SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cornick* [2015] QCA 279
PARTIES:	**R** **v** **CORNICK, Michael Allan** (applicant)
FILE NO/S:	CA No 105 of 2015 SC No 71 of 2015 SC No 152 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 22 May 2015
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2015
JUDGES:	Fraser and Philippides JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of trafficking and some lesser drug offences and not guilty to other lesser drug offences – where the applicant was found guilty by a jury on all but one of the counts he pleaded not guilty to – where the applicant was sentenced to 10 years' imprisonment on the first count of trafficking and 12 years' imprisonment on the second count of trafficking – where the second trafficking was committed while the applicant was on bail for the first trafficking – where the sentencing judge found that the second trafficking was a substantial escalation in offending – whether the sentencing judge placed insufficient weight on the mitigating factors and, in particular, the guilty pleas when imposing sentence – whether the sentence imposed of 12 years' imprisonment on the second trafficking count was manifestly excessive *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, cited *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, applied *R v Ahmetaj* [2015] QCA 248, cited

R v Barker [2015] QCA 215, considered
R v Belbruno (2000) 117 A Crim R 150; [2000] VSCA 201, cited
R v Bobonica & Runcan [2009] QCA 287, cited
R v Feakes [2009] QCA 376, cited
R v Galeano [2013] 2 Qd R 464; [2013] QCA 51, cited
R v Johnson [2014] QCA 79, cited
R v Lambert; Ex parte Attorney-General (2000) 111 A Crim R 564; [2000] QCA 141, considered
R v McGinniss [2015] QCA 34, cited
R v Mustafa [2006] QCA 231, considered
R v Omer-Noori [2006] QCA 311, considered
R v Ryan [2014] QCA 78, cited
R v Safi [2015] QCA 13, considered

COUNSEL: P J Davis QC, with J R Jones, for the applicant
J A Wooldridge for the respondent

SOLICITORS: A W Bale & Son for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Philippides JA. I agree with those reasons and with the order proposed by her Honour.

[2] **PHILIPPIDES JA:** On 22 May 2015, the applicant, who seeks leave to appeal against sentence, was sentenced on his pleas to two counts of trafficking. The first concerned trafficking in methylamphetamine (count 2) for which a sentence of 10 years' imprisonment was imposed. The second concerned trafficking in methylamphetamine and cannabis for which the applicant was sentenced to 12 years' imprisonment. A Serious Violent Offence Declaration was made in respect of both offences. Lesser terms were imposed in respect of other counts and two summary offences. All sentences were imposed concurrently. A declaration as to time served was made.[1]

[3] Although the application for leave to appeal referred to the sentences imposed on counts 2 and 16, it was apparent from the oral submissions that the focus of the application was the sentence imposed on count 16, which, it was contended, was manifestly excessive. Senior counsel contended that, in respect of both counts 2 and 16, appropriate sentences were concurrent sentences of 10 years.

Background

[4] The history of the matter has some complexity. The applicant's senior counsel adopted as accurate the respondent's summary which is as follows. The applicant was committed for trial following a full hand up committal hearing, on 20 March 2013. On 6 February 2015, the Crown presented a replacement 26 count indictment charging the applicant with the following offences:

- Count 1 – Supply methylamphetamine on an unknown date between 31 July 2007 and 1 September 2008;
- Count 2 – Trafficking methylamphetamine between 20 October 2008 and 20 March 2011;

[1] The applicant was remanded in custody from 19 March to 3 May 2011 and from 18 May 2012 to 21 May 2015, for a total period of 1,146 days, which was declared as time served under the sentences.

- Count 3 – Production 3,4-methylenedioxymethamphetamine (MDMA) between 9 August 2010 and 20 March 2011;
- Count 4 – Supply methylamphetamine on 20 October 2010;
- Count 5 – Supply methylamphetamine on 8 November 2010;
- Count 6 – Possession cannabis, in quantity exceeding 500 grams on 8 November 2010;
- Count 7 – Supply methylamphetamine on 17 March 2011;
- Count 8 – Supply methylamphetamine on 17 March 2011;
- Count 9 – Supply methylamphetamine on 17 March 2011;
- Count 10 – Unlawful possession of a category H weapon on 19 March 2011;
- Count 11 – Possession methylamphetamine, in quantity exceeding 2 grams, on 19 March 2011;
- Count 12 – Possession on 19 March 2011 of prohibited items, namely pseudoephedrine, hypophosphorous acid and iodine;
- Count 13 – Possession, on 19 March 2011, of things (an electrical burner, a quantity of light shades, a heat lamp, a quantity of transformers, a quantity of liquid fertilizer, a quantity of funnels, a quantity of electrical cords and a fan) used in connection with the commission of the crime of producing a dangerous drug;
- Count 14 – Unlawful possession on 19 March 2012 of a category H weapon;
- Count 15 – Unlawful possession on 19 March 2012 of a category D weapon;
- Count 16 – Trafficking methylamphetamine, cannabis and MDMA between 8 February 2012 and 18 May 2012;
- Count 17 – Supply MDMA on 7 April 2012;
- Count 18 – Possession methylamphetamine, in quantity exceeding 2 grams, on 17 May 2012;
- Count 19 – Possession cannabis on 17 May 2012;
- Count 20 – Possession cocaine, in quantity exceeding 2 grams, on 17 May 2012;
- Count 21 – Possession of the dangerous drug alprazolam on 17 May 2012;
- Count 22 – Unlawful possession of a relevant substance pseudoephedrine on 17 May 2012;
- Count 23 – Possession, on 17 May 2012, of things (a sim card, a quantity of mobile phones, digital scales and a clip seal plastic bag) used in connection with the commission of the crime of trafficking in a dangerous drug;
- Count 24 – Possession, on 17 May 2012, of a quantity of money obtained from trafficking in a dangerous drug, knowing it to have been obtained from the trafficking;
- Count 25 – Possession methylamphetamine, in quantity exceeding 2 grams, on 17 May 2012; and
- Count 26 – Possession, on 17 May 2012, of things (a quantity of clip seal bags, a plastic spoon and digital scales) used in connection with the commission of the crime of trafficking in a dangerous drug.

[5] On 11 February 2015, the applicant was arraigned and pleaded guilty to counts 2, 4, 5, 9-11, 16[2] and 18-26. He pleaded not guilty to counts 1, 3, 6 to 8, 12-15 and 17.

[6] On 25 February 2015, the Court was informed that the applicant would plead guilty to counts 3, 6, and 12-15. The Crown confirmed that it would not proceed on counts 1, 7, 8 and 17. The matter was listed for sentence for 6 March 2015.

[7] The afternoon before the sentencing the Crown were advised that the applicant's instructions had changed and he would not be pleading guilty. On 6 March 2015 the sentence did not proceed and the matter was again listed for trial in the sittings commencing 27 April 2015, with a not before date for commencement of the trial of 15 May 2015. On 17 April 2015 at a review mention, it was confirmed that the trial was to remain as listed. On 13 May 2015 it was indicated to the Court by the parties that the matter would be a trial in relation to eight of the 10 counts to which the applicant had pleaded not guilty, being counts 1, 3, 6, 7 and 12 to 15.

[8] The trial commenced on 18 May 2015. Consistent with the indication given to the Court on 13 May 2015, the Crown endorsed the indictment to state that the Crown would not proceed further on counts 8 and, it seems, 17 of the indictment. The Crown also amended count 6 on the indictment to remove the circumstance of aggravation (that the quantity of drug in the applicant's possession was in excess of 500 grams). The date span of count 1 was also amended to reflect an end date of 31 July 2009.

[9] The applicant was re-arraigned before the jury in relation to counts 1-15. He again pleaded guilty to counts 2, 4, 5 and 9-11. He also pleaded guilty to count 6, as amended, which he had previously pleaded not guilty to. Immediately after arraignment, the Crown identified a typographical error in count 15 of the indictment (as to the year charged). This was amended without objection and the applicant was again arraigned. The plea of not guilty was maintained. The trial therefore proceeded in relation to count 1 and counts 3, 7 and 12-15.

[10] The jury returned verdicts on 21 May 2015 (day four of the trial). The applicant was acquitted of count 1 but convicted of the remaining six counts. He also pleaded to two summary offences.

Circumstance of the offences

First period of offending

[11] The applicant was sentenced for two distinct periods of offending. The first period was constituted by counts 2-7 and 9-15, the Crown having entered a *nolle prosequi* in relation to count 8 and the jury having acquitted the applicant of count 1.

[12] The circumstances of the offences in the first period to which the applicant pleaded guilty and the sentences imposed are as follows:

- Trafficking in methylamphetamine from 10 February 2009 until 19 March 2011 (count 2). During the trafficking period the applicant maintained a steady supply of the drug. He had an established customer base in North Queensland, in addition to selling locally. The applicant was trafficking in wholesale quantities of the drug, usually selling in ounces or multiple ounces, up to pounds at a price in the range of $30,000 to $45,000 a pound. The purity of the drug was described as "street level" – no higher than 10 per cent pure.

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[2] Count 16 on the indictment was subsequently amended to only charge trafficking in methylamphetamine and cannabis.

- Counts 4, 5 and 9 concerned supplies of methylamphetamine during the trafficking period.[3] On 20 October 2010 the applicant supplied 119.39 grams of methylamphetamine with purity of 6.7 per cent (count 4). On 8 November 2010 the applicant supplied 57.95 grams of methylamphetamine with a purity of 9.7 per cent (count 5). On 17 March 2011 the applicant supplied 1 gram of methylamphetamine with purity of 6.2 per cent (count 9).

- Count 6 concerned the applicant's possession of cannabis on 8 November 2010 for a commercial purpose (the applicant indicated he could supply cannabis).[4]

- Count 11 concerned 1,352.94 grams of a substance containing methylamphetamine at a purity of 5.9 per cent, found during a search of the applicant's vehicle on 19 March 2011.[5]

- During the search of the applicant's vehicle, police also found a revolver that was operational and ammunition for the revolver (Count 10).[6] During a search of a shed on the same day, police found a veterinary tranquiliser gun. That was the subject of one of the summary offences (possession of a category A weapon).[7]

[13] As to counts 3, 7 and 12-15, committed during the first period of offending to which the applicant pleaded not guilty but was convicted by the jury, the learned sentencing judge observed that the evidence in relation to each of the counts was very strong and that it was unsurprising the jury rejected the applicant's case.

- The most serious offence, count 3, concerned the production of MDMA.[8] The learned sentencing judge found that, when the applicant was arrested on 19 March 2011, he was about to embark upon a very substantial ecstasy production with other criminal associates, involving the production of up to a million pills. The potential yield to the operation was expected to be $1 per pill, or one million dollars. The preparations had progressed to the sourcing and storing of 1.5 kg of MDMA and hardener. The remaining component of 30 kg mephedrone was to be sourced as part of the payment for the supply of the pounds of methylamphetamine on 19 March 2011. At trial the applicant gave evidence, which was rejected by the jury, as to his interest in mephedrone (that it was solely because his daughter had been poisoned by ingesting a capsule). The learned sentencing judge described the version as "wholly fatuous" and accepted the submission of the prosecutor that it was indicative of an absence of remorse.

- On 17 March 2011, during the period of count 2 trafficking, the applicant supplied a quarter of an ounce of a substance containing methylamphetamine (count 7).[9]

- During the search of the shed on 19 March 2011, police found a number of items for use in the production of methylamphetamine and cannabis (counts 12 and 13[10]). The applicant was sentenced on the basis that he was jointly in possession of these things with others with whom he was involved in the criminal enterprise.

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3 The sentenced imposed was three years' imprisonment on each count.

4 A sentence of six months' imprisonment was imposed.

5 The particulars of this charge were not specified in the course of sentencing submissions and but were the subject of admissions made in the course of the trial. No dispute was raised on the appeal as to the details of this count. A sentence of two years' imprisonment was imposed.

6 A sentence of 18 months' imprisonment was imposed on this count.

7 A sentence of six months' imprisonment was imposed for this offence.

8 A sentence of five years' imprisonment was imposed on count 3.

9 A sentence of three years' imprisonment was imposed on count 7.

10 A term of four years' imprisonment was imposed on count 12 and 12 months' imprisonment on count 13.

- Also on 19 March 2011, the applicant was found in possession of a sawn-off shotgun and a semi-automatic rifle which were operational (counts 14 and 15).[11]

[14] The applicant took part in an interview in relation to the first set of offences which the learned sentencing judge found to have been "in almost every respect, quite false".

Second period of offending

[15] The applicant was initially refused bail and was taken into custody from 19 March 2011 until 3 May 2011 when he was released on bail. From February 2012, whilst on bail, the applicant committed the second group of offences for which he was sentenced, constituted by counts 16 and 18 to 26.[12] The applicant pleaded guilty to each of these offences.

- Count 16 concerned trafficking in methylamphetamine and cannabis between 8 February and 19 May 2012. The applicant had telephone contact with in excess of 50 customers and associates in relation to drug related activity. The activities occurred near-daily over the period. The applicant sold in quantities of grams to multiple ounces and primarily (but not exclusively) in wholesale quantities of an ounce or more. He sold to others who were themselves drug traffickers and had a number of repeat customers. He made approximately 1,000 supplies of one or both drugs during the trafficking period. He accepted payments by cash, direct bank deposit and on credit. One customer alone owed him $28,000. He also accepted pseudoephedrine based products by way of payment. His profit and turnover could not be calculated with precision. However, the second period of trafficking involved a substantial escalation in offending. The applicant's customer base was larger than during the earlier period of trafficking but included customers with whom the applicant had engaged during the earlier trafficking period. His customers were spread across the state at locations between Brisbane and Rockhampton. The methylamphetamine was of greater quality (purity) than during the earlier period of trafficking. He was also selling methylamphetamine at the higher price of $13,000 to $14,000 an ounce. He sold cannabis for $250 to $280 an ounce, depending on whether one or more ounces was purchased.
- Counts 18 to 26 concerned offences detected on 17 May 2012 during a police search of the applicant's resident. He was found in possession of 18.482 grams of powder which contained 10.465 grams of pure methylamphetamine (count 18); a total of 4 grams of cannabis (count 19); 5.191 grams of a substance containing 3.74 grams of cocaine, this was submitted to be a commercial quantity (count 20); eight tablets weighing 2.077 grams, found to be alprazolam (count 21); 10 sheets of pseudoephedrine based medications (count 22); various items already referred to (as count 23); and the sum of $4,866 (count 24). Also on 17 May 2012, during a search of the applicant's vehicle, police located 18.482 grams of a substance containing 10.442 grams of methylamphetamine, a purity of 56.5 per cent (count 25), and the various items the subject of count 26.

[16] When apprehended on 17 May 2012, the applicant was also found in possession of a smoking utensil which was the subject of a summary offence.

[17] The applicant declined to be interviewed when arrested on the second occasion in May 2012.

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11 Each offences attracted a term of 18 months' imprisonment.

12 The Crown having entered a *nolle prosequi* in relation to count 17.

Antecedents and personal circumstances of the applicant

[18] The applicant was born on 10 November 1953. He was 55 years of age at the time of the commencement of the offending for which he was to be sentenced. He was 58 years of age at the conclusion of the offending period. He was 61 at the time of sentence.

[19] The applicant had a criminal history which commenced in 1979. There were entries for drug offences in 1994, 1997, 2000, 2002, 2008 and 2009. No entry resulted in a period of imprisonment. The entry on 7 July 2009, concerned a conviction for supplying cannabis for a period of approximately 15 years, between 29 January 1994 and 31 January 2009. The applicant had sold the cannabis to his friends, usually in amounts of two ounces per week and at price of $250 per ounce, with a profit of $20 per ounce. The offending attracted a fine of $2,750. That conviction occurred approximately five months after the applicant had commenced trafficking in methylamphetamine.

Sentencing remarks

[20] The sentencing judge proceeded on the basis that the applicant dealt in wholesale amounts, usually in ounce quantities. There was varying evidence as to the prices the applicant was charging, but they appeared to be in the range of $30,000 and $45,000 per pound. When apprehended on 19 March 2011, the applicant was about to embark on a significant enterprise with other criminal associates, involving the production of a very large quantity of ecstasy. The projected potential profit for the applicant and his associates was $1 per pill on a sale of up to 1 million pills. There were weapons located in the joint possession of the applicant and his associates. There was, however, no evidence of any violence in the applicant's operations.

[21] His Honour had regard to the fact that the second set of offending was committed while the applicant was on bail and described it as a substantial escalation in the applicant's criminal activities. The quantities trafficked were similar, however, there was an expansion of the customer base, an increase of the purity of the methylamphetamine and also the price sought. In some transactions the applicant sourced pseudoephedrine from customers, encouraging people to attend different chemists.

[22] His Honour also remarked that the applicant was not a drug addict; his offending was motivated solely by commercial gain. To his credit, the applicant had completed a large number of rehabilitation programs, since he was placed in custody.

[23] His Honour had regard to the fact that the applicant had entered guilty pleas to most of the counts and, significantly, had pleaded guilty to the most serious, being the trafficking counts. However, the pleas were offered at a relatively late stage and were by no means timely. His Honour, nevertheless, recognised that the applicant's pleas resulted in a saving to the court and the community that was not insignificant. His Honour also noted that the four day trial was conducted with considerable efficiency.

[24] The approach taken by the learned sentencing judge to count 16 was to impose a sentence that reflected the overall criminality revealed in both series of offending. His Honour expressed the view that when proper regard was had to the decisions of *R v Feakes*,[13] *R v Galeano*,[14] *R v Ryan*,[15] *R v Johnson*[16] and *R v Safi*,[17] the applicant's

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13 [2009] QCA 376.
14 [2013] QCA 51.
15 [2014] QCA 78.
16 [2014] QCA 79.
17 [2015] QCA 13.

overall criminality would ordinarily have attracted a sentence of 13 years' imprisonment. His Honour concluded that the pleas and matters of mitigation justified some amelioration of the sentence but not "the full amount" that would otherwise be justified had the applicant pleaded at the earliest opportunity. His Honour reduced the sentence he would have imposed on count 16 from 13 years to 12 years to take into account factors of mitigation, namely the plea, the applicant's age and his cooperation during the trial and rehabilitation. The effect of the sentence imposed in relation to count 16 is that the applicant will be eligible for parole after serving approximately nine years and seven months in custody.

The application for leave to appeal against sentence

[25] The applicant submits that the learned sentencing judge erred in not providing a more substantial reduction to reflect the applicant's plea of guilty to count 16 and other mitigating circumstances, identified as the applicant's age and his steps towards rehabilitation, pleas and the absence of any violence or threats. The thrust of the applicant's submissions, was then that error was demonstrated by the learned sentencing judge having only reduced the sentence imposed on count 16 from a stated notional starting point of 13 years to a sentence of 12 years to reflect the plea and matters in mitigation as itemised in his Honour's remarks.

Age of the applicant

[26] The learned sentencing judge had regard to the applicant's age. His Honour specifically remarked on "the need to make some allowance for what may be the crushing effect of a sentence in a case of an offender who is of an advanced age". In that regard, his Honour referred to *R v Bobonica & Runcan*[18] where the applicant's age at the time of his likely release from the custodial component of the sentence was a matter referred to by the Court as relevant to the exercise of the sentencing discretion. It is to be noted that the totality principle was there required to be considered in the context of a consideration of whether, the overall sentence, which was required by operation of law to be served cumulatively on an unexpired sentence, was crushing. While age is a relevant factor, as was stated in *R v Belbruno*,[19] those of advancing years who commit serious crimes cannot expect to escape appropriate punishment by reason of that factor alone. Personal deterrence remained an important consideration in the present case, given there were two distinct periods of offending, particularly where the second occurred while the applicant was on bail for the first and involved an escalation in offending.

Rehabilitation

[27] The applicant's good behaviour and the courses undertaken while in custody, following his arrest on the second occasion, were matters that were expressly referred to by the learned sentencing judge, who remarked that they went to the applicant's "considerable credit". The applicant's efforts at rehabilitation are to be viewed in the context of an offender who, although a drug user, was not drug addicted or motivated to offend because of an addiction. The applicant did not warrant special leniency and there is no basis to conclude that his rehabilitation efforts were not given due weight.

Plea of guilty and cooperation

[28] Referring to *R v Lambert; ex parte Attorney-General*,[20] the respondent submitted that the applicant was only entitled to a discount on sentence in relation to the counts to which

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18 [2009] QCA 287.
19 [2000] VSCA 201.
20 [2000] QCA 141.

he pleaded guilty. In contending for a different position, the applicant referred to the following statement in *Lambert*:[21]

> "In a mixed situation like the present, where the overall operative sentence is likely to be imposed on [the count that went to trial], and where the sentence to be imposed for it is likely to be increased to take account of the subsequent offences, the amount of the increase should be abated to give appropriate credit for [the] pleas on those later counts."

[29] The applicant argued that, applying the reasoning in *Lambert*, where, as in the present case, there was a trial of the less serious counts, that was not a factor that ought to impact largely on the sentence; for the most serious counts of trafficking to which pleas were entered. The applicant argued that the pleas should be seen as indicative of remorse, accepting nothing else could be pointed to as evidence of remorse.

[30] The learned sentencing judge considered that the applicant's preparedness to advance "a blatantly false explanation" at trial for the disputed counts was indicative of an absence of remorse. However, the fact that the applicant went to trial on some counts did not detract from the cooperation provided by the pleas to the trafficking counts. The appropriate discount to be given in relation to the pleas, nevertheless, was a matter to be determined by the sentencing judge having regard to factors which included the timeliness of the pleas and the strength of the Crown case. I have chronicled in some detail the history of the matter proceeding through the Court. It was a factor on which his Honour rightly placed weight. He did not accept that the pleas of guilty that were entered were early or timely. Noting the strength of the Crown case, his Honour nevertheless acknowledged the utility of the pleas and also that, in regard to the charges that proceeded to trial, the manner in which the defence case was conducted, including the making of admissions, had facilitated the trial proceeding more expeditiously than would otherwise have been the case.

[31] The analysis below of comparatives demonstrates that a sufficient discount was allowed for the plea to count 16.

Manifestly excessive

[32] As the respondent argued, to succeed on the application, it is not enough for the applicant to establish that the sentence was even markedly different from examples placed before the Court of sentences imposed in other cases. It is necessary that the applicant demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is unreasonable or plainly unjust.[22]

[33] Of the authorities referred to by the applicant before this court as comparable cases, the decisions of *Feakes*, *Galeano*, *Ryan*, *Johnson* and *Safi* were placed before the learned sentencing judge. Before this Court the applicant placed particular reliance on three decisions; *R v Omer-Noori*,[23] *R v Barker*[24] and *Safi*. The respondent additionally referred to *R v Mustafa*.[25]

[34] In *R v Ahmetaj*,[26] the following statement of Fraser JA in *R v McGinniss*[27] referring to the comprehensive examination of the authorities made in *Safi*, was adopted:

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21 [2000] QCA 141 at [28].
22 *Hili v The Queen* (2010) 242 CLR 520.
23 [2006] QCA 311.
24 [2015] QCA 215.
25 [2006] QCA 321.
26 [2015] QCA 248.
27 [2015] QCA 34 at [11].

"The Court has recently analysed the relevant sentencing decisions: see *R v Galeano*, *R v Ryan*, and *R v Johnson*. As I observed in *R v Safi* those analyses indicate that, whilst each sentence requires an exercise of discretion with reference to the facts and circumstances of the case, for substantial trafficking in a Schedule 1 dangerous drug of the order of the applicant's trafficking, offenders who have pleaded guilty and invoked a range of mitigating factors have commonly been sentenced to terms of imprisonment of between 10 and 12 years (with the automatic declaration that the offence was a serious violent one). In this case, as in *Safi*, it is sufficient to quote the following passage from the judgment of McMurdo P, with whose reasons Holmes JA and I agreed, in the broadly similar case of *Johnson* in which a sentence of 10 years imprisonment was upheld:

'[45] In *Feakes*, the applicant pleaded guilty to trafficking in an assortment of Sch 1 and Sch 2 dangerous drugs and to other related drug offences. He applied for leave to appeal against his 10 year sentence. He was 30 and 31 when he offended and 34 at sentence. He had some relevant but minor criminal history. The trafficking was committed in breach of a good behaviour bond when he was subject to "drug diversion". His offending consisted of supplying drugs on 11 particularised occasions over a seven month period to a covert police operative. He supplied 32 grams of cocaine, almost 5,000 tablets containing 330 grams of the then Sch 2 drug MDMA, and 110 grams of the Sch 2 drug MDEA. His benefit from drug related activity was over $56,000 and about $115,000 passed through his hands during the trafficking period. His trafficking was commercially motivated. After reviewing the cases of *R v Kashton*; *R v Assurson*; *Rodd*; *R v Elizalde*; *R v Bradforth* and *R v Raciti* this Court noted that, absent extraordinary circumstances, in cases of trafficking in Sch 1 drugs on this scale mature offenders who have pleaded guilty can expect a sentence of at least 10 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to slightly lesser terms. Feakes had a grossly dysfunctional upbringing and had made real efforts to overcome his dependence on cannabis and other drugs so that he had promising prospects of rehabilitation. Whilst a sentence of nine years imprisonment could have been imposed, the 10 year sentence was not manifestly excessive.'" (citations omitted)

[35] The sentence of 12 years imposed on count 16 was within the ambit of submissions made on behalf of the applicant at first instance, although it was also contended that a lesser sentence could be imposed. The above analysis by Fraser JA of relevant comparatives supports the sentence imposed on count 16 of 12 years after taking into account pleas and the other matters of mitigation put before the sentencing judge.

[36] As for the authority of *Omer-Noori*, the offender there had trafficked in heroin, methylamphetamine and cocaine over six and a half months. His offending was described as a "substantial, wide-ranging trafficking business, carried on as a purely commercial enterprise over a period for most of which the applicant was on bail for possession".

His offending included buying ecstasy tablets in large amounts (on one occasion, negotiating to buy 5,000 tablets for $95,000), selling cocaine in quantities of an ounce at a time, participated in a plan to import cocaine, negotiating to buy methylamphetamine and purchasing 12 and one half ounces of heroin. Although he pleaded guilty, he unsuccessfully contested at sentence the allegation that he had trafficked in heroin and cocaine. Apart from his lack of relevant convictions, there was nothing in the antecedents particularly deserving of leniency. The complaint that an insufficient discount (from a notional sentence of 15 years) was accorded for the late plea was rejected. The sentence of 13 years was held to be well within the range of a sound exercise of sentencing discretion.

[37] The decision was relied on by the applicant as showing that where there was only a plea to consider by way of mitigation, a discount of two years was considered appropriate. However, the extent of the discount for the plea and other matters of mitigation in this case cannot be approached in as mathematical a manner as the submission suggests. As the respondent submitted, referring to Kirby J in *Markarian v The Queen*[28] the nature of the balancing process involved in sentencing an offending is not arithmetical:

> "Because there are a multitude of factors to be taken into account, many of them pulling successively in opposite directions, the evaluation, in terms of time of imprisonment, quantity of fine or other sanction, is necessarily imprecise. Human judgment is inevitably invoked. In sentencing there is sometimes a legitimate role for differences of judicial view. These may occasionally favour the extension of leniency, as *Osenkowski* shows. Necessarily, there must also be room for the views of a judicial officer who takes a more punitive view of all of the relevant considerations in the case. So long as all relevant considerations are given due attention, the discretionary character of sentencing will inhibit appellate interference." (citations omitted)

[38] The critical question is whether the sentencing judge made sufficient allowance overall for the pleas and other matters of mitigation. As stated, his Honour took the approach of imposing a sentence on count 16 to reflect the overall criminality which involved a second period of high end trafficking in a Sch 1 drug, moderated to take into account the plea and matters of mitigation. A sentence of 12 years for trafficking on the scale involved in the second trafficking, aggravated by the features that the trafficking entailed an escalation in offending, and occurred while the applicant was on bail for prior trafficking, was clearly within range. That was particularly so, given the sentence of 10 years imposed for the first trafficking offence, which was not the subject of any complaint. That the applicant was required to serve an additional two years (80 per cent of which is to be served by way of actual custody) resulting in an effective sentence of nine years and seven months to reflect the overall criminality, moderated for the plea and other mitigating factors, did not result in a sentence that was manifestly excessive.

[39] Nor does the case of *Safi* assist the applicant. It also concerned offending which included two trafficking offences, the second trafficking offence being committed while on bail for the earlier offending. It is true that Safi, unlike the applicant, was said to have been "the clear leader" of the trafficking syndicate and the offending was associated with what was described in that case as "concerning evidence of threatened violence". However, while a sentence of 10 years was imposed on the first trafficking

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28 (2005) 228 CLR 357 at 465, [133].

offence, the second trafficking took place over a very much shorter period (eight days) than involved here, attracting a concurrent sentence of seven years and did not involve an escalation in offending as occurred in the present case.

[40] As for *Barker*, the sentence of 10 years was imposed for only one trafficking offence. That was also the position in authorities such as *Feakes* and *McGinniss*, where sentences of 10 years were imposed for trafficking over shorter periods than involved here. Those cases do not assist the applicant.

[41] *Mustafa* also supports the sentence imposed on count 16. In *Mustafa*, the applicant was sentenced to 12 years' imprisonment on his plea to trafficking in heroin, cannabis and cocaine and to lesser concurrent terms in respect of other offences, including seven years' imprisonment for the offence of supplying a dangerous drug to another person. The contention that the sentence imposed was manifestly excessive was rejected. The offender there had commenced offending to support his own addiction and confessed to having trafficked for 18 months (which involved a period of 12 months that was otherwise unknown to the authorities). It was accepted that the confession established an important aspect of the Crown case. Keane JA, with whom the other members of the Court agreed, explained deterrence features largely in sentencing for drug trafficking:

> "The offence of trafficking in dangerous drugs inevitably attracts condign punishment informed by the need for strong, personal and general deterrence as well as retribution for the harm caused to individuals and the community as a whole by the trade in which the applicant was engaged."

[42] For the reasons given above, the effective sentence of 12 years' imprisonment with a declaration that the applicant was convicted of a serious violent offence has not been demonstrated to be manifestly excessive in all the circumstances.

Order

[43] I would order that the application for leave to appeal against sentence be refused.

[44] **JACKSON J:** I agree with Philippides JA.