SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baradel* [2016] QCA 114
PARTIES:	**R** **v** **BARADEL, Michael Sergio** (applicant)
FILE NO/S:	CA No 129 of 2015 SC No 606 of 2014 SC No 93 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 22 May 2015
DELIVERED ON:	4 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2015
JUDGES:	Fraser JA and Jackson and Bond JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDERS:	**Refuse the application for leave to appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his pleas of guilty to four drug offences: trafficking in methylamphetamine, two counts of producing methlyamphetamine and possessing things used in connection with producing a dangerous drug – where the applicant was sentenced to five years and six months imprisonment for the trafficking offence and concurrent terms of imprisonment of three years for one count of producing methylamphetamine and 12 months imprisonment for each of the other two offences – where the applicant was 22 years old when he offended and 24 years old when he was sentenced – where the applicant profited from his conduct – where the applicant had only a minor criminal history – where the applicant had ceased using drugs following his arrest – where the trafficking and production operations were 'not insignificant' – whether the sentencing judge erred in concluding that the appropriate starting point for a head sentence was six years – whether the sentencing judge considered all relevant mitigating factors – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCING – where the applicant applied for leave to adduce an affidavit which exhibited copies of his co-offender's criminal history and traffic record – where these documents demonstrated that the co-offender had an extensive criminal history, including for drug offending – where the applicant argued that the evidence explained how the youthful applicant had become involved in the very serious drug offending of which he was convicted – where the applicant argued this demonstrated that the applicant had been 'influenced' by the co-offender – where the applicant argued that if the sentencing judge had been aware of this history the non-parole period would have been reduced – where the affidavit was not fresh evidence – whether the Court ought receive the affidavit

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Church [2015] QCA 24, considered
R v Gaerlan [2014] QCA 145, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v McAway (2008) 191 A Crim R 475; [2008] QCA 401, considered
R v Mikula [2015] QCA 102, considered
R v Pham (2015) 90 ALJR 13; (2015) 325 ALR 400; [2015] HCA 39, cited
R v PW [2005] QCA 177, cited
R v Wallace [2008] QCA 135, cited

COUNSEL: M J Copley QC for the applicant
D A Holliday for the respondent

SOLICITORS: Peter Shields for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant was convicted upon his pleas of guilty to four drug offences:

Indictment 606 of 2014

1. Trafficking in a dangerous drug (methylamphetamine) between 5 May 2013 and 9 September 2013.
2. Producing a dangerous drug (methylamphetamine) on 8 September 2013.
3. Possessing things used in connection with producing a dangerous drug on 8 September 2013.

Indictment 93 of 2015

1. Producing a dangerous drug (methylamphetamine) on a date unknown between 30 January 2013 and 13 November 2013.

[2] The applicant was sentenced to five years and six months imprisonment for the trafficking offence. He was sentenced to concurrent terms of imprisonment of three years for the offence of producing a dangerous drug in count 2 of indictment 606 of 2014 and 12 months imprisonment for each of the other two offences.

[3] The applicant has applied for leave to appeal against his sentence upon three grounds: (1) the sentence was manifestly excessive; (1A) a less severe sentence was warranted in law having regard to the applicant's admission to more extensive offending than was otherwise known; and (2) the applicant's offending would have warranted a less severe sentence if other relevant evidence had been adduced at the sentence hearing, accordingly a miscarriage of justice occurred.

The circumstances of the offences

[4] The applicant was 22 years old when he offended and 24 years old when he was sentenced. He had a prior criminal history comprising one offence, possession of tainted property on 26 October 2012, for which no conviction was recorded and he was placed on a good behaviour bond of 12 months. The applicant was subject to that bond when he committed these offences.

[5] The sentence proceeded upon agreed schedules of facts. The applicant trafficked in the dangerous drug methylamphetamine for a four month period from 6 May 2013 (when telephone intercepts of the applicant's mobile telephone commenced) to 8 September 2013 (when the applicant was arrested for the offence of producing a dangerous drug). The trafficking business was operated from the workshop of a company of which the applicant and a co-offender, Hunt, were directors. The telephone intercepts indicated that the applicant and Hunt worked together to produce methylamphetamine, or to source it from other people, and then to sell it. The applicant supplied or attempted to supply methylamphetamine on 61 occasions to 28 different customers. The amount supplied ranged from small personal amounts to two ounces, but more often the amounts were between 1.75 and 3.5 grams. Customers of the business usually made contact with the applicant on the telephone and organised to meet him at the workshop. Codes were used but the language was not particularly sophisticated. On one occasion the applicant advised a customer that the price of an "8 ball" (an eighth of an ounce or 3.5 grams) was $1,400. On 14 June 2014 police intercepted a customer after she had purchased .327 grams of a substance containing 33.2 per cent pure methylamphetamine. That purchase had been arranged in a conversation on the applicant's mobile telephone. After that customer's arrest she rang the applicant and told him to discard his telephone. On 6 July 2013 police intercepted a different customer who had purchased .057 grams of a substance containing methylamphetamine. That customer had sent a text message to the applicant asking if he could "pop down". The customer stated that he had been buying methylamphetamine from the applicant for 8-12 months and that it was always the same amount. The applicant and Hunt also sourced from a third person 14 grams of methylamphetamine about once a fortnight or month at a cost of $4,500 and on-sold the same amount to a regular customer, Lomas, for $5,000 making a profit of $500 (or $250 each). The applicant personally profited approximately $10,000 from the trafficking offence.

[6] On 8 September 2013 intercepted conversations between the applicant and a co-accused, Phillips, indicated that they were producing methylamphetamine at the workshop. The applicant asked Phillips for various items and to come and see him that morning as he needed assistance with something. Police observed Phillips and another drive to the workshop and take three bags of ice inside. Phillips returned to his car carrying a gas bottle. After Phillips exchanged the empty gas bottle for a new one police intercepted his car. A passenger advised police that they were on their way to a barbeque and they were released by police. Shortly after, in a telephone conversation between the applicant and Phillips, the applicant suggested to Phillips

that he do a lap of the block or something first. Police observed Phillips return to the workshop and drive into the shed through an open door. About three hours later Phillips left. Police executed a search warrant at the workshop. They found a packed away but recently used clandestine methylamphetamine laboratory in a downstairs storage room. A large metal pot was hot to the touch and an orange container, partially filled with ice was cooling the contents of a metal frying pan. Various items of laboratory equipment were found. In addition police found: plastic bottles containing a brown liquid that was analysed as 23.2 grams of pseudoephedrine which could be used to make a hypothetical maximum of 20 grams of pure methylamphetamine; 573.8 grams of iodine, that could make a hypothetical maximum of 337.3 grams of methylamphetamine; 783.9 grams of hypophosphorous acid that could make a hypothetical maximum of 1772.2 grams of methylamphetamine; and traces of methylamphetamine indicating that the laboratory had been used in the production of methylamphetamine.

[7] The applicant was arrested and charged with producing a dangerous drug on 8 September 2013. He was released on bail. On 12 November 2013 the police arrested the applicant for the trafficking offence. On both occasions the applicant declined the opportunity to participate in a formal interview with police.

[8] On 12 November 2013 police executed a search warrant at the residence of a customer of the applicant's and Hunt's trafficking business. That customer also supplied them with precursor chemicals. Police found in a shed a large amount of glassware, chemicals and implements commonly used in connection with the production of methylamphetamine. Drug analysts concluded that some of the glassware had been used in producing methylamphetamine. The applicant's fingerprints were found on various glass items and on a portable electric hotplate. The glass items appeared new and had not previously been used. The Crown case against the applicant was that he supplied the glassware for the purposes of producing a dangerous drug. The applicant was arrested for the production offence in indictment 93 of 2015 on 10 June 2014. He declined the opportunity of a formal interview with police.

Sentencing remarks

[9] The sentencing judge referred to the applicant's personal circumstances and the circumstances of the offence. The sentencing judge described the applicant as a good example of the point made by the President, with whom the Chief Justice and Muir JA agreed, in *R v McAway*:[1]

> "Those engaging or contemplating engaging in significant trafficking in dangerous drugs, including ecstasy, for commercial gain must understand that they are likely to be caught and when they are, any short-term gains made by them will be far outweighed by the penalties imposed by the courts. On a cost-benefit analysis the business of trafficking is not viable."

[10] The sentencing judge described the profit made by the applicant as a "relatively modest amount". The applicant's criminal history was minor, comprising one item which was irrelevant except that he committed the offences when subject to a good behaviour bond which needed to be taken into account. The applicant was a young man when he offended and was still a young man. He completed school to grade 10 and then completed a diesel fitting apprenticeship. He went into the diesel business

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1 [2008] QCA 401 at [25].

with Hunt in 2011. Hunt was much older than the applicant and had a criminal past. The reasons for the applicant getting into the production and trafficking business had not been made clear. The applicant was a drug user but it was frankly conceded by his counsel that his production of drugs was done both to feed his own habit and also for the purposes of making a profit.

[11] The sentencing judge noted that it was in the applicant's favour that he had ceased using drugs following his arrest, as evidenced by a lengthy series of drug tests that demonstrated he had not been taking illicit drugs for a long time; it was to the applicant's credit that he had engaged in a process of rehabilitation. The sentencing judge also took into account that the applicant had the support of his parents, siblings, and other members of his family and people with whom he had worked; and the applicant had pleaded guilty to the offences and thereby assisted in the administration of justice, which would be reflected in the setting of a parole eligibility date after approximately one third of the sentence imposed.

[12] The sentencing judge described the applicant's offending as "a not insignificant methylamphetamine operation, and you were not just engaged in the trafficking of the drug; you were also engaged in the production of the drug." It was "not the most serious example of a methylamphetamine production laboratory that the Courts have seen, but it was certainly a step above some of the backyard operations …" seen.

[13] The sentencing judge, having reviewed comparable sentencing decisions cited by defence counsel and the prosecutor, considered that, having regard to the trafficking and production operations in which the applicant was engaged as well as the applicant's relative youth and lack of any relevant criminal history, the appropriate starting point for a head sentence was six years imprisonment. The sentencing judge moderated the head sentence to one of five and a half years imprisonment to take into account the unexplained delay in the prosecution of the matters against the applicant during which he had made good progress with his rehabilitation. The sentencing judge fixed a parole eligibility date after 21 months of that sentence, rather than after 22 months (one third of the term), to take into account that the applicant had spent 28 days in pre-sentence custody which was declared to be time served under the sentence.

Ground 1: the sentence was manifestly excessive in all of the circumstances

[14] The applicant argued that *R v Mikula*[2] and *R v Church*[3] suggested that the sentencing judge had adopted an excessive starting point; that the appropriate starting point for the applicant's sentence was about five years imprisonment, so that, taking into account the credit of six months allowed by the sentencing judge for the applicant's rehabilitation during the delay, a sentence of four and a half years imprisonment was appropriate. The respondent argued that the applicant's argument inappropriately sought "to adjust the sentence as necessary so that it sits comfortably with all sentences previously imposed for broadly similar offending" rather than merely seeking to achieve "broad consistency".[4] The respondent argued that the sentence imposed in this case was consistent with *Church* and *Mikula* and that *McAway* also demonstrated that the sentence was not manifestly excessive.

[15] In *Mikula*, the Court refused an application for leave to appeal against a sentence of four years imprisonment for a trafficking offence and lesser concurrent sentences for

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2 [2015] QCA 102.
3 [2015] QCA 24.
4 *R v MVJ* [2010] QCA 211 at [5]-[8].

other offences, suspended after 16 months with an operational period of four years. That offender was of a similar age to the applicant at the time of the offending and sentence. His criminal history was described as "minor", but he had been previously dealt with for drug and weapon offences as well breaches of domestic violence orders. He trafficked in methylamphetamine and cannabis for a period of nine months. Like the applicant, that offender had stopped taking drugs since his arrest, he had made commendable efforts at rehabilitation, co-operated with the authorities and pleaded guilty at an early time.

[16] The applicant particularly relied upon the statement by the President that a review of the comparable decisions, "suggests the appropriate range in this case was a head sentence of between three and four years with parole eligibility at or slightly earlier than one third."[5] As is plain from that statement, however, it concerned the particular circumstances of that case. *Mikula* did not constrain the sentencing discretion in this case. The decision was only that the sentence was not manifestly excessive and there were circumstances justifying mitigation of the sentence in *Mikula* which were not present in this case. In particular the evidence in *Mikula* suggested that the offender had no more than 17 customers; that though he trafficked for commercial reward, ultimately he did not profit from his illegal business and was in debt when arrested by police; he supplied acquaintances and had a heavy personal drug use; he offended at a time when he was in a dysfunctional relationship; whilst he trafficked in both cannabis and methylamphetamine, it was submitted that he was a street level dealer; and he was not convicted of a production offence.[6]

[17] In *Church*, the Court allowed an application for leave to appeal against sentence and re-sentenced the offender to six years imprisonment upon a count of trafficking in the dangerous drugs cannabis and methylamphetamine for a period of about four months, with a parole eligibility date fixed after one third of that period of imprisonment. As the applicant acknowledged, that offender's trafficking in methylamphetamine was at street level whereas his trafficking in cannabis was at or near the top of the chain of distribution. That offender had a criminal history including sentences of imprisonment and, at 32 years of age at the time of offending, was older than the applicant. Church made limited admissions when interviewed, entered timely pleas of guilty, and co-operated in a full hand up committal, and the matter proceeded by way of an *ex officio* indictment. He had gained insight into his offending and engaged in activities that promoted his rehabilitation. On the other hand, that offender continued to offend while on bail and also while in custody.[7] The sentencing judge also took into account that the offender committed a variety of offences, including drug offences, whilst he was on bail, telephone intercepts revealed that the offender appeared to be near the top of the chain of distribution, the offender told a co-offender that the he was making $800 to $900 profit a week from one client alone (although the offender's counsel submitted at sentence that the offender was merely exaggerating), the offender had supplied methylamphetamine and some small amounts of heroin, and a large amount of cannabis and some methylamphetamine together with $5,000 were found by police at the offender's home.

[18] *Church* also does not confine the sentencing discretion in this case. Significant distinguishing factors are: that offender's trafficking in methylamphetamine appears

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5 [2015] QCA 102 at [32]. It is not necessary in this application to decide whether it would be inconsistent with *R v Goodwin; ex parte Attorney-General (Qld)* [2014] QCA 345 at [5] for the Court to attribute weight to a previous judicial statement about the appropriate "range".

6 [2015] QCA 102 at [1], [28], [30], [32].

7 [2015] QCA 24 at [56].

to have been much less serious; whilst that offender trafficked at a high level in cannabis, it is a schedule 2 drug rather than a schedule 1 drug (as is methylamphetamine); significantly, that offender's primary motivation in trafficking was a need to support his own very high level of dependency upon drugs; the sentencing judge took into account that offender's extremely disadvantaged childhood, including his development of a dependency on cannabis and amphetamines during childhood as a result of being exposed to those drugs at a young age, and that offender was not convicted of a production offence.

[19] In *McAway*, the Court refused an application for leave to appeal against an effective sentence of five years imprisonment on one count of trafficking in dangerous drugs MDMA and MDEA. A parole eligibility date in that case was set 18 months from the date of sentence. That offender was 19 and 20 years old when she offended and 21 when she was sentenced. She had no prior convictions. It appears that much of the evidence upon the trafficking offence resulted from extensive admissions made by the offender after police executed a search warrant at her premises and found a large quantity of ecstasy tablets. She had trafficked for about six months and sold approximately 500 ecstasy tablets, amounting to a monthly turnover of about $3,000, of which she made about $1,500 per month profit; over the six month period her business had an $18,000 turnover with a $9,000 profit. The President described that offender as being "above a street level dealer but well down the chain of distribution".[8] Also taking into account that the maximum penalty for trafficking in MDMA and MDEA (Schedule 2 drugs) was then 20 years imprisonment, rather than the 25 years imprisonment applicable for trafficking in methylamphetamine and that the applicant was also guilty of producing the dangerous drug methylamphetamine, the sentencing judge's starting point of six years imprisonment is not made to seem excessive by the decision in *McAway* or by the President's statement that, "[a] sentence in the range of four to five years imprisonment with parole eligibility after one to two years would have been appropriate in this case".[9]

[20] The sentencing decisions upon which the applicant relied do not justify a conclusion that the sentencing judge in this case must have misapplied any sentencing principle. Nor is that suggested by the terms of the sentence in the context of the circumstances of the case. Appellate intervention on the ground that the sentence is manifestly inadequate is therefore not warranted.[10]

Ground 1A: a less severe sentence was warranted in law having regard to the applicant's admission to more extensive offending than was otherwise known

[21] The applicant argued that the sentencing judge should have taken into account by way of mitigation that the applicant's co-operation with the authorities expanded the scope of his criminality[11] and evidenced his remorse, thereby becoming relevant to the consideration of deterrence.[12] In this respect the applicant argued that he was the only source of the information in the agreed schedule of facts that he and Hunt organised and profited from the regular deal with the customer, Lomas. The applicant argued that, because the sentencing judge did not refer to the circumstance that the applicant was the only source of that information, it should be concluded that the sentencing judge did not give this weight in determining the appropriate sentence, thereby erring in principle.

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8 [2008] QCA 401 at [19].

9 [2008] QCA 401 at [26]. See also my statement in footnote 5.

10 See *R v Pham* [2015] HCA 39; (2015) 325 ALR 400 at [43]; *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at [58].

11 *R v Wallace* [2008] QCA 135 at [5] (MacKenzie J).

12 *R v PW* [2005] QCA 177 at [7] (Keane JA, as his Honour then was).

[22] The respondent argued that the information supplied by the applicant did not expand the extent of his criminality, which was already known to police as a result of telephone intercepts, and that information merely provided context about the supply to Lomas.

[23] At the sentence hearing, the prosecutor submitted that the applicant's telephone was intercepted from 6 May 2013, that the recordings revealed communications between the applicant and Hunt to produce methylamphetamine or to source it from other people and sell the product to others, and that: "[t]he offender and Hunt organised a regular deal with a customer named Clinton Lomas whereby they would source half an ounce or 14 grams of methylamphetamine between once a fortnight to once a month".[13] That submission substantially repeated statements in the agreed schedule of facts. The reference to the deal between the applicant, his co-offender Hunt, and Lomas appeared immediately after the reference to the recordings of the telephone intercepts having indicated that the applicant and Hunt worked together "…to sell the product to other people". The schedule therefor conveyed that this evidence was obtained by police from telephone intercepts.

[24] Defence counsel made this submission:

> "The second thing, and I don't want to overstate this because this was made, I concede plainly, that this submission was made in the context of having seen the brief of evidence from January, but it's true to say that the only evidence, or the only source, I should say, of the information, which is contained in parts of the schedule of facts in respect of the first indictment; that is, in particular the second paragraph where it is stated that Mr Baradel and Hunt organised a regular deal with a customer named Clinton Lomas whereby they would source half an ounce and so on, and detail in respect of the manner in which the drugs were purchased and the profitability from each transaction.
>
> HIS HONOUR: So what's the point in relation to that?
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> MR MYLNE: Well, it's more information. It's detailed information which Mr Baradel has provided.
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> HIS HONOUR: I see.
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> MR MYLNE: Which the Crown didn't have."

[25] In this Court the respondent applied for leave to adduce evidence in the form of an affidavit which exhibited a summary of the intercepted telephone calls between the applicant and Lomas and also a submission by the applicant to the respondent. In the course of argument by the applicant opposing leave to adduce that new evidence, the applicant confined his argument by adopting the terms of the submission made by defence counsel quoted in the preceding paragraph. The Court refused the respondent's application to adduce the new evidence for the following reasons given at the hearing:

> "The applicant relies only upon the statement by defence counsel in the record, which referred, also, to the agreed schedule of facts in an identified passage. Had the Crown wished to contradict the statement by defence counsel, the prosecutor had the opportunity to do so and didn't take advantage of it. Assuming, without deciding, that there is some basis upon which, on appeal, the respondent might seek the exercise of a discretion to admit the evidence, this is not an appropriate case for the exercise of that discretion in favour of the Crown."

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13 Record Book, 17.

[26] The submission made by defence counsel was not that the applicant should be afforded some leniency on account of expanding his criminal liability by admissions of facts of which the authorities were unaware. Rather, the context clearly shows that this point was merely one aspect of a broader submission that there had been a delay in the prosecution of the charges, which was not the fault of the applicant, during which there had been progress in the applicant's rehabilitation.[14]

[27] When that is appreciated, significance can be attributed to defence counsel's statements that he did not want "to overstate this", his correction of the statement that his client supplied "the only evidence" by the remark that his client was "the only source … of the information …" in that part of the schedule, and his omission to make a submission that an additional allowance should be made on the footing that the applicant had expanded his criminal liability by the admissions. Upon the material before the sentencing judge, the information said to have been supplied by the applicant to the Crown merely fleshed out in more detail the applicant's supply of methylamphetamine to Lomas which was already evidenced in telephone intercepts. The submission to the sentencing judge upon which the applicant now relies was relevant to explain the delay in the prosecution of the matter and co-operation by the applicant during that period evidencing progress with his rehabilitation, but that was taken into account by the sentencing judge. The sentencing judge mitigated the sentence on that account. No further mitigation of the sentence was required.

Ground 2: the applicant's offending would have warranted a less severe sentence if other relevant evidence had been adduced at the sentence hearing

[28] The applicant applied for leave to adduce in evidence an affidavit by his solicitor which exhibited copies of Hunt's criminal history and Queensland Police Service traffic record. These documents showed that Hunt had an extensive criminal history, including for drug offending, and a very extensive traffic history. The applicant argued that the evidence was relevant as explaining how the youthful applicant with no significant prior offence became involved in the very serious drug offending of which he was convicted on his pleas of guilty. If the sentencing judge had been aware of the 40 year old co-offender's extensive criminal history which included many terms of imprisonment for drug and other offending, it was likely that the non-parole period would have been further reduced to take into account that the applicant must have been influenced to some extent by Hunt. The applicant submitted that the affidavit was admissible, even if it was not fresh evidence, upon the basis that it demonstrated that a more lenient sentence should have been imposed.[15] The respondent acknowledged that the Court retained a discretion to receive the evidence if a refusal to receive it would result in a miscarriage of justice but submitted that the affidavit upon which the applicant sought to rely did not satisfy that test.

[29] At the hearing the Court accepted the respondent's submission and ruled that the additional evidence should not be received. I will state my reasons for that ruling. The fresh evidence was unpersuasive. It sought to rely upon an inference merely from the disparity in age and the difference in criminal histories of the applicant and Hunt. Whether or not the applicant offended as a result of Hunt's influence was a matter upon which direct evidence could have been adduced at the sentencing hearing. Upon this topic experienced defence counsel submitted only that Hunt was a much older man and had an extensive criminal history.[16] The agreed facts upon

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14 See Record Book, 24 ln 35 - 25 ln 30 and 26 ln 15-35.

15 *R v Maniadis* [1997] 1 Qd R 593 at 596-597; *R v Gaerlan* [2014] QCA 145 at [5].

16 Record Book, 22.

which the applicant was sentenced did not suggest that the applicant was under the sway of Hunt. The schedule of facts for indictment 93 of 2015 stated that the defendant and Hunt were directors of the company Queensland Quality Maintenance out of whose premises methylamphetamine was being trafficked. It also referred to, "a customer of [the applicant's] and Hunt's trafficking business…".[17] The schedule of facts relating to indictment 606 of 2014 again referred to the applicant and Hunt being the directors of the company, alleged that the applicant and Hunt sourced and produced methylamphetamine and sold it to customers, and indicated that the profit upon sales to the regular customer, Lomas, was shared equally between them.

[30] The affidavit of the applicant's solicitors did not allege that any of those facts was incorrect. Insofar as that affidavit established that Hunt was an older man with a bad criminal record, so much was reflected in the sentencing judge's remark that, "Hunt was a man much older than you, who also, I was told by your counsel, had a criminal past."[18] Insofar as the application for leave to adduce the evidence was premised upon an inference being drawn that it explained the applicant's offending, the affidavit did not justify that inference being drawn.

[31] The refusal of leave to adduce that evidence requires the rejection of this ground of appeal.

Proposed orders

[32] I would refuse the application for leave to appeal.

[33] **JACKSON J:** For the reasons given by Fraser JA, in my view the application should be dismissed.

[34] **BOND J:** I agree with Fraser JA.

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17 Record Book, 56.
18 Record Book, 51.