SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson* [2010] QCA 377
PARTIES:	**R** **v** **ROBINSON, Allan Norman** (appellant)
FILE NO/S:	CA No 36 of 2010 SC No 110 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2010
JUDGES:	Margaret McMurdo P, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted and appeal against sentence allowed to the extent of substituting the term of eight years imprisonment for the term of 10 years cumulative imprisonment, and substituting for 19 May 2028 as the date fixed for parole eligibility, the date 19 November 2026.** **3. The sentence is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – appellant convicted after trial of one count of trafficking dangerous drug, methylamphetamine – prosecution relied on evidence of witness Doorley who assisted in trafficking business and evidence of four other witnesses who purchased quantities of methylamphetamine – prosecution also relied on telephone records and forensic accounting evidence – trial judge directed jury that assessment of Doorley's evidence must be treated with caution as may be unreliable – trial judge did not give similar directions regarding evidence of the other four witnesses – whether trial judge's directions were inadequate CRIMINAL LAW – APPEAL AND NEW TRIAL –

PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – trial judge did not give directions about expert financial evidence in the terms set out in the Benchbook – trial judge directed jury that they were sole judges of facts, they must consider credibility and reliability of witnesses and explained concessions made by expert witness – whether direction given by trial judge reversed onus of proof – whether direction should have been given in terms set out in Benchbook – whether trial judge's directions caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – defence wished to call evidence from witness where evidence would to go only to prosecution witnesses' credit – judge refused to admit the evidence – whether evidence ruled inadmissible was an exception to the rule that witness's answers as to credit are final – whether evidence should have been admitted

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – appellant sentenced to 10 years imprisonment cumulative upon 18 years imprisonment for maintaining unlawful relationship with a child and two counts of rape – parole eligibility fixed at 19 May 2028 – appellant did not cooperate with authorities – appellant showed little remorse – appellant had commenced rehabilitation in prison and would be 69 years old when eligible for parole – whether combined sentence crushing considering all offending – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 664, s 668E(1)
Corrective Services Act 2006 (Qld), s 181

Bromley v The Queen (1986) 161 CLR 315; [1986] HCA 49, cited
Khan v The Queen [1971] WAR 44, cited
Nicholls v The Queen (2005) 219 CLR 196; [2005] HCA 1, cited
Pollitt v The Queen (1992) 174 CLR 558; [1992] HCA 35 cited
R v Cannon [2007] QCA 205, cited
R v Chen [2008] QCA 332, cited
R v Jenkins, Rollason & Brophy [2008] QCA 369, cited
R v Kiripatea [1991] 2 Qd R 686, cited
R v Lawrence [2002] 2 Qd R 400; [2001] QCA 441, cited
R v Nabhan; R v Kostopoulos [2007] QCA 266, cited
R v Robinson [2007] QCA 99, cited

COUNSEL:	P E Smith for the appellant M J Copley SC for the respondent
SOLICITORS:	Fisher Dore Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Allan Norman Robinson, was convicted after a six day trial in the Cairns Supreme Court of one count of trafficking in the dangerous drug methylamphetamine between 2 August 2003 and 27 March 2005. He was sentenced to 10 years imprisonment cumulative upon an 18 year term of imprisonment he was then serving for maintaining an unlawful relationship with a child between January 2005 and March 2005 and two counts of rape of the same child. His full time release date is 23 December 2033 with parole eligibility fixed at 19 May 2028.

[2] He appeals against his conviction, alleging that a miscarriage of justice has occurred in this case as the learned trial judge:

- failed to give an adequate direction concerning the witnesses Huxley, Burge, Tisizis, and Thompson.
- failed to give an "expert evidence" direction.
- erred in his directions concerning the evidence of financial analysis and telephone records.
- erred in ruling the evidence of Ms Uren was inadmissible.

[3] He also applies for leave to appeal against his sentence, contending that its cumulative effect makes it manifestly excessive.

[4] Before returning to the grounds of appeal against conviction, it is first necessary to understand something of the evidence at trial.

[5] The prosecution alleged that the appellant was the principal in a business of trafficking in methylamphetamine (meth) carried on between 2 August 2003 and 27 March 2005 at Innisfail and other places in north Queensland. The prosecution principally relied on the evidence of Peter Doorley, who assisted the appellant in the trafficking business, and the evidence of Shane Huxley, Peter Burge and his friend Michael Tisizis, and Jason Thompson, who had purchased quantities of meth from the appellant. The prosecution also relied on telephone records which supported their evidence, forensic accounting evidence that the appellant's level of expenditure substantially exceeded the level of his ascertainable income, and admissions made under the *Criminal Code* 1899 (Qld). The appellant did not give or call evidence.

The evidence of witnesses connected to the appellant's trafficking

[6] **Huxley** gave evidence of the following matters. He met the appellant in 2003. Huxley used his mobile telephone to call the appellant on the appellant's mobile

telephone and invited him to his house in Townsville. Huxley wanted to purchase meth. He was an owner-operator truck driver who used the drug to stay awake in his work. The appellant went to Huxley's house. Huxley bought about 3.5 grams of meth (his approximate weekly usage) for $600. On two further occasions over the ensuing months at his house, he purchased 3.5 grams of meth from the appellant for $600. The appellant drove to Huxley's house on each occasion in a white Ford Falcon, either an XR8 or an XR6 model. Huxley could not recall introducing anybody to the appellant to buy drugs. Huxley had used meth for between five and seven years before purchasing the drug from the appellant.

[7] In cross-examination, he agreed he told police about his dealings with the appellant when police questioned him in April 2005 about a white Nissan Pulsar four door hatchback. He had purchased the car from Dequin Uren for $350 and sold it to a person called "A1". Defence counsel suggested that Huxley had paid Uren $1,000 for the car. He first denied this, but then said that he could not recall and did not know. He denied that he had taken $1,000 from Uren's handbag after this transaction and that they argued when Ms Uren suggested he had taken the money. He met Peter Burge through the panel beating industry. He did not think he spoke to Burge about his statement to police concerning the appellant. He could not recall introducing anyone to the appellant to buy drugs. He was "pretty sure" he did not. He had previous convictions including assault occasioning bodily harm, extortion, deprivation of liberty, burglary, assault (payback on his "wife's ex partner"), receiving stolen property, possession of dangerous drugs and breaches of the *Bail Act*. An annexure to the statement he gave to police dated 26 April 2005 implicating the appellant included:

> "I have provided the statement on the basis that the admissions made by me and contained therein, are not to be used to pursue a prosecution action against myself in relation to any criminal proceedings.
> I understand that if I have knowingly misled police or provided deliberate untruths in the statement I am liable to be prosecuted for having done so."[1]

[8] Huxley also conceded in cross-examination that in January 2005 he pleaded guilty in the Townsville Magistrates Court to breaches of a domestic violence order and breaches of bail and wilful destruction. He was sentenced to a period of imprisonment which was wholly suspended. He did not think that his pending sentence on these matters was a factor requiring him to cooperate with the police when they questioned him in April 2005 about the appellant. He agreed that he was concerned about going to jail.

[9] **Burge** gave evidence including the following. At the time of the trial he was an inmate at the Townsville Correctional Centre. He first met the appellant in 2004 outside the Kentucky Fried Chicken (KFC) outlet in Innisfail. Huxley organised this meeting so that Burge could buy meth from the appellant. Burge broke his leg in April 2004 in a motor bike accident. He began purchasing meth from the appellant about five months earlier, in late 2003. He first bought an ounce at a time, but this increased to 10 oz at a time. Some purchases took place at the Innisfail water tower. He stopped buying from the appellant for a while because the quality

---

1 Ex 1.

of the drugs deteriorated. After three weeks, the appellant rang Burge and they met at the water tower. The appellant gave Burge an ounce of meth which Burge sampled and found to be of improved quality. As their relationship progressed, the supply of drugs increased to 10 oz once a week. Burge sold the drugs to others. On 8 March 2004 and 16 May 2004, he sold meth which he had purchased from the appellant to a covert police operative.[2] The purity of the drug involved in those sales was between 75.2 per cent and 78.6 per cent.[3] Burge was arrested in respect of those dealings in 2004.

[10] On one occasion, the appellant brought a young man, 'Bobby' to their meeting. The appellant told Burge he was going away. If Burge needed anything during that time, he should phone Bobby. Burge phoned Bobby and they drove to the creek area where Burge frequently met with the appellant. Bobby left Burge there and drove away. After half an hour, he returned with a glass bottle covered in "mud and stuff". It looked like it had been buried. It contained 7 or 8 oz of drugs. Burge drove Bobby back to town.

[11] After that transaction, the appellant introduced Doorley to Burge. The appellant said Doorley was a good friend whom he had known for a long time; he was safe. Doorley and the appellant would often arrive in the same vehicle. Sometimes when he telephoned the appellant, Doorley answered the phone. Sometimes he phoned Doorley direct if he could not contact the appellant. The appellant told him that if he was away to phone Doorley. He first met Doorley after his broken leg was taken out of plaster (that is, sometime after April 2004). He met with Doorley alone about five times and each time Doorley supplied him with meth. In the period when Doorley was supplying him with drugs, he did not think he had contact with the appellant. On the first two occasions he called the appellant's number, Doorley answered. He thought Doorley then gave him his direct number. Burge called Doorley's direct number about four times. Burge used meth heavily, probably three or four times a day, two and a half points at a time, or about a gram a day. Sometime after his dealings with Doorley, Burge was again arrested on drug charges. He was released on bail after about a month in custody. He had no contact with the appellant whilst he was in custody. His drug use was much more limited from that point but he was still using "a little bit", an ounce or two, once or twice.

[12] The appellant told him that Jason Thompson owed him money. Burge told the appellant that Thompson was "a bit dodgy". The appellant told Burge that Thompson owed him $7,000 and as a result the appellant had taken Thompson's Mitsubishi Pajero 4WD vehicle.

[13] It was hard to estimate after five or six years, but Burge thought he had probably purchased drugs from the appellant in all on about 25 occasions. Although it was "a wild estimate", probably on at least 15 of those occasions he had purchased 10 oz quantities. Those purchases were in addition to his purchases from Doorley.

[14] In cross-examination, he agreed that Huxley had organised Burge's original meeting with the appellant at the KFC in Innisfail. He agreed that in his statement to police he described Huxley as a friend. At trial, he considered him "a friend but not a very good friend". Like Burge, Huxley used meth. Burge was friendly with Tisizis who

---

2 See the evidence of Bruce Andrew Beckett, Appeal Book, 250-251.

3 See Ex 13 (analyst's certificates).

also used meth. They had known each other for about 10 years. Burge used meth intraveneously two or three times a day. He did not consider his drug habit was serious; he had seen a lot worse. When he gave his statement to police in this matter on 28 March 2005, he could not remember if he injected himself with meth, but he probably had. He shared meth with Thompson at Thompson's house. He did not socialise with the appellant or Doorley. Burge had not taken meth for about two months prior to trial. When cross-examined at the committal hearing about the KFC meeting with the appellant and Huxley, Burge was vague. He said he had "a bad bloody speed habit … so everything's so sort of … some of the things are a bit hazy". He was asked about when his dealings with the appellant ended. Burge said he was uncertain of dates and times after all these years.

[15] Burge was remanded in custody on charges of possessing and trafficking in meth. He was convicted of those offences in the Townsville Supreme Court on 30 November 2006. He was also charged with a second count of trafficking and other associated drug offences, together with a count of serious assault and sentenced to five years imprisonment. At the sentence hearing, a letter from police officers referring to his assistance to the authorities in the present matter was tendered on his behalf. He agreed that he cooperated with the police in this matter by giving them his statement dated 28 March 2005, so that he would get that letter of comfort to be used to mitigate his sentence. He knew he was in significant trouble because he was facing serious charges and he had continued to commit offences whilst on bail. He had been on-selling the meth he received from the appellant for $5,500 per ounce so that all up he had received about $800,000. He was then grossly addicted to meth. When he provided police with a statement implicating the appellant in this matter, he thought his cooperation would save him years of imprisonment. He added that as it turned out, it had not. He did not speak to Huxley after giving his statement. The annexure to the statement contained the same terms as Huxley's (set out at [7] of these reasons).

[16] **Thompson** gave evidence including the following. He met the appellant in 1998 through the fishing industry. He bought a fishing boat from him in 1999. He did not see much of him until about 2003 when he went to the appellant's house at Garradunga. The appellant asked him "to get rid of" some meth for him. Thompson said that he could not sell 10 oz, but he did take 2 oz. He sold this at $5,000 an ounce and later gave the appellant $7,000. The appellant gave him speed to on-sell on a couple of subsequent occasions. Doorley was present at Thompson's second meeting with the appellant. From then on, Doorley, not the appellant, supplied him with drugs. When he telephoned the appellant's number, either the appellant or Doorley would answer and there would be a subsequent meeting at a bridge near the appellant's house. He consumed large quantities of the drugs he purchased from the appellant and Doorley; it was very pure. He gradually got behind in his payments until he owed the appellant about $8,000. He ceased contact with Doorley and the appellant. They came to his house one morning. He offered them his Pajero which was worth about $5,000 or $6,000. They took the vehicle.

[17] In cross-examination, he agreed that he was addicted to meth and was taking a gram a day. He had known Doorley as a friend in the fishing industry since 1999. He on-sold "a little bit" of the meth he purchased from the appellant and Doorley, but he used most of it. He gave a statement to the police implicating the appellant on 9 May 2005. The police had the Pajero, which was still registered in his father's

name, and he wanted the police "to sort it out". They said they wanted information about the appellant. He agreed that "they kind of threatened" him. They told him he was "in a bit of trouble". He thought that if he did not cooperate with the police and provide a statement, he would have been charged. He subsequently pleaded guilty in the Innisfail Magistrates Court on 5 July 2005 to various assault charges. He was sentenced to two months imprisonment fully suspended for 18 months. He was not charged in respect of his dealings with the appellant. In 1999, he purchased a fishing boat from the appellant for $24,000, of which he paid $17,000 in cash. It was not uncommon in the fishing industry for large amounts of cash to be exchanged legitimately. The annexure to his statement to police of 9 May 2005 was in the same terms as Huxley's and Burge's set out at [7] of these reasons.

[18] **Tisizis** gave evidence including the following. He knew both the appellant and Burge. He had lived with Burge in Ingham in 2003 and drove him around when he did not have a licence. On one occasion, Burge got out of the car at the basketball courts at Innisfail, chatted with the appellant and returned with a parcel. Burge told him it was "speed". Tisizis used speed at that time. He used some of the drug Burge had obtained from the appellant. On three or four occasions, he drove Burge to a swamp near a bridge where Burge met the appellant. Sometimes Burge came back with a parcel containing speed and gave some to Tisizis.

[19] In cross-examination, Tisizis accepted he gave a statement to police on 3 May 2005 in which he said he had never spoken to the appellant and did not know his real name. He was addicted to meth at the time of the events of which he gave evidence and had used it for some years beforehand. He stopped using the drug for a period but relapsed. Between 18 October 2003 and 20 September 2004 he was pulled over by the police on about six occasions when he was driving Burge. He stopped driving Burge around before Burge broke his leg. Burge was a very good friend with whom he shared speed. On 3 May 2005, police showed him a photo board with the appellant's photograph at the position numbered 3. He recognised the person in the photograph at number 3 as the person who provided speed to Burge. He knew then that Burge had been charged with drug offences. Burge may have told him that he had given a statement implicating the appellant. Tisizis denied that police put pressure on him to provide the statement he gave but he knew the police wanted evidence concerning the appellant. The police told him he would not be charged over what he had said in his statements to them. He had convictions for possession of cannabis and meth. The annexure to his statement contained paragraphs in like terms to those in Huxley's, Burge's and Thompson's set out at [7] of these reasons.

[20] **Doorley** gave evidence which included the following. He met the appellant in 1989 or 1990. He had a de facto relationship with the appellant's sister for about 18 years. He commenced to live at the appellant's property at Garradunga from January 2005 from which time the appellant lived at Goldsworthy Road, Miriwinni. Doorley met Burge and Thompson through the appellant. He first met Burge at a meeting between Burge and the appellant at a creek at a fishing hole in September or October 2004 when money changed hands. The appellant introduced him to Burge so that they could deal with others in future. In the latter part of 2004, he saw the appellant with some white powder. The appellant told him it was speed and that they could make a lot of money from it; it sold at about $5,000 an ounce. Over about eight months, Doorley helped the appellant package 1 oz bags of speed on

between four and six occasions at the Goldsworthy Road premises, both before and after Doorley met Burge. They used scales to weigh the drugs. Doorley put the 1 oz bags into 10 lot bags as Burge purchased 10 at a time for $50,000. On at least six occasions, Doorley delivered drugs to Burge at a fishing hole on a creek. The appellant paid Doorley $1,000 for each delivery to Burge. Doorley obtained the drugs to supply to Burge by following the appellant's directions. They were at the Goldsworthy Road premises, either in a fishing box in a carport or in a glass jar buried under the shed. His deliveries to Burge took place over three or four months and on occasions involved less than 10 oz. On one occasion, he and the appellant met Burge near the Innisfail Leagues Club and Burge handed over some money.

[21] On the appellant's instructions, Doorley took 2 oz of drugs to the fishing hole and gave them to Thompson. No money changed hands, but Thompson promised to pay within three days. Doorley later gave the appellant $10,000 which Thompson had provided to him. Doorley supplied another 2 oz to Thompson, but Thompson failed to make payment for it, claiming he had been robbed. The appellant told Doorley that, if Thompson did not pay, they would have to take his car. Thompson phoned and requested another 2 oz. The appellant told Doorley they would supply Thompson with the drugs but if he did not pay they would take his car. When Thompson did not pay after the third supply, the appellant and Doorley went to his house. Thompson gave the appellant the keys to his Pajero. Doorley drove the Pajero to the appellant's Cartwright Road premises where the Pajero stayed until the appellant arranged for Doorley and his brother to drive it to a panel beater's shop. The appellant told Burge to contact him on a mobile telephone number. Doorley had use of this phone when the appellant was away. On a few occasions, the appellant was in China visiting his fiancée when Burge contacted Doorley.

[22] In cross-examination, Doorley agreed he gave a statement to police implicating the appellant on 27 March 2005. The police had executed a search warrant on his house the previous month and taken possession of about $8,000 in cash hidden under a mattress. He had previous convictions and had spent significant periods in jail. He could have served time in prison with drug traffickers. He did not source the drugs he supplied to Burge from former prisoners but from the appellant. He both packaged and delivered the drugs. The appellant married in February 2005. Prior to his marriage he had travelled to China to visit his fiancée. He accepted that the appellant was overseas on nine different occasions between February 2004 and February 2005. He was uncertain of the dates he delivered drugs to Burge. He told police that the appellant's fingerprints would not be associated with the drugs. The appellant gave him a Chinese mobile phone as a gift. The appellant gave him a salary for being the caretaker of the Garradunga property where the appellant planned to grow passionfruit and bananas. Doorley had slashed some vegetation around the house at Garradunga. The appellant left his mobile phones with Doorley whilst the appellant was overseas.

Other evidence and admissions

[23] On 26 March 2005, police executed a search warrant at the appellant's Goldsworthy Road premises. They found $20,000 in the false bottom of a bar and $1,000 in a safe. The following day they went to the appellant's Garradunga premises where Doorley was present. They found $35,000 in a shopping bag under a concrete slab beneath the main steps. Police did not find any meth in their search of the

appellant's premises. Forensic tests in the kitchen area at the Goldsworthy Road property did not reveal any traces of meth. Police placed a listening device in the appellant's XR6 Falcon between 1 March 2004 and 25 March 2005 but it revealed nothing of any evidential value.

[24] Police took statements from Burge, Thompson and Doorley, after indicating that their statements would not be used against them. Police told Burge that they knew he was involved in drug trafficking. He had already been charged with other offences. They advised him that they would provide a letter of comfort if he gave a statement. Police told Doorley that they were aware he was involved in drug trafficking and that if he provided a statement, he could apply for an indemnity. Police advised Thompson in similar terms. Doorley, Thompson and Huxley were never charged in respect of their involvement in this matter. Doorley admitted owning the $8,000 found at the appellant's Goldsworthy Road property.

[25] When police searched Burge's premises, they found instructions for the production of meth and a small quantity of meth in a black leather pouch on the seat where Burge had waited during the search. They also found a hypodermic syringe full of clear liquid, a small clip-seal bag of cannabis, electronic scales and a gold Seiko watch. In a car at the premises they found white powder in clip-seal bags, eight names on a piece of paper, a total of $12,470 in cash, and a mobile phone which had received 160 telephone calls.

[26] Counsel made 24 admissions under s 644 *Criminal Code*. These included the dates and times when police intercepted Burge in the company of Tisizis. They also set out the dates that drugs to which tendered analysts' certificates related were supplied by Burge to the covert police officer; the travel movements in and out of Australia of the appellant between 4 February 2004 and 12 February 2005; and the known telephone numbers of the appellant, Burge and Doorley.[4]

[27] Chantelle Emery, an accountant and senior financial investigator at the Crime and Misconduct Commission, conducted a financial analysis of the appellant's affairs. Her ultimate conclusion was that, depending on various scenarios, his expenditure substantially exceeded his known income by at least $250,000 and perhaps over $500,000.

[28] The relevant telephone records were tendered.[5] They showed that when the appellant was in China between 4 February 2004 and 29 February 2004, no phone calls were made to Doorley or Burge from the appellant's home or mobile numbers, but someone used extensively another landline belonging to the appellant. The appellant visited China from 26 March to 24 April 2004. During that period, his other landline was used frequently and his mobile numbers were used occasionally. The appellant visited China between 11 and 29 May 2004. During that period, there were no calls made from his mobile or home phone. The appellant next visited China from 2 July to 17 July 2004. Burge made two calls to the appellant's home number on 6 July 2004 and one on 13 July 2004. He made four calls to the appellant's mobile number, three on 5 July 2004 and the fourth on 6 July 2004. Someone used the appellant's other landline during this period. The appellant next

---

4 Ex 12.

5 Exs 14-16, 18-19.

visited China from 6 August 2004 to 21 August 2004. Three calls were made from the appellant's home number to Doorley's mobile number on 21 August 2004. Burge made four calls to the appellant's mobile number, one on 14 August and three on 21 August 2004. Someone made frequent use of the appellant's other landline whilst he was overseas on this occasion. The appellant next visited China from 28 September to 6 October 2004. Two calls were made from the appellant's home number to Doorley's mobile number on 4 October 2004. One call was made from the appellant's home number to Doorley's mobile number on 6 October 2004. Someone used the appellant's other landline in his absence. The appellant next visited China from 12 November to 21 November 2004. During this period, one call was made to Doorley from the appellant's home number on 21 November 2004. Someone used the appellant's home number on occasions during this period. The appellant again visited China from 3 December 2004 to 15 December 2004. On 7 December 2004, three calls were made from his home number to Doorley. Someone used the appellant's other landline. The appellant's final visit to China was from 1 February to 12 February 2005. During this period, there were two calls from the appellant's mobile number to Doorley's mobile number on 1 February 2005, and one call from the appellant's home number to Doorley on 12 February 2005. Someone used the appellant's home number on occasions to make outgoing calls during this period. Between 2 February and 12 February 2005, Burge phoned the appellant's mobile number on 17 occasions and Doorley on five occasions. Burge also telephoned the appellant's home number on 7 February 2005.

[29] The appellant did not give or call evidence.

The adequacy of the direction concerning Huxley, Burge, Tisizis and Thompson

[30] The appellant concedes that the warning the judge gave to the jury about the evidence of the appellant's accomplice Doorley was adequate. He contends, however, that the judge should have, but did not, give a similar warning in respect of the evidence of the witnesses Burge, Huxley, Thompson and Tisizis. They each had reason to give false evidence about the appellant. They were effectively accomplices and informers. Their evidence was critical to the prosecution case. Their evidence should have been the subject of careful warnings: *Pollitt v The Queen*.[6] Nor did the judge make clear that the evidence of one accomplice could not corroborate the evidence of another: *Khan v The Queen*.[7] Further, as each of these witnesses had previous convictions, the judge should have warned the jury about the evidence of each of them in that regard: *Bromley v The Queen*.[8]

The judge's directions to the jury relevant to Ground 1

[31] The relevant directions the judge gave to the jury are as follows:

> " Now, the prosecution case is that the [appellant] sold the drug methylamphetamine in large quantities to a number of persons, to Mr Huxley, you will recall the first witness, is a former truck driver, there was evidence - or he gave evidence that he purchased the drug

---

6 (1992) 174 CLR 558.
7 [1971] WAR 44.
8 (1986) 161 CLR 315.

on three occasions. Mr Thompson, the fisherman, said he purchased on four or five occasions. Mr Burge said he purchased on a regular basis over that 19 month period. The prosecution case is that the [appellant] supplied directly to each of those persons on some occasions and on others he used the services of his friend at that time, Peter Doorley, to supply the drug and to receive the money from those persons. The prosecution says that Mr Doorley also assisted him - assisted the [appellant] in packaging the drug.

Well, that effectively makes Mr Doorley an accomplice. Now, Mr Doorley has not been charged with trafficking, although he admits to being involved in conduct which you might regard as amounting to trafficking, and *I am required to warn you that in your assessment of his evidence, it must be undertaken with caution. There is a reason for this, a person who has been involved in an offence may have reasons of self interest to - to lie or to falsely implicate another person in the commission of the offence.*

Evidence of such a person, by its very nature, is potentially unreliable, and it is therefore necessary for you to scrutinise that evidence carefully before acting on it. Peter Doorley, having been involved in the offence, is likely to be a person of bad character. He was exposed, in crossexamination, to have committed a number of other offences between 12 December 1974 and November 1983.

That's some 20 years prior to these offences. But, it might be the fact that he has that history, you may find his evidence to be unreliable and untrustworthy. Moreover, he may have sought to justify his conduct, or at least minimise his involvement, by shifting blame, wholly or partly, to the [appellant]. There's an inherent danger in this. If it is – if his account is at all false in implicating the [appellant], as he has, it will, nevertheless, have a seeming plausibility about it, because he will have familiarity with the details of any such offending.

So, there's for that reason, because of the position of an accomplice, that juries are instructed that it would be dangerous to convict a defendant on the evidence of an accomplice, unless you find that his evidence is supported in a material way by independent evidence otherwise implicating the [appellant] in the offence.

It is necessary that I make similar comments in relation to the evidence of the other witnesses, namely Mrs (sic) *Huxley, Burge, Thompson and Tisizis. They - each of them were cross-examined about their previous convictions. That, again, was an attempt to put them in that category of persons who it's suggested, and it has been suggested to you, are untrustworthy and unreliable, and that's something you should take into account when considering the credibility of each one of them and the weight to be given to that person's evidence.*

The fact that a person has previous convictions does not necessarily mean that the evidence has to be rejected out of hand. It's a matter for you what weight you give the evidence, and the fact - taking into

account the fact that each of the witnesses has that background. *But, again, it's necessary for those reasons of character of the witnesses that you scrutinise their evidence closely and then, looking at their evidence, together with the evidence taken as a whole, to see whether their evidence is supported by other independent evidence.*

And if, having done that, you are satisfied that each of those witnesses has given a truthful and accurate account of what they did and what they saw, then you can act upon that evidence notwithstanding that that particular witness has previous convictions. It's really a matter of common sense that you must look at the character of the witness, look at the evidence that they give, see to what extent the evidence is supported by independent evidence, and that way you weigh up what evidence it is; what the evidence is that you accept, and what evidence you reject." *(my emphasis)*

[32] The court then adjourned for the day. The following morning the judge continued his directions concerning the evidence of these witnesses:

".. *I mentioned that some of the principal witnesses have previous convictions which are suggestive of bad behaviour, and that you should exercise caution when weighing that witness' evidence, and to look to the rest of the evidence to require whether that witness' evidence is supported independently by other evidence.*

The fact that someone has a history of criminal behaviour does not necessarily mean that that person is not being truthful on this occasion. If you are satisfied that any of those witnesses is a truthful witness, after having seen them give evidence, and considered his evidence in conjunction with the other evidence, then you can act on the version of facts he has given to whatever extent you wish. It really is a matter for you what parts of the evidence of any witness you accept and what parts you reject.

There is also the additional factor here of each of these witnesses gave their evidence in accordance with the statement given to the police in return for the police promising not to use their statements against them. You've heard that that's called an inducement and, ordinarily, if someone makes an admission to police which has been adduced by some promise, it - it's not - it can't be used against them in Court in any event.

Now, you've had the opportunity of reading the terms of that document signed by each of them acknowledging that they gave their statements under such an inducement. I think they're Exhibits 4 and 5. You've read those. I won't read them out to you again, but it simply means that they can speak freely to police officers without their statements being used against them.

Now, you may have heard in relation to other cases that such a person is an indemnified witness. That means a witness who will not be charged at all except in very specific circumstances. Witnesses who gave evidence before you are not of that kind, not indemnified

> witnesses. They can be charged if there's enough evidence against them but they – that evidence - the evidence that can't be used against them is their own statement. So that's the plain meaning of the words of the acknowledgment which each of those witnesses have signed.
>
> Again, it's a matter for you to take into account when you're determining what weight, if any, you'll give to their evidence, because it may - may be seen that they are receiving an advantage that would come to a particular person to give evidence which is unreliable or self-justifying or exaggerated.
>
> So you'll perhaps recall how those inducements came to be made by the police officers at some instances. In most cases, officers - the police are - policemen - investigating police officer told the witnesses that the police were aware of that witness's involvement in the - with illegal drugs, and they then specifically sought information involving [the appellant]." *(my emphasis)*

[33] The judge dealt with various aspects of the evidence of Huxley, Thompson, Burge, Doorley and Tisizis before explaining the elements of the offence of trafficking. His Honour returned again to the evidence, noting that:

> "… the prosecution case is that you will accept the evidence of Huxley, Thompson, Burge and Doorley, each of whom gave evidence of direct dealings with the [appellant]."

[34] Soon after, the judge turned to the defence case which was that the prosecution witnesses were not credible or reliable. Their evidence was not supported by objective, independent evidence and the financial evidence was also unreliable. The defence case was, the judge explained, that the witnesses Burge, Thompson and Tisizis had:

> "close association based on their long term use of methylamphetamine. Each had criminal convictions bespeaking some bad character on their part. Each had reasons to make allegations against the [appellant] in order to secure in the case of Burge that letter of comfort which was used in an attempt to reduce his sentence, and in the case of the other two the police inducement that the police would not rely upon their admissions in pursuing any case against them. Huxley was in a similar position."

Doorley, the defence argued, may have supplied the drugs to these witnesses, not the appellant, who was in China through much of this period.

[35] The judge reminded the jury that the defence did not have to prove anything. His Honour summarised the position near the conclusion of his summing-up in this way:

> "If you are satisfied beyond reasonable doubt, then you would find the [appellant] not guilty. If you're not prepared to rely upon the evidence of those prosecution witnesses whose evidence I've drawn your attention to, then you would find the [appellant] not guilty. Or, if considering all the evidence that you have heard, not only that that

> I've mentioned, if you consider all the evidence and you're left with a doubt as to whether the [appellant] was the person engaged in the activities of the business of supplying drugs to Burge and to others, then, again, your proper verdict would be not guilty. So, that's it, the question is 'Am I satisfied beyond reasonable doubt that the [appellant] was carrying on the business of trafficking in methylamphetamine?' "

[36] The jury retired to consider its verdict at 11.25 am. Defence counsel did not ask for any redirections. In discussion with the prosecutor, the judge noted that he considered the only accomplice was Doorley. Defence counsel agreed with the judge's assessment in that respect and stated that he was content with the judge's "modified version of the accomplice warning". The judge nevertheless gave the following redirection:

> "… this afternoon when *I was giving you some general warnings about scrutinising evidence I referred to the general instruction that if you're relying on the evidence of an accomplice – and Mr Doorley, of course, was an accomplice - that the evidence has to be scrutinised with - with great care because of the position that an accomplice is in, knowing what's going on and easily to deflect blame, and I indicated to you that you should look for independent evidence, independent of Mr Doorley, the accomplice, before - to - before you accept his evidence.*
>
> As a matter of caution - I'm sorry - and *I also went on to caution you about the evidence of the other witnesses whose character is referred to as - indicating that they may not be truthful* - truthful persons. Again, *I suggested always look for independent evidence.*
>
> *The independent evidence that the prosecution rely on particularly is not the evidence of the other witnesses so much as the photographs, the financial analysis evidence and the … telephone records as being independent of the association. So they are tangible, the prosecution suggest, unsullied evidence which you can rely upon as independently indicating whether the evidence of the other witnesses is credible and truthful.*" *(my emphasis)*

[37] The jury retired again to consider their verdict at 11.30 am. They returned with their guilty verdict at 2.15 pm.

Conclusion on this ground of appeal

[38] When the *Criminal Code* was first enacted, s 632 provided that a person could not be convicted of an offence on the uncorroborated testimony of an accomplice. Over time, s 632 was amended to allow for a person to be convicted on the uncorroborated testimony of an accomplice, but only if the judge warned the jury that it was unsafe to do so. Now, the terms of s 632 specifically allow for convictions based on the uncorroborated testimony of one witness (even an accomplice) (s 632(1)); a judge is not required to warn a jury that it is unsafe to convict an accused person on the uncorroborated testimony of one witness (even an accomplice) (s 632(2)); but a judge may make comments on the evidence appropriate in the interests of justice, providing the judge does not warn or suggest in any way that the law regards any class of persons as unreliable witnesses (s 632(3)).

[39] The appellant does not make any complaint about the judge's directions concerning Doorley's evidence. The judge understandably considered Doorley to be much more closely connected with the charge of trafficking brought against the appellant than the witnesses Burge, Huxley, Thompson and Tisizis. On the prosecution case, they were customers of the business run by the appellant with Doorley's assistance. The present terms of s 632 mean that it is unnecessary to determine whether those four witnesses were, in law, also accomplices to the appellant's alleged trafficking. The cases cited by the appellant in support of this ground of appeal all preceded the most recent amendments to s 632 and, for that reason, are of no real assistance. The present terms of s 632 make clear that the central question concerning this ground of appeal is whether the interests of justice required a warning of the kind the appellant contends the judge should have given in respect of the evidence of Burge, Huxley, Thompson and Tisizis.

[40] It is true there were sound reasons for warning the jury about their evidence. They were certainly involved in the appellant's meth trafficking business, but as customers. They were given inducements, by police officers in positions of authority, to implicate the appellant in the offending. They were drug users with criminal convictions, including for offences of dishonesty. For all those reasons, the interests of justice required the judge to effectively warn the jury to scrutinise their evidence carefully before acting on it, where it was unsupported by independent evidence. The relevant judge's directions and redirections are set out above. The judge warned the jury about Doorley's evidence in terms about which there is no complaint. The judge explained that Doorley had reason as an accomplice to falsely implicate the appellant so that they should scrutinise his evidence carefully before acting on it. The judge added the warning that it would dangerous to convict on Doorley's evidence unless it was supported by independent evidence implicating the appellant. His Honour immediately stated that it was necessary to "make similar comments in relation to the evidence of the other witnesses … Huxley, Burge, Thompson and Tisizis". The judge explained that this was because they had previous convictions and because they had given statements to police implicating the appellant in return for the police promising not to use their statements against them.

[41] There can be no doubt that, when these directions are viewed in context, the jury must have understood that they should be extremely wary of acting on the evidence of those witnesses where their evidence was unsupported by other independent evidence.

[42] It is true that the judge, in summarising the prosecution case for the jury, stated that: "The prosecution argues that the evidence of those primary witnesses ought to be accepted because the evidence of each one is consistent with the evidence of the other." The present terms of s 632 make clear that there was nothing wrong with the prosecution in this case making that submission or with the judge referring to it in the context of summarising the prosecution case. The judge fairly put the contrary contentions in summarising the defence case: see [34] of these reasons. Importantly, the redirections[9] made clear that the prosecution was not relying on the evidence of Burge, Thompson, Huxley and Tisizis to support each other's testimony, but rather the photographs, the financial analysis, evidence and the telephone records, all of which was evidence independent of those witnesses. When the

---

[9] Set out at [36] of these reasons.

judge's comments are understood in their full and proper context, they are shown to be balanced and tailored to the circumstances of the case. They were "a comment on the evidence given at trial that it [was] appropriate to make in the interests of justice" (s 632(3)). They have not resulted in any miscarriage of justice. This ground of appeal is not made out.

The adequacy of the directions concerning expert evidence and evidence of financial analysis and telephone records

[43] The appellant next contends that the judge erred in not giving an expert evidence direction about Ms Emery's evidence in terms set out in the Queensland Supreme and District Courts Bench Book.[10] The appellant further contends that the judge, in directing the jury as to the financial analysis evidence of Ms Emery and the telephone records effectively reversed the onus of proof. The failure to give the expert evidence direction and the giving of these directions tending to reverse the onus of proof amounted to errors of law which have caused a miscarriage of justice.

The relevant judge's directions on these grounds of appeal

[44] The judge first referred the jury to Ms Emery's evidence analysing the appellant's financial position when explaining the concept of drawing inferences from facts established on the evidence:

> "… For example, the prosecution relies heavily on that in this case when they're talking about the financial matters and the finding of money. The prosecution invite you to draw the inference that, in all the circumstances of the financial analysis, that that money was - comes from the - or, indeed - is, indeed, the proceeds of – of drug dealing or trafficking in the drugs."

[45] The judge warned the jury that they could only draw an inference against the appellant if the inference was logical and rational and if there was no "other rational conclusion consistent with innocence".

[46] The judge next summarised the evidence in the prosecution case, commencing with the evidence of Doorley, Huxley, Burge, Thompson and Tisizis. His Honour's summation of the telephone records and financial analysis was as follows. The prosecution emphasised the frequency of contact between Burge and the appellant as demonstrated by the records of calls between their two telephones (ex 20) although the records did not show who used the telephones. His Honour continued:

> "That distillation of all of the telephone call records, and if you can see that [the appellant's] landline was being employed, and [the appellant's] mobile as well, to make calls to Mr Burge's mobile, you can assess the frequency of that telephone contact if you - the time of each call - I'm not sure that that's the actual time of the call, rather than the duration, but by cross-referencing back to the original documents you can see whether it's an unanswered call or whether there's a significant conversation.

---

[10] See direction number 55.

> Burge says that the personal contact that he had with [the appellant] related to the supply of drugs. He was asked, at page 128 line 55, "Did you have a social relationship at all with [the appellant]?" Answer, "No." *No other explanation has been given or suggested to explain the frequency of the telephone contacts that is set out in Exhibit 20.* You can observe the dates for yourself. The only gap appears to be between December 2003 and June 2004." *(my emphasis)*

[47] The judge summarised the prosecution case in this way:

> "So the prosecution case rests, really, on three main bases; firstly, your acceptance of those principal witnesses; secondly, the telephone records showing regular contact; thirdly, the financial analysis showing large sums, if you accept the primary opinion of Ms Emery, a large sum of unexplained expenditure.
>
> The prosecution argues that the evidence of those primary witnesses ought to be accepted because the evidence of each one is consistent with the evidence of the other. It's consistent in such matters as the quality of the drug which was being supplied, and, of course, you have that quality independently assessed by the analysis, it was a drug of a very high purity, and those witnesses who are users of the drug could tell that by trying it.
>
> …
>
> *You have the telephone records which show the frequent contact and, apart from the connection between those persons mentioned and the supply of drugs, there appears to be no other explanation for [the] frequency.*
>
> The financial analysis, accepting the primary opinion, shows a large sum of unexplained money available. You have to understand that a financial analysis of this kind has its limitations because the analyst must rely on traceable movement of funds, and where the suggestion is made of flows of cash the analysis depends upon ascertaining the source of cash, and how much it was, and how it was spent. Mrs Emery's methodology which is laid out to you in those various annexes, has not been challenged in cross-examination. She did however make two reports. The annexures exhibited before you are from the first report which shows an excess of expenditure over income of some $530,000 over the period of the analysis – that 19 month period of August '03 to March 2005.
>
> In cross-examination [defence counsel] referred to the second report. Ms Emery conceded that she, in making allowance for the possibility that the proceeds of the sale of the vessel, Michelle, $44,000, might have been held as cash on hand for the 18 months prior to the analysis period which suggests that there would be an alteration in her figures. There is no evidence that those proceeds from the Michelle were held as cash in hand for that period, so this is a statement she makes about a theoretical outcome if you accept on the basis that those proceeds were so held.

> She argued too that she did not factor into her figures the proceeds of the sale of one of the other boats - it might have been the Stanley Brown, I think - some $37,000 was similarly not included, but it would cause a change if that money was held in cash in hand for that period. It's a matter for you whether you - that raises some question in your mind about the use of funds, or the holding of that amount of money is cash in hand.
>
> Ms Emery also agreed she did not factor into her figures the $70,000 claimed as net profit from gambling in that period, nor of an unspecified loan of $150,000 from Mr Lynch, nor an amount of 70,000 which was the amount of a cheque payable by Mr Browning to a person named Katsidis.
>
> So there is no evidence about those matters except the gambling of $70,000 in the [appellant's] affidavit which is exhibited. So the issue for you is really whether they cause you to doubt the accuracy of the analysis which is of a kind which depends upon information being provided to the analyst. So that effectively is the defence [sic] case. You give that financial material such weight as you think it deserves taking into account those limitations." *(my emphasis)*

[48] In next summarising the defence case, the judge stated:

> "… The defence case essentially is that you will not be satisfied beyond reasonable doubt on that evidence that the [appellant] was carrying on the business of trafficking. The defence relies firstly that be - argues firstly that the witnesses for the prosecution are not credible or reliable. Secondly, that the defence points to the lack of any objective independent evidence of drug dealing in the [appellant's] houses or cars. And thirdly, they will suggest that the financial analysis because of its limitation has not taken into account all the evidence available and it should not be relied upon.
>
> …
>
> Next, if it is argued that if Burge was sourcing drugs from anyone it was more likely to be from Doorley. Doorley was in as good a position as the [appellant] to supply the drugs. He had access to the [appellant's] houses, cars, phones, fishing box. The records show that the phones were being used while the [appellant] was in China. If you make the comparison of the times that he was in China, the dates set out in Exhibit 12 in the admissions, and the dates of the phone calls, you will see that some of those calls were made while he was absent in China.
>
> So it becomes a matter for you to decide the extent of Doorley's involvement and whether there was such a connection with the other witnesses so that blame would be thrown onto the [appellant]. In other words, there was some joining of minds between these people to throw the blame onto the [appellant].
>
> It is not necessary for the defence to prove anything. The defence invites your consideration of those matters and the evidence which

> they rely upon to suggest that all - that will at least leave you in a state of doubt about the [appellant's] involvement.
>
> …
>
> Thirdly, as to the financial analysis, again, you need to realise the limitations that I've explained to you. The defence suggests that a blind reliance upon Ms Emery's first report would result in your being misled. You have heard the cross-examination, that it was put to her that there were other funds, the cash in hand that I've mentioned, it's a matter whether you accept the possibility even of that quantity - or that amount of cash in hand being kept for such a period. *Again it is a matter whether the additional matters which you regard as being possible or likely should result in your not accepting the evidence of Ms Emery at face value, but suggesting there might be other explanations. In short, again, does it raise a doubt in your mind about the matters of which she gave evidence?*"
>
> So, you're required to weigh all of these matters, but ultimately there is only one question you have to ask of yourself - each of you have to ask of yourselves – 'Am I satisfied beyond reasonable doubt that [the appellant] carried on the business of trafficking in the drug methylamphetamine between August 2003 and March 2005?' " *(my emphasis)*

Conclusion on these grounds of appeal

[49] The appellant contends that the italicised passages, set out in the extract from the judge's directions immediately above, effectively invited the jury to reverse the onus of proof. No redirection was sought on these aspects of the judge's summing-up. I consider that is because, in context, the judge's directions were fair. The judge made the comments whilst summarising the prosecution and defence cases. He was plainly repeating the contentions of counsel. On at least 12 occasions during the summing-up, the judge directed the jury that they must be satisfied of the appellant's guilt beyond reasonable doubt before convicting him. One of those passages immediately followed the second impugned direction. Very shortly before that direction, the judge reminded the jury that the defence invited them to find a doubt about the appellant's involvement in the trafficking, and the judge told the jury that it was unnecessary for the defence to prove anything. It is inconceivable that the jury could have considered from the judge's directions in their full context that the onus was on the defence to raise a doubt about either Ms Emery's financial analysis evidence or the telephone evidence. The impugned directions, when viewed in context, were balanced, appropriate and did not cause a miscarriage of justice. These contentions are without substance.

[50] The appellant further contends that the judge erred in not giving a direction commonly given to juries about the evidence of expert witnesses as set out in the Bench Book.

[51] As this Court regularly comments, the Bench Book is not a statute. It does not prescribe mandatory directions. So much is noted in the foreword to the Bench Book.

[52] True it is that the judge did not give the usual explanation to the jury about why the opinion of the expert forensic accounting witness, Ms Emery, was admitted into

evidence as an exception the rule against giving opinion evidence. And nor did his Honour specifically tell the jury that, although expert opinion, it was up to them, as the sole judges of facts, as to whether they accepted Ms Emery's evidence. But the judge told the jury that they were the sole judges of the facts; that they must be concerned with the credibility and reliability of the evidence of witnesses; that Ms Emery had made concessions in cross-examination which effectively watered down her original report, reducing the amount of unsourced income from about $500,000 to about $250,000; and that the defence suggested that therefore the accuracy of her financial evidence must be in doubt. The jury must have understood from these directions that they could either accept or reject part or all of Ms Emery's evidence.

[53] Had defence counsel asked the judge to give Bench Book direction 55, he no doubt would have done so. I consider the reason why defence counsel did not seek that redirection was because counsel appreciated that the jury well understood their options in accepting or rejecting Ms Emery's evidence. There has been neither a "wrong decision of any question of law" nor "a miscarriage of justice on any ground" under s 668E(1) *Criminal Code* as a result of the judge's omission to give the usual expert witness direction. This contention fails. These grounds of appeal are not made out.

The admissibility of Ms Uren's evidence

[54] The appellant emphasises that Huxley gave his statement to police implicating the appellant only after he went to the police station to discuss the Pajero which Huxley claimed he gave or sold to the appellant. Huxley gave evidence that he purchased it from Ms Uren for $350. In cross-examination, he could not recall if he paid her $1,000. He denied that he then stole the $1,000 from Ms Uren's handbag and that, as a result, they had an angry confrontation. Defence counsel at trial asked the judge to rule on whether he could call Ms Uren in the defence case to give evidence of her dealings with Huxley concerning the car. She would say he stole the money and they had an angry confrontation about it. Defence counsel accepted Ms Uren's evidence would only go to Huxley's credit, but, he submitted, her evidence was inextricably linked with a principal issue in the case, namely, Huxley's credibility.

[55] The judge held that, in this case, there was no direct link between Huxley's credibility and the issue for the jury's determination. Ms Uren's evidence related solely to a straight forward credit issue. Huxley's denial that he stole money from Ms Uren's purse was subject to the finality rule. Accordingly, the judge refused to allow Ms Uren to give the evidence.

[56] The appellant contends that Ms Uren's evidence was relevant to whether Huxley had a motive to lie to police; that the collateral finality rule is more flexible in criminal cases (see *R v Lawrence*[11]); and a miscarriage of justice has occurred by not allowing the evidence to be led. This was especially so in light of the following direction which the judge gave to the jury:

> "I should mention that in that same cross-examination there was an attack on Mr Huxley's credit, suggesting that he'd stolen the proceeds of a sale of a car to a Ms Uren. He denied that, and so there is simply no evidence of that fact at all. That is only going to credit and it's not relevant to any issue you have to decide."

---

11 [2002] 2 Qd R 400.

Conclusion on this ground of appeal

[57] The primary judge's ruling as to Ms Uren's evidence was plainly correct. The evidence proposed to be led from her went solely to the issue of Huxley's credit which was, in this case at least, a collateral issue. It did not fall within any of the exceptions to the rule that a witness's answers given in evidence as to credit are final: see *Nicholls v The Queen*.[12] The judge's direction to the jury about Huxley's evidence in the preceding paragraph was correct. It follows that this ground of appeal is also without merit.

Conclusion on the appeal against conviction

[58] For the reasons I have given, the appellant has not made out any of the contentions in his four grounds of appeal against conviction. It follows that the appeal against conviction must be dismissed.

The application for leave to appeal against sentence

[59] The judge sentenced the appellant to 10 years imprisonment, cumulative upon the 18 years imprisonment he was currently serving. His Honour set a new parole eligibility date at 80 per cent of that 10 year sentence, namely, 19 May 2028. The appellant contends that this cumulative sentence was not sufficiently discounted to recognise the effect of the combined sentences: it was crushing. The appellant contends that a cumulative sentence of seven years imprisonment should be substituted so that the combined total period of imprisonment was 25 years. A recommendation for parole should be made at the half way point of the seven year sentence, or, if the Court considers a serious violent offence declaration is appropriate, at the 80 per cent point.

[60] The appellant had prior convictions. These included drink driving, possession of a motor vehicle with intent to deprive the owner, possession of dangerous drugs, a *Weapons Act* offence and a bail breach. But of most significance, he was convicted in 2006 of maintaining an unlawful relationship with a child between 1 May and 26 March 2005, and two counts of rape. He was originally sentenced to life imprisonment for those offences. His appeal against conviction was dismissed but his application for leave to appeal against sentence was granted,[13] the sentence appeal allowed and a sentence of 18 years imprisonment was substituted. The circumstances of that offence were as follows. The complainant was a girl aged between five and seven during the period of the offending which coincided with the period of the present trafficking offence. The appellant was a friend of the little girl's parents. The appellant's motor vehicle had been fitted with a listening device on 23 February 2005 by police engaged in the investigation of the present charge. This device recorded conversations between the appellant and a young female consistent with painful and unwelcome sexual intercourse. The investigation on this matter was terminated so as to protect the child. Her underpants were stained with semen which was analysed and found to be consistent with the appellant's DNA, although not a conclusive match. The semen on the pants did not contain spermatozoa. The appellant had undergone a vasectomy which meant that he did

---

12 (2005) 219 CLR 196, Hayne and Heydon JJ 284-285 [248]-[249], 298-299 [285]-[288]; and Gleeson CJ agreeing at 206 [1].

13 See *R v Robinson* [2007] QCA 99.

not have spermatozoa in his semen. The complainant gave pre-recorded video evidence which supported the charges. Medical evidence showed that the child's vagina was dilated, consistent with regular penetration by an adult's penis. The appellant's full time discharge date in respect of that sentence was 23 December 2023. His parole eligibility date after serving 80 per cent of it was 19 May 2020.

[61] The prosecutor at sentence submitted the judge should find the following facts about the drug trafficking. There were three identified customers during its 18 month period. The appellant sought to sell large quantities of meth to only a few people, namely, Huxley, Burge and Thompson. The total amount supplied was nearly 6.5 kilograms, suggesting total revenue to the appellant of $1,115,800. This was a serious example of trafficking. There was little in mitigation. The appellant had not cooperated with the administration of justice nor shown remorse. He was not drug dependent and his motivation was solely financial greed. The delay in bringing the case to trial was not the fault of the prosecuting authorities. The appellant was committed for trial on 8 August 2006 and an indictment presented on 6 December 2006. It was first listed for trial on 24 November 2008. The delays were largely attributable to the appellant wanting clarification as to the financial report. One adjournment was at the request of the prosecution to obtain documents on which the analysis was said to be based. Personal and general deterrence were of significance, especially the latter. Meth abuse was prevalent in the community. It was associated with criminal activity. The appellant involved others in his enterprise, knowing that the drugs would be on-sold to drug users. The exercise of the sentencing discretion was difficult because of the 18 year sentence for child sex abuse. Were the appellant being sentenced only on the trafficking offence, the appropriate penalty after a trial would be 18 years imprisonment. The sentence must be moderated, however, because of the 18 year sentence the appellant is currently serving. It was appropriate to impose some further penalty for his engagement in the extensive criminal activity of drug trafficking. This could be either a cumulative term of imprisonment or a longer concurrent term. The judge indicated that he considered a cumulative sentence was more appropriate. The prosecutor responded that, allowing for a substantial discount for principles of totality, a 10 year cumulative sentence should be imposed. If a lesser cumulative sentence was imposed, a declaration that the offence was a serious violent offence should be made.

[62] Defence counsel made the following submissions at sentence. The appellant was 58 at sentence. He had a sound employment history in unskilled work. The revenue referred to by the prosecutor was clearly a gross figure and not the net proceeds of the crime. Nevertheless, counsel accepted the appellant had made a substantial profit from his trafficking. Under the appellant's present sentence, he would not be eligible for parole until shortly before his 69th birthday; at the full time discharge date he would be 72 years old. When he is released, he will have no assets to fall back on as they were presently the subject of confiscation proceedings. He would have very few family members and friends. Defence counsel conceded that an 18 year head sentence may be supported by comparable cases. But because of the cumulative nature of the sentence, the appellant's age and the possibility that he would die in custody, the judge should impose a cumulative sentence of only two or three years imprisonment. Since his incarceration, the appellant had been working as a leading hand in the wood chop section of the prison, cutting fence posts and making furniture, and was in charge of a large number of other inmates. He had commenced his rehabilitation.

[63] The judge found that the appellant was a drug wholesaler able to access high purity meth. His trafficking was at the higher end of the scale of seriousness. The case against him was overwhelming. He was not cooperative with the authorities. Indeed, his requests resulted in the vacation of potential hearing dates. He showed no remorse. The maximum penalty was 25 years imprisonment. A sentence of 18 years imprisonment would have been appropriate but for the lengthy term of imprisonment the appellant was serving for unrelated charges: see *R v Jenkins, Rollason & Brophy*;[14] *R v Nabhan; R v Kostopoulos*[15] and *R v Chen*.[16] His full time release date on his present sentence was 23 December 2023 with a parole eligibility date of 19 May 2020. A penalty must be imposed that adds to that very long term of imprisonment. A concurrent term of imprisonment would not be apposite because severe deterrent penalties must be imposed on those who sell drugs for greed. Having regard to the few mitigating factors, the judge determined that a 10 year cumulative sentence was appropriate. The judge fixed parole eligibility date at 19 May 2028.

[64] The only question for this Court is whether a combined sentence of 28 years with parole eligibility on 19 May 2028 is crushing, taking into account all the appellant's offending. As this Court stated in *R v Kiripatea*:[17]

> "When a sentence is deferred for a lengthy period … then some moderation is called for with respect to the length of the sentence in question. The sentence imposed should not be a crushing one, and there is good reason for avoiding a sentence which would effectively destroy any hope a prisoner may have for rehabilitation. It is obvious that by imposing cumulative sentences deferred for a lengthy period of time the court could impose in reality a sentence more severe than that of life imprisonment."[18]

[65] Not without some hesitation, I have concluded that the cumulative effect of the sentences in this case is crushing, despite the two quite separate, diverse and antisocial episodes of offending committed during the same time frame and the dearth of mitigating features.

[66] The case of *R v Cannon*[19] to which the appellant's counsel has referred the Court does suggest that the sentencing range for this offence of trafficking after a trial were it not imposed cumulatively, could have been a low as 14 or 15 years imprisonment. The appellant will be elderly when he finishes his initial 18 year sentence. He is making some efforts to rehabilitate in prison. Had he been sentenced to a global sentence of life imprisonment rather than two cumulative terms he would be eligible for parole after serving 15 years imprisonment: see s 181 *Corrective Services Act* 2006 (Qld). The present cumulative sentence of 28 years imprisonment, of which he must serve almost 22½ years before being eligible for parole, is manifestly excessive and crushingly oppressive. I consider that a cumulative sentence for the offence of trafficking of no more than eight years imprisonment should have been imposed. The offence should be declared to be a serious violent offence.

---

14 [2008] QCA 369
15 [2007] QCA 266.
16 [2008] QCA 332.
17 [1991] 2 Qd R 686.
18 At 702, Williams J (Ambrose J agreeing).
19 [2007] QCA 205.

[67] I would grant the application for leave to appeal against sentence and allow the appeal against sentence by substituting the term of eight years imprisonment for the term of 10 years imprisonment and, for 19 May 2028 as the date fixed for parole eligibility, the date 19 November 2026.

ORDERS:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence granted and appeal against sentence allowed to the extent of substituting the term of eight years imprisonment for the term of 10 years cumulative imprisonment, and substituting for 19 May 2028 as the date fixed for parole eligibility, the date 19 November 2026.

3. The sentence is otherwise confirmed.

[68] **FRASER JA:** I have had the advantage of reading the reasons for judgment of McMurdo P. I agree with those reasons and with the orders proposed by her Honour.

[69] **WHITE JA:** I have read the reasons for judgment of the President and agree with those reasons and the orders which her Honour proposes.