# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v McRea* [2015] QCA 110 |
| PARTIES: | **R**<br>**v**<br>**McREA, Jesse Robert**<br>(applicant) |
| FILE NO/S: | CA No 330 of 2014<br>SC No 398 of 2014<br>SC No 601 of 2014<br>SC No 767 of 2014<br>SC No 790 of 2014<br>SC No 796 of 2014 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane – Unreported, 12 December 2014 |
| DELIVERED ON: | 19 June 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 2 June 2015 |
| JUDGES: | Holmes and Gotterson JJA and Mullins J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Leave to appeal against sentence refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant pleaded guilty to 26 counts – where Count 1 on indictment 398 of 2014 alleged trafficking in a dangerous Schedule 1 drug, Methylamphetamine in contravention of section 5(1)(a) of the *Drugs Misuse Act* 1986 (Qld) – where Count 1 on indictment 601 of 2014 alleged that the applicant unlawfully did grievous bodily harm to a police officer in contravention of section 320 of the *Criminal Code* (Qld) – where the applicant was sentenced to seven years and six months' imprisonment for the trafficking offence and three years' imprisonment for the grievous bodily harm, along with other lesser sentences for the other 24 offences – where all sentences imposed are to be served concurrently – where parole eligibility was granted at the one third mark – where the offending concerned a four month period of trafficking in Methylamphetamine – where the applicant was arrested three times for trafficking and on the third occasion resisted arrest |

which recklessly resulted in injuries to the arresting officers – where the applicant proposed that this Court adopt as principle the observations of Dalton J in *R v Bowditch* [2014] QCA 157 at [23] – whether the learned sentencing judge erred in failing to clearly identify the way in which the sentence for the offence of trafficking in a dangerous drug was determined

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the learned sentencing judge noted during the sentence hearing that the sentence for trafficking after trial ought to have been six years' imprisonment and the sentence for the violence directed towards the police officers after trial ought to have been in the order of three or four years' imprisonment – whether in all the circumstances the sentence was manifestly excessive

*Criminal Code* (Qld), s 320, s 340(1)(b)(a)(ii)
*Drugs Misuse Act* 1986 (Qld), s 5(1)(a), s 6 (1)(c), s 9(b), s 9(d), s 10(1)(a), s 10(1)(b)
*Weapons Act* 1990 (Qld), s 50(1)(c)(i)

*Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, considered
*Makarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, considered
*R v Bowditch* [2014] QCA 157, considered
*R v Braithwaite* [2004] QCA 82, considered
*R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175, considered
*R v Ungvari* [2010] QCA 134, considered

COUNSEL: T A Ryan for the applicant
D R Kinsella 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 Gotterson JA and the order he proposes.

[2] **GOTTERSON JA:** On 12 December 2014 at the Supreme Court at Brisbane, the applicant, Jesse Robert McRea, pleaded guilty to 11 counts on two indictments and one *ex-officio* indictment and 15 summary offences. Count 1 on indictment 398/14 alleged trafficking in a dangerous Schedule 1 drug, Methylamphetamine, at Keperra and elsewhere in the State of Queensland between 14 March 2013 and 19 July 2013 in contravention of section 5(1)(a) of the *Drugs Misuse Act* 1986 (Qld) (DMA). Count 1 on indictment 601/14 alleged that the applicant unlawfully did grievous bodily harm to a police officer at Keperra in the State of Queensland on 18 July 2013 in contravention of section 320 of the *Criminal Code* (Qld) (Code).

[3] The abovementioned counts, the other counts, and the respective sentences imposed for them are set out in the following table:

| **Section** | **Indictment 398/14** | **Offence** | **Sentence of Imprisonment** |
|---|---|---|---|
| 5(1)(a) DMA | Count 1 | Trafficking in a dangerous drug | Seven years and six months |
| 9(b) DMA | Count 2 | Possessing a dangerous drug in excess of 2.0 grams | Two and a half years |
| 10(1)(b) DMA | Count 3 | Possessing a thing used in connection with Trafficking in a dangerous drug | One year |
| 9(d) DMA | Count 4 | Possessing a dangerous drug | One year |
| 10(1)(b) DMA | Count 5 | Possessing a thing used in connection with Trafficking in a dangerous drug | One year |
| 6(1)(c) DMA | Count 6 | Supplying a dangerous drug | Two years |
| 9(b) DMA | Count 7 | Possessing a dangerous drug in excess of 2.0 grams | Two years |
| 10(1)(a) DMA | Count 8 | Possessing a thing for use in connection with Trafficking in a dangerous drug | One year |

| **Section** | **Indictment 601/14** | **Offence** | **Sentence of Imprisonment** |
|---|---|---|---|
| 320 Code | Count 1 | Grievous bodily harm | Three years |
| 340(1)(b)(a)(ii) Code | Count 2 | Serious assault with a circumstance of aggravation | 18 months |

| **Section** | **Indictment 796/14** | **Offence** | **Sentence of Imprisonment** |
|---|---|---|---|
| 50(1)(c)(i) of the *Weapons Act* 1990 (Qld) | Count 1 | Unlawful possession of a weapon | Three months |

[4] On the 15 summary offences the applicant was convicted and not further punished.

[5] All sentences imposed are to be served concurrently and the learned sentencing judge declared 511 days spent in pre-sentence custody from 19 July 2013, the day following the date of the applicant's third arrest, to the date of sentence, as imprisonment served under the sentence. Eligibility for parole was fixed at 18 January 2016. As a consequence, the applicant is to serve 30 months' imprisonment, that is to say one third of the head sentence of seven years and six months' imprisonment, before becoming eligible for parole.

**Circumstances of the drug-trafficking offending**

[6] The applicant offended over an eight month period during which he committed some 26 offences. His offending was first observed in March 2013 when his residence was under police surveillance. Numerous persons were seen entering the residence carrying items of personal property and leaving empty-handed.

[7] Over a four month period between mid-March and mid-July 2013, the applicant engaged in the trafficking of the Schedule 1 drug Methylamphetamine at a "street level". During this period, he was intercepted and arrested three times, on 21 March, 19 May and 18 July, 2013 respectively. On the occasion of each arrest the

police seized quantities of Methylamphetamine packaged in clip seal bags. The calculated pure weight of Methylamphetamine seized on these occasions was 7.718 grams which had been diluted, on average, to almost 50 per cent.

[8] The extent of the applicant's trafficking could not be precisely established. However, he had some 30 regular customers and would sell Methylamphetamine several times a day. The applicant's customers were "end-users". He regularly sold at quantities and prices between 3.5 grams (known as a "ball") for $1,600.00 and 1.75 grams (known as a "half-ball") for $800.00. On occasion, the applicant sold single grams of the drug.

[9] The applicant sold Methylamphetamine on credit. He would take cash and on occasion, received stolen property as payment. When arrested, he was found to be in possession of electronic devices, cut precious stones, and jewellery, along with in excess of $3,000.00 cash. "Tick sheets" revealed not only that the applicant offered credit to his various customers but also that he did so to a significant extent. According to these records, he was owed $12,000.00 by one customer and $6,000.00 by another.

[10] The circumstances of the arrests are of some significance. On 21 March 2013 police executed a warrant at the applicant's partner's residence in relation to another matter. The applicant was present. They located three packages of drugs, jewellery, the accoutrements of drug trafficking, and a bong. Additionally, a stun gun was found. The applicant failed to co-operate with police. Later the applicant was searched and a "tick sheet" was located. He declined an interview with police and was served with a Notice to Appear. The applicant initially failed to appear but finally did so on 29 May 2013.

[11] On 13 May 2013, as a result of specific intelligence, police intercepted the applicant whilst he was driving. The applicant attempted to delete messages from his mobile phone. Police located stolen property and a quantity of drugs secreted in a magnetised box affixed to the inside panel of the vehicle's wheel. The drugs were parcelled in separate bags. An examination of the applicant's mobile phone revealed drug activity, along with a "tick sheet". The applicant was also in possession of an extendable baton. He declined an interview with police, was arrested and then admitted to bail.

[12] Undeterred by his arrests, the applicant continued to trade in Methylamphetamine whilst on bail.

[13] On 18 July 2013, police executed a warrant at the residence of a third party. They located the applicant in possession of four packages of Methylamphetamine and a number of accoutrements of drug trafficking. The purity of the drug in the respective packages ranged from 41.6 per cent to 76 per cent.

**Circumstances of the violent offending**

[14] The grievous bodily harm and serious assault offences were associated with the applicant's arrest on 18 July 2013. Upon being detained in a room on the upper floor of the residence, the applicant became agitated and aggressive. He attempted to leave the room and was arrested. Whilst police were endeavouring to hand-cuff the applicant, he struggled to break free and ran to the front stairs of the dwelling. A wrestle ensured. During it, two police officers and the applicant fell down the stairs. The applicant continued to resist restraint and again wrestled with the

officers. All three fell again. The applicant struggled further but was ultimately subdued.

[15] Both police officers were injured in the fall and were treated by ambulance officers at the scene. Each was taken to hospital and was treated for his injuries. One of the complainant police officers suffered bruising to numerous parts of his body and nerve damage to his right arm. Despite surgery and treatment, by the time of the sentence, there remained a loss of sensation and weakness to the officer's dominant hand, along with weakness in his right shoulder. By the time of sentence, it was likely that the officer would have to undergo further surgery. He faced the potentiality of not regaining full use of his right arm.

[16] During submissions on sentence, the learned primary judge said that he regarded the applicant's violence as "reckless", rather than intended or wilful. He was therefore satisfied that the case was not one for making a serious violent offender declaration.[1]

**Sentencing remarks**

[17] The learned sentencing judge commenced his sentencing remarks by referring to the two offences of violence. He then outlined the circumstances of the eight charges relating to the trafficking of the Methylamphetamine, the charge of possessing the stun gun, and the 15 offences charged in a summary way.

[18] His Honour noted the applicant's date of birth and observed that he was only 22 years of age at the time he committed "this substantial number of offences, and many of them serious."[2] He made particular reference to the applicant's continuing trafficking in Methylamphetamine while on bail; his awareness from his own drug dependence of how dangerous it was; and the worsening criminality of his conduct overall culminating in the offences of violence.[3]

[19] The learned sentencing judge discussed the applicant's relevant criminal history which included a charge of grievous bodily harm in 2008 as well as a number of drug related offences. His Honour observed:

> "Your appearances before the Courts over the years might have been expected to persuade you to give away drugs and an inclination towards living a criminal life, but that was not to be."[4]

[20] After his consideration of these matters, his Honour moved to the circumstances of mitigation. In this context, he referred to the following as factors which he would take into consideration:

1. the applicant's plea of guilty, which, he noted, had facilitated the course of justice, saved the community the trouble and expense of a trial, and would result in a more lenient sentence than would have been imposed had the matter proceeded to trial.

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1 Appeal Book ("AB"), page 54, lines 38-41.
2 AB, page 61, lines 35-37.
3 AB, page 63, lines 35-41.
4 AB, page 63, lines 6-8.

2. the applicant's relative youth at the time of the offending, observing that often "young men can learn from their mistakes and eventually become useful members of the community".[5]

3. the applicant's significant attempts at rehabilitation in custody of which his Honour said:

> "That is to your credit but your prior history from a relatively early age, given the large number of appearances you've had in Court, gives me substantial cause to doubt that you are likely to be a useful member of the community on your eventual release."[6]

4. the applicant's drug dependency during the period of offending.

[21] His Honour recorded that both the prosecution and defence had asked him to impose a sentence in respect of the trafficking count which also took into account the overall criminality involved in the other offending, including the offences of violence charged by the separate indictment and the summary offences. To do so accorded with the approach authorised by this Court in *R v Nagy*.[7] His Honour stated that he proposed to take that path although he did not refer explicitly to that decision.[8]

[22] He observed:

> "It goes without saying that the kind of offences you committed deserve sentences which are calculated to discourage you and others from committing anything like them again."[9]

[23] His Honour then imposed the sentences set out in the preceding table.

**Grounds of Appeal**

[24] The application for leave to appeal as filed sets out the following ground of appeal:

1. In all the circumstances the sentence was manifestly excessive.

[25] In the applicant's outline of submissions intimation was given of an application for leave to add a further ground of appeal, namely:

2. The learned sentencing judge erred in failing to clearly identify the way in which the sentence for the offence of trafficking in a dangerous drug was determined.

[26] At the hearing of the application, leave was sought and granted to file an Amended Notice of Appeal containing the further ground. In oral submissions the applicant argued Ground 2 first. It is convenient to deal with it at this point.

**Ground 2**

[27] The applicant accepted that the learned sentencing judge had, as requested, applied the *Nagy* approach by imposing a sentence for the trafficking count that took into

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5 AB, page 65, lines 25-26.
6 AB, page 65, lines 32-35.
7 [2004] 1 Qd R 63; [2003] QCA 175.
8 AB, page 65, lines 42-45.
9 AB, page 65, lines 47-49.

account the overall criminality involved in the other offending, including the offences of violence. The applicant's contention is that the learned sentencing judge erred in law in failing to clearly identify the way in which the sentence for the offence of trafficking a dangerous drug was determined.

[28] For the purpose of developing this ground of appeal, the applicant has proposed[10] that this Court adopt as a principle to be observed when sentencing in accordance with *Nagy*, a principle to which the applicant submitted the learned sentencing judge had not adhered. Specifically, the applicant urged this Court to adopt the following observations of Dalton J in *R v Bowditch*[11] as a sentencing principle:

> "I am bound to accept that the approach in *Griffiths* is legitimate but, in my view, if it is adopted, a sentencing judge should make the basis for the sentencing express and the sentencing remarks should show the reasoning of the Court as to which sentence, or sentences, have been inflated, and to what extent, to account for overall criminality. If that is not done, in my opinion, the reasons of the sentencing judge do not properly reveal the thinking behind the imposition of the sentences imposed."

[29] I am not prepared to adopt these observations as principle. That is not to acknowledge that what her Honour suggests might assist in a particular instance in explaining the sentence imposed. My reservation is that to accord the observations the status of principle would compel adherence to them in every instance.

[30] To this, I would add the following reasons for rejecting the applicant's proposal. Firstly, the observations are *obiter dicta* because a failure to make the basis of sentencing "express" was not a ground of appeal in that case. Secondly, they do not have the unqualified support of McMurdo P as appears from the following passages in her Honour's reasons in *Bowditch*:

> "[1] … I agree with Dalton J's reasons for granting the application for leave to appeal against sentence and allowing the appeal in part, save for the following caveat.
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> [2] This case highlights some of the difficulties which may arise when judges sentence offenders for multiple offences. Even where the effective sentence imposed for the totality of the offences is appropriate, judges should take care to fix a proportionate sentence for each offence: *Pearce v The Queen*. Judges have a discretion as to whether to impose cumulative or concurrent sentences or part cumulative and part concurrent sentences: *Griffiths v The Queen*. Generally, judges adopt one of two approaches. They may impose an increased head sentence, usually on the most serious offence, to reflect the totality of all the offending so as to avoid the possible unintended complications and consequences which sometimes flow from the combination of cumulative sentences and complex sentencing and related statutes. On the other hand, judges may impose a cumulative sentence or a series of cumulative sentences, moderated to reflect the totality principle discussed

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10 Appeal Transcript ("AT"), page 1-2, lines 44-46.

11 [2014] QCA 157 at [23].

> in *Mill v The Queen*. Either method is apposite provided the judges make clear the method adopted and the reasons for it; that the overall effect of the sentence is not manifestly excessive; and that the sentences do not result in double punishment for the same acts. Judges often tend to adopt the former approach as its effect tends to be more easily comprehended and it is less prone to unintentionally offend the totality principle. I see no reason to dissuade judges from this course." (citations omitted)

[31] Thirdly, and most significantly, the observations endorse an arithmetic methodology in sentence fixing which is not readily reconcilable with the High Court authorities, to which the respondent referred, which reject a mathematical approach in sentencing. In *Barbaro v The Queen*[12] French CJ, Hayne, Kiefel and Bell JJ recently stated:

> "Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts." (citations omitted)

[32] Some years earlier in *Markarian v The Queen*[13] Gleeson CJ, Gummow, Hayne and Callinan JJ had observed:

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies." (citations omitted)

[33] Later in their reasons, their Honours remarked:

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

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12 [2014] HCA 2; (2014) 253 CLR 58 at [34].

13 [2005] HCA 25; (2005) 228 CLR 357 at [27].

> by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge."[14] (citations omitted)

[34] To take up those remarks, this was not a simple case. His Honour was to increase the sentence on the trafficking offence to reflect the offending involved in it and 25 other offences, two of which were not drug trafficking-related but involved serious offending against police offers acting in the course of their duty. The arithmetic approach suggested by the applicant would have been unrealistic and unwieldy, and would have risked loss of sight of the objective of arriving at a sentence that both fairly reflected overall criminality and avoided double punishment.

[35] Given that I reject the applicant's proposed principle from which this ground of appeal is developed, it follows that, in my view, this ground of appeal could not succeed.

**Ground 1**

[36] In support of this ground of appeal the applicant contends that, in all the circumstances, the sentence of seven years and six months is manifestly excessive. The applicant submits that a sentence no greater than six years and six months with a parole eligibility after two years ought to have been imposed.[15]

[37] To advance the argument for manifest excessiveness, counsel for the applicant referred to the following observations made by his Honour during the sentence hearing:

> "No, I don't have a concluded view about whether the sentence needs to be cumulative. The thing that concerns me most about a concurrent sentence is that it will produce – if it's wholly concurrent, will produce a result which even for a very young man is inadequate to meet the circumstances of the case. Let me illustrate it in this way: assume that the head sentence after a trial ought to have been six years in respect of the offences other than those involving the violence directed towards the police officers and that the sentence after a trial in respect of the police officers ought to have been in the order of three or four years. On either view, if they're wholly concurrent, the result would be a sentence of – a head sentence of six years. And that just does not seem to me at the moment, at any rate, to be adequate to meet the gravity of the offending. But I am more

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14 At [39].

15 Outline of Submissions on Behalf of the Applicant, paragraph 15.1. It was not separately submitted that for a sentence of seven years and six months, a parole eligibility date after service of one-third was manifestly excessive.

> than willing to be shown cases which suggest that another view should be taken."[16]

[38] It is true, as the applicant's counsel noted, that his Honour spoke of sentences after trial. To have done so does not mean that he adopted a higher starting point than he should have. It was open to him to reflect the pleas of guilty, as he did here, in a conventional way by setting the parole eligibility date at one-third.

[39] It is no less true, as this passage and the sentencing remarks disclose, that his Honour was alert to the need to incorporate within the sentence sufficient recognition of the totality of offending in the 26 offences, not just the trafficking and grievous bodily harm. Much of the offending was committed whilst the applicant was on bail. It had become progressively more serious. The applicant was arrested twice, yet he continued his trafficking and when arrested for a third time caused a seemingly permanent and serious injury to a police officer.

[40] The decision of this Court in *R v Braithwaite*[17] justifies his Honour's recognition of the need for the sentence to reflect meaningfully the violence towards the police officers. There Jerrard JA observed:

> "The learned judge took into consideration, as he was obligated to, that both police officers were acting in the execution of their duty when attacked, and that the sentence imposed would need to reflect the overall criminality of Mr Braithwaite's conduct, and also have the capacity to deter other persons from attacking police officers. In *R v Nagy* [2003] QCA 125, Williams JA at [46]-[47] and Muir J at [72]-[74] emphasised the community need, which deterrent sentences can help to satisfy, for protection of police officers from violent assaults on them when performing their duties. In these circumstances the sentence of six years imprisonment for the offence of grievous bodily harm was an appropriate one, and so were each of the concurrent terms imposed. The recommendation that Mr Braithwaite be considered for post prison community based release after serving two and a half years adequately reflected his plea of guilty, and the fact that one blow only, although a very savage one, had been delivered."[18]

[41] In terms of comparability, the sentence in *R v Ungvari*[19] is instructive. There, the offender pleaded guilty to trafficking in a dangerous drug over a period of three months, eight counts of supply of a dangerous drug, and one count of possession of a dangerous drug, all committed in 2008. The dangerous drug was Methylamphetamine. He also pleaded guilty on an *ex-officio* indictment to two counts of serious assault on a police officer and one count of possession of Methylamphetamine committed in 2009. A few days later, he pleaded guilty to a series of much earlier offences ancillary to his drug supply activity. The offender was sentenced to seven years and six months' imprisonment for the trafficking offence. Penalties were not imposed for the other 2008 offences and earlier offences. He received concurrent sentences of 18 months for the assaults, and a cumulative sentence of six months for the 2009 possession offence. Parole eligibility was set after serving three years and two

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16 AB, page 55, lines 8-19.
17 [2004] QCA 82.
18 At [19].
19 [2010] QCA 134.

months. The offender was in his late twenties when he offended. The quantities of drugs and scale of trafficking were similar to those in the applicant's case. The offender's appeal against sentence was refused except to the extent that parole eligibility was adjusted to require service of two years and eight months (one-third of eight years).

[42] Taking into account the circumstances of the applicant's offending, his mitigating factors and comparability, I am unpersuaded that the applicant's sentence is manifestly excessive in its term or the parole eligibility period. The sentence might reasonably be regarded as a strong one but it is nevertheless one that is within the proper exercise of the sentencing discretion.

[43] For these reasons, I consider that this ground of appeal also could not succeed.

**Disposition**

[44] As neither ground of appeal has prospects of success, it is appropriate that leave to appeal against sentence be refused.

**Orders**

[45] I would propose the following order:

1. Leave to appeal against sentence refused.

[46] **MULLINS J:** I agree with Gotterson JA.