SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kohl* [2012] QCA 344
PARTIES:	**R** **v** **KOHL, Carlo Konstantin** (applicant)
FILE NO/S:	CA No 271 of 2012 SC No 229 of 2011 SC No 1000 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders delivered 4 December 2012 Reasons delivered 7 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2012
JUDGES:	Muir, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered 4 December 2012:** **1. Grant the application for leave to appeal.** **2. Allow the appeal with respect to the sentence imposed for trafficking in a dangerous drug in indictment no 229 of 2011.** **(a) Set aside the sentence of 4.5 years.** **(b) Instead impose a sentence of 3 years.** **3. (a) Set aside the parole eligibility date of 29 January 2013.** **(b) Instead fix the parole eligibility date at 4 December 2012.** **4. Otherwise affirm the sentences imposed below and the declarations made pursuant to s 159A of the *Penalties and Sentences Act* 1992.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of trafficking in two dangerous drugs and to numerous property offences, including burglary by

breaking while armed (count 32) and bringing stolen goods into Queensland – where applicant sentenced to four and a half years imprisonment on count 32 and lesser concurrent sentences for other property offending, and to cumulative term of four and a half years imprisonment for trafficking offence, with parole eligibility date for combined sentences fixed after approximately 30 per cent of total – where drug trafficking only able to be charged due to admissions made by applicant – where applicant aged between 18 and 21 years when offences committed – where applicant contends sentencing judge failed to have proper regard to totality principle, insufficiently considered mitigating factors, and failed to show "special leniency" as discussed in *AB v The Queen* – whether sentence manifestly excessive in all the circumstances

Drugs Misuse Act 1986 (Qld)
Penalties and Sentences Act 1992 (Qld), s 159A

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Baker [2011] QCA 104, considered
R v Broad & Prior [2010] QCA 53, considered
R v Casagrande [2009] QCA 1, considered
R v Challacombe [2009] QCA 314, cited
R v Cutajar; ex parte Attorney-General (Qld) (1995) 85 A Crim R 280; [1995] QCA 570, cited
R v Diano, Brienza & Badari, unreported, Supreme Court of Queensland, Atkinson J, SC Nos 232, 268 & 231 of 2009, 6 July 2009, considered
R v Dunphy [2007] QCA 421, considered
R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201, cited
R v Maguire [2001] QCA 55, cited
R v Manning [2007] QCA 145, cited
R v Mason [2000] QCA 179, cited
R v McAway (2008) 191 A Crim R 475; [2008] QCA 401, considered
R v McQuillan [2011] QCA 5, cited
R v Mullins [2007] QCA 418, considered
R v Pham [1998] QCA 174, cited
R v SBK [2009] QCA 107, cited
R v Tytherleigh [2006] QCA 193, cited

COUNSEL: The applicant appeared on his own behalf
B J Merrin for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree with White JA's reasons.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons for joining in the orders made by the Court on 4 December 2012.

[3] **WHITE JA:** On 4 December 2012 the court made the following orders:

1. Grant the application for leave to appeal.
2. Allow the appeal with respect to the sentence imposed for trafficking in a dangerous drug in indictment no 229[1] of 2011.
   (a) Set aside the sentence of 4.5 years.
   (b) Instead impose a sentence of 3 years.
3. (a) Set aside the parole eligibility date of 29 January 2013.
   (b) Instead fix the parole eligibility date at 4 December 2012.
4. Otherwise affirm the sentences imposed below and the declarations made pursuant to s 159A of the *Penalties and Sentences Act* 1992.

[4] These are my reasons for joining in those orders.

[5] The applicant pleaded guilty on 27 September 2012 in the Trial Division in Brisbane to one count of trafficking in a dangerous drug (cannabis and methylenedioxymethamphetamine[2]) between 1 June 2007 and 23 June 2009.[3] He had earlier pleaded guilty on 20 December 2011[4] to five counts of stealing; three counts of fraudulently falsifying a record; four counts of burglary and stealing; five counts of breaking and entering and stealing; six counts of receiving tainted property; one count of burglary by breaking; two counts of entering premises and stealing; one count of bringing stolen goods into Queensland; one count of unlawful use of a motor vehicle; and one count of burglary by breaking while armed. On 27 September 2012, before the applicant had pleaded to the trafficking offence, the prosecution entered a *nolle prosequi* in respect of counts 4, 5, 6 and 33 on indictment no 1000 of 2011 to which he had earlier pleaded not guilty.

[6] The applicant was sentenced to four and a half years imprisonment on count 32 (burglary by breaking while armed) and lesser concurrent sentences for the other offending on that indictment with parole eligibility fixed after 18 months. He was sentenced to a cumulative term of four and a half years imprisonment for the drug trafficking offence with parole eligibility fixed after 15 months. A parole eligibility date for the combined sentences of nine years was fixed at 29 January 2013, which was after serving 33 months in prison, that is, approximately 30 per cent of the total period. A declaration of 883 days spent in pre-sentence custody was made.

[7] The applicant, who was aged between 18 and 21 years when the offences were committed, was represented by counsel and solicitors below but appeared on his own behalf before this court. He contended that the sentence of nine years was, overall, manifestly excessive. His written grounds of appeal contended that defence counsel had failed to address relevant mitigating factors, but no particulars were submitted, and it is unnecessary to say anything further about it. He further

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1 The orders delivered on 4 December 2012 referred to indictment no 291 of 2011. The indictments on which the applicant was arraigned were nos 229 and 1000 of 2011. The orders should therefore be amended, as above, to refer to the correct number.

2 MDMA.

3 On indictment no 229 of 2011.

4 On indictment no 1000 of 2011.

contended (orally) that the sentencing judge failed to have proper regard to the totality principle; that her Honour gave insufficient consideration to the mitigating factors; and failed to show "special leniency" as discussed in *AB v The Queen*[5] for his admissions in respect of the drug trafficking. He submitted, as I comprehend his submission, that a proper sentence would be one of seven and a half years structured in such a way that the offences on indictment no 1000 of 2011 would attract a maximum head sentence of three years which would be fully served at his present parole eligibility date on 29 January 2013, and that the trafficking sentence would remain at four and a half years but would be wholly suspended on that date to give him certainty, accepting that he would likely be deported.

[8] Ms Merrin, for the respondent, conceded that the overall sentence was very high and accepted that special leniency was warranted for the *AB* principle. Nonetheless, she supported the structuring of the sentences below as appropriate and opposed suspending the drug trafficking sentence.

[9] Before considering the contentions of the applicant, the circumstances of the offending must be set out and, to have an appreciation of the serious nature of that conduct, this must be done in some detail.

Circumstances of offending

[10] The sentence proceeded on two schedules of facts. The applicant came to Australia in June 2006 from Germany after he had completed school when he was 18 years old. The applicant already had a not-insignificant criminal history as a juvenile which included offences of stealing, wilful damage and aggravated assault for which he was sentenced to actual detention in a youth detention facility as well as probation. In summary, the applicant's offending commenced at the end of September 2006, only three months after he had arrived in this country, with some relatively minor dishonesty offences. A warrant was issued for his arrest after he failed to appear and he remained at large during the commission of the remaining offences until he was extradited from Victoria on 28 April 2010. He co-operated with police giving several lengthy interviews admitting to numerous offences of dishonesty. He also revealed to police that he had been engaged between mid-2007 until the end of 2009 as a courier delivering mostly cannabis but some ecstasy for the man whose property he broke into, the subject of count 32, on 23 June 2009.

[11] On 13 November 2006, acting on information, police conducted a check on a vehicle parked in the street in North Ipswich. The number plates did not match the vehicle and had been stolen from another vehicle in Toowoomba that day. The driver, who was the applicant, produced a Netherlands passport in the name of DW but the photograph was not of the applicant. Police enquiries revealed that the passport had been stolen from a locker at a backpackers' hostel in Brisbane. The applicant told police that he had worked out the combination lock of the locker at the hostel and had stolen a black backpack belonging to the owner of the passport. The backpack also contained EFTPOS and Medicare cards and $100 in cash. The applicant wanted to change his identity as he had financial trouble at home in Germany (counts 2 and 3 – stealing and fraudulent falsification of records). The applicant admitted to stealing the number plates for the car (count 1).

[12] The applicant was charged with those offences on 13 November 2006 and issued with a notice to appear in the Ipswich Magistrates Court on 28 November 2006.

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5 (1999) 198 CLR 111 at 155 per Hayne J.

He failed to appear and a warrant was issued for his arrest. As mentioned, the remaining offences over the next two and a half years were committed while the applicant was at large.

[13] On 8 June 2008 police acting on information attended at a camping ground at Noosa where the applicant was living in tents. He was forewarned and was not there. Police recovered a quantity of property which the applicant, subsequently, during police interviews in April and July 2010 after extradition, admitted stealing or receiving.

[14] On 29 January 2007 a Belgian backpacker left his backpack containing his passport, international driver's licence, credit card and deposit book, airline ticket, camera and personal documents and papers in his unlocked room at backpackers' accommodation at Sunshine Beach. Police located his credit card and deposit book in the applicant's tent. The applicant told police that while he was staying at that accommodation in 2007 he entered the complainant's room, went through his backpack and stole the credit card and deposit book but never attempted to use them (count 7).

[15] The applicant told police that sometime during 2007 he had stayed at a backpackers' hostel in Bundaberg and had taken a laptop belonging to another resident and an external hard drive which had been found in his tent. He had never used the laptop as it had Japanese software (count 8). He told police that between the end of 2007 and early 2008 when residing in the Sunshine Beach area he walked to a fish and chip shop to order dinner and while waiting observed a neighbouring business to be unlocked. He opened the door, stole a laptop from the counter, collected his dinner and returned home (count 9).

[16] The applicant told police that he noted that his drug supplier had been given a generator in exchange for drugs. During bad weather the applicant moved the generator into his tent, to the supplier's knowledge, to keep it safe and to use it (count 10).

[17] During 2008 he befriended a woman who boasted to him that she was an exceptional thief in that she regularly entered shops and stole property without detection. At his request she obtained a steering wheel and an engraving drill. The applicant told police the businesses from which those items had been taken (counts 11 and 12). He asked her to get him a printer. They went to a business and while he was looking at other items she removed the printer from the store without paying for it and gave it to him (count 13). All of the items were retrieved by police but in a depreciated state.

[18] The applicant admitted breaking into a locked unit at Bargara in January 2008 with two male and two female friends. He stayed there for three nights (count 14).

[19] The applicant and another person stole a 2008 Honda motorbike and riding gear from an open carport at Boreen Point. The applicant told police that they took the bike because his accomplice wanted one. The damaged motorbike and riding gear were recovered from the campsite and returned to the owner (count 15).

[20] On 2 March 2008 at about 12.30 am the applicant disabled an exterior strobe light alarm outside a rental property at Sunrise Beach. He removed louvres from a bedroom to gain entry with an associate and disabled the internal alarm system by

pulling the control panel from the wall and removing the power supply and phone lines to the alarm system. He stole a television, stereo system, DVD recorder and sound system. The plasma television was located in the applicant's tent. The applicant told police he owed a $25,000 drug debt and intended to take the property to repay the debt. His dealings with this man were the subject of the trafficking charge which will be discussed below. Police recovered some of the items but they were in poor condition (count 16).

[21] During their search of the tents, police located a car fridge. The applicant told police that about six weeks before their search in June 2008 he saw the fridge in the rear section of a Land Cruiser parked outside holiday cottages in Noosaville. He opened the rear side window, put his hand through to unlock the door and removed the fridge. He said he took it to store his food (count 17).

[22] In the evening of 26 May 2008 the complainant and his partner had been working in their shed at the back of their residence, after which they closed and locked the shed. Inside, amongst other things, was a V8, 400 class custom jet spring boat class engine with a special mounting valued at $58,000. The next morning the roller door was open and the boat motor gone. On 8 June 2008 police located the motor in the applicant's tent. They returned it to the owner (count 18).

[23] In the mid-morning of 27 May 2008 the applicant was observed by Big W's loss prevention officer at Noosa removing tags on two jumpers and stuffing one down the front of his board shorts and pulling his t-shirt over his shorts. He was seen to leave the store without paying for the jumper. The loss prevention officer accompanied the applicant back to the store where he became abusive. A scuffle broke out and the applicant pulled the item from his shorts and threw it under a rack of clothes. The applicant left the store and ran off out of the car park but was captured on CCTV and later identified (count 19).

[24] In the late afternoon on 27 May 2008 the complainant parked his mini bike in his timber garden shed at the side of his home. It was closed but not locked. At 7 o'clock the following morning the bike was no longer in the shed. It was found by police in the applicant's tent on 8 June 2008. In his police interview on 29 April 2010 the applicant said he had observed the bike in the shed and he and an associate went there during the night and took it back to the camping site. The applicant told police he had ridden the bike in and around the camping ground as well as carrying out some mechanical repairs on it. He said he was heavily affected by cannabis when he committed this offence. The motorbike was returned to the complainant (count 20).

[25] The applicant told police that after stealing the mini bike, the subject of count 20, he saw a compressor and associated items unsecured in a tradesman's utility parked in a street in Tewantin. He took them to the camping ground. Police failed to locate the owner (count 21).

[26] On 1 June 2008 the complainant beached his dinghy runabout on the grass above the waterline of the front yard of his house at Noosa. It was fitted with a Yamaha 15 horsepower outboard motor which was chained and padlocked to the dinghy. After several days away the complainant returned home on 7 June 2008 to find his outboard motor had been stolen. It was located in the applicant's tent. The applicant told police that he and an associate were travelling down the

Noosa River when they saw the dinghy and outboard motor. They removed the motor and fixed it to their own vessel which only had a two horsepower outboard motor and continued on their way (count 22).

[27] About a year later police intercepted a motor vehicle at about 6.30 pm on 21 June 2009 in the Hervey Bay area because of apparent defects. It accelerated away and after sighting it parked in a street police saw a male person running away from the vehicle. The vehicle had South Australian registration plates. It was locked with no keys in the ignition. The back seat and rear boot compartment were full of bags, electrical equipment and crates. When police returned the vehicle had left. Shortly afterwards it was located with a female in the front driver's seat. Police searched the vehicle and found documents in the front console which included a United Kingdom driver's licence in the name of AC, an overseas driver's licence in the name of JW and a suitcase containing a Swiss passport in the name of JT. On the floor behind the driver's seat police located a plastic bag containing a quantity of coloured opals contained in numerous, smaller clip seal bags, most of which had prices on small pieces of paper. A stereo system was also located in the vehicle. The vehicle was placed in a secure compound at the police station.

[28] On 22 June 2009 the woman who was in the car (aged 20) told police that she knew a person by name of JW (the applicant) whom she had met in a backpackers' hostel in Adelaide. She told police that he had bought the car from two travelling younger women and that JW had stolen a bumper bar and front passenger side door from a car wrecker in Adelaide to put on the vehicle. She told police that they had driven to Coober Pedy and stayed there for over a week. They went to an underground opal shop and discussed breaking in. They checked out the store security and three or four nights later JW went to the opal store, returning some hours later with a bag containing opals in small boxes. The value was calculated from the price tags to be about $100,000. JW removed the opals and put them into clip seal bags. He told his companion that he had stolen sound system equipment from the television room of the caravan park where they were staying and she had seen them in the car. The next morning they left Coober Pedy and travelled to Queensland, arriving at Hervey Bay on 20 June 2009. When shown a photograph of the applicant, the young woman identified him as JW. Police enquiries revealed that on 9 June 2009 the opal business at Coober Pedy was broken into and approximately $165,000 worth of opals stolen. Other enquiries confirmed that the entertainment system had been stolen from the common area of the caravan park where they had been residing.

[29] When police spoke to the applicant on 15 July 2010 at the Hervey Bay watchhouse a different account was given. He said that the young woman had the car when he met her. He denied stealing the opals. He said he purchased about 16 opals from a truck driver in Alice Springs for about $9,500 but later that night went to the vendor's truck, took the rest of the opals and retrieved his cash. He told police he intended to sell them in Germany. The applicant was charged with and pleaded guilty to bringing stolen goods into Queensland (count 23). All the opals were recovered and returned to their owner. He denied stealing the electrical equipment from the caravan park at Coober Pedy. He told police officers that it was in the vehicle when he met the young woman.

[30] In later interviews in July 2010 police cleared up a number of outstanding offences involving the applicant which dated from mid-2008. Counts 24, 25, 26 and 27

concern receipt of stolen property and falsification of documents. Passports and drivers' licences had been stolen by an associate at the request of the applicant from backpacker accommodation. He had substituted his photograph on the documents which were found by police when they searched the impounded car at Hervey Bay.

[31] The applicant admitted he had broken into Andrew Axisa's home at River Heads on 18 June 2008 and took some marijuana located in a drawer but no other property (count 28). The applicant's fingerprints were associated with the break-in.

[32] The applicant had been on the run from police in the area in mid-June 2009 and had hidden in a shed where a quad bike was stored for a couple of days. Whilst in the shed he had attempted to hot wire the bike without success. He had placed a false registration plate on it with the intention of riding it away (count 29). A few days later, the applicant broke into a house and stole $400 in cash, some cash from a broken piggy bank and the locking mechanism of a wooden cabinet (count 30).

[33] About a year later, in June 2009, the applicant was "squatting" in Mr Axisa's pool house, unknown to him, and was anxious to recover some of his personal property which he had left behind when residing in the house. He explained to police that he had bought a replica pistol for his protection. He entered the house by forced entry through the garage. Mr Axisa left shortly after 7.00 am for work, leaving a tradesman working in the yard on a van. At about 8.00 am the applicant came outside and stood behind the tradesman. He wore a black jacket with the hood pulled over his hair. The man was grabbed by the applicant who pointed the replica pistol at his face and demanded to know the whereabouts of Mr Axisa. He was led to the shed in the backyard while the applicant kept the pistol pointed at him. The shed was locked so he was led back to the house where the applicant tried a side door into the house which also appeared to be locked. The complainant was led up the back stairs where the applicant tried the locked back door. He kept demanding to know the whereabouts of Mr Axisa and kept the pistol pointed at the man. He was led back to the van and instructed to put his hands against it. The applicant patted him down and removed his wallet. He asked for the man's ID which he agreed to give him. The applicant took a few steps back and picked up a roll of duct tape from the tool box. The man feared for his safety at the threat of being taped up and ran from the applicant towards a neighbour's yard. He jumped the fence and was able to call police. He sustained a grazed stomach and a cut to his hand. The applicant drove off in Mr Axisa's van which was located a short while later (count 31). A warrant was issued for the applicant's arrest. The applicant told police his visit was clandestine because he owed Mr Axisa $25,000 from a failed drug deal (count 32).

[34] The monetary value of the unrecovered property was said in the schedule of facts to be $5,500.[6]

Trafficking offence

[35] The applicant told police that he first met Mr Axisa in 2007 when he was staying around Hervey Bay. He purchased drugs from him for his own use. He had been diagnosed with ADD as a child and was medicated with Ritalin. However, when he came to Australia he found it difficult to obtain and self-medicated with cannabis. The applicant "did also … a few drug runs for him".[7] He said he would take the

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6 AR 99.

7 AR 81.

drugs from Hervey Bay to Bundaberg, Sunshine Beach, Sunshine Coast, Noosa and Maroochydore between early 2008 and 2009. He was paid 20 per cent commission for the drugs he delivered, "mostly weed, marijuana, but here and there, there were some pills about". He also received a small amount of cannabis for himself. He said he was then desperate for money. He supplied one purchaser at Rainbow Beach on a weekly basis.

[36] At the end of 2008, just before New Year, Mr Axisa asked him to drop off approximately 1,000 ecstasy tablets to a particular person at a backpackers' hostel at Rainbow Beach. On the way he received a "tip off" that there had been a police raid. The applicant dropped the bag containing the pills into a garbage bin at a service station before returning home. When he arrived police were waiting and searched his vehicle. Nothing was located. He returned to the service station but the bin had been emptied. He telephoned Mr Axisa and was told that he owed Mr Axisa $25,000 – the value of the lost ecstasy tablets.

[37] He told police he stayed around the Hervey Bay area for some time trying to clear his debt. Although the statement of facts is silent on the matter, it seems that couriering drugs for Mr Axisa diminished about this time but the indictment (to which the applicant pleaded) extends the period to the burglary at Mr Axisa's house in June 2009. The applicant returned to Hervey Bay in June 2009 intending to clear the debt and had telephoned Mr Axisa about two weeks prior to the offending at his house to tell him that he had the money and wanted to make a deal to clear the debt. The police were only able to charge the applicant with trafficking in cannabis and MDMA (or any drug offence) because of those admissions.

[38] The statement of facts records that police noted that "the accused was co-operative with police at all times".[8] Matters proceeded by way of a full hand-up committal.

Submissions below

[39] The prosecution tendered the applicant's German criminal history, which has been mentioned, and a Victorian criminal history and asserted, erroneously, that he was convicted and sentenced to six months imprisonment suspended after one month.[9] As the Victorian criminal history shows, his appeal was successful.[10] The applicant was concerned that the primary judge may have been influenced by this error. Her Honour makes no mention of it and it is unlikely to have inclined her to any higher sentence as a consequence.

[40] The prosecutor contended that the property offending would attract a range of between three to five years imprisonment and that the trafficking offending would attract between three and six years imprisonment. The prosecutor sought for the middle to upper levels of both of those ranges but reduced to take account of the applicant's youth and the totality principle. His final submission was for a sentence of three to three and a half years in respect of the property offences and the same for the trafficking offence to be served cumulatively upon each other. This would result in an overall sentence of between six and seven years imprisonment. The prosecutor noted that the admissions and co-operation were significant, particularly with respect to the trafficking, where otherwise the Crown "did not have

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8 AR 83.
9 AR 27.
10 AR 77.

a case".[11] Those factors, it was submitted, should lead to a parole eligibility date after two to two and a half years of the overall sentence.

[41] Defence counsel did not disagree with the range proposed by the prosecution. The ultimate submission for the defence was for a head sentence of six to seven years with factors personal to the applicant, including a special discount for the *AB* principle, which would dictate an immediate release because the applicant had, by the date of sentence, served two years and five months imprisonment.

[42] There was a faintly put submission that the applicant had spiralled into a life of crime after the death of his father. However, as the primary judge pointed out, not unreasonably, the applicant's criminal history commenced at an early age, well before the death of his father.

[43] A letter to the court written by the applicant expressed his remorse and regret for his life of crime in this country. It contained more detail about the applicant's relationship with Mr Axisa. He let the applicant reside in his house for eight weeks; he generally looked after the applicant taking him fishing and moto-cross riding; and the applicant felt that he was doing him a favour by couriering the drugs. The applicant contended that he would not have committed the offences if his life had not been overshadowed by drugs. He was strongly motivated to be rehabilitated and to that end had undertaken numerous courses whilst on remand and had clear drug screening tests.[12]

[44] The applicant's mother wrote to the court describing some family background relating to the applicant and his relationship with his father and offered her support to him when he returns to Germany.

Approach of the primary judge

[45] Her Honour noted that the offences fell into a number of categories distinguished by time and circumstances. She identified count 32 – the charge of burglary by breaking while armed – as the most serious of the offences on the property indictment. She noted that the offence of bringing stolen goods into Queensland – count 23 – was another serious offence, as was count 18, the theft of the boat motor valued at $58,000, and the more sophisticated theft in count 16 involving disabling the alarm system from a house from which considerable property was stolen. Her Honour observed that the duration of the offending over two and three quarter years fell into groups – the initial minor offences, stealing from backpackers; the series of offences committed prior to 8 June 2008 where stolen property was recovered from the tent site; and the other offences committed about a year later from June 2009, involving bringing the opals into Queensland, and the false documents found in the vehicle used to transport those opals, and finally, a little later, the counts of breaking into a shed and house and stealing.

[46] Her Honour noted that throughout the applicant was a drug user, was trafficking in drugs and observed, with justification, that he was living an "apparently fairly itinerant and absolutely lawless life".

[47] Her Honour referred to *Pham*[13] and *Leu*[14] for the property offences. She considered the applicant's offending as less than in *Pham* but serious in the context of all his

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11 AR 30.
12 AR 105-115.
13 [1998] QCA 174.
14 [2008] QCA 201.

other offending. Her Honour said that she had regard to the applicant's youth and co-operation and early indication of a plea.

[48] With respect to the trafficking charge her Honour noted that whilst the applicant was a courier, he was doing it for monetary commission as well as cannabis for his own drug habit. Her Honour characterised the applicant as more than just a mere courier describing the applicant as being involved intimately in the business and in it for profit. Her Honour referred to a number of comparable sentences, particularly *Mullins*,[15] *Tytherleigh*,[16] *McAway*,[17] *Challacombe*[18] and *Prior*.[19] Of those, only *Prior* was a courier. The other offenders sold drugs, apparently, on their own account, a fact acknowledged by the primary judge. Her Honour regarded the period of trafficking as significant and substantially longer than in those cases, even on the reduced period to the end of 2008. She described the applicant as "integrally involved in a drug trafficking operation over a very long period of time". Her Honour acknowledged that without his admissions there would have been no trafficking case against him and he was, therefore, entitled to the *AB* discount.

[49] Her Honour concluded that there ought to be accumulation between the sentence on the trafficking indictment and count 32 on the property indictment to reflect his serious criminality and the applicant's lawless life for a very long period of time. Her Honour resisted applying cumulative sentences between the groups of property offences by virtue of the totality principle because if she did the sentence would become "too high and be crushing". Her Honour treated the trafficking plea as an early plea despite a submission from the prosecution that it was not. Her Honour had regard to the applicant's quite serious criminal offending as a juvenile in Germany. She expressed some cynicism about the applicant's remorse.

[50] Her Honour was informed that the applicant had been subjected to two criminal assaults whilst in prison of some seriousness and in respect of one there had been a plea of guilty.[20] Those assaults caused a broken nose, a fractured right cheek bone, a broken upper jaw, swelling in the lower jaw and surgery to remove a number of teeth as a result of the assault. The applicant was subject to a second assault in 2012 not long before his sentence which resulted in lacerations and stitches to his right ear with a hospital stay overnight. As a consequence he was placed in the solitary confinement unit where it seems he will remain until he is released from custody, thus making prison more burdensome.

Discussion

[51] The sentence for the trafficking will be considered first. In *AB v The Queen*[21] Hayne J observed:[22]

> "An offender who confesses to crime is generally to be treated more leniently than the offender who does not. And an offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to

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15 [2007] QCA 418.
16 [2006] QCA 193.
17 [2008] QCA 401.
18 [2009] QCA 314.
19 *R v Broad & Prior* [2010] QCA 53.
20 AR 36 and 40.
21 (1999) 198 CLR 111; [1999] HCA 46.
22 At 155 at [113].

> offences that were known. Leniency is extended to both offenders for various reasons. By confessing, an offender may exhibit remorse or contrition. An offender who pleads guilty saves the community the cost of a trial. … And the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition."

The explanation which the applicant gave for breaking into Mr Axisa's residence related to his involvement with Mr Axisa's drug trafficking and may have been offered on an exculpatory basis, or, at least, to give the crime more purpose than mere criminality. But without that disclosure there was simply nothing with which to charge the applicant in respect to any drug offending. In that circumstance, the reduction does not seem to have attracted the "special leniency" referred to by Hayne J. That has been conceded by the respondent. Her Honour, no doubt rightly appalled by the life of crime in which the applicant had been engaged since a juvenile, regarded the offending as falling into a category worse than that of a courier. That was not the prosecution case nor was there much, if any, evidence to support that conclusion other than the applicant's explanation that he had stayed for eight weeks with his drug supplier and had been shown friendship – until he lost the ecstasy pills.

[52] The applicant and the respondent have referred to numerous trafficking cases but a brief overview of some of them will suffice.

[53] *R v Mullins*[23] involved a plea of guilty on *ex officio* indictment by a young offender (22 when trafficking, 25 when sentenced) to one count of trafficking in methylamphetamine and cannabis sativa and other lesser drug offending. She was sentenced to four years imprisonment on the trafficking with parole eligibility after serving 15 months imprisonment. The offender told police that over a period of seven months she had supplied between eight and 10 people on a weekly basis with small amounts of amphetamine and two people with cannabis. She was addicted to methylamphetamine and her motivation for trafficking was to support her own addiction. She had taken only tentative steps to address that addiction but had obtained employment and had commenced to establish her independence from the drug culture. The four years was described at the high end of the appropriate range but not beyond it. She was a principal and not a courier.

[54] In *R v Casagrande*,[24] an Attorney-General's appeal, the offender was a 17 year old with no prior criminal history who had trafficked cocaine and ecstasy over eight and a half months in part to feed his own addition but in the latter stage profiting to an amount of about $1,000 per week. He informed police he was supplying some eight other persons. He co-operated fully and those trafficking charges were said to be substantially facilitated by the offender's frank admissions. He had spent 46 days on remand for other offences. He was sentenced to three years imprisonment with immediate release on parole. He was noted to have performed satisfactorily on his parole. That approach to sentencing for trafficking in a schedule one drug was regarded as an "unusual approach",[25] but the sentence was not increased.

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23 [2007] QCA 418.

24 [2009] QCA 1.

25 At p 3 per de Jersey CJ.

[55] The court also considered the decision in *McAway*,[26] a decision relied upon by the applicant, where the offender was 19 to 20 years at the time of his trafficking. This court was particularly concerned that the five year head term with the parole conditions relating to drug testing was a powerful incentive for the offender to rehabilitate herself and to continue with her rehabilitation and, when considered in conjunction with pre-sentence custody, satisfactorily allowed for personal and general deterrence.

[56] Reference was made to *R v Prior*[27] where the offender was part of an organised crime network trafficking commercial quantities of cannabis grown in South Australia and transported for sale into Queensland in motor vehicles especially modified to conceal the drugs. He was paid a small sum by a co-offender to collect the cannabis from one of the couriers on his arrival to Queensland and deliver it. He made full admissions concerning his involvement. He challenged the four and a half years imprisonment with parole eligibility after 11 months on the basis of his relatively limited role in the trafficking network, his level of remuneration and his personal circumstances including his co-operation. He was described by Chesterman JA as "a warehouseman of the drugs". He was also entrusted with making payments for the drugs and held and passed over very large amounts of cash to be taken back to South Australia. He was paid between $4,000 and $4,800. He made admissions against himself, although not others, out of fear. He had one previous conviction. The court concluded that the sentence imposed did not reflect the limited part he played in the criminal enterprise reflected in his remuneration and concluded that it was "a little heavy". A term of imprisonment of four years with parole eligibility after 10 months was substituted. That offender was a mature married man with children.

[57] The applicant referred to the matter of *Badari*[28] in the Trial Division. He was sentenced with other offenders. He pleaded guilty to trafficking in cannabis as part of a major drug trafficking syndicate carrying drugs sourced in South Australia into the Gold Coast. He had engaged in criminal activity as a juvenile, including some quite serious offences. He was sentenced on the basis of being a courier of 70 pounds of cannabis hidden in a modified motor vehicle. He did not desist until police closed down the operation. His profit was some $7,000. The period of trafficking was six months involving 10 trips. He was not a cannabis user. He had adult children. He was sentenced to four and a half years imprisonment with parole eligibility after 18 months.

[58] The applicant also referred to *R v Baker*.[29] That offender pleaded guilty to trafficking in MDMA over a two month period and other associated *Drugs Misuse Act* 1986 (Qld) offences during the currency of a suspended sentence. He was sentenced to two years and six months imprisonment for the trafficking with other lesser concurrent sentences but ordered to be served cumulatively on the outstanding portion of a suspended sentence of 14 months. The effective sentence was three years and eight months imprisonment with parole after one year and eight months. He was a low level street dealer in MDMA, and was aged 23, with a criminal history of mostly minor offences although one grievous bodily harm

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26 [2008] QCA 401.

27 [2010] QCA 53.

28 *R v Diano, Brienza & Badari*, unreported, Supreme Court of Queensland, Atkinson J, SC Nos 232, 268 & 231 of 2009, 6 July 2009.

29 [2011] QCA 104.

offence, which was the subject of the suspended sentence. That offender co-operated significantly with the police. The court referred to comparable sentences such as *R v SBK*[30] and *R v Challacombe*.[31] Relevantly for the *AB* discount, in the former case very extensive co-operation with police to otherwise unknown trafficking led to "a very substantial reduction" in the time to be served in prison before being released on parole. The appeal was allowed because of the complication of the suspended sentence, but the court commented that three years, as sought by the prosecutor below, was the appropriate sentence for this low level street offending.

[59] Although the applicant referred to *R v Manning*,[32] that young woman offender trafficked in many drugs to numerous recipients and the sentence and appeal involved a conflict of evidence about her true involvement in the enterprise compared with that of her partner so as not to make it an apt comparable sentence.

[60] The applicant also referred to *R v Dunphy*,[33] as did the respondent. That offender was aged 21 to 22 when offending and 24 when sentenced. He had no criminal history and had been diagnosed with attention deficit disorder. He was an occasional user of illicit drugs. He pleaded guilty to a range of offences including two counts of trafficking in dangerous drugs. He appealed only with respect to the trafficking sentences for which he was sentenced to six years with parole eligibility after 16 months. He contended for four and a half years for trafficking with parole eligibility after nine months. One count of trafficking involved a six month period and the second count, an eight month period. The drugs were ecstasy and crystal methamphetamine. The turnover was between $113,500 and $125,500. He supplied at street level and the motivation was initially for profit but was subsequently for paying off debts. The profit was likely to have been between $10,000 and $20,000. He provided assistance and was sentenced under s 13A of the *Penalties and Sentences Act* 1992 (Qld). For that reason there is some disconformity between the sentence in that case and the present. The court considered that the head sentence of six years, having regard to age, lack of criminal history and s 13A co-operation might be seen as excessive but that the early parole eligibility date after 16 months represented a very substantial discount. The court concluded trafficking occupying two periods in aggregate of more than 12 months and involving substantial sums of money had to be recognised as serious offending.

[61] Both parties referred to *McAway*.[34] That offender, although young, engaged in serious trafficking in two drugs between February and August 2007. She was 19 and 20 at the time of offending with no prior convictions but admitted to selling quantities of ecstasy tablets – she was in possession of 500 tablets in bags of 50 when police executed their search warrant. Her turnover was about $1,500 per month giving her a profit of about $9,000. She used the money for normal living expenses. She co-operated with police by naming some minor players in the drug scene. She was sentenced to five years imprisonment on the trafficking offence and lesser concurrent terms for the remaining offences with parole eligibility at 18 months from the date of sentence. After an extensive review of comparable authorities the President concluded that a sentence of five years imprisonment with

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30 [2009] QCA 107.
31 [2009] QCA 314.
32 [2007] QCA 145.
33 [2007] QCA 421.
34 [2008] QCA 401.

parole eligibility after 18 months, although at the top end of the range, was nevertheless within it and described the sentence as heavy.

[62] Although the period during which the applicant engaged in couriering the drugs was longer than in the above cases, the frequency of deliveries was not, apparently, obtained by police apart from a reference to a regular weekly delivery to one buyer. The only quantity mentioned in the schedule of facts and in submissions was the failed delivery of 1,000 ecstasy tablets. A 20 per cent commission would have given the applicant $5,000 on that transaction. He did not tell police that that was his expectation. In the absence of evidence it cannot be assumed that this was a usual level of supply and, indeed, that it was juxtapositioned with the impending New Year festivities suggests it was not. Furthermore, the applicant's itinerant, somewhat hand-to-mouth style of living would suggest that he did not receive substantial amounts of money from Mr Axisa. In his submissions below the prosecutor emphasised that the applicant was to be sentenced as a courier[35] and likened the applicant to *Prior*.

[63] A sentence of four and a half years after deduction for co-operation, youth, attempts at rehabilitation in custody, and the "special leniency" to which the applicant was entitled, as well as the consideration of the sentence overall, suggests that too little weight was given to the mitigating factors, particularly the *AB* discount. A parole eligibility at one-third of the sentence did no more than reflect the practice for a plea of guilty. A sentence of three years is more reflective of those matters particularly when the total sentence is reviewed.

[64] As to the property offences, a consideration of their number and nature meant that a firm sentence was required to reflect the serious failure by the applicant to respect individual property rights including, importantly, the identity rights of those individuals from whom passports and drivers' licences were taken. The conduct towards the tradesman at Mr Axisa's house was rightly mentioned as the most serious of the offences and lifted it beyond other property offending mentioned in the comparable cases. The sentences imposed in *Pham*,[36] *Mason*,[37] *Maguire*,[38] *McQuillan*[39] and *Leu & Togia*[40] well support a sentence of four to five years. The applicant sought to distinguish those cases on the basis that the offenders were either on parole or had escaped custody. No doubt those were important factors but his offending was widespread and included the serious burglary in count 32.

[65] A sentence of four and a half years with parole release after 18 months, that is, at one-third of the sentence demonstrates no error.

[66] The applicant submitted that he should have some certainty about his release, particularly considering his placement in solitary confinement for his own protection. It is, of course, very disturbing that a prisoner is, effectively, serving his sentence more harshly due to the serious criminal assaults visited upon him in prison by other inmates. Nonetheless, and notwithstanding his attempts at rehabilitation and his resolution to lead a crime-free life on release, the applicant's history dictates that he should be subject to supervision on release.

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35 AR 32.
36 [1998] QCA 174.
37 [2000] QCA 179.
38 [2001] QCA 55.
39 [2011] QCA 5.
40 [2008] 186 A Crim R 240; [2008] QCA 201.

[67] It was necessary for the primary judge to review the aggregation of the sentences to ensure that the total result merited by the individual crimes was not so crushing as to require intervention.[41] Although the primary judge did this, because the sentence imposed for the trafficking was, in the circumstances, manifestly excessive, it gave rise to a total sentence which was, itself, manifestly excessive.

[68] For these reasons I joined in the orders made on 4 December 2012.

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41 *Postiglione v The Queen* (1997) 189 CLR 295 at 304 per Dawson and Gaudron JJ; *R v Cutajar; ex parte Attorney-General (Qld)* [1995] QCA 570 at 8.