SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAR* [2014] QCA 312
PARTIES:	**R** **v** **RAR** (applicant)
FILE NOS:	CA No 41 of 2014 SC No 977 of 2011 SC No 52 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2014
JUDGES:	Holmes and Morrison JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal.** **2. Allow the appeal.** **3. Vary the orders made in the Trial Division by;** **(a) on Count 3 of the indictment, substituting for the sentence and order made in the Trial Division:** **(i) a sentence of imprisonment for six years; and** **(ii) an order that the date the applicant is eligible for parole be fixed at 2 years which is 22 October 2015.** **4. Otherwise confirm the orders made in the Trial Division.** **5. The confidential reasons for judgment of Morrison JA handed down to the parties today and marked "A" be not further published, a copy thereof be placed in a sealed envelope together with the transcript of that part of the proceedings which was not conducted in open court, and that envelope be opened only by order of the Court or upon an application under s 188(2) of the *Penalties and Sentences Act* 1992 (Qld).**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two charges of trafficking in a dangerous drug; two charges of possessing dangerous drugs; and also pleaded guilty to 10 summary offences – where the applicant seeks leave to appeal in respect to Count 3, which is the trafficking count in methylamphetamine – where for that Count the applicant was sentenced to imprisonment for seven years – where co-operation was not initially offered by the applicant – where after arraignment the applicant co-operated and made a number of statements assisting police – where the applicant provided self incriminating information allowing the prosecution to add a level of detail to the circumstances of the offences – where after being granted bail the applicant failed to appear and remained at large for just over five months – where the applicant was eventually located however, he provided false details to avoid identification – where the applicant contends that the sentence for Count 3 was manifestly excessive and that inadequate weight was given to his co-operation with the authorities

Penalties and Sentences Act 1992 (Qld), s 13A

R v Guthrie (2002) 135 A Crim R 292; [2002] QCA 509, considered
R v Harbas [2013] QCA 159, considered
R v Johnson [2007] QCA 433, considered
R v Kalaja [2012] QCA 329, considered
R v Markovski [2009] QCA 299, considered
R v Miller [2013] QCA 346, considered
R v Mustafa [2006] QCA 231, considered
R v Nabhan; *R v Kostopoulos* [2007] QCA 266, considered
R v Prendergast [2012] QCA 164, considered
R v Raciti [2004] QCA 359, considered
R v Rodd; Ex parte Attorney-General of Queensland [2008] QCA 341, considered

COUNSEL: S R Lewis with D R Gates for the applicant
B J Power for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the orders he proposes.

[2] **MORRISON JA:** This is an application for leave to appeal against a sentence imposed on 14 February 2014. The applicant pleaded guilty to two charges of trafficking in a dangerous drug, and two charges of possessing dangerous drugs. In addition the applicant pleaded guilty to 10 summary offences.

[3] The offences on indictment, and the sentences imposed in respect of them, were as follows:

Count 1 - trafficking in a dangerous drug – schedule 2 (between 24 June 2009 and 1 September 2009); four years imprisonment;

Count 3 - trafficking in a dangerous drug – schedule 1 (between 24 June 2009 and 13 April 2011); seven years imprisonment (with a parole eligibility date fixed at three years);

Count 7 - possessing dangerous drugs – schedule 1: exceeding schedule 3 but not less than schedule 4 (12 April 2011); three years imprisonment; and

Count 8 - possessing dangerous drugs – schedule 2 (12 April 2011); two years imprisonment.

In imposing those sentences the sentencing judge took into account the declared period of pre-sentence custody, namely 116 days.

[4] The summary offences and the sentences imposed in respect of them can be conveniently set out as follows:

Charge 1 - unauthorised and prohibited explosives – convicted and not further punished;

Charges 2 and 8 - authority required to possess explosives – two months imprisonment;

Charges 3 and 7 - unlawful possession of weapons – two months imprisonment;

Charge 4 - possessing or acquiring restricted items under the *Weapons Act* 1990 (Qld) – convicted but not further punished;

Charge 5 - possessing dangerous drugs – two months imprisonment;

Charge 6 - possession of utensils under the *Drugs Misuse Act* 1986 (Qld) – two months imprisonment;

Charge 9 - contravene a direction or requirement of a police officer – convicted and not further punished; and

Charge 10 - breach of a bail undertaking – convicted and not further punished.[1]

[5] The application for leave to appeal is in respect of Count 3, for which the applicant was sentenced to imprisonment for seven years, with a parole eligibility date set at 22 October 2016.[2]

Circumstances of the offending

[6] In June 2010 police commenced an investigation into the distribution and production of dangerous drugs in the Sunshine Coast area. In the course of that investigation the police investigated and then charged a person named Saffet Harbas ("**Harbas**"). The applicant was a supplier of dangerous drugs to Harbas and others.

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1 All of the periods of two months imprisonment were ordered to be served concurrently with the terms imposed under the indictment offences.

2 Effectively three years after the commencement of the period of imprisonment, taking into account the 116 days declared as time served.

[7] Count 1 concerned trafficking in cannabis. The applicant and Harbas were introduced by a common associate (Clarke) in around October 2008. Clarke introduced the applicant to Harbas as someone from whom Harbas could purchase drugs. Harbas began purchasing cannabis from the applicant in June 2009.

[8] The first sale of cannabis by the applicant to Harbas was at the home of Clarke. The applicant sold one pound of cannabis in the first sale, and five pounds of cannabis each fortnight for the next two months. After that time Harbas was unable to obtain cannabis from the applicant. The cannabis was always packed in cryovac bags, each containing one pound. The purchase price was $3,700 to $3,800 per pound bag. The purchases were arranged by Harbas contacting the applicant and asking if they could catch up. The applicant would then tell Harbas at which of two particular locations Harbas was to meet him. Harbas would pay the applicant for the cannabis at the time of supply.

[9] In total about 20 pounds of cannabis (in excess of nine kilograms) was supplied by the applicant to Harbas over a two month period for which Harbas paid between $74,000 and $76,000. In addition, over that period Harbas observed occasions of the applicant placing two to three pounds of cannabis at a time into other cars attending at the same location where he was meeting the applicant.

[10] Count 3 concerned trafficking in methylamphetamine. When speaking to Harbas about the sale of cannabis, the applicant also indicated that he was in a position to sell him methylamphetamine. On one occasion when a person called Bush was moving house, the applicant supplied methylamphetamine to those who were there to help Bush move, in order to keep them awake. Harbas was present for that.

[11] Harbas delivered quantities of methylamphetamine to the applicant's residence on two occasions in 2010. Those deliveries were made on behalf of Bush. On each occasion Harbas delivered four packets of four ounces each, or 16 ounces (approximately 453 grams) on each occasion. Those deliveries were handed direct to the applicant. The applicant sourced methylamphetamine from Bush on a regular basis. He would pay $2,500 to $3,000 per ounce. Towards the end of the period of offending he would pay $3,000 per ounce or $10,000 for four ounces. The methylamphetamine would be delivered in a small container for amounts of one ounce, or a larger container for amounts of two to four ounces. The applicant was able to purchase those drugs on credit or "tick".

[12] The applicant told Harbas that he sourced methylamphetamine from an associate who would do one "cook" a year, the entire production of which would go to the applicant to sell. The applicant also sourced "ice" from other suppliers, including a person by the name of Marshall. He purchased drugs from Marshall on a weekly basis over the period of trafficking in quantities varying from grams to "eight balls" and on occasion an ounce. Those drugs were provided, at least in part, on credit.

[13] Between 31 July 2010 and 13 October 2010 three telephones belonging to the applicant were the subject of a telephone intercept warrant. Only a limited amount of drug activity was identified through the telephone intercepts. However, the applicant used mobile telephones that were not subscribed in his name, would often change his telephone numbers, and (on the advice of Bush) would text in preference to speaking on the phone. The content of the phone calls suggested that the applicant was hesitant to discuss details over the phone.

[14] On 25 October 2010 the applicant supplied a quantity of methylamphetamine to Harbas. That supply was part of a controlled operation by police and Harbas made an audio recording of the transaction. The transaction concerned a request by Harbas for half an ounce of methylamphetamine. The applicant indicated he only had 13 grams of smokeable methylamphetamine (not half an ounce) and that he would sell it at $350 a gram. Harbas persuaded the applicant to supply seven grams. Subsequent analysis of the substance supplied showed that the applicant had supplied 1.174 grams of methylamphetamine, within 5.784 grams of substance, being a purity of 20.3 per cent.

[15] On three subsequent occasions[3] Harbas attended at the applicant's home and asked to purchase drugs. On each of those occasions the applicant did not supply drugs, but made statements in the course of those conversations confirmatory of ongoing involvement in the sale of methylamphetamine.

[16] On 12 April 2011 police conducted a search of the applicant's home. They located, in the pockets of the applicant, clip seal plastic bags containing methylamphetamine to a total amount of 0.766 grams of pure methylamphetamine. They also located a plastic tub containing 20.895 grams of a substance which proved to contain 14.501 grams of methylamphetamine, at 69.4 per cent purity. In addition there was slightly in excess of $700 in cash. The total quantity located on the applicant himself was 15.267 grams of pure methylamphetamine. That quantity was the subject of Count 7 on the indictment. Elsewhere in the house police located three mobile phones and a number of SIM cards, quantities of cutting agents including Epsom salts and glucose, an operational CCTV system, and various weapons and ammunition.[4]

[17] The police also conducted a search at an address where the applicant's partner resided. They located $8,000 in cash, as well as electronic scales and mobile telephones. Forensic examination of the money located in the search revealed a DNA profile that matched that of the applicant. The search also revealed pipes able to be used for the consumption of methylamphetamine. At the conclusion of that search the applicant was arrested. He declined to take part in an interview with police.

[18] A subsequent police investigation included a financial analysis of the applicant's bank accounts. An audit of the applicant's expenditure between 30 June 2009 and 13 April 2011 revealed an amount of $76,084 as having been received from unknown sources. The total of sourced income for the applicant for the same period was $206,977.

[19] During the search of the applicant's residence police also located 277.6 grams of cannabis. This was the subject of Count 8. The police also located vacuum bags, grinders, a heat sealer, smoking pipes and a cone piece.

[20] The summary charges concerned items located in a search of the applicant's home and a vehicle. That search occurred on 9 September 2012, and therefore about 17 months after the applicant was charged with Count 3. The search revealed partially fragmented pills,[5] 18 glass pipes and two sets of scales, a small calibre break-action rifle,[6] and quantities of ammunition of various calibres.

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3 3 November, 5 November and 13 December 2010.

4 The weapons and ammunition were the subject of some of the summary charges.

5 Which the applicant said he believed to be ecstasy.

6 For which the applicant did not have a licence.

[21] The applicant was granted bail in relation to those summary offences, and on 13 May 2013 failed to appear in the Magistrates Court. He remained at large until 23 October 2013, just over five months after he failed to appear. When located the applicant provided (several times) a false name, date of birth and address, and refused to state his full and correct name. After some hours he was identified and he responded, saying, "It was worth a shot, wasn't it?" The failure to state his correct name and details were the subject of Charge 9 of the summary offences.

The applicant's circumstances and antecedents

[22] The applicant was born on 21 December 1980, and was aged between 28 and 30 during the period of offending, and 33 at sentence. At the time of sentence he was in a relationship and had a child of about three years of age. He also had two other children from previous relationships, aged 11 and 15.

[23] The applicant came from what was described as a "fractured family". His mother was an alcoholic who frequently went out after work, leaving the applicant to look after his three siblings. His upbringing did not involve a father figure, as all siblings came from different fathers. The applicant had cared for his mother from time to time.

[24] The applicant commenced using cannabis while he was a school. He went to school in two different places, leaving part way through grade 10. He then obtained employment as a trolley pusher at a shopping centre. His use of cannabis continued, and he also commenced to use methylamphetamine and ecstasy. In time he became a heavy user of cannabis. His use of drugs resulted in him being charged with various offences. In December 2000 he pleaded guilty to a charge of possessing cannabis, the quantity of which was almost a kilogram. Then, in 2004 he was convicted of trafficking in cannabis, as well as a variety of other offences.

[25] It was suggested to the sentencing judge that the applicant did not use drugs during his period of imprisonment following the 2004 sentence, and until 2008. In 2008 one of the applicant's siblings died in a motor vehicle accident. As a result the applicant returned to drugs "in a big way". It was described in these terms:

> "In terms of his drug use, it was significant. [He is] not able to estimate to what extent, but at the time that he was first arrested, he was in a very bad way …"[7]

[26] The applicant's criminal history is significant. His drug related offences commenced when he was just over 16 years old, in 1997. Those were offences of possession of dangerous drugs, as well as the possession of things used in connection with drugs. Those same offences were also committed when he was 20, in 2000, at which time he received a six month prison sentence, wholly suspended. Over the next three years the applicant was charged with weapons offences, breach of bail, receiving stolen property and more drug offences. In February 2004, on the trafficking charge, he was sentenced to three years imprisonment, suspended after serving a period of nine months, for a period of four years. At the same time he was convicted of a breach of a suspended sentence imposed for possession of drugs, and sentenced to imprisonment for six months (to be served concurrently).

[27] In 2004 he was also convicted of a number of offences involving dangerous operation of a vehicle, obstructing police, possession of property suspected of being

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7 AB 59-60.

the proceeds of drug offences, and weapons offences. Since that time, and up to 2012, he had also been convicted of possessing dangerous drugs.

Sentencing remarks in 2000 and 2004

[28] When the applicant was sentenced on 8 December 2000, having pleaded guilty to a charge of possessing a dangerous drug in excess of 500 grams, he was given a sentence of imprisonment of six months, wholly suspended for an operational period of 18 months. The sentencing remarks by Chesterman J[8] in relation to the 2000 sentence were placed before the learned sentencing judge in the current sentence. Those comments[9] reveal that the applicant was in possession of almost a kilogram of cannabis, a set of scales and had $1,700 in cash in his wallet. Chesterman J described the case as "a serious one". The applicant was not required to serve a term in prison because of his youth and the prospects of future rehabilitation. However, Chesterman J said that "the Court has to mark the seriousness of your conduct on this occasion by something other than a community-based order."[10]

[29] On 2 February 2004 the applicant was sentenced by Holmes J[11] for a number of offences, but most importantly for trafficking in cannabis. Those sentencing remarks[12] were also placed before the sentencing judge in the 2014 sentence. It appears that a number of police searches found substantial quantities of cannabis, cash, a list of names and money owed, and a large quantity of stolen property. The applicant made admissions to supplying marijuana. The applicant had attempted to flee police and in doing so drove in a dangerous manner, crossing unbroken lines, travelling on the wrong side of a traffic island, and travelling at speed, all at a time when the applicant's then de facto wife and six month old child were in the car. Subsequently the applicant was found to be in possession of an amount of cocaine and two MDMA tablets.

[30] The offences of possession of methylamphetamine, cocaine and MDMA all related to the applicant's own addiction. The trafficking offence related to the cannabis. The sentencing remarks noted the plea of guilty and the fact that the applicant had "given some significant co-operation to the police".[13] The sentencing remarks also noted the fact that the applicant was in a stable relationship and had been employed.

[31] The sentence on that occasion was three years imprisonment suspended after serving nine months. The reason for that was the applicant's co-operation, youth (he was only aged 23) and signs of rehabilitation in the interim.

The applicant's self incrimination

[32] Subsequent to the applicant's pleading guilty on 13 March 2013, he made a number of statements to the police which included further details of his own involvement with methylamphetamine. As a result the prosecutor was able to add a level of detail to the circumstances of the offences, which could not have otherwise been done. The extra information related to the level of drug purchasers, and was identified in paragraphs 11 and 13 of the statement of facts.[14] Those paragraphs state:

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8 As his Honour then was.
9 AB 79-80.
10 AB 79.
11 As her Honour then was.
12 AB 82-85.
13 AB 84.
14 AB 89.

> "11. The accused sourced methylamphetamine from [X] on a regular basis. He would pay $2500 to $3000 per ounce. Toward the end of the period of offending he would pay $3000 per ounce or $10 000 for four ounces. The methylamphetamine would be delivered in a container - a small container contained one ounce, or a larger container for amounts of two to four ounces. The accused was able to purchase the drugs on tick.
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> …
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> 13. The accused also sourced methylamphetamine or 'ice' from other suppliers, including a person by the name of [Y]. He purchased drugs from [Y] on a weekly basis over the period of the trafficking, in quantities ranging from grams to eight balls, and on occasion an ounce. The drugs were provided at least in part on 'tick' or credit."[15]

[33] In addition the applicant informed police that he had used a number of phones which were not subscribed to him, and that he would change his telephone number. However, as the prosecutor told the sentencing judge, that much might have been able to be inferred in any event. However, the prosecutor did make this submission to the sentencing judge:

> "But it is accepted that the Crown is able to allege a more substantial trafficking in [methylamphetamine] against the accused by virtue of the statements against interest as outlined in paragraphs 11 and 13 in the statement of facts and as concerns that additional aspect of his offending on count 3, the accused is entitled to be treated more leniently than he otherwise would be, consistent with the principle in [*E v The Queen*]."[16]

[34] The prosecutor accepted that the applicant's co-operation in making those additional statements against interest should attract some discount.[17]

The approach of the sentencing judge

[35] The learned sentencing judge summarised the circumstances of the offending under the indictable offences, but particularly count 3 which concerned trafficking in methylamphetamine.[18] Her Honour recognised two competing considerations, namely that the applicant was "an addict at the time", but that "it is not disputed that [he was] also involved for commercial profit in that there was a commercial aspect to [his] trafficking."[19] Further, her Honour noted that the Crown could not particularise the number of customers or sales, or the quantities in which the applicant sold. However, her Honour accepted:

> "that the facts do not suggest that you were a person involved in street dealer-level transactions. You used multiple mobile phones, and you indicated to Harbas when supplying him with cannabis that

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15 AB 89.

16 AB 29. The transcript reference to *E v The Queen* is an apparent error and should probably refer to *AB v The Queen* (1999) 198 CLR 111.

17 AB 31.

18 AB 69.

19 AB 69.

> you were also able to supply him with methylamphetamine, which suggests that you sought to further your business."[20]

[36] In relation to Count 1, the charge of trafficking in cannabis, her Honour reviewed the details of that offence, and in particular the fact that about 20 pounds of cannabis were sold in a two month period, for between $74,000 and $76,000.[21]

[37] Referring to both trafficking charges, the sentencing judge made this observation:

> "But in respect of the trafficking charges, it is pertinent to note that a financial analysis of your bank records identified some $76,000 from unexplained sources. And I accept that that does not reflect the full extent of your profit, given the overall level of trafficking, and that the transactions involved payment in cash. I also note as pertinent that there was a degree of professionalism and sophistication in your drug activities in that the cannabis was delivered in one pound cryovac bags. You generally arranged to meet buyers at two locations away from your home. You had CCTV security systems operating in your home. And as mentioned, you used several mobile phones. They were not in your name, and you changed your telephone number often. You were careful as to what was discussed on the telephone."[22]

[38] The sentencing judge also reviewed the applicant's antecedents, including his difficult upbringing and involvement in drugs at a very early age. Her Honour clearly proceeded on the basis that the applicant was a user of drugs, mentioning cocaine and methylamphetamine. Her Honour found that the applicant was "a drug dependent person relevantly at the time of the commission of the offences charged."[23]

[39] The applicant's criminal history was also taken into account, including the fact that the applicant continued to reoffend while on bail, referring to the two offences of possession of dangerous drugs, and unlawful possession of weapons and ammunition.[24]

[40] In relation to the applicant's co-operation the learned sentencing judge said:

> "The prosecution case against you included evidence of the witness Harbas, intercepted telephone evidence, money, drugs and other items found during searches, and a financial analysis of your bank account. I accept that the Crown case was a strong case. You did not make any statements against interest initially, that is, during the search of your premises, and you didn't take part in a formal interview with police. However, after your arraignment on 13 March 2013, you made a number of statements to police, including providing further details of your involvement in count 3, and it is accepted that as a result much more extensive trafficking was able to be alleged which the authorities had not previously known about. In that respect, you are entitled to be treated more leniently than you would otherwise be. See *AB v The Queen* (1999) 198 CLR 111. Also relevant is your cooperation which assisted police to close an illicit clandestine laboratory."[25]

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20 AB 69-70.
21 AB 70.
22 AB 70.
23 AB 72.
24 AB 71.
25 AB 71.

[41] Her Honour's reference to the statements made to the police, and the "much more extensive trafficking", is evidently a reference to paragraphs 11 and 13 of the agreed statement of facts, being those paragraphs which were able to be included only as a result of the applicant supplying information to the police. Not mentioned in those paragraphs, but taken into account by her Honour in the passage quoted above, was the applicant's co-operation which led to the closure of an illicit clandestine laboratory.

[42] In concluding that seven years imprisonment was an appropriate head sentence in respect of Count 3, the sentencing judge took into account the fact that the maximum penalty in respect of that offence was 25 years imprisonment.[26]

The competing contentions

[43] The two contentions advanced in respect of Count 3 are that the sentence was manifestly excessive in all the circumstances, and that inadequate weight was given to the applicant's co-operation in the administration of justice.[27] In reference to Count 3 the applicant submitted that:

> "The quantities and frequency of purchases made by the Applicant suggested he made sales of at least a medium size, likely to persons involved in commercial drug transactions".[28]

[44] The applicant referred to a series of comparable cases including *R v Harbas*[29], *R v Rodd; ex parte A-G of Queensland*[30], and *R v Miller*.[31] Particular reliance was placed on *Harbas*, where the offender pleaded guilty to trafficking in MDMA and methylamphetamine over a 12 month period, and trafficking in cannabis over about two years. He received a five year sentence, suspended after one year with an operational period of five years, when the original sentence was revised by the Court of Appeal. The applicant's contention was that Harbas was above the applicant in the hierarchy of offending, but with less serious criminal history and less of an addiction. Further, it was contended that Harbas trafficked solely for profit.[32]

[45] The applicant contended that the authorities revealed that an initial head sentence of nine years taking into account the guilty plea was appropriate. That should then have been reduced further to take into account the information supplied by the applicant, which enabled a case to be made of trafficking to a greater extent than would otherwise be the case, and the applicant's assistance in relation to the drug laboratory.

[46] For the respondent, reliance was placed upon *R v Kalaja*[33], *R v Mustafa*[34], and *Harbas*. It was noted that the applicant and Harbas were each principals in their own separate trafficking operations, with Harbas supplying the applicant with methylamphetamine, and the applicant supplying Harbas with cannabis. The respondent contended that unlike the applicant, Harbas had co-operated with police immediately and almost all of the evidence against him came from his own confessions. That, it was said, is not the case with the applicant, who declined to be interviewed and then absconded

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26 AB 72.
27 Applicant's outline, paragraph 2.
28 Applicant's submissions, paragraph 16.
29 *R v Harbas* [2013] QCA 159. (***Harbas***)
30 *R v Rodd; Ex parte Attorney-General of Queensland* [2008] QCA 341. (***Rodd***)
31 *R v Miller* [2013] QCA 346. (***Miller***)
32 Applicant's outline, paragraphs 21(f).
33 *R v Kalaja* [2012] QCA 329. (***Kalaja***)
34 *R v Mustafa* [2006] QCA 231 (***Mustafa***)

whilst on bail, remaining at large for five months. It was only after the applicant was remanded in custody, after being unlawfully at large, that he decided to co-operate. It was accepted that that co-operation was "significant and valuable",[35] but was belated, as it was given two and a half years after the applicant was first arrested and declined to be interviewed.

[47] The respondent contended that the sentence imposed, but for the applicant's s 13A[36] co-operation, was an effective sentence of 10 years imprisonment, which would have required that 80 per cent of the sentence be served. It was therefore contended that the applicant had received a 62.5 per cent reduction in the time he was required to serve before being eligible for parole, and a 30 per cent reduction in the head sentence.[37]

Discussion

[48] It is convenient to commence with a review of the authorities put forward as comparable cases.

[49] *Harbas* was a case of trafficking in dangerous drugs by someone who was involved in the supply of drugs with the applicant. Harbas was 28 to 29 years old when he committed the offences, and about 32 years old at the time of sentence. He had previous convictions for drug related offences, including for possession of cannabis,[38] producing dangerous drugs (cannabis),[39] and then possession of cannabis whilst on bail for the last mentioned offence. In addition, when he was 26 years old, Harbas committed four offences of entering premises and committing indictable offences. For that he was sentenced to 12 months imprisonment, with immediate release on parole.

[50] Harbas was addicted to cocaine and cannabis. The trafficking in LSD, MDMA and methylamphetamine was, however, not to feed his cocaine habit, but rather purely for profit. His obtaining cannabis through his trafficking business was in order to feed his addiction to that drug.

[51] The offences committed by Harbas came to light when police intercepted his vehicle and found about 2,000 MDMA tablets, containing 161 grams of that drug. Police had telephone intercepts which had earlier revealed that he was selling LSD along with other drugs. He was arrested and charged with the offence of possession of a dangerous drug in a quantity exceeding two grams. At that point in time the only other offence for which he might then have been prosecuted was the supply of LSD. Police knew that sales of LSD had occurred in quantities of between 100 to 200 tablets, but they did not know the frequency or period of time over which that occurred. Police also did not know that he was in the business of trafficking in methylamphetamine and cannabis.

[52] Soon after his arrest Harbas made admissions to the police of trafficking in amphetamine, MDMA, LSD and cannabis. He consented to a search of his house and property, where cannabis plants, methylamphetamine, cannabis and firearms were found. Harbas "frankly admitted to being a large scale distributor of dangerous drugs".[40] He admitted to trafficking in amphetamines and MDMA during a 12 month

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35 Respondent's submissions, paragraph 4.
36 A reference to s 13A of the *Penalties and Sentences Act* 1992 (Qld) (**the Act**).
37 Respondent's outline, paragraphs 6-7.
38 When he was 17, 27 and 28 years old.
39 When he was 29 years old.
40 *Harbas* at [5].

period, during which time he would purchase between one ounce and one pound of the drug, reselling it in one ounce lots to his own customers. He had six regular customers for amphetamines on the Sunshine Coast, but also sold amphetamines in the Northern Territory and North Queensland. He also acted as a debt collector for his supplier.

[53] Harbas obtained large quantities of MDMA tablets which he on sold. He also told police that he had been involved in the distribution and production of cannabis over almost two years. He had a regular client base of 10 to 12 people, selling between half a pound and a full pound every week. Harbas engaged in trafficking for purely financial reasons. At the peak of his drug trafficking he sold between $10,000 and $20,000 worth of drugs (amphetamines, MDMA, LSD and cannabis) per week, however, he never made more than $2,000 profit per week.

[54] Harbas was initially sentenced to six years imprisonment, with parole eligibility fixed two years after the date of sentence. On appeal, for reasons which were largely reflected in confidential reasons,[41] that sentence was varied to imprisonment for five years, suspended after 12 months, for an operational period of five years.

[55] Clearly the scale of trafficking in *Harbas* was greater than that of the applicant and spanned four different drugs rather than the applicant's two. Unlike the applicant, his co-operation with police was immediate and comprehensive.[42] Furthermore, unlike the applicant, who was servicing his addiction, Harbas was trafficking LSD, MDMA and methylamphetamine solely for profit; while he was addicted to cocaine and to cannabis, he obtained cannabis to feed that addiction through his trafficking. A further point of distinction between the applicant and *Harbas* is the extent of rehabilitation. It was described in *Harbas* as being "unusually impressive", in that since his arrest he had stopped taking illicit drugs of any kind, obtained employment (having candidly told his employer about his criminal history), completed a TAFE literary course and formed a permanent relationship with a partner who was expecting their first child. Whilst the applicant has claims to rehabilitation, they are not of the scale in *Harbas*.

[56] The applicant also relied on *R v Markovski*.[43] That involved a sentence of 15 years imposed for trafficking in cocaine and ecstasy, over a period of seven to eight months. Markovski was 47 to 48 years old at the time of the offences, and about 52 years old when sentenced. He had no relevant criminal history. On appeal Keane JA[44] reviewed the circumstances of the offending. It suffices to say that Markovski was "highly placed in the drug distribution network" and "dealt in wholesale amounts".[45] The sentencing judge had described Markovski as engaged in "trafficking at a very high level … in wholesale amounts of cocaine and ecstasy … for the obvious motive of making profits … over eight months."[46] The description used by the sentencing judge was that there were "very large amounts of cash" and "very large quantities of illegal drugs".[47] Markovski was considered to have engaged in trafficking

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41 Confidential because of Harbas' co-operation and undertaking under s 13A of the Act.

42 It extended to volunteering details that the police could not possibly have known otherwise, and revealing drugs hidden in a PVC pipe buried in the ground, and details of where drug equipment had previously been buried.

43 *R v Markovski* [2009] QCA 299 ***(Markovski)***

44 As he was at the time, with whom Fraser JA and Jones J agreed.

45 *Markovski* at [45].

46 *Markovski* at [46].

47 *Markovsk*i at [46].

which produced substantial profits, and he was "close to the top of his distribution network".[48] Keane JA said:

> "Decisions of this Court show that in cases of substantial trafficking at a relatively high level in the drug distribution network, a sentence between 11 and 13 years imprisonment is the appropriate range where the offender is entitled to the benefit of a plea of guilty."[49]

[57] In the result the court concluded that a 15 year sentence, of which 12 years would be spent in actual custody because the offender was declared to be a serious violent offender, was not manifestly excessive.

[58] The circumstances of *Markovski* are well removed from the applicant's case. There the offender was at a high level in the drug distribution network whereas the applicant is probably best described as a medium level trafficker. Indeed, so much was recognised by each of the applicant and the respondent, as each contended for a sentence, after a plea of guilty, of something less than that indicated in *Markovski*.

[59] The applicant also relied on *Miller*. In that case the offender, aged 24 to 27 at the time of his offending and 28 at the time of sentence, pleaded guilty to one count of trafficking in dangerous drugs. The drugs were methylamphetamine, MDMA, GHB and cocaine. The trafficking was to multiple customers over an eight month period. The offender had a longstanding drug addiction which had commenced in his teens, and continued throughout the period of his offending. He also had an extensive criminal history, which included being sentenced to a period of actual imprisonment.[50] Miller's involvement was for profit and the business turned over tens of thousands of dollars.

[60] The sentencing judge found that Miller was a significant dealer in drugs during the period, selling quantities consistent with a wholesale level. He also had a "shocking" criminal history, including committing offences after the offences that are the subject of the sentence related to the indictment.[51] Whilst his plea of guilty could not be considered an early one, the sentencing judge acknowledged that the plea reduced the sentence that would otherwise be imposed.

[61] The contest in *Miller* was not about the head sentence of eight years imprisonment. That was conceded to be within range.[52] The contention was that a parole eligibility date set at one-third of the head sentence was excessive when a co-offender had received a shorter parole eligibility period. However, Miller's concession that a sentence of eight years was within range was described by the court as being a concession:

> "properly made having regard to the basis upon which the applicant entered pleas of guilty to very serious drug offences. The applicant was involved in selling numerous types of drugs to many clients over an eight month period, for commercial gain. He was not a youthful first time offender. He had a lengthy criminal history."[53]

[62] *Miller* is of some limited assistance. Whilst he was trafficking a greater number of drugs, the period was shorter than that of the applicant, and *Miller* was approached as a street level trafficker[54] unlike the applicant.

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48 *Markovski* at [50].
49 *Markovski* at [53]; internal citations omitted.
50 *Miller* at [6]. Though it does not seem to have included a conviction for trafficking.
51 *Miller* at [11].
52 *Miller* at [18].
53 *Miller* at [18].
54 *Miller* at [9].

[63] The applicant also referred to *Rodd*. That was an Attorney-General's appeal from a sentence imposed for trafficking in methylamphetamine for a period of just over two years. The sentence was nine years imprisonment with parole eligibility fixed after six years. The offender was aged between 29 and 30 years at the time of the offences, and 34 when sentenced. He had a prior criminal history of no particular relevance. He was one of two principals in the trafficking business and responsible for the manufacture and sale of large amounts of methylamphetamine. The business generated large amounts of cash, described by one witness as being so much "that instead of counting it, he would weigh it."[55]

[64] Rodd also used violence and threats of violence to control and manipulate those assisting him in the trafficking. He also threatened and intimidated witnesses who were summoned to appear in relation to his offences. Further, a considerable part of his offending took place whilst on bail.[56] Whilst a plea of guilty had been entered, it was not a timely plea, coming after a lengthy committal involving cross-examination of many witnesses, and two pre-trial enquiries.

[65] Rodd was seriously addicted to amphetamines throughout the period of trafficking, but commercial gain from the trafficking was of equal significance to feeding his habit. The trafficking operation was described by the sentencing judge as "a large scale wholesale business".[57] On appeal de Jersey CJ[58] described the offences in this way:

> "This was a particularly serious instance of trafficking in a schedule one drug. It persisted over more than two years; the offending was relentless, moving from one address to another; it continued while the respondent was on bail; the amounts produced were large; the respondent both produced and sold on a wholesale basis; the respondent was commercial motivated, funding an extravagant lifestyle and regularly in possession of very large amounts of cash; and the trafficking was attended by gangster-type actual and threatened violence."[59]

[66] The court considered a sentence of nine years imprisonment was manifestly inadequate. It was held that the relevant range from which the trial judge should have proceeded "began at 10 years imprisonment,"[60] and that a sentence of 12 or 13 years imprisonment would have been appropriate had the sentencing been proceeding afresh at first instance.[61] However, because the Attorney-General only sought no more than a 10 year term of imprisonment, the court declined to exceed that term.[62]

[67] *Rodd* is of some assistance. There can be no doubt that the circumstances of the offending were more serious than that in the applicant's case, involving a longer period of time, conduct as a principal, trafficking at a wholesale level, production as well as sale, and the trafficking was accompanied by violence. Unlike the applicant's case, *Rodd* had an inconsequential criminal history, but did not enter an early plea of guilty. Further, there is no suggestion of any form of co-operation as in the applicant's case. The most that can be derived from *Rodd* is that a more serious

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55 *Rodd* at [16].
56 *Rodd* at [8].
57 *Rodd* at [13].
58 With whom White AJA (as she then was) and McMeekin J agreed.
59 *Rodd* at [15].
60 *Rodd* at [24].
61 *Rodd* at [25] and [28].
62 *Rodd* at [25].

level of trafficking than that in the applicant's case would attract a head sentence (after a plea of guilty) of 12 to 13 years imprisonment, and at a minimum 10 years.

[68] The respondent referred to *Kalaja*. That involved a 14 year sentence, on a plea of guilty, for a series of offences, the most serious being four counts of trafficking in dangerous drugs. The drugs were cannabis, methylamphetamine, 3, 4 methylenedioxymethamphetamine (ecstasy) and gamma-hydroxybutyric acid (GHB). The traffic in cannabis occurred over a period of almost three years, with the trafficking of the remaining drugs occurring at different times within that period. The trafficking occurred notwithstanding that Kalaja had been charged with offences, and been granted bail.

[69] Kalaja was 32 years of age when sentenced, and aged between 27 and 29 at the time of the offences. He had a criminal history which included a period of imprisonment (wholly suspended) for drug offences. He entered an early plea. He was a user of drugs, and exhibited symptoms consistent with poly-substance dependence disorder. However, the sentencing judge did not accept that his use of drugs amounted to that of an addict engaging in criminal conduct simply to feed his addiction. The level of offending involved multiple drugs, in large quantities, for substantial monetary sums.[63] There was at least $600,000 in unsourced income. Much of the offending conduct occurred while Kalaja was on bail for other offences.

[70] In *Kalaja* the Court reviewed *Markovski* and *Rodd* as part of the comparable cases. In addition, it referred to ***R v Nabhan***; ***R v Kostopoulos***,[64] which involved a 15 year sentence imposed on an offender who controlled and financed a sophisticated and well resourced trafficking operation "at the highest level of drug trafficking".[65] Kostopoulos trafficked in cocaine, speed, ecstasy, and GHB over a five month period, and the sales were conservatively estimated as amounting to $811,000. He was motivated by profit, had a relevant criminal history, and used threats and violence in the operation of his business. The court in ***Kostopoulos***[66] did not disturb the 15 year sentence, observing that a sentence in the order of 16 years would have been within the proper range "for trafficking on the grand scale in question".[67]

[71] Ultimately, the Court did not disturb the sentence of 14 years imprisonment in *Kalaja*. There are similarities between *Kalaja* and the applicant's case. Kalaja was of a similar age, and with a relevant criminal history which included drug offences and a sentence for a period of imprisonment for a drug offence. He was a drug user, though the trafficking was not to serve his addiction. Further, he entered an early plea. He also had demonstrated attempts at rehabilitation. On the other hand, the trafficking was in a greater number of drugs, over a longer period, and involving a far greater sum in unsourced income. His involvement was described by the sentencing judge as "high level, lengthy and brazen, illegal conduct".[68] Further, whilst there had been "significant steps … taken towards rehabilitation",[69] there was nothing in that case of the sort of co-operation at issue in the case of the applicant.

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63 *Kalaja* at [16].
64 *R v Nabhan*; *R v Kostopoulos* [2007] QCA 266. ***(Kostopoulos)***
65 *Kalaja* at [13].
66 Keane JA (as his Honour was then), Williams and Jerrard JJA agreeing.
67 *Kalaja* at [14].
68 *Kalaja* at [5].
69 *Kalaja* at [17].

[72] The respondent also referred to *Mustafa*. That involved a sentence of 12 years imposed for trafficking in heroin, cannabis and cocaine over a period of 18 months. Mustafa was a heroin addict who commenced selling heroin to support his own addiction. During the period of trafficking he sold to a customer base of about 30 people, making 10 to 15 sales a day (at the time of his apprehension) and selling about $4,500 worth of heroin per day. His business was efficiently organised and well developed, and he acted as a middle man between his supplier and his own customers.

[73] Mustafa provided assistance to the police in relation to breaking the code which was used to disguise the transactions, and strengthening the case against his supplier and his supplier's wife. The sentencing judge accepted that the applicant's assistance to the police was significant, but described the business as "trafficking in drugs [on] a very, very grand scale".[70] The trafficking in cocaine commenced with a small amount, but Mustafa arranged to take delivery of a five kilogram amount of relatively high purity cocaine, for resupply at a wholesale level. The transaction was not completed because his supplier was apprehended. Searches of Mustafa's house and his mother's house revealed a large sum of cash in excess of $38,000 and he had, even though he had no employment for many years, over $20,000 in bank accounts. He had further purchased equipment for significant sums of money.

[74] Mustafa's criminal history commenced with drug offences (possession of drugs) in 1990, other offences for receiving and false pretences in 1994, and further offences relating to drugs and dishonesty in 1996. He was between 33 and 36 years old when the offences occurred, and 37 years old at sentence. He had an unfortunate childhood, with a violently abusive father, which contributed to his descent into heroin addiction.

[75] Once apprehended, Mustafa made extensive admissions in relation to the extent of his drug trafficking and in particular, confessed to trafficking for a period of 12 months of which the police were not aware. He also assisted in relation to the further investigation of the drug network of which he was involved, giving details of suppliers and codes.[71]

[76] The sentencing judge adopted a notional head sentence of 16 years, which was then moderated by 25 per cent to recognise the plea of guilty and other circumstances of mitigation. That then resulted in a sentence of 12 years. As to that, Keane JA[72] had this to say:

> "It must be said immediately that the notional head sentence of 16 years fixed upon by the learned sentencing Judge was well within the range appropriate to the serious offending in which the applicant had been engaged. The applicant was a mature adult. There was an element of commercial motivation as well as the need to feed his own dependence in his offending.
>
> The offence of trafficking in dangerous drugs inevitably attracts condign punishment informed by the need for strong, personal and general deterrence as well as retribution for the harm caused to individuals and the community as a whole by the trade in which the applicant was engaged."[73]

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70 *Mustafa* at p 5.
71 *Mustafa* at p 6.
72 Williams and Holmes JJA concurring.
73 *Mustafa* at p 9.

[77] The contention in *Mustafa* was that a discount greater than 25 per cent should have been applied because of his co-operation with the administration of justice, extending beyond the plea of guilty to assisting the police with their investigations, and his confession to an extended period of trafficking.[74] However, it was observed that he had not given evidence against his supplier, and had not undertaken to do so. Further, there was no objective evidence that he was at real risk of harm while in prison as a result of identifying his supplier and the supplier's wife to the police.

[78] The respondent contended that the notional head sentence of 16 years was not significantly influenced by the greater length of time during which Mustafa had admitted he had been in business. Whilst the confession established an important aspect of the Crown case, even if the evidence had established that the business of trafficking had gone on for only six months, it was contended that the notional head sentence of 16 years would have been justified. Keane JA found some support for that proposition in *R v Do*.[75] As summarised by Keane JA *Do* concerned:

> "…a 22 year old [who] trafficked in heroin for four months and did so to support his own dependence. He had only a minor criminal history and no prior convictions for offences involving drugs. He was entitled to the benefit of an early plea of guilty. That offender had readily admitted his involvement in the trafficking. He was sentenced to 12 years' imprisonment after a notional head sentence of 14 years was adjusted for his plea of guilty."[76]

[79] In the light of *Do*, and two other decisions considered by Keane JA,[77] the sentence of 12 years imprisonment for the offence of trafficking was held not to be excessive.[78]

[80] *Mustafa* involved trafficking on a scale which was apparently greater than that of the applicant. It was for a somewhat shorter period than in the applicant's case, but involved a greater variety of drugs the subject of trafficking. The significant feature was that in *Mustafa* the co-operation was nowhere near the level or significance of that of the applicant. Further, his cooperation was really limited to past co-operation and involved no aspect of future co-operation that might be the subject of s 13A of the Act.

[81] The learned sentencing judge was also referred to *R v Raciti*,[79] *R v Guthrie*,[80] *R v Prendergast*[81] and *R v Johnson*.[82] Those decisions were not separately urged on the application for leave to appeal and therefore can be reviewed in a fairly summary way.

[82] In *Raciti* a sentence of 11 years imprisonment with an automatic serious violent offender declaration was imposed on a plea of guilty to one count of trafficking in MDMA, methylamphetamine and cocaine, over a four month period. The offender was a 39 year old with a lesser criminal history than the applicant. On his arrest he had just engaged in an $117,000 transaction and he continued with a high level of offending while on bail. The sentence was upheld on appeal.

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74 *Mustafa* at p 11.
75 *R v Do* [2000] QCA 135. (***Do***)
76 *Mustafa* at p 13.
77 *R v George* [2001] QCA 135, and *R v Tran* [2006] QCA 174.
78 *Mustafa* at p 13.
79 *R v Raciti* [2004] QCA 359. (***Raciti***)
80 *R v Guthrie* [2002] QCA 509. (***Guthrie***)
81 *R v Prendergast* [2012] QCA 164. (***Prendergast***)
82 *R v Johnson* [2007] QCA 433. (***Johnson***)

[83] *Guthrie* concerned a sentence of nine years imprisonment, with a discretionary serious violent offender declaration, for trafficking in heroin and cannabis over a five month period. The sentence was upheld on appeal. His conduct, on the whole, involved more significant transactions than in the case of the applicant, and he had a criminal history of no particular significance.

[84] *Prendergast* concerned a drug user (though not an addict on the level of the applicant) who was sentenced to eight years imprisonment with parole eligibility after one-third of the sentence was served. That was on a plea of guilty to an offence of trafficking for two years in methylamphetamine and MDMA. The sentence was not disturbed on appeal. The trafficking was of some sophistication, with seven couriers being used to transfer drugs between various cities. Unsourced income was about $111,000, and there was persistent offending, in that the trafficking continued for 20 months after the offender was charged, and for some months after a trial that miscarried. That offender had no particular criminal history.

[85] *Johnson* was a case where the offender was sentenced to nine years imprisonment for trafficking in methylamphetamine, but reduced to eight years on appeal. The offender was a street level dealer, and the offending was at the lower level of criminality. Quite rightly the learned sentencing judge found *Johnson* not to be particularly useful as a comparative.

[86] Of more significance is the learned sentencing judge's review of the comparable cases in terms of what they suggested as the appropriate range for a sentence taking into account a plea of guilty, but before discounts for other matters. The net result can be summarised in this way:

(a) *Guthrie* (2002): 13 years; involved more significant transactions than the applicant's case, but the offender had no relevant criminal history;

(b) *Raciti* (2004): 10-12 years; this involved trafficking in a greater variety of drugs than the applicant, and a higher level of offending while on bail;

(c) *Rodd* (2008): 12-13 years; the criminality was accepted as being more serious than in the applicant's case, the offender was higher up the hierarchy and also responsible for manufacturing as well as selling large amounts of drugs. He also involved threats and violence as part of his business;

(d) *Markovski* (2009): 11-13 years, for substantial trafficking at a relatively high level. *Markovski* was accepted as involving offending at a higher level, and more serious than in the applicant's case;

(e) *Harbas* (2013): 11-12 years; the level of trafficking was more serious than that of the applicant and involved a greater variety of drugs. In relation to dealing in methylamphetamine, Harbas was further up the drug distribution than the applicant. His criminal history was not as significant as the applicant, and he had not been previously sentenced to imprisonment for trafficking, as the applicant had.

[87] Looking at the more recent authorities, namely *Rodd*, *Markovski* and *Harbas*, and bearing in mind that the level of the offender in each of those cases was at a higher level than the applicant, and the level of offending was more serious, I am of the view that 10 to 12 years imprisonment is the appropriate level for the applicant's trafficking, after a plea of guilty. In some senses he could be described as engaging

in trafficking "at a relatively high level in the drug distribution network".[83] Even though *Markovski* involved a trafficker "close to the top of his distribution network",[84] the applicant could correctly be described as a medium level trafficker with a "wholesale" aspect to his transactions. However, he was not as high up the network as the offender in *Markovski*. Further, Harbas was, at least in respect of methylamphetamine, higher up the drug distribution line than the applicant.[85] Recognising that and the fact that *Harbas* involved a greater variety of drugs, at a greater level of intensity, the appropriate level of sentence after a plea of guilty should not be quite as high as that in *Harbas*.

[88] In my view, the appropriate start point was 10 to 12 years, on the basis of a plea of guilty.

[89] As this Court's decision in *Harbas* reflects, the next steps in the process of adjusting the sentence required that consideration be given to the level of self-incrimination for offences otherwise unknown to the authorities and the applicant's past cooperation.

[90] Those matters are dealt with in the confidential reasons delivered today.

Disposition and orders

[91] For the reasons above, and for the reasons given in my confidential reasons handed down to the parties today, I am of the respectful view that the sentence was manifestly excessive, and that the appropriate orders are:

1. Grant the application for leave to appeal.
2. Allow the appeal.
3. Vary the orders made in the Trial Division by;
   (a) on Count 3 of the indictment, substituting for the sentence and order made in the Trial Division:
      (i) a sentence of imprisonment for six years; and
      (ii) an order that the date the applicant is eligible for parole be fixed at 2 years which is 22 October 2015.
4. Otherwise confirm the orders made in the Trial Division.
5. The confidential reasons for judgment of Morrison JA handed down to the parties today and marked "A" be not further published, a copy thereof be placed in a sealed envelope together with the transcript of that part of the proceedings which was not conducted in open court, and that envelope be opened only by order of the Court or upon an application under s 188(2) of the *Penalties and Sentences Act* 1992 (Qld).

[92] **ATKINSON J:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

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83 To use the term in *Markovski*, at [53].

84 *Markovski* at [50].

85 Though the applicant supplied Harbas with cannabis.