SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cunniffe* [2013] QSC 330
PARTIES:	**THE QUEEN** **v** **JASON MATTHEW CUNNIFFE** (defendant)
FILE NO/S:	Indictment 464/12 and Bench charge sheet 517/13
DIVISION:	Trial Division
PROCEEDING:	Sentencing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	5 November 2013, ex tempore
DELIVERED AT:	Brisbane
HEARING DATES:	24 September and 11 October 2013
JUDGE:	Dalton J
ORDERS:	**Rulings on evidence.** **Various sentences imposed.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – where there were alleged trafficking offences relating to an arrest in October 2010 and an arrest in September 2011 – where the defendant pleaded guilty in the Magistrates Court to charges relating to only the 2010 offending – where the Crown then framed the indictment to cover the whole of the 2010 and 2011 offending – where the Crown submitted that the trafficking charge on the indictment was a different charge from that to which the defendant pled guilty in the Magistrates Court so that s 600 of the Criminal Code was inapplicable – where there was an alleged agreement made as to how the Crown would proceed – whether there was an agreement – whether there was a departure from an agreement - whether any such agreement is enforceable or gives rise to an estoppel – where there was no application to stay the indictment – whether the evidence should be excluded for unfairness or public policy reasons – whether abuse of process or bad faith *Criminal Code* 1899 (Qld), s 600 *AB v R* (1999) 198 CLR 111

Barac v DPP; Barac v Stirling [2007] QCA 112
Churchill Fisheries Export Pty Ltd v Director-General of Conservation [1990] VR 968
R v Playford [2013] QCA 109
Williamson v Trainor [1992] 2 Qd R 572

COUNSEL: J Robson for the Crown
E Mac Giolla Ri for the defendant

SOLICITORS: Director of Public Prosecutions (Queensland) for the Crown
Fisher Dore for the defendant

HER HONOUR: On 11 October 2013, the defendant in this matter, Mr Cunniffe, pleaded to nine counts on an indictment in this court. The first count was a count of trafficking between 31 July 2010 and 7 April 2012. The trafficking was alleged to have been in the drugs methylamphetamine, MDMA, and cannabis. The remaining counts on the indictment were, in effect, the particulars of the trafficking, and they fall into two groups: one relating to the first search of the defendant's premises and his arrest on 27/10/2010, and the second group relating to the second search of the defendant's premises and his arrest on 22 September 2011. In the first such group: count two was that the defendant was in possession of a sum of money obtained from trafficking; count three was that he was in possession of MDMA; count four was that he was in possession of methylamphetamine in excess of two grams; count five was that he was in possession of a document containing instructions as to how to produce cannabis. All of those counts related to 27 October 2010.

The second group of counts were count six, possessing cannabis in excess of 500 grams; possessing methylamphetamine in excess of two grams; possessing MDMA in excess of two grams, and possession of a drug, 2CE. All of those counts relate to 22 September 2011. As well, before me there were five bench charge sheets brought up from the Magistrates Court. Once again, they form particulars of the trafficking in substance, and once again, they fall into two groups: the first relating to 27/10/2010 and the second relating to 22 September 2011. In the first group of bench charge sheets, that is those relating to 27 October 2010, there is a count of possessing – or a charge of possessing, I'm sorry, four water pipes and two brass pipes which the defendant had used in connection with smoking a dangerous drug; possession of four glass smoking pipes, and possession of other paraphernalia including a coffee grinder which the accused admitted to the police was used to prepare drugs, two sets of scales, calibration weights, two heat sealers, a modified compressor, and a mobile phone. The second group of bench charge sheets all relate to property taken on 22 September 2011. There is a possession of a condenser and possession of three pipes and two cone, c-o-n-e, pieces.

Some difficulties in the way this matter progressed through the criminal justice system were occasioned by the fact that there were two different police operations responsible for the search and arrest in 2010 and the search and arrest in 2011, and after – or even after both of those events, matters stayed separated into two tranches, even once they had gone to the office of the police prosecutor. It was not until all the material was received by the DPP after proceedings in the Magistrates Court that, as

it were, the whole picture was looked at. At the time of proceedings in the Magistrates Court, the trafficking charge related only to the 2010 offending. Once all matters were looked at together by the DPP, the DPP framed the indictment in the way which I have just indicated; that is, the DPP preferred a much larger trafficking charge covering the whole period of the 2010 and the 2011 offending.

The matter first came before me as a contested sentence on 24 September 2013. On that day, I heard argument but adjourned the matter without having Mr Cunniffe arraigned. It came back before me on 11 October 2013. At that time, Mr Cunniffe was arraigned. He pled guilty to all the charges on the indictment and all the – sorry, all the counts on the indictment and all the charges on the bench charge sheets. I heard evidence on the contested sentence, argument as to a point of law which I will detail below, and reserved my decision.

On 24 September 2013 – that is, the first occasion the matter came before me – the defence was granted leave to read and file an outline which showed a contest as to count one on the indictment, the trafficking count, and also a contest as to the particularisation of the amount of money involved in count two on the indictment. That is possession of money being the proceeds of drug trafficking. The outline of argument raised contentious matters as to an alleged agreement between the police prosecutor at the time the matter was being dealt with in the Magistrates Court and solicitors then acting for the defendant before the plea on the trafficking charge was taken in the Magistrates Court. There was an allegation that an agreement had been made as to how the Crown would proceed in relation to the trafficking and an allegation that that agreement had been departed from in the sense that the larger trafficking charge was preferred before me on count one, and the particulars of count two were as to a much larger sum of money than had been discussed in the Magistrates Court.

There was no application made before me on 24 September 2013 (or at any other time), for example, to stay the indictment in this court. On 24 September 2013, there was in fact no real definition given by the defence to what flowed from the effect of this alleged departure from agreement by the Crown. This lack of definition was productive of confusion at the hearing on 24 September, and on that day, the Crown complained that it had no sufficient notice of the defence position. By the end of the hearing on 24 September, my understanding was that the defendant said that the following flowed from the alleged departure from the agreement made with the Crown: that I should hear the evidence on the contested sentence and exclude evidence as to particulars of trafficking which fell outside what the defence said was the agreement made as to the trafficking charge before the plea in the Magistrates Court on the basis that to proceed otherwise would be unfair to the defendant – cf s130 of the Evidence Act. Further, that the particulars of money referable to count two on the indictment before me should likewise be limited in the evidence I acted upon to the amount discussed in the Magistrates Court. Counsel for the defendant agreed with his characterisation of his position at the beginning of the hearing on 11 October 2013, but the position was not entirely clear, I accept, at the earlier hearing, and this is illustrated by the response of the Crown in submissions filed 2 October 2013, and even in the outline of the defence filed on 11 October 2013 which asks the court to "hold the Crown to the basis of a negotiated factual agreement".

On 24 September 2013, as I have said, I refused to arraign the defendant because the Crown had not considered the alleged departure from the agreement alleged by the defence. I adjourned the matter and made directions as to the exchange of outlines of argument on the point which was contentious.

On 2 October 2013, the Crown filed an outline of submissions in accordance with my directions. That outline asserted that as the trafficking charge in the indictment was a different charge from the trafficking charge to which the defendant had pled guilty in the Magistrates Court, so the defendant was free to plead guilty or not guilty as he chose when arraigned in this court – ie section 600 of the Criminal code was inapplicable. I think that submission was correct. The Crown outline also asserted that even had there been an agreement as alleged, and a departure from it as alleged by the defence, the Crown had a right to present the larger trafficking charge on indictment in this court where it was acting in good faith and in the public interest on the basis of review of he whole of the evidence as to the 2010 and 2011 offending, and on the basis of an accounting report it had obtained as to unexplained income after the plea in the Magistrates Court. They relied upon *Barac v DPP [2007] QCA 112* in this respect.

In any event, to combat any perceived unfairness to the offence, the Crown offered to present a new indictment, or two new indictments, containing two different trafficking charges: first as to the period admitted in the defendant's October 2010 interview with police and the second as to the remainder of the period between 2010 and the second arrest. The defendant would then be at liberty to plead guilty or not guilty to either or both of these counts.

The defence attitude to this offer was to reject it; see the submissions filed by the defence on 11 October 2013. Counsel for the defence said that the defendant wished to be arraigned on the extant larger trafficking count and proceed to contest the facts as to the periods in which he trafficked in the three drugs alleged.

The Crown therefore took the view that it would do as the defence wished, not present a new indictment or indictments, but ask that the defendant be arraigned on the extant larger trafficking charge and call evidence on the sentence.

On 11 October 2013, when the matter was before me for the second time, counsel for the defendant told me that (1) he made no application to stay the indictment; (2) if arraigned, he expected his client would plead guilty to all the counts on the indictment, including the trafficking count and count two, possession of money; (3) that he objected to evidence that there was trafficking other than in terms of the alleged agreement with the police prior to the plea in the Magistrates Court on the basis of unfairness, and likewise objected to the particularisation of the sum of money in respect of count two; (4) that he made no argument as to double jeopardy. On that basis, the defendant was arraigned and pleaded guilty to all counts on the indictment and all the charges on the bench charge sheets. I then proceeded to hear evidence on the contested sentence and reserved my decision on the unfairness point. I turn now to my determination of the unfairness point.

The first question on that is as to whether there was an agreement as alleged by the defence. On 27 October 2010, police attended the defendant's home. They there found $16,740, which they seized. $1050 was in a jewellery box or similar in the main bedroom of the house and the rest was in an esky in a garage. The police also found drugs – methylamphetamine, MDMA and cannabis. The police also found paperwork and the paperwork, in my opinion, showed that the defendant conducted a concreting business and also dealt in drugs and I will come to that paperwork in some detail later in these reasons. The defendant co-operated in an interview with police and he admitted that he had been trafficking for about three months in cannabis and about two months in methylamphetamines. The police officer in charge of this operation was Detective Giddins, who gave evidence before me on the contested sentence. The defendant was given bail.

On the 2nd of November 2010, he reported late for bail, which aroused the interest of police and he was re-interviewed and searched and found to have $7000 cash on him. This was seized and he was questioned as to how he came to have this amount of cash. He said in the interview that the cash was from concreting jobs and the police who dealt with the defendant on that day decided that they couldn't prove otherwise, and returned the money to him. Before doing so, they spoke to Detective Giddins, who strongly advised that the cash should not be returned to him, however the police dealing with the defendant on that day acted against his advice.

On 22 September 2011, police attended the defendant's home for the second time. The police involved on this day did not include Detective Giddins. They found cannabis, methylamphetamine, MDMA and the drug, 2CE. The defendant did not co-operate by giving an interview.

On the 11th of November 2011, the defendant's car was pulled over by police. Again, the police involved did not include Detective Giddins. In the car were drugs, a phone containing a text message which was capable of showing that there had been a supply of cannabis by the defendant, and an amount of $30,000 cash, which was seized. Together with the amount of $16,740 taken on 27 October 2010, that meant that, at that point, the police had in their possession $46,740 cash.

On the 25th of May 2012, Mr Cunniffe was dealt with in the Magistrates Court on about 38 charges, which related primarily to drug offending and the events which I have just recounted.

It is the defence case that a deal was struck with the police prosecutor by the solicitor then acting for the defendant. Materially here, as to the period over which the defendant trafficked, and in what drugs he trafficked (count 1 on the indictment before me), and how much of the money was particularised as the sum of monies obtained from trafficking (count 2 on the indictment before me). The deal is alleged to have been that if the trafficking charge was limited to the period of two months between 1 September 2010 and 28 October 2010 and that if $41,740 was paid out by the police to the defendant's lawyers, and the amount said to be obtained from the trafficking of drugs was particularised as $5000, the defendant would plead to the trafficking charge in the Magistrates Court.

The evidence of this agreement is as follows: there is evidence that the defendant's solicitors were in contact with the police prosecutor as to "how best to resolve all matters" – see exhibit 2 – and were looking to resolve as many matters by plea before the magistrate as possible and further that the defendant's solicitors were looking for concessions from the police prosecutor in relation to, for example, dropping allegations of commerciality in relation to some of the possession charges.

On 24 May, a schedule was sent by the solicitors acting for the defendant to the police prosecutor with the comment, "Trafficking period is to be reduced" against the October 2010 charge of trafficking in cannabis and amphetamines. The same schedule had "$16,740 – to be reduced to $5000. $11,740 to be returned", against the 10 October charge, "possessing property obtained from trafficking – $16,740." This same schedule had "$30K remove from facts" against the November 2011 charge of, "supplying dangerous drugs cannabis 2.1 grams".

There is an earlier letter, 28 March 2011 – part of exhibit 2 – from the defendant's solicitors to the police making a submission in relation to the charge of "receiving cash from trafficking or supplying a dangerous drug, the alleged amount being $16,740". This letter said, "If your office were to change the charge to that of possessing tainted property under the Drugs Misuse Act and reduce the amount to $5000, our client would not seek that the matter be listed for a committal hearing and instead would enter a plea of guilty in the Magistrates Court."

On 28 May 2012 – three days after the Magistrates Court's proceedings – the defendant's solicitors wrote again to the Police Prosecutor. This letter said:

> "You and I appeared on a sentence of our above-named client before Magistrate Cucks, C-u-c-k-s, in Beenleigh Magistrates Court on Friday 25 May 2012.
>
> On that day Mr Cunniffe was committed for sentence to the Brisbane Supreme Court on two groups of charges. He was then sentenced on a further four groups of charges.
>
> In respect of the approximately 36 charges that were dealt with on that day, two charges concerned money that had been seized by the Queensland Police Service: (1) A charge of possessing anything for use in the commission of a crime said to have been committed on 11 November 2011 (and in respect of which $30,000 in cash was seized from our client) was dismissed by the Magistrate after the Prosecution indicated that it had no evidence to offer on that charge. (2) In respect of a charge of receiving or possessing property obtained from trafficking or supplying on 27 October 2010 ($16,740 seized by the QPS) the Prosecution amended the charge to refer instead to an amount of $5000.
>
> We refer to previous correspondence and ongoing discussions relating to the abovementioned changes to the charges against our client and request the total amount of $41,740 ($30,000 plus $11,740), previously seized by the QPS be released by the QPS as soon as possible".

From the QPS charge list - exhibit 3 it can be seen that originally the trafficking charge was between 11 July 2010 and 28 October 2010 and that the defendant trafficking cannabis and amphetamines. Further, that the charge of possessing property obtained from trafficking was in relation to the amount of $16,740. From the transcript of proceedings in the Magistrates Court on 25 May 2012 it can be seen that the defendant pleaded guilty to trafficking in cannabis and amphetamines between 1 September 2010 and 28 October 2010 and that the second charge was that on 27 October 2010 the defendant was in possession of $5000 cash obtained from trafficking in dangerous drugs. The defendant did not plead guilty to this second charge but his solicitor said to the Magistrate that he intended to do so in the Supreme Court – see transcript 1-8 and 1-9 in the Magistrates Court – exhibit 7. Further, from the transcript in the Magistrates Court – T1-15 – it can be seen that the events of 11 November 2011 were dealt with on a plea before the Magistrate and there was no charge of supplying drugs; mention of the $30,000, found in the defendant's possession that day, or any charge relating to that cash.

Detective Giddins gave evidence before me that he was consulted on returning the amount of $11,740 to the defendant prior to the proceedings in the Magistrates Court. He could not recall being consulted about the return of the $30,000. It may well be that he was not consulted about this latter amount, because it was not his arrest. Detective Giddins was happy enough to see the $11,740 returned. It was not that he believed the money was not the proceeds of drug trafficking, however, he understood that the defendant did do concreting work for cash and that the police would have difficulty proving that all the amount of $16,740 was the proceeds of trafficking. He saw what was going on as a pragmatic compromise – "a deal to make this matter go through the Courts smoothly".

I find that there were negotiations and an agreement before the Magistrates Court date of 25 May 2012 which involved: (1) the QPS reducing the period of the trafficking charge by two months from 1 July 2010 to 28 October 2010 to 1 September 2010 to 28 October 2010 and which resulted in the QPS reducing the sum particularised as proceeds of trafficking in the defendant's possession on 27.10.2010 from $16,740 to $5000, and involved the QPS offering no evidence on the supply charge of 11 November 2011 and, lastly, the QPS offering no evidence on the charge of possessing proceeds of supply of $30,000 on 11 November 2011.

I find that the defendant had indicated that if the police prosecutor modified the charges against him in this way, he would plead guilty to the charges in the Magistrates Court, and accordingly, he did plead guilty to the trafficking charge as modified. He also indicated he would plead guilty to the possession of $5000 as the proceeds of trafficking as well as other charges from the 27th of October 2010. For some reason which isn't entirely explained in the Magistrates Court transcript, solicitors acting for the defendant at that point thought that he could not plead to those charges then, but said he would plead when the matter came to the Supreme Court.

I turn now to the effect of these findings. I am conscious of the passage in the judgment of Keane JA in *Barac* (above) [28] that in looking at the effect of such an

agreement on the exercise of my discretion, I am not in the realm of contract law or in the business of enforcing contractual promises. There is no evidence before me that there was any express term of the agreement between the defendant's solicitors and the police prosecutor that the Crown would not charge the defendant with other or different offences in relation to the matters the subject of the agreement. I very much doubt the legality of such an agreement – see *Churchill Fisheries Export Pty Ltd v Director-General of Conversation* (1990) VR 968 (cited in *Barac* on this point). I am similarly unconvinced that the court should be sidetracked into considering factual circumstances as the present, in the framework of promissory estoppel, despite what was said in *Williamson v Trainor* [1992] 2 Qd R 572. There are very well-established principles that estoppel will not run against the Crown, and authorities as to the application of this principle in cases of attempts to fetter a prosecutorial discretion are collected and applied in *Churchill Fisheries*. The court's role is, as recognised in *Barac* and *Williamson v Trainor* and in *Churchill Fisheries*, to guard against an abuse of its process.

Most usually, the factual circumstances relied upon by a defence in this type of case will be called in aid of an application to stay proceedings. Here the defence has specifically eschewed any such position and relies upon the court's general discretion to exclude evidence on the basis to admit it would be unfair to the accused. I recently discussed the principles involved in the exercise of this discretion at length in *R v Playford* [2013] QCA 109. There is a separate and distinct consideration as to whether evidence should be excluded for reasons of public policy, and I think it is fair to regard the defendant here as relying on both discretions to exclude. And, indeed, this is, in substance, the way *Barac* proceeded – see [20].

Looking firstly as to unfairness to the defendant in reception of the evidence, there is no contest that the construction put on the series of factual circumstances relied upon by the Crown to support the larger trafficking charge was always available to the Crown. It was due to the way that the defendant's various interactions with police came about, including once the matter got the office of the police prosecutor, that the significance of all the facts was not apparently appreciated. There is no doubt that a forensic accountant's report could have been obtained earlier if someone had turned their mind to it, but they did not. Thus I can identify inefficiency but not bad faith on the part of the Crown – cf. *Barac* [24] and [34].

The defendant was prepared to plead guilty to the trafficking charge at count 1 on the indictment and to the possession of money charge at count 2 of the indictment notwithstanding the longer period, extra drug involved and more money involved. This was so even though the Crown offered to present a new indictment dividing the charges. It is hard to see any specific disadvantage to the defendant caused by the Crown's change of position. There are some advantages to the accused, that is, the return of $41,740 in May 2012, but no specific disadvantage was put forward by counsel for the defence, and nor can I identify one from the facts which were proved in evidence before me. It is clear from *Barac* – [23] – that considerations as to the defendant's state of mind as a result of the Crown's change of position are not relevant. I am concerned with fairness to the defendant in the conduct of the proceedings in the court.

The defendant entered a plea on the trafficking charge (two months for cannabis and amphetamines) in the Magistrates Court, and I assume for the purpose of argument that he did so on the basis that he had reached an agreement as to the various matters outlined above with the police prosecutor. His entry of a plea can, or could, have had irreversible consequences in some circumstances – see section 600 of the Criminal Code. Here, in fact, it did not, because the count on the indictment was not the same as that to which the defendant pled in the Magistrates Court and, further, because of the Crown's offer to present a new divided indictment in this regard. In fact, the defendant plead guilty to the larger trafficking charge and possession of tainted money in a larger amount before me against the history I have related.

The forensic accountant report was new, but there is no suggestion that the defendant has not had a fair opportunity to test it and to call evidence to contradict it if he deemed it wise to do so.

The defence criticised the quality of the evidence led by the Crown on the sentence to establish the period of trafficking and the amount of the tainted property. I cannot see how this is a separate consideration under the fairness discretion.

I cannot see that the Crown's change of position in preferring the larger trafficking charge and in relying upon any amount higher than $5000 as particulars of the tainted property charge is unfair to the defendant.

Further, I cannot see that there are public-interest considerations which should prevent the evidence being led. No doubt the efficient administration of criminal justice depends to an extent on the Crown and representatives acting for defendants coming to sensible and pragmatic agreements as to the course matters will take as they progress through the system. Nonetheless, as explained, these agreements are not contracts and do not give rise to estoppels. They are not susceptible to analysis in terms of commercial law. The public interest will in most cases require prosecution where there has been no bad faith on the part of the prosecution authorities and no unfairness to the accused – *Barac* [35]. I can see nothing here which would amount to an abuse of process, and it seems to me that there are no considerations of public interest which require me to exclude evidence of trafficking and possession of tainted money outside that comprehended by the parameters of the matter in the Magistrates Court. I reject both bases put forward to exclude the evidence (unfairness and public policy).

I turn now to the findings of fact on the contested sentence. I note that the standard of proof is the balance of probabilities, but that standard is higher than it would be in a civil case. It is one commensurate with the seriousness of matters about which I am asked to make findings. Here I am asked to make findings about trafficking over a 20-month period, that is, it is a very serious matter, and I adopt a standard appropriate to that. The trafficking period alleged is 31 July 2010 to 7 April 2012.

On 27 October 2010, the police found at the defendant's premises cash in an amount of $16,740. As I say, $1050 was in the bedroom, and the defendant said at interview that this was his girlfriend's savings. I am prepared to give him the benefit of the doubt in that regard. The police found cannabis, methylamphetamine and MDMA.

In interview, the defendant admitted that they all belonged to him. As well, there were drug paraphernalia which, again, the defendant admitted belonged to him. Some of the pipes he admitted in interview were for sale. As well, the police found white powder which the defendant admitted in interview was a cutting agent which he used to dilute MDMA or methylamphetamine. The police also found quite extensive hydroponic equipment which the defendant admitted was his. He said he had bought it at a market to grow vegetables in the backyard.

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The defendant admitted, when interviewed on this occasion, that he sold about two ounces of cannabis a week. He said he sold the drug at work, sometimes at home, although he preferred not to have people coming to his house to buy drugs, and that about two afternoons a week, he would attend at the Kensington Hotel where people who required drugs knew he was there and would come to purchase them. He said that he sold these drugs at a profit of around $60 per ounce and he had done so for about three months. The defendant admitted to police that he sold about half a gram of amphetamine a week at a profit of about $100 or more, depending upon the generosity or otherwise of his cutting it with a cutting agent. He said he had been doing that for about two months.

The police found pages in a Bunnings trade diary which the Crown alleges is a tick book. There are two pages in particular which have a list of names and figures under the heading, in one case, "HRS" and on the other one "HRS done". The cross-examination on the sentence before me was to the effect that the HRS stood for shours. The figures against the names in these lists are clearly not hours worked by the defendant. Neither are they hours worked by people who worked for the defendant. Amounts such as 3700, 6050 and 2852 are reported, or are recorded, I'm sorry, which are clearly inconsistent with these propositions. Also there are negative adjustments to the figures in the list, which again just couldn't happen if what were being recorded was hours worked. It is clear that what is there is a monetary account of some type. A dollar sign is shown against some of the amounts, and against one person's name is shown "given half an ounce". I am satisfied to the requisite standard that these pages amounted to a tick book and a tick book showing a considerably higher level of dealing than the defendant admitted to police.

As for the cash, I accept, as I have said, that the $1050 found in the bedroom belonged to the defendant's girlfriend. The remainder was the amount seized by police, of which $11,740 was refunded. I accept Detective Giddin's evidence that this was not as a result of some precise mathematical process, but as the result of a pragmatic decision. I have no doubt that the defendant was, in fact, running a concrete business. There was paperwork found in the garage which supports that – invoices, receipts, notes of jobs and things such as house plans. As well as that, Detective Giddins made inquiries in October 2010. He went to three addresses where the defendant said he had carried out jobs. At two of the addresses he found that the occupants had, in fact, had the defendant carry out concreting jobs for them, and had insisted on being paid in cash. At the third address, he could not raise the occupants, but there was evidence of fresh concreting.

There were also documents in the garage from trade suppliers to the defendant for materials which he needed to carry on a concreting business. So I find that he was

carrying on a concrete business during this time, that he did carry on that business at least in part for cash payment, and, again, from the affidavit of Dore – D-o-r-e – I am prepared to assume that some of the suppliers to him also worked on a cash basis. That is, he paid some of his suppliers in cash.

The defendant told police on interview on 27 October 2010 that he had been divorced and couldn't handle the bookwork of running his own business himself. He had thus been working as an employee. Then, in the months prior to his arrest, in his words, work had "gone real slow". So he had to sell drugs to survive. He went into some detail as to what this meant. He said that without selling drugs he could not pay the mortgage on his home or buy food. He said that without selling drugs he would be living on the street. He said that not only was he selling drugs, but because of his dire financial circumstances everything in his house was for sale, and explained a message on his phone that related to an older fridge in the garage saying that he was willing to sell the fridge in the garage for $100 because he really didn't have enough money to survive. He said he was only doing one or two days or work a week. He told police he had only recently re-started working on his own account again, rather than working as an employee. He was just getting around to putting an advertisement in the paper in relation to this. He said that he could potentially make eight to 900 dollars a day working on his own account. Notwithstanding this, he could not explain how it helped in any way to significantly advance his financial circumstances to make 150 or 200 dollars a week selling drugs when he could make the amount of eight to 900 dollars a day working on his own account concreting. He also ventured an unsatisfactory explanation as to how it was that he came to be renovating his house, and in particular the bathroom, when he was in such dire straits financially. All of this sits well, in my opinion, with the evidence provided by the tick book that, in fact, at this stage the defendant was dealing in drugs to a greater degree that he was prepared to admit to the police in this interview.

The defendant could not account in any precise way for the money in the esky. He said he received the money from jobs he had undertaken and was saving it in the esky because he owed it to his suppliers. To believe this entails believing that trade suppliers would be willing to supply to a new business on credit before the job was done, and that he – that the defendant was, in fact, carrying out much more concreting work than would be indicated by someone who was willing to sell an older fridge for $100, and who was struggling to buy food, or would be on the street without the income of 150 to 200 dollars a week selling drugs.

The defendant said that he differentiated between money he made selling drugs and money he made from his concreting work, because he kept money to sell and buy drugs in his wallet, and kept concreting money separate from that – that is, in the esky. There was $450 in his wallet. The defendant told police he didn't sell drugs on credit because he couldn't afford to. I do not believe this having regard to the evidence of the tick book.

Six days later, on the 2nd of November 2010, the defendant was interviewed by police again because he had reported late for bail. This is the occasion where he was found with $7000 cash on him. He explained that it had been money paid to him for concreting jobs. One job he said was two weeks ago and the other job was four to

five weeks ago. He said he had it in his wallet because he was going to pay for some concreting supplies and he said he had had the money in his possession since payment either two, in one case, or four to five, in the other case, weeks ago. This was the money which the police returned to him because they felt they could not prove that it was connected to any illegal act. Having regard to the amounts found and seized on the 27th of October 2010 and the explanations given in interview on that date, I find that the explanation given to police on 2 November 2010 as to this $7000 was false.

On 22 September 2011, the police executed a search warrant at the defendant's home. They found a bolt action rifle, a hydroponic garden in a shed with a cluster of young cannabis plants, about 20 grams of harvested material in the room, 105 grams of cannabis in a bedroom in three containers, 10 grams of methylamphetamine in a bedroom, and 2.5 grams of MDMA in a bedroom. In the lounge room they found five bags, each with about 470 grams of cannabis in them as well as other small amounts of cannabis, 4.3 grams of MDMA, 14.3 grams of methyl amphetamine. In the computer room they found 140 grams of cannabis, and small amounts of methylamphetamine, and six grams of 2C-E (a schedule 2 drug). In the garden there were seven cannabis plants. In total, therefore, they found 2.6 kilograms of cannabis – count 6 before me – worth about $16,000; five grams pure methylamphetamine – count 8 before me – worth about $414, and; 6.11 grams of 2C-E – count 9 before me – worth about $1566.

On 11 November 2011, the defendant was pulled over by police while driving. He had drugs including two grams of synthetic cannabinoid with him, a taser, a small amount of cannabis and a plastic shopping bag which contained $3000 in 50 and 20 dollar denominations in bundles totalling between 1000 and 5000 dollars as well as a phone with a text message in relation to the supply of cannabis. The explanation proffered in relation to this money – the $30,000 – was sworn in an affidavit in the Magistrates Court. The defendant swore that the $30,000 consisted of three amounts, $5000, $7000 and $18,000, which he had in his possession because he was intending to repay a $30,000 debt he owed to Ms Wake, his de facto or ex de facto, as the case may have been.

He said he received $18,000 from one Szanto – S-z-a-n-t-o – which had agreed to pay him $20,000 to buy his car – number plate 6-0-2-R-T-C. He produced receipts dated 1.10.11, 12.10.11, 16.10.11, 21.10.11 and 28.10.11, all said to be part payments totalling $18,000. I note that the receipt numbers are not in chronological order. The last $2000 on this purchase he said was outstanding and he would not transfer the car until it was paid. A Mr Szanto swore an affidavit to the same effect. The evidence before me was that the car was never transferred to Mr Szanto. It is shown in the Department of Transport records as sold to a Mr Jager – J-a-g-e-r – on 2 September 2012 – exhibit 18 – and I'll just note that I've made that material, which came in after the hearing, exhibit 18. This was not explained by the defendant.

I do not believe the explanations sworn to as to this money being a part-purchase price of the car with the number plate 602 RTC.

As well, it was sworn by the defendant in the Magistrates Court affidavit that he sold another car to one Moriarty for $5000 on 31 May 2011, some five and a half months before being apprehended by the police, and a go-kart to one Donnelly for $7000, just a week before. Again, the receipts are also not chronological. Having regard to the false explanation as to the $18,000 and the $7000 on 2 November 2010 and the lack of any corroborative evidence from Moriarty, Donnelly and Wake, I do not believe this explanation either.

Before me was an accounting analysis by a forensic accountant as to the 20-month period of the trafficking, 31 July 2010 to 7 April 2012. The analysis was of moneys in and out of bank accounts held by the defendant, a person assumed by the accountant to be the defendant's de facto – Wake, and the business JC Concreting. For the purposes of the analysis, these three people were treated as one entity. I consider it was proper to do so, as there was evidence that there was intermingling of finances between the three people. The defendant raised the difficulty that the de facto relationship between him and Wake had apparently ended at some point in the period of trafficking. I don't think there was any evidence of this, but in any event, the accountant said it would make no difference as the amounts coming into the accounts from Wake were all sourced – wages or social securities payment so that even if it were true that Wake stopped being the defendant's de facto at some time in the period, it made no difference to the accountant's conclusion about the amount of unsourced income – see t1-20 of the transcript before me.

It was also asserted in questions to the accountant during cross-examination that the defendant began another relationship with another woman. There was no evidence of this and there was no evidence that it was financially relevant, that is, that there was no – that there was any financial intermingling.

It seems to me that the accountant's analysis was conservative in several ways: (1) any withdrawal of moneys seven days or less before the deposit of any unsourced income to any bank account was deemed to be part of the deposit so as to avoid double counting, (2) there was an amount of $9000 which was unsourced at the very beginning of the period, which was disregarded in the defendant's favour, and (3) because the analysis only dealt with moneys in and out of bank accounts, neither the $16,740, $7000, nor the $30,000 were included, as none of them were run through any bank account.

The accountant found that the amount of $114,000 was deposited into the bank accounts and there was no source revealed for it. Over the same period an amount of $119,000 was deposited with a source. Substantial amounts with a source were payments made by Ms Wake. As I say, the analysis only dealt with money that ran through the bank accounts and it must be considered that on the three days in which the defendant came to police attention through that period he had a total of $52,690 cash on him, which is not taken into account in the analysis. As I say, there is no doubt through this period that the defendant earned cash payments concreting and there is no way of telling, and the accountant could not tell, what amounts of unsourced income were from this concreting work. Needless to say, the defendant's tax returns are of no assistance. Having regard to the fact that on the three days the police searched the defendant during this period, he had over $52,000 on him which

didn't go through the bank accounts, I think there is every prospect that there were other large amounts of cash which were not banked by the defendant during the period in question. The accountant's evidence was that the receipt of unsourced income to the bank accounts was in a relatively steady flow through the period in question.

This financial evidence, the large sums of money found on the defendant on 27.10.2010 to 2.11.2010 and 9.11.2011, the quantity and variety of drugs and paraphernalia found on the 27th of October 2011 and the 9th of the 11th 2011 and 11.11.2011, the tick book, and the weapons found on 11.9.11 and 11.11.11 persuade me, to the high standard necessary, that the defendant was trafficking in cannabis, methylamphetamine and MDMA to a moderate degree, more than admitted to police on 27.10.2010 during the period alleged at count 1 of the indictment.

Likewise, in the absence of any legitimate explanation for the cash found by police and the provision of false explanations in relation to the $7000 and $18,000 discussed above, I find it proved to the high standard necessary that most, if not all, of the amounts of money particularised as to count 2 on the indictment were tainted property. It must be, having regard to the evidence of Detective Giddins, that some of the amounts were cash for concreting jobs, however I'm not prepared to assume that even half of the total amount was in this category.

All right. Well, that concludes the findings of fact on the sentence. Mr Cunniffe, would you stand up, please, and I'm going to sentence you now.

You are 38 years of age now. You were 35 to 37 at the time of this offending. You have a criminal history which dates from 1992. It involves drugs charges and dishonesty offences and includes breaches of probation. Having said that, your criminal history does not reveal any offending warranting imprisonment until 25 May 2012 when you were sentenced to six months by the magistrate who dealt with some of the more minor matters which are associated with those for which I am sentencing you today.

The material before me shows that you had a normal enough childhood and schooling. You finished year 12 and you worked in the building industry and it is to your credit, and it goes to your prospects of rehabilitation, that you have had this work history in the past. It is an aggravating factor in the offending that much of the offending with which I am dealing was offending when you were on bail. That is, after your arrest on the 27th of October 2010 you continued to traffic significantly.

In terms of looking at your interaction with police and with the court system, I would have to say there is something of a mixed bag in terms of any indication of remorse and co-operation. On the 27th of October 2010 you did, in some respects, co-operate with police. That is, you agreed to participate in an interview and it is quite a long interview. In it, you confess to ownership of drugs and paraphernalia and you also confess to some trafficking. I have wondered whether the confession of trafficking brings into play the principles in AB v R (1999) 198 CLR 111, particularly per Hayne J at 155-156. Those principles are that there is a special measure of leniency afforded to an offender who discloses an offence in circumstances where it would

otherwise be unlikely to be discovered. Here, I think that trafficking was likely to be discovered whether or not you made admissions. That is because of the clear evidence in the tick book, as well as the amounts of drugs and cash found by the police when they searched your house. There are certainly questions asked by the police in the interview that indicate they had evidence as to one or two supplies by you. As well, my view is, really, that the information you gave police as to your trafficking was dishonest, in that it minimised the extent of it - see my reasons above. So I don't think that you are entitled to an AB discount.

In the Magistrates Court you pled and indicated that you would plead in this Court and I do take into account that there was a significant saving of court resources and public money because of the number of charges you were facing and because to prove them would have involved quite a lot of time and I give you credit for that. To some extent, that is tempered by the fact that you have chosen to contest the matters in this Court and run the point of law you have chosen to run in this Court, on which you have, ultimately, been unsuccessful.

To your credit I think, in May this year you surrendered yourself into custody. That was the first return date for the sentence hearing in this Court. It may indicate remorse. It certainly indicates, I think, a strong indication, Mr Cunniffe, that you were, at that point at least, understanding the seriousness of what you faced and taking responsibility for your actions.

The Crown relied on the authority of *Taylor* [2005] QCA 379 in support of a submission that the appropriate sentence on the trafficking charge should be six years imprisonment. The sentence imposed in *Taylor* was five years, however it seems to me the offending in *Taylor* was less than the offending here. Mr Taylor was much younger than you. He was aged only 20. The trafficking in which he engaged was trafficking over a period of only four months, as compared to the trafficking I have found you engaged in, and the quantities of drugs and the amount of money found in Mr Taylor's possession were less than those found in your possession. You had a variety of drugs for sale. You had paraphernalia, including pipes, for sale. You had a large amount of cash money indicating the extent of trafficking and on the 11th of September 2011 you had considerable amounts of drugs on your premises. The trafficking was over a long period of time. Quite a lot of it was while you were on bail and, disturbingly enough, on the last two occasions when you were intercepted by police you were in possession of weapons.

In that respect, I think that a period of imprisonment on the trafficking charge of six years is well justified, and that it would be what I impose, except for the magistrate having sentenced you to six months on the 25th of May. That sentence was six months imprisonment. The magistrate noted that you had served 49 days in presentence custody and immediately released you on parole. The Crown fairly conceded that the six months from that sentence should come off the head sentence I impose and I accept that that is correct. Had all the matters been dealt with together, I don't think that you would have received any more time. I, therefore, impose a period of imprisonment on count 1 of the indictment of five and one half years.

I fix a parole eligibility date two years into that sentence. In fixing that date I take into account that you have served 153 days presentence custody from the 7th of June 2013 until today, the 5th of November 2013 and I declare that's time served in respect of this sentence.

There is also the matter of the 49 days which you served before the magistrate sentenced you. It is not time which is strictly declarable. At the time I heard the matter I rather thought that the time was spent, but having considered the matter I think it should be taken into account in fixing your parole eligibility date now. Really, in accordance with the more generally applied maxim, that time served comes off both the top and bottom of a sentence. I, therefore, take into account 203 days served and I fix a parole eligibility date of 16 April 2015.

On the rest of the counts of the indictment I sentence you to the following terms of imprisonment, which are cumulative. On count 2, 18 months; on count 3, six months; on count 4 – sorry – which are concurrent. I beg your pardon. So the sentences which I am reading out now are to be served concurrently. Count 2, 18 months; count 3, six months; count 4, six months; count 5, I record a conviction, but impose not further punishment; count 6, 18 months; count 7, 12 months; count 8, 12 months; count 9, nine months.

On the bench charge sheets I record convictions, but impose no further punishment. If it's not obvious, the reason why all those sentences are concurrent are that they are, in effect, the particulars of the trafficking charge.

Very well. I don't know if counsel's had a chance to look at my mathematics with that parole eligibility date, but - - -

MR Mac GIOLLA: I think it's 49 days off the 7th of June, your Honour. I think that's – which was your object - - -

HER HONOUR: Yeah. Well, I took into account and declared the 153 days. Added to that was the 49 days, which took me to 203, I think, and, working on the basis that I would fix a date two years after the sentence, I think that brought me to 16.

MR Mac GIOLLA: I think that's correct, your Honour.

HER HONOUR: Good. All right, then. Thank you.