SUPREME COURT OF QUEENSLAND

CITATION:	*R v Church* [2015] QCA 24
PARTIES:	**R** **v** **CHURCH, Russell John** (applicant)
FILE NO/S:	CA No 207 of 2014 SC No 694 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2015
JUDGES:	Fraser, Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, Fraser and Philippides JJA concurring as to the orders made, Morrison JA dissenting
ORDERS:	**1. Leave to appeal be granted in respect of the sentence imposed on 14 July 2014 on count 1.** **2. The sentence imposed on count 1 be set aside and in lieu thereof impose a concurrent sentence of six years imprisonment.** **3. The applicant's parole eligibility date be fixed at 14 July 2016.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – SPECIFIC ERROR – where the applicant pleaded guilty to one count of trafficking in cannabis and methylamphetamine and other lesser drug offences – where the applicant was sentenced to seven years imprisonment with parole eligibility after two years and six months for the trafficking count – where error as to the nature of the drugs trafficked was demonstrated – where the sentencing discretion was exercised afresh – where the applicant trafficked in significant amounts of cannabis and at a low level in methylamphetamine during a period of over

three months – where the applicant trafficked to feed his drug dependency – where the applicant entered pleas

Kentwell v The Queen (2014) 88 ALJR 947; [2014] HCA 37, followed
R v Brienza [2010] QCA 15, considered
R v Hennig [2010] QCA 244, considered
R v Salter [2010] QCA 284, considered
R v Wallace [2008] QCA 135, considered

COUNSEL: The applicant appeared on his own behalf
B J Power for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.

[2] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Philippides JA. In paragraphs [26]–[52] her Honour deals with the circumstances of the offence, the submissions and sentencing remarks below, and the submissions on appeal. Accepting what is said in those paragraphs permits me to express my reasons in shorter form than would otherwise be the case.

Did the sentence proceed on the basis of a factual error as to the drugs trafficked?

[3] In paragraph [53] of her reasons Philippides JA concludes that the learned sentencing judge fell into error in stating that a third drug was trafficked, when setting out the circumstances of the trafficking for which the applicant was being sentenced. For the reasons which follow I respectfully find myself unable to agree with that conclusion.

[4] The prosecution tendered, by consent, a schedule which was described as "an agreed schedule of facts". It became exhibit 6.[1]

[5] In a section entitled "Background" reference was made to a police operation in respect of suspected trafficking of dangerous drugs. The opening paragraph of that section refers to telecommunications intercepts. The second paragraph then says:

> "An analysis of the intercepted information demonstrated that between 23 February 2012 and 29 May 2012 a total of 467 sessions [being telephone calls and text messages] occurred between the defendant, Russell John Church, and Zouhair Houda. The intercepted information identified communication between the defendant and Zouhair Houda, the content of which was consistent with the

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[1] AB 14-15; the schedule is at AB 55.

> defendant carrying on the business of trafficking in dangerous drugs. The defendant was trafficking in drugs including cannabis, methylamphetamine and MDMA."[2]

[6] Thereafter exhibit 6 makes no reference whatever to MDMA. After the "Background" paragraphs there followed a table setting out the details for each count on the indictment. In respect of each count it recorded the date of offence, the offence itself, and then the facts relevant to that offence. Count 1 recorded the offence as being "Trafficking in Cannabis and Methylamphetamine".[3] That coincides with count 1 on the indictment.[4]

[7] The applicant was first called upon to plead to the indictment, bearing No 694 of 2013, on 9 May 2014. At that time the indictment included only one count of trafficking, namely in cannabis. The matter proceeded by way of a full hand up committal on 28 June 2013, and was committed to the District Court because it did not include the second charge of trafficking in methylamphetamine. That charge was added, and an ex officio indictment was presented in the Supreme Court on 6 December 2013.

[8] In the submissions made to the learned sentencing judge exhibit 6 was referred to. The prosecutor said that:

> "The telephone intercepts show that between the 23rd of February 2012 and the 29th of May 2012 there were a total of 467 sessions, being calls and texts, occurring between Church and Houda and they identified that Church was trafficking in dangerous drugs."[5]

[9] The learned sentencing judge was then told:

> "So the trafficking reveals that he was trafficking in both cannabis and methylamphetamine but his trafficking in cannabis was the main part of his offending and it appears to be at a wholesale level … So it appears that the trafficking in methylamphetamine was more at a street level, while the trafficking in cannabis was in pound lots."[6]

[10] The prosecutor made no reference whatever to MDMA.

[11] No reference to MDMA, much less trafficking in that drug, was made by counsel for the applicant, except in the context of reciting the facts in *Hennig*.[7] In fact, in distinguishing *Hennig* counsel for the applicant referred to the fact that in the applicant's case "there was a hand up committal in respect of cannabis only", and "It was only when he came to the DPP that the [S]chedule 1 drug[8] was added".[9]

[12] In the learned sentencing judge's remarks reference was made to the fact that the original indictment was amended "to include **a** trafficking offence".[10] Then, having referred to the applicant's prior criminal history his Honour said:

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2 AB 55.
3 AB 56.
4 AB 2.
5 AB 15.
6 AB 15.
7 *R v Hennig* [2010] QCA 244.
8 Referring to methylamphetamine.
9 AB 25.
10 AB 28. Emphasis added.

> "The matter has proceeded before me by way of an agreed statement of facts called a "Drug Offences Schedule". What it shows is that in the course of an [sic] a police intercept operation, a total of 467 telephone calls and text messages occurred between you and another person in the nature of communications consistent with you carrying on the business of trafficking in dangerous drugs, including cannabis, methylamphetamine and the drug usually called MDMA."[11]

[13] In the remarks which followed his Honour dealt with trafficking in respect of cannabis and then trafficking in respect of methylamphetamine. Apart from that his Honour did not mention MDMA at all.

[14] Neither the prosecutor nor counsel for the applicant took any point about the learned sentencing judge's reference to exhibit 6.

[15] In my respectful view all that the learned sentencing judge did was to paraphrase part of the "Background" contents of exhibit 6. The only reference to MDMA occurred in that context. Indeed, what the learned sentencing judge said was less emphatic than the wording of exhibit 6. It referred to the intercepted communications being "consistent with the defendant carrying on the business of trafficking in dangerous drugs", but then recorded that the applicant "was trafficking in drugs including cannabis, methylamphetamine and MDMA".[12] As can be seen from the passage above, the learned sentencing judge said that the communications were "consistent with you carrying on the business of trafficking in dangerous drugs, including cannabis, methylamphetamine and the drug usually called MDMA".

[16] However, in my respectful view the features which point to there being no error on the part of the learned sentencing judge by referring to exhibit 6 are these:

(a) the reference to trafficking in MDMA in exhibit 6 was in the section dealing with "Background", whereas the facts for each count were specifically set forth, and none of them referred to MDMA;

(b) the submissions made by each of the prosecutor and counsel for the applicant made no reference to trafficking in MDMA, but only to trafficking in cannabis and methylamphetamine;

(c) when the learned sentencing judge referred to the characterisation of the trafficking offences, he referred only to trafficking in cannabis and methylamphetamine, and made no reference whatever to MDMA; the only reference to MDMA by his Honour was in paraphrasing what the parties had put before him in exhibit 6.

[17] In my respectful view it cannot be concluded that the learned sentencing judge permitted the reference to MDMA in exhibit 6, which was tendered by consent, to influence the sentencing process. He was aware that the original indictment included only the charge of trafficking in cannabis, and that the amendment was to

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11 AB 28.
12 AB 55.

include only one other trafficking offence, namely that in relation to methylamphetamine. He addressed only trafficking in respect of cannabis and methylamphetamine when dealing with the offences with which the applicant was charged. The way in which his Honour referred to exhibit 6 and then the offences demonstrates, in my view, that whilst he recorded the parties' agreed statement that the intercepted communications were "consistent" with trafficking in three drugs, in fact he dealt with the sentence on the basis that the applicant was only charged with, and guilty of, trafficking in two.

[18] There being no error, no occasion arises to re-exercise the sentencing discretion. That leaves the question of whether the sentence imposed can be said to be manifestly excessive.

Is the sentence manifestly excessive?

[19] In approaching this question I bear in mind what was said by this Court in *R v Tout*:[13]

> "As to ground 1, a contention that the sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is "unreasonable or plainly unjust": *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]."

[20] Further, in dealing with comparable cases, one must remember that it can be difficult to translate the result in one case to another, and that in general the level of sentence in one case can only be a rough guide to another.[14]

[21] The comparable cases put forward both below were *R v Salter*,[15] *R v Wallace*,[16] and *R v Hennig*,[17] and in this Court *R v Brienza*[18] was added by the respondent. The essential circumstances of each have been summarised by Philippides JA in paragraphs [36]–[38] and [51] of her reasons. I am content to adopt what her Honour has said in respect of each.

[22] Whilst it might be right to say that *Salter* and *Wallace* were more serious cases than that of the applicant, and that there are reasons to distinguish *Brienza* for the reasons given in paragraph [55] by Philippides JA, that does not establish that the sentence imposed on the applicant was manifestly excessive, bearing in mind what was said in *Tout* and *Hopper*, referred to above. Further, whilst it is true that *Hennig* involved a very short period of trafficking, a wider range of drugs, possession of a greater number of Schedule 1 drugs and greater amounts of cash, and the sentence was imposed after a trial, that also does not establish, in my respectful view, that the sentence imposed on the applicant was manifestly excessive.

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13 *R v Tout* [2012] QCA 296, at [8] per Fraser JA.
14 *R v Hopper* [2011] QCA 296, at [24], per Chesterman JA, with whom Muir JA and M Wilson AJA agreed.
15 *R v Salter* [2010] QCA 284.
16 *R v Wallace* [2008] QCA 135.
17 *R v Hennig* [2010] QCA 244.
18 *R v Brienza* [2010] QCA 15.

[23] The decisions in each of *Salter*, *Wallace*, *Hennig* and *Brienza* were that the sentence imposed was not manifestly excessive. The utility of such a decision, where the "comparable" case involves greater criminality that the case in question, in establishing some sort of precision as to the sentence is doubtful, as was recognized in *Brienza* itself:[19]

> "In each of *R v Brown* and *R v Wallace* the Court declined to interfere with a sentence of seven years imprisonment imposed for offending of greater criminality than might be ascribed to the applicant in this case. To say that the Court in *R v Brown* and *R v Wallace* regarded higher sentences imposed for worse crimes as not manifestly excessive is to say very little, if anything at all, as to whether the sentence imposed on the applicant in this case was manifestly excessive.
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> In *R v Dwyer*, this Court rejected as unsound attempts to extrapolate from decisions of the Court upholding sentences as within the proper range to calculate the proper range of sentence in a case involving a lesser degree of criminality:
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> > 'An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process.'"

[24] In my view the learned sentencing judge was right to take a more general view and conclude that the authorities indicated a head sentence of "around six to seven years", a conclusion which echoed the submission of counsel for the applicant during sentencing.[20] Whilst seven years might be said to be at the upper end of the range, in my view it cannot be said to be manifestly excessive.

[25] I would refuse the application.

[26] **PHILIPPIDES JA:** The applicant was convicted on 9 May 2014 on his pleas to 13 counts, the most serious of which concerned one count of trafficking between 23 February 2012 and 6 June 2012 in the dangerous drugs cannabis and methylamphetamine (count 1). The other counts comprised seven counts of supplying a dangerous drug (counts 2 to 8), one count of possessing a dangerous drug in excess of 500 grams (count 9), one count of possessing a dangerous drug (count 10), one count of possessing property obtained from trafficking in dangerous drugs (count 11), one count of possessing a thing for use in connection with trafficking in a dangerous drug (count 12) and one count of possessing a relevant substance (count 13). The applicant was sentenced on 14 July 2014. In relation to count 1, a sentence of seven years was imposed with a parole eligibility date of 14 January 2017 (being two and a half years from the date of sentence). In relation to each of counts 8 to 11, sentences of six months were imposed. In relation to counts 2 to 7

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19 At [17] and [18], internal footnotes omitted.

20 AB 25.

and 12 to 13, sentences of three months were imposed. All the sentences imposed were ordered to be served concurrently with each other and with the balance of the sentence which the applicant was then serving.

[27] The applicant, who was 32 years of age at the time of the offences and 34 at sentence, seeks leave to appeal against the sentence imposed on count 1 on the basis that it is manifestly excessive.

Circumstances of the offences

[28] The sentence proceeded on the basis of an agreed statement of facts, entitled "Drug Offences Schedule".[21] The offending came to light as a result of a police investigation targeting, inter alia, another person, Zouhair Houda, whose telephone calls with the applicant were intercepted. The agreed facts stated that the telephone intercepts revealed that the applicant sourced and distributed large amounts of cannabis during the relevant period. They showed that the applicant was already established in the supply of cannabis and was considered to be an expert by Houda, who was seeking to establish himself in the market and relying heavily on the applicant to purchase cannabis from him and distribute it for him. The intercepts revealed that the applicant appeared to be near the top of the chain of distribution and that Houda wanted the applicant to be his second in command. The intercepts also revealed that the applicant was trafficking in methylamphetamine. The applicant was using at least four different phones during the period of offending, including phones registered to the names of his partner and young son.

[29] The schedule stated that the extent of the trafficking could not be defined, but a number of discussions provided a sense of the operation. As to the trafficking in cannabis, the intercepts recorded the applicant stating that he was buying and distributing pounds of cannabis a week, which he purchased for about $3,100 a pound. Houda told the applicant's partner that he could beat the price that the applicant was paying per pound. There were subsequent discussions of cannabis purchases at $3,000 a pound. The applicant made requests for various quantities of cannabis, including numerous requests for up to five pounds. The applicant told Houda "he will be clientele forever" as long as "they stay at the right price". The applicant advised Houda that he would be getting five to ten pounds a week on tick, would be able to move it "just like that" and get that far ahead that he would simply pay cash for new product. There was a conversation that the applicant was trying to get money together for five pounds. Subsequently, in May 2012, the applicant asked for five pounds of cannabis and told Houda he could move 35 pounds a week, stating that he had "a mate who moves 20 and another mate who moves 15 a week". Also in May 2012, the applicant told Houda that at that moment he was "moving 20 pounds and over" of cannabis a week (which based on a purchase price of $3,000 a pound, indicated purchases of $60,000 worth of cannabis a week for resale). At one stage, the applicant told Houda he wanted "5 pounds straight up on the weekend" and Houda advised the applicant to let his "boss" know that he would supply the cannabis.

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[21] Exhibit 6.

[30] As to the methylamphetamine trafficking, the intercepted telephone conversations also recorded the applicant telling Houda that, from one client alone (his son's mother), he was making $800 to $900 profit a week (which could have been from cannabis, but was more likely to be from methylamphetamine). The intercepts revealed that the applicant would source methylamphetamine from Houda and vice versa, with requests for variously described quantities of up to a "ball" and payments of up to $5,500 for "half a diamond". There were discussions about purity with different batches described as being 100 per cent and 80 per cent. The applicant stated at one time that he wanted to purchase an ounce for $5,000 "if it's good".

[31] The supply counts (counts 2 to 8) comprised four counts of supplying methylamphetamine (on 6 and 7 March 2012, 24 April 2012 and 15 May 2012) and three counts of supplying small amounts of heroin (on 15 and 16 May 2012) .

[32] On 5 June 2012, a search warrant was executed at the applicant's home. The police located 576.5 grams of cannabis hidden in the ceiling, which the applicant admitted was his. That cannabis was packaged in 35 clip sealed bags with weights ranging from less than one gram to 392 grams and there was also some cannabis (3.8 grams) found in a bowl (count 9). In addition, the police found various containers and clip sealed bags within which methylamphetamine was detected and a container and a clip sealed bag containing a total of 0.047 grams of methylamphetamine (count 10). A quantity of $5,000 in cash, bundled in $50 notes, was found in a safe (count 11). Twenty mobile phones were located, four of which were used in the applicant's conversations with Houda during the period of the intercepts (count 12). The police also found a container holding 1.790 grams of 4 – hydroxybutanoic acid lactone (count 13).

Submissions and authorities put before the sentencing judge

The respondent's submissions at sentence

[33] The respondent contended that a reasonable inference from the intercepts was that the applicant was trafficking in cannabis at a wholesale level (valued up to $60,000 a week based on the applicant's statement that he was moving up to 20 pounds a week), but accepted that the methylamphetamine trafficking should be regarded as being at a street level.

[34] The respondent submitted that the applicant's cooperation, other than his pleas, was of a limited nature. Although he participated in an interview and agreed that the voice on the telephone intercepts played to him was his, he downplayed his offending, stating that he had only done business with Houda on two or three occasions and that the drugs were for personal use. His interview was thus self-serving and did not reflect what could be proved against him by other means. The respondent referred to the applicant's criminal history and his continued offending whilst on bail for the present offences and also his offending (for possession of cannabis) when in custody.

[35] The respondent referred the sentencing judge to the following as comparatives: *R v Salter*,[22] *R v Wallace*[23] and *R v Hennig*[24] and submitted that the present case fell between *Wallace* and *Salter*.

[36] *Salter* concerned a plea to an ex officio indictment charging trafficking in cannabis. The sentence of nine years imprisonment with no parole recommendation was upheld on appeal. The trafficking charge proceeded on the basis of extensive admissions made by Salter after a search warrant located 11.24 kg of cannabis. The admissions made by Salter, which moderated the sentence that would otherwise have been imposed, included that he had trafficked in Queensland over a three year period (having also admitted to commencing two years prior to that period, when in South Australia). He had four regular customers in Queensland, who knew that once or twice a week Salter would receive large quantities of cannabis (usually 24 pounds). He bought cannabis about 200 times over the five year period that included the trafficking interstate. The profit over the total five year period was calculated to be approximately $1.3 to $2.4 million, with an overall purchase price for the cannabis of $14 million. Salter was 60 years old with an extensive history, including 19 terms of imprisonment, although only one previous conviction for a drug offence. He was neither an addict, nor drug dependent, nor a user of unlawful drugs. He became involved in dealing in cannabis first as a courier and then as a wholesale supplier in order to make a profit.

[37] In *Wallace*, a sentence of seven years imprisonment with parole eligibility at two years and nine months was imposed on a plea to trafficking in cannabis over a 12 month period. There were also pleas to other less serious drug offences. As a result of a search warrant being executed at Wallace's business premises, police found about 4 kg of cannabis and $55,000 in a concealed place. Wallace, who was 48 years old when he committed the offences, had two minor drug convictions. He made full and frank admissions as to the extent of his trafficking. He admitted to trafficking over the 12 month period and supplying on average 10 pounds of cannabis a week. Over the 12 month period of trafficking, he sold about 236 kg of cannabis for a total profit of about $100,000. On the basis of the figures he provided, the cannabis was valued at $1.8 million, indicating he was a significant wholesaler. The offending involved repetitive wholesale dealing in cannabis obtained in a well-organised way from an interstate supplier using a courier service. Wallace's motivation was financial gain. The sentence imposed was upheld on appeal as being within the appropriate range, even taking into account the early plea and extensive cooperation.

[38] In *Hennig*, a sentence of seven years imprisonment was imposed upon conviction after a trial for trafficking in cannabis, methylamphetamine, MDMA and MDEA, with lesser concurrent terms for other drug offences. Appeals against conviction and sentence were unsuccessful. The trafficking concerned a 10 day period and was based on covert surveillance of Hennig's unit. The surveillance footage showed upwards of five people a day visiting the unit for short periods of time. Police intercepted Hennig as he was leaving his unit and executed a warrant and searched the unit. They found 621 tablets containing MDMA, MDEA and

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22 [2010] QCA 284.
23 [2008] QCA 135.
24 [2010] QCA 244.

methylamphetamine in the backpack Hennig was carrying. They also found items inside the unit, including methylamphetamine, MDMA, cannabis, scales and paperwork. In another unit, which he also rented, police found more drugs, including a small amount of cocaine. There was over $60,000 cash in his safe (although not all was attributed to being the proceeds of trafficking). Whilst an unusual aspect was that the trafficking related to a very short period, it was observed on appeal[25] that the total amount of drugs found (9.483 grams of pure methylamphetamine, 32.143 grams of pure MDMA, 9.112 grams of pure MDEA, almost a kilogram of cannabis and a small quantity of cocaine) and their diversity, established that Hennig was an active trafficker in a miscellany of drugs over the 10 day period charged. Hennig showed no remorse and could not be accorded any leniency for a plea or cooperation. He was 26 when he offended and 29 at sentence. He had a minor criminal history. He had health problems, but it was not shown that they could not be managed in prison. While the seven year sentence with no early parole eligibility was a high one, given the short period of trafficking, it was not manifestly excessive.

The applicant's submissions at sentence

[39] The applicant's counsel emphasised the applicant's personal antecedents, including his very early drug and alcohol abuse and various other matters detailed in the psychological report of Dr Freeman. That report set out that the applicant was assessed as suffering from amphetamine and cannabis dependence, a major depressive disorder (with mixed anxiety), borderline personality traits and below average intelligence. Additionally, the applicant was examined for symptoms of a stroke in early 2014 and was found to have an aneurism. He was close to his son aged eight years. He has been in a relationship with a new partner for some 18 months. The applicant had started using drugs again after he fell in an accident, breaking his hip. He required morphine, but ended up using drugs again.

[40] Counsel submitted that the applicant's discussions with Houda about his ability to move large quantities of cannabis should be understood as the applicant "talk[ing] big" and "talk[ing] it up". Moreover, as to methylamphetamine trafficking, no large amounts were located by the police and even when there was a suggested purchase of methylamphetamine for about $5,000, the applicant did not have sufficient cash to make the purchase. Nor was the applicant in a position to pay large amounts for the cannabis he dealt in. There were no large bank accounts found.

[41] The applicant's counsel distinguished *Salter* and *Wallace* as concerning much larger enterprises by offenders who trafficked solely for financial gain and, in the case of *Salter*, with a more serious criminal history. The applicant, on the other hand, was dealing to support his own significant drug habit and any money he obtained from drug dealing went back into purchasing drugs for himself. There were no large amounts of methylamphetamine found, but rather traces of the drug consistent with the applicant being a user. The schedule of facts referred to the applicant using six grams of methylamphetamine from one batch of drugs received.

[42] The applicant's counsel referred to *Hennig* as the most useful of the authorities. It was submitted that, although the trafficking in *Hennig* was for a shorter period of time,

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[25] *R v Hennig* [2010] QCA 244 per McMurdo P at [65] with whom the other members of the Court agreed.

that was counterbalanced by the great number of schedule 1 drugs trafficked by Hennig, the considerable amount of cash (in excess of $60,000) located in Hennig's safe, the fact that Hennig did not have the benefit of a plea and showed no remorse or cooperation. In contending for a lesser sentence than imposed on Hennig, counsel stressed the applicant's mitigating circumstances; in particular, the applicant's long-standing addiction, pleas and other cooperation including that there was a hand-up committal for the trafficking in cannabis. For the trafficking offence, a sentence in the order of six years was urged with a parole eligibility date at about one third of the term.

Sentencing remarks

[43] The learned sentencing judge noted that the sentence proceeded on the basis of an agreed statement of facts set out in the schedule tendered, which analysed intercepted communications between the applicant and Houda. His Honour stated that "the nature of communications [was] consistent with [the applicant] carrying on the business of trafficking in dangerous drugs, including cannabis, methylamphetamine and the drug usually called MDMA". His Honour observed that there was a strong inference (which was not disputed) that the applicant had some expertise in dealing in cannabis and that Houda was relying on the applicant to purchase cannabis from him and to distribute it for him. His Honour noted the prosecution's submission that the cannabis trafficking should be categorised as being at a wholesale level, while the trafficking in methylamphetamine could be categorised as being at a street level. His Honour concluded that the evidence suggested that the applicant engaged in transactions "involving substantial amounts of cannabis", referring to the applicant's statement that he was "moving 20 pounds or more of cannabis a week", which his Honour noted involved a "considerable cash value".

[44] His Honour stated that, notwithstanding the apparently large scale of the trafficking, the applicant's primary motivation was his need to support his own very high dependency; the applicant's use of drugs was at such a level that he needed to "transact intolerably large sums of drugs and money". In that regard, his Honour accepted the submission that there was nothing to suggest that the applicant was found with the trappings of wealth or engaged in high living, which was reinforced by only $5,000 in cash being found in his house.

[45] His Honour had regard to the applicant's criminal history in Queensland, Western Australia and South Australia, which largely concerned drug and dishonesty offences. His Honour noted that the Queensland history comprised offences, principally concerning the drug cannabis. The applicant had had the benefit of community based orders, probation and parole orders and rehabilitation orders, which in each case had been breached by reoffending. He had also been sentenced to terms of imprisonment, including in February 2009. However, his Honour also noted that, despite the applicant's long criminal history, there was no previous conviction for supply and that there was a period between early 2009 and late 2011 when no convictions were recorded.

[46] The sentencing judge also had regard to the fact that, while the applicant was on bail for the present offending, he committed other offences, including drug offences, driving offences and dishonesty offences, with the result that he was remanded in custody from 19 August 2013 and sentenced (on 3 February 2014) to six months imprisonment with immediate parole after a declaration of 169 days of pre-sentence custody. His Honour also noted that the most recent offending (on 4 April 2014)

was of possession of cannabis whilst in custody. There was also a lengthy and very disturbing traffic history, involving many convictions for driving whilst unlicensed and whilst disqualified. The applicant was, at the time he was sentenced, serving a 17 month sentence for driving offences (which expired on 18 January 2015).[26]

[47] The sentencing judge referred to Dr Freeman's report and noted that the applicant had had an unfortunate childhood, with parents who suffered from alcoholism and had provided limited parental supervision. He had been sexually abused and struggled at school. He was exposed to drug and alcohol use at a young age and quickly developed a dependency on cannabis and amphetamines during adolescence. The applicant also had problems with managing depression and was prone to reckless behaviour, which was likely to be exacerbated by below average intelligence. However, the applicant had developed a level of insight into his offending.

[48] The sentencing judge referred to the authorities cited, which he considered indicated a relevant head sentence of around six to seven years. His Honour considered that *Salter* concerned more serious offending. As to *Wallace*, his Honour noted that the wholesale trafficking in that case, which attracted a seven year term, was carried out by an offender who, although not having the applicant's serious criminal history, was also not an addict. His sales, in some millions of dollars, involved substantial profit, which was his primary motivation. His Honour accepted the respondent's submission that *Hennig* was the most useful of the authorities cited. The sentencing judge considered that, in light of the applicant's criminal history and the very serious nature of the offending, a head sentence of seven years imprisonment on count 1 was warranted, concurrent with the sentence the applicant was serving and moderated to provide for parole eligibility on 14 January 2017.

Submissions on appeal

[49] The applicant, who was self-represented, in submitting that the sentence imposed for count 1 was manifestly excessive, argued that the sentence that ought to have been imposed was one of either six years by way of head sentence or one which moderated the sentence imposed by providing a parole eligibility up to one year earlier than ordered. The applicant contended that, while the prosecution sought to compare his trafficking with that of "big drug dealers", he was only "hoping and seeking to obtain [his] personal drugs" and much that he said in the intercepted conversations was "bravado" designed to obtain a supply of drugs for personal use more cheaply or for free. The $900 a week referred to in the intercepted calls should be seen as an attempt to "talk up" his perceived profile in the hope of securing drugs at a better price. Had he trafficked to the extent contended for by the prosecution he would have been much better off financially than was apparent when the police searched his premises.

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[26] That sentence was imposed on 3 February 2014, when the applicant was also dealt with for other drug and driving offences. His parole was cancelled and he was returned to custody on 28 March 2014, where he remained until sentence.

[50] The applicant also referred to the various physical and mental problems he suffered and his desire to assist in the care of his young son. The trigger for his recent offending was falling and breaking his pelvis and not wanting to use morphine for pain relief. He had made concerted efforts to rehabilitate himself, which have continued since being sentenced. (Leave was granted to the applicant to tender material in that regard.)

[51] The respondent conceded that when declaration could be made, the concurrent sentence imposed by the learned sentencing judge equated to a head sentence of about seven years and nine months. The respondent submitted that the sentence imposed for count 1, while high, was not manifestly excessive. The applicant's extensive criminal history, his offending while on bail and while in custody were aggravating features. The respondent relied on the authorities cited below, but also provided the Court with the authority of *R v Brienza*.[27] In that case, a sentence of 10 years imprisonment with parole eligibility after two years was imposed on a plea to trafficking in cannabis. The offender, who was an American citizen in his mid-30s, had no relevant history and was not a user of cannabis. There were a number of people involved in the drug network as wholesalers or couriers. Brienza engaged in wholesale trafficking over nearly a year and was supplied with a total of 70 pounds in 12 transactions. There was no evidence of the extent of the profit, but the street value of the cannabis sourced and supplied was said to be in the order of a quarter of a million dollars. Brienza's motivation was purely commercial. He ceased his activities in the drug trafficking network just before it was closed down, apparently because he had reason to believe it had been compromised. A co-offender, Diano, who had been sentenced earlier, had organised the purchase of cannabis from South Australia and its transportation to Queensland. He admitted to arranging the supply of at least 200 pounds of cannabis, generating more than $600,000 in cash. He had a South Australian criminal history, including for production, and was sentenced to seven and a half years imprisonment with parole eligibility after two and a half years.

[52] In response to questioning by the Court, as to whether the sentencing judge proceeded on a mistaken basis concerning the drugs the subject of the trafficking count, the respondent accepted that, if such error was demonstrated, this Court would be required to exercise the sentencing discretion afresh.

Did the sentence proceed on the basis of a factual error as to the drugs trafficked?

[53] The learned judge's sentencing remark that the applicant trafficked in three drugs, cannabis, methylamphetamine and MDMA, reflected what was stated on page 1 of the schedule under the heading "Background". That statement in the schedule was confusing and incorrect, in that it did not accord with what was stated in the actual portion of the schedule that set out the details of the agreed facts concerning count 1, which was explicit in identifying only the drugs cannabis and methylamphetamine as the subject of that trafficking count. Of course the trafficking charge, as particularised in count 1 on the indictment, also only specified trafficking "in the dangerous drugs Cannabis and Methylamphetamine". The sentencing judge fell into error in stating that a third drug was trafficked when setting out the circumstances of the trafficking for which the applicant was being

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[27] [2010] QCA 15.

sentenced. The error as to the drugs trafficked resulted in the sentencing discretion miscarrying. It is therefore necessary for this Court to exercise the discretion afresh. In those circumstances, as counsel for the respondent rightly conceded, this Court must also have regard to the applicant's efforts to rehabilitate himself since he was sentenced: *R v Kentwell*.[28]

The re-exercise of the sentencing discretion

[54] Although the quantity of drugs trafficked was not able to be ascertained with precision, the intercepted conversations included comments by the applicant that he could move 35 pounds a week and that he was moving over 20 pounds of cannabis a week. The applicant also made reference to getting five to ten pounds a week on tick, which he was able to move "just like that". Although the applicant was not found with large quantities of cash, that was consistent with his obtaining the drugs on credit. Even having regard to the submission made by the applicant's counsel below, and repeated by the applicant before this Court, that the intercepts involved a degree of "talk[ing] big" by the applicant, it is apparent that the applicant trafficked in significant amounts of cannabis. The schedule of agreed facts recorded that the telephone intercepts revealed that the applicant appeared to be near the top of the chain of distribution. As to the trafficking in methylamphetamine, there was no dispute that it was at a low level.

[55] Clearly, *Salter* was a much more serious example of trafficking than the present case, as the sentencing judge noted. *Wallace* concerned a longer period of trafficking, although only in one drug and by an offender with a less serious criminal history. But an important distinguishing feature between that case and the applicant's was that Wallace's trafficking was motivated solely by financial gain, which was substantial, whereas the applicant's trafficking was driven by his addiction. *Brienza* also involved a longer period of wholesale trafficking in cannabis purely for profit. While *Hennig* concerned an unusually short period of trafficking, that offender trafficked in a wide range of drugs and was found in possession of significant quantities of pure Schedule 1 drugs and with a considerably greater amount of cash derived from trafficking. Although that offender was younger and had a minor history, he could not be accorded the benefit of leniency for a plea or other cooperation.

[56] The applicant on the other hand, while making limited admissions when interviewed, did enter timely pleas and cooperated in that there was a full hand-up committal and, after a further charge was added, the matter proceeded by way of an ex officio indictment. The applicant has developed some insight into his offending, as the sentencing judge noted. He has also engaged in activities that promote rehabilitation, which have continued after the applicant was sentenced. Against that must be balanced, not only the applicant's criminal and traffic history, but also the aggravating factors of the applicant's ongoing offending while on bail and, indeed, while in custody.

[57] Having due regard to the seriousness of the trafficking and the other matters of which mention has been made, but also bearing in mind the matters of mitigation in favour of the applicant, I consider that a concurrent sentence of six years

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[28] [2014] HCA 37 at [42] and [43].

imprisonment is appropriate, with parole eligibility after a third of that period, that is 14 July 2016.

Orders

[58] I would make the following orders:

1. Leave to appeal be granted in respect of the sentence imposed on 14 July 2014 on count 1.

2. The sentence imposed on count 1 be set aside and in lieu thereof impose a concurrent sentence of six years imprisonment.

3. The applicant's parole eligibility date be fixed at 14 July 2016.