SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hennig* [2010] QCA 244
PARTIES:	**R** **v** **HENNIG, Tamlan John** (appellant)
FILE NO/S:	CA No 221 of 2009 DC No 515 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2010
JUDGES:	McMurdo P, Fraser JA, and White JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – appellant pleaded not guilty to eight drug offences, including trafficking in the dangerous drug methylamphetamine, trafficking the dangerous drugs 3,4-methylenedioxymethamphetamine (MDMA), 3,4-methylenedioxyethylamphetamine (MDEA) and cannabis sativa, possessing scales used in connection with the commission of the crime of trafficking in dangerous drugs and knowingly possessing a sum of money obtained from trafficking in dangerous drugs – appellant's mobile phone and computer produced no evidence of business of trafficking – witnesses, including the appellant's brother and father gave innocent explanations for the appellant's possession of money – appellants living expenses considerable but no regular apparent source of income – appellant in possession of various illegal drugs, scales and paperwork – surveillance footage showed a number of visitors to appellant's apartment for short periods of time – whether it was open to the jury to be satisfied beyond reasonable doubt that the money found in

appellant's safe was obtained from trafficking in dangerous drugs – whether it was open to the jury to be satisfied beyond reasonable doubt that appellant engaged in business of trafficking dangerous drugs – whether verdict unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – during trial prosecutor put to appellant that his version of events was false – prosecutor submitted that appellant's inability to explain possession of drugs was indication of inability to cover up lies – neither counsel sought direction from judge about lies told by appellant – defence did not seek jury direction on lies – whether judge erred in failing to direct the jury as to the use to be made of lies – whether non-direction resulted in a miscarriage of justice

CRIMINAL LAW – EVIDENCE – RELEVANCE – GENERALLY – police surveillance footage of number of people visiting appellant's unit over eight days tendered as evidence – footage was over 15 hours long – judge directed that footage be fast-forwarded during periods of no activity and prosecution to produce a schedule for each DVD showing times of arrival and departures – schedule not evidence itself – jury had access to all footage – whether judge erred in not playing the surveillance footage in full

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – appellant sentenced to effective total sentence of seven years imprisonment with no parole eligibility date set – time period of appellant's offences was short – appellant was young with short criminal history – references submitted that offending was out of character – appellant suffers from diabetes – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 668E(1)

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, considered
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Barton [2006] QCA 367, considered
R v Coleman [2006] QCA 442, considered
R v Cooney; ex parte A-G (Qld) [2008] QCA 414, considered
R v Taylor [2005] QCA 379, considered

R v Taylor [2006] QCA 459, considered
R v Yates [2006] QCA 101, cited
Smith v The Queen (2001) 206 CLR 650; [2001] HCA 50, distinguished
The Queen v Hillier (2007) 228 CLR 618; [2007] HCA 13, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28

COUNSEL: S J Hamlyn-Harris for the appellant
M J Copley for the respondent

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

[1] **McMURDO P:** The appellant, Tamlan John Hennig, pleaded not guilty to one count of trafficking in the dangerous drug methylamphetamine (count 1); one count of trafficking in the dangerous drugs 3,4-methylenedioxymethamphetamine (MDMA), 3,4-methylenedioxyethylamphetamine (MDEA) and cannabis sativa (count 2); possessing the dangerous drug MDMA in excess of 2 grams (count 3); unlawful possession of the dangerous drug methylamphetamine in excess of 2 grams (count 4); possession of the dangerous drug MDMA in excess of 2 grams (count 5); unlawful possession of the dangerous drug cannabis sativa in excess of 500 grams (count 6); possessing scales used in connection with the commission of the crime of trafficking in dangerous drugs (count 8); and knowingly possessing a sum of money obtained from trafficking in dangerous drugs (count 9). He pleaded guilty to one count of unlawfully possessing the dangerous drug cocaine (count 7).

[2] His trial on counts 1-6, 8 and 9 first commenced on 18 August 2009 but was aborted due to the illness of a juror. It re-commenced on the following day before a different jury. After a six day trial, the jury convicted him on all counts. He then pleaded guilty to a summary offence of unlawful possession of a pipe used in connection with smoking a dangerous drug. He was sentenced to an effective global term of seven years imprisonment on count 1, six years concurrent imprisonment on count 2 and lesser concurrent terms of imprisonment on the remaining counts on the indictment. He was convicted but not further punished on the summary offence. The judge did not set the date at which he was to be considered for eligibility for release on parole so that his parole eligibility date is after three and a half years imprisonment.[1]

[3] He appeals against his conviction on a number of grounds. He first contended that his conviction on count 9 was unsafe having regard to the whole of the evidence. He then contended that his convictions on counts 1, 2 and 8 were also unsafe. He next contended that the primary judge failed to direct the jury on the use of lies which the prosecution alleged he had told in his evidence at trial and that this gave rise to a miscarriage of justice. His final contention was that the primary judge refused to allow surveillance tapes to be played in full without editing or fast-forwarding and that this gave rise to a miscarriage of justice. He has also applied for leave to appeal against the sentences imposed on counts 1 and 2, contending they are manifestly excessive.

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1 *Corrective Services Act* 2006 (Qld), s 184.

The appeal against conviction

The evidence at trial

[4] Before dealing with the grounds of appeal against conviction, it is necessary to summarise the evidence at trial.

The prosecution case

[5] The prosecution case was as follows. The offences were alleged to have occurred over 10 days in early January 2007. The appellant rented a small unit at 355 Main Street, Kangaroo Point but lived in another rented unit at 30 O'Connell Street, Kangaroo Point. Police conducted covert surveillance by training a concealed camera on the door of the Main Street unit from Tuesday, 2 January 2007 to Friday, 5 January 2007, and from Monday, 8 January 2007 to Thursday, 11 January 2007. The trafficking alleged in counts 1 and 2 was charged as occurring between 1 January and 12 January 2007. The surveillance camera footage was tendered at trial. It showed the appellant going to the Main Street unit on each day from and including 2 to 5 and 8 to 10 January 2007 at about 4pm and staying for one to two hours. On Thursday, 11 January, it showed that he arrived at about 5.20pm.

[6] The surveillance footage also showed a number of people visiting the unit on those days and at those times when the appellant was present. On 2 January 2007, seven people visited and left. On each of 3, 4 and 5 January, nine people visited and left. On 8 January, eight people visited and left. On 9 January, five people visited and left. On 10 January, seven people visited and left. On 11 January, 12 people knocked on the unit door to the unit or made telephone calls outside the unit after about 3.30pm, but the appellant did not arrive until about 5.20pm. Many of the visits were of short duration, sometimes only three or four minutes. The prosecution did not call evidence from those visitors and nor did it tender evidence of telephone or other communications between the appellant and the visitors. The prosecution, however, contended that the evidence of those visits was a piece of circumstantial evidence implicating the appellant in trafficking in dangerous drugs: at least some of those visitors went to the unit to transact drug deals with him.

[7] On 11 January 2007, police intercepted the appellant as he was leaving the Main Street unit. They then executed a warrant and searched the unit. They found 621 tablets containing 32.143 grams of MDMA and 9.112 grams of MDEA and methylamphetamine with a pure weight of 1.169 grams and 7.241 grams in a backpack which the appellant was carrying. Inside the unit they found further methylamphetamine, MDEA, cannabis and in a black suitcase a set of scales and some pieces of tablet containing MDMA. There was no food in the unit's refrigerator but there was a clipseal plastic bag containing 0.339 grams of pure methylamphetamine. A black Puma sports bag inside the unit contained a large quantity of cannabis. A small quantity of methylamphetamine was found in another bag. In a Canadian Club cooler bag in a bedroom, police found methylamphetamine with a pure weight of 0.584 grams and some more cannabis. Some shopping bags in a cupboard in a bedroom contained a residue of green leaf material. Paperwork with names of 18 people and figures ranging from 15 up to 8,500 was found in the appellant's shoulder bag. Many of the names had been scratched out so thoroughly that they were completely illegible.[2]

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[2] Exs 8 and 9.

[8] Police also found a large commercial coffee machine, bags of coffee beans, business letterhead associated with a business called "Expresso Capers" and paperwork concerning a t-shirt design business called "Corrupt Brothers".

[9] Police took the appellant to his residence in O'Connell Street where they executed another warrant. They found cannabis sativa in a bag above the refrigerator, a clipseal bag containing 0.717 grams of pure methylamphetamine, a small amount of cocaine[3] and two MDMA tablets with a pure weight of less than 0.001 grams. More cannabis sativa was found in the pantry. The appellant also directed them to a safe which contained $63,445 in cash and methylamphetamine totalling 0.312 grams. In a bedroom, police found a further 454 grams of cannabis. In all, 969.3 grams of cannabis was found.

[10] Once it was established that the appellant was an occupier or a person concerned in the control and management of the units where the drugs and associated items were found, he was in possession of those goods, unless he satisfied the jury that he did not know of or have reason to suspect their presence: *Drugs Misuse Act* 1986 (Qld), s 129(1)(c), (d) and (e).

[11] There were no text messages on the appellant's mobile phone, or any material on his computer, to link him with illegal sales of drugs. The appellant told police that the money in the safe, or some of it, came from family members.

[12] Inam-Youl-Haque Alvi, a taxi driver who was friendly with the appellant, gave the following evidence. The appellant lent him $15,000 in March 2006 to help him with expenses associated with Mr Alvi's wedding in Pakistan. In return, Mr Alvi lent the appellant a red BMW until he was able to repay the appellant. The appellant was using this vehicle at the time of his arrest. Mr Alvi was one of the visitors shown on the surveillance tape visiting the Main Street unit on 8 January 2007. He was unaware of any illegal drug transactions occurring at the unit. He discussed with the appellant the possibility of opening a restaurant and in June 2006 gave him $26,000 for this purpose. Mr Alvi had received $23,000 from an inheritance and he had $3,000 in savings. He was aware that the appellant was in the coffee machine vending business and also ran "Corrupt Brothers", a t-shirt design business.

[13] The prosecution also tendered analysts' certificates identifying the drugs found[4] and bank records to establish that the appellant had no apparent significant source of income at the time of the alleged offences.[5]

The defence case

[14] The appellant called a number of witnesses who had visited the Main Street unit during the surveillance period. Shay Leonard Lake had been a friend of the appellant for three or four years and was in business with him. He had visited the unit but did not see any drug dealing there. Mr Lake's personal partner, Yeal Lavon, also gave evidence. She had known the appellant for more than seven years and had visited the Main Street unit. She had never seen any illegal drug trafficking or sales there. Nicole Armanasco gave evidence that she had known the appellant for 12 or

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3 The cocaine was the subject of count 7 to which the appellant pleaded guilty.

4 Exs 24 and 25.

5 Ex 26.

13 years. She was unaware of any illegal drug transactions taking place at the Main Street unit. Michael Andrew Maher had known the appellant for between 15 and 17 years. He visited the Main Street unit once. The appellant never offered him drugs and he never saw illegal drugs at the Main Street unit. He thought of the appellant as a little brother. He lent the appellant $10,000 for an Indian restaurant project. He did so on the basis that the appellant would reimburse him once his business was established. He recorded the date of the payment of the $10,000 loan on a Wallace Bishop receipt[6] but did not record the amount of the payment.

[15] The appellant's brother, Simon Hennig, gave evidence that he lent the appellant $15,000 in cash in March or April 2006 to assist with the purchase of a restaurant.

[16] The appellant's father, Robert James Hennig, gave evidence that he lent the appellant $10,000 in March 2006. The loan was in cash because the appellant told him he did not have a bank account.

[17] The appellant's evidence included the following. He conducted a number of businesses, including "Expresso Capers" which owned two coffee vending machines intended for installation in city office blocks. One was installed with Queensland Railways. He used the Main Street premises to store supplies for that business and also for his "Corrupt Brothers" t-shirt design business. He spoke to potential business operators who might be interested in hiring coffee equipment at the Main Street premises. He identified various people who visited the Main Street unit in the surveillance DVDs. Their visits were for legitimate business purposes.

[18] He was considering setting up a Pakistani-Indian restaurant with Mr Alvi. Mr Alvi and Mr Maher had contributed money towards this project. He kept this money in his safe in O'Connell Street together with $10,000 he had received from his father and $15,000 from his brother.

[19] The appellant denied selling or supplying illegal drugs to anyone. He admitted that some of the drugs found in the O'Connell Street unit were his. The drugs which police found in his shoulder bag were taken by him from another bag left in the Main Street unit by a tall bald man to whom he was introduced by a person by the name of Sef Aksamaz. He knew this tall bald man as John or Greg. This man threatened him with a cocked Glock pistol at close range and accused him of robbing a friend. He threatened to kill the appellant and said that if he called the police he would kill him. He claimed to be a police officer and that he would know if the appellant contacted the police. The tall bald man left a suitcase with the appellant and told him not to open it. He accused the appellant of taking a large amount of money from friends. He told the appellant that "he was going to work him like a mule".

[20] The appellant said that, about a year earlier in 2005, he had robbed a person whom he believed to be a corrupt police officer at Mowbray Park. He thought the tall bald man was connected with this incident. The appellant had received some information about corrupt police robbing drug dealers who had large amounts of cash. He was told of a meeting that was to take place involving such people at Mowbray Park. He borrowed a pistol from a friend and went to Mowbray Park. He pointed the gun at a man whom he believed to be a corrupt police officer and robbed him of a brief case containing $160,000 in cash. He gave $50,000 to the man who

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6 Ex 27.

provided him with the information and other amounts to different friends. He spent most or all of the rest. The money found in his safe on 11 January 2007 would not have been the proceeds of that robbery.

[21] A few days after the first visit, the tall bald man called on the appellant in his O'Connell Street unit and was more pleasant. He offered him marijuana and "ice" but the appellant refused these drugs. The man asked if he could leave drugs at the O'Connell Street unit for a few days. The appellant put the cannabis into his third bedroom. He did not see the tall bald man again. He kept the drugs at his Main Street and O'Connell Street units because the tall bald man threatened to kill him if he told anybody or did anything with the drugs.

[22] On 11 January 2007, the appellant had been out to lunch with friends. He arrived at the Main Street unit a little later than usual. He received a phone call from a friend who told him there were police around the Main Street unit. He went to the black suitcase left by the tall bald man which he had cut open the day before. He removed the drugs from the suitcase, put them in his shoulder bag and left the unit. He intended to arrange for Shay Lake to take him to a police station so that he could hand in the drugs but he was apprehended by police before he was able to do this.

[23] He agreed that the paperwork[7] looked like his handwriting but it had nothing to do with drugs. He could not say what it was about. He did not bring drugs or scales into the Main Street unit.

Is the conviction on count 9 unreasonable?

[24] The appellant's first contention is that the conviction on count 9, knowingly possessing money obtained from trafficking in dangerous drugs, is unreasonable or cannot be supported having regard to the evidence. There were innocent uncontradicted explanations from Mr Alvi, Mr Maher, and the appellant's brother and father for the appellant's possession of this money. A reasonable jury must have had a reasonable doubt as to the source of the money found in the appellant's safe.

[25] The respondent emphasises the statement of Gummow, Hayne and Crennan JJ in *The Queen v Hillier*:[8]

> "… It is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence."

[26] In my opinion, those observations are apposite when considering the evidence on count 9. The appellant's brother, father, Mr Alvi, and Mr Maher, all gave evidence that they gave the appellant various amounts of cash some time before the appellant was charged with these offences. But that evidence must not be considered in isolation from all the evidence. The jury were entitled to reject that evidence. But, even if they accepted it or thought it may be reliable, they were entitled to conclude that, in any case, the money in the safe, or some of it, came from the business of trafficking in illegal drugs. The appellant did not have a regular source of income.

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7 Exs 8 and 9.

8 (2007) 228 CLR 618, 637, [46].

The rent on his O'Connell Street unit, where he lived alone at the time of his arrest, was $640 per week. The rent on his Main Street unit was $250 per week. He maintained Mr Alvi's red BMW. His living expenses were plainly considerable. Money given to him by others some time earlier could well have been spent by the time he was charged with the present offences. His account of obtaining $160,000 from a corrupt police officer in Mowbray Park appeared fanciful. Importantly, his possession of a large quantity of diverse drugs, scales and unexplained business-type paperwork at the time of his apprehension was damning and was entirely consistent with his trafficking in dangerous drugs. The steady number of visitors to the Main Street unit for short periods when the appellant was present also supported the trafficking counts.

[27] The absence of damning mobile phone or computer records did not undermine the considerable body of other incriminating evidence. It was therefore almost certain that at least some of the $60,000 odd found in a safe in his residence was the proceeds of his trafficking. And nor did the absence of evidence from those attending the Main Street unit that they were doing so to purchase drugs.

[28] When the whole of the evidence relevant to count 9 is considered, it was well open to the jury to be satisfied beyond reasonable doubt that the money found in the appellant's safe was obtained from trafficking in dangerous drugs: *MFA v The Queen*.[9] The first ground of appeal fails.

Were the appellant's convictions on counts 1, 2 and 8 unreasonable?

[29] The appellant next contends that the evidence at trial was insufficient to show beyond reasonable doubt that he was engaged in the business of trafficking in dangerous drugs and that counts 1, 2 and 8 were unreasonable and cannot be supported by the evidence: s 668E(1) *Criminal Code*. He again emphasises that there was no evidence that any of the visitors to the Main Street unit were engaged in drug transactions. The appellant's mobile phone and computer did not produce any evidence of relevance. Nothing was found in the appellant's car or in a storage shed to which he had access to link him with drug trafficking. The jury could not exclude beyond reasonable doubt the reasonable possibility that the visitors came to the Main Street unit for lawful reasons and that the appellant was not engaged in drug trafficking.

[30] These contentions are beyond optimistic. The jury were well entitled to reject the appellant's exculpatory evidence as unbelievable in light of the other compelling evidence against him. The prosecution evidence established that the appellant was in possession of significant quantities of various illegal drugs, a set of electronic scales, and paperwork in his handwriting with names and figures. The appellant was unable to provide an innocent explanation for the paperwork. As I have noted at [27] of these reasons, they were entitled to find that at least some of it had come from drug trafficking. He had over $60,000 cash in his safe. The appellant's attendance at the Main Street unit at a regular time on eight of the nine days the surveillance was conducted, together with numerous visits from others during those times, often for short periods, was a piece of circumstantial evidence capable of supporting the prosecution case. The appellant was living a comfortable lifestyle without any apparent lawful income. He drove and maintained a BMW car. He

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9 (2002) 213 CLR 606, [25], [59].

rented the O'Connell Street unit for $640 and the Main Street unit for $250 per week. From at least late September 2006 he paid all the rent on both units.

[31] The jury were also entitled to conclude that the evidence of the appellant's friends and family did not support any explanation consistent with innocence when weighed against the strong prosecution case.

[32] After reviewing the whole of the evidence on these counts, I am well satisfied that it was open to the jury to be satisfied of the appellant's guilt on counts 1, 2 and 8. This ground of appeal is without merit.

Did the judge's direction on lies cause a miscarriage of justice?

[33] The appellant then submits that the judge's failure to direct the jury about any lies told by the appellant in accordance with *Edwards v The Queen*[10] and *Dhanhoa v The Queen*,[11] caused a miscarriage of justice. There was a real danger that the jury might reason that, because the appellant's evidence was false, his lies could be used as circumstantial evidence of guilt to strengthen the prosecution case.

[34] I will first set out what occurred at trial on the matter of the appellant's lies. During cross-examination, the prosecutor put to the appellant that his version of events was false and that his claims of involvement of a tall bald man and a corrupt police officer, were "fantasy".

[35] The prosecutor in his final jury address said:

> "…I'd like to discuss the evidence and the comparative merits of the case. [The defence barrister], in the course of his address, mentioned to you a phrase and I'm sure you're all familiar with, 'truth is stranger than fiction', a phrase that has its origins in a poem actually written by Lord Byron in the early 1800s, a poem by the name of 'Don Juan', and that is where this phrase, 'The truth is stranger than fiction' comes from.
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> Could I pick up on the literary theme, as it were, and mention to you another quote that he might find apposite in the context of this trial and particularly in the context of the evidence that you've heard from [the appellant]. The quote comes from Joseph Goebbels, who some of you might know was the Minister for Propaganda in the Nazi regime in the 1940s, Germany, and during the Second World War. Joseph Goebbels was the one who - and I paraphrase this - said this, 'when one lies, lie big and stick to it. Keep up the lie even at the risk of looking ridiculous.'
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> You might think in this case [the appellant], in order to explain away significant if not overwhelming evidence of his drug trafficking, has chosen to lie big and to stick with it, by coming up with a frankly preposterous story of corrupt drug dealing police officers, bikies and informants, who manage to run around undetected in Brisbane carrying briefcases with hundreds of thousands of dollars, stealing drugs from different drug dealers, organising bashings, things that

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10 (1993) 178 CLR 193.

11 (2003) 217 CLR 1, 12, [34].

> they get away with with not a whiff of it coming to the attention of the police, the press, or anyone else, you might think. How on earth could a group such as that operate? How could they operate in a town like Brisbane? We're not talking about New York. We're not talking about Hollywood where some scriptwriter might have cooked up a story like this. We are dealing in this Court, ladies and gentlemen, with the evidence and with the real world, not some man's fantasy in order to try and persuade you that he was not the person responsible for the large amount of drugs and money found in his possession on the 11th of January 2007.
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> You see, ladies and gentlemen, if you disbelieve [the appellant's], evidence as I would suggest you would - and I'll come to some reasons why you would shortly - if you disbelieve his evidence you are left then, in effect, with the uncontradicted evidence of the prosecution case, the evidence of the surveillance of unit 26, the evidence of the quantity and variety of drugs found on that day, the evidence of the money found in his O'Connell Street unit, evidence of the names and numbers written on Exhibit 8, evidence which establishes, not only beyond reasonable doubt, but beyond any possibility of a doubt, that [the appellant] was deeply involved in the illicit drug trade.
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> If you believe his story, if you think he was telling the truth about the police officer called Greg or John or Jimmy, the other fellow called Pete, whatever names were that he came up with, if you believe that story, then acquit [the appellant]. If you think he was telling the truth about corrupt cops running around with sackfuls of cash stealing drugs, acquit [the appellant].
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> If you think that he was beaten for the purpose of trying to persuade him to plead guilty and not allow this corrupt game to be exposed, then acquit [the appellant]. If you disbelieve him though, you are left, as I say, with the uncontested evidence of the prosecution case that establishes beyond any doubt his involvement in the unlawful trafficking in these drugs."

[36] The only jury direction as to lies given by the judge was when the judge summarised the prosecution case. His Honour reminded the jury that the prosecutor had submitted that the appellant's "inability to explain the presence of some drugs such as the methylamphetamine in the refrigerator in the Main Street Unit was … but a further indication of his inability to cover up all of the lies he had told."

[37] The judge, however, gave the jury other helpful, fair and pertinent directions on this aspect of the trial:

> "Often enough cases are described as ones of word against word. You should understand that in a criminal trial it is not a question of your making a choice between the evidence of the prosecution's principal witness or witnesses and the evidence of the defendant and/or his witnesses.
>
> The proper approach is to understand that the prosecution case depends upon you, the jury, accepting that the evidence of the prosecution's principal witnesses was true and accurate beyond

> reasonable doubt despite the sworn evidence by the [appellant] and his witnesses. So you do not have to believe that the [appellant] is telling the truth before he is entitled to be found not guilty.
>
> Where, as here, there is defence evidence, usually one of three possible results will follow. First, you may think the defence evidence is credible and reliable and that it provides a satisfying answer for the prosecution's case. If so, your verdict would be not guilty. Or, secondly, you may think that although the defence evidence was not convincing it leaves you in a state of reasonable doubt as to what the true position was. If so, your verdict will also be not guilty. Or, thirdly, you may think that the defence evidence should not be accepted. However, if that is your view, be careful not to jump from that view to an automatic conclusion of guilt. If you find the defence evidence unconvincing, set it to one side, go back to the rest of the evidence and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question."

[38] His Honour's directions to the jury as to circumstantial evidence were also relevant:

> "To bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference, but also that it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is your duty to find the [appellant] not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt."

[39] Neither counsel sought a direction or redirection from the judge concerning the question of lies told by the appellant in his evidence. It follows that to succeed on this ground of appeal, the appellant must establish that the omission of such a direction has caused a miscarriage of justice.

[40] There is no doubt that ordinarily, if the telling of a lie by an accused person is relied upon by the prosecution not just to strengthen the prosecution case but also to corroborate other prosecution evidence, the jury should be given careful directions. They should be told that the untruthfulness of the statement said to be a lie must be established otherwise than through the evidence of the accused person and the lie must be precisely identified. They may take the lie into account only if satisfied, having regard to the relevant circumstances, that it reveals a knowledge of the offence or some aspect of it, and that it was told because the accused person knew that the truth of the matter with which the lie was concerned would implicate the accused in the offence, or because of a realisation of guilt and a fear of the truth. The jury should also be reminded that there may be reasons for the telling of a lie apart from a realisation of guilt. See Deane, Dawson and Gaudron JJ's discussion of this issue in *Edwards*.[12]

[41] The High Court has since emphasised in *Zoneff v The Queen*[13] that where the prosecution does not rely upon the answers of an accused person to submit that the

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12 (1993) 178 CLR 193, 208-211.

13 (2000) 200 CLR 234, Gleeson CJ, Gaudron, Gummow and Callinan JJ 244- 245, [16]-[20].

accused person lied out of a consciousness of guilt, it is usually unnecessary and undesirable to give an *Edwards* direction. But where there is a serious risk that the jury might engage in an impermissible process of reasoning in relation to the matter of lies, a trial judge might warn the jury not to reason, just because a person is shown to have told a lie about something, that is evidence of guilt.[14]

[42] More recently, in *Dhanhoa*,[15] the High Court affirmed that where the prosecution did not contend that a lie was evidence of guilt, it was generally unnecessary and inappropriate to give an *Edwards* direction unless the judge apprehended there was a real danger the jury might apply an inappropriate course of reasoning. McHugh and Gummow JJ noted, however, that it would have been preferable for the judge in that case to have instructed the jury that, if they found that the accused had lied, the lies only affected his credibility.[16] The appellant contends such a direction should have been given in this case.

[43] When the prosecutor's colourful submissions to the jury about how they might deal with the appellant's evidence is viewed in the context I have set out,[17] it is clear he was not inviting the jury to treat the appellant's evidence, which he described as false, fantasy and lies, as amounting to a circumstance capable of boosting the prosecution case. The prosecutor correctly told the jury that, if they disbelieved the appellant (as he urged them to) then they would be left with the uncontested prosecution evidence. This evidence, he submitted, established beyond reasonable doubt the appellant's involvement in the unlawful trafficking of drugs. As the prosecutor did not invite the jury to treat the appellant's lies as a matter strengthening the prosecution case or to use the lies themselves to improperly reason that the appellant was guilty because he lied, this was not a case where directions of the *Edwards* or *Zoneff* kind were needed. Nor was a direction of the type discussed by McHugh and Gummow JJ in *Dhanhoa* required. Such directions would only have highlighted the credibility issues at the essence of matters for the jury's determination[18] and emphasised the fanciful aspects of the appellant's case. No doubt that was why the experienced defence counsel at trial did not ask for any such direction.

[44] The absence of any direction as to lies has certainly not caused a miscarriage of justice. This ground of appeal is not made out.

Should the surveillance tapes have been played in full?

[45] The appellant's final ground of appeal is that the judge should have played to the jury in full the seven surveillance DVDs[19] of the entrance to the Main Street unit during the alleged trafficking period. The appellant contended his submission was supported by *Smith v The Queen*.[20]

[46] The appellant's counsel at trial stated that he did not want any part of the surveillance DVDs fast-forwarded when played to the jury. He sought to emphasise to the jury that there were long periods of footage without any activity. The trial

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14 Above, 245 [22]-[24].
15 (2003) 217 CLR 1, Gleeson CJ and Hayne J 12 [34].
16 Above, 17-18, [59].
17 See [35] of these reasons.
18 See *Zoneff* (2000) 200 CLR 234, 245 [20].
19 Exs 16-23.
20 (2001) 206 CLR 650.

judge had misgivings about playing over 15 hours of surveillance DVDs when for many hours nothing relevant was happening. His Honour noted: "Surely, there must be some more efficient way of dealing with it than just looking at a door area most of the time?" Defence counsel informed the judge that his hands were tied and that his instructions were that the DVDs should be played in full.

[47] His Honour determined to take a compromise course. The DVDs would be fast-forwarded during periods when they recorded no activity. His Honour noted that, otherwise, the jury would be subjected to about three or four days where most of the time they were looking at a screen displaying a blank doorway. This would be "an intolerable burden for the jury and a very significant waste of the Court's time and public money". To ensure the fast-forwarding did not distort the jury's perception of real time, the prosecution would produce a schedule for each surveillance DVD showing the times of arrivals and departures. The fast-forwarding of the DVDs would not then present a false impression of the frequency or infrequency of arrivals and departures at the Main Street unit. All DVDs would go into the jury room when they retired to consider their verdict so that the jury could review the surveillance evidence if they wished.

[48] The judge directed the jury that he had decided that it was more efficient to conduct the trial by fast forwarding the footage between incidents where people came to the doorway of the unit, explaining to them:

> "To facilitate that and to avoid any risk of a false impression being created as to the frequency with which visits occur to the unit the prosecution is going to prepare a schedule for you for each DVD showing the elapsed time in between events commencing from the start of the video, and the control of the video has been changed to a computer at the prosecutor's part of the Bar table which allows more precise fast-forwarding between events than can be achieved by the equipment available to the Bailiff in that corner of the Courtroom.
>
> [The prosecutor] tells me that he proposes to fast-forward at the rate of four times normal speed between events which should enable you to satisfy yourselves whether there's anything of interest happening between the events when people come to the doorway or leave, but also achieve, from what I think is an efficient - the point of view of the efficient conduct of the trial, the aim of speeding up the viewing of this part of the evidence.
>
> So, would you please bear that in mind and particularly bear in mind that because of the speeding up you should make sure that you don't draw any adverse conclusions about the rate at which events occur and you will have a schedule to enable you to clarify that issue by tomorrow …."

[49] The anticipated schedule was produced by the prosecution and distributed to the jury.[21] This schedule set out in one column the time which had elapsed from the commencement of the surveillance footage against the event noted next to that time in the other column. The judge told the jury that the schedule was designed to assist them in watching the DVDs but was not evidence in itself; the evidence was the DVD footage.

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21 Ex B for identification.

[50] In *Smith*, upon which the appellant places some reliance in this ground of appeal, cameras had recorded photographs of an armed robbery taking place. Police officers gave evidence identifying the accused person as the person depicted in these photographs. The High Court determined that the police officers' evidence was not admissible as identification evidence; the police officers were in no better position from their previous observations of the appellant than were the jury to determine whether the person depicted in the photographs was the appellant.[22] The evidence of the police officers identifying the accused person from the photographs was therefore inadmissible. I cannot see any analogy between *Smith* and the present case or any legal principle in *Smith* which applies to the present grounds of appeal.

[51] The procedure followed by the judge of which the appellant complains was entirely proper and regular. It met the interests of justice and ensured fairness to the appellant. It was an efficient way of conducting the trial. It avoided the futile wastage of court time and public money. His Honour's careful and comprehensive directions ensured that the jury fully understood that the DVDs were being fast-forwarded and that, in reality, there were lengthy periods where no-one visited the Main Street unit. The jury had the full surveillance footage with them in the jury room and could refer to it if and as they wished. This ground of appeal is also without merit.

[52] It follows that the appeal against conviction must be refused.

The application for leave to appeal against sentence

[53] The appellant submits that the effective sentence of seven years imprisonment was manifestly excessive; an effective sentence of five years imprisonment should have been imposed.

[54] The appellant was 29 at sentence and 26 when he committed these offences. He had one relatively minor entry in his criminal history: on 7 August 2000 he was dealt with in the Magistrates Court for possessing dangerous drugs on 21 July 2000 and common assault on 25 June 2000. No conviction was recorded and he was fined on each count.

[55] The prosecutor made the following submissions at sentence. The period of the appellant's trafficking was short, but his trafficking was obviously successful. He was unlikely to have amassed the $64,000 in the 10 day period charged in the indictment. Although the judge could not sentence the appellant for trafficking for a period longer than that charged, the evidence suggested that he had been successfully carrying on business beyond those dates. The appellant had access to substantial quantities and varieties of dangerous drugs. Methylamphetamine was a sch 1 drug. The other drugs in which he trafficked were sch 2 drugs. This Court's decision in *R v Chez Taylor*[23] supported that an effective global sentence of seven years imprisonment, with lesser concurrent sentences for the remaining counts.

[56] Defence counsel made the following submissions at sentence. The appellant was young and had a negligible criminal history. He had the support of his father who had been present in court throughout his trial. He had a troubled background, living on the streets from the age of 14. Although he did not have an impressive

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22 (2001) 206 CLR 650, 655 [9].

23 [2006] QCA 459.

employment history, he had made efforts to build up legitimate businesses. He suffered from insulin dependent diabetes and a medical report was tendered which set out his need for access to appropriate medical advice to adjust his insulin as required. This health problem would impact upon his quality of life whilst incarcerated. The appellant was arrested in January 2007 and was granted bail. He had not been in trouble with the law since; these offences have had a salutary impact on him and he has lived a law abiding life. He has had occasional short-term employment but has no real educational skills. He was severely beaten in July 2009 and was hospitalised overnight. Defence counsel tendered this beating was instigated by those higher up the drug chain to silence him. Three character references were tendered which spoke of the appellant's positive qualities and suggested that his involvement in the present offending was out of character. Defence counsel emphasised the short period of the trafficking and that not all those visiting the Main Street unit during the surveillance period were purchasing drugs. Referring to *R v Dylan Taylor*,[24] he submitted that an effective global sentence of no greater than five years imprisonment should be imposed, with lesser concurrent sentences on all remaining counts.

[57] In sentencing the appellant, the judge made the following observations. The appellant was found in possession of 621 tablets containing 32.143 grams of MDMA and 9.112 grams of MDEA, methylamphetamine with a pure weight of 4.604 grams, a quantity of cannabis weighing 969.3 grams and some other small quantities of those drugs. Paperwork with names and figures was found in the appellant's shoulder bag and was relevant evidence of his trafficking. In a safe at his residence police found $63,445. The jury determined that the appellant was guilty of knowingly possessing a sum of money obtained from trafficking in dangerous drugs. More drugs were found at the appellant's O'Connell Street unit, including a small amount of cocaine to which he had pleaded guilty to possessing. The total amount of pure methylamphetamine found was 9.483 grams. It was an unusual case of trafficking in that the evidence related to a relatively short period. The enterprise was apparently successful, judging by the amount of cash in the appellant's possession and ex 8, the paperwork which the appellant was unable to explain away and which was "capable of bearing a significantly adverse inference". But his Honour, in the end, did not find that the appellant was trafficking for longer than the charged period on the evidence. The judge also referred to the many matters emphasised by defence counsel.

[58] His Honour concluded that the appellant's conduct was "significantly serious" even though it occurred over a relatively brief period. It reflected successful criminal conduct involving a significant quantity of drugs at a high level. A sentence in the range of seven years imprisonment was appropriate. As I have noted, the judge imposed an effective global seven year sentence on count 1, a six year sentence on count 2 and lesser concurrent sentences on the remaining charges.

[59] The appellant emphasises that the sentence must reflect the short period of trafficking charged, a mere 10 days between 1 and 12 January 2007. The cash found in the appellant's safe provided no real indication of the nature or extent of the trafficking because of the substantial body of unchallenged evidence from family and friends who provided considerable sums of cash to the appellant in the preceding period. The appellant suffered from diabetes and his requirement for

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[24] CA No 192 of 2005, [2005] QCA 379.

regular injections of insulin will make his time in prison difficult. He will clearly not be able to have access to hypodermic needles and he will have limited control over the food available to him.

[60] The respondent contends that, although the sentence was at the top of the range, a sentence of seven or even eight years imprisonment was open: *R v Coleman*[25] and *R v Cooney; ex parte Attorney-General*.[26] The appellant trafficked in a significant quantity and variety of drugs in premises which were visited frequently over the 10 day surveillance period by a number of visitors.

[61] It is helpful in determining the sentencing range in this case to begin by reviewing the cases explained by the parties. In *Cooney*, the Attorney-General appealed against an effective sentence of five years imprisonment with parole eligibility after two years when Cooney pleaded guilty to trafficking in cocaine and ecstasy; possession of ecstasy; possession of cannabis; and related summary charges. Cooney supplied small amounts of cannabis to friends and acquaintances until requested by a covert police officer to provide larger quantities. His trafficking involved in total 42.9 grams of pure cocaine, 259.655 grams of pure MDMA and 109.740 grams of pure MDEA over a four and a half month period. He owned a successful marine business and made only a modest profit from the trafficking. An analysis of his finances indicated that his identified expenditure exceeded his source income by $110,248.44, but during a period longer than the period of the trafficking. He was a mature man who engaged in social drug taking. This Court referred to *R v Taylor*,[27] *R v Barton*[28] and *R v Yates*,[29] concluding that the appropriate range was a head sentence of between five and seven years imprisonment, with parole eligibility after serving two or two and a half years imprisonment to reflect Cooney's plea of guilty, cooperation with the authorities and prospects of rehabilitation. This Court dismissed the Attorney's appeal, but noted that offences of this kind deserved heavy deterrent penalties.

[62] In *Barton*, the applicant was sentenced after pleading guilty to trafficking in methylamphetamine to seven years imprisonment with parole eligibility after two years and three months. The trafficking occurred over a two and a half month period and involved 26.608 grams of pure methylamphetamine. She continued to offend whilst on bail. It was not vigorously contended on appeal that her seven year head sentence was manifestly excessive. There were, however, extraordinary extenuating circumstances: Barton had made impressive efforts since the birth of her baby at overcoming her severe drug addiction and would benefit from a lengthy period of intense community supervision. This Court recommended that she be eligible for parole after 18 months.

[63] In *R v Coleman*, the applicant again pleaded guilty to an assortment of drug related offences including trafficking in methylamphetamine, this time over a four and a half month period. He told police that he had been purchasing one to two ounces of methylamphetamine each week for $5,000 an ounce, and selling it at a $1,500 profit per ounce. His estimated profit during the period of the trafficking was $143,000. He was 46 years old and had some previous convictions, including for drug

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25 [2006] QCA 442, [18].
26 [2008] QCA 414, [25].
27 [2006] QCA 459.
28 [2006] QCA 367.
29 [2006] QCA 101.

offences. This Court noted, in rejecting his contention that his cumulative sentence of four years imprisonment was manifestly excessive, that trafficking in dangerous drugs at that level attracted sentences in the range of between five and seven years imprisonment after a plea of guilty. The Court referred to *R v Bellino*[30] where a sentence of six years imprisonment was imposed for trafficking in sch 2 drugs on a lesser scale than in *Coleman*. Coleman's cumulative sentence was modified to give effect to the totality principle.

[64] In *R v Taylor*[31] upon which the present appellant especially relies, the applicant pleaded guilty to trafficking in drugs and other related offences. He was sentenced to five years imprisonment suspended after two years for an operational period of five years on a count of trafficking and to lesser sentences on the remaining counts. He trafficked in methylamphetamine, a sch 1 dangerous drug, and MDMA, a sch 2 dangerous drug, over a three month period. The judgment does not state Taylor's age but as he was an apprentice plumber, he was probably youthful. He did not use drugs but was selling them to make money. Taylor readily confessed his activities to police. This Court determined that the sentence imposed was not excessive.

[65] These cases have features some of which are more exacerbating and others more mitigating than the features of the present case. None closely match the circumstances of the present case. But they do support a head sentence in the range of between five and seven years for offending of the type and scale engaged in by Hennig. The distinguishing feature of the present case is the very short period of the trafficking: only 10 days. The sentence imposed must reflect that short period. It must also reflect that the maximum penalties were on counts 1, 3 and 4, 25 years imprisonment, on counts 2, 5 and 9, 20 years imprisonment, and on count 7 and 8, 15 years imprisonment. I am not persuaded that all of the $60,000 found in the appellant's safe was necessarily from the proceeds of trafficking during that period. Unchallenged evidence in the defence case suggested that some of that money may have come from family or friends. The appellant was found in possession of a total of 9.483 grams of pure methylamphetamine, 32.143 grams of pure MDMA, 9.112 grams of pure MDEA and almost a kilogram of cannabis, as well as a small quantity of cocaine. The quantities of those drugs and their diversity established that the appellant was an active trafficker in a miscellany of drugs during the 10 day period charged in the indictment. He may have been immature, as his counsel at trial suggested, but at 26 years old he was hardly a callow youth. He should have had an appreciation of the risks he was taking in trafficking in illegal drugs. He decided to take those risks. He has lost out badly. He and others like him must appreciate that the risks the business of drug trafficking are not worth the heavy penalties incurred when detected. He showed no remorse. He could not be shown any leniency for a guilty plea or cooperation with the authorities, an important mitigating factor present in all the cases discussed above. His health problems are concerning but there is no evidence that the prison system is unable to cope with prisoners like him with diabetes who require regular insulin injections and close medical monitoring. Unfortunately, diabetes is not an unusual illness. There was no reason to require the judge to set an early parole eligibility date.

[66] The sentence of seven years imprisonment with no early parole eligibility was a high one in light of the short period of Hennig's trafficking, but the cases which I

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30 (1999) 105 A Crim R 137; [1999] QCA 106,.

31 [2005] QCA 379.

have reviewed do not demonstrate that it was outside the appropriate range. It follows that the application for leave to appeal against sentence must be refused.

ORDERS:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[67] **FRASER JA**: I have had the advantage of reading the reasons for judgment of the President. I agree with those reasons and the orders proposed by her Honour.

[68] **WHITE JA:** I have had the advantage of reading the reasons for judgment of the President and agree with those reasons and the orders which she proposes.