

Mr Wagner has pleaded guilty to one count of trafficking in methyldamphetamine.

The prosecution case is that between 5 July 2021 and 4 October 2021, Mr Wagner, jointly with his then partner Sonya Hopkinson, conducted a business trafficking in methyldamphetamine. The business was operated from Mr Wagner's home at Dromedary, where he lived with Ms Hopkinson during the relevant period. The prosecution asserts that the trafficking included selling significant quantities to another trafficker, who has subsequently been convicted of conducting a substantial trafficking business during a period which included that relevant to the case against Mr Wagner. That person is Kelly Rhodes. Ms Rhodes was sentenced by Justice Estcourt on 16 August 2023 for two counts of trafficking, to imprisonment for 10 years. In respect of Mr Wagner, the prosecution asserts that in addition to selling to Ms Rhodes and her associates on a wholesale basis, he and his partner were also making regular retail sales to a number of other persons. The prosecution alleges that this was a substantial business and that numerous transactions occurred regularly during the relevant period. The allegation is that Mr Wagner and Ms Hopkinson carried on the business jointly and each was a full participant in it. Further, it is alleged that each benefitted from the proceeds it generated. It is alleged that payment for the methyl amphetamine was received both in cash and by way of electronic transfer into Mr Wagner's bank account. The prosecution cannot, of course, identify all of the individual transactions, but the nature and extent of the business can be inferred from some transactions of which there is evidence. There are telephone intercepts of conversations between Ms Rhodes and her associate, Mr Barda, and Mr Wagner and Ms Hopkinson which relate to seven separate sales between July and September 2021. At least four of these transactions were, according to the intercepted conversations, for a quantity known as a "ball" which is commonly known to be 3.5 grams of methyldamphetamine. At that time, according to expert evidence provided by a detective, the price for that quantity of methamphetamine was \$3,500-\$4,000. It is alleged that the total value of these seven sales was not less than \$18,800. Further, during a search of Mr Wagner's house on 4 October 2021, police located \$35,200 in cash contained in a plastic container which had been concealed behind a wall in the bathroom. The prosecution alleges that all of this money represented the proceeds of drug sales. In addition, the prosecution has identified a number of deposits into Mr Wagner's bank account in various sums during the relevant period, which it claims were, although in some cases labelled as payment for innocent commodities such as firewood and flowers, in fact payments for the retail sale of drugs. In total, the prosecution alleges that Mr Wagner and Ms Hopkinson received in excess of \$60,000 during the alleged period of the trafficking.

In addition to sentence, the prosecution seek orders relating to the proceeds of the trafficking pursuant to the *Crime (Confiscation of Profits) Act 1993*. In particular, it seeks a forfeiture order pursuant to s 16 of the said Act with respect to the money found hidden in Mr Wagner's house and a pecuniary penalty order pursuant to s 21 of the Act in relation to the aggregate value of the benefits derived from the trafficking business.

Mr Wagner disputes the allegations concerning the extent of his involvement in the trafficking business, as well as both the forfeiture and pecuniary penalty orders. In general terms, Mr Wagner claims that it was Ms Hopkinson who conducted and solely benefitted from the drug trafficking business. His only involvement was to drive her to make transactions, and occasionally he would take a phone call for her and pass on information received during the call.

He claims that during any such call, she was always with him and told him what to say. He also permitted her to utilise his bank account, including for the purpose of receiving payment for drug transactions, as well as for legitimate purposes, because she did not have a separate account. He would withdraw money from the bank account on her behalf as directed by her. He claims that he did not personally receive any financial benefit from the enterprise. He contends that most of the deposits into the bank account were legitimate payments for the purpose shown in the notation in the account, for example for firewood, the sale of other items such as cars, farm equipment, dogs bred by him, and for flowers sold by Ms Hopkinson as part of a legitimate business operated by her. Mr Wagner disputes that any of the cash found by police in the bathroom hiding place came from drug trafficking. His evidence is that his mother left him a substantial inheritance some years before and that the money was comprised of the balance of this inheritance plus other money paid to him for legitimate cash transactions. He says that he had a lifelong distrust of banks and preferred to keep his money in cash and hidden, rather than in the bank. As he acquired money in his bank account, he would withdraw it and add it to the cash hidden in the bathroom. Mr Wagner claims further that he only cooperated with and assisted his partner in drug trafficking because of threats and actual physical violence perpetrated against him by her three adult sons. He denies handling or having anything else to do with the methylamphetamine.

Clearly, there is a very significant difference between the factual basis of sentence alleged by the prosecution and that conceded by Mr Wagner. Both factual scenarios are consistent with his plea of guilty to the crime of trafficking, but the difference is significant in terms of his moral culpability and, of course, the forfeiture and pecuniary penalty orders. Because of the need to resolve the matters in dispute, I heard evidence presented by both parties. This included the oral testimony of Mr Wagner. In determining the factual basis of sentence, I can only find facts adverse to the defendant if satisfied of those facts beyond reasonable doubt. Accordingly, to find wholly or partly in favour of the factual basis asserted by the prosecution, I would need to be satisfied of it to that standard. However, in respect of the disputed forfeiture and pecuniary penalty orders, in accordance with s 71 of the Act, I need only be satisfied of facts necessary to support those orders on the balance of probabilities.

Having considered all of the evidence, while I accept that Mr Wagner conducted the trafficking enterprise jointly with Ms Hopkinson, I am satisfied beyond reasonable doubt that he was a full, active and willing participant in it. In arriving at this conclusion, I have regard to various aspects of the evidence presented to me. The first of these is the content of the telephone intercepts played to me. These record various conversations conducted during the relevant period between Mr Wagner and others, which the prosecution asserts relate to the sale of drugs. I also have regard to other circumstantial evidence including the transactions in Mr Wagner's bank account, the money hidden in the bathroom wall and other aspects of the evidence such as the obvious use of his vehicle and telephone to conduct the business.

In relation to the intercepted telephone calls, which were played during Mr Wagner's cross-examination, it is abundantly clear from their content, as well as Mr Wagner's tone and demeanour during them, that he is discussing the sale of drugs and doing so in a way which can only be consistent with his full participation in the business. For example, he discusses stock levels, negotiates prices and makes arrangements for the delivery of merchandise. Although the subject of the transaction is not expressly identified during the conversation as methylamphetamine, that is the only conclusion which is reasonably open. In most of the conversations, the quantity of the merchandise which is the subject of the sale is described by

use of terms which, according to the evidence of a police officer experienced in drug investigations, are those commonly used by drug traffickers to describe quantities of methylamphetamine. For example, in a number of the conversations, the purchaser, either Ms Rhodes or Mr Barda, and Mr Wagner discuss the supply and price of a "ball", which, as I have already noted, is the term used to describe 3.5 grams or an eighth of an ounce of methylamphetamine. In one conversation, Ms Rhodes sends a text message to Mr Wagner's phone enquiring as to the availability and price of "wood". A subsequent conversation with Mr Wagner makes it very clear that the enquiry related to the purchase of drugs from him. Police surveillance depicted Mr Wagner and Ms Hopkinson arriving at and entering Ms Rhodes' house shortly after this conversation, apparently to deliver the requested merchandise. There is no suggestion that police saw the delivery of a load of wood. Clearly, the word "wood" was being used as a convenient codeword in an attempt to hide the fact that what was actually being sold and delivered was methylamphetamine.

Further, I reject Mr Wagner's evidence that he was not discussing methylamphetamine during these calls or, if he was, it was at the direction of Ms Hopkinson. I found his evidence to be completely devoid of credit. In fact, I am satisfied that he was deliberately misconstruing and lying about the meaning of the conversations and his involvement in them and the trafficking activity relevant to them. His explanations and denials were far-fetched and fanciful, and he was evasive and defensive when he was confronted with the calls. I gained the clear impression that he was well aware that the intercepted telephone calls implicated him in the conduct of this drug trafficking enterprise and he was falsely attempting to deflect blame from himself onto his former partner. Further, insofar as he attempted to portray himself as simply passing on information provided to him by Ms Hopkinson, the telephone calls do not support that assertion. On each occasion, he was clearly negotiating and making arrangements as a primary participant in the trafficking operation. During at least one conversation, it is apparent that Ms Hopkinson was not present. In any event, the fact that she may also have been involved in the business is beside the point. The evidence supports a finding that he was a full participant in the conduct of this trafficking business and carried it on jointly with her. It is the extent of his participation in the business which is relevant to my assessment of his moral culpability.

Further, an analysis of the bank account records supports the conclusion that Mr Wagner was fully involved in the conduct of this business, and that he undertook significant trafficking during the relevant period. The overwhelming majority of deposits into the bank account are labelled as related to wood, flowers or similar innocent descriptions of merchandise. However, the frequency and amount of the deposits is inconsistent with the pattern of sales of that type of material described by Mr Wagner during his police interview or in evidence. For example, he told police that he did not sell wood regularly, and did not suggest otherwise during his evidence. However, there are examples of regular deposits within a few days of each other for significant sums, which are attributed to wood. These sometimes are shown as coming from the same person. I refer for example to payments made by a person named Rebecca Smith. Between 21 August and 17 September, there are 24 deposits from this name for an aggregate sum of \$17,650. Twenty-three of these are simply labelled as 'wood'. It is simply not credible that this person would have purchased that much wood so often during this period. I have already noted the use of the term "wood" as a coded means of referring to methylamphetamine. Mr Wagner denied this reference in his evidence, but I simply do not believe him about this. Further, the use of wood selling as subterfuge to conceal the sale of methylamphetamine implicates Mr Wagner in the trafficking. Similarly, Mr Wagner's description of Ms Hopkinson's flower selling business

suggested a small-scale, poorly paid pursuit conducted in the rear bedroom of the house. In the bank records, between 5 July and 16 September, there are 34 payments shown from a person named Danielle Gearman for an aggregate sum of \$13,955. All of the deposits are labelled as "flowers". Once again, this pattern of payment is not consistent with the innocent explanation and entirely consistent with ongoing sales of methylamphetamine. There are a number of other similar examples in the records. Taking all of the evidence into account, I am satisfied that most if not all of the bank deposits were payments made for the sale of methylamphetamine. I will return to the precise quantification when considering the proceeds of crime orders.

I find, accordingly, that Mr Wagner was a full and active participant in the trafficking operation during the period alleged in the indictment. Of course, he must only be sentenced for trafficking during that time but the extent of the trafficking activity is informed by my inference that the business during that time was an ongoing part of a well-established trafficking enterprise. The evidence does not permit a finding as to when, by whom or how the business was started, but Mr Wagner's culpability for trafficking during the indictment period takes into account the established nature of the business. This also informs its extent which, in my view, is consistent with an established business.

Mr Wagner is 67 years of age. He has spent time in prison for offences of dishonesty, and has some minor drug convictions on his criminal record. These seem to relate to his own use of cannabis. However, in 2012, he pleaded guilty in the Supreme Court to drug charges which included one count of cultivating cannabis for sale. Mr Wagner had, at that time, been growing a significant number of cannabis plants on his property at Dromedary. Mr Wagner claimed that all of the cannabis was for his own use, but the court proceeded to sentence on the basis that it was his intention to sell at least some of it. His cultivation had produced a quantity of the drug which was beyond anything that could have been used by him personally. The judge on that occasion imposed a suspended sentence of imprisonment. Three years later, he was again convicted of cultivating cannabis. This time, it was a minor offence which did not include the element of sale. Apart from some speeding offences, there is no record of any subsequent convictions prior to his commission of the crime with which I am dealing.

In terms of his current personal circumstances, he is single and has three adult children. He lives what his counsel described as an "off the grid" lifestyle in the house at Dromedary, which he owns outright. His principal legitimate income is a pension. He has some health issues. He suffered an aneurysm and a stroke last year and requires further surgery. He continues to experience symptoms, including low-energy and reduced activity. He left the workforce many years ago after suffering a significant injury in an accident. He has also been the victim of a serious physical assault perpetrated on him about 20 years ago.

Before dealing with the question of sentence, it is appropriate to resolve the applications made by the prosecution for the orders under the *Crime (Confiscation of Profits) Act*. I will deal firstly with the application for a forfeiture order in respect of the cash found concealed in the bathroom. By virtue of s 16(1), I can only make this order if satisfied on the balance of probabilities that the money is tainted property, that is, that it is proceeds from the trafficking. Under s 4, proceeds, in relation to an offence, means property that is derived or realised, directly or indirectly, by any person from the commission of the offence. By virtue of s 3 of the *Misuse of Drugs Act 2001*, Mr Wagner is taken to have engaged in the trafficking activity if he participated in it. In view of my findings that he was a full and active participant in the trafficking, any money derived or realised directly or indirectly from this business is properly classed as the proceeds of that crime,

and amenable to a forfeiture order, irrespective of whether it was Mr Wagner or Ms Hopkinson who brought the money into their possession.

Having regard to the evidence already discussed, I am satisfied that the entirety of the money found hidden in the bathroom wall is proceeds from the trafficking business and hence liable to be forfeited under the said provisions. I reject the innocent explanations provided by Mr Wagner for the derivation of this money. His evidence is lacking credit and the explanations are improbable. The fact that the money was found by police during a search conducted without notice during what was clearly a period of active trafficking, supports the probability that the money was derived from the trafficking activity. The amount is consistent with the cash flow likely to have arisen from the transactions demonstrated by the intercepted telephone calls and the bank account records. The suggestion that the money came from the sale of firewood, the occasional sale of secondhand pieces of machinery, dogs bred by Mr Wagner or the sale of flowers is in my view, highly improbable. Further, his mother's inheritance which he claimed was in the sum of \$155,000 was received by him 12 years before. Again, it is improbable that this constituted the money found during the search. Accordingly, I am satisfied that the entire sum of \$35,200 in cash seized by police during the search on 4 October 2021 is tainted property. I intend to make the forfeiture order in that sum.

In respect of the pecuniary penalty order, the starting point is to determine whether I should make an assessment of the value of benefits derived by Mr Wagner from the commission of the offence. If so, I must then decide whether I should make a pecuniary penalty order. If I decide to do both, then the legislation leaves me with no discretion in respect of the quantum of the order, it must be in the amount assessed. These questions must be answered before imposing sentence because such an order, if made, may be taken into account in the exercise of the sentencing discretion.

In this case, I am satisfied that I should make an assessment of the value of the benefits derived by Mr Wagner from the commission of the crime. This was a profitable business, in which large amounts of methylamphetamine were being sold on both a wholesale and retail basis for significant sums. Mr Wagner and his partner were deriving considerable profits from the sale of a substance which is not only illegal but highly addictive and destructive. Methylamphetamine causes untold misery and health impacts to those who use it and has a significant impact on the welfare of the community generally. One aspect of this is the common practice of drug users to turn to crime to fund the purchase of this drug. It is bad enough to be selling the drug to users on a retail basis but the harmful impact is increased by providing methylamphetamine on a wholesale basis to those who then on sell to others. In my view, it is appropriate to make an assessment of the benefits derived by Mr Wagner from the operation of this enterprise.

The telephone intercept evidence establishes seven sales to either Ms Rhodes or her associate Mr Barda. A calculation based on the prices actually discussed, which are consistent with expert evidence as to the street value of those amounts at that time, establishes that the money derived from those transactions was in the aggregate of \$18,800. The prosecution also asserts that the majority if not all of the money paid into Mr Wagner's bank account during the relevant period was from the sale of drugs to retail customers. As I have already discussed, having regard to my analysis of the bank records, I accept this allegation. In total, there are 123 transactions with monetary value of \$51,156. I am satisfied on the balance of probabilities that the majority of these were payments made for drugs supplied by Mr Wagner and Ms Hopkinson. The prosecution has asserted that 97 of these transactions with a total of \$42,230 satisfy this

description. Taking a conservative approach, I will proceed on the basis of the prosecution assertion. I consider this to be the minimum number of transactions which reflect the proceeds of the drug trafficking operation.

The final question is whether the cash found hidden by police in the bathroom is completely reflected in these payments or represents payment made for other drug transactions. It is highly probable that there would have been other payments made but there is no reliable evidence that would permit quantification of them. In the circumstances, I will proceed upon the basis of the prosecution position that all of this cash should be regarded as already reflected in the monies received from the transactions with Ms Rhodes and from retail customers into the bank account. It follows that as I intend to make a forfeiture order in respect of the cash found in the bathroom, that sum must be deducted from the total of the benefits assessed from the cash transactions and those in the bank account.

Accordingly, I assess the value of the benefits derived by Mr Wagner from the commission of the crime to which he has pleaded guilty as follows:

Cash payments from transactions with Ms Rhodes and Mr Barda	\$18,800
Payments made into bank account	<u>\$42,230</u>
	\$61,030
Less forfeiture order	\$35,200
Total pecuniary penalty order	<u>\$25,830</u>

In relation to the question of sentence, as I have already indicated, I regard both the trafficking enterprise and Mr Wagner's participation in it as significant. The primary sentencing consideration is general deterrence. Having regard to his prior convictions, I think also that there is a need for a sentence which takes into account specific deterrence. Having heard his evidence, I do not accept that Mr Wagner has any genuine remorse for the crime. Further, while his plea of guilty has some limited utilitarian value in that it has avoided a full trial, the need to conduct a disputed facts hearing has significantly eroded any benefit he might otherwise have received from his plea of guilty. However, in assessing sentence, I have regard to the punitive impact of the pecuniary penalty order. I do not expect that he will have the cash to meet that order for some time but he does own his property outright and, accordingly, he ultimately has the means to satisfy the order. The loss of his property, if that were to occur, would have a significant punitive impact on him and I will take that into account. Finally, I take into account that his poor health and advanced age will make his time in prison more difficult than it would be for others.

Please stand. The orders I make are as follows:

- 1 You are convicted of the crime to which you have pleaded guilty;
- 2 I make the following orders pursuant to the *Crime (Confiscation of Profits) Act 1993*:
 - a that the sum of \$35,200 seized by police on 4 October 2021 be forfeited to the State of Tasmania.

- b that Mr Wagner pay to the State of Tasmania a pecuniary penalty in the sum of \$25,830.
- 3 You are sentenced to imprisonment for a term of four years, which will be backdated to 29 of January 2026. You are not eligible for parole until you have served one half of that sentence.