SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lacey* [2013] QCA 292
PARTIES:	**R** **v** **LACEY, Dionne Matthew** (applicant)
FILE NO/S:	CA No 203 of 2012 SC No 221 of 2012 SC No 308 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2013
JUDGES:	Margaret McMurdo P and Margaret Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, Margaret Wilson and Douglas JJ concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to trafficking in a dangerous drug (Ind 308/11, count 1); possessing a thing for use in connection with trafficking in a dangerous drug (Ind 308/11, count 2); possessing property obtained from trafficking (Ind 308/11, count 3); three counts of possessing a dangerous drug (Ind 308/11, counts 4 to 6); and three counts of armed robbery in company with personal violence (Ind 221/12, counts 1 to 3) – where the applicant was sentenced to two years imprisonment on each count of armed robbery, to be served concurrently with each other, but cumulatively with the effective term of 18 years imprisonment (with parole eligibility after 12.8 years) that the applicant was serving at the time for previous offences including manslaughter and torture – where the applicant contends that the sentencing judge erred by imposing a cumulative sentence on the robbery offences, thereby altering his full time release date and the date of his earliest possible release – where the

applicant contends that the sentence was manifestly excessive – whether the sentencing judge erred in imposing a cumulative sentence on the robbery offences – whether sentence manifestly excessive

Drugs Misuse Regulation 1987 (Qld), Sch 1
Penalties and Sentences Act 1992 (Qld), s 9, Pt 9A

Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered
Neal v The Queen (1982) 149 CLR 305; [1982] HCA 55, cited
R v Barry [2011] QCA 119, cited
R v Bird and Schipper (2000) 110 A Crim R 394; [2000] QCA 94, cited
R v Clements (1993) 68 A Crim R 167; [1993] QCA 245, considered
R v Dinaro (1997) 97 A Crim R 137; [1997] QCA 358, cited
R v Dionne Matthew Lacey and Jade Michael Lacey, unreported, Supreme Court of Queensland, No 920 of 2008, Martin J, 13 May 2009, related
R v Hess [2003] QCA 553, cited
R v Jade Michael Lacey, unreported, Supreme Court of Queensland, Ind No 308 of 2011, de Jersey CJ, 19 March 2013, cited
R v Kiripatea [1991] 2 Qd R 686, cited
R v Lacey & Lacey [2011] QCA 386, related
R v Lacey & Lacey [2010] QDC 344, related
R v Lacey; Ex parte Attorney-General (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, related
R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201, cited
R v Lovell [1999] 2 Qd R 79; [1998] QCA 36, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Nolan [2009] QCA 129, cited
R v Prendergast [2012] QCA 164, cited
R v Todd [1982] 2 NSWLR 517, considered

COUNSEL: J A Fraser for the applicant
D C Boyle for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant pleaded guilty on 27 July 2012 to a number of offences contained in two indictments. The first (308 of 2011) contained offences of trafficking in a dangerous drug (count 1); possessing a thing for use in connection with trafficking in a dangerous drug (count 2); possessing property

obtained from trafficking (count 3) and three counts of possessing a dangerous drug (counts 4 to 6). These offences were charged as occurring between January 2006 and May 2007. The second (221 of 2012) charged three counts of armed robbery in company with personal violence, all committed on 23 April 2007. On each count of robbery he was sentenced to two years imprisonment to be served concurrently with each other but cumulatively with the term of imprisonment he was already serving. The convictions for the robbery offences were declared to be convictions of serious violent offences under Pt 9A *Penalties and Sentences Act* 1992 (Qld).

[2] He has applied for leave to appeal against his sentence. He contends that the judge erred by imposing a cumulative sentence on the robbery offences, thereby altering his full time release date and the date of his earliest possible release. He also contends that his sentence was manifestly excessive. In determining his application, this Court must consider the present offences in the context of his serious criminal history for which he was serving a lengthy period of imprisonment when sentenced in July 2012.

The applicant's criminal history

[3] The applicant's criminal history has been well publicised and he can fairly be described as notorious. But there is nothing glamorous or cool about his violent and anti-social past.

[4] The applicant was sentenced in November 2005 to 80 hours community service without conviction for dangerous conduct with a weapon and possessing dangerous drugs, both committed in February 2005. The remainder of his past offending was committed in the period encompassed by the present offending.

[5] In May 2009 after a 14 day trial, he was acquitted of murder but convicted of the manslaughter of his friend, Kevin Palmer, in May 2007. The circumstances of that offence are set out in *R v Lacey; ex parte A-G (Qld)*[1] and in the transcript of the trial judge's sentence.[2]

[6] The applicant used a .25 calibre pistol previously concealed on his person to kill Mr Palmer during a fracas in a unit at Nerang. The jury rejected the defences of accident and self-defence of his brother, Jade Lacey; the applicant deliberately shot the deceased with an intention to do something other than kill or cause grievous bodily harm to him.[3] This Court expressed concern that he deliberately fired into a small room which he knew was occupied by at least six people so that there was a high risk of death or injury. He routinely carried a loaded handgun and produced the weapon in a crowded, small apartment in the midst of an aggressive situation, deliberately discharging it with tragic consequences. The offence caused immeasurable, life-changing grief to the deceased's parents, family and friends.[4]

[7] The sentencing judge described the killing as occurring in a chaotic situation in which the applicant had a direct line of sight to the deceased. Had the applicant not served time on remand, a 12 year sentence would have been imposed, but as he had already served two years in pre-sentence custody which could not be declared as

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1 [2009] QCA 274, [1], [5]-[26].

2 *R v Dionne Matthew Lacey and Jade Michael Lacey*, unreported, Supreme Court of Queensland, No 920 of 2008, Martin J, 13 May 2009.

3 [2009] QCA 274, [159].

4 Above, [234].

time served, the judge sentenced him to 10 years imprisonment. It follows that his sentence was effectively 12 years imprisonment. The judge declared the conviction to be of a serious violent offence so that the applicant must serve 80 per cent of the 10 year sentence before parole eligibility.

[8] He was next sentenced in the Brisbane District Court in September 2010 after an 18 day jury trial of the offences of torture, assault occasioning bodily harm whilst armed and in company, threatening violence at night, extortion, unlawful wounding with intent and deprivation of liberty, all committed in April 2007. He was sentenced to six years imprisonment for the offence of torture with a declaration that the conviction was of a serious violent offence and to lesser sentences on the remaining counts, other than the wounding offence for which he was convicted but not further punished. Those terms of imprisonment were ordered to be served concurrently with each other but cumulatively on the expiration of his sentence for manslaughter. The circumstances of that offending are set out in *R v Lacey and Lacey*[5] and in the transcript of the trial judge's sentence.[6]

[9] The applicant supplied ecstasy pills on "tick" (credit) to a young man whose girlfriend was to exchange the pills with the male complainant for marijuana. The ecstasy was stolen by two associates of the complainant. The applicant refused to accept that the complainant was not involved in the theft. He and his brother, Jade Lacey, repeatedly hit the complainant with baseball bats between his head and shoulders, breaking a tooth and cutting his forehead. Jade Lacey fired a pistol towards the complainant's legs. One of them demanded that he repay $13,000. They accompanied him to a property in Kenilworth where they were unable to obtain any money. On the return journey, they stopped outside a house at Kingston where Jade Lacey fired his gun in the direction of a woman occupant.

[10] The Laceys took the male complainant to their Gold Coast unit and then by boat to a nearby sand island. The applicant threw a shovel at him and ordered him to dig. When he refused, the applicant hit him in the face. The hole when completed was five or six feet long, two or three feet wide and four feet deep. Jade Lacey told the complainant to kneel in it with his hands on his head. The complainant heard a gunshot and felt pain in the left side of his head. Jade Lacey then aimed the gun towards the complainant's head and pulled the trigger two or three times. The gun clicked but did not fire. The complainant was told to get out of the hole and was asked how he could repay the money. He offered to ask his mother who had just sold a house. Jade Lacey shot him through his left hand to prove they were not joking.

[11] They took him back to their unit where they held him overnight in the laundry. The next morning they made him ring his mother. He asked her to transfer $50,000 to his bank account as a result of a rip-off in a drug deal and said that he had already been shot. They put him back in the laundry and handcuffed one wrist to a cupboard door handle. The applicant later said he had lost the key to the handcuffs and began to use an electric grinder to cut through them. When the complainant said it was burning him, he was permitted to use the grinder. After the complainant's repeated but futile efforts to obtain money from his mother and another night in the laundry, the applicant drove him to a service station where he was handed over to others who eventually left him near a Brisbane railway station. He sought police and medical assistance.

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5 [2011] QCA 386.

6 *R v Lacey and Lacey* [2010] QDC 344.

[12] The sentencing judge noted the applicant's youth at the time of the offending and that he had made admissions of fact at trial which reduced the number of prosecution witnesses and the length of the trial. He had displayed, however, absolutely no remorse and this was a relevant consideration under s 9(4)(i) *Penalties and Sentences Act*. His Honour noted the applicant's ambition to obtain a degree and his efforts at rehabilitation whilst in prison. The prosecution sought a sentence of eight to 10 years cumulative imprisonment. Defence counsel sought an effective global sentence of seven years imprisonment concurrent with the manslaughter sentence. Whilst noting the applicant's encouraging efforts towards rehabilitation, his Honour was not satisfied of his remorse. He was equally culpable with his brother for the victim's callous and cruel treatment. The offence of torture involved the intentional infliction of severe pain or suffering. The victim's appalling treatment and terrifying ordeal has had a significant negative impact on his life. These offences were unconnected with the manslaughter offence. His Honour stated that to impose a concurrent sentence would be to impose no actual punishment for these offences. The sentence should be cumulative and the convictions declared convictions of serious violent offences. As a result, he would not be eligible for parole until he had served 80 per cent of that sentence. Taking into account the totality principle, a cumulative sentence of six years imprisonment on the torture offence was appropriate with a declaration that the conviction was of a serious violent offence.

[13] This Court dismissed the applicant's application for leave to appeal against the severity of that sentence. The Court noted that, although the lengthy sentence could impede rehabilitation, deterrence was a particular consideration as the offending was characterised by a propensity to use firearms against unarmed victims.[7]

[14] It follows that at the time of the present sentencing the applicant was serving an effective sentence of 18 years imprisonment with parole eligibility after 80 per cent of the actual 16 year sentence, that is, after 12.8 years but because of pre-sentence custody he will have served 14.8 years in prison before parole eligibility.

The circumstances of the present offending

[15] The offending in the first indictment occurred as follows. Police suspected that the applicant and his brother were trafficking in dangerous drugs. They executed search warrants on properties linked to them and located items including a gun silencer, mobile phones and SIM cards, financial documents, a "tick" list, MDMA tablets, cannabis and a pill press containing traces of MDMA. The applicant and Jade Lacey jointly trafficked in the dangerous drugs MDMA, cocaine and cannabis from 15 January 2006 to 28 May 2007, using the services of others as couriers and in sales and distribution (count 1).

[16] On 16 January 2006, police executed a search warrant at a Broadbeach apartment where Jade Lacey was present. They found cannabis, scissors with plant residue, a vial of sustanon, two boxes containing vials of stanazol steroids, and $16,600 cash. Police also executed a warrant at the Lacey family home. They found a pistol silencer, ammunition and a diary with names and amounts of money which had been used as a "tick" list in Jade Lacey's handwriting (count 2). On 4 May 2006, police executed a warrant at a Gold Coast apartment. Jade Lacey was present and admitted owning 161 tablets containing almost 20 grams of methandienone and

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7 [2011] QCA 386, [183].

eight boxes of testosterone. On 5 June 2006, a phone number associated with Jade Lacey was used to send a text message to eight recipients offering drugs for sale (count 3). On 12 August 2006, police executed another search warrant at the Lacey family home. They found two yellow tablets in a drawer in the applicant's bedroom. The tablets were later analysed as containing methandienone (count 4).

[17] One of those to whom the Laceys supplied drugs was David King. King claimed that some drugs which he had hidden in a drain were washed away in heavy rain and he would need time to repay his drug debt from his work as a tiler. A few months later, King was seen handing the applicant a thick pile of money notes in partial repayment. He was subsequently seen handing over his motorcycle as security. He later died. The applicant used Jeremy Clune to transport drugs. Clune received between $300 and $700 for each of 15 to 20 transactions. On most occasions, he received between $20,000 and $30,000 cash which he passed on to the applicant. On one occasion he delivered five pounds of cannabis and gave the applicant's girlfriend $16,500 cash. He was later sentenced to a five year suspended sentence for trafficking in MDMA and supplying cannabis. Scott Kitchell delivered ecstasy, mainly received from Jade Lacey but once from the applicant, in return for his own ecstasy tablets and between $1,500 and $4,000 cash. He was not prosecuted. Ashley Bowley sold drugs for the applicant; in all, about 4,200 pills, including ice and ecstasy on "tick" with an estimated value of not more than $44,800. He was sentenced for offences including trafficking in MDMA and LSD to five years imprisonment suspended after two years. Timothy D'Arcy purchased ecstasy and MDMA from the Laceys. He was sentenced for offences including trafficking in MDMA to three years imprisonment with parole fixed after nine months. Jade Lacey supplied Christopher Donges with cocaine and ecstasy on "tick". Donges has not been prosecuted.

[18] The applicant had a pill press which he wanted modified. In early 2007 he left it in an engineering workshop. Following the publicity about the killing, Peter Fleming, who worked at the workshop, buried the press at a friend's property. When recovered by police, the press contained traces of MDMA and ketamine.

[19] On 9 May 2007, police executed a search warrant at the Lacey's residence and located small amounts of cocaine (count 5) and methandienone (count 6). On 11 May 2007, police intercepted the Laceys' girlfriends at a Broadbeach shopping centre. One had almost $5,000, scales, a knife and a "tick" list relating to drug debts. Handwriting analysis showed that the "tick" list was in the applicant's handwriting.

[20] On 28 May 2007, after the brothers had been charged with killing Mr Palmer and were incarcerated, Jade Lacey spoke with his father, Kenneth Lacey, about collecting drug debts for the applicant. On 20 July 2007, police conducted another search of a unit associated with the Laceys and found documentation relating to drug debts and correspondence from the brothers in prison to their girlfriends in which they used code to advise about collecting drug debts.

[21] The armed robbery offences contained in the second indictment occurred as follows. On 23 April 2007, the applicant and Jade Lacey contacted Jarrod Pritchard (also known as Norton) to obtain cannabis. Jade Lacey offered Pritchard cocaine, saying he could source "ounces". Pritchard said he was not interested in cocaine but would make enquiries about cannabis. At about 3.30 pm, the Laceys, together with

Giuseppe Furnari and an unknown male, arrived at Pritchard's unit where Pritchard was present with his cousin, Kahu Whitehouse. Meanwhile, the complainant in the torture offence was locked in the Lacey brothers' laundry. Peter Bandiera arrived carrying a large box containing 32 pounds of compressed cannabis.

[22] Twenty pounds was given to the Laceys who then produced handguns. They threatened the three complainants saying, "no fucking around" and demanded property from them. Furnari asked, "who is the mad cunt?" Jade Lacey pointed to Whitehouse. Furnari kicked or punched Whitehouse in the ribs and then punched Pritchard in the ribs. Furnari asked if there was anything else of value in the house. Pritchard said that there was money in his girlfriend's bag in the laundry. Furnari grabbed Pritchard by the hair and dragged him into the laundry and then the bedroom in search of the bag. Furnari took money from the bag and the remaining 12 pounds of cannabis. Whitehouse gave the robbers his phone and wallet and Bandiera gave them his phone. One assailant turned up the television while Furnari stole items from around the unit. One assailant (not the applicant) said, "[w]e should shoot them in the head." Jade Lacey replied, "just shoot him in the legs." A gun shot struck the floor between Whitehouse and Bandiera, grazing Bandiera's calf and making it bleed slightly. The assailants left with the stolen property.

The submissions at sentence

[23] The prosecutor at sentence accepted that, as the present offences occurred during the same time frame as the offences for which the applicant had already been sentenced, considerations of totality were highly relevant to the sentencing process. The present offences, however, were quite separate from those for which he had already been sentenced. The trafficking was serious, extending over more than 12 months and involving significant sums of money and drugs. The trafficking offence, if standing alone, warranted a term of eight years imprisonment with an early recommendation for parole to reflect mitigating matters: *R v Prendergast*.[8] The robbery offences were also serious. The applicant produced a firearm in the course of the offending and was an active participant. Were he being sentenced for those offences alone, a head sentence in the range of four to five years would be appropriate: *R v Nolan*;[9] *R v Leu; R v Togia*[10] and *R v Hess*.[11] The robbery convictions warranted declarations that they were convictions of serious violent offences: *R v McDougall and Collas*.[12]

[24] Balancing the overall criminality of the offending with totality considerations, the prosecution submitted that to impose a sentence which did not extend the applicant's current parole eligibility date would send a message to the community that the use of loaded firearms in the course of large scale drug trafficking will not be punished by a further period of imprisonment. A sentence of two or three years imprisonment should be imposed on each count of robbery, concurrent with each other but cumulative on the term of imprisonment already being served. Declarations that the convictions were convictions of serious violent offences should be made. A sentence of five years imprisonment for the trafficking and all related offences, concurrent with all other terms of imprisonment, would then be appropriate.

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8 [2012] QCA 164.
9 [2009] QCA 129.
10 [2008] QCA 201.
11 [2003] QCA 553.
12 [2007] 2 Qd R 87.

[25] Counsel for the applicant emphasised that the applicant had been in custody since 11 May 2007; his present full time release date was 11 May 2025; and his earliest possible release date was 2 March 2022. In those circumstances, his sentences for the present offending should be concurrent so as not to affect those dates. The applicant pleaded guilty, saving the community time, resources and money. A trial would have taken about three weeks. The complainants in the robbery counts have been saved the trauma of giving evidence. The applicant was but 20 years old when he committed the offences, had very limited prior offending and had a sound work history. He had realistic prospects of rehabilitation. In support of that contention, counsel tendered certificates of courses the applicant had completed whilst in custody; a letter from the applicant; a letter from his mother; a reference from his present girlfriend (who was not involved in the offending); an encouraging statement of academic record from the Life Coaching Institute; and a positive course performance review for a Bachelor of Business.

[26] The applicant in his letter to the judge admitted his past wrongs, expressed remorse for them and set out his efforts to turn his life around in recent years. He emphasised that his decision to plead guilty to the present offences was an indication of his growing maturity and willingness to accept responsibility. He was expelled from high school and paid no attention to his education at the time of his offending, but now he had completed a tertiary preparation program in mathematics and english. His work with the Life Coaching Institute had significantly improved his life and he hoped to become a fully qualified life coach and to help other prisoners. He obtained a distinction in Mathematics B and was accepted into a Bachelor of Business where he was progressing well. He planned to complete his degree by July 2015. He was also engaged in painting, pottery and Italian language. He no longer used drugs and since his placement at the Woodford Correctional Centre in June 2009 has had no breaches of discipline. He understood that he needed to repay his debt to society and claimed that he would leave prison as someone determined to live the rest of his life positively and fully rehabilitated.

[27] The applicant's mother informed the court that whilst in prison the applicant had undergone surgery as a result of a personal health issue which had permanent after-effects. This and the lengthy sentences he had received left him emotional, unsettled and depressed. After the imposition of his six year cumulative sentence, she became gravely concerned for his mental health. But he gradually became more positive and involved himself in constructive education projects. He had made great strides towards rehabilitation. His guilty plea to the present counts showed his remorse for his past actions. He was now a model prisoner doing his very best to rehabilitate so that he has some chance to be part of and to contribute to society on his release.

[28] Defence counsel submitted that to extend his actual and potential release dates even further would have a crushing effect on this young, model prisoner who at last had insight into his past offending and was showing real remorse. Sentences of eight years imprisonment for the trafficking offence and three to four years imprisonment for the robbery offences were appropriate. Those two terms of imprisonment could be made cumulative on each other but should be made concurrent with his present sentence.

The judge's sentencing remarks

[29] After reviewing the applicant's antecedents, criminal history and the circumstances of the present offending, her Honour correctly observed that the contest between the

parties was whether a cumulative sentence should be imposed. Her Honour referred to the competing contentions including the prosecutor's submission that it would be unduly lenient for no further actual custodial period to be served. The judge noted the importance of the totality principle when imposing a cumulative sentence. Delay was caused not by the prosecution but through the applicant's conduct and that was "an aspect to be taken into account". The trafficking involved sch 1 and 2 drugs over a substantial period of time in significant quantities. The robbery offences involved firearms, at least one of which was loaded. These circumstances made deterrence an important sentencing consideration.

[30] Taking into account the mitigating matters including the guilty plea, her Honour considered that the approach urged by the prosecution was correct. Ordinarily, a sentence in the vicinity of eight years imprisonment would be appropriate for the trafficking and related drug offences and about four years for the robbery offences. Her Honour moderated those sentences in accordance with the totality principle to five years concurrent for the drug offences and two years for the robbery offences, with the robbery sentences to be served concurrently with each other but cumulatively upon the sentences he was already serving and with a declaration that they were convictions of serious violent offences. Her Honour recognised that the sentence was onerous but considered it was warranted by the gravity of the offending. Her Honour did not consider the resulting extension to the applicant's time in prison to be crushing or as offending the totality principle.

Jade Lacey's sentence

[31] Jade Lacey pleaded guilty to these same offences on 19 March 2013 and received the same sentence as the applicant. The sentencing judge noted, however, that the totality consideration in the present applicant's case produced a level of moderation in his sentence which was not so warranted in Jade Lacey's sentence.[13] It seems that subsequently in May 2013 Jade Lacey pleaded guilty in the Magistrates Court to further charges, some of which involved violence, and received a concurrent sentence.[14] By contrast, the present applicant has no further charges outstanding.

Conclusion

[32] The sentencing of this applicant was a particularly difficult exercise. He has been in custody since May 2007. His 10 year sentence for manslaughter was in truth a 12 year sentence because of his two years of pre-sentence custody which could not be declared. He served those two years in full without any discount for early parole eligibility. He then received a six year cumulative sentence for torture, with a declaration that the conviction was of a serious violent offence. As I noted earlier, this means that when sentenced for the present offences he was serving in truth an 18 year sentence with parole eligibility after 14.8 years. Following the imposition of his sentence the subject of this application, he is serving in truth a 20 year sentence with parole eligibility after 16.4 years. The issue for this Court's consideration is whether the two year sentence for the robbery offences made

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13 *R v Jade Michael Lacey*, unreported, Supreme Court of Queensland, Ind No 308 of 2011, de Jersey CJ, 19 March 2013, 6.

14 B Baskin, "Jade Lacey sentenced to no extra jail time over four charges including supplying a gun used in wounding", Courier Mail, 29 May 2013, available at <www.couriermail.com.au/queensland/jade-lacey-sentenced-to-no-extra-jail-time-over-four-charges-including-supplying-gun-used-in-wounding/story-e6freoof-1226653043855>.

cumulative on his previous sentence (18 years with parole eligibility after 14.8 years) with a declaration that the convictions are of serious violent offences makes his total present sentence (20 years imprisonment with parole eligibility after 16.4 years) crushing and unjust. In the end, the difference in approach concerns whether he should serve a further period of imprisonment of between 1.6 to two years.

[33] However that issue is resolved, he will be serving a heavy sentence, especially for offences committed as a young man aged between 19 and 20 with a very limited criminal history. As counsel for the respondent conceded, had the applicant pleaded guilty in May 2009 to Mr Palmer's murder (rather than the manslaughter of which the jury convicted him) and to all his other offending, he would have been eligible for parole after 15 years. That analogy, however, is of no particular assistance in resolving the issue before this Court.

[34] It is beyond doubt that the full gamut of the applicant's spate of criminality over the 18 month period between January 2006 and May 2007 warranted a severe penalty. He trafficked on a large scale with others in the dangerous drugs MDMA, cocaine and cannabis. He sustained his evil trade by using a loaded pistol to threaten and intimidate others, by committing armed robberies and by cruelly torturing a young man. He was convicted of manslaughter of another young man as a result of his gravely reckless use of a loaded pistol. Issues of general and personal deterrence and community protection were critical in determining the appropriate sentence. But the question remains whether a 20 year sentence with parole eligibility no earlier than 16.4 years is a crushing and manifestly excessive penalty, offensive to the totality principle.

[35] The leading case concerning the totality principle is *Mill v The Queen*[15] where Wilson, Deane, Dawson, Toohey and Gaudron JJ explained:

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp. 56-57, as follows (omitting references):
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> 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong["]; "when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".' "[16]

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15 (1988) 166 CLR 59.

16 Above, 62-63.

[36] Their Honours also cited with approval comments of the New South Wales Court of Criminal Appeal[17] in *Todd*:[18]

> "... where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach – passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner."[19]

[37] Those principles are well accepted in Queensland: see *R v Kiripatea*;[20] *R v Dinaro*[21] and *R v Barry*.[22] The present case is in that unusual category of cases where an offender is being sentenced for stale crimes and has been in custody for many years for related offending. It follows from the authorities referred to above that the correct approach to sentencing in this case was to look at the totality of the applicant's offending and determine whether a term of imprisonment beyond 18 years with no parole eligibility for almost 15 years would result in a manifestly excessive sentence. As *Mill*, *Todd* and the many cases following them recognise, giving proper effect to the totality principle may sometimes result in a sentence which, were it standing alone, would be unduly lenient. Indeed, the principle may require the imposition of a concurrent sentence, even though that has the effect that the applicant will not be additionally punished for serious violent criminal conduct.

[38] I am uncertain why her Honour emphasised that the delay in sentencing was caused by the applicant rather than the prosecution and that this should be taken into account. It was true that the applicant exercised his right to trial in respect of earlier charges and that he was convicted of many of those charges. But when sentenced for the present offending he had already been sentenced for the earlier convictions on the basis that he had neither the mitigating benefit of a timely guilty plea nor remorse. It was also true that his present guilty pleas were not timely although they remained a significant mitigating feature. What is clear, however, is that the applicant's conduct of his earlier legal proceedings did nothing to dilute the critical relevance of the totality principle to the determination of his most recent sentence.

[39] Had the applicant been sentenced at the same time for all his offending between January 2006 and May 2007, although cumulative sentences could have been imposed on various counts, it would have been appropriate (although not mandatory) to impose concurrent sentences on all offences other than the

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17 Street CJ, Moffitt P and Nagel CJ at CL.
18 [1982] 2 NSWLR 517.
19 (1988) 166 CLR 59, 64.
20 [1991] 2 Qd R 686, 702.
21 [1997] QCA 358, 9.
22 [2011] QCA 119, [14]-[16].

manslaughter. That is because the offences other than the manslaughter were part of a single enterprise, namely, the applicant's violent drug trafficking business. Another sound reason for sentencing judges to avoid multiple cumulative sentences is because they can have an unintended crushing effect.

[40] The 2010 sentencing judge who imposed the six year cumulative sentence on the torture offence and declared the conviction to be of a serious violent offence understandably emphasised the applicant's lack of remorse after a lengthy trial. By contrast, when sentenced for the present offences, the applicant's plea of guilty and the material filed on his behalf suggested that he was at last remorseful, with insight into the unacceptability of his previous criminal behaviour. He had saved the community the cost of two trials involving several weeks' court time. He stood to be sentenced on the basis that he was a young man when he offended with very little prior offending. The material tendered at sentence demonstrated that he had made commendable efforts to rehabilitate in recent years and appeared to have promising prospects when ultimately released from prison. Even when sentencing for horrific offences of intentional violence, courts recognise that youth, the absence of prior convictions and promising rehabilitative prospects are significant mitigating factors, despite the 1997 amendments to the *Penalties and Sentences Act*: see *R v Lovell*;[23] *R v Bird and Schipper*;[24] and s 9(4), especially s 9(4)(h) *Penalties and Sentences Act*.

[41] After careful deliberation, I am persuaded that in view of the mitigating features and despite the serious nature of the present offending, the two year cumulative sentences for the robbery offences with declarations make the applicant's resulting total sentence (20 years imprisonment with no parole eligibility before 16.4 years) manifestly excessive and crushing. I consider the primary judge erred in imposing a cumulative sentence on the robbery counts.

[42] All of the applicant's offending was committed between January 2006 and his arrest in May 2007. An effective sentence reflecting the totality of his 18 month violent, drug-motivated rampage of criminality, including his manslaughter of Mr Palmer, is 18 years imprisonment with no parole eligibility before 14.8 years. This is appropriately condign punishment to deter him and others and to reflect the other relevant sentencing principles: community protection, retribution and denunciation. If and when he is paroled, I anticipate that the authorities will closely monitor his performance in the community so that any lapses into illicit drug use or violent behaviour will swiftly result in his return to prison. That said, his rehabilitative efforts in prison so far suggest he has real prospects of becoming a useful community member, albeit one who must carry the dreadful life-long burden of having killed a friend with a loaded gun at a time in his life when he was a despicable and violent drug trafficker and stand-over merchant.

[43] In the unlikely event that this case is sought to be used as a sentencing precedent for drug trafficking or robbery, I add that, had the applicant been sentenced for the trafficking and drug offences alone, I would have imposed a sentence of eight years imprisonment with parole eligibility after about three years to reflect the mitigating factors. Had he been sentenced for the robbery offences alone, I would have imposed a sentence of five years imprisonment with parole eligibility after three years to reflect the mitigating features. As I propose to now order that the robbery

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23 [1999] 2 Qd R 79, 83.

24 [2000] QCA 94, [33].

sentences be served concurrently, their length has no practical impact on the period of imprisonment to be served. Even a technical increase in sentence, however, may be problematic: see *Neal v The Queen* (1982) 149 CLR 305. For that reason, I will leave the robbery sentences at two years imprisonment.

[44] I would grant the application for leave to appeal, allow the appeal, set aside that part of the primary judge's order that the robbery sentences be served cumulative upon the current period of imprisonment, and instead order that they be served concurrent with the current period of imprisonment. As I have explained, this will have the effect that for the totality of his dreadful criminal conduct over 18 months when he was 19 and 20, he is serving an effective sentence of 18 years imprisonment with no parole eligibility for 14.8 years.

ORDERS:

1. Application for leave to appeal against sentence granted.

2. Appeal allowed.

3. Sentence in indictment 221 of 2012 (three counts of armed robbery in company with personal violence) be varied:

    (a) by deleting "Order that the date the offender is eligible for parole be fixed at 7 Oct 2023" and substituting "Order that the date the offender is eligible for parole be fixed at 2 March 2022".

    (b) by deleting "Each sentence concurrent on each other but cumulative on current period of imprisonment" and instead ordering "Each sentence be concurrent on each other and on all other periods of imprisonment".

[45] **MARGARET WILSON J:** I have had the benefit of reading the President's reasons for judgment in which her Honour has carefully and thoroughly recounted the applicant's antecedents, the circumstances of the present offending, and the submissions at sentence.

[46] At the time he was sentenced for the present offending, the applicant was already serving a very long period of imprisonment for various offences committed during the period of the trafficking – manslaughter, and four "District Court offences", namely torture, assault occasioning bodily harm whilst armed and in company, threatening violence, and deprivation of liberty. His convictions of three of those District Court offences were accompanied by serious violent offence declarations. As the President has explained, he was serving an effective sentence of 18 years imprisonment and, having regard to pre-sentence custody, he would not be eligible for parole until 14.8 years after his incarceration began.

[47] The present offending involved carrying on the business of unlawfully trafficking in three dangerous drugs – cocaine, which was a schedule 1 drug under the *Drugs Misuse Regulation* 1987, and MDMA and cannabis, which were then both schedule 2 drugs. The sentencing judge rightly described the offence as a serious one, given the extended period over which it occurred and the significant sums of money and considerable quantities of drugs involved. As her Honour observed, the trafficking involved the production of MDMA pills by the use of a pill press, as well as the sale

and distribution of drugs, and was one in which violence was used to achieve business outcomes.

[48] The three offences of armed robbery with personal violence all occurred on the same occasion and were directly linked to the trafficking and the District Court offences for which the applicant had previously been sentenced. The applicant, his brother Jade Lacey, Giuseppe Furnari and another male went to a unit occupied by the complainants to obtain 20 pounds of cannabis. The applicant and his brother both brandished firearms, threatening the complainants and demanding property. Furnari physically assaulted the complainants. One of the assailants fired a shot which grazed the calf of one of the complainants, causing it to bleed mildly. This conduct occurred while the complainant in the District Court offences was detained in the laundry at the unit. The four intruders then left the unit, taking the cannabis and other property.

[49] The sentencing judge considered that ordinarily a sentence in the vicinity of eight years would be appropriate for the trafficking, and about four years would be appropriate for the armed robberies in company with personal violence. Her Honour identified the issue as whether or not the sentence for the present offending should be cumulative on the period of imprisonment already being served. Her Honour succinctly and accurately set out the totality principle when she said –

> "As I mentioned, the critical matter and difficult matter in the sentencing process here concerns whether or not a cumulative sentence should be imposed. An important sentencing consideration when imposing a cumulative sentence is the totality principle. It requires the Court when sentencing to review the aggregative sentence and consider whether the aggregate is just and appropriate. In particular, the Court must not lose sight of the overall effect of the sentence and must guard against a sentence that is so unduly onerous as to be overwhelming and crushing.
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> Having regard to the serious nature of the offending before the Court, which concerns trafficking in both Schedule 1 and 2 drugs over a substantial period of time and in significant quantities, and offending involving firearms, at least one of which was loaded, considerations of deterrence are also significant matters for the Court. I bear in mind the matters of mitigation, including the pleas and other factors which have been raised by your counsel, and the need to keep firmly in mind the totality principle."

[50] The sentence which her Honour ultimately imposed was fashioned along the lines submitted by the prosecutor.

[51] I have not detected any error in her Honour's application of the totality principle. She took account of the plea of guilty, which she described as a significant matter, and the other matters on which defence counsel relied in mitigation – the applicant's young age, both at sentence and at the time of the offending, his limited criminal history at the time of the offences, his prospects of rehabilitation, including significant steps taken up to sentence, and references tendered on his behalf.

[52] By the time of sentence, nearly five years had passed since the trafficking had ceased. During that time, the applicant had been sentenced for manslaughter after

a 14 day trial, which was followed by appellate proceedings in the Court of Appeal[25] and the High Court.[26] He had been sentenced for the District Court offences after an 18 day trial, followed by appellate proceedings in the Court of Appeal.[27]

[53] The sentencing judge recorded the prosecutor's submission that the delay had been caused by the applicant's own conduct and not any conduct by the prosecution and was therefore an aspect to be taken into account. However, it is not clear that her Honour accepted that submission.

[54] The applicant pleaded guilty to the present offences. The material tendered on his behalf was consistent with his having acquired some insight into his past conduct and being remorseful for it. He had taken commendable steps towards rehabilitation. The rehabilitation of an offender, especially one as young as the applicant, is to be encouraged, as it is in the community's interest, as well as the offender's, that he be a useful, law-abiding member of the community upon his ultimate release.

[55] The task which always confronts a sentencing judge is to impose the penalty which is "just and appropriate" in all the circumstances. It always necessitates fashioning a sentence provisionally, and then reviewing all its component parts (which often comprise the imposition of a term of imprisonment, a decision on how pre-sentence custody is to be treated, and fixing a non-parole period by the imposition of a serious violent offence declaration or otherwise) to ensure the overall sentence is just and appropriate in all the circumstances.

[56] Where the imposition of a cumulative term of imprisonment is a live issue, the sentencing judge has to be especially careful to ensure that the sentence ultimately imposed is not disproportionate to the offender's overall criminality and that it does not stifle prospects of rehabilitation, which is one of the purposes of sentencing.[28]

[57] In *R v Clements*[29] Macrossan CJ and de Jersey J (with whom Pincus JA agreed) said –

> "It is true that a broad discretion applies when a judge is giving consideration to a decision whether to impose consecutive or concurrent terms. Of course, if no special direction is given then the separate sentences which he pronounces will be concurrent: previously s 20 of the *Criminal Code* (Qld) and now ss 155 and 156 of the *Penalties and Sentences Act* 1992 (Qld). While the discretion as to the imposition of cumulative terms is broad, there are certain approaches which have gained acceptance. In *Campbell and Brennan* [1981] Qd R 516 at 524 it was said that it is important that the court should look for some clear reason why sentences should be served cumulatively in a particular case before so ordering and also should determine whether the resulting effective sentence is out of proportion to the combined seriousness of the offences (the 'totality'

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25 *R v Lacey* (2009) 197 A Crim R 399.
26 *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573.
27 *R v Lacey & Lacey* [2011] QCA 386.
28 *Penalties and Sentences Act* 1992 (Qld) s 9(1).
29 (1993) 68 A Crim R 167 at 172 – 173.

> principle). It also appears to be accepted that concurrent terms will usually be called for in the case of a series of related offences committed over a short time span. In other situations the court may be conscious of a clear and compelling need to visit an offence with a separate additional penalty. However, in many instances the judicial discretion may be at large and less restricted by particular principle. Still, a need for caution will always attend the matter to which attention was drawn in *Campbell and Brennan*, viz that an unjust excessiveness may be produced if care is not taken to assess the overall effect of the imposition of cumulative penalties."

[58] The offending conduct in the present case was very serious. The trafficking was more than mere background to the other serious offending for which the applicant had already been sentenced. The armed robbery offences, which occurred during the same incident as the District Court offences, involved the brandishing of firearms and the discharge of a loaded firearm.

[59] In the assessment of whether there was good reason to impose a cumulative sentence, the seriousness of the applicant's present offending outweighed his youth and the potential impact of further punishment on his rehabilitation prospects. But his youth and the effect on his rehabilitation prospects remained relevant to the determination of by how much the existing period of imprisonment should be extended.

[60] The sentencing judge moderated the sentences she considered would have been appropriate had the totality principle not loomed so large. The sentences her Honour imposed, which increased his period of imprisonment by two years and increased the period before which he will be eligible for parole by about 19 months, were just and appropriate in all the circumstances.

[61] I would refuse the application for leave to appeal against sentence.

[62] **DOUGLAS J:** I have had the advantage of reading the reasons of the President and of Wilson J. For the reasons expressed by Wilson J, with which I agree, I have not been able to detect any error by the learned sentencing judge in her consideration or application of the totality principle. It was rational to adopt the approach that the seriousness of the offending should attract further punishment but to moderate the further time to be served to give effect to the totality principle. That the applicant will not be eligible for parole for a significant period reflects the overall seriousness of his conduct rather than an error in the sentencing process. I too would refuse the application for leave to appeal against the sentence.