SUPREME COURT OF QUEENSLAND

CITATION:	*R v Squires* [2016] QCA 348
PARTIES:	**R** **v** **SQUIRES, Dean David** (applicant)
FILE NO/S:	CA No 188 of 2016 SC No 772 of 2014 SC No 921 of 2015 SC No 664 of 2016 SC No 682 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 24 June 2016
DELIVERED ON:	23 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2016
JUDGES:	Margaret McMurdo P and Fraser JA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Sentence varied by ordering that the term of imprisonment imposed on Count 1 of Indictment 921 of 2015 be reduced to 12 months and be served cumulatively upon the terms of imprisonment imposed on Indictment 772 of 2014.** **4. The sentence and orders imposed at first instance are otherwise confirmed.** **5. The parties are to make submissions as to the appropriate parole date in accordance with these reasons and orders by 4.00 pm on 3 February 2017.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECT OF SENTENCE OF IMPRISONMENT ON PRISONER – where the applicant pleaded guilty to eleven summary charges and sixteen indictable offences including two counts of trafficking – where the first count of trafficking was more serious than the second count of trafficking – where

the second count of trafficking attracted the provisions of s 5(2) *Drugs Misuse Act* 1986 (Qld) – where the applicant was sentenced to four and five years imprisonment for the first and second counts of trafficking respectively – where the applicant was required to serve 80 per cent of the five year sentence – whether the learned sentencing judge erred by imposing a greater term of imprisonment for the less serious count of trafficking on which s 5(2) *Drugs Misuse Act* 1986 (Qld) applied – whether the learned sentencing judge erred by failing to consider the appropriateness of the sentence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECT OF SENTENCE OF IMPRISONMENT ON PRISONER – where the applicant pleaded guilty to eleven summary charges and sixteen indictable offences including two counts of trafficking – where the applicant was sentenced to a head sentence of five years imprisonment – whether the learned sentencing judge erred by failing to moderate the sentence to take into account the applicant's psychiatric illness

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to eleven summary charges and sixteen indictable offences including two counts of trafficking – where the applicant was sentenced to a head sentence of five years imprisonment – whether the sentence was manifestly excessive

Corrective Services Act 2006 (Qld), s 182A, s 185
Drugs Misuse Act 1986 (Qld), s 5, s 5(1), s5(2)
Penalties and Sentences Act 1992 (Qld), s 59A, s 160A

Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, cited
R v Barton [2006] QCA 367, cited
R v Clark [2016] QCA 173, considered
R v Connolly [2016] QCA 132, cited
R v Cooney; ex parte Attorney-General (Qld) [2008] QCA 414, cited
R v McMahon [2003] QCA 369, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, considered
R v Prendergast [2012] QCA 164, cited
R v Taylor [2005] QCA 379, cited
R v Tout [2012] QCA 296, cited
R v Wilson [2016] QCA 98, considered

COUNSEL — K Prskalo for the applicant
D Nardone for the respondent

SOLICITORS — Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Ann Lyons J's reasons for granting the application for leave to appeal against sentence and allowing the appeal and with the orders proposed by her Honour.

[2] **FRASER JA:** I agree with the reasons for judgment of Ann Lyons J and the orders proposed by her Honour.

[3] **ANN LYONS J:** On 4 December 2015 the applicant pleaded guilty to 15 indictable offences on two indictments as follows:

> **Indictment 772 of 2014** - five counts of supplying a dangerous drug and one count of trafficking in dangerous drugs in the period between 5 June 2013 and 5 November 2013.
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> **Indictment 921 of 2015** - one count of trafficking in dangerous drugs between 14 November 2013 and 29 October 2014, four counts of supplying a dangerous drug, one count of producing a dangerous drug, one count of possessing a dangerous drug, one count of possessing property obtained from trafficking and one count of possessing a thing for use in connection with trafficking in a dangerous drug.

[4] On 24 June 2016 the applicant pleaded guilty to an ex officio indictment and 11 summary offences as follows:

> **Ex Officio Indictment -** one count of unlawful possession of a weapon.
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> **Summary Offences -** five charges of possessing dangerous drugs, one of receiving tainted property, one of possessing property suspected of having being used in connection with the commission of a drug offence, two of possession of utensils or pipes that have been used, one of possession of utensils or pipes for use and one of driving without a licence, whilst subject to a SPER suspension.

The sentences imposed

[5] On 24 June 2016 the applicant was sentenced in relation to the 16 indictable offences on the three indictments and the eleven summary offences as follows:

Date and Nature of Offence	**Sentence imposed**
Indictment Number 772 of 2014 (First Indictment)	
Count 1: Supplying a dangerous drug on 24 February 2013	2 years imprisonment
Count 2: Supplying a dangerous drug on 10 April 2013	2 years imprisonment
Count 3: Supplying a dangerous drug on 23 May 2013	2 years imprisonment
Count 4: Trafficking between 5 June 2013 and 5 November 2013	**4 years imprisonment**
Count 5: Supplying a dangerous drug on 15 June 2013	Not further punished
Count 6: Supplying a dangerous drug on 25 July 2013	Not further punished
Order that the sentences of imprisonment are to be served concurrently with each other and with those imposed in respect of IND 921/15 and the new IND presented on 24 June 2016.	

Indictment Number 921 of 2015 (Second Indictment)	
Count 1: Trafficking between 14 November 2013 and 29 October 2014	**5 years imprisonment**
Count 2: Supplying a dangerous drug on or about 28 March 2014 (cannabis)	2 years imprisonment
Count 3: Supplying a dangerous drug on or about 1 April 2014 (cannabis)	2 years imprisonment
Count 4: Supplying a dangerous drug on or about 27 September 2014	Convicted and Not further punished
Count 5: Supplying a dangerous drug on or about 26 October 2014 (cannabis)	2 years imprisonment
Count 6: Producing a dangerous drug on dates unknown between 14 and 29 October 2014 (methylamphetamine)	3 years imprisonment
Count 7: Possessing a dangerous drug on 28 October 2014 (cannabis)	1 year imprisonment
Count 8: Possessing property obtained from trafficking on 28 October 2014 (money)	1 year imprisonment
Count 9: Possessing a thing for use in connection with trafficking in a dangerous drug on 28 October 2014	1 year imprisonment
Order that the sentences of imprisonment are to be served concurrently with each other and with those imposed in respect of IND 772/14 and the new IND presented on 24 June 2016.	
Indictment Number 682 of 2016 (Ex Officio)	
Count 1: Unlawful possession of weapons	1 year imprisonment
Order that the sentence of imprisonment is to be served concurrently with those imposed in respect of IND 772/14 and IND 921/15.	
Summary Offences:	
Charges 1 - 10	Convicted and Not Further Punished for charges 1-10.
Charge 11	Disqualified from holding or obtaining a driver licence for 4 months for charge 11

[6] The two trafficking offences attracted the most significant penalties and the applicant was sentenced to a period of four years imprisonment for the first count of trafficking and five years imprisonment for the second period of trafficking. The second period of trafficking attracted the provisions of s 5(1) of the *Drugs Misuse Act* 1986 with the

consequence that the five year period of imprisonment resulted in a mandatory minimum non-parole period of 80 per cent.

[7] The applicant will be eligible for parole at four years after serving 80 per cent of the sentence. A period of 406 days spent in pre-sentence custody was declared as time served, pursuant to the provisions of s 59A of the *Penalties and Sentences Act* 1992.

The amended grounds of appeal

[8] The applicant was given leave at the hearing to amend his grounds of appeal. He now appeals against his sentence on the basis that it is manifestly excessive on the following grounds.

Ground 1: The learned sentencing judge erred by imposing the greater term of imprisonment on the less serious of two counts of trafficking, when that resulted in a mandatory minimum non-parole period of 80 per cent on the less serious count; or alternatively, the learned sentencing judge erred by failing to consider the appropriateness of that course.

Ground 2: The learned sentencing judge erred by failing to moderate the sentence to take into account the applicant's psychiatric illness.

Ground 3: The sentence is manifestly excessive.

The factual circumstances to the offences

The first period of trafficking

[9] On 6 November 2013 police executed a search warrant at Springfield. The applicant's phone was seized and an analysis of messages on the phone showed that for a six month period from June 2013 to November 2013 he had trafficked in methylamphetamine, cannabis and MDMA. Counts 1 to 3 related to the applicant's supplying or offering to supply methylamphetamine before the commencement of the trafficking period. Count 1 related to the sale of .1 gram and the other two counts were offers to sell rather than completed sales.

[10] In relation to the trafficking in Count 4, the schedule of facts indicated that in the six month trafficking period the applicant sold dangerous drugs on 32 occasions and supplied them without payment another three times. In terms of the extent of the trafficking carried on, in the trafficking period he sold methylamphetamine on 18 occasions to nine different customers involving an amount of 70 grams and a value of approximately $25,700. He sold cannabis on 13 occasions to three customers in an amount of 106 grams for a total of $1,275. He sold MDMA on one occasion which was an amount of two pills for $60. The total sales over the six month period of trafficking was therefore $27,035 in relation to the completed transactions.

[11] There were also a number of enquiries during that period by potential customers which either did not lead to a completed sale or there was no evidence of a completed sale. In relation to the sourcing of drugs during the trafficking period the applicant sourced methylamphetamine on 25 occasions and cannabis on 22 occasions, as well as making other attempts which were not successful. It was clear that he also trafficked in LSD, GHB and cocaine.

[12] The Crown alleged that during the trafficking period the applicant was a street level dealer selling methylamphetamine in small amounts of one-eighth of an ounce and

less, except on two occasions when the applicant sold one ounce for a price of $9,000. Counts 5 and 6 on the indictment related to two occasions when he sold an ounce of methylamphetamine for a price of $9,000. All of the cannabis sales were also in small amounts, except for one occasion when he sold an ounce for $350.

[13] He was arrested and given a notice to appear.

The second period of trafficking

[14] Whilst the applicant was on bail for the first set of offences, he continued to carry on the business of trafficking in dangerous drugs between November 2013 and October 2014. It was accepted by the Crown to be on a lesser scale than the first period. Police intercepted the applicant in September 2014 and found him with some drug related items and money. They also seized his phone which then led to a search of his house in October 2014. When his house was searched a phone was seized as well as a gram of substance which contained methylamphetamine. There was also $1,100 in cash and other drug apparatus. When interviewed the applicant denied he was a drug dealer but was simply making money to support his child.

[15] The mobile phone analysis indicated the applicant had carried on trafficking in methylamphetamine in the eleven month period between 14 November 2013 and 28 October 2014. The Crown conceded that during the second trafficking period the business was very much scaled back from what it had been during the initial period of trafficking. From November 2013 to August 2014 there were only six completed sales of methylamphetamine and then in September and October 2014 the business picked up with three sales in September and nine in October. There were no sales in March, April, June, July or August of 2014. In total there were 18 sales of methylamphetamine to 10 people of less than 22 grams for approximately $10,000. The Crown indicated that again there were a number of discussions for offers to sell by the applicant or customer enquiries.

[16] The applicant's sales during the second trafficking period were also for smaller amounts, except on one occasion where he supplied a quarter of an ounce of methylamphetamine for $2,600 which is Count 4 on the second indictment No 921 of 2015. Counts 2, 3 and 5 on that indictment relate to supplies of cannabis on three different occasions. The three supplies of cannabis are not particulars of the trafficking as it is only alleged the applicant carried on trafficking in methylamphetamine. Count 6 is the amount of methylamphetamine the police found during the search.

[17] The summary offences essentially relate to drug and drug-related items seized by police during the searches of the applicant's home in November 2013 and October 2014, as well as on the other occasions up until July 2015. The ex officio indictment relates to the possession of a taser.

Submissions on sentence

[18] At the sentencing hearing the Crown relied on three Court of Appeal decisions of *R v Tout*,[1] *R v Barton*[2] and *R v Prendergast*.[3] In *R v Tout* the period of trafficking was seven months and he received six years imprisonment for trafficking in methylamphetamine and cannabis. Parole eligibility was fixed after 18 months. In *R v Barton* the applicant had pleaded guilty to trafficking in methylamphetamine for two and a half months. The sentence imposed was one of seven years with a parole eligibility after two years and three months.

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1 [2012] QCA 296.
2 [2006] QCA 367.
3 [2012] QCA 164.

[19] The last decision relied on by the Crown was *R v Prendergast*, which was the least comparable because it involved a highly sophisticated commercial operation where there had been trafficking in methylamphetamine for a two year period where the minimum amount of unsourced income over the two year trafficking period was about $111,225. Prendergast had a similar number of regular customers, namely 18, but sold in larger amounts of up to five grams. He had also been arrested and charged with a number of drug offences and had continued to carry on the business of trafficking whilst on bail and for another 20 months. Prendergast was sentenced to a period of eight years imprisonment with a parole eligibility at one-third.

[20] Counsel for the applicant relied at the sentencing hearing on the decisions of *R v McMahon*,[4] *R v Taylor*[5] and *R v Cooney; ex parte Attorney-General (Qld)*.[6] In particular reliance was placed on the decision in *McMahon* where there was a trafficking period of over 11 months whilst on probation. McMahon was sentenced to five years imprisonment suspended after two years in circumstances where he was heavily addicted.

[21] In the present case the applicant's drug addiction was also relied on at sentence with reference made to the fact that he was not making any money from his trafficking but rather was dealing to support his own habit whilst living a chaotic existence. A report from psychologist Damien Thomas dated 16 May 2016 was relied upon which outlined the applicant's traumatic and dysfunctional upbringing. Taking into account the circumstances of the offending together with the applicant's personal circumstances the ultimate submission by counsel for the applicant was that a five year head sentence suspended after 18 to 20 months would be appropriate. The applicant had already served 13 months by way of pre-sentence custody and had made some significant steps towards his rehabilitation. It was also proposed that he would attend a 'live in' drug treatment facility on his release.

The approach of the sentencing judge

[22] It is clear from the sentencing remarks of the learned sentencing judge that he carefully examined the facts and the material tendered at sentence. He accepted that the applicant had entered timely pleas and that there was genuine remorse on his part. The learned sentencing judge correctly noted the seriousness of the offending in the first period of trafficking in 2013 and referred to the 32 completed sales of dangerous drugs, particularly the 18 sales of methylamphetamine to nine different customers involving 70 grams and a revenue of over $25,000.

[23] After indicating that the applicant was arrested and released on bail, the sentencing judge then referred to the seriousness of the fact that the second period of trafficking occurred whilst the applicant was on bail for the first set of offences. Reference was then made to the weapons offence, the summary offences and the driving offence. His Honour stated:[7]

> "All – in all, what it shows is that you have been engaged in trafficking in dangerous drugs for a very significant period of time. On the first occasion it was in relation to more than one drug, and resulted in multiple transactions. On the second occasion it was for an extended period, although the majority of the activity occurred late in that period.

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4 [2003] QCA 369.
5 [2005] QCA 379.
6 [2008] QCA 414.
7 ARB 55.

> Those are the serious aspects of the offending. It is made more serious by reason of a consideration of your criminal history. It reveals you have had many occasions when you have come to the attention of the authorities. You have received actual imprisonment in the past. You have received parole and probation in the past. Despite coming to the attention of the authorities and being charged, you just went on your merry way and engaged in trafficking in drugs again. It is very serious behaviour."

[24] His Honour referred to the psychologist's report and the applicant's "very, very sad upbringing"[8] but did not make any particular reference to his diagnosed mental illness which was clearly well managed on medication in custody by the Prison Mental Health Service. He also noted the significant steps the applicant had taken during his lengthy period in custody and accepted that he had reasonable prospects of rehabilitation as well as significant support in the community, including offers of employment.

[25] Ultimately his Honour considered that he had to structure a sentence that acknowledged the need for general and personal deterrence but also encouraged rehabilitation. He considered however that given the applicant's flouting of the law by engaging in trafficking in dangerous drugs on two separate occasions, including whilst on bail, meant that the need for general and personal deterrence loomed large. He continued:[9]

> "Our law provides, that in the case of the second trafficking period, unless I am satisfied it is appropriate to wholly or partially suspend the sentence, you must serve 80 per cent. I am satisfied that you are not an appropriate candidate for a suspended sentence. If I was to structure the sentence in the way your counsel suggests, it would simply be designed to try and avoid the consequences of the legislation. It is unfortunate that the judicial discretion does not exist in relation to that period of release, particularly having regard to your pleas of guilty, but I am satisfied your behaviour is of such a nature that you are not an appropriate candidate for a suspended sentence. In those circumstances the legislation must have its effect.
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> The fact that you will be required to serve 80 per cent of the sentence satisfies me that I should temper what the sentence should be. **The fact you engaged in trafficking in dangerous drugs whilst on bail normally would satisfy me it was appropriate to impose a cumulative period of imprisonment. But the effect would be that on the cumulative aspect you would have to serve 80 per cent. That would result in a crushing sentence. The appropriate course is to look at the sentence on the second period of trafficking, which reflects your overall criminality but is tempered by the fact that you will have to serve 80 per cent of that sentence. But for the 80 per cent rule, I would have been looking at a sentence of imprisonment in the order of six years. Allowing for the fact that you must serve 80 per cent I am going to reduce that sentence to five years' imprisonment.**" (my emphasis)

[26] There is no argument that it was clearly open to the sentencing judge to conclude that the applicant was not a suitable candidate for a suspended sentence given the applicant's

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8 Ibid.
9 ARB 56.

significant criminal history for drug offending. There is also no doubt that the sentencing judge was also correct in his assessment that the applicant had been engaged in drug trafficking for a significant period of time given the period involved was 16 months from June 2013 until October 2014, with a break of only 10 days between the two periods of trafficking when he was arrested and released on bail. His Honour was clearly sentencing the applicant for multiple drug offences over an extended period of time.

[27] In *R v Nagy*[10] Williams JA discussed the significance of the High Court decision of *Griffiths v The Queen*[11] and the way a sentencing judge should approach the determination of a sentence where numerous offences are involved which are not greatly separated in time as follows:

> "[31] Brennan and Dawson JJ noted at 377 that "counsel for the applicant accepts that the Court of Criminal Appeal was entitled to increase the head sentence to 15 years, treating the head sentence as the sentence appropriate to the totality of the offences of which the applicant was convicted." In their joint judgment Gaudron and McHugh JJ said at 393:
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> > "**It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effect of the sentence on the offender. . . This may be done through the imposition of consecutive sentences of reduced length with or without other sentences to be served concurrently or through the imposition of a head sentence appropriate to the total criminality with all the other sentences to be served concurrently.**"" (my emphasis)

[28] It is clear therefore that there are a number of options that a sentencing judge may take when faced with multiple offences which have been committed over a relatively short space of time. When one considers the approach the sentencing judge took in this case, particularly when one considers the highlighted portion of the sentencing judge's remarks set out in paragraph [23], it would seem apparent that his Honour's initial view was that he would have imposed a cumulative sentence for the second period of trafficking because it occurred whilst the applicant was on bail. That is in accordance with sound sentencing principles as outlined in *Griffiths* and there is clearly no error in such an approach. When such an approach is adopted however the cumulative or consecutive sentences are usually of a "reduced length", as outlined in *Griffiths*, because regard must be had to the total effect of the sentences imposed cumulatively to ensure that the overall sentence imposed is appropriate to the nature of the offending.

[29] When such an approach is taken a sentence would be imposed in relation to the first period of offending (in this case the first period of trafficking) which reflects the seriousness of the offending. A sentence is then considered in relation to the second period of offending (the second period of trafficking) which again reflects the seriousness of the offending. The total sentence to be imposed is then considered to ensure it is an appropriate sentence in terms of the total offending. The sentences imposed are thereby mitigated by considerations of totality and to ensure that the total sentence imposed is not "crushing".

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10 [2003] QCA 175.
11 (1989) 167 CLR 372.

[30] The learned sentencing judge in this case however considered that a cumulative sentence would necessarily be crushing because of the requirement to serve 80 per cent of the second sentence. For this reason, the sentencing judge instead reduced what would have been a head sentence of six years to five years, which reflected the totality of the offending.

[31] Essentially what his Honour indicated was that the requirement to serve the first sentence plus 80 per cent of the second sentence was necessarily more onerous than the requirement to serve 80 per cent of a reduced single head sentence, which took into account the totality of all of the offending for trafficking.

[32] I consider his Honour was mistaken in this regard for two reasons. First the cumulative sentence to be imposed for the second period of trafficking would necessarily be less in the circumstances of this case, given the second period of trafficking was less serious and was conceded by the Crown to have been at a "reduced level". Second, any sentence which would have been imposed cumulatively would necessarily have to be moderated by the principle of totality and the need to avoid a crushing sentence. In my view his Honour's conclusion that the requirement to serve 80 per cent of the second period of trafficking was "crushing" would only arise if the cumulative sentence to be imposed was not appropriately moderated. A higher penalty for the second period of trafficking would not have been appropriate here where the second period of trafficking was clearly less serious and where the consequences of continuing to offend whilst on bail could have been recognised by a cumulative sentence.

[33] Furthermore a consideration of the sentencing remarks indicates that the learned sentencing judge considered that he was required to fix a head sentence which reflected the totality of the offending in relation to the second period of trafficking, when in fact he had a discretion to fix it on the first period of trafficking as outlined by Williams JA in *R v Nagy*:[12]

> *"*In my view all the authorities to which reference has been made, with the exception of *Hammoud* and *Lemene*, can be reconciled. Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted."

[34] In my view his Honour was mistaken in relation to two aspects of the sentence and thereby proceeded on erroneous assumptions which unduly constrained his sentencing discretion. Accordingly having proceeded on a wrong principle this Court is required to set aside the sentence and exercise the discretion afresh.

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12 [2003] QCA 175 at [39].

What sentence should be imposed?

[35] Turning then to a consideration of the appropriate sentence. The recent decision of this Court in *R v Clark*[13] involved an analysis of penalties to be imposed with respect to street trafficking at the lower level. In that decision Morrison JA reviewed a number of decisions for such trafficking including *R v Connolly* as follows:

> "[66] …The Court did not interfere with the head sentence of four years, but reduced the time to be served, from 12 to six months. In doing so the Court reviewed a number of authorities including *Taylor*, *McAway* and *Challacombe*. The Court noted that the offender "was an addict, who had taken impressive steps towards rehabilitation and has promising prospects of continuing along that path", and said:
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> > "Thus, even with the inherently serious crime of trafficking in Schedule 1 drugs, that the offender is driven by addiction can be a mitigating circumstance, especially where (as here) there is a genuine effort at rehabilitation which is bearing fruit. Those matters, together with the applicant's age, plea, remorse and good references indicate that a sentence of four years imprisonment, suspended after six months, and operational for five years, is one that imposes a period of actual custody that is a realistically (sic) deterrent to this applicant and other young offenders, while also giving due regard to the weighty considerations of mitigation present here."
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> [67] That analysis is sufficient to show that the sentence imposed on Ms Clark was not manifestly excessive, and the selection of four years as the start point was appropriate.
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> [68] The learned sentencing judge discounted that to three years in recognition of the fact that s 5(2) of the *Drugs Misuse Act* would have the effect of compelling that 80 per cent of the period of imprisonment must be served. In my view, that was an appropriate exercise of the sentencing discretion, consistent with the established proposition that "a sentencing judge is accorded as much flexibility as is consonant with the statutory sentencing regime in determining the appropriate sentence". Where there is such a requirement, it is appropriate to sentence at the lower end of the available range."

[36] In the recent decision of this Court in *R v Wilson*[14] the applicant was sentenced to various concurrent terms of imprisonment for offences on two indictments together with a number of summary offences. She received six years imprisonment for trafficking in methylamphetamine and other drugs over a six month period. In relation to a further one month period of trafficking she received a concurrent sentence of 20 months which carried a requirement pursuant to s 5 of the *Drugs Misuse Act* 1986 that she not be released until she had served 80 per cent. Her parole eligibility was effectively fixed at around the half way mark of her six year sentence. Whilst her trafficking was at a relatively low level, it was noted that she was supplying to other

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13 [2016] QCA 173.
14 [2016] QCA 98.

dealers as well as users and that the frequency of her wholesale business had increased over the period. In his judgment Philip McMurdo JA referred to the arguments on the appeal as follows:[15]

> "The level of her trafficking was similar to that in her previous offence. This second period of trafficking occurred whilst the applicant was on bail and had been given notices to appear in respect of a number of offences. The sentencing judge remarked that this was a circumstance tending against leniency. His Honour referred to a number of mitigating circumstances: her pleas of guilty; her heavy drug dependence, in particular, her addiction to methylamphetamine; and that she had a young child whose care and company would be missed in prison. His Honour remarked that:
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> > "Totality considerations intrude, especially in relation to the sentence that needs to be imposed in relation to the second period of trafficking."
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> He noted also that the second trafficking offence was subject to the operation of subsection (2) of section 5, by which she would have to serve 80 per cent of the term for that offence. His Honour started with the consideration of the appropriate head sentence, for the first trafficking count, absent the consideration of the second trafficking, and said that the first count would warrant a head sentence of five years. He said that the second period of trafficking would warrant a term of four years, but for considerations of totality, that should be reduced. But on the other hand, his Honour said, as concurrent sentences would be imposed in respect of all of the offences, it was necessary to assess the overall criminality of her conduct. And having done so, his Honour imposed the six-year term for the first trafficking count.
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> The applicant's argument does not criticise his Honour's methodology. The criticism is that his Honour started the head sentence of five years for the first trafficking count, which was too high and which resulted in the term of six years being manifestly excessive. It is argued that his Honour should have started with a term of three to four years for that count, which, adjusted for the reasons given by his Honour, would have resulted in a term of five years and a parole eligibility date after two and a-half years. In the applicant's argument, it is said that cases such as *R v Mikula* and *R v Blumke* would have supported a sentence of four years for the first trafficking count absent the second count."

[37] Ultimately after a review of a number of decisions, the Court concluded that the sentence imposed in *Wilson* was not manifestly excessive as follows:[16]

> "Of more relevance are decisions where this court has resentenced an offender or where it has upheld a sentence as high as that which is now criticised. The respondent's argument refers to several cases in the latter category where a term of five years was imposed for drug trafficking, *McAway, Challacombe*, *McMahon* and *Oldfield*.

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15 Ibid, p 3-4.
16 Ibid, pp 5-6.

> In *McAway* the applicant was 19 and 20 years old at the time of her offending and had no prior convictions. She trafficked in MDMA and MDEA for about six months. Her parole was recommended after 18 months. It should be noted that she was not an addict.
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> In *Challacombe*, again, the sentence was a term of five years with eligibility for parole after serving 18 months. His trafficking was described as being as at a "relatively low level" involving about 1,000 ecstasy tablets and two bags of methylamphetamine with a turnover of between 24,000 and $30,000 over a period of four to five months for a modest product. He had four regular customers. He was 21 and 22 years of age at the time of the offending, had a good work history and references. He was not an addict.
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> *McMahon* was a relatively older offender, being 37 and 38 when trafficking in methylamphetamine and cannabis over an 11-month period with about 70 occasions of supply. He was then on probation for other drug offences. His sentence of five years was suspended after two years.
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> In *Oldfield* the applicant was 28 when trafficking over a period of two and a half months in methylamphetamine and MDMA. These cases sufficiently indicate that in the present case his Honour's starting point of the term of five years for the first trafficking offence before considering the impact of the second offence was open to him.
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> In the applicant's favour it can be said that the head sentence in each of those cases was affected by orders for suspension or parole eligibility at less than the half way mark and, in that way, it was a lighter sentence. But, overall, these cases sufficiently indicate that a term of five years with parole eligibility at the halfway mark would have been open to the sentencing judge, absent the second trafficking count."

[38] What sentence should be imposed in relation to the Counts 1 to 6 on the first of the indictments, namely Indictment 772 of 2014? Count 4 was is clearly the most serious of the charges as it relates to the first period of trafficking.

[39] I agree with the submissions of counsel for the applicant that all of the sentences referred to on sentence were in fact more serious for a variety of reasons. In *R v Pendergast*[17] which I referred to earlier, a sentence of eight years was imposed with parole eligibility at two years and eight months with respect to a very sophisticated trafficking operation over a two year period, involving transportation between cities by air on at least 43 occasions with significant amounts in unsourced income. The relevant factors there involved the "commerciality and sophistication of the operation and the flagrancy of his continuing with that operation for 20 months after being charged in August 2006 and for 11 months after participating in a criminal drug's trial in the Supreme Court in June 2007, justified her Honour regarding the offending as very serious."[18]

[40] Whilst a six year period of imprisonment was imposed in *R v Tout*[19] in relation to eight drug related offences including two periods of trafficking, Tout was not a drug addict but rather was driven by profit and power to traffic in drugs for a six or seven

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17 [2012] QCA 164.
18 At p 5.
19 [2012] QCA 296.

month period involving in excess of 6,200 text messages. Tout had been producing methylamphetamine and selling a gram a week for $1,000 and in the six weeks before the search he had sold $30,000 worth of drugs. He was sentenced on the basis that he was a street level trafficker with a potential turnover of around $46,000. He had made frank admissions and he had a history of fairly minor property matters and assault. Of particular note was the fact that his parole eligibility was also set at 18 months which was after serving a quarter of the six year term.

[41] In *Tout* Fraser JA undertook an analysis of a number of trafficking sentences including *R v Barton*[20] which was referred to on sentence, where a term of seven years imprisonment was imposed with parole eligibility of two years three months. Barton had sold methylamphetamine to an undercover police officer on seven occasions. The total amount was 120 grams gross, 26 grams pure, and the amount involved was $14,700. Barton was also found in possession of pseudoephedrine and other drug apparatus. While she sold larger amounts of drugs it was over a shorter period of time and her criminal history was less serious. She was also on bail for drug offences for the last three weeks of her trafficking. Whilst the head sentence was not disturbed, the parole eligibility date was varied on appeal to 18 months to acknowledge the significance of the rehabilitation which had been undertaken.

[42] The sentence actually imposed by the sentencing judge for Count 4 was a period of four years. In my view this was the appropriate sentence when one considers the authorities outlined above, the applicant's actual offending during this first period, his timely plea of guilty, his psychological factors, his rehabilitation in custody and his support in the community. The applicant's rehabilitation was set against a very disturbed background, including his ongoing but treated mental illness. In this regard it was clear from the material tendered at sentence that the applicant had overcome some significant obstacles as he had experienced a truly traumatic upbringing. The psychologist's report tendered at sentence had in fact detailed the applicant's background in some detail, including being the victim of numerous serious sexual assaults, including rape. He had also been raised in an environment where his father had been the perpetrator of serious and sustained domestic violence and had served a custodial sentence for a near fatal assault on the applicant's mother with a hammer.

[43] The psychologist's report also noted that the applicant had been diagnosed with schizophrenia and had been taking medication for that disorder since 2006. He was currently receiving treatment, namely Seroquel for his schizophrenia and was diligent in taking his medication. A letter from Dr Samaraweera from the Prison Mental Health Service dated 7 January 2016[21] confirmed the applicant's diagnosis of schizophrenia as "multiple episodes, currently in remission" and his involvement with the Prison Mental Health Service. Mr Thomas in his report also referred to the applicant's engagement with mental health staff at the correctional facility acknowledging that he had been compliant with his medication and had therefore not experienced any psychotic phenomena for a number of years.

[44] Further the psychologist Mr Thomas had referred to the applicant's insight and stated:[22]

> "Moreover, Mr SQUIRES acknowledges the importance of engaging meaningfully with mental health professionals towards addressing his significant trauma-related history, particularly as this relates to his involvement in the current matter."

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20 [2006] QCA 367.
21 ARB 119.
22 ARB 100-101.

[45] The other material tendered at sentence included a very insightful letter from the applicant in which he took responsibility for his actions and noted the harm he had caused. He stated that he had taken the time in custody to understand the nature of his addiction and how he had used drugs to self-medicate and bury his feelings and emotions. He continued:[23]

> "I have tried to use my time on remand to positively better myself as an individual. I have taken the opportunity to get to know myself and begin to understand and tackle my true issues at the core of my offending. With hope and enthusiasm, I enrolled in Arthur Gorrie Correctional Centre's First-Aid and CPR, Anger Management (Strong not Tough), Narcotics [Counselling] Course (Do It Program) as well as Goal Settings, Skills [Development] and the Drug Abuse Program. The 'Do It' and Drug Abuse program was pivotal in helping me become aware of the mental triggers surrounding my drug use, and it also made me aware of the need to eliminate high-risk environments. These course's [sic] also helped me to build a useful and on-going relapse and Prevention plan that I know that I can draw upon and utilise if ever the need should arise."

[46] Letters of support were also tendered from a close friend and his partner's father.[24] The latter confirmed the progress the applicant had made in custody and noted the offer of employment at a mechanical repair business which also involved the future prospect of an apprenticeship as a diesel mechanic. That offer of employment, together with the prospect of an apprenticeship, was also confirmed in writing by the employer.

[47] The applicant therefore had made significant steps towards rehabilitation and had good prospects on his release. I consider that a sentence of four years on the first period of trafficking appropriately takes into account the applicant's personal factors including his ongoing mental illness. As there was no indication that his schizophrenic illness played any part in his actual trafficking I consider that a sentence of four years with parole eligibility at the one third mark of 16 months appropriately recognised all of those factors including his chronic mental illness.

[48] Accordingly it is apparent that I would not vary the sentences imposed on Count 4 or on any of the other counts on the first indictment.

[49] I would however make a variation in relation to the sentences imposed on the second indictment by ordering that the sentence to be imposed on Count 1 on the second indictment, that is the sentence for the second period of trafficking, be served cumulatively. I consider that a cumulative sentence would be an appropriate penalty in relation to the second period of trafficking given it occurred whilst the applicant was on bail for the first set of offences.

[50] Such a cumulative sentence would appropriately denounce the applicant's conduct of continuing to offend whilst on bail and would also take into account the factors referred to in *Nagy*. As Williams JA stated in *Nagy*, whilst a judge may fix a sentence for the most serious offence or the offence which is last in point of time, which is higher than the sentence that would have been imposed had it stood alone with the higher sentence as reflecting the overall criminality, such an approach should not be taken where there are "collateral consequences such as being required to serve

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23 ARB 121.
24 ARB 124-125.

a longer period in custody before being eligible for parole".[25] This led to the conclusion "Such considerations may mean that the option of utilising cumulative sentences should be adopted."[26] It was clear here that if a head sentence was imposed in relation to the second period of trafficking then the consequence would be a requirement to serve 80 per cent and that would mean the applicant would have to serve a long period in custody before being eligible for parole which did not in fact reflect the overall criminality.

[51] In coming to an appropriate sentence to be imposed cumulatively in relation to the second period of trafficking a lesser penalty in the order of three years would have been the appropriate sentence given the fact the offending was less serious, before any moderation for issues of totality and accumulation were factored into the sentence. Taking into account those factors, a cumulative sentence of 12 months imprisonment with a requirement to serve 80 per cent (9.6 months) before being eligible for parole would in my view appropriately reflect the seriousness of continuing to offend whilst on bail. Such a sentence would be on the basis that whilst the second period of trafficking was technically longer, there were many months of inactivity with an escalation only in the last month of the trafficking period.

[52] Accordingly I would impose a term of imprisonment on Count 1 on Indictment 921 of 2015 of 12 months imprisonment and I would order that that term of imprisonment be served cumulatively with all periods of imprisonment imposed on Indictment 772 of 2014. This would effectively result in a total period of imprisonment of five years.

[53] In relation to the remaining counts on Indictment 921 of 2015 and the summary offences I would order that the penalties imposed on 23 June 2016 should stand, but order that those terms of imprisonment on Counts 2-9 be served concurrently with the total term of imprisonment of five years which I have just imposed.

[54] I would vary the sentence on Count 1 of Indictment 921 of 2015 by reducing it to 12 months to be served cumulatively on the terms of imprisonment imposed on Indictment 772 of 2014. To remove any doubt, all the remaining sentences are concurrent.

What is the Parole Eligibility Date?

[55] The calculation of the Parole Eligibility Date in circumstances where a cumulative sentence is imposed is somewhat complicated as a number of requirements of the *Penalties and Sentences Act* 1992 and the C*orrective Services Act* 2006 need to be considered.

[56] Parole release and eligibility dates are imposed pursuant to Part 9 Division 3 of the *Penalties and Sentences Act* 1992. Section 160A of that Act provides that a Court may make orders relating to a person's release on parole under sections 160B-D inclusive.

[57] Section 182A(3)(a) of the *Corrective Services Act* 2006 applies with regard to the second period of trafficking. That section provides that a prisoner serving a term of imprisonment for a drug trafficking offence to which the section applies is eligible for parole after serving 80 per cent of the term of imprisonment imposed.

[58] Section 185 of the *Corrective Services Act* 2006 is then the relevant section and provides that:

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25 *R v Nagy* [2003] QCA 175, at [39].

26 Ibid.

"**185 Parole eligibility date for prisoner serving terms of imprisonment in particular circumstances**

(1) This section applies if, apart from this section, more than 1 of sections 182, 182A, 183 and 184 would apply to a prisoner.

(2) If the imprisonment mentioned in the sections is to be served concurrently, the prisoner's parole eligibility date for the prisoner's period of imprisonment is the day after the day on which the prisoner has served the longer of the periods calculated under the sections.

(3) If any of the imprisonment mentioned in the sections is to be served cumulatively with imprisonment mentioned in another of the sections, the prisoner's parole eligibility date for the prisoner's period of imprisonment is the date mentioned in subsection (4) calculated after applying the following rules—

Rule 1—

Consider first each term of imprisonment (***concurrent term***) that is not cumulative on another term of imprisonment and calculate the period the prisoner must serve for the concurrent term by applying whichever of sections 182, 182A, 183 or 184 apply. For these rules, the prisoner's ***notional parole date*** is the day the period, or the longest of the periods, so calculated ends.

Rule 2—

Next, consider each term of imprisonment (***cumulative term***) that is cumulative on another term of imprisonment and calculate the period the prisoner must serve for each cumulative term by applying whichever of sections 182, 182A, 183 or 184 apply.

Rule 3—

Next, add the period the prisoner must serve for a cumulative term to the period the prisoner must serve for the term of imprisonment the cumulative term is cumulative on (the ***additional eligibility period***).

(4) The prisoner's parole eligibility date for the prisoner's period of imprisonment is the day after the later of the following dates—

- the notional parole date
- the latest date the additional eligibility periods end."

[59] Accordingly to ascertain the applicant's parole eligibility date as set out in subsection (4) of s 185, the Rules contained within the section must be applied. The parties are agreed that it is not necessary to set an actual parole eligibility date pursuant to this section.

[60] As I have already indicated, the sentence for the first period of trafficking is four years with parole eligibility set at the one third mark of 16 months.

[61] On the second period of trafficking the sentence is a cumulative sentence of one year, which requires 80 per cent of that sentence be served namely 9.6 months.

Orders

1. Application for leave to appeal against sentence granted.

2. Appeal against sentence allowed.

3. Sentence varied by ordering that the term of imprisonment imposed on Count 1 of Indictment 921 of 2015 be reduced to 12 months and be served cumulatively upon the terms of imprisonment imposed on Indictment 772 of 2014.

4. The sentence and orders imposed at first instance are otherwise confirmed.

5. The parties are to make submissions as to the appropriate parole date in accordance with these reasons and orders by 4.00 pm on 3 February 2017.