SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maksoud* [2016] QCA 115
PARTIES:	**R** **v** **MAKSOUD, Luke Dillon** (applicant)
FILE NO/S:	CA No 195 of 2015 SC No 609 of 2014 SC No 85 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 13 August 2015
DELIVERED ON:	4 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence granted.** **2. Appeal allowed.** **3. Substitute for the sentence on Count 1 on Indictment 609 of 2014, a sentence of nine years' imprisonment with a parole eligibility date fixed at 13 February 2019.** **4. Set aside the serious violent offence declaration made at first instance.** **5. The sentence imposed at first instance on both indictments are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to unlawful trafficking in, and possessing, the dangerous drug methylamphetamine, and possessing phones used in connection with drug trafficking – where the applicant was sentenced to 10 years' imprisonment with a serious violent offence declaration for the trafficking offence, two years' imprisonment for the possession of the phones, and five years' imprisonment and the issuance of a drug offence certificate for the possession offence – where the applicant filed an application for leave to appeal against sentence, alleging that the sentence

is manifestly excessive – where it is alleged that: (1) insufficient allowance was made for the applicant's youth; (2) no allowance was made for the 376 days of pre-sentence custody; and (3) it is of no relevance to the applicant's sentence that a co-offender is required to serve at least 80 per cent of his sentence – where another offender took advantage of the applicant's naivety – where the learned sentencing judge was not referred to the applicant's pre-sentence custody as a relevant consideration in sentencing – where an otherwise just sentence should not be harshened in order to achieve perceived parity or comity with the term of imprisonment of a co-offender – whether the sentence imposed is manifestly excessive

Drugs Misuse Act 1986 (Qld), s 5(a), s 9(1)(b), s 10(1)(b)
Penalties and Sentences Act 1992 (Qld), s 161B

R v Bird and Schipper (2000) 110 A Crim R 394; [2000] QCA 94, cited
R v Booth [2001] 1 Qd R 393; [1999] QCA 100, cited
R v Cowie [2005] 2 Qd R 533; [2005] QCA 223, considered
R v Crossley (1999) 106 A Crim R 80; [1999] QCA 223, considered
R v Daphney [1999] QCA 69, cited
R v Fabre [2008] QCA 386, cited
R v Feakes [2009] QCA 376, considered
R v Gordon [2016] QCA 10, considered
R v Horne [2005] QCA 218, cited
R v Johnson [2014] QCA 79, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v McGinniss [2015] QCA 34, cited
R v Meerdink [2010] QCA 273, considered
R v Mikaele [2008] QCA 261, considered
R v Mules [2007] QCA 47, cited
R v Pham (2015) 90 ALJR 13; (2015) 325 ALR 400; [2015] HCA 39, cited
R v Safi [2015] QCA 13, considered
R v Sharkey; ex parte Attorney-General (Qld) (2009) 195 A Crim R 237; [2009] QCA 118, considered
Siganto v The Queen (1998) 194 CLR 656; [1998] HCA 74, cited

COUNSEL: A J Glynn QC for the applicant
P J McCarthy for the respondent

SOLICITORS: Robertson O'Gorman for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for granting the application for leave to appeal and allowing the appeal against sentence.

[2] This case raises the question of parity when sentencing an offender to less than 10 years imprisonment where a co-offender has been sentenced under Part 9A *Penalties and Sentences Act* 1992 (Qld) so that 80 per cent of the co-offender's sentence must be served before parole eligibility.

[3] Despite the respondent's contentions, there is nothing in the cases to which the parties have referred this Court to support the principle that an offender's sentence, which is otherwise within range and to which Part 9A does not apply, may be increased for no other reason than to achieve perceived parity with a harsher sentence imposed on a co-offender to which Part 9A has mandatory application.

[4] As Gotterson JA has explained, a nine year sentence is appropriate in this case, given the applicant's serious level of offending, his commission of significant further like offending whilst on bail, his youth at the time of the offending, his guilty plea and co-operation with the authorities, and his pre-sentence custody which could not be declared under s 159A *Penalties and Sentences Act* as time served. Given those circumstances, the cases discussed by Gotterson JA demonstrate that a nine year sentence is towards the middle of the appropriate range but is not lenient. The factors discussed in *R v McDougall & Collas*[1] which might warrant the exercise of the discretion under s 161B(3) *Penalties and Sentences Act* to declare the applicant's trafficking offence a serious violent offence are not present. Nor are there circumstances justifying the postponement of the applicant's parole eligibility beyond the statutory half way point.[2] Setting parole eligibility after three years and six months appropriately balances the significant mitigating features, including the undeclarable pre-sentence custody, with the aggravating feature that the applicant committed a further concerning drug offence whilst on bail for a very serious offence of trafficking in the same drug.

[5] I agree with the orders proposed by Gotterson JA.

[6] **GOTTERSON JA:** On 19 May 2015, in the Supreme Court at Brisbane, the applicant, Luke Dillon Maksoud, pleaded guilty to the counts on a two-count indictment and the count on a separate single-count indictment.[3] These counts alleged, respectively, unlawful trafficking in the dangerous drug methylamphetamine between 24 January 2012 and 14 November 2012 at Brisbane;[4] having in his possession on 20 February 2013 at Greenbank, phones that he had used in connection with drug trafficking;[5] and, on 9 May 2014 at Mackenzie, unlawfully possessing the dangerous drug methylamphetamine in a quantity exceeding 2.0 grams.[6]

[7] The applicant was sentenced on 13 August 2015. For the trafficking offence, he was sentenced to 10 years' imprisonment and a serious violent offence declaration was made. The sentence for the offence of possession of the phones was two years' imprisonment. For the drug possession offence, the applicant was sentenced to five years' imprisonment and a serious drug offence certificate was issued.

[8] On 24 August 2015, the applicant filed an application for leave to appeal against sentence.[7]

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1 [2007] 2 Qd R 87, [19].
2 Above [21].
3 Indictments 609 of 2014 and 85 of 2015 respectively.
4 *Drugs Misuse Act* 1986 (Qld) s 5(a).
5 *Ibid* s 10(1)(b).
6 *Ibid* s 9(1)(b).
7 AB60-61.

Circumstances of the applicant's offending

[9] The applicant engaged in trafficking methylamphetamine for a period of nine to 10 months, the bulk of which was in a six month period between April and October 2012. During that time, he resided with an older man, Adrian Thompson. Thompson headed a large syndicate which distributed wholesale quantities of methylamphetamine in the greater Brisbane area, in Roma and in Rockhampton.

[10] The applicant had left school when he was about 16 years of age. He obtained employment at a retail outlet where he met Matthew McGinniss who was then 26 years old. The applicant moved into shared accommodation with McGinniss who introduced him firstly to speed and then to methylamphetamine. The applicant became a very heavy user of methylamphetamine. He and McGinniss continued to reside and work together. When the applicant was 18 years of age, Thompson, who was known to McGinniss, moved into the residence and lived with them.

[11] Thompson was involved in the daily business of sourcing and distributing methylamphetamine. He had a network of individuals who assisted him in the business. McGinniss was one of them. He worked at Thompson's direction couriering drugs and money either to Thompson's supply network or his customer base. McGinniss also deposited money into the bank accounts of Thompson's suppliers at the latter's request.[8]

[12] The Schedule of Facts[9] tendered at the sentence hearing reveals that Thompson's network was detected by police in 2012 through the monitoring of two of McGinniss's mobile phones. He was arrested on 9 June 2012. In due course, Thompson's mobile phone was monitored. In the period from 29 May 2012 to 14 November 2012, some 13,708 calls and text messages directly relating to Thompson's network activities were intercepted on his phone. Of these, 364 involved the applicant. The applicant and Thompson communicated in code.

[13] The applicant was involved in sourcing and supplying drugs and collecting money for Thompson. These types of activities were also carried out by others in the network such as McGinniss.

[14] However, the Schedule of Facts indicates that the applicant had other roles which distinguished him from those individuals. His bank account was used for depositing monies received on behalf of Thompson. He had his own customers to whom he arranged drug supplies by Thompson.[10] He held discussions with Thompson about adding "fillers" to drugs to enlarge the quantities sold.[11] He encouraged Thompson to persist in the business after a friend's overdose,[12] and he arranged for financial assistance for Thompson to repay debts.[13]

[15] The Schedule of Facts describes the applicant as acting in the role of Thompson's "business partner".[14] This description is arguably inappropriate insofar as it implies that the applicant and Thompson shared the profits of the network's criminal enterprise.

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8 Schedule of Facts: AB44.
9 Exhibit 4: AB44-50.
10 Exhibit 4: AB45.
11 *Ibid.*
12 Exhibit 4: AB46.
13 *Ibid.*
14 Exhibit 4: AB44.

However, it is accurate insofar as it implies a close working relationship between the applicant and Thompson which exceeded that of an ordinary employee. The facts suggest, as the respondent submits, that the applicant occupied a position "higher up the chain" than McGinniss. That expression warrants elaboration. It accurately reflects the applicant's closer working relationship with Thompson but lacks acknowledgement of the fact that Thompson evidently took advantage of the applicant's naivety in having him work as his "run around boy".[15]

[16] At some point, the applicant severed his connection to Thompson and began trafficking on his account.

[17] A financial analysis of the applicant's affairs revealed that he had received income from unexplained sources of a little over $48,000 between 24 January 2012 and 14 November 2012.[16]

[18] Police closed down Thompson's network in February 2013. Contemporaneously with that, they executed a search warrant at the applicant's residence at Greenbank on 20 February 2013. They located two of his phones in the glovebox of his vehicle. After receiving legal advice, he agreed to participate in an interview at the police station. The interview was terminated because of concerns for the applicant's welfare. He was then arrested and charged with trafficking.

[19] On 14 May 2014, the applicant was apprehended by police for speeding. At that time he was on bail for the trafficking offence. He was very agitated and kept looking at his phone and deleting messages. He was found to be in possession of five individually wrapped small plastic bags. They were concealed in his shorts in a black cloth case. The substance in the bags weighed about 13 grams. Upon analysis it was found to contain 8.849 grams of pure methylamphetamine. The five samples of the substance varied in relative purity from 60 per cent to 73 per cent.[17]

The applicant's personal circumstances and history of offending

[20] The applicant was 22 years old at the time of sentence. At all times during the period of this offending, he was a drug user. He was taken into custody on 2 August 2014 for unrelated offences. Whilst in custody he had registered for a drug rehabilitation course but had been unsuccessful in gaining a place in it because of his status as a remand prisoner.[18]

[21] The applicant has the support of his mother, father and stepfather. He has a partner with whom he had been in a relationship for seven years at the time of sentence. He had been a talented rugby league and baseball player. The applicant has an ambition to undertake a mature age mechanics apprenticeship.[19]

[22] Prior to his sentencing for these offences, the applicant had a minor history of offending. The history included convictions arising out of his errant driving in May 2014.

Sentencing remarks

[23] The learned sentencing judge observed that the applicant was "aged between 18 and 21 at the time" he committed these offences.[20] He noted the timely pleas of guilty

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15 As the applicant described his role: Exhibit 4: AB46.
16 Exhibit 4: AB49-50.
17 Exhibit 4: AB50.
18 AB23 Tr1-9 ll8-11.
19 AB22 Tr1-8 ll23-28.
20 AB29 P2 ll8-9.

and also that by the time of sentence, the applicant had spent 376 days in custody on remand for the unrelated matters.[21]

[24] His Honour referred to Thompson's "trafficking syndicate"; that the applicant had been part of it; and that he had also trafficked as a principal. He referred to the numerous transactions in which the applicant had participated as shown in the Schedule of Facts, instancing one in June 2012 in which the applicant gave a particular employee of Thompson some $13,000 to give to his employer, and another in which the applicant had left seven grams of methylamphetamine in a shoe in a pot plant for collection by McGinniss.[22] Reference was also made to the applicant's other roles which I have mentioned. As well, his Honour referred to the circumstances of the applicant's offending in February 2013 and in May 2014.[23] He accepted that the possession in May 2014 was for a commercial purpose.[24]

[25] The learned sentencing judge observed that, notwithstanding the applicant's youth, he had engaged in wholesale trafficking on a large scale. His participation in it had been motivated by profit and to give himself a source of income to fund his drug habit.[25]

[26] His Honour referred to the applicant's personal circumstances which I have also mentioned. He noted the applicant's registration for the drug rehabilitation course but expressed concern that no attempt at rehabilitation had been made by the applicant after he was arrested for trafficking and before he committed the possession offence some 15 months later.[26] That, his Honour considered, also manifested an absence of remorse on the applicant's part during that period. However, he did acknowledge that references provided suggested that the applicant had suffered "some remorse" by the time of sentence.[27]

[27] On 12 June 2014, McGinniss had been convicted on pleas of guilty of one count of trafficking in dangerous drugs and one count of possession of a dangerous drug in excess of 200 grams. On the first count he was sentenced to 10 years' imprisonment with an automatic serious violent offence declaration, and to a concurrent term of eight years' imprisonment on the second count. His application for leave to appeal against sentence on the ground that it was manifestly excessive was refused by this Court on 13 March 2015.[28]

[28] The learned sentencing judge acknowledged that in light of McGinniss's sentence, he needed to have regard to parity principles. His Honour continued:

> "Now, it was urged on me that I should fix a head sentence of something less than ten years for your offending in this matter. Having regard to the comparable authorities to which I have been referred, it is clear that for your level of offending, a sentence of at least 10 years could have been expected to have been imposed in the circumstances. Ten years or more.

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21 AB17 Tr1-3 l31.
22 AB30 P3 ll6-36.
23 AB31 P4 l22 – AB32 P5 l5.
24 AB32 P5 ll2-3.
25 *Ibid* ll7-13; 40-42.
26 *Ibid* ll44 – 47.
27 AB33 P6 ll1-8.
28 *R v McGinniss* [2015] QCA 34.

> It was submitted that I should reduce that to less than 10 years to take account of the fact that if I impose a 10 year sentence, that means automatically under the law, that I must make a Serious Violent Offender Declaration, and that means that you will be required to serve 80 per cent of the sentence that is imposed.
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> In a case called *R v McDougall* [2007] 2 Qd R 87, the Court of Appeal noted that when I am determining the appropriate head sentence to be imposed in circumstances such as this, I need to undertake a practical exercise which has regards to the needs of punishment, rehabilitation, deterrence, community vindication and community protection. I cannot ignore the serious aggravating effect upon a sentence of an order of 10 years rather than, say, 9 years. The inevitable declaration, if a sentence is 10 years or more, is relevant to the consideration of what sentence is just in all the circumstances. On the other hand, as was made plain by the Court of Appeal in that case, I should not attempt to subvert the intention of Part 9A of the *Penalties and Sentences Act*, by reducing what would otherwise be regarded as an appropriate sentence.
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> Despite your counsel's best efforts, Mr Maksoud, I have decided that in all the circumstances a head sentence of 10 years is the appropriate sentence to be imposed. I do so particularly having regard to the principles of parity with the sentence that was imposed on McGinniss. He was older than you, but balanced against that is the fact that you are higher up in the drug distribution chain than he was.
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> By fixing the head sentence at 10 years, as I have said, I have set it at the low end of what I regard to be the appropriate range for offences of this nature and are thereby taking into account the fact that you have pleaded guilty and assisted in the administration of justice."[29]

The ground of appeal

[29] There is one stated ground of appeal. It is that the applicant's sentence is manifestly excessive.

Applicant's submissions

[30] The applicant submitted that several factors indicate that his sentence is manifestly excessive. The first is that insufficient allowance was made for his youth. The description of his having been aged between 18 and 21 at the time masked the fact that the bulk of his trafficking offending occurred when he was 18 to 19 years old. The possession offence occurred about two years later when he was 21.

[31] The two other factors mentioned are related to one another. They also may be seen to be a consequence of the first. These factors are that in submissions at sentence, the learned sentencing judge was not taken to the decisions of this Court in *R v Sharkey; ex parte Attorney-General (Qld)*[30] and *R v Mules*[31] and hence did not have regard for the approach for which they are authority.

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[29] AB33 P6 l33 – AB34 P7 l18.
[30] [2009] QCA 118.
[31] [2007] QCA 47.

[32] In *Mules*, McMurdo P, with whom Keane JA and Mullins J agreed, observed that this Court's decision in *R v Horne*[32] made clear that youthful offenders with limited criminal histories and promising prospects who have pleaded guilty and cooperated with the administration of justice, should receive more leniency from the courts than would otherwise be appropriate.[33] In *Sharkey*, McMurdo P and Mullins J, in a joint judgment, made an observation to similar effect.[34] On that occasion, this Court's decision in *R v Bird and Schipper*[35] was cited as authority.

[33] In submitting that his Honour did not apply the approach endorsed in these cases, counsel for the applicant referred to the following sentencing remark:

> "A lot was made in the course of submissions about your relative age, in that you were young at the time you were engaged in this business. You were immature. You were yourself a drug user and I have had regard to all those factors. The problem is, Mr Maksoud, is that it is not all about you and it is not all about your family for whom I feel very sorry. I should hasten to add, that they have to sit in court and see you being dealt with as the criminal that you have admitted to being."[36]

[34] A quite separate matter raised by the applicant is that no allowance was made for the 376 days of pre-sentence custody. At the sentence hearing, the prosecutor made passing reference to it and submitted that "although your Honour can take it into account, it's completely unrelated".[37] Counsel for the applicant noted that the learned sentencing judge had not been referred to the decision of this Court in *R v Fabre*[38] or to the cases referred to in it. Counsel referred particularly to the following paragraph in the judgment of Fraser JA, with whom Keane and Muir JJA agreed, which he submitted had been overlooked here:

> "[14] Unfortunately his Honour's attention was not drawn to the decisions of this Court in which it has been held that, although it is not mandatory, it is generally desirable to take into account periods of pre-sentence custody which are not declarable under s 159A of the Act at the first opportunity: *R v Ainsworth* [2000] QCA 163 and *R v Voss* [2000] QCA 176. In those decisions the Court referred with approval to the approach taken in Victoria under analogous legislation in decisions including *R v Renzella* [1997] 2 VR 88 and *R v Arts & Griggs* (1997) 93 A Crim R 56. This Court has recently endorsed that general approach: see *R v Cannon* [2005] QCA 41. I note that the Victorian Court of Appeal has also continued to endorse the same general approach: see *R v Wade* [2005] VSCA 276, *R v Black* [2007] VSCA 82, and *R v Rosenow* [2007] VSCA 265."

Respondent's submissions

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32 [2005] QCA 218.
33 At [21].
34 At [12].
35 [2000] QCA 94; (2000) 110 A Crim R 394 at [33].
36 AB33 P6 ll14-19.
37 AB17 Tr1-3 ll35-36.
38 [2008] QCA 386.

[35] The respondent submitted that it was proper for the learned sentencing judge to have had regard to comity and that whilst McGinniss was older when he trafficked in methylamphetamine, the overall seriousness of the criminality of his offending was less than that of the applicant and, significantly, he had not re-offended whilst on bail.

[36] With respect to the applicant's age, the respondent submitted that his youth had not been misapprehended. His Honour's remark that he was setting the sentence at the low end of the appropriate range indicated that an allowance for youth was made.

[37] As to the undeclarable time in custody, the respondent relied on the same remark. It also indicated that some allowance was being made for that period of time in the sentence.

[38] Overall, it was submitted by the respondent that a sentence of 10 years' imprisonment after moderation for mitigating factors was supported not only by the decision of this Court in *McGinniss*, but also by those in *R v Feakes*,[39] *R v Johnson*,[40] *R v Safi*[41] and *R v Gordon*.[42] As well, such a sentence achieved comity in sentencing between the applicant and McGinniss.

Discussion

[39] I propose to consider first the matter of the pre-sentence custody. The applicant's complaint in that regard is better categorised as one evident failure to have regard to a relevant consideration in sentencing, rather than as one of deduced misapplication of principle as is commonly associated with the manifestly excessive ground.[43] Be that as it may, the appeal was conducted on the basis that the complaint was open on the stated ground of appeal. No objection was taken by the respondent on that account.

[40] I accept the applicant's submission that no allowance was made for the custody in sentencing him. The matter was not at all referred to by defence counsel and, regrettably, his Honour was not referred either to *Fabre* or the cases mentioned in it. On the one occasion that his Honour mentioned the custody, he also mentioned the pleas of guilty. He then said that the fact that the applicant had pleaded guilty would be reflected in a moderation of the head sentence. No corresponding statement was made in respect of the custody.[44]

[41] Furthermore, the remark to which the respondent refers was not accompanied by any reference to the custody. Again, his Honour made express reference to the guilty pleas and consequent assistance in the administration of justice at that point.[45] In all these circumstances, I am unable to infer, as the respondent invited the Court to do, that when his Honour spoke of setting the sentence at the lower end, he did so making allowance for the non-declarable pre-sentence custody of 376 days. All the indications are to the contrary.

[42] I conclude therefore that his Honour erred in failing to make allowance for it. The error was one of principle. It infected the sentence that was imposed. It follows that

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39 [2009] QCA 376.
40 [2014] QCA 79.
41 [2015] QCA 13.
42 [2016] QCA 10.
43 See *R v Pham* [2015] HCA 39; (2015) 325 ALR 400 at [28].
44 AB29 P2 ll14-21.
45 AB34 P7 ll15-19.

the application for leave to appeal should be granted; the appeal should be allowed; and the applicant should be sentenced afresh unless this Court concludes "in the separate and independent exercise of its discretion" that no different sentence should be passed.[46]

[43] It therefore falls to this Court to consider what sentence ought to be imposed on the applicant if he is sentenced afresh. I now turn to that matter.

[44] **Comparative sentences:** I have referred to McGinniss's offending and his sentence. For completeness, I note that the period of trafficking to which he pleaded guilty was seven months between mid-November 2011 and mid-June 2012. His income from unexplained sources between 3 January and 10 June 2012 was $27,290. In addition, Thompson had paid him $1,000 per week for his services. The possession count involved an amount of substance containing 404.325 grams of pure methylamphetamine (72 per cent purity) with an estimated wholesale value of $200,000.

[45] The offender in *Sharkey* pleaded guilty to 17 drug-related offences, including one of trafficking in methylamphetamine (Schedule 1 drug) and another of trafficking in MDMA (then a Schedule 2 drug). The offences were charged on two indictments. They included possession and supply offences, receiving stolen property, and possession of money from trafficking. He was sentenced to nine years' imprisonment for the methylamphetamine trafficking offence and a concurrent sentence of six years for the MDMA trafficking offence. A period of some 522 days of pre-sentence custody was declared to be time served under each sentence. This period was less than the whole of the period of his pre-sentence custody: about seven months of it in total was not declarable.[47] A parole eligibility date was set at a point when the offender would have served two years and 11 months of this sentence. On an Attorney General's appeal, the sentence was varied to substitute a parole eligibility date at a point when he would have served about one half of his "effective nine years' and seven months' sentence". The offender was 17 years old when he committed most of the possession offences and 20 years old when he committed the two trafficking and other offences.

[46] It was common ground that the offender in *Sharkey* had supplied drugs to street-level suppliers; that his turnover from trafficking in drugs was very significant; and that he had made a substantial profit in the range of $20,000 to $25,000 per week over a seven to eight week period.[48] The joint judgment described the offending in the following terms:

> "At face value, Sharkey's offending was at a grotesquely high level involving obscenely large quantities of dangerous drugs and money. It was more serious and significant than that in *Assurson* and *Elizalde*. But we agree with the primary judge that Sharkey's offending reflected the behaviour of an immature, drug-dependent young man who was so flagrant in his dealings that it was inevitable he would be quickly detected by the authorities, as indeed he was. The primary judge rightly distinguished Sharkey's behaviour from that of professional

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46 *Kentwell v The Queen* [2014] HCA 37; (2014) 252 CLR 601 per French CJ, Hayne, Bell and Keane JJ at [35], [42]; *R v Illin* [2014] QCA 285 per Fraser JA at [21].

47 The seven month period was comprised of six months for offences interconnected with the offences charged on the first indictment; 22 days for IDRO detoxification; and seven days for non-payment of fines: at [5]. This period was taken into account in re-sentencing the offender on the totality principle: at [20].

48 At [6].

> traffickers who run businesses for long periods and take elaborate steps to conceal their evil trade from the authorities. The circumstances of his offending did not warrant a declaration that the offence was a serious violent offence. The immaturity and recklessness involved in his offending, however, did not alter in any way the consequences for others of his distributing for further supply over a period of two months drugs to the value of about $370,000."[49]

Their Honours said of the sentence varied as to the parole eligibility date that it "sufficiently balances the need for condign deterrent punishment for large-scale drug trafficking, whilst recognising the folly of youth and the importance of rehabilitation of young, remorseful offenders".[50]

[47] In *Feakes*, the offender pleaded guilty to an offence of trafficking in the dangerous drugs cocaine, MDMA and MDCA, during a period of a little over six months, an offence of producing cannabis on a commercial scale, and a drug possession offence. The trafficking was committed in breach of a good behaviour bond when he was subject to "drug diversion". The offender was 30 and 31 years old at the time of the offending. He was a heavy drug user. He occupied a position "very high up" in a drug distribution chain and was well removed from street-level trafficking. Slightly in excess of $115,000 passed through his hands during the trafficking period. He profited to the extent of at least $56,000 from the trafficking. He was sentenced to 10 years' imprisonment on the trafficking count. His application for leave to appeal against it as being manifestly excessive was refused.

[48] The offender in *Johnson* was also sentenced to 10 years' imprisonment on a trafficking count. He pleaded guilty to trafficking in cocaine and methylamphetamine over a period of about eight months and to associated possession offences. He was aged 24 and 25 years old at the time. McMurdo P, with whom Holmes and Fraser JJA agreed, observed:

> " … The applicant was not in the most youthful category of offenders and he had a relevant and unimpressive criminal history. The trafficking occurred in breach of an intensive correction order. The community correctional authorities did not consider he was suitable for further community based orders. His trafficking was on a very large scale, often involving significant quantities of drugs and money. He ran a much larger and more lucrative operation than either Westphal or Feakes resulting in payments to his suppliers of more than $1.5 million …"[51]

The offender's application for leave to appeal against his sentence as being manifestly excessive was refused.

[49] In *Safi*, the offender pleaded guilty to two offences of trafficking in a dangerous drug and related possession offences. The trafficking alleged was over a period of about nine months, and a second period of eight days. The offender was the "clear leader" of a Townsville drug syndicate. The value of drugs trafficked was, in all likelihood, at least $190,000. There was threatened violence associated with the offender's

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49 At [19].
50 At [23].
51 At [46].

offending. He was 30 and 31 years old at the time of the offending. He was sentenced to 10 years' imprisonment for the major trafficking offence. His application for leave to appeal against it as being manifestly excessive was refused.

[50] The offender in *Gordon* was 21 years old when he began trafficking in drugs. The offences to which he pleaded guilty included trafficking in cannabis and methylamphetamine respectively over a period of nearly five years. He also possessed a pill press. His offending increased in scale over time. In 2014, cannabis with a street value in excess of $700,000 was found at his premises. A tick list, also found, showed that he was owed over $250,000 for drug debts. His offending had continued notwithstanding several arrests for drug offences. The offender was sentenced to 10 years' imprisonment for trafficking in methylamphetamine and to a concurrent eight years' imprisonment for trafficking in cannabis. He had prior convictions for production and possession of drugs. The offender's application for leave to appeal against the sentence as being manifestly excessive was refused. It was thought by the Court that the offender was not in the category of youthful offenders to whom leniency is offered, particularly since his offending significantly expanded when he was approaching his mid-twenties.

[51] It remains to note that automatic serious violent offence declarations were made for the offences which attracted the 10 year sentences in *Feakes*, *Johnson*, *Safi* and *Gordon*, as was required by s 161B(1) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act").

[52] Of the cases cited by counsel for comparative purposes, in my view, the circumstances in *Sharkey* most closely resemble those in the applicant's case. Both were youthful offenders; they were drug users; the applicant was 18 and 19 years old and Sharkey was 20 years old at the time of the bulk of their respective offending; and both were involved in large-scale offending. Whereas Sharkey had undertaken a detoxification program, the applicant has demonstrated a willingness to undergo a drug rehabilitation course; however, circumstances beyond his control have not permitted him to participate in it.

[53] The offenders in the other cases cited, including *McGinniss*, were all considerably older than the applicant with the arguable exception of *Gordon*. However, as noted, Gordon's offending increased in scale towards his mid-twenties; his trafficking was on a much greater scale than the applicant's; and he had a prior history of relevant offending.

[54] **Parity considerations:** The sentencing remarks indicate that parity with McGinniss's sentence played a highly influential role in setting the applicant's sentence. The learned sentencing judge considered that McGinniss's seniority in years was balanced by the applicant's higher position in the drug distribution network. On this application, the respondent submits that the approach of the learned sentencing judge was correct at setting the sentence at 10 years' imprisonment, or, alternatively, that if the applicant's sentence is moderated to less than 10 years' imprisonment, a serious violent offence declaration ought to be made in exercise of the discretion conferred by s 161B(3) of the Act, in the interests of maintaining comity with McGinniss's sentence.

[55] At the hearing of the application, the Court invited written submissions on the significance for parity in sentencing an offender that a co-offender has been sentenced to a term of imprisonment for which a serious violent offence declaration must be made. The issue concerns the influence, if any, that the requirement that 80 per cent

of the sentence must be served by the co-offender, is to have in sentencing the offender.

[56] The applicant submits that, consistently with decisions of this Court, the requirement is to have no influence. Reliance is placed on the opinion of Pincus JA, with whom McPherson JA agreed, expressed in *R v Crossley*.[52] In that case, the Court was pressed with an argument that the parity principle must be respected even if to do so involves reducing a head sentence below that which would have been imposed were it not for the 80 per cent requirement. Counsel for the applicant in that case invited the Court to adopt a rule that if a consequence of applying the requirement is to impose on the greater offender a non-parole period which is excessive by comparison with that imposed on the lesser offender, the head sentence for the greater offender must be reduced.

[57] Pincus JA referred to an opinion expressed by Gaudron J in *Siganto v The Queen*[53] where her Honour stated that the principle of parity in sentencing had been displaced to the extent of the different treatment directed by a Northern Territory legislative provision which required 70 per cent of a term of imprisonment to be served for certain sexual offences. Pincus JA continued:

> "In my opinion, the law requires that where one of two co-offenders but not the other is caught by the 80% requirement, that circumstance is to be ignored in considering parity between the two. Perhaps some judges might in practice be inclined to be less severe in fixing the head sentence on the more serious offender, in those circumstances, but there is no justification in strict principle for doing so. The result is that in the present case one compares a 10 year head sentence with a 4 year head sentence. In contrast to the applicant, Banks had no relevant prior convictions; he was a few years younger than the applicant and was involved in only two of the offences. As to the relative criminality of Banks and the applicant, the learned sentencing judge, who heard evidence, found that it was the applicant and another person, not Banks, who suggested the commission of the offences; but the judge was not satisfied that Banks' involvement arose from any direct threats on the applicant's part. The judge sentenced on the basis, which is unchallenged, that the applicant played 'the dominant role'."[54]

McMurdo P considered it unnecessary to determine the issue but noted that the argument advanced for the applicant there did not gain support from then recent decisions of this Court in *R v Booth*[55] and *R v Daphney*.[56]

[58] The opinion expressed by Pincus JA was cited by this Court in *R v Cowie*[57] with the observation that where a serious violent offence declaration must be made, there is no "balancing exercise" as arises where there is a discretion to make one.[58]

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52 [1999] QCA 223; (1999) 106 A Crim R 80.
53 [1998] HCA 74; (1998) 194 CLR 656 at [60].
54 At [27].
55 [1999] QCA 100; [2001] 1 Qd R 393.
56 [1999] QCA 69.
57 [2005] QCA 223; [2005] 2 Qd R 533 per McPherson, Keane JJA and McMurdo P.
58 At [15].

[59] Later, in *R v Mikaele*,[59] Mackenzie AJA, with whom Keane JA and Douglas J agreed, observed that *Crossley* is authority for the conclusion that, once a serious violent offence declaration is appropriately made in one case, but not in the other, the principle of parity that would ordinarily apply has little scope for operation.[60]

[60] The respondent notes that in *R v Meerdink*,[61] White JA, with whom McMurdo P and Jones J agreed, considered that observation to be one that must be treated with some caution. However, the comments her Honour went on to make indicate that she did not mean to cast doubt upon its correctness. Her concern was that it not be taken to detract from the impact that a close analysis of the participation of each offender in the offence, their antecedents, and their prospects of rehabilitation all have upon what is a just sentence for each co-offender.

[61] I would, with respect, adopt the opinion expressed by Pincus JA. To my mind, it is correct in principle. Specifically, I would reject a notion that an otherwise just sentence for the applicant's offending should be harshened in order to achieve a perceived parity or comity with the term of imprisonment that McGinniss must serve on account of the mandatory serious violent offence declaration in his case.

[62] In any event, there are disparities between the applicant's circumstances and those of McGinniss which need to be borne in mind. The latter was, of course, considerably older when he offended. He was not a youth. It was he who introduced the applicant, first, to drugs and, then, to Thompson. As well, his roles were diverse: he was not merely an employee; he was also a customer of Thompson's network from which he acquired drugs in order to conduct his own drug supply business.

[63] **Appropriate sentence:** The submission for the applicant is that an appropriate sentence for his offending is eight to nine years' imprisonment. Having regard to the similarities with *Sharkey*, to which I have referred, I would impose a sentence of nine years. It, in my view, appropriately reflects the degree of criminality in his offending, the leniency to be afforded to the applicant on account of his youth and his prospects of rehabilitation. I accept the applicant's further submission that no serious violent offence declaration ought be made. To my mind, given the applicant's youth and that his offending did not involve any infliction of violence by him, there is no reason for making such a declaration.

[64] There are two particular matters that should be taken into account in fixing a parole eligibility date in addition to the pleas of guilty. One is his re-offending, the subject of the second indictment, which occurred while he was on bail and when he was older. The other is allowance for the non-declarable pre-sentence custody. I consider that a non-parole period of four years is appropriate. In order to make some allowance for the non-declarable custody, I would fix a parole eligibility date at three years and six months from the date of his sentencing, that is, at 13 February 2019.

Orders

[65] I would propose the following orders:

1. Leave to appeal against sentence granted.

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59 [2008] QCA 261.
60 At [36].
61 [2010] QCA 273.

2. Appeal allowed.

3. Substitute for the sentence on Count 1 on Indictment 609 of 2014, a sentence of nine years' imprisonment with a parole eligibility date fixed at 13 February 2019.

4. Set aside the serious violent offence declaration made at first instance.

5. The sentences imposed at first instance on both indictments are otherwise confirmed.

[66] **BOND J:** I agree with Gotterson JA.