SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nguyen* [2016] QCA 57
PARTIES:	**R** **v** **NGUYEN, Nam Van** (appellant/applicant)
FILE NO/S:	CA No 219 of 14 SC No 566 of 12
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 8 August 2014; Date of Sentence: 15 August 2014
DELIVERED ON:	11 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2015
JUDGES:	Holmes CJ and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty after trial of one count of unlawfully trafficking in heroin and one count of possessing a sum of money obtained from trafficking – where telephone intercept evidence established that the user of a certain mobile telephone was trafficking heroin – where the Crown case was that the appellant was the user of the relevant telephone – where the Crown relied on an accumulation of circumstantial evidence to infer the appellant was the user of the relevant telephone – whether the jury could be satisfied beyond reasonable doubt on the evidence that the appellant was the user of the relevant telephone CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was found guilty of one count of unlawfully trafficking heroin and one count of possessing a sum of money obtained from trafficking – where the appellant

was sentenced to 12 years and six months imprisonment on the trafficking count – where the appellant was sentenced on the basis of trafficking over a four month period as a wholesale and street-level dealer with a turnover in excess of $50,000 – whether the sentence was manifestly excessive

R v Carey [2015] QCA 51, cited
R v Feakes [2009] QCA 376, cited
R v Galeano [2013] 2 Qd R 464; [2013] QCA 51, cited
R v George [2001] QCA 135, cited
R v Johnson [2014] QCA 79, cited
R v Matasaru [2000] QCA 246, considered
R v McGinniss [2015] QCA 34, cited
R v Ryan [2014] QCA 78, cited
R v Safi [2015] QCA 13, cited
R v Saunders [2007] QCA 93, cited
R v Le (2002) 127 A Crim R 573; [2002] QCA 17, cited
R v Truong & Nguyen [2001] QCA 98, cited
R v Versac [2014] QCA 181, considered

COUNSEL: S J Keim SC for the appellant/applicant
D L Meredith for the respondent

SOLICITORS: Guest Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The appellant was found guilty by a jury of one count of unlawfully trafficking in heroin between 14 February 2011 and 22 June 2011 and one count of possessing, on 21 June 2011, a sum of money obtained from trafficking. He was sentenced to 12 years and six months imprisonment on the trafficking count. He appeals against his convictions and seeks leave to appeal against the sentence for trafficking on the ground that it is manifestly excessive.

[2] At trial, the Crown adduced evidence of telephone conversations, conducted in both Vietnamese and English, obtained from intercepts placed pursuant to warrants on three mobile telephone numbers. The appellant conceded at trial that a participant in the intercepted conversations (who on the Crown case was the appellant) was a person engaged in selling some form of illicit substance. On the defence case, the appellant (who did not give evidence) was not that person. His argument here was that the verdicts of guilt, which must have been based on a contrary conclusion, were unreasonable.

The telephone intercepts and eventual seizure of relevant telephones

[3] The first of the telephone intercepts, with the codename "Storm", was obtained in respect of the mobile telephone number 0438 141 594, the subscriber to which was a person named Van Tran Chu; the second, codenamed "Gouda", was for the number 0402 428 552, with a subscriber named Minh Tran; the third, codenamed "Brie", was for the number 0423 205 990, held in the name of Mark Peterson, which appears to have been a fictional identity. (For convenience, I will set out each relevant mobile phone number in full, and thereafter refer to it by its last three digits.)

[4] A phone with the sim card for the number 990 was found in the possession of the appellant's co-accused, Quoc Si Nguyen, when he was stopped at Aratula on a return trip from Sydney on 19 June 2011. A number of calls made to and from both the 990 number and the Van Chu telephone number, 594, were made by or received from two mobile phone numbers: 0416 311 996 and 552 (the subject of the Gouda intercept). The appellant was registered as the subscriber to the 996 service, with his address being given as 41 Durella Street, Durack.

The evidence pointing to the appellant as the user of 552

[5] On 21 June 2011, at the conclusion of the operation, police searched the appellant's home address, 37 Skylark Street, Inala. The appellant was there, and his driver's licence, bearing his photograph, was located; it gave his address as 41 Durella Street, Durack. The police found a number of mobile phones on a television cabinet, including a Nokia telephone with a dual sim with the 552 number and an additional number, 0402 127 408. A Samsung with the 996 number was also found, as was another Nokia with the number 0415 638 723. (The contacts for the 552, 408 and 996 sims all included the 990 number for the phone found on Quoc Si Nguyen.) Finally, a woman at the premises was found to have an iPhone with the number 0414 472 272 in her purse. Other items located on the search were $28,000 in cash, a set of digital scales, clip seal bags, and a bag containing 26 grams of methylsulfonylymethane, a cutting agent.

[6] The Crown sought to connect the appellant to the 552 telephone number not only through its finding at his home but through links, direct and indirect, with other phones found there, and through the content of calls made to and from it, relating to events apparently involving the appellant. On 3 April 2011, a man named Bird was intercepted by police and found with small deals of heroin. Both the 552 and 996 numbers appeared in the contacts recorded in his mobile phone, the second against the name "Nate". The following day, an individual using the 552 number called Quoc Si Nguyen on 990 and said that his "soldier" had been caught. Another man named Aaron Pahoff, who from the content of his calls was a small-time seller, courier and addict, regularly rang the 552 number to be given instructions and to report sales made. Until 14 April 2011, he used a mobile registered in his own name; after that, his calls were made to 552 from the 723 number, the Nokia found at the appellant's house. On 17 April 2011, the user of 552 asked whether there was credit on the phone he had given Pahoff, suggesting that it was he who had provided the 723 phone.

[7] On 21 April 2011, police raided Bird's house in Inala and he was found with heroin. At 11.51 am on that day, the user of 552 told Pahoff not to take any more orders for the moment for anything but "smallies" because "Birdy just got done". Pahoff continued to make calls on the 723 number until 16 May 2011. Thereafter he used, first a landline registered to his mother, and subsequently his original mobile number.

[8] On 22 April 2011, a police officer named Andrejic intercepted a Mazda vehicle with a registration number, according to his evidence as transcribed, was 667-MCB. Its driver produced a licence in the name Nam Van Nguyen. Andrejic and his companion searched the vehicle, finding an ice pipe and $9,000 in cash. The driver claimed that he had the cash to give to his sister at her wedding the following day. He was given a notice to appear in court on 10 May 2011, in relation to the utensil. That corresponded with a call from the 552 number to Pahoff later the same night, in which the caller said that he had been pulled up with cash and had to go to court on 10 May. The incident was described again the following day by a person using 552 in a call received

from Quoc Si Nguyen on 990. Later on the same day, the person using 552 referred to going to a wedding that day. On 10 May 2011, the user of line 552 told Pahoff he would see him after court.

[9] Another police interception, this time of a pedestrian, took place on 26 April 2011 in Skylark Street Inala. Constable Lukin conducted a search of the person spoken to and recorded his details. On a search of the police system, she saw that a photograph there matched the man she had seen, whose name and address as given to her was Nam Van Nguyen of 41 Durella Street Durack, with the birth date 2 November 1974. He had mentioned meeting a girl called Vicky and also mentioned a male's name which, on a leading question, she agreed, was Aaron. That was in the early hours of 26 April. On the same day, a person using the 552 number telephoned Pahoff to warn him that police had intercepted him; that he, the caller, would have to go to see Vicky; and that he had told police that he had come from Pahoff's place, so Pahoff should confirm that he had been there.

[10] On 5 May 2011, a Constable Skuse and his partner intercepted a brown Mazda, whose registration (again according to the transcript) they recorded as 667-MCD,[1] in Inala Avenue. At the trial in 2014, Skuse gave evidence that the driver produced a licence bearing a photograph, the name on which was Nam Van Nguyen. He was not detained, but his details were recorded on a computer document referred to as a "street check". Skuse could not recall the address given, although it was, he said, on the licence. The street check in fact showed it as 37 Skylark Street, Inala. In cross-examination, there was this exchange:

> "And you say that you now remember, having looked at this report, that you looked at his driver's license, and it had the address 37 Skylark Street, Inala on it?---I didn't say I remembered the address. I remember – once I looked at the intel file, I do vaguely remember pulling him up.
>
> The simple fact is it wasn't the address on his license. It was a Durack address on his license?---I didn't say I remembered the address on the license."

[11] The precise time of Skuse's interception of the driver named Nam Van Nguyen was not given in evidence. On the same day, there had been text messages between the user of 552 and Pahoff's number, evidently associated with drug supply, as well as a call from Quoc Si Nguyen. At 11.23 am the user of 552 received a call from a woman using an unidentified number to whom he referred as "my dear". The woman said that a male who had previously sold a laptop wanted to speak to him. The male was put on the line and there was more discussion about selling laptops, evidently code for drugs. He said he was at the shop at Darra. (The appellant and his wife ran a clothing business at Darra.) The user of 552 gave him instructions to meet at the end of Skylark Street and to obtain a phone number from "my wife". The woman was put back on the line and there was some discussion between her and the 552 user about providing the number to the customer.

[12] Another person rang from a different number shortly afterwards and there was a discussion about payment of $200 as a "deposit for the car". From this point, the Skuse interception assumes some significance. The user of 552 said that he would

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[1] It was accepted that the apparent variation in the last letter as between Andrejic's and Skuse's accounts was probably the result of a transcript error.

see his caller soon and warned him that "the dogs were running around" and he was to make sure that he was not followed. At 12.10, a woman using 272 (the iPhone found at the Skylark Street house on the search) rang the 552 number. The 552 user receiving the call referred to the woman in affectionate terms and told her that he had "got done"; he had been searched by police but luckily had "it" in his mouth and "swallowed the whole bloody thing". The woman revealed that someone had come into the shop offering to sell, but she had said she did not want to buy. The male warned that "they" suspected she was selling over there and would search the place; she was to hide the money. A minute or so later another call occurred between the same parties in which the male described the search again and referred to driving in the direction of "our house…on Skylark Street". Some other people near the car had, he said, been arrested on Skylark Street. In a later call on the same day, the 552 user once more described the search and swallowing the drugs.

[13] On 24 May 2011, at 10.48 am, the 552 user telephoned Pahoff's mobile and arranged for him to visit in the next half hour. Two police officers involved in the investigation, Detectives Fergusson and McCarthy, had Pahoff under surveillance. Watching him from a vehicle, they saw him leave the unit block where he lived with his mother some streets away from the appellant's residence and walk across a park to Skylark Street where he crossed a vacant lot next to the appellant's property. McCarthy lost sight of him there, but Fergusson, who had left the car, saw him go through the side gate of 37 Skylark Street, emerging about 20 minutes later. The two police officers waited for him in the park and spoke to him on his return, at about midday. Pahoff produced his driver's licence and telephone and they let him go on his way. About 10 minutes later Pahoff used his mobile phone to text to 552 saying that he had been searched by plainclothes police officers in the park. A series of texts about the incident followed, with the 552 user counselling Pahoff to be careful.

[14] From calls to the 990 number, the subject of the Brie intercept, on 17 June 2011, it emerges that the user of 552 was intending to visit Quoc Si Nguyen to give him money to buy heroin in Sydney. Quoc Si Nguyen was tracked through his mobile telephone travelling to Sydney and returning via Aratula where he was intercepted on 19 June 2011. Packages concealed in his vehicle contained about 700 grams of powder, in turn containing about half a kilogram of pure heroin. The mobile number ending 990 was taken from Quoc Si Nguyen. It contained records of calls or text messages to and from the 996, 552 and 408 numbers, all found at 37 Skylark Street when it was searched two days later.

[15] In addition to the links which could be made through the fact and content of the calls made to and by the 552 number, the Crown relied on the fact that some of the 552 calls, made when the caller was evidently at home, were transmitted through an intercom tower in Partridge Street, Inala, which was not far from the Skylark Street address.

[16] Finally, the Crown invited the jury to listen to a tape-recording made on the search of 37 Skylark Street and compare the appellant's voice with that of the man heard in the intercepted calls, suggesting they would conclude they were one and the same person. Counsel on the appeal agreed on 13 intercepts which this court could regard as representative in order to make the same comparison with the recording made during the search.

The appellant's submissions

[17] The appellant made the following submissions as to why he could not properly have been identified as the person speaking in the calls intercepted from 552 and 996, notwithstanding that both telephones were located at his house and one was registered

to him. The telephones were not found on the appellant himself and could have been abandoned in the house by a visitor. The 996 phone was registered in his name in 2007; it might subsequently have been passed on to someone else, or in the first instance have been registered in the appellant's name by someone else. Pahoff, when he went to the Skylark Street house on 24 May 2011, might have been dealing with the person who left the phones there. In any event the reliability of Fergusson's evidence that he had seen Pahoff entering the premises at 37 Skylark Street was questionable because Ms McCarthy, who was otherwise with him for the entirety of their surveillance, had not made the same observation.

[18] The man whom Andrejic had intercepted was not fingerprinted or photographed, and although Andrejic recalled his having a licence on him, the police officer was being asked for his recollection of a routine interception three years later. It was possible that he had not in fact seen the licence and that someone else had given him the appellant's name. It was conceivable that that person had chosen to appear in court in order to ensure that he could continue to use the appellant's details as an alias. The Lukin interception, similarly, it was said, could have been of someone using the appellant's details. The person intercepted on that occasion was not said to have produced a licence, but simply to have given his address as 41 Durella Street and his date of birth as 2 November 1974. Skuse's recollection was obviously incorrect because, although he was confident he had seen a licence, he had recorded the address of the person intercepted as 37 Skylark Street, which was not in fact the address on the licence.

[19] Nobody had actually identified the appellant's voice on any of the calls and the court would not be satisfied that the speaker in them was the appellant. Counsel went so far as to say, in written submissions, that inviting the jury to compare the tape recording made on the search of the Skylark Street house with the intercepted telephone conversations was "by all accounts … a disaster for the Crown". (That submission was made on the strength of defence counsel's address to the jury to the same effect.)

[20] Various deficiencies in the police investigation were pointed out. No financial analysis of the appellant and his wife's business had been undertaken, so it could not be ruled out as a possible source of the money found at 37 Skylark Street. No attempt had been made to test the money to ascertain whether any traces of heroin could be found on it. No evidence was given as to the ownership of the Mazda in which the appellant was said to have been intercepted. No attempt had been made to prove that the appellant had actually attended a wedding at the time the 552 caller spoke of a wedding, or that he had in fact appeared in court. The location of the telephones in the appellant's house was not sufficient evidence for him safely to be convicted. The verdict was consequently unreasonable.

[21] No submissions were made specific to the verdict of guilty on the lesser count of possession of money obtained from trafficking in a dangerous drug. One infers that the appellant would argue that if he was not the person engaged in the trafficking, there was no basis for concluding that the money was from that source.

Discussion

[22] This was a circumstantial case, with the Crown inviting the jury to draw the inference that the appellant was the speaker in incriminating calls from 552 and 996. The facts that telephones with both those numbers were found at his house and that he was the subscriber to the 996 service were not, of course, conclusive, but they were relatively

weighty circumstances to be taken into account with other circumstances. Another important circumstance was the evidence suggesting that the appellant had been the subject of three different police intercepts subsequently described, in the first person, by the user of 552.

[23] As to that evidence, the jury could quite reasonably have accepted the evidence of Andrejic that the driver he intercepted did indeed produce a licence in the name Nam Van Nguyen. It was extremely unlikely, they might have thought, that he would give a notice to appear to somebody whose identification he had not checked against a licence. Skuse did not in terms say that the licence which he saw had the address 37 Skylark Street on it; his recall was of recording the street check address from the licence, but in cross-examination he made it clear that he did not recall the address on the licence, although the driver's name was Nam Van Nguyen. An obvious inference is that the person intercepted produced a licence with one address on it and disclosed that he lived at another, the Skylark Street address, the latter being recorded on the street check. Constable Lukin's check of the police system confirmed that the man using the name Nguyen from the 41 Durella Street address was indeed the person whose photograph was recorded on the system.

[24] There is no doubt from the content of the telephone conversations subsequent to the relevant encounters, that the individual with whom the three officers dealt was the person who used 552. If the jury accepted, as in my view it could rationally do, the evidence of Andrejic and Skuse that they had been shown a licence in the appellant's name, the obvious conclusion was that they had spoken to the appellant. Another individual could have assumed the name and given the address of the appellant, but it seems improbable that he could have produced a licence in his name bearing photographic identification to Andrejic and Skuse. To add to that, the address given to Constable Lukin was that on the appellant's licence, which was then found in his possession on the search of his house.

[25] In addition to those circumstances, Pahoff was seen by Fergusson to go to the appellant's residence. There was nothing mysterious about the fact that Fergusson was in a position to see Pahoff enter the Skylark Street premises while McCarthy did not. She remained in the car, and he, leaving it, had a different vantage point. As counsel for the respondent pointed out, their evidence was unchallenged at trial, so the submission now that there was some reason to reject it is uncompelling. Subsequent communications between Pahoff and the user of 552 make it clear that the former went to Skylark Street to deal with the latter.

[26] The recording of the conversation with the appellant during the search of his house contains several minutes of questions about items found during the search, to which the appellant in some instances gives fairly detailed answers, including a description of the use of pipes for smoking methylamphetamine. It provides a far more limited sample of voice, in both quantitative and qualitative terms, than the many telephone intercepts. What can be heard is less distinct than what is heard in the recorded conversations; the speaker is much more subdued. The conversation runs for some six minutes. As a lay person relying on the small amount of material available for comparison, I do not think one could be satisfied beyond reasonable doubt that the speaker was the same as the participant in the recorded conversations; but it seems entirely possible. The recording certainly does not demonstrate the contrary, notwithstanding the appellant's submission to that effect.

[27] To say that the police might have investigated further in relation to a number of matters does not mean that the Crown case was not sufficient to satisfy the jury beyond reasonable doubt that the appellant was the person who could be heard in the calls directing activities which amounted to trafficking in drugs.

[28] The jury was entitled, on the evidence thus far detailed, taken in combination, to be satisfied beyond reasonable doubt that the appellant was the user of 552 and thus the person undertaking the trafficking activities in the calls made on that phone. And there were some other circumstances which could also be taken into account: the fact that the 552 user spoke to a woman with whom he was evidently in some form of relationship, who was in a shop at Darra, consistently with the appellant's wife's being involved in the Darra business; the location of the woman at the appellant's house who, it could reasonably be inferred, was his wife, with the 272 telephone; and the finding of the cutting agent and funds at the appellant's house.

[29] The hypothesis suggested at trial and here, that someone had assumed the appellant's identity in dealing with police, and had left the relevant telephones at his house is not plausible. The further step of conjecturing that the same person actually used the appellant's house to deal with the courier Pahoff, takes it to the point of risibility. The jury could properly reject that hypothesis; it was entirely open on the evidence for them to be satisfied beyond reasonable doubt that the appellant was guilty of trafficking and of possessing money obtained from trafficking. The verdict was not unreasonable.

The application for leave to appeal against sentence

[30] The appellant was sentenced on the basis that he had trafficked over a four month period, acting as both a wholesaler and a street-level dealer. He had supplied through Bird and Pahoff, paying the latter with heroin, but also from time to time had arranged to meet with customers himself to supply them with heroin. Pahoff had sold between $400 and $900 worth of heroin on most days; the amounts dealt with varied between .1 and 3.7 grams. The sentencing judge proceeded on the basis that the turnover over the four month period was in excess of $50,000. He noted that when arrested the appellant had between $20,000 and $30,000 in cash and had, on the occasion of the Andrejic intercept, been in possession of $9,000. Cutting agents were found in his home. The appellant had been running the trafficking enterprise as a business, regularly checking on Pahoff and Bird as to their sales, collecting monies and checking whether further supplies were needed.

[31] The appellant was 36 at the time he was trafficking and was married with two children. He had a criminal history in three States, beginning with a three month suspended sentence imposed in 1996 in Melbourne for intentionally or recklessly causing injury. In 1998, he was convicted in the Brisbane District Court of a series of offences: break and enter, assault occasioning bodily harm and grievous bodily harm, resulting in a prison sentence of 3.5 years, suspended after six months, with an operational period of four years. Although he was convicted again during the operational period (in 2001, of dangerous operation of a vehicle), no breach proceedings were taken. In the interim, in 1999, the appellant was convicted and placed on a recognizance in New South Wales on a charge of having goods in custody (the equivalent of receiving). At the end of 2001, a warrant was issued for his arrest after he failed to appear in Melbourne on a charge of possession of money being the proceeds of crime and possessing heroin. Between 2006 and September 2011, he was before the Magistrates Court in Brisbane on five occasions on charges of possessing dangerous

drugs and/or possessing utensils used in their administration, including the conviction resulting from the notice to appear he received from Andrejic. On each occasion he was convicted and fined.

[32] The appellant's counsel on sentence submitted that his client suffered from a medical condition, an anterior venous malformation in his brain, which had required surgery in 2004; something which was confirmed by medical records. His counsel indicated from the bar table that his client understood he was at risk of stroke after 45 years of age. He conceded, however, that if there were any deterioration in the appellant's condition, he would have access to appropriate medical treatment in prison. It was submitted that the appellant was a user of heroin, although not an addict. According to his counsel, the authorities supported a sentence of between 10 and 12 years imprisonment for high level street trafficking, which was an apposite description of what the appellant had undertaken; he was properly to be sentenced at the top of that range.

[33] Here it was contended that defence counsel (who was not counsel on the appeal) had erred in making that submission. Instead it was said, relevant authorities – *R v Feakes*[2], *R v Galeano*[3], *R v Ryan*[4], *R v Johnson*[5], *R v Safi*[6], *R v McGinniss*[7], *R v Carey*[8], *R v Saunders*[9] and *R v Versac*[10] all supported a sentence below ten years imprisonment. Four cases relied on by the Crown – *R v Truong & Nguyen*[11], *R v Matasaru*[12], *R v George*[13] and *R v Thanh Vu Le*[14] – in which sentences of between 12 and 16 years imprisonment had been imposed, involved more serious offending and were not comparable. Nine and a half years would have been an appropriate sentence here.

[34] It is fair to say that in *Truong & Nguyen*, *George* and *Thanh Vu Le*, the Crown was able to establish the turnover of larger amounts of funds and drugs, so it is not surprising that more substantial sentences (14 and 16 years) were imposed in those cases. The applicant in the remaining case, *Matasaru*, was sentenced to 12 years imprisonment (which would not at the relevant time have entailed a serious violence offence declaration). The period of his trafficking, however, is not clear from the judgment. Because he supplied to an undercover police officer on some 10 occasions, he was known to have made sales amounting to 49 grams of pure heroin for payment of $28,000. It appeared, too, that he had other customers. One hundred and forty-nine grams of pure heroin were found at his house. The amounts in which he dealt, then, could be shown to be more substantial than those attributable to the appellant here. On the other hand, he did not have others working for him, as the appellant did; and it was a significant circumstance in the present case that one of those others was himself an addict whose addiction the appellant exploited. And *Matasaru* pleaded guilty, unlike the appellant; it can be inferred that his sentence was correspondingly

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2 [2009] QCA 376.
3 [2013] QCA 51.
4 [2014] QCA 78.
5 [2014] QCA 79.
6 [2015] QCA 13.
7 [2015] QCA 34.
8 [2015] QCA 51.
9 [2007] QCA 93.
10 [2014] QCA 181.
11 [2001] QCA 98.
12 [2000] QCA 246.
13 [2001] QCA 135.
14 [2002] QCA 17.

reduced to reflect that fact. On the whole then, the sentence in *Matasaru* was consistent with that imposed on the appellant.

[35] Of the eight authorities cited by the appellant, four – *Feakes*, *Johnson*, *Safi* and *McGinness* – involved cases in which sentences of 10 years imprisonment were imposed for trafficking of similar or greater proportions, but they are of limited assistance to the appellant for two reasons. Firstly, in all of those cases the offender was entitled to a lowering of his sentence to reflect a plea of guilty. Secondly, in each case the sentence was held not to be manifestly excessive, which was not to say that it was the only proper sentence that could be imposed, or represented any upper limit.

[36] In *McGinness*, the applicant trafficked in methylamphetamine over a seven month period, primarily supplying to three regular customers, his turnover being at least $84,000. The compounding feature of his conduct was that he also acted as courier for the head of a drug syndicate carrying large amounts of drugs on six occasions and on others delivering money to pay for drugs and assisting in the distribution of drugs. On the other hand, he was in his twenties when he offended and had no relevant criminal history, had pleaded guilty early, and had made what were accepted to be commendable efforts at rehabilitation. When one takes into account those very substantial mitigating factors, compared with their complete absence in the appellant's case, there seems no real disproportion between their sentences.

[37] In *Feakes*, the applicant had also trafficked over about seven months in cocaine, 3,4-methylenedioxymethamphetamine (MDMA) and 3,4-methylenedioxyethylamphetamine (MDEA). He had a minor criminal history and was 31 years old at the time of his offending. His turnover was just over $115,000 and his gain some $56,000. He was selling to a covert police operative at wholesale level. On the other hand, he had made an early plea of guilty; he was an addict; it was accepted that he had a "grossly dysfunctional upbringing"; and he had good prospects of rehabilitation, having made substantial efforts at overcoming his drug dependence. Nonetheless, his application for leave to appeal against his 10 year sentence was refused. Again, in light of those mitigating factors, particularly the early guilty plea, the case provides no real basis for the submission that the appellant's sentence was excessive.

[38] The applicants in *Johnson* and *Safi* both pleaded guilty to trafficking and received 10 year sentences. Johnson was a 24 year old who, on the evidence put before the sentencing court, was a drug user, but not an addict. He had a minor criminal history, which included an offence of assault occasioning bodily harm on which he had been sentenced to an intensive correction order breached by his conviction of trafficking in ecstasy and methylamphetamine. The trafficking was alleged over a seven month period and involved sales to 10 or more regular customers. Over $1.5 million had been paid to the applicant's suppliers; it was said on sentence that he had received between 10 and 15 per cent of the money which passed through his hands. The applicant in *Safi* committed two offences of trafficking, the first over a nine month period and the second about a year later, over a one a week period. He was described as the "operations manager" of a distribution network with at least two other people working at his direction. At times he owed hundreds of thousands of dollars to his main supplier, although the quantity and value of the drugs trafficked was not clear from the evidence. While on bail for the first set of offending he carried out the second trafficking involving some 43 grams of pure methylamphetamine. He was about 30 years old and had summary convictions for drug offences. In both *Safi* and *Johnson*, this court rejected submissions as to specific error by the sentencing judge

and in each case observed that in any event a more lenient sentence than 10 years imprisonment would have been inappropriate. It is plain that more severe sentences might properly have been imposed. Thus, while the appellant might reasonably assert that the applicants in *Safi* and *Johnson* were more leniently treated than he, that does not demonstrate that the sentence imposed on him was manifestly excessive.

[39] The applicants in *Carey* and *Ryan* were co-offenders. They and three others pleaded guilty to trafficking in methylamphetamine, ecstasy and cannabis over about five months. Both were aged between 26 and 27 at the time of their offending. Ryan was the buyer for the group and had purchased some $77,000 worth of methylamphetamine, about 120 ecstasy tablets and 112 grams of cannabis. Carey's role was to answer the phone and sell the drugs. Carey had a criminal history which included a prior sentence for trafficking in methylamphetamine for which he had received five years imprisonment, and he had committed the offences before the court on parole. Ryan at the time of sentencing was already serving a four year sentence for unlawful wounding. An arithmetical error made on their original sentence required this court to set it aside and re-sentence. Carey was re-sentenced to nine years imprisonment with a non-parole period of six years, and Ryan to 10 years imprisonment for the trafficking, with the result that for both offences he would serve an effective sentence of 12 years and five months with parole eligibility after 10 years and five months. The process in each case was complicated by application of both the parity principle (having regard to the sentencing of the co-offenders) and the totality principle (given that each had already served a period in relation to earlier offending), so that they are of doubtful use as comparatives.

[40] *Saunders* is similarly unhelpful, because parity and totality considerations were taken into account by the sentencing judge in imposing a sentence of eight years imprisonment with a serious violent offence declaration. To add to the difficulties of comparison, there was in that case an unspecified period of pre-sentence custody which could not be declared. Over a six month period the applicant with the assistance of his co-offenders had bought and re-sold ecstasy and methylamphetamine; the quantities and values are not given in the judgment, but it is said that he had "sourced" some 9,000 ecstasy tablets valued at $180,000 for re-sale. He had already commenced a sentence for conspiring to import pseudoephedrine before pleading guilty to the trafficking. On appeal it was held that the basis for the making of the serious violent offence declaration had not been made out, but that, in any event, eight years imprisonment with the same parole release date (i.e. after 6.4 years of his sentence) was necessary to recognise the criminality of the conduct.

[41] The applicant in *Galeano* pleaded guilty to trafficking over a three month period in methylamphetamine, cannabis and ecstasy, selling drugs with a possible value of $390,000. His criminal history included an offence some years before of trafficking in dangerous drugs which had led to a three and a half year sentence. He was sentenced to 10 years imprisonment. Unlike the applicant in the present case, he had provided some cooperation to police by way of providing information while declining to testify, something which was described as requiring "modest recognition". In the event a sentence of nine years imprisonment was substituted, coordinating the observation that the discount amounted to an allowance of one-quarter on a 12 year head sentence. Again, the sentence, when one takes into account the allowance made for cooperation, and the fact that it involved a plea of guilty, does not seem in any way disproportionate to that of the applicant in the present case.

[42] *Versac* is the only one of the cases cited which entailed a sentence imposed after a trial. The applicant had been sentenced to 10 years and six months for trafficking in heroin over six or seven months with a turnover of about $15,000 per week. Allowing for time spent in pre-sentence custody, his effective head sentence was 12 years and two months imprisonment with parole eligibility after 10 years and 24 days. That compares with the applicant's parole eligibility after 9.6 years. The applicant in *Versac* was refused an extension of time within which to seek leave to appeal against sentence. The court observed that the sentence was severe, but such severity was required by the seriousness of the offence.

[43] As in *Versac*, the sentence imposed on the applicant in the present case might be described as severe. But neither *Versac* nor any of the other cases relied on suggest to me that it was manifestly excessive. I would refuse the application for leave to appeal against sentence.

[44] I would make the following orders:

1. Dismiss the appeal against conviction.

2. Refuse the application for leave to appeal against sentence.

[45] **GOTTERSON JA:** I agree with the orders proposed by Holmes CJ and with the reasons given by her Honour.

[46] **MORRISON JA:** I have read the reasons of Holmes CJ and agree with those reasons and the orders her Honour proposes.