# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Parker* [2015] QCA 181 |
| PARTIES: | **R**<br>**v**<br>**PARKER, Dion Robert**<br>(applicant) |
| FILE NO/S: | CA No 15 of 2015<br>SC No 517 of 2014 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane – Unreported, 20 January 2015 |
| DELIVERED ON: | 2 October 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 14 July 2015 |
| JUDGES: | Fraser and Gotterson JJA and Flanagan J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Application for leave to appeal against sentence refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to an offence against s 5(a) of the *Drugs Misuse Act* 1986 (Qld) in that, he carried on the business of unlawfully trafficking in the dangerous drug methylamphetamine – where the applicant was sentenced to imprisonment for eight years – where a declaration of a conviction of a serious violent offence was made pursuant to s 161B of the *Penalties and Sentences Act* 1992 (Qld) ("PS Act") – where the applicant was in custody at the time of sentence – where the offending was committed while the applicant was on parole – where the sentence hearing proceeded on the footing that the applicant's trafficking activity had taken place over a period of about six months – where s 156A(2) of the PS Act required that because the applicant offended while on parole, his sentence the subject of this application should be served cumulatively with his current sentence – where the sentence of eight years is to commence on 8 December 2015 – where there was no declarable time already served – where the learned sentencing judge took into account the serious violent offence declaration and fixed a parole eligibility date of 1 May 2022 pursuant to s 160D of the PS Act – where by 1 May 2022 the applicant will have |

served 80 per cent of his eight year sentence – where the applicant's involvement in the trafficking was described at sentence as a "junior partner" role – where the applicant sourced methylamphetamine – where transactions were organised with persons in Brisbane, the Sunshine Coast, Cairns and South Australia – where the applicant was able to source drugs with a higher percentage of methylamphetamine, up to 75 per cent purity – where the applicant was selling from street level amounts known as "points" to ounces of methylamphetamine – where these were cash transactions interspersed with occasions when the applicant would take payment from customers by way of pseudoephedrine tablets – where the roles carried out by the applicant in the partnership business diversified over time – where on one occasion the applicant part-financed a proposed methylamphetamine production venture to the extent of $9,500 from his drug earnings – where the applicant sourced pre-cursors for further methylamphetamine production and investigated a source of cannabis in South Australia which he expected the partnership could re-sell profitably – where the partnership encountered issues with drug quality and quantity from time to time and the applicant terminated the partnership at the end of May 2012 – where the applicant continued to traffic in methylamphetamine on his own account during June and July 2012 – where the applicant would sell drugs in south-east Queensland and Cairns – where the applicant had served suppliers and at least 15 customers – where the nature of the applicant's sole trading was described by the learned sentencing judge as "especially … retail" in contrast to the "mainly wholesale" description the learned sentencing judge gave to the trafficking in which the partnership had engaged – where complaints about quality continued – where several of the applicant's proposed transactions did not eventuate – where the learned sentencing judge found that the trafficking in which the applicant was involved was producing sales of "many tens of thousands of dollars" – where Police arrested the applicant on 15 July 2012 and found 110 grams of methylamphetamine in five containers concealed in the engine bay of his car – where of the 100.88 grams tested, 69.72 grams were methylamphetamine with a purity of the order of 75 per cent – where the applicant had $4,060 in his wallet at the time of his arrest – where despite the scale of the trafficking, the applicant did not possess business acumen and traded on credit – where there were no obvious signs of business success – where the applicant was 37 years of age at the time of this offending and is now 41 years old – where the applicant had been a drug user since his teenage years and was a user of methylamphetamine at the time of the offending the subject of this application – where the applicant had an extensive and relevant prior criminal history – where the learned sentencing judge referred to the circumstances of the applicant's offending, his age, his drug usage habit and his criminal history, including his twice offending on parole –

where the learned sentencing judge observed that the applicant must have been aware of harmful consequences in the community of his trafficking and that courts impose penalties for trafficking calculated to deter would-be offenders from engaging in it – whether the sentence imposed was manifestly excessive

*Drugs Misuse Act* 1986 (Qld), s 5(a)
*Penalties and Sentences Act* 1992 (Qld), s 156A, s 156A(2), s 160D, s 161B

*Azzopardi v R* (2011) 35 VR 43; [2011] VSCA 372, considered
*Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, considered
*R v Bost* [2014] QCA 264, considered
*R v Carey* [2015] QCA 51, considered
*R v Kendrick* [2015] QCA 27, cited
*R v Orchard* [2005] QCA 141, considered
*R v Sullivan* [2005] VSCA 286, considered
*R v Westphal* [2009] QCA 223, considered

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| COUNSEL: | S M Ryan QC for the applicant<br>D L Meredith for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** On 20 January 2015, the applicant, Dion Robert Parker, pleaded guilty to an offence against s 5(a) of the *Drugs Misuse Act* 1986 (Qld) in that, in the period between 8 November 2011 and 16 July 2012, he carried on the business of unlawfully trafficking in the dangerous drug methylamphetamine. The applicant was sentenced on that day to imprisonment for eight years. A declaration of a conviction of a serious violent offence was made pursuant to s 161B of the *Penalties and Sentences Act* 1992 (Qld) ("PS Act").

[3] The applicant was in custody at the time of sentence. He was then serving a seven year sentence with a full time release date of 7 December 2015. He had been released on parole on 14 November 2011. The offending for which he was sentenced on 20 January 2015 was committed while the applicant was on parole. He was rearrested on 16 July 2012 and his parole was suspended on that day.

[4] At sentence, it was common ground that, despite the trafficking commencement date stated in the indictment, 8 November 2011, the applicant's trafficking in fact began after that date. His counsel at sentence stated that telephone records indicated that the drug trafficking in which the applicant actively participated, started on 21 January 2012.[1] The statement was not disputed factually and the sentence hearing proceeded on the footing that the applicant's trafficking activity had taken place over a period of about six months.[2]

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1 AB10; Tr1-4 ll5-26.
2 *Ibid* at ll38-32; AB39; Sentence 2 1.4.

[5] The applicant having offended while on parole, s 156A(2) of the PS Act required that his sentence for it be served cumulatively with his current sentence. Hence, the sentence of eight years is to commence on 8 December 2015. There was no declarable time already served. Taking account of the serious violent offence declaration, the learned sentencing judge fixed a parole eligibility date of 1 May 2022 pursuant to s 160D of the PS Act. By that date, the applicant will have served 80 per cent of his eight year sentence.

**Circumstances of the applicant's offending**

[6] A thirteen-page Statement of Facts[3] was tendered at the sentence hearing. It details the applicant's participation in the trafficking to which he pleaded guilty. His involvement had been detected by way of a telecommunications service interception warrant that had been obtained to intercept communications with a mobile phone service used by Craig Cant. The applicant had met Cant in prison. He contacted Cant by mobile phone on 18 December 2011. The two met in January 2012. At that time, Cant was trafficking in methylamphetamine.

[7] A working relationship quickly development between Cant and the applicant in which the latter adopted what was described at sentence as a "junior partner" role.[4] Cant organised buyers for the methylamphetamine; the applicant sourced most of it. Transactions were organised with other persons in Brisbane, the Sunshine Coast, Cairns and South Australia.

[8] The applicant was sourcing the drugs as early as 4 February 2012. Apparently he was able to source drugs with a higher percentage of methylamphetamine, up to 75 per cent purity, than Cant was able to source.

[9] The applicant would also arrange sales to contacts nominated by Cant. He was selling from street level amounts known as "points" to ounces of methylamphetamine. These were cash transactions interspersed with occasions when the applicant would take payment from customers by way of pseudoephedrine tablets.

[10] The roles carried out by the applicant in the partnership business diversified over time. On one occasion he part-financed a proposed methylamphetamine production venture to the extent of $9,500 from his drug earnings. He sourced pre-cursors for further methylamphetamine production and he investigated a source of cannabis in South Australia which he expected the partnership could re-sell profitably.

[11] The partnership encountered issues with drug quality and quantity from time to time. The applicant terminated the relationship with Cant at the end of May 2012. He continued to traffic in methylamphetamine on his own account during June and July 2012. He would sell drugs in south-east Queensland and Cairns. He had served suppliers and at least 15 customers.

[12] The nature of the applicant's sole trading was described by the learned sentencing judge as "especially … retail" in contrast to the "mainly wholesale" description he gave to the trafficking in which the applicant and Cant had engaged.[5] Complaints about quality continued. Several of the applicant's proposed transactions did not eventuate. He had a cash flow problem by 10 June 2012.

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3 AB43-55.
4 AB45 p2 l13.
5 AB39; Sentence 2 ll15-17.

[13] The learned sentencing judge found that the trafficking in which the applicant was involved was producing sales of "many tens of thousands of dollars".[6] An indication of the level of the trafficking can be gauged from intercepted phone calls he made during and after his partnership arrangement with Cant. By way of examples, these calls revealed the following.

[14] On 22 February 2012, the applicant collected money on behalf of Cant and himself but complained that it was $5,000 short. In March 2012, there were discussions between Cant and the applicant in which Cant said that he could obtain $90,000 to $100,000 worth of drugs a time from a person named Morrison in South Australia. In a later discussion, the applicant told Cant that it would be better for them to pay $11,000 an ounce so that they would be able to buy eight ounces per week. On 20 March 2012, the applicant told Cant that he had two persons delivering drugs for him. The next day, he complained to Cant that the "runners" were a bit slow; that he had made only $6,200 from drug sales; and that he hoped to have $9,000 by the end of the day. On 9 June 2012, in a conversation with a customer, Cameron, the applicant said that he was trying to cut out his "boss" (Cant) so that he could make an even better profit of $11,000 to $11,500 a week. Individual sales to customers, Parisi and Davies, at this time were for at least $12,000 and $7,500 respectively. On 21 June 2012, the applicant agreed to buy 100 mls of methylamphetamine oil for $18,000 from his supplier, Trewin.

[15] Police arrested the applicant on 15 July 2012. They found 110 grams of methylamphetamine in five containers concealed in the engine bay of his car. Of the 100.88 grams tested, 69.72 grams were methylamphetamine with a purity of the order of 75 per cent. The applicant had $4,060 in his wallet at the time of his arrest.

[16] Despite the scale of the trafficking, the applicant did not possess business acumen. He traded on credit. There were no obvious signs of business success.

**The applicant's prior criminal history**

[17] The applicant was 37 years of age at the time of this offending. He is now 41 years old. He had been a drug user since his teenage years and was a user of methylamphetamine at the time of this offending.

[18] The applicant's record of offending[7] discloses nine occasions between October 1992 and February 2001 when convictions were entered against him for drug offences. Fines, or less serious penalties, were imposed on those occasions. The applicant was sentenced to one month's imprisonment in 1994 for breach of bail and assault. He was sentenced to 18 months' probation for possession of dangerous drugs in March 2002.

[19] On 21 July 2004, the applicant was convicted of trafficking in dangerous drugs, namely, cannabis and ecstasy, over a period of about 18 months ending in December 2002.[8] He was sentenced to six years' imprisonment. Some 592 days of pre-sentence custody commencing on 6 December 2002 were declared as time served. He was released on parole in December 2005.

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6 AB30; Sentence 2 l14.

7 AB60-62.

8 At sentence, the applicant's counsel had erroneously stated in written submissions that the trafficking during the 18 months had been in cannabis and methylamphetamine. The error was detected and corrected at the sentence hearing: AB33; Tr1-27 ll34-44.

[20] The applicant was arrested in July 2006 for trafficking in, and possession of, dangerous drugs committed on 22 July 2006 and after his release on parole. The drug trafficked was methylamphetamine. For this offending he was sentenced on 12 October 2007 to seven years' imprisonment cumulative on his antecedent six year sentence with a parole eligibility date at 12 November 2011. He began serving the seven year sentence on 6 December 2008. He was released on parole on 14 November 2011.

[21] As noted, the applicant's parole was suspended on his re-arrest on 16 July 2012. He will have served all time required to be served on his seven year sentence and his antecedent six year sentence, at 7 December 2015.

**The sentencing remarks**

[22] The learned sentencing judge referred to the circumstances of the applicant's offending, his age, his drug usage habit and his criminal history, including his twice offending on parole. His Honour observed that the applicant must have been aware of harmful consequences in the community of his trafficking and that courts impose penalties for trafficking calculated to deter would-be offenders from engaging in it.[9]

[23] His Honour then made the following observations before passing sentence:

> "There are considerations in mitigation. The most significant is your plea of guilty. It is recent. It might have been expected that, if you were to gain full credit for the plea, that the plea would have been entered at an earlier stage. Nonetheless, it has led to resource savings by avoiding the trouble and expense of a trial. And it will lead to a more lenient sentence than would have been imposed had the case proceeded to verdict.
>
> Next, there is the consideration that you were a user, which is not irrelevant.
>
> Thirdly, even though the sentence which I must impose today is to be served cumulatively upon the sentence which you are serving as a consequence of section 156A of the Penalties and Sentences Act, nonetheless, I must take into account totality considerations.
>
> After a trial, I suspect that the sentence would have been of the order of 13 years. It would, if that, inevitably have been accompanied by a declaration pursuant to section 161B of the Penalties and Sentences Act, that you were convicted of a serious violent offence. That would have required you to serve 80 per cent of the sentence.
>
> I consider that totality considerations aside, the sentence after discounting for the plea, would have been of the order of nine years, perhaps a little longer.
>
> Allowing for totality considerations has persuaded me to decrease it to eight years. But, as I indicated during the course of your counsel's comprehensive and helpful submissions, not to attach the serious violent offence declaration to the discounted sentence would produce an inappropriately lenient consequence. That, I think, is a sufficient justification for retaining the serious violent offence declaration. But I should record that there are other considerations which would point in the same direction in any event. These include your extensive criminal

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9 AB39; Sentence 2 ll31-35.

> history for relevant drug offences, that the offending occurred whilst on parole, and that the scale of the trafficking meant that it was a serious example of such an offence."[10]

**The grounds of appeal**

[24] At the hearing of the application, leave was granted to the applicant to amend the proposed grounds of appeal. As amended, those grounds are:

1. In all the circumstances the sentence imposed was manifestly excessive.
2. The learned sentencing judge erred in the exercise of his sentencing discretion by failing to explicitly consider the aggregate sentence to determine whether the total sentence was just.
3. The learned sentencing judge erred in the exercise of the discretion to make a serious violent offence declaration by taking into account considerations irrelevant to its exercise.

[25] Senior counsel for the applicant submitted that a sentence of four years' imprisonment cumulative on the sentence being currently served with parole eligibility after one-third was required "to justly punish, to ensure relativity and to avoid a crushing sentence".[11] In oral submissions, primacy was placed on Ground 2 which was addressed first. I now turn to it.

**Ground 2**

[26] The totality principle, as explained by the High Court in *Mill v The Queen*,[12] often requires a court, when imposing a sentence which will be cumulative on, or overlaps, an existing sentence, to moderate the new sentence so that its overall effect is not harsh or crushing.[13]

[27] The applicant acknowledged that the learned sentencing judge had adverted to the totality principle. Moreover, he had reduced a nine year sentence discounted for the guilty plea to eight years to cater for totality considerations. The applicant's challenge is as to his Honour's application of the principle. The challenge was developed in argument on several bases.

[28] At the commencement of oral submissions, senior counsel for the applicant focused upon what she termed the "aggregate sentence", that is to say, the aggregation of the three cumulative trafficking sentences of six years, seven years and eight years, a total period of 21 years' imprisonment from 6 December 2002. It was proposed that with the parole eligibility date fixed at sentence, the applicant will have to serve 92 per cent of the entire period of imprisonment before he will become eligible for parole on the eight year sentence. This, it was submitted, is "beyond the punishment just and appropriate for the offending in the aggregate".[14]

[29] Next, criticism was made that his Honour did not explain why a reduction of one year only was made for totality considerations. His remarks were general.[15] In oral argument, the criticism was elaborated to include a failure to consider specifically the aggregate sentence in terms of the percentage of it required to be served in order to become eligible for parole.

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10 AB40; Sentence 3 ll6-36.
11 Written Submissions paragraph 71; Amendment thereto paragraph 7.
12 (1988) 166 CLR 59, per the Court at 66.
13 *R v Carey* [2015] QCA 51, per McMurdo P at [14].
14 Tr1-2 l43.
15 Tr1-7 ll14-23.

[30] In advancing this ground of appeal, the applicant referred to the notion of a "crushing sentence". In the end, no submission was made on the footing that, independently of the totality principle, courts are obliged to avoid a crushing sentence. Senior counsel for the applicant interrelated the two, stating that "when (as here) one gets to periods of imprisonment that extend into decades, then the notion of avoiding a crushing sentence is embedded into totality considerations".[16] The further criticism was made that this sentence is harsh or crushing.

[31] Reference was also made to the recent discussion of the content and application of the totality principle by this Court in *R v Kendrick*;[17] the acceptance in that decision of the view expressed in *R v Sullivan*[18] that, notwithstanding a provision such as s 156A(2) of the PS Act, the principle has application where a sentence currently being served derives from a breach of parole; and the endorsement by Redlich JA of the Court of Appeal of Victoria in *Azzopardi v R*[19] that the severity of a term of imprisonment is an exponential, not a linear function. His Honour observed:

> "Once the sentence satisfies the punitive and mitigatory sentencing objectives for the offender's overall conduct, the sentence is then proportionate to the offender's criminality. No justification then exists for a more severe sentence, proportionality and just deserts defining the outer limits of punishment."[20]

[32] The first basis for this challenge appears to be arithmetically incorrect. Allowing for the approximate 16 months spent on parole, the applicant will have to serve in custody of the order of 86 per cent of the aggregate sentence in order to become eligible for parole on the sentence under appeal.

[33] More significantly, the basis tends overlook the fact that the applicant's criminality is not confined to three periods of drug trafficking over an aggregate period of approximately two years and two months. It is a composite of that offending and the very significant facts that the applicant had breached the conditions of his parole during each of the periods that he was on parole, and that the mode of breach in each instance was by significant-scale drug trafficking. It is the serious offending on parole that has required that the applicant serve out the balance of his sentences of six years and seven years respectively.

[34] Having regard to these two features, I am unpersuaded that the proposition at the forefront of this basis of challenge reliably demonstrates error in the application of the totality principle.

[35] Nor am I persuaded that the second basis of challenge has merit. What the learned sentencing judge was required to do was to have regard to the principle of totality in a meaningful way. It was a matter for his judgment how allowance should be made for it. His Honour was not required to devise or adopt a stated percentage or fraction of time actually to be served under the aggregate sentence, as a standard by reference to which he was to calculate the duration of the sentence he was to impose or the period of it to be served for parole eligibility. Insofar as this basis implies that his Honour ought to have done that or something similar, it is misconceived.

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16 Tr1-3 ll19-31.

17 [2015] QCA 27.

18 [2005] VSCA 286, per Eames JA at [20] (Charles and Buchanan JJA agreeing).

19 [2011] VSCA 372; (2011) 35 VR 43 at [62] (Coughlan and Macaulay AJJA agreeing). This decision did not concern offenders who had offended in breach of parole or bail conditions.

20 *Ibid*, citing *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472.

[36] It is convenient at this point to deal with what I perceive to be a related shortcoming in the approach to totality urged for the applicant. It is inherent in the sentence which the applicant submits ought to have been imposed. A sentence of four years with parole eligibility at one-third would be very considerably less than that imposed for the comparable offending by the applicant on two previous occasions. By contrast, the gravity of the applicant's offending has been mounting on two planes. On one plane, this is the third occasion on which he has engaged in large-scale drug trafficking and, on the other, it is the second occasion on which he has done so in breach of his parole conditions.

[37] The sentencing objective of personal deterrence must have a justified prominence given the circumstances of the applicant's repeat offending on parole. In the context of offending with these particular characteristics, a substantially shorter sentence than those imposed for his earlier offending, as is proposed on behalf of the applicant, does not, to my mind, reconcile satisfactorily with the fulfilment of this sentencing objective.

[38] More broadly, I do not understand the view expressed in *Sullivan* to which I have referred, to be one that endorses a pattern for sentencing whereby progressively shorter sentences are imposed for repeat similar offending in breach of parole. Nor do the observations of Redlich JA which I have cited and would accept, implicitly endorse such a sentencing pattern as necessary to avoid a severe sentence, beyond the outer limits of punishment for offending with such characteristics.

[39] As to the third basis of challenge, it is a matter of judgment whether the sentence is harsh or crushing. Having regard to the scale of the applicant's drug trafficking, the repetition of it and the occurrence of the repeat offending during two separate parole periods, on the one hand; and allowing for the circumstances of mitigation, on the other, I am not satisfied that the sentence is harsh. The applicant will be eligible for parole in a little over six and a half years from now when he will be 47 years old. From that perspective, the sentence is not a crushing one.

[40] The applicant referred to sentences in other cases for the purpose of demonstrating, on a comparative basis, that his sentence was harsh or crushing. Those cases are considered in the discussion of Ground 1.

**Ground 3**

[41] This ground of appeal is focused upon the remarks of the learned sentencing judge that not to attach a serious violent offence declaration to the discounted sentence of eight years would produce "an inappropriately lenient consequence." That outcome, his Honour said, "is a sufficient justification for retaining the serious violent offence declaration".[21] Reference was made by the applicant to the following observation of Holmes JA in *R v Westphal*:[22]

> "I do not think in imposing such a declaration purely to ensure a sufficiently heavy sentence is an appropriate use of the mechanism".[23]

[42] It was submitted that what his Honour did was inconsistent with this observation. I am not persuaded that that is the case. His Honour's remarks do not disclose a sole

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21 The reference to retaining the serious violent offence declaration is evidently a reference to the serious violent offence declaration that his Honour would have had to have made had the head sentence of about 13 years that he considered appropriate for this offending, been imposed. Neither of the applicant's sentences of six years and seven years' imprisonment has been accompanied by a serious violent declaration.

22 [2009] QCA 223.

23 At [40].

purpose in the declaration of ensuring a sufficiently heavy sentence. In terms, one of the considerations he had in mind was the avoidance of inappropriate leniency. That objective is not precisely equivalent to an objective of achieving appropriate severity in sentencing. Further, as his Honour explained, it was not the only consideration which in his view justified the declaration. He continued:

> "But I should record that there are other considerations which would point in the same direction in any event. These include your extensive criminal history for relevant drug offences, that the offending occurred whilst on parole, and that the scale of the trafficking meant that it was a serious example of such an offence."

[43] The applicant relies upon his Honour's reference in this context to the applicant's extensive criminal history as disclosing impropriety in the approach of the learned sentencing judge. To develop the submission, the applicant referred to the following observations of McPherson JA in *R v Orchard*:[24]

> "For my part, I am by no means persuaded, that in declaring the applicant's conviction under count 5 to be of a serious violent crime, his past record in that regard was relevant. A power to declare an offender 'to be convicted of a serious violent offence' does not seem to me readily to lend itself to saying that his past offences make it so if, apart from particular features of the offence or perhaps offences under consideration, the addition of such a declaration would not be justified."[25]

[44] McPherson JA made these observations in circumstances where he had stated that it was clear that the offender's record of violent crime in the past was the decisive consideration in the making of the serious violent offence declaration by the primary judge.[26] That is not the case here. The learned sentencing judge neither stated, nor implied, that the serious violent offence declaration was justified by the applicant's history of prior offending. His Honour evidently was of the view that the scale of the trafficking for which the applicant was being sentenced and that it was the second occasion of like offending on parole, justified the declaration in order to avoid an inappropriate leniency in it. In my view, his Honour's approach is not inconsistent with the observations of McPherson JA. For these reasons, this ground of appeal cannot succeed.

**Ground 1**

[45] No issue was taken by the applicant with his Honour's adoption of a head sentence of about 13 years as appropriate for his offending, or with the discount of it to nine years for the plea of guilty. In essence, the applicant's case is that the sentence of eight years with a parole eligibility date of 1 May 2022 is manifestly excessive by reason of the serious violent offence declaration and an insufficient allowance for totality, or a combination of both.

[46] The applicant submitted that the sentencing provisions to which he was subject, the accumulation of the three sentences, and the specific distinguishing features of his offending meant that comparable sentences were of limited utility in assessing whether the sentence imposed here is manifestly excessive.[27] Notwithstanding, reliance was placed on

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24 [2005] QCA 141.

25 At [6]. The correctness of these observations was not challenged in this appeal.

26 *Ibid*.

27 Written submissions paragraph 65.

the sentence imposed on the applicant's erstwhile partner, Cant, on 22 April 2015, as "a very relevant comparable decision" which showed the applicant's sentence to be manifestly excessive.[28] Cant's sentence was not relied upon to mount a separate parity ground of appeal.[29]

[47] Cant had convictions in 2001 and 2003 for being knowingly concerned in the importation of commercial quantities of ecstasy and cannabis resin. These were Commonwealth offences. The ultimate effect of those sentences was that he was imprisoned for a total period of 17 years and six months from 19 November 2001, with a fulltime discharge date of 18 May 2019. The offending for which Cant was sentenced this year was committed after he was released on parole on 18 May 2011. He was returned to custody as a result of that offending and, under the legislative regime applicable to him, a new parole eligibility date of 19 May 2016 was set. Under that regime, there was no requirement that his 2015 sentence be cumulative upon the earlier sentences.[30] Cant was sentenced to eight years' imprisonment for the State trafficking offences to be served concurrently with the sentences he is now serving. His fulltime release date is 22 April 2023. No serious violent offence was declared and no parole eligibility date was set. Hence, he will become eligible for parole during his 2015 sentence after serving four years of it, that is, on 22 April 2019.

[48] The outcome then is that the applicant and Cant have received broadly similar custodial sentences for their aggregate offending[31] The offences for which they have been respectively sentenced, when taken in the aggregate, have both similarities and differences with regard to the types of offences committed. Yet it cannot be said that the criminality of the applicant's offending overall is of a lower order than Cant's such that this outcome is unjust to him. Cant had a more senior role in the joint trafficking enterprise carried on with the applicant. Yet, this was the applicant's third trafficking exercise and the second occasion of trafficking while on parole. Compared with Cant's sentence, the applicant's sentence cannot be seen as manifestly excessive.

[49] The applicant also referred to *R v Carey*[32] as providing some assistance. In that case, the offender pleaded guilty to drug trafficking in methylamphetamine over a period of about five months. The criminality of Carey's offending was regarded as below that of his co-offender, Ryan, whose sentence was set aside on appeal for factual error on the part of the sentencing judge as to the value of the drugs trafficked, and who was re-sentenced to 10 years' imprisonment. On appeal, Carey's sentence of 10 years' imprisonment was set aside for the same error and he was re-sentenced to nine years' imprisonment. Whilst a serious violent offence declaration was not made, his parole eligibility date was fixed beyond the halfway point of his sentence, at six years. Carey had been convicted in 2012 and sentenced to five years' imprisonment for trafficking in methylamphetamine over a period of about three months in 2009. The offending for which he was sentenced in 2014 was committed while he was on parole for the 2012 sentence.

[50] The decision in *Carey* is an instructive illustration of reconciliation of totality and parity considerations. However, it is not of immediate relevance to the applicant's

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28 Tr1-10 ll46-47.

29 *Ibid*, ll37-43.

30 As would have been the case had s 156A of the PPS Act applied.

31 Whilst Cant has a longer aggregate sentence (21 years and six months, compared with the applicant's 21 years), the period that he will spend in actual custody would be shorter in aggregate if he and the applicant are both released on parole when they become eligible for it, (16 years and eight months compared with the applicant's 18 years and one month).

32 [2015] QCA 51.

case where parity considerations are not directly in play. Also, Carey's offending does not have the aggravating circumstance of trafficking during two separate parole periods. Allowing for these differences, I do not regard the sentence in his case as a sound basis for compelling arguments against a serious violent offence declaration in the applicant's case or for manifest excessiveness in his sentence.

[51] Further, the decision in Cant is not to be regarded as authority for a proposition that where a sentence of less than 10 years is imposed for drug trafficking, a serious violent offence declaration is not to be made on the footing that an extension of the parole eligibility period is to be preferred. That approach was not taken in *R v Bost*[33] decided in this Court in 2014. The offender in that case had a leading role in an enterprise in which methylamphetamine and other drugs were trafficked on a large scale. The offending for which he was convicted continued over about two and a half years. It began during a period of suspension of a 12 month prison sentence he was serving for possession of drugs and associated equipment. On his plea of guilty, Bost was sentenced to nine years' imprisonment and a serious violent offence declaration was made.

[52] Bost's application for leave to appeal against his sentence was refused. Fraser JA regarded the combination of factors relied upon by the sentencing judge for the declaration, notably, the large scale trafficking, Bost's position at the head of the enterprise over a lengthy period and his extensive criminal history including drug offences, as sufficient and conventional justification for the declaration.[34] Such a description is apt for the reasons relied upon by the learned sentencing judge for making the serious violent offence declaration in the applicant's case.

[53] In my view, the applicant has not demonstrated that his sentence is manifestly excessive. This ground of appeal ought not succeed.

**Disposition**

[54] None of the proposed grounds of appeal can succeed. In these circumstances, the application for leave to appeal against sentence ought to be refused.

**Order**

[55] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[56] **FLANAGAN J:** I agree with the reasons given by Gotterson JA and the order proposed by his Honour.

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33 [2014] QCA 264.

34 At [18].