SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown* [2015] QCA 225
PARTIES:	**R** **v** **BROWN, Kieran Daniel** (applicant)
FILE NO/S:	CA No 315 of 2014 SC No 993 of 2011 SC No 235 of 2013 SC No 278 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 10 December 2013
DELIVERED ON:	13 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2015
JUDGES:	Margaret McMurdo P and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for an extension of time for leave to appeal is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the application for leave to appeal was filed 11 months late – where the applicant's only explanation for eight months of that delay was that his lawyers, at the time of his sentence, did not advise him that he could appeal – whether the explanation provided is adequate – whether an extension of time for leave to appeal should be granted APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant pleaded guilty to a number of drug related offences, including trafficking in methylamphetamine, MDMA and MDEA over a period of 19 months and was sentenced to nine years' imprisonment for the trafficking – where the applicant's offending was very serious and was committed, for the most part, while on bail – where the prosecutor, during sentencing submissions, informed the sentencing judge that MDMA is a Schedule 1 dangerous drug for the purpose of the *Drugs Misuse Act* 1986 (Qld) – where, in fact, MDMA was a Schedule 2 dangerous drug for

a large part of the trafficking period – where the sentencing judge did not place emphasis on the types of drugs trafficked and, instead, focused on the nature, extent and seriousness of the offending – whether the sentence imposed on the trafficking count was manifestly excessive

Drugs Misuse Act 1986 (Qld), s 5 , s 9
Drugs Misuse Amendment Act 2008 (Qld)
Drugs Misuse Regulation 1987 (Qld)

Beil v Mansell (No 1) [2006] 2 Qd R 199; [2006] QCA 173, cited
Chapman v State of Queensland [2003] QCA 172, cited
Queensland Trustees Limited v Fawckner [1964] Qd R 153, cited
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, considered
R v Feakes [2009] QCA 376, considered
R v Johnson [2007] QCA 433, considered
R v McGinniss [2015] QCA 34, considered
R v Saunders [2007] QCA 93, considered
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited
Spencer & Anor v Hutson & Ors [2007] QCA 178, cited

COUNSEL: S G Bain for the applicant
C N Marco for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Morrison JA's reasons for refusing this application for an extension of time for leave to appeal. The applicant, who was aged 22 to 27 at the time of his trafficking and related drug and fraud offences, has not provided a persuasive explanation for the significant 11 month delay in pursuing his appeal rights. Even so, this Court would extend time if the interests of justice warranted it. It is true that the judge was misinformed as to when MDMA became a Schedule 1 drug under the *Drugs Misuse Act* 1986 (Qld). But the effective sentence of nine years imprisonment with parole eligibility after four years was entirely appropriate given the high level of his offending, much of which was committed whilst on multiple bail orders; his limited cooperation with the authorities; and his late guilty plea. The interests of justice are not served by granting the extension of time.

[2] **GOTTERSON JA**: I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** On 10 December 2013 Mr Brown was sentenced, on his plea of guilty, for 29 offences. The main one was trafficking in dangerous drugs, for which he was sentenced to nine years' imprisonment.[1] All sentences ran concurrently, with a parole eligibility date set after four years, which, taking into account 200 days of pre-sentence custody, meant it was fixed at 24 May 2017.

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[1] Lesser sentences were imposed for the other charges, the next most serious being five years for production of methylamphetamine.

[4] On 2 December 2014, about 11 months out of time, Mr Brown filed an application to extend the time within which to apply for leave to appeal against his sentence. The grounds of that application were:[2] (i) he was not told by his solicitor or counsel that he could appeal his sentence, and only raised the question of appeal with his new solicitor on 5 September 2014; (ii) he had been trying to raise the money to file an application; and (iii) the sentencing discretion miscarried because the sentencing judge treated MDMA as a schedule 1 drug whereas it was a schedule 2 drug for most of the trafficking period.

[5] The issues raised by his application are:

(a) is there an adequate explanation to account for the delay;[3]

(b) what are the merits of the proposed appeal;[4] and

(c) is there good reason to relieve Mr Brown of the consequences of not filing in time?[5]

Legal principles

[6] The test to be applied has long been established by this Court in *R v Tait*:[6]

> "[5] The recent approach of this Court to the question of extending time in criminal appeals is sufficiently illustrated by *R v Mentink* and a number of unreported cases in this Court. These suggest that the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal, and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay, it being much easier to excuse a short than a long delay."

The explanation for the delay

[7] Mr Brown has sworn that he was not told by his solicitor or counsel that he could appeal his sentence, and only raised the question of appeal with his new solicitor on 5 September 2014.

[8] Therefore, the first time that the question of appealing the sentence was raised was nearly nine months after the sentence, and therefore eight months out of time. There is simply no explanation for that delay. The only statement is that Mr Brown's lawyers did

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2 As set out in the amended notice filed on 10 December 2014.

3 *R v Tait* [1999] 2 Qd R 667 at [5]; *Beil v Mansell (No 1)* [2006] 2 Qd R 199 at 207-208; *Spencer & Anor v Hutson & Ors* [2007] QCA 178 at [28] (*Spencer*).

4 *Chapman v State of Queensland* [2003] QCA 172 at [3]; *Queensland Trustees Limited v Fawckner* [1964] Qd R 153 at 163-164.

5 *Spencer* at [28].

6 [1999] 2 Qd R 667 at [5]. Internal footnotes omitted.

not advise him, **at the time of his sentence**, that the sentence could be appealed. That is not an adequate explanation.

[9] The delay between 5 September 2014 and 2 December 2014 has been adequately explained. It took until 30 October 2014 for Mr Brown to get the funds to pay his solicitor and counsel. The solicitor saw him on 7 November 2014 at which time he swore an affidavit for use on the application. However, counsel could not settle the documents so the solicitor did it, and filed the application on 2 December 2014.

[10] I do not consider that the delay has been adequately accounted for.

Merits of the proposed appeal

[11] The trafficking was over a period of about 19 months between 18 April 2007 and 21 November 2008, and involved methylamphetamine, MDMA,[7] and MDEA.[8] The plea of guilty was entered to the charge of trafficking over that whole period. However, within that period the acts that constituted the particulars of trafficking encompassed two distinct periods:

(a) three weeks between 18 or 19 April 2007 and 3 May 2007 (counts 2 to 8);[9] and

(b) six weeks between 10 October 2008 and 25 November 2008 (counts 9 to 14).

[12] Count 1 on indictment 993 of 2011 was the trafficking count. As the learned sentencing judge said, the remaining counts on that indictment were particulars of the trafficking.[10] Counts 3, 4 and 8 on that indictment identified the section of the *Drugs Misuse Act* 1986 (Qld) which created the possession offences, and by that means, identified whether the drug was categorised as a schedule 1 or schedule 2 drug under the *Drugs Misuse Regulation* 1987 (Qld):

(a) count 3 (April 2007), methylamphetamine, recited s 9(b) and therefore schedule 1;[11]

(b) count 4 (April 2007), MDMA, recited s 9(c) which refers to schedule 2;[12]

(c) count 8 (May 2007), MDEA and MDMA, recited s 9(c) – schedule 2.[13]

[13] Count 11 was also a particular of the trafficking. It was a charge of possession of MDMA on 20 November 2008, at which time MDMA was a schedule 1 drug. The indictment simply recited s 9 of the *Drugs Misuse Act* 1986 without identifying a subsection.

[14] Count 1, the trafficking count, listed methyamphetamine, MDMA and MDEA, and referred to s 5 of the *Drugs Misuse Act*. That section provides a different maximum penalty depending on whether the trafficking involves a schedule 1 or schedule 2 drug. For schedule 1 drugs, it is 25 years' imprisonment; for schedule 2 drugs, 20 years.

[15] During the sentencing remarks the learned sentencing judge did not refer to any of the drugs involved in the trafficking, or on counts 3, 4 or 8, by reference to whether they were schedule 1 or 2. Rather, her Honour spelt out the nature, extent and seriousness of the offending, thus:

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7 3,4-Methylenedioxymethamphetamine.
8 Methylenedioxyethylamphetamine.
9 Count 1 started on 18 April, and count 2 on 19 April.
10 Sentencing remarks, page 2 line 27.
11 Affidavit of Ms Gillies dated 3 June 2015, Exhibit A page 8.
12 Affidavit of Ms Gillies, Exhibit A, page 8.
13 Affidavit of Ms Gillies, Exhibit A, page 9.

(a) the fraud charges "displayed a level of sophistication";

(b) from about 23 May 2007[14] all offending occurred while Mr Brown was on bail;

(c) searches found "massive amounts of controlled substances which could be used to make precursor drugs in the course of producing methylamphetamine"; the learned sentencing judge referred to two large drums each containing 25 kilograms as well as 40 litres of toluene and other substances;

(d) over the period of trafficking "the criminality of your activities was probably increasing in seriousness and sophistication and flagrancy";

(e) count 8 concerned 20,000 tablets and "$86,000 paid for something less than five kilograms of tablets which yielded something less than two kilograms of pure … MDMA and MDEA";

(f) counts 11 and 14 concerned tablets "in the thousands";

(g) it was "very significant trafficking", "wholesale in its quantity and it must be regarded as commercial";

(h) there "were a number of drugs involved; methylamphetamine, MDMA and MDEA, as well as cannabis";

(i) the break and enter was "fairly brazen activity associated intimately with the trafficking";

(j) the trafficking was "moderately serious trafficking"; and

(k) the case fell into one of two groups of comparable cases; the more serious was where the range of sentences was 11 to 13 years and the other category was where sentences of nine to 11 years were given; this case fell into the latter category.

[16] In the sentencing submissions reference was made as to whether the drugs were schedule 1 or schedule 2. When characterising the offences the Crown told the learned sentencing judge that the final indictment involved schedule 1 drugs:[15]

> "MR MINNERY: Your Honour, by way of aggravating features, it's my submission that there is nearly constant offending on bail, there's the quite lengthy period of offending in terms of time and in terms of the scale of the offending, there is escalation to his offending over time, there is, despite the seizures, despite being involved with police, his offending gets worse, not better. There's the brazenness to it and also the sophistication, particularly the final indictment. It involves two schedule 1 drugs. Really, three, but the MDVA[16] (sic) was part of the MDMA tablet itself. So realistically, two schedule 1 drugs have been trafficked, and also the involvement with cannabis.
>
> HER HONOUR: MDMA is schedule 1, isn't it?
>
> MR MINNERY: Yes. …"

[17] In fact MDMA became a schedule 1 drug by the amendments introduced by the *Drugs Misuse Amendment Act* 2008. Part 3 of that Act (which contained the change) commenced on 1 June 2008.[17] Prior to that MDMA was a schedule 2 drug.

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14 This was when he was released on bail after being arrested on 3 May 2007.

15 T 1-23 lines 1-7.

16 An evident typographical error which should read "MDEA".

17 Government Gazette, Vol 348, No 30, 30 May 2008, p 674.

[18] In terms of the trafficking period, the impact of the change in 2008 is this:

(a) for about 13 and a half months, from 18 April 2007 to 31 May 2008 the trafficking was in one schedule 1 drug (methylamphetamine) and two schedule 2 drugs (MDMA and MDEA); that is about 70 per cent of the period;

(b) then for about five and a half months, from 1 June 2008 to 21 November 2008, it was trafficking in two schedule 1 drugs (MDMA and methyamphetamine) and one schedule 2 drug (MDEA); that is about 30 per cent of the period.

[19] Understood literally, the statement by the Crown was true. The trafficking did involve two schedule 1 drugs. It is just that MDMA became a schedule 1 drug part of the way through the trafficking period. Thus, as counsel for Mr Brown submitted, that statement is erroneous only if it is read as meaning that MDMA was a schedule 1 drug for the entire period of trafficking. It is capable of being read that way.[18]

[20] However, I am not satisfied that the error conveyed by the Crown in submissions actually had an impact on the sentencing. The learned sentencing judge's comments do not mention the difference at all, nor that any drug fitted into one or other schedule, whether in respect of individual offences or in respect of the trafficking offence. Her Honour characterised the seriousness of the offending by the facts concerning the nature, scope, escalation and commerciality of the trafficking. Further, the flagrancy of the offending was a significant factor, given that from about 23 May 2007 it was while on bail. That meant that about 18 months of the 19 months (or 95 per cent of the period) consisted of offending while on bail.

[21] Further, the comparable cases that the learned sentencing judge referred to, *R v Assurson*[19] and *R v Feakes*,[20] were both cases where the trafficking was in a mix of schedule 1 and schedule 2 drugs.

[22] However, if the contrary conclusion was reached, namely that the learned sentencing judge wrongly proceeded on the basis that MDMA was a schedule 1 drug for the whole period, that would mean that the sentencing discretion would be exercised afresh. For the reasons which follow, that would result in the same sentence being imposed.

Re-exercise of the sentencing discretion

[23] Some aspects of the characterisation of the sentence are referred to in paragraph [15] above. However, further details emerge from the agreed schedule of facts[21] and the submissions on behalf of Mr Brown.[22]

[24] The plea was entered on the day before the commencement of the second trial set for the charges. There had been a nine day committal in 2009-2010, 36 mentions and four pre-trial hearings before it came on for trial. A four week trial was scheduled with over 100 witnesses. Not all the delay in getting to trial was caused by Mr Brown. Hence, it was a late plea, but with value in terms of the saving of court costs and time, and public moneys.

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18 It must be noted that counsel for Mr Brown did not correct the error, and there was no discernable forensic advantage for him not to do so.

19 [2007] QCA 273 (*Assurson*).

20 [2009] QCA 376 (*Feakes*).

21 Affidavit of Ms Gillies, Exhibit A, page 11.

22 T 1-25 to T 1-27.

[25] The trafficking was over 19 months and was in respect of three drugs, methylamphetamine, MDMA and MDEA. As well, Mr Brown was in possession of significant quantities of those dangerous drugs, and acquired the equipment, precursor materials and instructions for producing them. He was in possession of methylamphetamine paste (4.416g pure), 486 MDMA pills (24.612g pure), and MDEA (3.516g pure).[23]

[26] He purchased 20,000 MDMA tablets (1976.6g pure) plus MDEA (193.4g pure) for $86,110. Police found these in a car in which Mr Brown was travelling. The 20,000 tablets weighed about 4.4 kilograms. He had sets of scales, a pill press, 1683 tablets and 5g of powder, with a gross weight of 201.368g of MDMA, 12.484g pure.[24]

[27] Mr Brown used false identification to rent a storage shed. When the business owner of the shed discovered it had been rented in a false name, it was locked and a sign was put on directing anyone to the owner. Mr Brown broke into the shed by cutting a hole in the security fence and cutting off the lock on the shed. He was disturbed in the process of removing goods from the shed. In Mr Brown's car police found a driver's licence, 18+ card, a debit card and a credit card, all in a false name, and the methylamphetamine paste and clip seal bags referred to above. In the shed were MDMA tablets and MDEA.

[28] In October 2008 a police operation identified Mr Brown involved with another person in relation to a hydroponic setup for cannabis production. Mr Brown was an investor in the production, and his job was to seek and retain investors. The hydroponic setup was in a shipping container, stacked with all the equipment for production of cannabis. Two more shipping containers were identified, with similar contents. Mr Brown possessed the containers and contents with the intention of producing cannabis in significant quantities.

[29] Police intercepted Mr Brown on one occasion and found $16,871.75 in cash, several mobile phones and drug related notes in the glove box of his car. The money was from drug sales. On another occasion the car in which Mr Brown was travelling was searched. Police found 1,683 tablets of MDMA (12.484g pure) and 5g of powder, three sets of scales, parts for a pill press, and a pill press in the boot. Mr Brown had $2,240 in cash.

[30] Mr Brown had the components of a clandestine laboratory for the manufacture of methylamphetamine, and the instructions to do so. He intended to produce methylamphetamine.

[31] The fraud counts involved numerous occasions when Mr Brown used documents in false names, such as driver's licences, ATM cards, credit cards, citizenship certificates, and Medicare cards. He used the false documents to purchase two Mercedes cars, rent a storage shed and hire cars.

[32] The fraud counts showed a persistent, sophisticated, and systematic series of fraudulent activities, starting in September 2006 and ending in November 2007. Part of the fraud (the rental of the storage shed) was to facilitate the drug trafficking and potential production of methylamphetamine.

[33] The trafficking started in April 2007. On 3 May 2007 Mr Brown was arrested and spent 20 days in custody. All trafficking and related offences thereafter occurred while Mr Brown was on bail. That is a serious aggravating feature.

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[23] This amount of MDMA was on 19 April 2007.

[24] This amount of MDMA was on 20 November 2008.

[34] The arrest and time in custody did nothing to dampen the trafficking. Mr Brown was arrested again on 25 November 2008, and spent 57 days in custody before being released on bail. Counts 15 and 16 on the trafficking indictment occurred after that again. Those counts in 2010 were in respect of Mr Brown's intended clandestine laboratory to produce methylamphetamine. He spent 123 days in custody then, before again being released on bail.

[35] That means that the offences under indictment 235 of 2013 occurred while Mr Brown was under three sets of bail undertakings. Those counts were for production of methylamphetamine (between 8 September 2010 and 27 March 2012), and possession of a piece of equipment used in that process.

[36] Mr Brown set up a company "Queensland Lab Supply" to import the precursor materials for the production. The operation was revealed when an importation of 28 kilograms of some substance was discovered. A search of Mr Brown's home revealed five mobile phones (containing numbers of well-known drug dealers), two large drums each containing 25 kilograms of a material used in production of a precursor to methylamphetamine, plus a notebook with a list of chemicals, including 40 litres of Toluene. Mr Brown lied to the police about the substance in the 25 kilogram package.

[37] In my view this was a case of very serious trafficking in a mix of schedule 1 and schedule 2 drugs. It is right to characterise the trafficking as very significant, commercially motivated and at a wholesale level. The time over which it is admitted to have occurred, and the sheer quantities and amounts of money involved demonstrate that. It is also right to characterise it as flagrant, and escalating in its intensity and flagrancy. Most of it occurred while on bail, and repeated police intervention seemed to do nothing to slow Mr Brown's appetite for offending. Even after the third period in remand and third release on bail the offending continued with the production of methylamphetamine over an 18 month period in 2010 to 2012.

[38] Mr Brown was 22 to 27 at the times of the offences, as they spanned five years and seven months. He was almost 23 to 24 when the trafficking occurred. He had a minor and largely irrelevant criminal history.

[39] As the sentencing comments and submissions reveal there was little remorse, and nothing of note in his background to act as substantial mitigating factors. It is true that he could show a work history, but it was, from what was said by his counsel, sporadic. Whilst there was constant drug use on Mr Brown's part there was nothing to suggest drug addiction or that this offending was to serve an addiction. His counsel put it as "[Mr Brown] at least attributes part of his recklessness to the use of those drugs".[25] That is not redolent of an addiction driven activity. Rather this was a case of pure financial greed that motivated the offending.

[40] Counsel for Mr Brown submitted that the quantities involved in counts 4 and 8 (486 and 20,000 tablets of MDMA at a time when it was a schedule 2 drug) "mark this particular trafficking as one dealing largely in schedule 2 drugs".[26] I do not accept that submission. The trafficking was across the entire period, and the plea accepted that to be so. The learned sentencing judge proceeded on the basis that the individual counts in the specific three and six week periods were the high water marks of the

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25 T 1-26, lines 24-25.

26 Appeal transcript T 1-3.

trafficking. I consider that conclusion to be correct. That still means that this was very significant constant trafficking in both schedule 1 and schedule 2 drugs. There was no evidence to suggest cessation of one in favour of the other, but rather an escalation over time.

Comparable cases

[41] A number of comparable cases were proffered, including *Assurson*,[27] and *R v Saunders*,[28] and the learned sentencing judge referred to *Feakes*[29] as well.

[42] *Assurson* involved a late plea of guilty to trafficking in methamphetamine, MDMA and cocaine. The period was six weeks in November 2004 to January 2005. At the time that was a combination of schedule 1 and 2 drugs. The sentence was nine years and a serious violent offence (SVO) declaration was made. The case turned on whether the SVO made the sentence manifestly excessive. The trafficking was over six weeks, during which time Assurson "was able to source and wholesale significant quantities of cocaine, speed and ecstasy". He made a profit of $29,900, but one potential transaction would have netted a profit of $200,000, with a possibility of up to $1 million. Assurson discussed that he had used, and was prepared to use, violence to recover money he was owed.

[43] He was 23 at the time, and 26 at sentence, and had a relatively minor criminal history. It was conceded that a start point of 12 to 13 years was appropriate. The Court said nine years was within range, noting that the trafficking was "over a short period of time and … only a relatively small amount of profit was made". The SVO was removed, and parole eligibility set after five and a half years.

[44] *Assurson* supports the sentence imposed on Mr Brown, in that multiple drugs were used, they were schedule 1 and 2 drugs, the trafficking period was short, the profits were not large, and the offender was similar in age and history.

[45] *R v McGinniss*[30] is a recent decision where this Court reviewed many of the comparable cases for trafficking. It involved a 10 year sentence imposed, on plea of guilty, for trafficking in methylamphetamine over a seven month period. He was 26 at the time, and 28 at sentence, with no relevant criminal history. He supplied small amounts to three regular customers, and other occasional customers. One customer was supplied on 30 or 40 occasions over that period, at an amount of at least $54,000. Other supplies were at $10,000 and $20,000. As well McGinniss was paid $1,000 per week to carry out various tasks in another drug syndicate, including transporting drugs worth more than $100,000. He was intercepted and had pure crystallised methylamphetamine worth more than $200,000 in his possession. Mitigating features were urged, including that he had work, commenced rehabilitation had not reoffended while on two years bail.

[46] Fraser JA said:[31]

> "The Court has recently analysed the relevant sentencing decisions: see *R v Galeano* at [26]-[31], *R v Ryan* [2014] QCA 78 at [43]-[45],

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27 [2007] QCA 273.
28 [2007] QCA 93 (*Saunders*).
29 [2009] QCA 376.
30 [2015] QCA 34 (*McGinniss*).
31 *McGinniss* at [11], Carmody CJ and Gotterson JA concurring.

and *R v Johnson* at [43]-[46]. As I observed in *R v Safi* [2015] QCA 13 those analyses indicate that, whilst each sentence requires an exercise of discretion with reference to the facts and circumstances of the case, for substantial trafficking in a Schedule 1 dangerous drug of the order of the applicant's trafficking, offenders who have pleaded guilty and invoked a range of mitigating factors have commonly been sentenced to terms of imprisonment of between 10 and 12 years (with the automatic declaration that the offence was a serious violent one). In this case, as in *Safi*, it is sufficient to quote the following passage from the judgment of McMurdo P, with whose reasons Holmes JA and I agreed, in the broadly similar case of *Johnson* in which a sentence of 10 years imprisonment was upheld:

> '[45] In *Feakes* [2009] QCA 376, the applicant pleaded guilty to trafficking in an assortment of Sch 1 and Sch 2 dangerous drugs and to other related drug offences. He applied for leave to appeal against his 10 year sentence. He was 30 and 31 when he offended and 34 at sentence. He had some relevant but minor criminal history. The trafficking was committed in breach of a good behaviour bond when he was subject to "drug diversion". His offending consisted of supplying drugs on 11 particularised occasions over a seven month period to a covert police operative. He supplied 32 grams of cocaine, almost 5,000 tablets containing 330 grams of the then Sch 2 drug MDMA, and 110 grams of the Sch 2 drug MDEA. His benefit from drug related activity was over $56,000 and about $115,000 passed through his hands during the trafficking period. His trafficking was commercially motivated. After reviewing the cases of *R v Kashton* [2005] QCA 70; *R v Assurson* (2007) 174 A Crim R 78, [2007] QCA 273; *Rodd*; *R v Elizalde* [2006] QCA 330; *R v Bradforth* [2003] QCA 183 and *R v Raciti* [2004] QCA 359 this Court noted that, absent extraordinary circumstances, in cases of trafficking in Sch 1 drugs on this scale mature offenders who have pleaded guilty can expect a sentence of at least 10 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to slightly lesser terms. Feakes had a grossly dysfunctional upbringing and had made real efforts to overcome his dependence on cannabis and other drugs so that he had promising prospects of rehabilitation. Whilst a sentence of nine years imprisonment could have been imposed, the 10 year sentence was not manifestly excessive.'"

[47] Whilst *McGinniss* itself is a more serious case than that of Mr Brown, involving only schedule 1 drugs, a greater organisation of the trafficking business and greater profit, it is the reference to *R v Feakes*[32] that is apposite here. The learned sentencing judge considered *Feakes* indicated the range of offending, that is between nine to 11 years, rather than the more serious cases where 11 to 13 was indicated.[33]

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32 [2009] QCA 376 (*Feakes*).

33 Sentencing remarks, page 4 lines 29-35.

[48] Further, there was a previous decision of this Court in *R v Johnson*[34] which shows, in my view, that the nine years that Mr Brown received was well within the range of sentences that might have been imposed.

[49] *Johnson* involved a nine year sentence, reduced to eight on appeal. It was a plea of guilty to trafficking in methylamphetamine, speed and marijuana over five years. Error in the sentencing judge's approach was identified so the question was not one of manifest excess, but the imposition of a new sentence. Johnson purchased methylamphetamine in ounce lots for about $5,000 per lot. He supplied to people who came to his house, in amounts from $20 to $500. On one occasion he gave $12,000 to a courier to purchase 2.5 ounces of speed. Johnson was an addict himself, and the proceeds of the business supplied his own habit and the living expenses of him and his partner.

[50] The Court held that Johnson was at "a lower level of criminality relative to larger retailer or wholesalers who traffic in dangerous drugs for commercial gain" and:[35]

> "The variety of circumstances which may attend trafficking in dangerous drugs means that, with this offence as with many others, it is not possible neatly to categorise the degrees of seriousness of offending in particular cases with quite the degree of precision suggested by the submissions made on the applicant's behalf. **Nevertheless, it is, I think, possible to say that the nature of the offending engaged in by the applicant, even over the period of five years, is less serious than that which this Court has regarded as attracting a sentence of the order of 12 to 13 years by way of head sentence before circumstances in mitigation, such as an early plea of guilty, are taken into account. There is much force in the submission made by Mr Moynihan SC, who appeared for the applicant, that the criminality of an addict who sells dangerous drugs at the retail level to support his habit is of a different order from that of a large retailer or wholesaler whose motivation is 'cynically commercial'.** While one cannot ignore the seriousness of the applicant's offending and the social harm he has caused, it would be both unrealistic and unduly harsh to refuse to recognise that the applicant too is a victim of dangerous drugs."

[51] Whilst Mr Brown was a user of drugs there is nothing to suggest that he was in the scale of a seller at retail level merely to support his own habit. The learned sentencing judge characterised the trafficking as "very significant trafficking" and "wholesale in its quantity and it must be regarded as commercial". *Johnson* is therefore a less serious case, and supports the conclusion that the nine years in Mr Brown's case was within range.

[52] *Saunders* involved trafficking in MDMA and methylamphetamine over nearly six months, at a time when the drugs were schedule 2. There was also supply of cocaine and cannabis, as well as other drugs. A sentence of eight years was imposed, with an SVO. Saunders was about 37 at the time, and 40 at the sentence. He had a number of prior convictions.

[53] He sold in batches of 10 to 1500 tablets, and sourced 9,000 tablets valued at $180,000 for resale. A search found him in possession of 101.382g of methylamphetamine, 2,361.5g of MDMA and 17.705g of cocaine. More tablets and MDMA were found at his house.

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34 [2007] QCA 433 (*Johnson*). This is not the same decision as was cited in *McGinniss*; that *R v Johnson* was [2014] QCA 79.

35 *Johnson* at [17]. Emphasis added; internal footnotes omitted.

[54] The Court held that the eight years sentence was not manifestly excessive, and "a head sentence of at least 10 years could be supported".[36] The Court had to exercise its discretion afresh because of demonstrated error in relation to the SVO. Saunders was resentenced to eight years without the SVO. Relevant to that conclusion was the fact that the trafficking was in schedule 2 drugs.[37]

[55] In my view *Saunders* also supports the conclusion that the sentence imposed on Mr Brown was within range.

[56] *Feakes* involved trafficking in cocaine,[38] MDMA[39] and MDEA,[40] over a period of about five and a half months. There were associated production and possession offences. He pleaded guilty and a sentence of 10 years was imposed, with an automatic SVO. Feakes was 30 to 31 at the time, and 34 at sentence. He had a criminal history that included drug offences. The trafficking started some seven days before a previous good behaviour bond expired.

[57] The trafficking was commercially motivated. The quantities sold included about 32g of cocaine, almost 5,000 tablets containing 330g of MDMA, and 110g of MDEA. He had a hydroponic garden set up to produce cannabis (5,001g were found), and a search revealed cash ($5,000), clip seal bags, 9.983g of pure cocaine, 2.881g of 74.6 per cent pure MDMA, and other tablets that contained 3.683g of pure MDMA, among other things. Feakes made at least $56,199.66 in profit, with in excess of $115,000 passing through his hands over the trafficking period.

[58] The Court considered that *Assurson* was a less serious case than *Feakes*. It was serious trafficking, and not by a youthful offender.

[59] Notwithstanding the mitigating features,[41] the Court did not consider it appropriate to interfere with the sentence. McMurdo P said:[42]

> "[34] … He did not (or was unable to) take advantage of that lenient community based rehabilitative sentence and commenced trafficking in sch 1 and sch 2 drugs whilst at the tail end of that four month good behaviour order. This Court has often stated that those who traffic in sch 1 drugs for profit at a high level and in large quantities can anticipate that courts will impose heavy deterrent sentences: on a cost-benefit analysis, the profits from such illegal, anti-social and dangerous conduct are not worth the resulting long jail sentences."

and

> "[36] The cases which I have analysed demonstrate, at their highest for the applicant, that because of his significant mitigating features, particularly his rehabilitative prospects, a sentence of nine years imprisonment without a serious violent offence declaration would

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36 *Saunders* at [12].
37 *Saunders* at [22]-[23].
38 A schedule 1 drug under the *Drugs Misuse Act* 1986 (Qld).
39 Then a schedule 2 drug.
40 A schedule 2 drug.
41 A grossly dysfunctional upbringing and dependence of drugs, but good prospects of rehabilitation.
42 *Feakes* at [34] and [36], Fraser JA and Fryberg J concurring.

> have been at the bottom of the appropriate range, which I consider is between nine and 11 years imprisonment. But they do not demonstrate that the sentence imposed of 10 years imprisonment was outside that range. The sentencing range in this case spans the 10 year point at which a serious violent offence declaration becomes mandatory, requiring the offender to serve 80 per cent of the sentence before parole eligibility."

[60] In my view *Feakes* supports the imposition of a nine year sentence for Mr Brown's offending.

[61] Counsel for Mr Brown added an oral submission that the setting of the parole eligibility date at just short of the halfway mark made the sentence manifestly excessive. She contended that the date should be set at the usual one third to acknowledge the plea of guilty. I cannot accept that submission. Whilst the plea avoided the time, costs and inconvenience of a long trial involving about 100 witnesses, there were countervailing factors: it was not really indicative of true remorse, as Mr Brown's escalation of the offending in the face of police intervention, and while on bail shows; there had been a long committal involving cross-examination of (no doubt) many of those witnesses; and considerable delay following 36 mentions and four pre-trial hearings (some of which were attributable to Mr Brown), and two separate trial listings. In my view there was good reason for the plea not being treated in the usual way.

Conclusion as to sentence

[62] For the reasons above, if leave were granted I would impose the same sentence for the trafficking offence as was imposed by the learned sentencing judge, namely nine years' imprisonment, with parole eligibility set at 24 May 2017.

[63] The sentence on the trafficking charge was the sole point of the proposed challenge to the sentence. No challenge was mounted to any other part of the sentences imposed.

Conclusion

[64] For the reasons expressed above, there is no adequate explanation for the delay in filing the application for leave to appeal, and the prospects of successfully challenging the sentence imposed are poor. Consequently there is no reason to relieve Mr Brown from the consequences of not filing his application in time.

[65] I would refuse the application to extend time.