Honour then referred to the fact that there was no evidence of extremely large scale supplies on the telephone intercepts, but at the same time the intercepts only related to one of the applicant's telephones. The learned sentencing judge went on to observe that even if it was the case that the applicant was storing the drugs that were found on his property, "that puts you in a different category, but it hardly puts you in a good light", because the applicant "would be storing someone else's [drugs], and the Court must impose heavy penalties for people who possess drugs in those kind of quantities and conceal them for the benefit of drug traffickers".[30] The learned sentencing judge then said:[31]

> "**It is one inference – I do not necessarily draw it – that you were able to transport these drugs**. But where you have chosen to exercise your right to silence and there is not much evidence that you were, in fact, storing these drugs for others, **I tend to conclude that you were storing them for yourself**. Whether that be the case or not, your drug trafficking was on a large scale. **You were not simply a storeman at the end of the period. You were dealing in large amounts of cash at the start of the trafficking period and there was consistency to your trafficking. It is not said that at some time during this 18-month period your business went into a lull**.
>
> Because of the deficit of some information, because you have chosen to exercise your right to silence and because **only one telephone was able to be intercepted, I am prepared to proceed on the basis that you were dealing largely on your own account and your business had a high intensity selling in various quantities**."

[57] Two things follow from that passage. The first is that his Honour did not draw an inference that the applicant was able to transport the drugs due to his transportation background. That is not surprising given that there was no contention from the prosecution that such ability to transport would have been an aggravating factor.

[58] Secondly, his Honour's finding was that the applicant was storing the buried drugs for himself. That follows, if from nothing else, from the findings that the applicant was "not simply a storeman at the end of the period", was "dealing largely on your own account", and "I am prepared to proceed on the basis that you were dealing largely on your own account".

[59] The learned sentencing judge was entitled to reject the assertion of the applicant's instructions given that the evidence otherwise suggested that he was not acting just as a storeman. The instructions challenged the Crown's allegation of fact, and thus

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28 Applicant's Outline, para 11.
29 AB 42 lines 27-30.
30 AB 42 lines 39-42.
31 AB 42 line 42 to AB 43 line 7; emphasis added.

put the learned sentencing judge into the position that he could act upon the allegation "if … satisfied on the balance of probabilities that the allegation is true": s 132C(3) of the *Evidence Act*.[32] In that respect, the learned sentencing judge referred to the large scale and consistency of the trafficking, that it included wholesale trafficking, the telephone intercepts, the large amounts of cash being dealt with at the start of the trafficking period, and the high intensity of the selling. Those facts, in the absence of evidence to the contrary from either the applicant or Ms Welldon, were sufficient for the learned sentencing judge to be satisfied on the balance of probabilities that the allegation by the Crown (that the drugs were stored on the applicant's own behalf) was true. There is no basis to interfere with the sentencing judge's finding of fact.[33]

[60] The second specific error relied upon by the applicant was in the approach to setting a parole eligibility date. The contention is that his Honour formulated both the head sentence and parole eligibility date with direct proportionality to what would have been imposed had a sentence of 10 years or over been available, without the non-declarable pre-sentence custody. This was said to be inconsistent with previous approaches applied by this Court in *R v Carlisle*[34] and *R v Tran; Ex parte Attorney-General (Qld)*.[35] The submission ultimately advanced was that simply because an 80 per cent parole requirement would have automatically followed a head sentence of 10 years or more does not, as a matter of logic or fairness, support a contention that a sentence of just under 10 years (irrespective of how it was arrived at) requires a commensurate non-parole period to achieve a just sentence.[36]

[61] In my view, the applicant's contentions mischaracterise the approach adopted by the learned sentencing judge.

[62] His Honour determined that a sentence of nine years and five months with a parole eligibility date set after serving six years was "appropriate … to reflect [the applicant's] overall criminality". In other words, his Honour determined that that sentence was a just sentence in the circumstances, reflecting the overall criminality, taking into account the plea of guilty and the absence of mitigating factors, and allowing for totality considerations. In doing so his Honour acknowledged, as did the applicant's then counsel, that in the event the sentence was reduced below 10 years by deducting the non-declarable pre-sentence custody, the parole eligibility date could be set beyond the statutory halfway mark.[37]

[63] The passage set out in paragraph [52] above reveals some of his Honour's reasoning in arriving at that sentence, but should be understood as being an attempt to disclose how account was taken of the two years and seven months pre-sentence custody. In doing so his Honour was providing accessible reasoning in the interests of all concerned. This Court adopted a passage from *Markarian v The Queen*[38] in *R v Carlisle*:[39]

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32 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363.
33 *R v Carrall* [2018] QCA 355 at [9]-[11].
34 [2017] QCA 258.
35 [2018] QCA 22.
36 Applicant's Outline, paras 17-20.
37 AB 25 lines 10-41.
38 (2005) 228 CLR 357 at 375 [39].
39 [2017] QCA 258 at [44]-[45]; internal citations omitted.

"[44] … As Gleeson CJ, Gummow, Hayne and Callinan JJ observed in *Markarian v The Queen*:

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

[45] The requirement to take full account of the applicant's pre-sentence custody which could not be declared made it appropriate to disclose how account was taken of this 12 month period in arriving at a head sentence which triggered an automatic serious violent offence declaration."

[64] The explanation by the learned sentencing judge revealed these aspects of the reasoning:

(a) a start point of 12 years was appropriate for the trafficking before the plea of guilty was taken into account;

(b) after the plea was taken into account the appropriate sentence for the trafficking alone was 10 years;

(c) then a cumulative sentence of two years[40] for the additional offence of unlawful possession of a motor vehicle was appropriate;

(d) that meant the effective head sentence was 12 years;

(e) there were no other mitigating factors such as remorse or steps to rehabilitation; that left only the non-declarable pre-sentence custody to be taken into account;

(f) under the effective head sentence the applicant would be required to serve a total of eight years and eight months before being eligible for parole; and

(g) the period of two years and seven months pre-sentence custody should reduce both the effective head sentence and the effective period to be served prior to parole eligibility.

[65] In taking the non-declarable pre-sentence custody into account against both the effective head sentence and the effective period before parole eligibility, the learned sentencing judge was following an approach considered in *R v Carlisle*.[41] There it was held that in a typical case where account is taken of pre-sentence custody which is non-declarable, the practice is that it is taken into account in fixing both the head sentence and the non-parole period. Further, where a head sentence is reduced by non-declarable pre-sentence custody to a figure which still invokes a serious violent

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40 Moderated under the totality principles set out in *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70.

41 *Carlisle* at [50]-[53].

offence declaration, failure to also discount the non-parole period can result in a disproportionately high non-parole period in excess of 80 per cent.

[66] Moreover, the approach reflected in the sentencing remarks was one advocated by the applicant's then counsel in the event that the head sentence was set at 12 years:[42]

> "Your Honour, my ultimate submission will be the easiest way to do it … and probably the most appropriate for that reason will be for your Honour to work out what the head sentence should be … and then if your Honour is – my argument, of course, would be that your Honour won't impose a serious violent offence declaration that's – it's below 10, but if your Honour is not of that view, and your Honour takes the view that it should be in the order of 12 years, and your Honour reduced that by two years and seven months to about nine and-a half years, and your Honour would work out what 80 per cent of 12 would have been and reduced that by two years and seven months, and the parole eligibility would be after that period."

[67] The applicant's approach ignores the fact that that sentence was a head sentence imposed to reflect the overall criminality of all the offences then being considered. That being the case, and there being nothing by way of mitigating circumstances but the late plea, and aggravating features such as the persistence of the trafficking in the face of known police intervention, the effective postponement of a parole eligibility date beyond the statutory halfway mark cannot be said to be beyond the scope of sentencing discretion. His Honour was striving to achieve a sentence that was just in the circumstances, those circumstances being egregious trafficking in methylamphetamine over a long period, at a wholesale level, and persisting in the face of authority. To that has to be added the offence of unlawful use of a motor vehicle where that involved not only depriving the owner of the vehicle (an expensive prime mover) but steps to disguise both it and its true ownership.

[68] The applicant seeks to have the parole eligibility date set at the halfway mark, that is, after serving four years and eight and a half months. To do so would not result in a just sentence in all the circumstances of this case. An effective head sentence of 12 years was justified, as was an effective period of eight years and eight months as the period to be served prior to parole eligibility. To impose a lower non-parole period would distort the sentence and effectively convey a double benefit by not only reducing the non-parole period by the period of pre-sentence custody, but also avoiding the impact of the requirement to serve 80 per cent. It is true that the period to be served under the sentence imposed is beyond the halfway mark, but the appropriate effective head sentence was one which invoked the requirement to serve 80 per cent before parole eligibility. Under the sentence actually imposed the period of six years is less than 80 per cent.

[69] In my view, this ground of challenge fails.

[70] The applicant contends that the sentence is manifestly excessive. However, in doing so the applicant "accepted that the nominal starting point for sentence arrived at by His Honour of 10 years imprisonment could not be said to be manifestly excessive if the trafficking count was dealt with in isolation".[43] In other words, it

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42 AB 25 lines 12-27.

43 Applicant's outline, paragraph 24.

was accepted that it was within the sentencing discretion to start at 12 years before the guilty plea was taken into account, and that a discount to 10 years was appropriate.

[71] The cases referred to below[44] and to this Court[45] amply support that concession, given that the applicant was the principal in an intensive wholesale methylamphetamine trafficking operation over a period of more than 17 months, in circumstances where he persisted in the face of police intervention, and where he threatened violence to recover debts. In *R v Feakes*[46] this Court refused to interfere with a 10 year sentence imposed on a mature (about 31 years old) offender who pleaded guilty to wholesale trafficking in cocaine, MDMA and MDEA, where the trafficking extended over seven months, notwithstanding that there were "impressive mitigating features". Having reviewed numerous authorities, the Court concluded 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";[47] and
>
> "This Court has often stated that those who traffic in sch 1 drugs for profit at a high level and in large quantities can anticipate that courts will impose heavy deterrent sentences …"[48]

[72] A similar conclusion was expressed in *R v Carlisle*[49] where this Court again examined numerous so-called comparable cases in the course of reviewing a sentence imposed for trafficking in schedule 1 drugs. There the offender played a subsidiary role in a trafficking operation, so the actual sentence offers no real assistance here. However, this Court said, in relation to the level of sentences for trafficking in schedule 1 drugs:[50]

> "[93] The cited cases indicate that when the principals of large scale drug operations like *Jacobs*,[51] *Barker*,[52] and *Gordon*[53] plead, they often receive sentences of around 10 years, and when they do not plead, or plead very late, they receive sentences of 13 years (*Milos*),[54] 13 years (*Nabhan*,[55] a late plea which he sought to withdraw), 15 years (*Markovski*)[56] and 12 years (*Versac*).[57]
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> …

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44 *R v Feakes* [2009] QCA 376; *R v Carlisle* [2017] QCA 258; *R v Nabhan*; *R v Kostopoulos* [2007] QCA 266; *R v Milos* [2014] QCA 314; *R v Markovski* [2009] QCA 299; *R v Westphal* [2009] QCA 223; and *R v Bradforth* [2003] QCA 183.

45 *R v Carall* [2018] QCA 355; *R v Nunn* [2019] QCA 100; *R v Castner* [2018] QCA 265.

46 [2009] QCA 376.

47 *Feakes* at [33].

48 *Feakes* at [34].

49 [2017] QCA 258.

50 *Carlisle* at [93] and [95]; internal citations added.

51 *R v Jacobs* [2016] QCA 28.

52 *R v Barker* [2015] QCA 215.

53 *R v Gordon* [2016] QCA 10.

54 *R v Milos* [2014] QCA 314.

55 *R v Nabhan; R v Kostopoulos* [2007] QCA 266.

56 *R v Markovski* [2009] QCA 299.

57 *R v Versac* [2014] QCA 181.

> [95] Cases of trafficking by defendants on their own account in apparently smaller operations than the one in which the applicant was engaged cluster around the 10 year mark. *Bradforth*[58] is an example of an effective sentence of 11 years for someone who was 24 to 25 years old, with a significant criminal history and who was in business on his own account. He was not an addict but a drug user."

[73] Similar conclusions were expressed by this Court in *R v Tran; Ex parte Attorney-General (Qld)*[59] and *R v Castner*.[60]

[74] Further, in *Carlisle* this Court adverted to the fact that trying to distinguish so-called comparable cases by applying labels to the offending was not helpful. In each case one must return to what the offender did in order to properly characterise the seriousness of the offending.[61] In my view, bearing in mind that no two sets of facts for offending conduct will be precisely the same, it is also not helpful to try to distinguish comparable cases by the minutiae of the differences between them and the subject offending. Relevant distinguishing features are ordinarily measured by orders of magnitude rather than the veneer that separates one set of facts from another.

[75] In the present case the focus of the submission was, however, that the appropriate range for the whole of the offending was, in all of the circumstances, nine to 10 years' imprisonment, and that effectively accumulating the sentence for trafficking with that for unlawful possession of a vehicle resulted in a crushing and inordinate sentence which did not reflect an appropriate application of the principle of totality.

[76] Both the prosecutor and applicant's counsel agreed that the count for unlawful possession of a motor vehicle warranted a two year sentence. His Honour considered that three years was appropriate given: (i) the applicant knew it was stolen; (ii) the prime mover's value ($130,000); and (iii) the fact that the applicant took steps to modify it to conceal its ownership.[62] In my view, it cannot be demonstrated that his Honour's exercise of that discretion miscarried. As his Honour said, this was a different case from that where the offender simply took a car.

[77] Further, the learned sentencing judge cannot, in my respectful view, be demonstrated to have erred in the notional reasoning towards reaching a just sentence which proceeded upon the basis of making that sentence cumulative. That offence was not related to any of the drug offences, and the applicant knew the truck to be stolen when he took possession of it.

[78] When the nine year and five months sentence for trafficking was imposed the learned sentencing judge made the motor vehicle sentence concurrent, not cumulative. Thus its impact was only as part of the reasoning towards his Honour's determination of a just sentence to reflect the overall criminality.

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58 *R v Bradforth* [2003] QCA 183.
59 [2018] QCA 22 at [37]-[38].
60 [2018] QCA 265 at [30].
61 *Carlisle* at [91].
62 Replacing its vehicle identification number with a false identification number, and then re-registering it with the false number.

[79] In my view it cannot be said that the sentence is manifestly excessive because of the way that the learned sentencing judge factored in the effective sentence for that separate offence.

[80] I would refuse the application for leave to appeal.

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

[82] **CALLAGHAN J:** I agree with Morrison JA and Bond J.