SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAX* [2020] QCA 218
PARTIES:	**R** **v** **KAX** (applicant)
FILE NO/S:	CA No 109 of 2020 SC No 69 of 2019 SC No 51 of 2020 SC No 56 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Date of Sentence: 30 April 2020 (Crow J)
DELIVERED ON:	7 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2020
JUDGES:	Philippides and Mullins JJA and Brown J
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal allowed.** **3. Set aside the sentence imposed by the primary judge on 30 April 2020 for count 1 including the serious violent offence declaration and, in lieu, sentence the applicant to imprisonment for nine years and 10 months.** **4. Confirm the other sentences and orders imposed by the primary judge.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to unlawfully trafficking in dangerous drugs – where the trafficking was over a period of five months – where the applicant was sentenced to imprisonment for 10 years and 10 months – where the applicant had been sexually assaulted whilst in juvenile detention – where the assaults caused the applicant to develop psychiatric conditions that contributed to his drug addiction which was one of the reasons for his trafficking – where the sentencing judge accepted that the

applicant's drug addiction was the result of the sexual assaults – where the sentencing judge accepted that harsher conditions in the prison due to the COVID-19 pandemic was a mitigating factor – whether there was an error in the sentencing – whether the sentencing judge failed to moderate the sentence for the applicant's psychiatric conditions and the effect of COVID-19 on prison conditions

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Feakes [2009] QCA 376, considered
R v Nunn [2019] QCA 100, considered
R v Phillips & Woolgrove (2008) 188 A Crim R 133; [2008] QCA 284, cited
R v Safi [2015] QCA 13, considered
R v Stasiak & Anor, unreported, Supreme Court of Queensland – Cairns, Henry J, Indictment No 1 of 2019, 4 August 2020, considered
R v Tran; *Ex parte Attorney-General (Qld)* [2018] QCA 22, considered

COUNSEL: J P Feely for the applicant
J M Phillips for the respondent

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

[1] **PHILIPPIDES JA:** I agree with the orders proposed by Mullins JA for the reasons given by her Honour.

[2] **MULLINS JA:** The applicant pleaded guilty in the Supreme Court to unlawfully trafficking in dangerous drugs (count 1) and the unlawful supply of a category H weapon (count 2). The trafficking period was particularised over a period of five months between 22 August 2017 and 24 January 2018. He also pleaded guilty to three summary charges and was dealt with for committing an offence during the operational period of a suspended term of four months' imprisonment that had been imposed on 30 October 2017. The applicant was sentenced to imprisonment for 10 years and 10 months for the trafficking which therefore attracted the declaration that he was convicted of a serious violent offence. He was convicted and not further punished for the unlawful supply of a weapon and two of the summary charges. For the summary charge of fraud, he was sentenced to a concurrent sentence of six months' imprisonment. The suspended term of imprisonment was activated in full and ordered to be served concurrently. The applicant had spent 773 days in pre-sentence custody and that was declared to be imprisonment already served under the sentence.

The applicant's antecedents

[3] The applicant was born in 1986 and was 31 years old during the period of the trafficking. He had numerous entries in his criminal history that commenced with two entries before the Childrens Court of Queensland for which he served sentences in juvenile detention. As an adult, his criminal history includes many dishonesty

and property offences for which he was mainly dealt with in the Magistrates Court. He did appear before the Beenleigh Drug Court on 25 May 2007 for 13 charges of enter premises and commit indictable offence by break and other charges for unlawful use of motor vehicles, dangerous operation of a vehicle and similar offences for which he was sentenced to 12 months' imprisonment to be served by way of an intensive correction order with special conditions that he undergo medical, psychiatric and psychological treatment, attend anger management program and submit to drug testing as required. The applicant breached that intensive correction order and was dealt with for the breach in the Beenleigh Magistrates Court on 8 April 2008 and the intensive correction order was revoked and he was resentenced to 262 days' imprisonment for the original offences.

[4] He was sentenced in the District Court on 29 January 2010 for multiple burglary, breaking and entering premises, stealing and unlawful use of motor vehicle and similar offences. He was sentenced to an effective term of three years' imprisonment, but with pre-sentence custody of 270 days, was released on parole on the day of the sentence. (That was the longest sentence imposed on the applicant before he was sentenced for the trafficking.) Even though none of the offences for which he was sentenced on that occasion were drug offences, Dearden DCJ described the applicant as "living proof … of the damage that drug addiction does to a human being". The applicant was then dealt with in the District Court on 16 February 2011 for robbery with actual violence committed on 20 June 2010 whilst on parole for which he was ordered to serve two years' imprisonment cumulative upon the term of imprisonment then being served and he was given an eligibility for parole date of 16 May 2011. The applicant was then dealt with in the District Court on 16 November 2011 for an offence of receiving tainted property committed on 20 January 2010 that related to receiving six stolen motorcycles that were under his control only for a very short period of time and for which there was no suggestion he received any benefit. He was sentenced to nine months' imprisonment and given the date of the sentence as an eligibility for parole date. Bradley DCJ accepted that the offending was related to the applicant's drug addiction and noted that the applicant had been offered help in the past, but failed to comply with orders. (That must have been a reference to the intensive correction order imposed by the Drug Court that was subsequently revoked.)

[5] There is a gap in the applicant's Queensland criminal history between 16 November 2011 and 20 February 2017, but he was given an effective sentence of nine months' imprisonment (with release after six months) in Moree in New South Wales for driving offences, common assault and a dishonesty offence committed in January/February 2013. The applicant was dealt with for further dishonesty offences and multiple breaches of bail and other summary offences in the Magistrates Court on 30 October 2017 and 6 March 2018. The offending that was dealt with in the Magistrates Court on 6 March 2018 resulted in an effective sentence of four months' imprisonment for which a parole release date of 30 April 2018 was given. That excised the period of approximately two months between 6 March and 29 April 2018 from the pre-sentence custody for the trafficking. The applicant also has a lengthy traffic history that includes many entries for unlicensed driving and dangerous driving and on many occasions his traffic matters were dealt with at the same time as criminal matters.

[6] A report from psychologist Dr Yoxall dated 27 April 2020 was tendered on the sentence. That report filled in a number of details about the applicant's personal

history. His upbringing was unremarkable until he left home at the age of 13 years after he had been accused of stealing money which he said he did not do, but had been punished by his parents and the school for doing so. He then started associating with other disengaged youth who were engaging in drug and alcohol use and criminal offending. He informed Dr Yoxall that he was raped whilst in juvenile detention and that as a result of that trauma he turned to illicit drugs to self-medicate against intrusive memories and psychological distress and reported that he has been heroin dependent since he was 16 years old.

[7] He and his girlfriend with whom he was in a relationship for about eight years had three children, the first of whom was born when he was 16 years old. He was drug free from approximately 2012 to 2016 which he described as the first time he was released from prison without further charges outstanding. He formed a relationship with a woman and they moved interstate. He was working in a car detailing business, but his partner suicided in 2016. The applicant found her in the backyard after she had hung herself, he cut her down and administered CPR, but she died in hospital. The applicant related that he relapsed into heroin use after this loss. He relocated back to Queensland and became involved in various forms of offending. He has hepatitis C from intravenous drug use. He has not engaged in any counselling for his long history of heroin, cannabis and alcohol dependence. He informed Dr Yoxall that during the period of trafficking he was using heroin on a daily basis and that his offending was motivated by a desire to obtain money from trafficking to spend on his own drug use and lifestyle. He met his current fiancée during this period of offending. She had been using drugs, but has since engaged in rehabilitation. He informed Dr Yoxall that at the time of the offending, he was aware that if he was caught, he would go back to prison for a long period of time.

[8] Dr Yoxall was of the opinion that the applicant has a substance use disorder, namely polysubstance dependence (heroin, cannabis and alcohol), chronic and severe. Dr Yoxall considered that the applicant's history of offending and drug use are interrelated, as he has used substances for most of his life to self-medicate against psychological distress or to avoid negative emotions. Despite the applicant's reporting to Dr Yoxall of his intention to address his drug dependence and live a law abiding life, Dr Yoxall noted that he had not engaged in drug rehabilitation in any form to date and had not completed educational and self-development courses to date whilst serving a sentence or on remand. Dr Yoxall did note, however, that information from assessment of the applicant suggests that at the age of 31 years "he is developing personal insight into his own functioning and the drug dependence and offending cycle". Dr Yoxall considered that the applicant was now able to identify that the past traumas he has experienced continue to perpetuate his drug dependence and that he would benefit from psychological intervention to address those traumas and treat the symptoms arising from those traumas and that he needs to engage in formal drug rehabilitation.

[9] A report dated 16 March 2020 was also obtained from psychiatrist Dr Takyar. The applicant told Dr Takyar that, while he had tried or experimented with substances before the sexual abuse, he was not regularly using substances until the abuse happened and he described the use of substances to numb himself. He engaged in crime to fund his substance use. The applicant gave the psychiatrist a history of depressive phenomena and anxiety symptoms which had commenced from the time of his abuse and continued. He said that his partner had pushed him to open up about the difficulties he had faced in terms of abuse and that was a difficult process

for him. Dr Takyar diagnosed the applicant as having developed a psychiatric condition subsequent to non-consensual sexual abuse occurring when he was in juvenile detention. Dr Takyar considered that the applicant presents with a history consistent with a DSM-5 major depressive disorder and generalised anxiety disorder with his symptom intensity fluctuating over time and that he also met criteria on a DSM-5 for a substance use disorder.

The offending

[10] The applicant's offending came to the attention of the police as a result of an operation that was targeting the distribution of dangerous drugs in Mackay. Police initially intercepted the telecommunications of Mr G that revealed Mr G was sourcing significant wholesale quantities of methamphetamine from the applicant who then became a target of the operation.

[11] The applicant supplied methylamphetamine, cannabis and MDMA (3,4-methylenedioxymethamphetamine). The methylamphetamine was supplied at a wholesale level to other dealers. The applicant sold methylamphetamine in multiple ounces and occasionally sold in the street level amount of 3.5 grams. He sold cannabis exclusively in wholesale quantities (pounds) and he purchased wholesale quantities (100 pills) of MDMA. The applicant operated the business in between Brisbane and Mackay and had a customer base of dealers in both locations.

[12] Mr G travelled to Brisbane from Mackay on three occasions to purchase drugs from the applicant. On 3 September 2017 he purchased 10 ounces of methylamphetamine and paid somewhere between $30,000 and $40,000 "up front" and the rest of the purchase was conducted on credit. On the same occasion Mr G organised for the purchase of $65,000 to $70,000 worth of cannabis from the applicant that was intended for another dealer. On Mr G's second trip on 11 and 12 September 2017, Mr G paid the applicant again somewhere between $30,000 and $40,000 "up front" and the rest was supplied on credit. The agreement was that the applicant would supply 10 ounces, but the quantity that Mr G actually received on that occasion and onsold is unknown. The third trip by Mr G was on 16 and 17 September 2017. The applicant had some difficulty in coming up with the product and ultimately Mr G purchased seven ounces for $5,800 each and three ounces of a different quality methylamphetamine for $6,500 each. Mr G paid around $28,000 in advance with the rest on credit. Mr G received complaints from his customers about the quality of the methylamphetamine in the seven ounces lot. The applicant travelled to Mackay at the end of September 2017 with another associate, in order to supply Mr G. There was a supply for an unknown commercial quantity of methylamphetamine. The relationship between Mr G and the applicant deteriorated, when Mr G could not pay his debt for the last lot of methylamphetamine. Threats were exchanged between Mr G and the applicant. On 8 November 2017 Mr G was taken into custody.

[13] The sentencing judge also sentenced Mr G. He was sentenced to 10 years' imprisonment for trafficking over a period of about five months between 21 August 2017 and 16 January 2018 that was interrupted, but not deterred, by his spending about one month in custody from 8 November 2017. Although Mr G was a drug user, he admitted to being involved in the business of trafficking for the business benefits and not to cover a habit. Mr G was unsuccessful in his application to this court for leave to appeal against the sentence. The sentencing remarks for Mr G

show that the purchases of methylamphetamine made by him on 1 and 18 October 2017 were not from the applicant and the purchase of methylamphetmine that he made after being released from custody was also not from the applicant.

[14] The applicant's relationship with another associate with whom he purchased drugs continued up until the beginning of January 2018 when their relationship also broke down. Even though the applicant purchased drugs together with this associate, each distributed the drugs to his own customers. The applicant agreed on 7 December 2017 to supply another person with 30 pounds of cannabis at a price of $2,800 per pound. The applicant attempted to source 150 pounds of cannabis from various associates, but it is not known whether he was successful. The applicant sourced five ounces of methylamphetamine on 5 January 2018.

[15] The applicant supplied drugs on credit and would follow up customers for the debts owed and threatened violence over the drug debts owed to him. There was no assertion in the schedule of facts that the applicant inflicted actual violence. A financial analysis was done of the applicant's accounts that showed $111,285 was deposited into the applicant's accounts between 23 August 2017 and 22 January 2018 and the sentencing proceeded on the basis that sum came from the trafficking.

[16] The applicant had another associate, Mr L, to whom he would supply drugs. On 12 January 2018 they discussed going to Darwin together. On 18 January 2018 they discussed the applicant obtaining 10 ounces of methylamphetamine. The applicant said he could get them at a cost price of $3,600 each. They had a further discussion on 21 January 2018 about obtaining the 10 ounces. Mr L booked flights for them to Darwin. Police intercepted the applicant and Mr L at the airport on 23 January 2018. The applicant was found with $850, an iPhone and a Blackberry phone. The methylamphetamine was found on Mr L. The gross amount of substance was 282.244 grams of which 210.386 grams was pure methylamphetamine. Although the applicant ultimately was not dealt with for an offence for possession of that methylamphetamine, the fact that he was jointly in possession with Mr L of that methylamphetamine for the purposes of selling it in Darwin to make a profit was a particular of the trafficking charge against the applicant. The applicant was arrested and remanded in custody.

[17] Mr L pleaded guilty to trafficking in dangerous drugs over a period of about seven weeks between 11 December 2017 and 24 January 2018. He also pleaded guilty to being in possession of the large quantity of methylamphetamine that exceeded 200 grams that he had at the airport. His guilty pleas were early. He was sentenced on the basis that he had a significant addiction to drugs. He had previously been dealt with in the Supreme Court on 7 July 2016 for supplying and possession of dangerous drugs. Mr L's offending was committed during the operational period of a suspended sentence that had been imposed on that occasion and whilst on parole for other sentences imposed at the same time. He had served about one year and three months since returning to custody on account of the previous sentences imposed in the Supreme Court. He would have been sentenced to nine years' imprisonment for the trafficking, but as the sentence was cumulative on the previous sentences, he was sentenced to eight years' imprisonment.

[18] In relation to count 2, telephone intercepts showed that the applicant had possession of a .38 calibre pistol that he tried to sell, before supplying it to an unknown associate on 18 January 2018.

Sentencing remarks

[19] After summarising the agreed facts for the offending, the applicant's antecedents and criminal history and the applicant's personal history conveyed to psychologist Dr Yoxall, the sentencing judge referred to the comparable authorities to which he had been referred and noted "there is a range of sentencing for this serious level of offending between nine and 11 years" (which reflected the submission made by the applicant's counsel at the sentencing before taking into account the features of the child institutional sexual abuse and the current custodial environment). These authorities were for trafficking sentences imposed after guilty pleas and included: *R v Feakes* [2009] QCA 376, *R v Safi* [2015] QCA 13, *R v Barker* [2015] QCA 215, *R v Tran*; *Ex parte Attorney-General (Qld)* [2018] QCA 22, *R v Nunn* [2019] QCA 100 and *R v King* [2020] QCA 9.

[20] The sentencing remarks continued as follows. The applicant's criminal history is "very significantly worse" than many of the cases to which the sentencing judge had been referred. In the sentencing remarks provided to the sentencing judge for the applicant's previous offending, the offending that had been committed by the applicant was acknowledged to be drug-related. Deterrence is very important to deter the applicant from engaging in trafficking which he admitted to the psychologist was to fund his own habits and lifestyle. Deterrence is also to deter other persons, so that if they are involved in the wholesale trafficking of schedule 1 drugs, they "should expect to be locked for a very large part of their life". Denunciation was also an important principle of sentencing for this offending.

[21] The applicant was near the top of the syndicate, although he did not manufacture or produce the drugs and there were therefore people above him. He was a wholesale dealer of very large amounts, dealing with large sums of money and attempting to arrange large transactions. There is evidence and admitted facts of threats of violence, but there was no evidence of any actual violence. The threats were serious. There was a strong commercial motivation and the applicant knew the harm he was causing, but he continued to cause it because of his "own greed" and "own addiction".

[22] The sentencing judge acknowledged there were some factors in the applicant's favour which the sentencing judge stated that he had taken into account:

> "There are some factors in your favour. There is your plea of guilty. I take into account your history, the fact that you have diagnosed psychiatric conditions, the fact that with respect to the long-standing psychiatric conditions leading to your drug addiction, it results from sexual assault when you were a very young person, that is, you were sentenced to jail for – or detention – juvenile detention for the criminal acts that you had done as a juvenile. And the plan, of course, for juveniles is to attempt to rehabilitate them, but if they are subject to sexual assault, then clearly there is no rehabilitation, and things from that stage in your life got significantly worse."

[23] The sentencing judge also noted, however, that the applicant's criminal record showed that he had been given multiple opportunities to undertake drug courses to get away from drugs, but that he failed to take them on most occasions, other than the period of four years between 2012 and 2016. The sentencing judge expressly stated that he took into account that the appellant has the support of his partner and

others, when he is eventually released. The sentencing judge referred to the period of about two months in custody (when the applicant was serving the sentence from 6 March 2018) that could not be declared as time served, but for which the applicant should be given credit.

[24] The sentencing judge noted the submissions made with respect to the effect of COVID-19 pandemic and accepted "that has made things significantly worse for those that are in prison", however that stricter regime is necessary. The applicant should be given some discount for that, but "it is difficult to specifically verify the level of such discount because no one can predict how long these arrangements will last for". The concept of incarceration and imprisonment means that the applicant has lost his liberty and is "subject to the vagaries of what occurs in society" and what has occurred is that the society outside the prison has had an effect on the way in which prisons need to operate. The facts of the applicant's offending and the fact that he was "a high level wholesale dealer" requires a lengthy prison sentence.

The applicant's submissions

[25] The basis on which the applicant seeks to show that the sentence imposed for trafficking was manifestly excessive is a failure of the sentencing judge to moderate the sentence by reason of custodial conditions, psychiatric conditions and the pleas of guilty. As the sentencing judge had identified the appropriate range of sentences between nine and 11 years' imprisonment, the only reduction made to the top end of the range was two months that was expressly due to non-declarable custody served consequent upon the imposition of a term of imprisonment of four months in 2018. It is therefore not apparent how the features of custodial restrictions, psychiatric conditions and pleas of guilty which were acknowledged as relevant features in mitigation were given effect.

[26] Because of the inability to discern any apparent moderation in the sentence for the mitigating circumstances that the sentencing judge expressly acknowledged he was taking into account, the sentence should be set aside and the applicant re-sentenced to imprisonment for nine and one-half years for count 1.

The respondent's submissions

[27] Even though the sentencing judge may not have made some small allowance in fixing the sentence for the impact from COVID-19 on prison life, that does not make the sentence imposed on the applicant manifestly excessive. COVID-19 restrictions affect both life in prison and life outside prison. The observation made by Henry J in *R v Stasiak & Anor* (unreported, Supreme Court of Queensland – Cairns, Henry J, Indictment No 1 of 2019, 4 August 2020) in sentencing a son and his father for trafficking in methylamphetamine over a period of about 18 months is applicable:

> "You each have had to endure greater deprivation than usual because of COVID-19 related restrictions in prison. The stage of restrictions did ease, but recently tightened again … . I take the impact of undulating restrictions into account, including the prospect they may undulate into the future. That said, their relative significance is diluted in the context of the lengthy sentences that you are each facing."

[28] The respondent also submitted that the pleas of guilty were factored in by the sentencing judge in referring to the range of sentences for that type of serious offending after guilty pleas. It was also open to the sentencing judge to give little or no weight to the psychiatric condition of the applicant, as it was not a matter that was emphasised by the applicant's counsel before the sentencing judge and "it is too far removed from his high order offending to matter much".

Was there an error in the sentencing?

[29] Even though the only ground on which the applicant relies for applying for leave to appeal against his sentence is that the sentence is manifestly excessive, the basis on which Mr Feely of counsel argued the application for the applicant was that the sentencing judge did not take into account the mitigating factors which the sentencing judge identified he would be taking into account in fixing the sentence. The respondent's submissions addressed the applicant's case based on error in exercising the sentencing discretion by failing to take into account material considerations, rather than relying merely on manifest excessiveness of the sentence. It is therefore appropriate to deal with the application on the basis on which it was argued on behalf of the applicant.

[30] It cannot be said that the sentencing judge overlooked the pleas of guilty, when the comparable authorities to which his Honour had regard and accepted as being relevant to the applicant's serious offending all involved sentences imposed after guilty pleas.

[31] The applicant's counsel referred to a number of sentences imposed in the Trial Division since the commencement of COVID-19 pandemic restrictions where some relatively small discount on the custodial component of a sentence has been allowed for harsher conditions that have applied to prisoners at various times during the pandemic. It is consistent with principle to make an allowance in favour of the person being sentenced for unduly harsh conditions of imprisonment, but there is no fixed formula to apply in assessing what is an appropriate allowance in all the circumstances: *R v Phillips & Woolgrove* (2008) 188 A Crim R 133 at [43]-[46]. The fact that restrictions due to the COVID-19 pandemic affect persons outside prison, as well as prisoners is not a reason to ignore the harsher conditions of imprisonment where restrictions such as keeping prisoners in their cells for most of the day and precluding visitors may apply for significant periods. As the sentencing judge acknowledged, it is unknown for what period of time the various levels of restrictions due to the COVID-19 pandemic will continue to apply to prisons from time to time. The observations by Henry J in *Stasiak* are apposite, when the length of sentence that is likely to be imposed reduces the relevance of a small discount for harsh conditions that may apply for some indeterminate period of the imprisonment. By itself, the failure to make some allowance for the impact of COVID-19 restrictions on conditions in the prison would not in the circumstances of a sentence in the vicinity of 10 years' imprisonment be an error in the sentencing.

[32] This sentencing was the first occasion on which the applicant had disclosed for the purpose of the sentencing the sexual abuse he asserted was committed against him whilst in juvenile detention. The applicant did not disclose it in the letter to which he wrote the sentencing judge, but with prompting from his partner he did disclose it to the psychologist and the psychiatrist who provided reports for the sentencing. The fact that the applicant's counsel before the sentencing judge tendered

Dr Takyar's report meant that it was a report relied on by the applicant before the sentencing judge. It was not disputed by the respondent before the sentencing judge that the sentencing should proceed on the basis that sexual assaults were committed against the applicant whilst he was held in detention as a youth for his rehabilitation. This disclosure and the diagnosis of psychiatric conditions connected to the sexual abuse that was related to his drug addiction that underpinned his offending was a relevant consideration for the sentencing and was accepted as such by the sentencing judge.

[33] Despite the sentencing judge's express acknowledgement that he had taken into account the diagnosis of the psychiatric conditions and their relationship with his drug addiction, it does not appear from the ultimate sentence for count 1 that the sentencing judge did so. It is apparent that the sentencing judge arrived at the ultimate sentence of imprisonment for 10 years and 10 months by deducting the period of two months for the non-declarable pre-sentence custody from 11 years which was top of the range of sentencing that the sentencing judge otherwise accepted as appropriate for the level of the applicant's offending. This was an error in the exercise of the sentencing discretion by failing to take into account a material consideration, as described in *House v The King* (1936) 55 CLR 499, 505.

[34] The sentence for the trafficking offence must therefore be set aside and the applicant re-sentenced.

Re-sentencing

[35] It is appropriate to consider the most relevant of the comparable authorities relied on by the sentencing judge.

[36] *Feakes* concerned an offender with a minor criminal history who was between 30 and 31 years at the time he trafficked over a period of about six months during which he supplied drugs on 11 occasions to covert operatives. He supplied 32 grams of cocaine and almost 5,000 tablets containing 330 grams of the then schedule 2 drug MDMA and 110 grams of the schedule 2 drug MDEA. When arrested, he was cultivating cannabis that weighed about five kilograms. The offender pleaded guilty and the mitigating factors included his dependence on cannabis, ecstasy and cocaine and the steps taken to overcome that dependence before being sentenced. The sentence of 10 years' imprisonment was not disturbed on appeal. The observation made by McMurdo P at [33] after discussing the comparable authorities is often referred to and, in fact, reflects the range of sentences for the applicant's trafficking that was suggested by the respondent before the sentencing judge:

> "My analysis of the comparable cases relied on by Feakes and the respondent in this application demonstrate that, absent extraordinary circumstances, in cases of trafficking in sch 1 drugs on a scale like the present offence, the sentence imposed on mature offenders who have pleaded guilty is ordinarily in the range of 10 to 12 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to a slightly lesser term of imprisonment in the range of eight to nine years: see, for example, *Assurson* (aged 23) and *Elizalde* (aged 25). As I noted earlier in these reasons, the practical effect of a sentence

> of less than 10 years imprisonment where there is no declaration that the offence is a serious violent offence takes on disproportionate significance." (*footnote omitted*)

[37] Fraser JA in *Nunn* at [11] referred to the observation of McMurdo P in *Feakes* at [33] and explained:

> "McMurdo P's analysis has been referred to with approval in many subsequent decisions concerning sentences imposed in comparable cases. It clearly appears from the reasons in those subsequent decisions that in each case the sentence under review was considered with reference to the particular circumstances of the subject offence and offender, the sentences in the past cases which were described and analysed by McMurdo P being used only to 'provide guidance … as a yard stick' against which to examine the sentence." (*footnotes omitted*)

[38] The offender in *Safi* was also 30 and 31 years old when he committed two offences of trafficking. The first trafficking was over a period of almost nine months and the second, which was committed about one year after the first trafficking finished, was over a period of about eight days. The offender was sentenced to 10 years' imprisonment for the first trafficking offence and a concurrent sentence of seven years' imprisonment for the second trafficking offence. During the first trafficking, the value of the drugs trafficked was substantially greater than the highest amount of the debt owed by the offender to his supplier which was at least $190,000. The offender had three persons who worked for him and at his direction. The second trafficking offence was committed whilst on bail for the earlier offending where the offender was found in possession of 43.5 grams of pure methylamphetamine and had a message on the phone he was using that referred to a proposed sale of a pound of methylamphetamine for $40,000. The offender had a relevant criminal history for various drug offences and his prospects of rehabilitation were described as "slight". He was unsuccessful in his application for leave to appeal. It was noted (at [19]) that his offending overall was at least as serious as that in *Feakes*.

[39] The Attorney-General successfully appealed the sentence imposed in *Tran*. The offender who was 33 years old at the time of the offending and had no prior criminal history was sentences to nine and one-half years' imprisonment for trafficking over a period of about five months. At first instance, an eligibility for parole date had been fixed after one-third of the sentence had been served in custody, but that parole eligibility date was set aside on the appeal. The trafficking was described as "large scale, wholesale level trafficking" and the offender had an unknown number of runners to assist him in the distribution of methylamphetamine. He had also pleaded guilty to possession of 892 grams of methylamphetamine and 959 tablets of MDMA containing 50 grams of pure MDMA for which he was convicted and not further punished. During the trafficking period the offender had paid in excess of $250,000 to his supplier for methylamphetamine and his trafficking was engaged in with a commercial motivation.

[40] The offender in *Nunn* was 29 to 30 years old in the period of about five months during which he trafficked in methylamphetamine. He had a relevant prior criminal history that included offences of violence and less serious drug offences than trafficking for which he had been sentenced to imprisonment for 18 months with

immediate parole just over three years prior to the commencement of the trafficking. The trafficking was conducted largely as a wholesale business with many of the customers supplying the drug to their own customers. The offender had an employee who dealt with the majority of the lower level customers on a daily basis and three other people who worked at times for him distributing drugs and collecting money. The offender and his employee supplied at least 2.32 kilograms of methylamphetamine. When the offender was arrested by police, he was in possession of a total amount of 434 grams of pure methylamphetamine. The offender's sentence of 10 years' imprisonment was held to be the appropriate sentence in all the circumstances of the case.

[41] Before considering the applicant's psychiatric conditions and any relevant effect of the COVID-19 restrictions on prison conditions, the applicant's offending appears to be more serious than the offending in *Feakes* and possibly not as serious as the offending in *Safi* by reason of that offender's second trafficking offence and that he had three persons working for him. The lack of a prior criminal history for the offender in *Tran* distinguishes the sentence imposed in that case. The applicant's offending was at least as serious as that committed by the offender in *Nunn*. Even though there is a tendency for sentences for trafficking that warrant the imposition of a serious violent offence declaration to cluster around 10 years, these authorities did support a starting point for the applicant's sentence for the trafficking that was above 10 years, as recognised by the sentencing judge.

[42] Even though trafficking in dangerous drugs over a period of months is a serious offence, the youth of an offender is not the only exceptional circumstance that may apply where the nature and extent of the trafficking would warrant a sentence otherwise of imprisonment of 10 years or more. When the appellant appeared before the sentencing judge, it was the first time that he had a diagnosis of the psychiatric conditions from which he had suffered since the sexual assaults he experienced whilst in juvenile detention. That does not excuse his offending behaviour to any extent, but it is related to his drug addiction which was a cause of his offending, even though he also enjoyed lifestyle benefits from the profits he made. It is also not surprising that the applicant had not previously performed well on orders imposed by the court directed at drug rehabilitation, where the trauma he experienced from the sexual assaults was neither disclosed nor addressed.

[43] If it is possible to do so, the sentencing of the applicant must respond to the seriousness of the trafficking committed by the applicant, but give some recognition to the circumstances of the sexual assaults that have caused his psychiatric conditions and contributed to his long term drug addiction. That can be done by bringing the notional sentence for the trafficking down to 10 years' imprisonment before allowing a deduction of two months for the period of non-declarable custody which means that a declaration that he was convicted of a serious violent offence does not automatically apply. In the exceptional circumstances that apply to the applicant on this re-sentencing, it is appropriate to leave the date of eligibility for parole to the operation of s 184(2) of the *Corrective Services Act* 2006 (Qld) which will be the day after the applicant has served half of the period of imprisonment of nine years and 10 months. Mitigating the applicant's sentence for the exceptional circumstances that apply to him personally in this way makes the issue of any further mitigation for the COVID-19 pandemic restrictions of no significance in the circumstances.

[44] Before the sentencing judge, the respondent had submitted that, as the applicant was above Mr G in the supply chain and the applicant's business was more targeted to a commercial wholesale enterprise, a sentence above Mr G's sentence was called for. That submission was made without taking into account the exceptional circumstances that applied to the applicant's sentencing. Mr G was sentenced on the basis that, apart from the three large purchases and one further purchase of unknown quantity from the applicant, he obtained large quantities of methylamphetamine on three other occasions from other sources. The motivation for his trafficking was only commercial reward. His sentencing also proceeded on the basis that, in addition to threats of violence to those who owed him money, Mr G had inflicted actual violence upon one debtor. It was an aggravating circumstance of Mr G's offending that he was not deterred by police interception that resulted in a period of about one month in custody and his continued offending on release was committed whilst on bail, although his trafficking after his release from custody was to a lesser extent than it was before entering custody. Apart from those distinguishing features, the difference between the sentence that will now be imposed on the applicant and that which was imposed on Mr G is explicable by reference to the exceptional circumstances that applied to the applicant's sentencing due to his psychiatric conditions.

Orders

[45] It follows that the orders which should be made are:

1. Application for leave to appeal against sentence granted.

2. Appeal allowed.

3. Set aside the sentence imposed by the primary judge on 30 April 2020 for count 1 including the serious violent offence declaration and, in lieu, sentence the applicant to imprisonment for nine years and 10 months.

4. Confirm the other sentences and orders imposed by the primary judge.

[46] **BROWN J:** I agree with the orders proposed by Mullins JA for the reasons given by her Honour.