

DIRECTOR OF PUBLIC PROSECUTIONS

v

Michael BARBARO

---

JUDGE: HIS HONOUR JUDGE O'CONNELL  
WHERE HELD: Melbourne  
DATE OF HEARING: 16 May 2023  
DATE OF SENTENCE: 1 September 2023  
CASE MAY BE CITED AS: DPP v Barbaro  
MEDIUM NEUTRAL CITATION: [2023] VCC 1546

### REASONS FOR SENTENCE

---

**Subject:** CRIMINAL LAW  
**Catchwords:** Plea of guilty; Trafficking in not less than a commercial quantity of methylamphetamine; Prohibited person possess firearm; Possession of drugs of dependence; 9 sales to police covert operatives of 476 grams mixed quantity of methylamphetamine valued at \$78,900; 371 grams of mixed quantity methylamphetamine trafficked to others over 7 month period; Offender found in possession of a further mixed quantity of 152.4 grams; Relevant prior convictions; Whether possession of firearm connected to business of drug trafficking; Whether sentences imposed for subsidiary offenders constrains sentence; Where offender made bona fide attempts at rehabilitation; Further commission of offences on bail; Totality; Significant utilitarian benefit of pleas.  
**Legislation Cited:** *Drugs Poisons and Controlled Substances Act 1981* (Vic); *Crimes Controlled Operations Act 2004* (Vic); *Sentencing Act 1991* (Vic)  
**Cases Cited:** *Barbaro v The Queen* [2021] VSCA 277; *Gregory v The Queen* [2017] VSCA 151; *Acciarto v The Queen* [2019] VSCA 264; *DPP v Condo* [2019] VSCA 181; *DPP v Bowen* [2021] VSCA 355; *Arici v The Queen* [2019] VSCA 228; *Polos v The King* [2022] VSCA 258; *DPP v Moustafa* [2018] VSCA 331; *Mourkakos v The Queen* [2018] VSCA 26; *Singh v The Queen* [2022] VSCA 93; *Parks v The Queen* [2017] VSCA 232; *Vincent v The Queen* [2021] VSCA 99; *Lytras v The Queen* [2020] VSCA 150; *Berichon v The Queen*; *Houssein v The Queen* [2013] VSCA 319; *Acciarito v The Queen* [2019] VSCA 264.  
**Sentence:** Total effective sentence of 8 years and 1 month imprisonment, non-parole period of 5 years imprisonment.

---

APPEARANCES:

Counsel

Solicitors

For the DPP

Mr Y. Hardjadibrata

Office of Public Prosecutions

For the Accused

Dr M. Gumbleton

Sarah Tricario Lawyers

HIS HONOUR:

### **Introduction**

1 Michael Barbaro you have pleaded guilty to the following charges:

#### **On Indictment number J11562158B;**

- Charge 1 - That at Sydenham and Taylors Hill between 15 September 2017 and 13 June 2018 you trafficked in a commercial quantity of a drug dependence namely methylamphetamine.

Related summary offences:

- Summary Charge 4 - That at Sydenham on 13 June 2018 being an unlicensed person under the Firearms Act 1996 you stored various ammunition in an manner that was not secured;
- Summary Charge 8 - That at Sydenham on 13 June 2018 you possessed a prohibited weapon namely a flick knife.

#### **On Indictment number J11562158.1**

- Charge 1 - That at Sydenham on 13 June 2018 being a prohibited person you possessed a firearm namely a Beretta model 680 12 gauge shotgun.

#### **On Indictment number N10818635;**

- Charge 1 - That at Sydenham on 23 April 2022 you possessed a drug dependence namely methylamphetamine;
- Charge 2 - That at Sydenham on 23 April 2022 you possessed a drug dependence namely cannabis.

Related summary offences:

- Summary Charge 5 - That at Sydenham on 23 April 2022 you committed two indictable offences namely possession of a drug of dependence, whilst on bail;
- Summary Charge 6 - That at Melbourne and diverse other places between 14 January and 22 April 2022 you contravened certain conduct conditions of bail namely that you not leave the State of Victoria and that you reside at an address in Greensborough or an address in Ascot Vale.

### **Circumstances of offending**

- 2 During 2017 police investigators from the Drug Task Force commenced an investigation into drug trafficking in the western suburbs of Melbourne, codenamed Operation Ezekiel. The investigation revealed that you were trafficking in high-purity methylamphetamine in multiple ounce (28 gm) quantities from your residential address at in Sydenham.
- 3 The total methylamphetamine trafficked in the period of 15 September 2017 to 13 June 2018 was up to, but not more than, 1 kg of mixed substance containing methylamphetamine. At the relevant time a commercial quantity of a mixed substance containing methylamphetamine was 500 gm.
- 4 The trafficking in which you engaged encompassed three types of conduct:
- 5 First, 476 gm of methylamphetamine was sold to undercover police agents by one of your co-accused, Jayson Muir, on eight separate occasions between 15 September 2017 and 27 December 2017. An additional sale was made to an undercover operative by another associate, Van Tran, on 15 September 2015. In respect of each of those sales you supplied the methylamphetamine.
- 6 Second, a further 371 gm was sold between mid-November 2017 and 13 June 2018. Those sales were detected through intercepted telephone calls, physical and electronic surveillance and CCTV recordings during that period. That evidence

showed drug customers frequently attending your premises at all times of the day and night in order to purchase methylamphetamine.

- 7 Third, on 13 June 2018 investigators executed a search warrant at your premises and located 152.4 gm of methylamphetamine on your person and in your bedroom together with drug paraphernalia and other indicia of drug trafficking. Police also seized a sawn-off shot gun, unsecured cartridge ammunition and a flick knife.
- 8 At the plea hearing of 16 May 2023, counsel for the Victorian Director of Public Prosecutions, Mr Hardjadibrata, tendered a Prosecution Opening Upon Plea of 3 May 2023, which sets out in considerable detail the circumstances of your offending. What follows attempts to summarise that offending but it should be understood that it is no more than a summary and that the detailed Prosecution Opening will constitute the factual basis for sentence.

#### **1. Covert operative purchases**

- 9 By way of illustration as to the manner in which methylamphetamine was trafficked to covert operatives, your co-accused Jayson Muir met by chance two undercover operatives at Van Tran's home in St Albans in early October 2017. One of the covert operatives recognised Mr Muir as the person who had delivered the methylamphetamine purchased through Van Tran on 15 September 2017.
- 10 They discussed the previous purchase and one of the operatives provided his phone number to Mr Muir on the basis that Mr Muir could supply him with methylamphetamine at \$4,750 an ounce. That amount comprised \$4,500 as the price and the extra \$250 was Mr Muir's commission. He explained that his supplier was the boss of the mafia in this area and that he always had a large quantity of methylamphetamine with him.
- 11 On the morning of 6 October 2017 a police covert operative rang Mr Muir seeking to purchase two ounces of methylamphetamine. Mr Muir agreed to provide the

drugs saying “sweet brother no worries”.<sup>1</sup> After this conversation Mr Muir contacted you to arrange the supply of the two ounces of methylamphetamine.

12 That afternoon the covert operatives met with Mr Muir and his girlfriend at a Caltex service station near the Watergardens Shopping Centre in Taylors Lakes. They then followed a black Audi being driven by Mr Muir who, after a time, indicated to them to turn into a street in Sydenham. They waited at that location whilst Mr Muir was observed by surveillance officers arriving outside your residential address in Sydenham.

13 About half an hour later Mr Muir returned to the location where the covert operatives were waiting. He got into their car and handed one of them the methylamphetamine. When asked about the weight of the drugs Mr Muir responded that his supplier did not play games. Mr Muir was then handed \$9,500 for the methylamphetamine and agreed that further purchases could be arranged through him. Surveillance officers then observed Mr Muir return to your home address at.

14 The drugs purchased were analysed and confirmed to be methylamphetamine weighing 55.9 gm with a purity of 79%.

15 Similar transactions were conducted on the following days:

- 12 October 2017 - 56 gm of methylamphetamine at 81% purity for \$8,500;
  - 25 October 2017 - 56 gm of methylamphetamine at 80% purity for \$9,500;
  - 10 November 2017 - 56 gm of methylamphetamine at 88% purity for \$9,500;
  - 23 November 2017 - 56 gm of methylamphetamine at 65% purity for \$9,500;
  - 14 December 2017 - 56 gm of methylamphetamine at 74% purity for \$9,500;
- and,

---

<sup>1</sup> CO239 audio/transcript (6 October 2017).

- 27 December 2017 112 gm of methylamphetamine at 84% purity for \$17,600.

16 It should be noted that in respect of the transaction of 12 October 2017, DNA testing of the inner packaging of the methylamphetamine in question, located a DNA profile in which you were 190 million times more likely to be a contributor.

17 The intercepted mobile telephone calls, listening devices, physical surveillance and CCTV recordings overwhelmingly established you as the supplier of the methylamphetamine the subject of these transactions. Indeed, you accept as much for the purposes of your plea.

## **2. Electronic and physical surveillance**

18 Investigators obtained a telephone intercept warrant on your mobile phone which became operative on 16 November 2018. The intercepts revealed you to be supplying methylamphetamine in response to calls at all times of the day and night in which people would tell you of their intention to attend your Sydenham home, so as to pop in for a drink, lunch or dinner.

19 One prominent customer detected in this way was Kelly Luscombe. She attended your residence on 18 November, 21 November, 23 November, 25 November, 28 November, 29 November and 2 December 2017 purchasing methylamphetamine on each occasion. The intercepted calls between you and Ms Luscombe of 28-29 November 2017 revealed that she had purchased 112 gm of methylamphetamine from you but was short-changed and only supplied with 84 gm. You apologised for the error and the additional ounce was collected by Ms Luscombe the following day.

20 On 7 December 2017 investigators executed a search warrant at Ms Luscombe's address in Geelong. Among other items 82 gm of methylamphetamine, a large quantity of cash and other drug paraphernalia were located and seized.

21 Investigators also conducted physical surveillance of your residence between 13 March 2018 and 13 June 2018. That surveillance revealed numerous people

attending your residence for short periods in order to purchase methylamphetamine. For example, on 28 May 2018 surveillance was conducted between 6.30pm and 11.55pm. About a dozen vehicles were observed coming and going from your address with numerous people going into and coming out of your house. One of the cars observed, a RAV4 vehicle, was followed and intercepted after it had been in attendance at your house for approximately six minutes. The two occupants of the car were arrested after 15 gm of methylamphetamine was located in the glove box.

- 22 Similarly on 4 June 2018 between 6.30pm and 1.00am police observed numerous people coming and going from your address including a dozen or so vehicles.
- 23 On 8 June 2018 between 6.29pm and 12.01am about six vehicles were observed attending at, or departing from, your address. One such vehicle was a white Mercedes with New South Wales registration plates, which arrived at 9.27pm and parked near to your house. Two males were seen to enter your house and then were recorded on a listening device having a conversation with you and others about methylamphetamine quality, prices, cutting agents and the price of precursor chemicals. The two men left at 10.11pm and about 20 minutes later the vehicle was intercepted by investigators in Coburg. A couple of days later you were recorded on a listening device speaking about that interception and the failure of police to find the concealed drugs when they searched the Mercedes and its occupants.
- 24 In April 2018 investigators installed a listening device in the garage at your Sydenham address. The garage had a large table and a kitchen where you would regularly meet with visitors and where you would generally conduct your drug trafficking business. You would often hold conversations with associates regarding drugs, drug quality, drug pricing, firearms, drug use, drug importation and methods of concealing illegal items.



- 25 For example, on 20 April 2018 at about 2.00pm you were recorded as talking to two associates about purities of drugs, commercial quantities and cutting agents whilst the rustling of bags could be heard in the background. At about 6.15pm that day you were recorded discussing with a visitor the return of a bag of drugs together with two bags. Later on that same day at about 8.25pm, you were recorded as speaking with an unknown male about prices for ounces and “eight balls”. You indicated that you had sold someone two ounces previously and that they had returned an eight ball. Conversations at that time were regularly recorded up until the execution of the search warrant on 13 June 2018.
- 26 During the course of the investigation the surveillance identified individuals who were significant drug customers or suppliers to you. They included Ms Luscombe in the period November-December 2017 to whom I have already referred, Eric Nguyen in April 2018, Van Quoc Nguyen in May 2018, Terry Alexiadis in June 2018, an unidentified female in January and June 2018, and Luke Fenech in March-June 2018.
- 27 For example, on 19 April 2018 you invited Mr Nguyen to “come past here”.<sup>2</sup> The following day he was observed walking into your house holding a dark-coloured shoulder bag. You and Mr Nguyen can then be heard on the listening device having a conversation about drugs where you discuss returning a bag of drugs and two bags. Similarly, later that month on 29 April, Mr Nguyen was recorded in a conversation with you in the garage discussing the price of quantities of methylamphetamine.

### **3. Search warrant**

- 28 On 13 June 2018 investigators executed search warrants at your property in Sydenham, a property occupied by Mr Muir at Pascoe Vale, and another property occupied by Pepe Scardamaglia. Present with you at your house at that time were

---

<sup>2</sup> SMS contact report between Nguyen and Pasquale Barbaro.

your son Pasquale Barbaro together with associates Jimmy Barkho, Mario Fioramente, Vasco Neskovski and Soueil Abdul-Wahad.

- 29 Eight separate items containing methylamphetamine were located either on you or in your bedroom and comprised 152.4 gm of a mixed substance containing methylamphetamine.

**Indictment J11562158.1**

- 30 Amongst the other items seized that day were the following:

- (a) One, 12 gauge Beretta model 680, under and over break open shot gun serial number C02648B, located on the kitchen bench. Both the barrel and the butt stock had been sawn off. The firearm met the definition of a handgun and had partly burnt and unburnt grains of propellant visible within both bores. It was assessed as capable of being discharged;
- (b) On the kitchen bench, a white sock containing eight cartridges suitable for use within the shot gun;
- (c) Assorted ammunition was also located in the kitchen on the dining table, in the theatre room inside a BMW children's car two containers with 135 .223 Remington calibre cartridges, and in the master bedroom inside the walk-in robe a box of Winchester ammunition labelled as containing .32 Automatic Colt Pistol calibre cartridges (28 in total);
- (d) In the kitchen drawer above the fridge, an ammunition magazine with a capacity for 30 .223 Remington calibre cartridges;
- (e) In the master bedroom, a flick knife on the television table.

- 31 The possession of the Beretta shot gun forms the basis of Charge 1 on Indictment J11562158.1. You are not the holder of a firearms licence and you are not authorised to possess, carry or use cartridge ammunition. You were a prohibited person as defined under the *Firearms Act 1996* because less than five years had

expired since you had finished serving a term of imprisonment of less than five years for an offence under the *Drugs Poisons and Controlled Substances Act 1981*. That was so because on 5 September 2015 you were sentenced in this court to 53 days imprisonment for trafficking in a drug dependence.

32 Your possession of the various types of cartridge ammunition which had not been secured constitutes related Summary Offence Charge 4. The possession of the flick knife found in your bedroom constitutes related Summary Offence Charge 8, possession of a controlled weapon.

33 You were arrested that day and when later interviewed by police elected to exercise your right to silence.

**Indictment number N10818635**

34 On 22 April 2022 you were arrested at Brisbane Airport because you were found to be in contravention of the conditions of your bail in respect of the state drug and firearm matters that comprise Indictments J11562158B and J11562158.1.

35 The circumstances giving rise to the arrest were as follows:

- On 13 June 2018, you were arrested and charged with the Operation Ezekiel offences. You were remanded in custody;
- On 18 September 2018, you were granted bail with conditions that you reside at Riverside Clinic in Kyneton, report daily to Kyneton Police Station and not to leave the State of Victoria;
- On 7 December 2018, that bail was varied such that you were required to reside at an address in Ascot Vale and report daily to Ascot Vale Police Station;
- On 11 October 2019, you were committed for trial in this court and bailed with conditions that you reside at an address in Greensborough or an address in Ascot Vale and not to leave the State of Victoria;

- On 21 April 2021, your bail was varied to allow you to travel to New South Wales on specified dates in April and May 2021;
- Between January 2022 and April of that year investigators established that you were living at your home address in Sydenham in contravention of the conditions of your bail;
- On 19 April 2022, again in contravention of your bail you flew to Brisbane with your then partner Crystal Portelli.

36 At about 5.00pm on 22 April 2022 AFP airport uniform police conducted cash and drug dog screening of passengers and their baggage at the Qantas departure gates at the Brisbane domestic terminal. A check revealed you were in breach of your bail and you were arrested and remanded in custody. That conduct constitutes related Summary Offence Charge 6 - contravention of the conduct conditions of your bail.

37 Whilst you were still in custody in Queensland, investigators executed another search warrant at your Sydenham property. A clear resealable bag containing 13.6 gm of cannabis was found in the kitchen and forms the basis of Charge 2, possession of cannabis.

38 Another clear resealable bag was located in the kitchen area of the garage which contained 2.8 gm of methylamphetamine which was analysed at 80.1% purity. A further clear resealable bag was located on a shelf in the walk-in pantry and it was found to contain 3.3 gm of methylamphetamine at 78% purity. The possession of those two items totalling 6.1 gm of methylamphetamine is the subject of Charge 1 possess methylamphetamine. Police also located other items consistent with the use of drugs.

39 The possession of those items also gives rise to related Summary Offence Charge 5 being the commission of two indictable offences whilst on bail.

40 On 26 April 2022 you were extradited from Queensland to Victoria and have remained in custody since.

### **Procedural chronology**

41 As has been indicated, you were arrested and charged on 13 June 2018. Mr Muir and Mr Scardamaglia were also charged at the same time. A three-day contested committal took place in October 2019 and you were committed to stand trial in this court on 11 October 2019. At that time you pleaded not guilty to these charges, noting that you faced the more serious charge of trafficking in a large commercial quantity of methylamphetamine.

42 In this court there were a number of directions hearings and pre-trial applications. Most notably, you joined with your co-accused Mr Muir in applications to exclude evidence as a result of an alleged illegal delegation by the Chief Commissioner of Victoria police under *The Crimes Controlled Operations Act 2004*. In addition, the legality of the variations of the controlled operations authority issued under that Act was also challenged.

43 As a result some of the variations of the controlled operations authority were determined to be invalid and therefore illegal.

44 A trial date was set for 4 July 2022 with an estimate of 8-10 weeks.

45 Following discussions with the prosecution the matters of Muir and Scardamaglia resolved.

46 Ultimately Mr Muir's charges were dealt with in the Koori Court. He pleaded guilty to trafficking in methylamphetamine (simpliciter) between 15 September and 27 December 2017. That charge encompassed five separate sales to the covert operatives involving 293 gm of methylamphetamine which you had supplied. He was sentenced to a total effective sentence of 164 days imprisonment and in addition to undertake a Community Correction Order for a period of 2 years.

- 47 Mr Scardamaglia pleaded guilty to one charge of trafficking methylamphetamine (simpliciter) between 23 November and 27 December 2017. He was complicit in two of the sales to the covert operatives where 168 gm of methylamphetamine was provided. On 24 February 2023 he was sentenced to a total effective sentence of 2 years and 6 months' imprisonment with a non-parole period of 15 months.
- 48 You elected to challenge the admissibility of the evidence obtained in consequence of the invalid controlled operation authorities. On 4 July 2022 a pre-trial ruling was delivered allowing the prosecution application to admit the evidence which had been obtained in consequence of the invalid variation authorities.
- 49 On 13 July 2022, after a further case conference the prosecution accepted your offer to plead guilty to trafficking in a commercial quantity of methylamphetamine and elected not to proceed with the original charge of trafficking in a large commercial quantity of methylamphetamine.
- 50 On 31 January 2023, the firearm charges relating to Indictment J11562158.1 were resolved and you pleaded guilty to those charges on 17 February 2023.
- 51 The matters comprising Indictment N10818635 were brought into this court quickly so that they could be dealt with at the same time as your other charges. Your plea of guilty in respect of those matters was clearly at the earliest practicable opportunity.

### **Personal circumstances**

- 52 You were born in February 1960 and are now 63 years of age. Your counsel Dr Gumbleton, emphasised that you did not offend in any particularly serious way until you were about 46 years of age. Even so, over the last 15 years or so it appears you have been heavily involved in the drug world both using drugs and in trafficking them. It was submitted that you have made considerable efforts to address your drug use and that you have the very significant support of your four

adult children. Your prospects of rehabilitation, it was submitted, were therefore much better than might first appear.

53 On the plea your eldest daughter Mary Grace Barbaro gave evidence. Counsel adduced the evidence of your personal history through Ms Barbaro.

54 You were born and grew up in a small village in Calabria in Italy being the second youngest of eight children. I was told that you had a happy but largely unremarkable upbringing save that you contracted polio when you were young and that one of your older sisters passed away when she was 16. Your parents worked hard to support their large family. They grew grapes on a vineyard and your father worked as a forest ranger.

55 One of your elder sisters migrated to Australia, and when you were 20 years of age you decided to follow her and make a life for yourself in this country. Not long after arriving in Australia you met your future wife and married her when you were 22 years of age. All of your four children were born in the 1980s and were brought up in the Ascot Vale area. Your daughter describes her upbringing as happy, very family-oriented and very traditional. You worked in factories and then started family businesses such as a takeaway food shops. She recalls you working hard over long hours until you are able to purchase a family home.

56 Your daughter explained that she and her siblings were never exposed to any family violence and that you provided a stable home which enabled each of the children to get a good education and thereafter work productively.<sup>3</sup> She went to university studying among other things visual merchandising. Her sister pursued a career in jewellery design. Your youngest son now runs a restaurant with his mother and your other son Pasquale works as a concreter although he has had some difficulties to which I will refer shortly.

---

<sup>3</sup> I note that this view of your children's upbringing is at odds with that put on behalf of your son, Pasquale, as described in *Pasquale Barbaro v The Queen* [2021] VSCA 277. Nevertheless, it was not challenged on your plea.

57 At this point I should say something about your prior criminal convictions. When you were 23 years of age you were fined \$100 for using indecent language. When you were 30 years of age you were placed on a bond to be of good behaviour for possession of cannabis. In December 1996 when you were 36 years of age you were convicted and fined \$20,000 in this court for possession of amphetamines. About eight years later, in 2004 you were placed on a one month suspended sentence for driving whilst authorisation suspended.

58 You were first imprisoned in December 2006 when you came before this court on a charge of cultivating a narcotic plant in a commercial quantity for which you were sentenced to 2 years' imprisonment with a non-parole period of 18 months. Two months later, again in this court, you were convicted of three charges of trafficking a drug dependence, cultivating a narcotic plant and, among other charges, being in possession of a Category E handgun without a licence. The sentence imposed was largely concurrent with the sentence imposed in December 2006 such that the total effective sentence for all matters at that time was 2 years and 6 months with a non-parole period of 2 years.

59 On 8 September 2015 you were again before this court and convicted of trafficking in a drug dependence and possession of an unregistered Category A longarm firearm. You were sentenced to 53 days imprisonment together with a two-year Community Correction Order. Finally, in September 2017 that Community Correction Order was varied with the effect of extending it until 7 March 2018.

60 Returning to the narrative provided by your daughter – you were involved in a serious motorcycle accident in 1996. All of the bones in your foot were broken and you also suffered injuries to your knee and back. She believes you still suffer a lot of pain from the injuries you received at that time. Your daughter suggested that she saw a personal deterioration in you after that accident.

61 In 2005 you and your then wife, with the help of all of the children, opened an Italian restaurant in Keilor Rd in Niddrie. Not very long afterwards you received the



prison sentences for commercial cultivation and trafficking to which I have referred. You were released on parole after serving two years.

62 You went back to the family home and working in the restaurant. It seems that you were unable to leave your past behind. Your daughter noticed some people who were involved in criminal activity regularly visiting the restaurant and she noticed a change in your behaviour. You appeared to be constantly paranoid and preoccupied. I was told that at around this time police apparently formed the view that some of the offenders associated with a notorious tomato tins MDMA importation, in particular a Graham Potter, had conspired to have you murdered. The prosecution in this matter accepted that was so. This was said to have caused you significant distress and fear and contributed to your substance abuse becoming more regular.

63 In your daughter's eyes you had become a very different person from the father that she grew up with.

64 In 2009 the restaurant was closed and your marriage broke down. That same year you were involved in another very serious motor vehicle accident in which you broke your sternum and suffered a severe eye injury. The long term effects of these injuries are noted in a short medical report of 11 May 2023 which confirms that you continue to suffer from chronic pain together with Type 2 diabetes and asthma (Exhibit 16).<sup>4</sup>

65 At around this time both of your daughters broke off contact with you and remained estranged from you for about five or so years. During that time your counsel suggested that you developed a significant substance abuse problem where you drank to excess and used cannabis, cocaine and methylamphetamine in ever increasing quantities.

---

<sup>4</sup> Dr Peter Zammit, *Medical report from M3 Health* (11 May 2023).

- 66 You reconciled with your daughters not long after the 53 day term of imprisonment imposed in 2015. Your daughter explained that you were then living at the former family home in Sydenham. She would visit you there reasonably frequently perhaps four or so times a week and she stated that she wasn't comfortable with what she saw happening at the house and in what she saw of you. She described you as looking horrible, skinny, gaunt and unkempt. She saw a lot of strange people coming and going some of whom may have been affected by drugs.
- 67 She concluded that you had a severe drug problem. She tried to talk to you about it and she sought the help of her siblings. In response it seems that you would isolate yourself, refuse to talk to your family and would lock yourself in your bedroom and refuse to come out. Your arrest came as a relief to your family.
- 68 After you had been in custody for some time, Ms Barbaro and other members of your family arranged for you to be admitted to the residential drug treatment facility in Kyneton known as Riverside Clinic. You were granted bail on 19 September 2018 and remained as an inpatient at that clinic until 2 November 2018. Because that facility was closing you were then admitted to a facility known as DayHab Addiction Treatment Centre in Glen Waverley. You remained as an inpatient there until 18 December 2018.
- 69 Materials tendered on the plea confirmed that you had undergone that treatment. A letter from Mr Neil Sanderson a clinical counsellor at DayHab notes a "remarkable change" in your attitude and outlook on life and that you were highly motivated to rehabilitate (Exhibit 4).<sup>5</sup>
- 70 Your family saw quite a dramatic improvement once you had completed that program. You had put on weight, you looked much more healthy and appeared in many ways to being back to your old self. Over the next couple of years your daughter was involved in taking you to Narcotics Anonymous meetings and also

---

<sup>5</sup> Mr Neil Sanderson, *Letter from DayHab Addiction Treatment Clinic* (4 December 2018).

seeing a psychologist. Generally you lived with either her or your older sister throughout most of that time.

71 In July 2020 your son, Pasquale, went into custody in relation to serious drug offending which was in part related to your offending. He was sentenced at first instance to 7 years 10 months' imprisonment with a non-parole period of 5 years.<sup>6</sup>

72 You were said to have felt responsible for your son's predicament and that this weighed heavily on you. Not long afterwards it seems that both of your daughters contracted different forms of cancer and you lost their effective support. You formed a relationship with a drug user and relapsed. It was in that context that you came to be arrested in Brisbane in April 2022.

73 Since being again remanded in custody your daughter has been speaking to you daily and sees you regularly. You now present in good health and she says motivated to start a different life with the support of your extended family.

74 Ms Barbaro's evidence was supported by the psychological material tendered on your behalf. Not long after your arrest you were assessed by Carla Ferrari, forensic psychologist. In a lengthy report of 12 May 2022 she explained that you suffer from symptoms consistent with a recurrent major depressive disorder, generalised anxiety disorder and post-traumatic stress disorder. Since you were last remanded in custody in April 2022 you have been receiving regular and ongoing treatment from a forensic psychologist, Laura Fleming who provided two reports of 26 August 2022 on 8 May 2023.

75 Ms Fleming confirms that you have and continue to be treated for the disorders diagnosed by Ms Ferrari. You have attended appointments with her via video fortnightly. It is evident that you have applied yourself to treatment particularly the cognitive behavioural therapy which Ms Fleming indicates has been an important part of the progress you have made. In addition to attending on Ms Fleming you

---

<sup>6</sup> *Barbaro v The Queen* [2021] VSCA 277. That sentence was the subject of a successful appeal and reduced to 5 years' imprisonment with a non-parole period of 2 years and 9 months.

have also undertaken regular counselling with Ms Karly Doyle, a mental health social worker and forensic alcohol and other drug specialist. Ms Doyle says that you have engaged "incredibly well" (Exhibit 14),<sup>7</sup> that you have expressed a commitment to treatment and that you continue to make personal gains.

76 She states:

"Mr Barbaro presents with multiple goals and protective factors. He has a large network of immediate and extended family members. He noted that his family had been extremely supportive and in particular, he is very close to his four children and eight grandchildren. Whilst discussing his priorities and thoughts about the future he reflected "I am changed. I want to live my life with my family. I want to show my family and the court that I am not that man from the past. I am ashamed and I am sorry. I am a different man".<sup>8</sup>

77 Whilst in custody you have been tested for drug use on a random basis. Four urine tests were tended on your plea all of which demonstrate that at the time of testing you had not been using any illegal drugs. You also completed a six-hour rehabilitative program, "Ice and Me". On the strength of all of that material I am satisfied that you have made significant genuine efforts to overcome your drug problem and that those efforts are ongoing.

78 Finally, I should also note that your former wife provided a supportive reference which states that you had been a good father to her children and that since your incarceration you have remained close to them and they remain devoted to you.

## **Submissions**

79 Dr Gumbelton acknowledged that the only appropriate sentence that could be imposed in these circumstances was one that involved imprisonment with a non-parole period. He submitted however there were a number of factors which operated to moderate the sentence that might otherwise be imposed. Not least

---

<sup>7</sup> Ms Karly Doyle, *Counselling Letter from Ms Karly Doyle (AOD Specialist)* (1 May 2023), 2.

<sup>8</sup> *Ibid.*

among those considerations was the need to carefully apply the principle of totality and in so doing ensure that a crushing sentence is not imposed.

80 It was submitted, for reasons which I will explain shortly, that the appropriate sentencing range for this offence was in the order of four to six years.

81 Some of the matters relied upon included:

- Your pleas of guilty which have saved three criminal trials and substantial court resources. Those pleas were all the more valuable given the need to manage the large number of cases delayed by the pandemic;
- The need to have regard to the sentences imposed on Mr Scardamaglia and Mr Muir. Although those accused played lesser roles and pleaded guilty to less serious offences they were nonetheless co-accused and the sentence imposed on you needed to be proportionate or relative to their sentences;
- Whilst the offences of April 2022 on Indictment N10818635 occurred whilst you were on bail, that was after a period of three and a half years or so on bail and was far less serious than the original offending;
- You are now 63 years of age and counsel emphasised that your criminal history really did not commence in earnest until you were 46 or so. Whilst you have very relevant prior convictions they have been driven by a substance abuse problem that you have made genuine attempts to address such that your prospects for rehabilitation, whilst guarded, are still promising;
- You are fortunate to enjoy an exceptional level of family support which enhance your prospects.

82 With respect to the offence of being a prohibited person in possession of a firearm counsel accepted that as a matter of principle a more severe sentence will be imposed where a prohibited person possesses a firearm whilst committing another criminal offence. However it was submitted that you should not be sentenced on

the basis that the firearm was related to your drug-trafficking. There was no forensic evidence linking you to the gun and there were five other people in the house at the time. It was submitted that the sentence imposed should be less severe than would be the case if the firearm was connected to the drug-trafficking.

83 Mr Hardjadibrata submitted that you trafficked in a commercial quantity of methylamphetamine over a period of eight and half months where the quantity trafficked was just below what would be defined as a large commercial quantity (1000 gm or 1 kg). The purity of the quantities trafficked was consistently high. The total price of the methylamphetamine sold to police covert operatives was \$78,900. Moreover, the police surveillance revealed an extensive ongoing trafficking business of which you were the principal. It followed that your moral culpability in respect of that offending was very high.

84 During part of the period in which you trafficked methylamphetamine you were subject to the Community Correction Order which had been extended in September 2017. You also fall to be sentenced as a serious drug offender because you were sentenced to a term of imprisonment, namely cultivating cannabis in a commercial quantity in December 2006. In consequence, protection of the community must be the principal purpose in imposing your sentence, and the presumption of concurrency is displaced.

85 In relation to the firearm it was submitted that it was an inherently dangerous weapon which was capable of discharge, had been discharged, had been modified such that the barrel and butt had been sawn off and was located in a case with eight cartridges suitable for firing by that shotgun. Reliance was placed on *Acciarto v The Queen*<sup>9</sup> to submit possession of the weapon in the course of committing other criminal activity, but without the actual or threatened use of a weapon, falls at the higher end of seriousness for this offence.

---

<sup>9</sup> [2019] VSCA 264.

86 It was submitted additionally that you have relevant prior convictions in that you were sentenced to three months imprisonment, as part of a sentence for a number of matters, for being a non-prohibited person in possession of a Category E handgun without a licence in February 2007. Further, in September 2015 you were dealt with, among other offences, for being a non-prohibited person in possession of an unregistered Category A long arm firearm and placed on a combined Community Correction Order.

87 The total effective sentence to be imposed for those matters and the offences committed whilst on bail must inevitably comprise a head sentence with a non-parole period.

### **Consideration**

88 The considerations which determine the seriousness of commercial drug trafficking include the quantity trafficked, the offender's role, the duration of the trafficking and the motivation for the offender's involvement.<sup>10</sup> Additional considerations include the overall scale of the enterprise, the quality or purity of the drugs involved and the extent, if any, to which "operational violence" was employed.

89 Applying that criteria your offending represents a serious example of this offence. You trafficked at a wholesale level in a quantity which was at the upper end of the range for commercial trafficking, the drugs involved were of a high purity, you were undoubtedly the principal of the enterprise and you carried on this business over a period of more than eight months. Moreover, you have prior convictions for trafficking simpliciter and commercial quantity cultivation.

90 In *Gregory* it was said that there needed to be an uplift in current sentencing practices for trafficking in commercial quantities. Whilst that uplift cannot "control" the sentence to be imposed, it cannot be ignored. That said, I note that the

---

<sup>10</sup> *Gregory v The Queen* [2017] VSCA 151; (2017) 268 A Crim R 1, [24].

statutory thresholds which define commercial trafficking have changed since you committed this offence. Accordingly, case comparison post-*Gregory* requires care.

91 For example, the prosecutor initially submitted the case of *DPP v Condo*<sup>11</sup> was relevantly comparable where, on a Director's appeal, a sentence of nine years and nine months was imposed for the offence of trafficking in a commercial quantity involving 846 gm of methylamphetamine. It did seem however that *Condo* involved a more extensive enterprise and in discussion on the plea, Mr Hardjadibrata accepted that it was more useful to have regard to a range of sentences decided after *Gregory*, of which *Condo* represents but one example.

92 In that vein, I was referred to the following Court of Appeal decisions:

*DPP v Bowen*<sup>12</sup> was a most unusual case which lacked the sort of features ordinarily present in commercial drug trafficking including the fact that of the 3,419 gm of methylamphetamine which was 3.82 times the commercial quantity it contained only 192.1 gm of pure drug none of which was usable. The sentence imposed was 3 years with a non-parole period of 18 months.

*Arici v The Queen*<sup>13</sup> concerned a question of parity that attached to a sentence imposed for trafficking in a commercial quantity of 1,4 Butanediol. He had been sentenced on the basis that he was a "sitter". The sentence at first instance for trafficking in a commercial quantity of methylamphetamine remained unchanged and involved 442.7 gm of methylamphetamine (352 gm pure). He was sentenced on that charge to 4 years' imprisonment.

In *Polos v The King*<sup>14</sup> the offender pleaded guilty to, among other charges, commercial trafficking in methylamphetamine involving 401.4 gm of a purity of approximately 85%. The quantity was 1.6 times the mixed quantity threshold. Although a sentence of 3 years and 3 months was imposed for that offence, as

---

<sup>11</sup> [2019] VSCA 181 ('*Condo*').

<sup>12</sup> [2021] VSCA 355.

<sup>13</sup> [2019] VSCA 228.

<sup>14</sup> [2022] VSCA 258.



was the case in *Bowen*, the sentence imposed was distorted to accommodate totality arising from a breach of parole.

*DPP v Moustafa*<sup>15</sup> involved a Director's appeal which involved very serious drug offending including commercial trafficking in 640 gm of mixed methylamphetamine. At first instance a sentence of 2 years was imposed. That sentence was distorted by the need to take into account "dead time", cooperation with the authorities and totality. For that offence a sentence of 4 years imprisonment was substituted.

*Barbaro v The Queen*<sup>16</sup> is the case which dealt with your son to which I have earlier referred. He was sentenced to 4 years and 6 months for trafficking in a commercial quantity of MDMA involving 926 gm which constituted 1.85 times the applicable threshold. His subjective circumstances were particularly strong.

In *Mourkakos v The Queen*<sup>17</sup> the offender pleaded not guilty and was ultimately sentenced in respect of the offence of trafficking in a commercial quantity of methylamphetamine to 4 years and 7 months, where the trafficking involved 577 gm of methylamphetamine, being 1.2 times the then applicable statutory threshold.

In *Singh v The Queen*<sup>18</sup> the offender pleaded guilty to one charge of trafficking in methylamphetamine simpliciter where on eight separate occasions he sold a total of 311.6 gm of mixed methylamphetamine to a covert operative. A sentence of 3 years and 6 months was imposed for that offence. He further pleaded guilty to a charge of trafficking in a commercial quantity of methylamphetamine where he sold 277.3 gm mixed to a police covert operative. A 5 year term of imprisonment was imposed in respect of that offence he also pleaded guilty to a further charge of trafficking in a commercial quantity of methylamphetamine comprising an offer to sell 500 gm of methylamphetamine. The sentence in respect of that charge was also 5 years. With cumulation the total effective sentence for those three offences

---

<sup>15</sup> [2018] VSCA 331.

<sup>16</sup> [2021] VSCA 277.

<sup>17</sup> [2018] VSCA 26.

<sup>18</sup> [2022] VSCA 93.

would have been 7 years and 3 months. The offender had relevant prior convictions. When cumulated with other offending relating to the sale of firearms the total effective sentence imposed was 9 years and 9 months.

In *Parks v The Queen*<sup>19</sup> the offender pleaded not guilty to trafficking a commercial quantity of methylamphetamine involving 195 gm pure of methylamphetamine (being 1.95 times the applicable threshold) comprising 218.6 gm mixed in 13 separate packages. He was sentenced to 6 years' imprisonment at first instance and that sentence was upheld on appeal.

In *Vincent v The Queen*<sup>20</sup> the offender was found in possession of 15 bags which contained a total of 418 gm mixed of methylamphetamine which amounted to 1.67 times the applicable threshold. He was sentenced to 6 years and 6 months' imprisonment in respect of that offence. The offending was described as "mid-range". The court emphasised that whilst the weight of drugs is very significant it is nevertheless only one of many factors that must be synthesised for the purpose of arriving an appropriate sentence in an individual case.<sup>21</sup>

In *Lytras v The Queen*<sup>22</sup> the offender sold drugs which included 224.1 gm of methylamphetamine to a covert police operative on eight occasions. A further 515 gm was located in the possession of a co-accused. He pleaded guilty to a charge of trafficking in commercial quantity of methylamphetamine which comprised 738.3 gm (being 1.48 times the applicable threshold) which he either sold or possessed. The scale of trafficking engaged in in this instance was said to be significantly less than was the case in either *Gregory* or *Condo*. A sentence of 10 years at first instance was substituted for a sentence of 8 years' imprisonment. The offender had a relevant prior conviction.

---

<sup>19</sup> [2017] VSCA 232.

<sup>20</sup> [2021] VSCA 99.

<sup>21</sup> Ibid [45].

<sup>22</sup> [2020] VSCA 150.

- 93 It was contended that review of comparable cases reveals a sentencing range of between 3 and 8 years. Your counsel also emphasised that these comparative decisions are all from the Court of Appeal. Sentences imposed for this offence in the County Court it was submitted tend to be lower in that they are not sought to be appealed. For these reasons it was submitted that the appropriate sentencing range for this offence was 4 to 6 years.
- 94 I do not agree that current sentencing practice for offending at the level you engaged in is as low as your counsel submitted. Nor do I accept the submission that the appropriate sentencing range for your offending is 4 to 6 years. Properly analysed it is clear that the sentences at the lower end arise in quite special or unusual circumstances that have no application to your situation. Bearing in mind that all of the cases referred to were decided at appellate level, in my view decisions such as *Condo*, *Singh*, *Parks*, *Vincent* and *Lytras* are relevantly comparable and they reveal a higher sentencing range.
- 95 I have made the point that this is a serious example of this offence. I accept however that your involvement in this offending and your previous convictions have their genesis in your own substance abuse problems. Your addiction is perhaps one feature of your personal circumstances that distinguishes you from the generally more serious category of offender, namely the entrepreneurial drug trafficker who is not so afflicted. That said, I must emphasise that your addiction in no way mitigates your trafficking, rather it helps to explain how you became involved and have continued to be involved in offending of this type.
- 96 As a young man you led a productive life raising a large family. You did not commence offending until you were well into your thirties when you began abusing drugs. It seems reasonable to suppose that if you were to overcome your drug problem you would be much less likely to reoffend.
- 97 Although you relapsed back into drug use in late 2021 into early 2022, until that time I accept that you had made genuine and substantial efforts to address your

addiction over a period of more than three years after you were released on bail in September 2018. Experience suggests that relapses frequently occur before rehabilitation is ultimately achieved and I note that you are now 63 years of age.

98 You have continued to make progress in custody. I was impressed with the evidence of your daughter. I was all the more impressed by the level of family support that you enjoy. Given your history, any assessment of your prospects needs to be cautious, even so I have formed the view that your prospects for rehabilitation seem reasonable enough. Nevertheless, it should be understood that those personal considerations tend to attract less weight where the offending is as serious as is the case here.

99 I also accept that the sentence to be imposed on you must take account of the sentences imposed on your co-accused and that there must be some relativity/proportionality between those sentences. That consideration has, to some small extent, a limiting effect on the sentence imposed on you.

100 As the prosecution acknowledged you pleaded guilty once the more serious charge was withdrawn and that plea has saved three trials and the considerable resources that would have been required. Moreover, the utilitarian value of the plea made as it has been in the context of this court having to manage a large number of cases delayed by the pandemic is significant. No doubt also the delay in having these matters finally resolved has been punitive. Those considerations mean that the sentence to be imposed will be substantially reduced than would otherwise be the case.

101 As to the sentence to be imposed for the offence of being a prohibited person in possession of a firearm the principles about which I must be mindful were helpfully stated by Redlich JA in *Berichon*:

The conduct of a prohibited person in possession of an unregistered firearm may be placed in one of two broad categories of seriousness. ...The first category of cases are those where the conclusion is not open that the possession of the firearm is associated with some ongoing criminal activity. Sentences of a low order of imprisonment are usually

appropriate unless the previous criminal history of the offender warrants a more substantial sentence, proportionate to the gravity of the offence. The second category of cases are those where the evidence enables the conclusion that the possession is for the purpose of criminal activity or a specific criminal purpose, more severe sentences are then usually in order. Such sentences will be appropriate where the firearm is for example possessed in the context of a criminal activity to provide security or as a means of enforcement. The prior convictions of the offender in conjunction with circumstantial evidence may also enable the conclusion to be drawn that the possession is for some unlawful activity.

Where an offender faces two charges, the first being for a criminal offence committed in circumstances where in aggravation of that offence the offender uses or possesses a firearm and the second being a charge for possession of that unregistered firearm as a prohibited person, to avoid double punishment the criminal conduct the subject of the first charge cannot be relied upon in relation to the second charge of possession to elevate that possession into the more serious category discussed above. For the second charge of possession to be placed in the more serious category, the state of the evidence must permit the conclusion that the possession was for some criminal purpose distinct from the unlawful activity the subject of the first charge.<sup>23</sup>

102 It seems to me two simple principles can be discerned from His Honour's comments. First, the extent to which the possession of a firearm will be aggravated will depend very much on the context in which it is possessed. Second, it is important to avoid doubly punishing an offender where the possession of the firearm is associated with other criminal activity.

103 As I indicated in discussion on the plea I do not accept the defence contention that the possession of the firearm is not related to your drug-trafficking. It is clear from the listening device product that you regularly spoke about firearms and ammunition in the context of more general discussions about drug quality, drug pricing and drug use and methods of concealing drugs, an example of which was a conversation with your son relating to Glock pistols and bullets in a bag, that occurred in the garage on 5 June 2018 at 5.22pm - 5:30pm.<sup>24</sup>

104 Firearms are a notorious accoutrement of the drug trafficking business. In my view, it would be artificial in the extreme to sentence you on the basis that the

---

<sup>23</sup> *Berichon v The Queen; Houssein v The Queen* [2013] VSCA 319, [26]-[27]. See also *Acciarito v The Queen* [2019] VSCA 264, [52]-[54].

<sup>24</sup> Other examples include 21 April 2018 1.35pm - 1.42pm; 1 May 2018 9.08pm - 9.14pm; 12 May 2018, 2.57am - 3.05am;

presence of this firearm was completely distinct from the conduct of your business in trafficking drugs. This gun was found in your house in the place where you conducted that business. In my view it matters not that others were in the house at the time. The reality was that firearms figured reasonably prominently in your drug business discussions and that it was therefore no coincidence that there was a sawn-off shotgun on the kitchen bench with ammunition, when the police executed the search warrant on 13 June 2018.

105 To avoid double punishment I will treat the trafficking in a commercial quantity of methylamphetamine as somewhat more serious by reason of the circumstances involving the recorded discussions about firearms and the presence of the gun on 13 June 2018. That context, however, will not attract a heavier sentence on the firearm charge and the degree of cumulation will be moderated.

106 I note that you had spent 90 days in residential rehabilitation and I have taken that “quasi-custody” into account in formulating sentence.

107 Before moving to sentence I should say something about why this offending is so serious. Suffice I think to extract what the sentencing judge in *Condo* said about the drug in which you trafficked in a commercial quantity:

Ice is a scourge throughout Victoria. Ice contributes to crime and not just crimes of dishonesty as users seek money to purchase this drug, but also to violent crime, that is violent drug fuelled crimes in homes, the streets and on the roads. The courts regularly confront crimes committed by offenders where the explanation put forward is that the offender is addicted to ice. This drug is a corrosive force in our community.<sup>25</sup>

108 The fact is you were responsible for the extensive distribution of that drug and that is why the sentence to be imposed now must seek to deter you, it is why it must seek to deter others, it is why it must seek to denounce what you did and it is why the principal purpose for which this sentence is to be imposed, will be to protect the community.

---

<sup>25</sup> *Condo*, [15].

## Sentence

- 109 Taking all relevant matters into account you will be sentenced as follows:
- 110 First, I must, pursuant to s 6F(1) of the *Sentencing Act 1991* declare that by reason of your previous conviction and imprisonment for a drug offence<sup>26</sup> you will be sentenced as a Serious Drug Offender and I will cause that declaration to be noted in the records of the Court.
- 111 On Indictment J11562158B Charge 1 trafficking in a commercial quantity of methylamphetamine you will be convicted and sentenced to a term imprisonment of 7 years and 6 months.
- 112 On the related Summary Offence Charge 4 of storing ammunition in an unsecured manner you will be convicted and sentenced to a term of imprisonment of 1 month.
- 113 On the related Summary Offence Charge 8 of possession of a prohibited weapon you will be convicted and sentenced to a term imprisonment of 1 month.
- 114 On Indictment J11562158.1 Charge 1 prohibited person possess firearm you will be convicted and sentenced to term of imprisonment of 2 years.
- 115 On Indictment N10818635 Charge 1 possess methylamphetamine you will be convicted and sentenced to term imprisonment of 1 month.
- 116 Charge 2 possess cannabis you will be convicted and sentenced to pay a fine of \$500.
- 117 On the related Summary Offence Charge 5 of commit indictable offences whilst on bail you will be convicted and discharged.
- 118 On the related Summary Offence Charge 6 of contravening conditions of bail you will be convicted and sentenced to a term of imprisonment of 1 month.

---

<sup>26</sup> Cultivation Commercial Quantity Cannabis; Schedule 1, Clause 4(a)(iv); *Sentencing Act 1991*

- 119 I will order that 1 month of the sentence imposed on Charge 6 be served cumulatively upon the sentence imposed on Charge 1 rendering a total effective sentence on Indictment N10818635 of 2 months imprisonment.
- 120 I will further order that 6 months of the sentence imposed on indictment J11562158.1 and 1 month of the sentence imposed on indictment N10818635 be served cumulatively upon the sentence imposed on indictment J11562158B, rendering a total effective sentence on all indictments of 8 years and 1 month. I will fix a minimum non-parole period of 5 years.
- 121 I will declare pursuant to s 18 of the *Sentencing Act 1991* that you have served 595 days by way of presentence detention and I will cause that declaration to be noted in the records of the court.
- 122 I will further declare pursuant to s 6AAA the *Sentencing Act 1991* that but for your plea of guilty you would have been sentenced to a total effective sentence of 11 years and six months with non-parole period of 8 years.