SUPREME COURT OF QUEENSLAND

CITATION:	*R v Galeano* [2013] QCA 51
PARTIES:	**R** **v** **GALEANO, Salvatore Mario** (applicant)
FILE NO/S:	CA No 88 of 2012 SC No 36 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	19 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2012
JUDGES:	Margaret McMurdo P and Gotterson JA and McMeekin J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Gotterson JA concurring as to the orders made, McMeekin J dissenting
ORDERS:	**1. Grant application for leave to appeal against sentence.** **2. Allow appeal to the extent of:** **(a) substituting a term of nine years imprisonment for the term imposed at sentence; and** **(b) fixing the applicant's parole eligibility date at 11 May 2016.** **3. Otherwise affirm the orders made at sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant sentenced to a period of imprisonment of 10 years – where the sentencing judge considered a range from 10 to 12 years to be appropriate – whether this was manifestly excessive with regard to the authorities – whether the period of imprisonment imposed was manifestly excessive with regard being given to the applicant's mitigating factors of cooperation with the authorities and injuries suffered during the course of the applicant's arrest *Corrective Services Act* 2006 (Qld), s 182 *Penalties and Sentences Act* 1992 (Qld), s 13A, s 161A, s 161B(1)

Malvaso v The Queen (1989) 168 CLR 227; [1989] HCA 58, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, applied
R v AAN [2010] QCA 313, applied
R v Bradforth [2003] QCA 183, cited
R v Christensen [2002] QCA 113, cited
R v D; ex-parte Attorney-General (Qld) [1995] QCA 332, cited
R v George [2001] QCA 135, cited
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, considered
R v Kashton [2005] QCA 70, cited
R v Noble and Verheyden [1996] 1 Qd R 329; [1994] QCA 283, distinguished
R v Pang (1999) 105 A Crim R 474; [1999] NSWCCA 4, cited
R v Raciti [2004] QCA 359, cited

COUNSEL: P J Davis SC for the applicant
B J Merrin for the respondent

SOLICITORS: Bosscher Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P**: I agree with Gotterson JA's reasons for granting the application for leave to appeal against sentence and allowing the appeal and with his Honour's proposed orders.

[2] **GOTTERSON JA**: On 28 March 2012, the applicant, Salvatore Mario Galeano, pleaded guilty to a single count that between 30 April 2006 and 3 August 2008, he carried on the business of unlawfully trafficking in dangerous drugs and thereby committed a crime under s 5 of the *Drugs Misuse Act* 1986 ("DM Act"). The applicant was that day sentenced to a period of imprisonment for a period of 10 years. As part of the sentencing order, the learned sentencing judge stated that the applicant had been in pre-sentence custody for a period of 137 days between 2 August 2008 and 16 December 2008, and declared that the whole of that time be imprisonment already served under the sentence.

[3] An application for leave to appeal against the sentence was filed by the applicant on 18 April 2012. One ground of appeal only is proposed in the application as follows:

> "The sentence imposed was manifestly excessive in that the sentencing judge failed to give sufficient weight to the powerful personal mitigating circumstances of the applicant."[1]

[4] The applicant was sentenced in Townsville. He was born on 14 April 1959 and has lived in North Queensland all his life. He attended school until Year 7. He has worked consistently during his adult life as a haul-out driver, fisherman, and as a cane farmer. He is single and has a son aged nine and a stepson aged 12.

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1 AB 54.

[5] At the sentence hearing, the Court was informed of the applicant's not inconsiderable criminal history.[2] He was convicted of summary drug related offences on six occasions during the period between 1979 and 1999, and of summary offences involving property, threats or obstructing police officers in the period between 1977 and 1999. He was convicted of offences involving possession or use of weapons in 1978, 1983, 1998, 2000 and 2008. In 2000, he was sentenced for an offence of trafficking in dangerous drugs to imprisonment for three and a half years, with eligibility for parole after serving 15 months.

Circumstances of the offending

[6] The applicant was the target of a police operation called "Golf Magic" which was conducted between 12 June 2008 and 3 August 2008. The operation involved camera and audio monitoring of his residence by equipment concealed in the kitchen. Numerous drug sale transactions for which customers would call at the residence were observed to take place daily. During the operation, the applicant became aware of police interest in his activities. Notwithstanding that he believed that the residence was bugged, he persisted in the offending. He adopted a method whereby customers would write down the drugs and quantities they wished to purchase and then show what they had written to him.

[7] As a result of the surveillance, statements were taken from persons who had been observed purchasing drugs from the applicant. The information gathered by, and disclosed to, the police revealed that the applicant had sold significant quantities of methylamphetamine, and on occasions, cannabis and Methylenedioxymethamphetamine ("MDMA") to a number of customers over a period of more than two years. The applicant had a large client base. He was able to provide relatively large or smaller quantities of the drugs to customers on a regular basis. Evidently, he had a ready access to a supply of the drugs to enable him to do that.

[8] A financial analysis relied on by the prosecution indicated that drugs with an unsubstantiated value of $390,000 were sold by the applicant over the period of trafficking referred to in the count on which he was convicted. His business appeared to be expanding over the course of the period of surveillance.

[9] Between March and August 2008, a woman named, Julie Clark, lived with the applicant. He provided her with methylamphetamine and cannabis to the value of $400 on a daily basis in exchange for sex. In all, the value of the drugs he supplied to her was about $60,000. Such were the profits from the trafficking sales that his business was able to carry the potential proceeds of sale of those drugs which were foregone.

[10] The police operation culminated in the attendance by the Special Emergency Response Team at the applicant's residence at about 6.30 am on 2 August 2008. The residence is located on a cane farm. According to the applicant, he heard a large explosion, turned around and saw a person dressed in fatigues and carrying a rifle running towards him from a nearby paddock. The person fired three shots into the ground near where he was standing. He panicked, turned, and saw another person running towards him from the opposite direction. He took flight, tripped on

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2 AB 31-33.

some barbed wire fencing and fell to the ground. The two individuals, who were police officers, "tasered" the applicant. On their account of the incident, they did so to ensure that the applicant did not attempt to arm himself.

[11] The applicant sustained some physical injuries during the incident. He was arrested and then transported to the Townsville watch-house where he was charged with drug trafficking and supply offences. The evidence as to the extent of the applicant's physical injuries was rather inconclusive. The prosecutor accepted,[3] and the learned sentencing judge acted upon the footing, that when he was "tasered", the applicant had suffered injuries to the face in terms of blackened eyes and several broken teeth, and to both shoulders.

[12] During a search of the applicant's house, police located quantities of cannabis, crystalline powder, MDMA tablets, scales, mobile telephones, handwritten notes and tick lists as well as three shotguns, four rifles and boxes of ammunition.

Matters considered on sentence

[13] The learned sentencing judge referred to the foregoing circumstances as matters that he took into account. He concluded that the applicant had engaged in a busy commercial enterprise with a view to making substantial profits.[4] The enterprise was part of a "network" involving other co-offenders.[5] He took into account, as matters personal to the applicant, that he had a capacity for hard work;[6] that after arrest, he had sold the cane farm in order to discharge tax debts and to pay outstanding penalties due to the State of Queensland and then had purchased another cane farm;[7] and that in the three years since apprehension and whilst on bail, no suggestion of re-offending on his part had arisen.[8]

[14] The learned sentencing judge acknowledged and accepted that despite a contested committal over a full day, once a new indictment with a re-framed count had been presented, the applicant very promptly intimated an intention to plead guilty to it.[9] A document tendered at the hearing and received as Exhibit 4 indicated a measure of cooperation with the authorities after arrest. His Honour regarded that as a "significant matter" in the applicant's favour.[10]

[15] The applicant was examined by Dr Michael Likely, a consultant psychiatrist, on 24 August 2011. Dr Likely provided a report dated the same day which was tendered by the applicant and received as Exhibit 6.[11] Dr Likely stated that he believed that the applicant has developed a major depressive disorder as a consequence of the events of 2 August 2008.[12] At sentence, reliance was placed by the applicant's counsel on this psychiatric sequelae as being of "particular significance" and more important than the physical injuries.[13] How the learned

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3 T1-4; AB 8 LL30-57; Sentence Remarks Transcript ("SRT")1-7; AB 24 LL15-32.
4 SRT1-3; AB 20 LL3-5.
5 SRT1-6; AB 23 LL18-21.
6 SRT1-4; AB 21 L3.
7 SRT1-4; AB 21 LL19-39.
8 T1-4; AB 21 L51 – SRT1-5; AB 22 L1.
9 SRT1-5; AB 22 LL3-37.
10 SRT1-5; AB 22 LL40-50.
11 AB 47-52.
12 *Ibid* at p 3 AB 49.
13 T1-8 AB 12 LL50-T1-9 AB 13 L2.

sentencing judge took into account the contents of this report forms the basis of one of the arguments advanced by the applicant on appeal and which is considered later in these reasons.

[16] It is convenient to mention at this point that Dr Likely's report listed some 10 physical problems which the applicant told Dr Likely he had noted since 2 August 2008. They included not only the injuries to which I have already referred as having been accepted by the prosecutor, but also to a number of other injuries or conditions including exacerbation of a back injury, gastrointestinal problems and loss of libido. From his sentencing remarks, I understand the learned sentencing judge not to have had regard to those other injuries or conditions in formulating the sentence. In my view, his Honour was well justified in taking that approach. Dr Likely volunteered this information as no more than the applicant's reported observations. He did not dignify it with a professional opinion that they were caused by the circumstances in which the applicant was apprehended and arrested. To the contrary, Dr Likely acknowledged that the reported physical problems were clearly outside his area of expertise.[14] Thus, there was no expert evidence before his Honour that those other injuries or conditions, in so far as they did exist, had been so caused.

[17] Towards the outset of his sentencing remarks, his Honour expressed the view that the circumstances of the applicant's offending called ultimately for "a sentence that not only denounces [his] conduct but serves to deter others who would re-offend and to deter [him] from offending".[15]

The sentence

[18] The learned sentencing judge received submissions with respect to comparable sentences. The prosecution submitted that a sentence of at least 10 years was appropriate. The applicant's submission was for a sentence of between nine and nine and a half years without any recommendation for parole.[16] His counsel twice acknowledged that normally a sentence of 10 years would be appropriate for this type of offending, but submitted that discretionary considerations to which he had referred would justify the shorter sentence range which he proposed.[17]

[19] Towards the conclusion of his sentencing remarks, his Honour explained the sentence that he was about to impose in the following terms:

> "The authorities suggest to me that in the circumstance of your criminal history, the substantial and serious offending for which you have pleaded guilty, as revealed by the agreed facts, might call for a sentence exceeding 10 years and, perhaps in the range of 10 to 12 years. I acknowledge at once that one cannot be mathematically precise with these taking into account all of the factors that may be in play in comparable authorities.
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> Taking into account the discretionary considerations in your favour, in particular the matters referred to in Exhibit 4, your suffering that you have endured as a result of the psychiatric illness that, at least,

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14 AB 49.
15 SRT1-3 AB 20 LL35-42.
16 T1-12 AB 16 LL48-50; SRT1-10 AB 27 LL29-43.
17 T1-10 AB 14 LL34-36; T1-12 AB 16 LL40-42.

> has been contributed to by the circumstances of your arrest, the significance that in the last three years you have not re-offended but, indeed, have gone to some lengths to re-establish yourself productively in business, your cooperation in promptly pleading once the more recent indictment was presented and matters of dispute were resolved and agreed, I have determined that I should impose sentence at the bottom of the range that I indicated earlier would ordinarily apply, that is, a sentence of 10 years' imprisonment. But for those discretionary factors, the sentence I would have imposed would have been higher. So in respect of the count to which you have pleaded guilty you are convicted and a sentence of 10 years' imprisonment is imposed and a conviction is recorded."[18]

[20] By virtue of the provisions in s 161A and Schedule 1 of the *Penalties and Sentences Act* 1992 ("PS Act"), the applicant's sentence of 10 years upon conviction on indictment of an offence against s 5 of the DM Act had the consequence that he was convicted of a serious violent offence. The transcript of the sentencing remarks does not record the making of the declaration that the conviction was of a serious violent offence which s 161B(1) PS Act required be made as part of the sentence. Nevertheless, the absence of such a declaration has not affected the fact that the applicant was convicted of a serious violent offence.[19]

[21] Section 182 of the *Corrective Services Act* 2006 ("CS Act') applies to the applicant as a person who is serving a term of imprisonment for a serious violent offence.[20] The effect of s 182(2) thereof is that he must serve 80 per cent of his term in order to be eligible for parole. Had the applicant been sentenced to a term of more than five years, but less than 10 years imprisonment and no serious violent offence declaration been made under s 161B(3) PS Act, he would become eligible for parole upon serving one half of the period of imprisonment,[21] provided that an earlier or later eligibility date had not been set under s 160C(5) PS Act.[22] Thus, had the applicant been sentenced in accordance with the submissions made by his counsel at the sentence hearing, and no declaration been made or other eligibility date been set, he would become eligible for parole upon serving between four and a half and four and three-quarter years of imprisonment rather than the period of eight years which he must now serve in order to become eligible for parole.

The development of the ground of appeal in argument by the applicant

[22] At the commencement of oral submissions, senior counsel for the applicant observed that what the learned sentencing judge appeared to have done was to start with a range of 10 to 12 years without reference to mitigating circumstances and then to have arrived at a sentence of 10 years after taking such circumstances into account.[23] He then identified two complaints as being those on which this application is based. The first complaint is that the range of 10 to 12 years at which his Honour started, was too high. The second complaint is that even if that range was correct and a head sentence of 12 years had been adopted as a reference point,

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18 SRT1-10 AB 27 L48-SRT1-11 AB 28 L39.
19 PS Act s 161B(2).
20 Section 182(1).
21 CS Act s 184(2).
22 CS Act s 184(3).
23 Appeal Transcript ("AT")1-2 LL40-45.

the end point of a sentence at the bottom of that range reflected a failure to take into account properly the mitigating circumstances of the case. The two mitigating circumstances upon which particular reliance is put are the applicant's cooperation with the police as evidenced by Exhibit 4 and the injuries sustained by the applicant in the apprehension and arrest including his ongoing psychiatric problems associated with those events.[24]

[23] It was submitted that the remarks from the summing up which are set out earlier in these reasons do not disclose how it was that allowance was made for those circumstances in arriving at a sentence at the lower end of the range. It was further submitted that whilst the learned sentencing judge was evidently mindful of those circumstances, he failed to accord them sufficient weight.[25]

[24] I propose to deal with the two complaints separately. With the second of them, it is convenient to consider the respective circumstances of cooperation and injuries separately.

The first complaint – the range of 10 to 12 years

[25] Although this complaint was made, little was advanced on behalf of the applicant by way of submissions to develop it. The acknowledgement made by the applicant's counsel at the sentence that normally 10 years would have been appropriate placed some limitation on the scope for credible argument by the applicant on this complaint.

[26] Moreover, a review of the cases to which his Honour was referred in this respect reveals the complaint to be without solid foundation. In *R v Kashton*,[26] the offender, aged 35 to 37 years when he offended and 39 years when sentenced, had trafficked in heroin and methylamphetamine, making an apparent profit of $156,000 over a two and a half year period. He resisted arrest and continued his trafficking whilst on bail. The offender had a substantial criminal history dating back to 1983 relating to cannabis use. He was not a heroin user. On this occasion, he pleaded guilty but did not otherwise cooperate in the administration of justice. He provided no assistance regarding the source of his drugs. A sentence for him of 10 years after allowing for a modest discount for the plea, was affirmed on appeal.

[27] In the earlier case of *R v Christensen*,[27] the offender, aged 40 years at sentence, had trafficked on a large scale in methylamphetamine and cannabis sativa over four years, generating a profit of some $500,000. His trafficking also involved production by "cooks" on a substantial scale. Whilst on bail, he re-commenced his activities and did so again following a second arrest. The offender had a minor criminal history. He pleaded guilty. Williams JA, with whom McMurdo P and Muir J agreed, considered that given the scale of the operation, a sentence as high as 13 to 14 years could well have been adopted as a starting point given that the trafficking had been continued after the applicant had been twice arrested and released on bail. The sentencing judge had adopted a starting point at 12 years which was reduced on account of the plea of guilty to 10 years. That sentence was upheld on appeal.

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24 AT1-2 L45-AT1-3 L16.
25 AT1-3 LL24-28.
26 [2005] QCA 70.
27 [2002] QCA 113.

[28] A little later, in *R v Raciti*,[28] an offender who had trafficked in MDMA, methylamphetamine and cocaine during a four month period was sentenced to a period of imprisonment of 11 years. He had already been convicted of drug offences in 1983 and 2000. That sentence was affirmed in the dismissal of his application for leave to appeal. This Court regarded his trafficking as "large scale". Whilst there appears to have been no estimation of the profits he gained from the trafficking, when the police intervened, he had just engaged in purchasing 6,000 ecstasy tablets for $117,000. Despite being given bail, he continued to offend by supplying some 5,000 for $50,000. In that case, this Court regarded the offending as considerably more serious than in *R v Bradforth*.[29]

[29] In *Bradforth*, the applicant, aged 26 years at sentence, was convicted on his own plea on one count of trafficking in cocaine, MDMA and methylamphetamine over a 12 month period and two counts of possession. He had no previous convictions. Significantly, he had a drug addiction. He was sentenced on each count to 12 years imprisonment with a serious violent offence declaration. His appeal was allowed and for the trafficking offence, a sentence of 10 years was imposed. Shorter concurrent sentences were also imposed in respect of the other counts. The considerations that influenced the reduction of penalty on the trafficking count are expressed in the following paragraphs from the reasons of Muir J with whom Williams and Jerrard JJA ageed:

> "Major determinants of penalty in trafficking cases include the type of drugs supplied, the quantity of the drugs, their value, the nature of the venture or undertaking, and whether the activities are commercial or are engaged in to feed a habit. In all cases, however, regard must be had to the maximum penalties imposed by statute and the recognition by the Legislature and the courts that the purveying of drugs of the nature of those under consideration, however motivated, has the potential to cause much individual suffering, as well as social harm and decay.
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> There were plainly commercial aspects of the applicant's trafficking activities and he appears to have been motivated by financial gain, at least to a degree. Against that, there is scant evidence of substantial profitability or the trappings of wealth and there is evidence which suggests that the applicant's conduct was actuated, in part, by the desire to feed a drug addiction. He is a young man with a minor criminal history which does not include any drug related convictions."[30]

[30] At the hearing of this appeal, the respondent submitted that the decision in *R v George*[31] established that a starting point as high as 14 years would have been appropriate in this case.[32] In that case the offender, aged 49 years during the offences and 51 years at sentence, was sentenced to 14 years imprisonment, a reduction of two years having been made from the sentence that otherwise would have been imposed, in recognition of his plea of guilty. The trafficking involved was in heroin and cocaine, and on a large scale. He had paid $220,000 cash for a

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28 [2004] QCA 359.
29 [2003] QCA 183.
30 At [29] and [30].
31 [2001] QCA 135.
32 AT1-20 LL43-45.

house in Brisbane. His drug business extended to trafficking in New South Wales in respect of which the National Crime Authority had been instrumental in obtaining an order requiring forfeiture of $300,000 against him. The offender had previous convictions for drug offences for which he had served a short term of imprisonment in New South Wales or had received a fine. His application for leave to appeal against that sentence was refused.

[31] These cases do suggest a range generally of 10 to 12 years for trafficking in dangerous drugs for substantial gain on pleas of guilty. That range is one that may be exceeded, up to 14 years, where the offending has been aggravated by trafficking in a drug as dangerous as heroin on a large scale as in *George* or by repeat offending whilst on bail as in *Raciti*.

[32] Here, none of those types of aggravating features are present. However, as senior counsel for the applicant acknowledged, there is, in his client's case, a significant feature of aggravation in the form of his prior conviction in 2000 and sentence of imprisonment for trafficking in dangerous drugs.[33] That feature suggests to me that the applicant's offending should be viewed as having features which compare more closely with those of cases where a sentence at or near the top of the range has been imposed rather than with those of cases where the sentence has been at or near the bottom of it.

The second complaint – cooperation with the police

[33] In *R v D; ex-parte Attorney-General*,[34] this Court allowed an Attorney-General's appeal against sentence in circumstances where the offender had been convicted of a drug trafficking offence and associated offences. At sentence, a term of eight years imprisonment with a recommendation for immediate parole was imposed. Several aspects of the applicant's personal circumstances including the impending birth of a child, progress with rehabilitation and relative youth, favoured some leniency. However, the eligibility recommendation that was made was based upon the offender's cooperation with the police. He gave information about other drug offenders and the identity of a heroin supplier which was also useful for the identification and prosecution of other offenders. The Court acknowledged[35] the observations of Deane and McHugh JJ in *Malvaso v The Queen*[36] that it was in the public interest that there be a general perception that leniency will be extended to offenders who provide genuine information to the authorities about the workings of organised crime, particularly in relation to drug offences. In substituting a parole eligibility recommendation after serving 15 months, the Court counselled against excessive leniency on account of cooperation, lest the effective sentence be so disproportionate to the gravity of the offence as to affront community standards.[37]

[34] Later, in *R v Gladkowski*,[38] this Court observed[39] that discounts of one-third or even one-half of the head sentence that would otherwise be appropriate are not uncommon, according to the value and risk of the assistance rendered. Reference

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33 AT1-15 LL8-10.
34 [1995] QCA 332.
35 At p 4.
36 (1989) 168 CLR 227 at 239.
37 At p 4.
38 [2000] QCA 352; (2000) 115 A Crim R 446.
39 At [7].

was made by the Court to *R v D* and also to the observations of Wood CJ at CL in *R v Pang*[40] that, without covering the field, the discount "customarily given" in New South Wales was one that ranged between 20 per cent and 50 per cent. In that case, a discount of 50 per cent was given for cooperation "of a very high order", involving assistance with covert police operations and signing an undertaking to give evidence in proceedings against co-offenders higher up the organisational ladder.

[35] In the context they were made, I do not understand that, by its own observations and its reference to those in *Pang*, the Court in *Gladkowski* meant to set finite boundaries within which any and every discount for cooperation with authorities must fall. There is no fixed "floor" or "ceiling" for the discount that may be accorded on account of cooperation.

[36] In this case, the applicant did not sign an undertaking as would have engaged the operation of the provisions of s 13A of the PS Act. That, of course, did not have the consequence that as a matter of law no allowance may be made for cooperation on his part. So much is illustrated by the decision of this Court in *R v AAN*.[41]

[37] Here, the value of the cooperation that the applicant has provided falls to be assessed against these facts. The cooperation began in the latter part of 2010, several years after his arrest. He did give accurate information in consequence of which police operations located a significant amount of cannabis and number of cannabis plants at one location, and a rudimentary clandestine "laboratory" at another. Prosecutions, which were unsuccessful, ensued. The applicant declined to testify, apparently for fear of his physical safety. As noted, he has not provided any information as to how the drugs in which he trafficked were sourced. Overall, the information he did provide, whilst useful, was limited. He did not place himself at risk by offering to testify. A fair description of the degree of cooperation given by him is that it was modest and at a low level. In my view, it warranted correspondingly modest recognition in sentencing.

Second complaint – applicant's injuries

[38] I have already expressed my view that his Honour acted correctly in determining the extent of the physical injuries sustained by the applicant in his apprehension and arrest.[42] As noted, greater reliance was placed upon the psychiatric sequelae of those events before the learned sentencing judge.

[39] As well as the diagnosis that the applicant was suffering a major depressive illness as a consequence of the events of 2 August 2008, Dr Likely reported that the applicant:

> "… is totally incapacitated from working in his pre-injury position as a result of his depressive disorder symptoms of poor sleep, with subsequent daytime lethargy, anergia, amotivation, anhedonia, cognitive problems particularly in the areas of poor attention, concentration and short-term memory not to mention the overall zeitgeist surrounding his situation."[43]

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40 [1999] NSWCCA 4; (1999) 105 A Crim R 474 at 477.
41 [2010] QCA 313.
42 At [15].
43 P 4 AB 51.

Dr Likely considered that there was a need for an urgent review of the applicant's medicinal regime. His report did not suggest that that could not be undertaken or managed during imprisonment.

[40] In *R v Noble and Verheyden*,[44] the offenders had pleaded guilty to a charge of attempted armed robbery in company and a related charge of unlawful use of a motor vehicle. They had attempted to rob an antique shop run as a family business. In outlining the circumstances of the case, the Court remarked:[45]

> "An unusual feature of the case is that a member of the family which ran the business the subject of the attempted robbery shot at the applicants during the attempt, hitting each of them; Verheyden was seriously injured by the shotgun pellets, Noble only slightly injured. A question was raised with respect to the relevance of these injuries to fixation of penalty."

[41] Verheyden was quite seriously injured. He was hospitalised. His abdomen was damaged, necessitating the removal of his spleen and part of his colon. There were many perforations and lacerations. A colostomy had to be fashioned for him.

[42] In addressing the question that it had posed, the Court observed:[46]

> "… The second point, the injury, is more debatable. We were referred to no authority on the question whether an offender who was injured in the course of committing an offence should have that taken into account in his favour. The point is discussed in a note in (1980) 4 Crim LJ by Mr F Rinaldi at pp 244-246. The writer discusses a decision of the Victorian Court of Criminal Appeal in a robbery case in which one of the robbers suffered serious injury when his gun discharged during the robbery. The court took the view that the injury should be taken into account on sentence. We would not accept, however, that any injury suffered in the course of committing an offence is necessarily a factor in sentencing."

[43] There follows a discussion in which the Court postulated that the circumstances of an assailant whose victim retaliates so as to cause serious injury ought to have that injury regarded as part punishment. Likewise for an injury suffered as a result of a victim's self defence of property.[47] The Court was of the view that the sentencing judge had appropriately taken Verheyden's injuries into account and affirmed the sentence of four years imprisonment.

[44] His Honour here referred to *Noble and Verheyden* and said that he had little difficulty with the proposition that the injuries sustained by the applicant was a matter to be taken into account "in potential mitigation of sentence".[48] He considered the issue requiring his consideration to be the extent to which the evidence satisfied him that the applicant was suffering a substantial depressive disorder as a consequence of his arrest.[49]

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44 [1994] QCA 283; [1996] 1 Qd R 329.
45 Davies, Pincus JJA, Williams J at 329.
46 At 330-331.
47 At 331.
48 SRT1-8 AB 25 LL5-6.
49 SRT1-9 AB 26 LL20-26.

[45] His Honour noted that Dr Likely had described the applicant as "somewhat of a vague historian".[50] He also accepted that the applicant's anxiety at the time of his apprehension was heightened by the circumstance that his brother had died on an earlier occasion when the police were attempting to arrest him. His Honour expressed the following conclusions on the issue for his consideration:

> "On the limited evidence before me, albeit not vigorously contested by the prosecution, I accept that the circumstances of your arrest has, to some extent, contributed to your suffering and that you have suffered from apparently a psychiatric complication that, in part, has been contributed to by the fright or fear that you suffered on the occasion of your arrest. Whether that condition has all its genesis in that event or only partially is a matter that perhaps one day another Court might have to look into and I say no more about that. It is a matter that I will take into account that that is a contribution that, on the evidence before me, has played."[51]

[46] It is evident from this passage that his Honour deliberately stopped short of making express findings with respect to the extent or cause of the applicant's psychiatric condition. It was open to him to have taken that course. The concession made by the prosecutor went only to the applicant's physical injuries. There was no admission as to the cause or extent of a psychiatric condition. Section 132C of the *Evidence Act* 1977 sets a balance of probabilities standard of proof for fact finding by a sentencing judge where alleged facts are not admitted or are challenged. The provision does not require the sentencing judge to make findings that accord with such facts where some evidence is adduced in support of them and none is adduced to contradict them. As with the general law, the provision allows flexibility to make, or refrain from making, findings, having regard to the strength and integrity of the evidence that is adduced.

[47] That his Honour did not make express findings may be attributed to the reason for which Dr Likely's report was commissioned and also to the extent and quality of the evidence before him on those matters. As to the former, his Honour was informed during the sentence submissions that the report had been commissioned in order to support a proposed civil action for damages by the applicant against the Queensland Police Service for injuries sustained during the apprehension and arrest.[52] Whilst any express findings, had they been made, would not have operated by way of estoppel in a civil action, they might well have complicated a finalisation of it at the pre-trial stage.

[48] As to the latter, whilst the report was tendered without objection and Dr Likely was not cross-examined, his report was the only evidence on those matters. However, it was a report produced on the day of the one occasion on which Dr Likely examined the applicant. It was based largely on information narrated by the applicant himself. There was good reason, which would have been apparent to his Honour, to have been cautious with regard to findings and conclusions based upon the applicant's account of fact including the symptoms he experienced. For one thing, Dr Likely had described him as somewhat unreliable. For another, he had told Dr Likely

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50 P 4 AB 50.

51 SRT1-9 AB 26 LL30-51.

52 T1-11 AB 15 L58-T1-12 AB 16 L5.

adamantly that he was not guilty of trafficking in illicit drugs.[53] That was manifestly untrue. The applicant did not give evidence at the sentence hearing.

[49] On the state of the evidence before him, it was open to his Honour also to proceed on the rather broad factual basis that the circumstances of the applicant's arrest had contributed to, but was not the sole cause of, a psychiatric disorder from which he was suffering. On the hearing of the appeal, the applicant did not mount a serious challenge to his Honour's having done so.

Recognition of cooperation with the police and injuries as mitigating factors

[50] In *Markarian v The Queen*,[54] the High Court has recently affirmed "…that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison".[55] Thus, the determination of an appropriate sentence here does not involve an arithmetical exercise where discrete discounts for different mitigating circumstances are progressively deducted from some starting point.

[51] The applicant afforded a moderate degree of cooperation with the police. I have referred to cases decided prior to *Markarian* which suggested a range for a discount for cooperation with the investigation and prosecuting authorities which has a lower end of one-fifth. As a result of his arrest, he suffered physical and psychological injuries. The applicant's physical injuries were substantial but neither life threatening nor productive of significant long term physical disability. The learned sentencing judge found that the circumstances of the arrest have contributed to an enduring psychiatric disorder which requires medication. This is likely to make his time in prison more difficult than for an offender without these health problems. Due allowance needs to be made to reflect these as mitigating circumstances.

[52] I would regard a sentence of nine years imprisonment as one that makes due allowance for the totality of the mitigating circumstances in the applicant's case, including those to which I have just referred. It may be noted that a term of this duration would equate to an allowance of one-quarter against a term at the top of the range to which his Honour had referred.

Disposition

[53] For these reasons, in my view, the sentence imposed is manifestly excessive. I would substitute a term of nine years imprisonment. Since the starting range adopted here reflects sentences on pleas of guilty, there is no justification for an order under s 160C(5) PS Act to allow further for the plea of guilty. Senior counsel for the applicant conceded as much at the hearing.[56] As the mitigating features have all been credited against the head sentence, the applicant accepts that no further mitigation by way of setting an early parole eligibility date is appropriate.

[54] The respondent submitted that in the event that a sentence of less than 10 years is imposed on appeal, an order ought be made under s 160C(5) postponing the

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53 P 2 AB 48.
54 [2005] HCA 25; (2005) 228 CLR 357.
55 Per Gleeson CJ, Gummow, Hayne and Callinan JJ at [39].
56 AT1-17 LL53-55.

applicant's parole eligibility date beyond that which would otherwise apply. No submission was made that a serious violent offence declaration ought be made in that event. Decisions of this Court[57] have consistently held that it is only where there are special circumstances which warrant it, that an order under s 160C(5) may be made. Here, the respondent did not identify any specific circumstance, or circumstances, of the applicant or his offending which it said was special as would justify the order sought. That being so, no such order ought be made. Allowing for 137 days of pre-sentence custody, the applicant's parole eligibility date will be 11 May 2016.

Orders

[55] I would propose the following orders:

1. Grant application for leave to appeal against sentence.
2. Allow appeal to the extent of:
   (a) substituting a term of nine years imprisonment for the term imposed at sentence; and
   (b) fixing the applicant's parole eligibility date at 11 May 2016.

[56] Otherwise affirm the orders made at sentence.

[57] **McMEEKIN J**: The applicant applies for leave to appeal his sentence. Gotterson JA has set out much of the background. I will repeat so much of it as I feel I need to in order to explain my views, which differ from my colleagues.

[58] There were two complaints made on appeal. First, the applicant submitted that there was a fundamental error in the approach of the sentencing judge in that he first determined a range without regard to all the facts of the case and then sought to find where within that range the proper sentence should lie. His Honour said:

> "The authorities suggest to me that in the circumstance of your criminal history, the substantial and serious offending for which you have pleaded guilty, as revealed by the agreed facts, might call for a sentence exceeding 10 years and, perhaps in the range of 10 to 12 years.
>
> …
>
> Taking into account the discretionary considerations in your favour…I have determined that I should impose sentence at the bottom of the range that I indicated earlier would ordinarily apply, that is, a sentence of 10 years imprisonment."

[59] Second, it was submitted that, even if there was no error in that approach, the sentence made insufficient allowance for the mitigating factors and so was manifestly excessive justifying this Court's intervention.

[60] Involved in that second argument are questions that have not previously been considered, so far as my research shows, in decisions on sentencing. They include whether psychiatric injury ought to be brought into account in mitigation of sentence, and whether a court is required to assume the correctness of psychiatric

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[57] *R v Griinke* [1992] 1 Qd R 196; *R v Whelan* [1997] QCA 305; *R v Hundric* [2005] QCA 324; *R v Russell* [2005] QCA 392.

opinion where a criminal, exercising his right to silence, has not made full disclosure to the psychiatrist or, of course, to the Court.

The Offending Conduct

[61] This was a case involving substantial trafficking in schedule 1 drugs with a lesser involvement in schedule 2 drugs. There was an agreed schedule of facts. The trafficking was conducted from the applicant's residence. The applicant was subjected to video and audio surveillance at this house over a period of about 7 weeks or so, only a fraction of the entire period of trafficking. At some point it is evident that the applicant is aware of police interest and on occasions he informs visitors to his home that it is "bugged". Steps were taken to conceal some transactions.

[62] The surveillance showed that the applicant had a large client base, the precise number not being established. Numerous drug transactions were recorded on a daily basis. The trafficking extended over more than two years. The drugs involved were principally methylamphetamines, but also 3,4 methylenedioxymethamphetamine (MDMA) and cannabis. The applicant's business was observed to be expanding during the period of surveillance. The applicant had the capacity to access relatively large quantities of drugs regularly.

[63] The scale of operations is hard to determine precisely but was very substantial.

[64] The agreed facts show that "a number of indemnified witnesses" provided evidence of amphetamine purchases from the applicant on a weekly or bi-weekly basis for a number of years with an average value of purchase in the order of $200. The annual turnover for each such witness was then in the order of $10,000.

[65] One client painted the applicant's house and received $7,700 worth of drugs in return before becoming a regular client. Another client is said to have brought the applicant $1000 "on some days". In one conversation the applicant is overheard to speak of $16,500 being owed in drug debts from only three of his customers.

[66] The schedule of facts shows that in the period of surveillance and excluding the monetary worth of "points", "½ s", and "grams" (the implication I take it being that there were transactions at this level but they were deemed to be of little moment in the overall scheme) conservatively the "cash worth" mentioned was in the order of $40,000 – nearly $6,000 per week. There is no reason to think that the relatively short period of surveillance was exceptional. In fact to the contrary – there were attempts to conceal what was taking place and the business seemed to be expanding. It is evident that, while the prosecution could not be precise in its analysis, hundreds of thousands of dollars worth of drugs were sold during the trafficking period.

[67] A financial analysis indicated an unsubstantiated income of $390,000. The prosecutor submitted that the applicant derived approximately $4,500 per month or $500 per day (I suspect an error in the transcript or a slip of the tongue - $14,500 per month presumably was meant as it matches the other figures given) from his business. He operated two mobile phones, vetted calls, and had a "seemingly… unfettered access to drugs."

[68] Some idea of the scale of the profits of this business can be gleaned from the fact that the applicant supplied to a woman with whom he lived amphetamines and

cannabis to a value of $400 per day for five months without cash payment – the drugs were exchanged for sex. So the trafficking business was sufficiently profitable for the prisoner to indulge his sexual appetite by expending something in the order of $60,000 in a five month period.

[69] There can be no doubt that this was a case of trafficking in schedule 1 drugs on a substantial scale. As well the applicant was not selling drugs to support a habit, he at all relevant times having a profitable cane farming enterprise. The business was correctly described by the prosecutor as "cynically commercial".

Character & Background

[70] The applicant's counsel stressed the applicant's hard work throughout his life as a fisherman, transport operator and cane farmer. He pointed out that since his arrest the applicant had paid taxes said to be owing and the debt that the State sought to recover relating to his criminal activities. He had re-established himself with another cane farm by the time of sentence. He had commenced attending the Seventh day Adventist Church since his release on bail and had not re-offended since his arrest.

[71] While each of these matters is commendable they do not require a conclusion that the applicant has reformed or indeed necessarily has remorse for the evil that he has done. The applicant was aged 49 years when arrested. To that point in time he had continually re-offended over the previous 31 years. That he has not re-offended in the years that he has awaited sentencing for these charges does not mean that he has finally learnt his lesson.

[72] The applicant's criminal record stretches back to 1977. Most significantly in 2000 the applicant was sentenced to three years six months imprisonment for trafficking in amphetamines. Subsections 9(8) and (9) of the *Penalties and Sentences Act* 1992 (Qld) are relevant:

> (8) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—
>
> (a) the nature of the previous conviction and its relevance to the current offence; and
>
> (b) the time that has elapsed since the conviction.
>
> (9) Despite subsection (8), the sentence imposed must not be disproportionate to the gravity of the current offence.

[73] Plainly enough, this prior conviction of trafficking in schedule 1 drugs is a substantial aggravating factor. But the applicant's past offences are more extensive than one prior trafficking charge, albeit that was the most serious matter on his criminal record. His past offending includes six summary drug offences between 1979 and 1997, repeated offences over 20 years involving the possession or use of weapons, and offences involving property, threats and obstruction.

[74] After his arrest the applicant was found to have three shotguns, four rifles and boxes of ammunition in the residence. He had not learnt from his previous convictions for weapons offences in 1978, 1983, 1998 or 2000.

[75] Other features of the case call into question the extent of remorse and the true prospects of rehabilitation. The applicant chose not to co-operate with the police by way of an interview. As a result the full extent of his trafficking is unknown. The applicant has not revealed his sources of drugs. The applicant conducted a committal that lasted a "full day". The learned sentencing judge, in my view, took a generous approach to this accepting that the cross-examination at committal led to some re-framing of charges with a prompt plea and hence demonstrating some willingness to co-operate with the system of justice. While there is always a utilitarian value to a plea, for sentencing purposes not a great deal more in favour of the offender can be inferred from such a course. As Fryberg J observed in rejecting a similar argument in *R v Kashton* [2005] QCA 70 in these terms:

> "It was submitted on his behalf that the part of the cross-examination at committal which was relevant to him was, 'conducted as efficiently as possible exploring legitimate forensic issues which could properly be said to have contributed to the resolution of the matter.' I would reject that submission. Testing the strength of the Crown case by cross-examination at committal proceedings in order to make a decision about whether to try to negotiate a plea bargain does not, in my judgment, evidence a willingness to co-operate in the administration of justice."[58]

[76] Despite being fully aware of his involvement in trafficking in drugs the applicant told a psychiatrist in August 2011, seven months before sentence and three years after his arrest, that he was "adamant" that he was not guilty of trafficking in illicit drugs but only of supplying drugs. That lie hardly demonstrates remorse, acceptance of responsibility, or rehabilitation.

[77] I turn then to the complaint that his Honour erred in principle.

The Wrong Approach

[78] In my view his Honours' approach did not involve any error. To assert that cited authorities demonstrated that an identified period of imprisonment "might" be called for offends no principle I am aware of or identified by reference to any authority. It needs to be recalled that his Honour's comments were made *ex tempore* and in response to the submissions made to him by the defence counsel that "in normal circumstances a sentence of 10 years would be open and most likely appropriate." The authorities cited to the sentencing judge quite rightly gave him a yardstick against which to measure the sentence that might be appropriate in this case given its particular characteristics.

[79] Indeed it is common for this Court to expound that a certain period of imprisonment is required for offences reflecting certain features, obviously requiring an adaptation of the precise sentence to the aggravating and mitigating factors in the case. An example is *R v Coleman* [2006] QCA 442 where Keane JA (as his Honour then was) said at [18]:

> "Decisions of this Court show that trafficking in dangerous drugs to the extent engaged in by the applicant can be expected to attract a sentence of

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58 At p4.

> imprisonment in the range between five and seven years after a plea of guilty."

[80] Examples could be multiplied. This is done to assist sentencing judges to achieve the consistency in sentencing that is desirable: *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 per Gleeson CJ at 591 [6]. It would be a peculiar thing if sentencing judges were to commit error in reflecting on those very guidelines.

[81] It may be that the complaint intended that his Honour's remarks indicated that he adopted the "two-stage" process of sentencing – where a prima facie sentence is identified and then adjusted up or down according to the influence of particular factors. It has been said that this is a process which leads to error: *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476-477 per Mason CJ, Brennan, Dawson and Toohey JJ; *AB v The Queen* (1999) 198 CLR 111 at 121-122 [15]-[17] per McHugh J; *Ryan v The Queen* (2001) 206 CLR 267 per Hayne J at [144]. If that is the complaint then I do not read his Honour's remarks as indicating that he has made that error. An observation in the joint judgment of Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian v The Queen*, (2005) 215 ALR 213 is apposite:

> "It is not useful to begin by asking a general question like: was a 'staged sentencing process' followed. That is not useful because the expression 'staged sentencing process' may mean no more than that the reasoning adopted by the sentencer can be seen to have proceeded sequentially. Or it may mean only that some specific numerical or proportional allowance has been made by the sentencer in arriving at an ultimate sentence on some account such as assistance to authorities or a plea of guilty. Neither the conclusion that a sentencer has reasoned sequentially, nor the observation that a sentencer has quantified the allowance made, for example, on account of the offender's plea of guilty, or the offender's assistance to authorities, of itself, reveals error."[59]

[82] The joint judgment concluded:

> "Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. 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."[60]

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59 At [24].

60 At [39].

[83] That the learned sentencing judge did not "add and subtract item by item from some apparently subliminally derived figure" is apparent from his remark that immediately followed the first of the passages that I have quoted above – "I acknowledge at once that one cannot be mathematically precise with these taking into account all the factors that may be in play in comparable authorities." As Hayne J remarked in *Ryan v The Queen*: "What the sentencer must do is instinctively synthesise the various competing factors" (at [144]). And that, it seems to me, was the process that the sentencing judge was engaged in in the passage that is criticised.

[84] I reject then the complaint that there was some error in approach. What of the other complaint? It was that insufficient weight was given by the learned sentencing judge to factors in mitigation. There were two principal matters that it was said deserve special consideration – the impact of injuries, and particularly a consequential psychiatric injury, said to have been suffered during the course of the applicant's arrest when "tasered" by police officers and the extent of the applicant's co-operation.

Impact of Injuries

[85] When confronted outside his home by members of the Special Emergency Response Team the applicant turned to head for his residence. The officers were armed with and used taser devices to subdue him. Given the applicant's background with weapon offences and the knowledge gained from surveillance that the applicant had weapons on the premises the officers' actions were unsurprising and were not criticised on sentence.

[86] According to a psychiatric report tendered the applicant complains of having suffered the following extensive physical injuries as a result:

(a) Black eyes;
(b) Broken teeth;
(c) Neck pain;
(d) Injuries to both shoulders;
(e) Fractured ribs;
(f) Exacerbation of a pre-existing back injury;
(g) Urological injury;
(h) Wounds from taser darts;
(i) Significant gastrointestinal problems;
(j) Loss of libido and erectile and ejaculatory problems.

[87] The prosecutor advised the learned sentencing judge that the prosecution accepted that the applicant received "minor injuries" as a result of the arrest and later advised that he accepted that there were injuries to the "shoulder and face".

[88] The applicant also complained of "significant disturbance in his mental health". It was submitted by his counsel to the sentencing judge that "as a consequence of [the police] doing their job it's undisputed that [the applicant] suffered ongoing psychological injury."

[89] No medical evidence was led concerning the physical injuries complained of to confirm their existence, establish a causal link with the manner of the applicant's

arrest, or provide any measure of their severity or prognosis. The emphasis at sentence was on the psychiatric complaints.

[90] The claimed psychiatric symptoms recorded were significant. They included "anergia, amotivation, anhedonia, social withdrawal, loss of appetite, difficulty sleeping, frequent bouts of tearfulness and evanescent feelings of hopelessness which have coalesced into suicidal ideas… significant cognitive problems particularly in the areas of poor concentration, attention and short term memory, which were severely curtailing his capacity to plan, organise, sequence and perform tasks."[61]

[91] The psychiatrist diagnosed a major depressive disorder with a 17% impairment. He suggested certain medications and ten hourly sessions of cognitive and behavioural psychotherapy. For patients over the age of 50 with this condition he suggested that the need for medication would be life long.

[92] Despite the assertion that the cause of the psychiatric complaints was undisputed and was to be found in the injuries consequent upon arrest it would have been more accurately said that the psychiatrist had asserted as much, without any discussion, and no check opinion had been obtained. The opinion seems to have been based on the self reporting of the applicant that his mental disturbances had come on only since the sustaining of the injuries in the course of his arrest and his claims to being "terrified of the police coming to kill him". The learned sentencing judge was evidently alive to the limitations of the opinion. He observed that the circumstances of the arrest had "at least" contributed to the psychiatric condition.

Principles Relevant on Sentencing Pertaining to Adverse Consequences of Criminal Conduct

[93] While the legislation governing sentencing in this State[62] does not deal expressly with the matter it has long been accepted at common law that it is relevant and appropriate on sentence to bring into account in mitigation of sentence the adverse consequences of one's own criminal conduct. But it is not easy to identify the limits, if any, to that principle.

[94] Physical injury suffered during the course of committing crimes has been accepted in this State as a mitigating feature: *R v Noble & Verheyden* [1996] 1 Qd R 329; *R v Hook* [2006] QCA 458; and see *R v Fletcher* (1980) 4 Crim LJ 244; *Haddara* (1997) 95 A Crim R 108 for similar views in other States. Extra curial punishments inflicted on a criminal because of their criminal conduct have been treated the same way: *R v Cooney* , a decision of the Queensland Court of Appeal (Pincus, Davies JJA, Fryberg J - unreported 6 March 1998; BC9802559); *R v Allpass* (1993) 72 A Crim R 561, a decision of the Court of Criminal Appeal in New South Wales and applied in *R v Clampitt-Wotton* [2002] NSWCCA 383; see also from that Court *R v Genz* [1999] NSWCCA 285; and *R v Daetz; R v Wilson* [2003] NSWCCA 216 for a comprehensive review of authorities by James J; contra see *R v Gooley* (1996) 87 A Crim R 209 per Doyle CJ. Likewise where injuries have been suffered in the course of arrest: *R v Barci & Asling* (1994) 76 A Crim R 103, a decision of the Victorian Court of Criminal Appeal, where an armed robber had been shot by police at the

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61 AB 49.

62 See Part 2 of the *Penalties and Sentences Act* 1992 (Qld).

scene of the crime; *Lawless* (unreported) – Court of Criminal Appeal (Victoria) 16 May 1989.

[95] Nor have the relevant consequences been limited to physical injury. Financial ruin consequent upon the exposure of criminal conduct has been put in the scales as deserving a mitigation of sentence: *R v Wright (No 2)* (1968) VR 174; and see the comment of McHugh J in *Ryan v The Queen* (2001) 206 CLR 267 at [54]. While differences of view have been expressed, public opprobrium has been thought to be a mitigating factor: *Ryan v The Queen* (2001) 206 CLR 267 per Kirby J at [123], Callinan J at [177]; quaere McHugh J at [52]-[55].

[96] The common thread running through these cases providing the reason for any reduction in sentence seems to be the notion that the criminal will have as a permanent reminder through the remainder of their lives the particular adverse consequence which will be of such a nature as to cause them a significant degree of suffering either in their purse, mind or body and so constitute a punishment, over and above that which the community can inflict by way of sentence. In those circumstances it seems to have been accepted that it would be just to ameliorate the sentence the community, through the Courts, ought to impose. Jerrard JA explained the rationale in *Hook* (supra) at [14]: "Painful consequences already suffered can be both a deterrent to future offending, and a matter a sentencing court is required to take into account as a personal circumstance going to mitigation, and as a material fact when ensuring that the punishment the offender receives from the court is what in all the circumstances is an appropriate punishment and not an excessive one."

[97] I should observe that there are older cases that are to the contrary effect. They are discussed by Mr F Rinaldi in a note in (1980) 4 Crim LJ at pp. 244–246. The suffering of a "social disease" by rapists as a consequence of their crime, or the sustaining of broken legs by prisoners seeking to effect an escape, or gun shot wounds suffered while resisting lawful detention with the use of weapons have brought no reduction in sentence in a series of cases in the 1970s.

[98] The consistent view however in more recent authority is to the opposite effect. As Grove J observed in *Alameddine v The Queen* [2006] NSWCCA 317 at [23] (with whom Kirby and Hislop JJ agreed): "…there is a strong current of judicial opinion against outright rejection of the possibility of mitigation even where the injury is self inflicted or induced by the activity of the offender".

[99] However cautionary statements appear in several of the cases that suggest that there must be limits to the principle, if it is a principle. This Court has said that not all injuries should be so treated. In *R v Noble & Verheyden* (supra) the Court (Davies, Pincus JJA, Williams J) said (with my emphasis):

> "The second point, the injury, is more debatable. We were referred to no authority on the question whether an offender who was injured in the course of committing an offence should have that taken into account in his favour. … **We would not accept, however, that any injury suffered in the course of committing an offence is necessarily a factor in sentencing**.
>
> But it is easy to postulate circumstances in which an injury so suffered would be relevant. If an offender has assaulted another without causing significant injury, and the other has defended himself so vigorously as to cause the

> offender serious injury, it would ordinarily be right to treat the injury the offender has suffered as at least part punishment — whether or not the retaliation was within lawful bounds. That is not this case, but we are of opinion that an injury suffered by a robber as a result of the victim's defence of the property may, in appropriate circumstances, go in mitigation of penalty."

[100] Their Honours did not explain the basis for their reticence to accept that all injuries so suffered were relevant, nor did they explain what might be the "appropriate circumstances" in which effect would need to be given to such injuries. Obviously retaliation well out of proportion to the offence committed - the example that was given where it was said it would be obvious that an injury would be brought into account - was plainly not seen as an essential condition. Or at least it is not obvious that the injuries suffered by Verheyden, serious though they were, were out of proportion in some way to the offence of armed robbery with an apparent intent, not realised, of inflicting harm upon the owners of the property if it became necessary. And if that is the test there would seem to be insuperable obstacles in most cases to in some way measure proportionality of injury to the level of criminality.

[101] Presumably the transience of any injury would be a factor. In *Sharpe v The Queen* [2006] NSWCCA 255, where the offender was shot in the leg during commission of the offence, the consequences of the injury were described as a passing physical injury and the need for sentence reduction as a consequence was rejected. However there was no apparent permanency of injury in *R v Hook* (supra) where the offender's counsel had conceded that the offender did not have any "medical problems" as a result of the injuries (a dislocated hip, a broken left arm, and some cuts to the knee) sustained in a motor vehicle accident that she had caused through her own dangerous driving. Yet each judge of the Court (Williams and Jerrard JJA and Philip McMurdo J) plainly thought the occurrence of injury relevant, Williams JA cautioning that "on the facts of this case the injuries in question were not such as to call for any significant moderation in the head sentence; nor were they of a decisive character in determining the period of the head sentence which actually had to be served" (at [4]).

[102] The example given in *Noble & Verheyden* suggests a relevant and limiting factor. The converse of retaliation and consequent grievous injury out of all proportion to the crime is the realisation of an obvious risk inherent in the criminal activity. In the latter case there is the argument that less weight should be given to the consequence. Thus in *R v Wright (No 2)* (supra) where the offender was a police officer who was required to forfeit $3000 that represented long service leave entitlements and his contributions to his superannuation, the Full Court (Winneke CJ, Gillard and McInerney JJ), after commenting that this was "undoubtedly" a matter to be taken into consideration, said: ".. a balanced view would require that we take into account that it must have been a factor that would have been known to the applicant when he set out upon his course of criminal conduct. In other words it was one of the risks that had to be taken when conduct of that sort was entered upon" (at p 180-181).

[103] Given the diverse circumstances in which injuries have been brought into account - when committing the crime, or in the course of being arrested, or inflicted as extra curial punishment - it would appear that the precise manner in which the detriment

was sustained would seem not to be relevant, although reservations were expressed by Grove J in *Alameddine* (supra) at [27] (again my emphasis):

> "To the extent that the Crown submitted that there was a boundary created by injury sustained by self inflicted illegal activity beyond which no mitigation could be granted, I would reject it. **That is not to say that the circumstances of infliction are irrelevant** but to deny that, once injury is sustained by the action of the offender in the course of committing the crime, the consequences are incapable of giving rise to a factor of mitigation."

[104] And it has been expressly held that the fact that there is some connection between the crime and the injury has been held not to be sufficient. So injuries inflicted on an offender by other prisoners whilst in gaol on remand, and which would not have been suffered had the offender not been imprisoned consequent upon the crime in question, have been disregarded: *Silvano v R* [2008] NSWCCA 118 [24]-[35] per James J. The argument advanced and accepted was that if this connection was accepted as sufficient to justify amelioration of sentence then any injury suffered whilst on remand in prison, such as an accidental falling or tripping, must have the same consequence.

[105] I make two observations. The first is that I am not convinced that there is merit in that distinction. Given that Silvano complained of a brutal anal rape by a fellow prisoner in the shower block and an assault by his cell mate causing partial loss of sight I would have thought that the connection was much more than just being in a certain place at a certain time – the injuries were a direct result of the State requiring that a person on remand live in extremely close proximity to violent criminals, obviously without sufficient protection, thereby substantially and materially increasing the risk of precisely such events. The law has long denied any causal connection between an everyday accident and an earlier tortious act that puts the sufferer in the wrong place at the wrong time – Windeyer J warned that "lawyers must eschew this kind of 'but for' or *sine qua non* reasoning about cause and consequence": *Faulkner v Keffalinos* (1970) 45 ALJR 80 at 86. There is good sense in applying that approach here. But where the injury is a direct result of the increased risks brought about by the criminal conduct then it is difficult to distinguish the case from those I have discussed above which were all accepted as justifying some amelioration of sentence. And the more relevant principle would seem to me that explained by Mason CJ in the context of negligence claims in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 516: ".. a factor which secures the presence of the plaintiff at the time and place where and at the time when he or she is injured is not causally connected with the injury, **unless the risk of the accident occurring at that time was greater.**" Again my emphasis.

[106] The second observation I make is that if the rationale be as Jerrard JA explained in *Hook* it is not immediately apparent why such injuries would not have the desired deterrent effect or why they would not serve as a punishment.

[107] Nonetheless *Silvano* stands as a decision of the Court of Criminal Appeal in New South Wales that there is some limit to the circumstances in which injuries that are sustained as a consequence of criminal conduct will be brought into account.

[108] The only other limitation identified in the cases would seem to be the deliberate self infliction of harm: *Christodoulou v The Queen* [2008] NSWCCA 102 per Grove J at

[42] where the offender injected himself with battery acid in an attempt to dissuade others from arresting him and his injuries were not brought into account.

[109] After an extensive review of authority in *R v Daetz; R v Wilson* (supra) James J (with whom Tobias JA and Hulme J agreed) after expressing some reservation as to whether all the cases discussed had been correctly decided concluded in respect of an extra curial punishment case (with my emphasis) at [62]:

> "I have concluded from this examination of the authorities cited to the Court and especially *Allpass*, *Clampitt-Wotten* and *Cooney* that, while it is the function of the courts to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on an offender, **can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence**. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence. In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment. How much weight a sentencing judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case. Indeed, there may well be many cases where extra-judicial punishment attracts little or no significant weight."

[110] The purposes and indeed the "only purposes for which sentences may be imposed on an offender" which are set out in ss 9(1) of the *Penalties and Sentences Act* 1992 ("the Act") are not offended by this approach. Such an approach is consistent with the need to arrive at an "appropriate punishment" mentioned in ss 3(b) of the Act where the purposes of the Act are explained. It is consistent with and assists in meeting the injunction in ss 9(9) that the "sentence imposed must not be disproportionate to the gravity of the current offence". And while there is no express reference to these considerations in the principles that "must" be taken into account under ss 9(2) of the Act the requirement in ss 9(2)(r) to bring into account "any other relevant circumstance" would plainly allow it.

[111] In my view that statement of principle in *Daetz* accords with a "strong current of judicial opinion" throughout Australia over decades, is consistent with earlier decisions of this Court and of the High Court and is not inconsistent with the legislation governing sentencing in this State. Nonetheless, as the reservations expressed in *Noble & Verheyden, Daetz, Silvano* and to some extent *Alameddine* indicate, there has been judicial disquiet from time to time as to the extent to which such injuries ought be put in the scales. Hence the qualifications identified in *Daetz* should be accepted and followed in this State.

[112] Those important qualifications were that there needed to be "serious loss or detriment", it must arise in some way out of the offending conduct, and the circumstances of the case can influence the weight given. The comment in *Wright (No 2)* too seems, with respect, to reflect common sense and suggests that the more

obvious is the risk of the injury complained of resulting from the criminal enterprise then the less is the weight it should be afforded.

Psychiatric Harm

[113] The injury complained of here was a major depressive disorder with a 17% permanent impairment having been diagnosed. In none of the cases cited to us has any court been asked to accept that there should be some mitigation of sentence for a claimed psychiatric disorder consequent upon the criminal conduct engaged in or the manner of arrest of an offender. There are two issues. Should the principle extend so far? And, if so, should it apply here?

[114] In my view the Courts should approach claims of the type made in this case with some caution and this Court should have some considerable scepticism about the claim made here.

[115] The reasons for my concern stem from the subjective nature of the condition and the manner of its proof. If the conditions identified in *Daetz* are essential pre conditions to the application of the principle then there is real doubt that they can be satisfied for harm of this type, at least in the general run of cases.

[116] I have mentioned the difficulties of proof. Allied with that are the application of the scarce resources of the criminal justice system to the determination of whether a criminal has mental distress amounting to a psychiatric disorder that is permanent in its effect, and the utility of doing so to bring about some, almost certainly modest, mitigation of sentence. And if it becomes the rule that sentences should be reduced for claimed psychiatric consequences such as depression based entirely on self reporting there is the real potential for floodgates to be opened.

[117] The distinctive aspect of psychiatric injury is that it depends in large degree upon a self report and upon expert opinion and judgement. That is not necessarily the case with many physical injuries, and was not a feature in any of the decided cases that I have discussed.

[118] The financial loss in *Wright* was measurable and certain. The loss of status and the attraction of public opprobrium discussed in *Ryan* may not be measurable but it is certain and we all know it can be keenly felt. Where a criminal comes to Court with extensive physical injuries caused, for example, by an attack by a husband with a claw hammer (*Genz*), the suffering of extensive and severe burns (*Haddara; R v SS* [2010] NSWSC 1169), the shooting off of a foot (*Fletcher*), the blasting away of a shoulder (*Barci*), or where the internal organs have been damaged and removed and a colostomy fashioned (*Verheyden*), then it hardly matters what account the criminal gives – it is part of the human condition that such injuries will cause life long problems and will serve "(f)or the rest of his life, … as a savage reminder … of his criminality, and as such, they must fairly be regarded as constituting some punishment for that criminality" (*R v Barci & Asling* (1994) 76 A Crim R 103 at 111). You do not need the opinion of a medical expert to come to the conclusion. The courts and the community can be confident that that criminal has and will suffer. But the same confidence cannot always be expressed about a psychiatric condition.

[119] As well I suspect that many members of the community would doubt the wisdom of lending too sympathetic an ear to the troubles that follow from the choices that criminals make. In order to avoid having the criminal law fall into disrepute by the setting of sentences that are disproportionately low given the criminal conduct in question it seems essential that any claimed adverse consequence, and importantly its severity and permanency, be seen to be established to a reasonable degree of certainty. I doubt that level of certainty can be achieved in cases of this type.

[120] Even if it could be achieved is the effort worth it? To achieve that necessary confidence would take a great deal of effort. The diagnosis and prognosis of any psychiatric condition must necessarily depend on the accuracy of the history provided. In the cases under consideration here an acknowledged criminal seeking to diminish their sentence provides the report. Is that history to be uncritically accepted? Unless the notion be that prosecution authorities and hence the Courts are compelled to accept psychiatric opinion advanced by criminals then it is at least desirable that check opinions be obtained and claimed histories be critically examined. That involves time and expense. I am certain that the community cannot afford to have scarce resources thrown at the resolution of disputes about criminals suffering psychiatric harm inherent in and resulting from their criminal conduct. I note that no check opinion was obtained here, no doubt for good practical reasons. But that results in the very argument advanced here - that the persecutor did not contest the opinion.

[121] No doubt each case must be treated on its merits. There is no doubt that psychiatric injury can be real and debilitating. If it is established to the requisite degree that the qualifications to the principle explained in *Daetz* are satisfied then some amelioration might be justified. But the cases where that degree of satisfaction will be reached will, in my opinion, be rare. Where it is certain that all is not known and the unknown facts might be relevant to the diagnosis or prognosis then it seems to me that there is more injustice than justice in the acceptance of such conditions as ameliorating sentence.

The Evidence Tendered Here

[122] As mentioned the applicant tendered a psychiatric report at sentencing. As mentioned it is plain that the opinion proffered was based on a false premise. The psychiatrist was told that the applicant "intends to enter a plea of guilty on the charge of supply but is adamant that he is not guilty of trafficking in illicit drugs". Presumably the psychiatrist accepted that statement of lack of guilt as accurate. He certainly has not said that he rejected it. What charge of supply was intended is unknown. That the applicant was lying to the psychiatrist in his assertion that he was not guilty of trafficking is plain. There is the potential for a very great difference in scale between the assumed history and the reality.

[123] The applicant admitted to the psychiatrist "a long history of contact with the police particularly regarding drugs", of being a user and seller of marijuana since age 19, to having been convicted on 10 occasions for possession of that drug, and incarcerated twice for trafficking in that drug – the last occasion being for two years and five months and the conviction some 12 years in the past by the time of the interview. The psychiatrist observed that the applicant was a "vague historian" and the forgoing criminal history was not completely accurate. But importantly no

information was supplied in relation to the applicant's activities in the period of 27 months leading up to the applicant's arrest.

[124] Indeed no one other than the applicant knows the true extent of that criminal business. The applicant declined to provide any information about his own activities exercising his right not to incriminate himself.

[125] It has long been accepted that for any expert opinion to be accepted a proper basis for the assumptions underlying the opinion must first be established: see the discussion by Heydon JA (as his Honour then was) in *Makita Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 at [64]-[86]. Heydon JA summarised the law in the following passage (at [85] and with my emphasis):

> "…so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; **it must be established that the facts on which the opinion is based form a proper foundation for it**; … If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight."

[126] In my view where a psychiatrist is shown not to be aware of facts having the potential to influence his or her opinion then there is good reason to doubt that there is any proper foundation for the opinion and no good reason to give effect to it.

[127] The crucial opinion here suffers from that defect. The psychiatrist expressed the view that the depressive illness arose "as a direct result of the consequence of the injuries sustained on [the date of his arrest]."[63] As the review of the decided cases shows injuries sustained in the course of arrest have been accepted as being legitimately brought into account. The injury here may be due to the injuries sustained in the course of arrest. But what if the cause lies elsewhere? Without a complete history how can the Court have the necessary degree of satisfaction that the opinion is sound and that the principle therefore applies?

[128] And there are other possible competing causes. The conducting of an illegal business involving hundreds of thousands of dollars and an unrevealed number of customers over a long period of time with the constant need for secrecy; the presumably ever present threat of physical harm from competitors or customers such that the applicant kept firearms and ammunition at his premises; the living under the threat of sudden apprehension and arrest for 27 months; the prospect of possible incarceration for a decade or more; the use and perhaps misuse of the woman whose addiction was manipulated for the applicant's sexual purposes. Each of these circumstances has the potential, I imagine, to cause a depressive illness. None of them were known to the reporting psychiatrist.

[129] And there were other possible competing causes that the psychiatrist knew of but he offered no explanation as to why they should be discounted as the cause, or a cause,

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of the diagnosed condition. I have in mind the apparent realisation that the applicant was under the surveillance of authorities and so heightening any apprehension he may have felt; the claimed destruction of the applicant's businesses with the loss of three cane farms and three trucks after his incarceration; the separation from his de facto partner and their children with her taking out a domestic violence order against him; and the applicant's perception that he had been abandoned by "everyone".

[130] Where causation of a condition is relevant the mere expression of an opinion as to that causation by an expert does not conclude the matter – it is for the tribunal of fact to be satisfied as to the cause. The following statement appears in *Ramsay v Watson* (1961) 108 CLR 642 (per Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ at 645) and in my view is applicable here:

> "That some medical witness should go into the box and say only that in his opinion something is more probable than not does not conclude the case. A qualified medical practitioner may, as an expert, express his opinion as to the nature and cause, or probable cause, of an ailment. But it is for the jury to weigh and determine the probabilities. In doing so they may be assisted by the medical evidence. But they are not simply to transfer their task to the witnesses. They must ask themselves 'Are we on the whole of the evidence satisfied on a balance of probabilities of the fact?'."

[131] As Heydon J observed in *Makita* (supra) at [67]: "[t]he jury cannot weigh and determine the probabilities for themselves if the expert does not fully expose the reasoning relied on." So here, the task of determination of course falling to the sentencing judge. There was mere assertion here without exposure of reasoning and assertion based on a patently inadequate history. In my opinion there was every reason to doubt the validity of the opinion proffered.

[132] Some of these potentially competing causes are inherent in the trafficking business that the applicant took on. Some are not, or at least not directly. That raises the question of whether the necessary pre-conditions for the applicability of the principle previously identified are satisfied. And how is the balancing exercise suggested in *Wright (No 2)* to be carried out if the cause is unknown?

[133] We are not in a position to judge what significance the psychiatrist may have placed on the applicant's activities, criminal and otherwise, in the period leading up to his decompensation but one would expect at least that they would need to be explored in detail to enable the psychiatrist to arrive at any informed opinion about diagnosis, aetiology and prognosis. No evidence was led to the effect that the diagnosis and prognosis did not depend on an understanding of the applicant's precise activities. Common sense suggests that both diagnosis and prognosis are very likely to depend on an accurate history. Evidence to that effect is given every day in the courts.

[134] And if prognosis might be affected then how does one conclude that there is the necessary degree of seriousness about the condition to justify putting it in the scales?

[135] All that, it is said, is cured by the fact that the prosecutor, unarmed with any psychiatric opinion of his own, did not put the opinion of the psychiatrist in issue.

In my view that is not the end of the matter. Where an offender seeks to persuade a Court that a factor should be accepted in mitigation of sentence then the offender bears the onus of proof. The standard to be met is persuasion on the balance of probabilities. Where, as here, the full extent of the criminal activities remain unknown, where the offender has chosen to keep silent where only he has the knowledge of his true activities, and where what has been revealed to the medical practitioner does not accord with the known facts, then I cannot see how that opinion can or should affect the sentence.

[136] What I have said so far is directed to the psychiatric complaints. Apart from the psychiatrist's recording of the applicant's complaints to him no evidence was led concerning the physical ailments. The prosecution made plain that they were not accepted in their entirety. Even had they been there was nothing to show how serious or permanent the conditions complained of were. In the absence of such evidence they cannot weigh much in the scales. Only minor injuries were conceded. The conditions identified in *Daetz* are not met.

Co-Operation

[137] What of the co-operation point? Again it was a factor expressly taken into account. But again the argument is that not enough weight was given to it. I cannot agree.

[138] That some allowance should have been given cannot be doubted. The community have an obvious interest in encouraging criminals to reveal what they know. There are many authorities to this effect: see *R v Lowe* [1977] 66 Cr App Rep 122; *R v Perez-Vargas* (1986) 8 NSWLR 559; *R v Golding* [1980] 24 SASR 161; *Hayes v R* [1981] 3 A Crim R 286; *R v Rostom* [1996] 2 VR 97 and there are many more.

[139] The principle was explained in *R v Webber* (2000) 114 A Crim R 381at 382 where McMurdo P and Chesterman J, delivering the majority judgment, observed that:

> "a prisoner who provides tangible co-operation in the prosecution of others implicated in the prisoner's or some other criminal offence should receive a significant reduction in sentence sufficient to afford an inducement to others to provide such co-operation.
>
> Although the discount for co-operation must be discernible, and worthwhile, the adjusted sentence must nevertheless reflect the seriousness of the offence which is being punished. The balance between these competing demands will not always be easy to strike…"

[140] Of considerable assistance in the striking of that balance are the observations of Wells J in *R v Golding* (supra). His Honour's judgement has been described as "very careful" and one from which "much useful assistance is to be obtained" (per Young CJ in *R v Schioparlan and Georgescu* (1991) 54 A Crim R 294 at 305); and "illuminating" (per Charles JA in *R v ZMN* (2002) 4 VR 537 at 542). Wells J considered several matters that he thought might be of assistance in determining the leniency that an informer might deserve (at 172-173), two of which are relevant here:

(1) the effectiveness of the prisoner's work as an informer and Wells J gave examples - "whether large quantities of stolen property or illicit drugs have been recovered; whether persons guilty of wide

scale criminal operations have been brought to justice; whether crimes that would otherwise have been difficult to detect or to resolve have been effectively cleared up"; and

(2) the standards maintained by the informer - by which Wells J explained he meant whether the information was given "in good faith, in disclosure of all unlawful conduct that could fairly be thought of interest to the police, or whether he acted cynically and was interested in vouchsafing information only where it appeared to him to suit his own interests, and suppressed information that could and should have been revealed".

[141] I agree with those observations. Here the effectiveness of the applicant's information was at best modest. The information provided concerned two named individuals. One was a producer of cannabis sativa – a crop involving a modest number of plants with a total weight under 600 grams and a small quantity of dried cannabis were found at the street address provided by the applicant. The second individual was found to have a small unsophisticated laboratory and a gram of cannabis. No convictions resulted. The criminal activity exposed in each case was very minor in scale compared to the applicant's efforts. Nonetheless there was utility in the information and some credit should be given.

[142] But significantly it is difficult to avoid the view that here the applicant has "acted cynically and was interested in vouchsafing information only where it appeared to him to suit his own interests, and suppressed information that could and should have been revealed". The applicant trafficked principally in methylamphetamines. He chose to keep from the authorities all that he knew about that evil trade – and he must have known a great deal. Any leniency must be tempered by the fact that he has done little, and very much less than he could, to undo the great evil that he has done by his large scale trafficking efforts.

[143] So I would accept that only a modest discount for the information provided was justified.

Comparable Sentences

[144] It was submitted for the applicant that it could be seen that his sentence was manifestly excessive as cases in which imprisonment for 10 years had been imposed involved a period and extent of trafficking greater than his and aggravating features more significant than here with reference to *R v Kashton* [2005] QCA 70; *R v Bradforth* [2003] QCA 183; *R v Johnson* [2007] QCA 433; *R v Christensen* [2002] QCA 113 and *R v Fischer* [2007] QCA 105. Further it was said that cases where sentences of 11 years and 10 ½ years had been imposed were significantly worse with reference to *R v Raciti* [2004] QCA 359 and *R v Adams* [2009] QCA 56.

[145] The argument was not made out.

[146] Cases in which this Court has declined to interfere on a prisoner's application do not advance matters greatly. As Holmes JA, who was a member of the Court in *Kashton*, remarked in *R v Westphal* [2009] QCA 223 at [32]: "I think it is fair to say that *Kashton* was a worse case than this, particularly given the persistent re-offending on bail there. However, since it was an unsuccessful application for leave

to appeal against sentence, it demonstrates no more than that 10 years was not a manifestly excessive sentence for Kashton, rather than that a similar sentence here was beyond a proper exercise of discretion." The same can be said of the unsuccessful applications for leave to appeal against the sentences imposed in *Christensen*, *Fischer* and *Adams*.

[147] Nor does it assist greatly to be told that longer sentences were imposed in cases involving more serious facts. That is as one would expect. It has often been said that there is no precise mathematical answer to the question what is the proper sentence for any given set of circumstances. The argument has connotations of assuming there is some such answer. It is impossible to analyse the cases so precisely in my view. Even so, *Raciti* did not necessarily involve more serious facts than this – in both that case and this one the amounts of money and drugs involved were substantial but the period of trafficking there was much shorter at only four months.

[148] In *Johnson* a sentence of nine years imprisonment was reduced by this Court to one of eight years but the reasons for that leniency are not present here. As Keane JA (as his Honour then was) said at [17]: "There is much force in the submission …that the criminality of an addict who sells drugs at the retail level to support his habit is of a different order from that of a large retailer or wholesaler whose motivation is 'cynically commercial'". The applicant falls into the latter class.

[149] The sentence imposed by this Court in *Bradforth* demonstrates the difficulty in the claim that the sentence here was manifestly excessive. A sentence of 10 years imprisonment was substituted for one of 12 years. The prisoner had served nine months on remand that could not be declared. That was expressly acknowledged as a relevant feature. The similarities include that Bradforth pleaded guilty, he did so to trafficking in more than one drug, two being schedule 1 drugs and one then being a schedule two drug (there cocaine, methylamphetamines, and 3,4 methylenedioxymethamphetamine), the supply was to customers who were not the end users and the business was conceded to be a "large" one, and the businesses continued until the police determined to shut them down. One aggravating feature not present here is that the applicant was found in possession of significant quantities of illicit drugs when on bail for trafficking. But there were many features much more favourable to the offender than here – Bradforth was aged 26 years, significantly younger than the applicant; he had only a relatively minor criminal history and no prior drug related convictions; the trafficking period was significantly shorter than here – only 12 months; and the trafficking was "motivated in part to feed a drug addiction". In my view the decision in *Bradforth* would justify a longer sentence than was imposed here.

Conclusion

[150] It was of course necessary for the sentencing judge to put in the scales all the relevant factors that comprised the "offender considerations" spoken of by Kirby J in *Ryan v The Queen* (2001) 206 CLR 267 at [110]. The applicant stresses the two matters that I have dealt with in detail and there were others in his favour – the timely plea of guilty and his work history, after as well as before his arrest, were mentioned in submissions. All these factors were expressly mentioned by the sentencing judge. If the learned sentencing judge had ignored the issue of the injuries complained of I would not accept that he fell into error. However he did

not. If, contrary to my view, some allowance should be made for the psychiatric condition then, at best for the applicant, it could only be a modest one. And only a modest allowance was due to the co-operation point. The other mitigating factors each deserved and received consideration. But there were many factors against the applicant.

[151] In a number of decisions members of this Court have expressed the view that a sentence of between 10 and 12 years imprisonment is appropriate for large scale trafficking in schedule 1 drugs where a plea of guilty had been entered: Thomas JA (with whom Pincus JA agreed) in *R v Le* [2000] QCA 392*;* McPherson JA in *Raciti* (with whom Jerrard JA and Jones J agreed); Fryberg J in *Kashton*. Plainly each intended their comment as a guide only[64]. The decisions in *Le* and *Johnson* demonstrate as much. But while the decisions in past cases are not a strait jacket the mitigating factors would need to be compelling for a sentence of 10 years imprisonment in a case that meets the description of trafficking in schedule 1 drugs on a substantial scale to be accurately described as **manifestly** excessive. Even more so where the trafficker has a prior conviction for the same offence.

[152] Those mitigating features are not present here. Gotterson JA has concluded[65] that the comparable cases suggest a sentence here towards the upper end of the range of 10 to 12 years. I agree.

[153] The learned sentencing judge brought into account each of the considerations advanced in the applicant's favour. In my view his Honour's approach was too favourable to the applicant. Those considerations contributed to his Honour setting the sentence at what seems to me to be accurately described as "the bottom of the range" for cases of this type.[66] There is no error shown, at least none adverse to the applicant.

[154] In my view the sentencing judge's discretion did not miscarry. I would refuse the application.

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64 *Hili v The Queen; Jones v The Queen* [2010] HCA 45 at [54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

65 At [31].

66 *R v Kashton* [2005] QCA 70 per Fryberg J.