IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S 146 of 2011

BETWEEN:

BRETT ANDREW GREEN
Appellant
AND
THE QUEEN
Respondent
No S 143 of 2011
SHANE DARRIN QUINN
Appellant
AND
THE QUEEN
Respondent

ANNOTATED

RESPONDENT'S SUBMISSIONS

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. 1 Where a sentence has been found to be manifestly inadequate on a Crown appeal is a Court of Criminal Appeal required to refuse to increase the sentence where to do so would create disparity with a co-offender's sentence.

Part III: Section 78B of the Judiciary Act

The applicant has filed notices under s78B of the *Judiciary Act 1903* (Cth).

Date of document: 17 May 2011
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Part IV: Statement of contested material facts

4.1 There was an agreed statement of facts (AB 98).

4.2 The respondent agrees with the appellants' outline that the cultivation was a large scale and sophisticated operation involving considerable planning and organisation. Separate crop sites were established and a large range of equipment and supplies were marshalled to generate power, provide irrigation, fuel and food, and to harvest and dry the cannabis. The vehicles used in the operation were registered in false names. The 20 or so mobile phones used had false subscriber details. Remote surveillance cameras were set up to monitor movement near the sites. Telephone conversations were conducted in code.

4.3 The workers were given instructions by phone and were restricted from contacting their families while on the crop sites. In some cases they were required to wear hoods and blindfolds so that they would not know the location of the sites or drying sheds. There were up to a dozen people employed in the harvesting phase in April 2008.

4.4 The appellant Quinn began developing the plants in 2007. By November 2007 they were transported to the crop sites. By April 2008 they were ready for harvesting. The appellants were arrested on 30 April 2008.

4.5 At that stage police found a total of 1,354 plants. They had already been trimmed and had yielded over 145 kg of cannabis leaf. The plants were valued at about $2.7 million and the leaf already harvested at about $1.33 - $1.47 million.

4.6 The appellants were arrested together. In their car police found 6 mobile phones all with false subscriber details and about $3087 in cash. At the home Quinn shared with his wife and 4 children police found further pre-paid mobile telephone packs and about $9365 in cash (not including the $360 found in his wife's wallet). At his grandmother's house, which he specified was his residential address, police found $20,800 in cash and 1.38 kg of cannabis leaf.

4.7 The appellant Quinn was the principal of the operation. His brother Shannon was also at the most senior level. Below that level were 3 offenders considered at partner level, Brett Green, Garry Mason, and Kodie Taylor. Green was somewhat more senior than Kodie Taylor and Garry Mason. This was conceded by the Crown at the sentence of Kodie Taylor: "During the hearing Mr O'Neill who

appears on behalf of the Crown conceded that the involvement of Brett Green was somewhat greater than that of Mason and Taylor. However, that does not change the character of Mr Taylor's involvement" (ROS (Kodie Taylor) at 4.2; CCA at [18] AB223.12).

PART V: Applicable Legislative provisions

The respondent agrees with the applicant's list of legislative provisions.

PART VI: Statement of Argument

6. 1 The simplicity of the principle that like cases be treated alike[1] belies the complexity of its application. In practice, as Gibbs CJ noted, the particular circumstances of an offence, "the age, background, previous criminal history and general character of the offender" and the myriad of other factors relevant to sentence are seldom equal.[2]

6. 2 This is nowhere better illustrated than in the decision in ***Lowe*** itself. The two co-offenders were charged with the same offence, armed robbery, both pleaded guilty, both were 18 and both had no prior criminal record. Lowe was sentenced to 6 years imprisonment, his co-offender, to a bond and community service. Despite this disparity, Lowe's application for special leave to appeal was refused. Even the minority who would have granted leave, Mason and Brennan JJ, would not have reduced Lowe's sentence to equal that of the co-offender.

6. 3 Similarly, in ***R v Tisalandis***[3], a case on which the appellant particularly relies, Tisalandis and his co-offender were sentenced on similar charges, malicious wounding, played similar roles and had similar criminal histories. It was said that, if anything, the co-offender played a greater role and had a more serious criminal history[4] yet Tisalandis received 3 years imprisonment and his co-offender a bond. The major difference was that the co-offender had pleaded

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[1] ***Lowe v R*** (1984) 154 CLR 606, ***Postiglione v R*** (1997) 189 CLR 295 at 301 per Dawson & Gaudron JJ, at 309 per McHugh J, at 335 per Kirby J, ***Hili v R ; Jones v R*** (2010) 272 ALR 465 at [49].
[2] ***Lowe v R*** (1984) 154 CLR 606 at 609 per Gibbs CJ.
[3] ***R v Tisalandis*** [1982] 2 NSWLR 430.
[4] ***R v Tisalandis*** [1982] 2 NSWLR 430 at 436G per Moffitt P.

guilty and Tisalandis had not. While the CCA accepted that the two sentences were "greatly disparate"[5], Tisalandis' appeal was dismissed.

6. 4 One of the issues raised in ***Lowe*** and ***Tisalandis*** was whether the principle of equal justice required reducing an otherwise appropriate sentence to an inadequate level to eliminate or reduce the disparity with a lesser sentence. It was held that "marked" or "gross" disparity, even with an inadequate sentence, *may* warrant appellate intervention, but the principle was not extended to *require* that a manifestly inadequate sentence be imposed for the sake of consistency. As Brennan J put it in ***Lowe***: "To say that an appellate court is bound to take the lesser sentence as the norm even though it is inappropriately lenient is tantamount to saying that "where you have one wrong sentence and one right sentence [the] Court should produce two wrong sentences" – a proposition that cannot be accepted."[6]

6. 5 The comments by Mason J in ***Lowe*** and Street CJ in ***Tisalandis*** that it was preferable to avoid disparity by reducing a sentence to a level that "might be regarded as inadequate"[7], or as Street CJ expressed it, to a level that is "objectively too lenient"[8] did not go so far as to require or "bind" an appellate court to adopt the lesser, manifestly inadequate sentence as the norm or "ceiling" (AWS at [33]) to be applied. The importance of avoiding disparity was emphasised but the impact of that consideration in any particular case remained a matter of discretion.[9] That was evident from the qualified terms used, such as that the sentences "might" be regarded as inadequate, and from the decision to dismiss the appeals in both cases.

6. 6 This was made explicit by Street CJ in ***Draper*** [10] 4 years later where his Honour stated that the principle enunciated by Mason J in ***Lowe*** was not of absolute application: "*The principle enunciated by Mason J is not one which is of absolute application. His Honour recognises an entitlement upon the court to interfere to*

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[5] ***R v Tisalandis*** [1982] 2 NSWLR 430 at 442A per Nagle CJ at CL with whom Street CJ agreed (at 431B).
[6] ***Lowe v R*** (1984) 154 CLR 606 at 617 per Brennan J.
[7] ***Lowe v R*** (1984) 154 CLR 606 at 613 – 4.
[8] ***R v Tisalandis*** [1982] 2 NSWLR 430 at 435B.
[9] In ***R v Pecora*** (1979) 1 A Crim R 293 at 297 Young CJ noted that that terms such as 'inappropriate' or 'inadequate' in this context were probably not used to mean "manifestly inadequate", in the sense of "wrong" but rather to mean the imposition of a sentence lower than would have been imposed in the circumstances were it not for the reference to the lesser sentence imposed on the co-offender.
[10] ***R v Draper*** (unreported) NSWCCA 12/12/1986.

correct manifest disparities." In ***Draper*** there was a "glaring" disparity between the aggregate sentence of 6 years with 3 years NPP Draper received for offences of larceny of a motor vehicle and break enter and steal and the sentence of the co-offender which involved, in practical terms, no penal consequence. Street CJ considered the co-offender's sentence "irresponsible" and the prospect of imposing a comparable sentence on Draper "*an affront to the proper administration of justice*"..... ...."*[it] would be so gross a distortion of the proper administration of the criminal law that I take the view that this Court should not interfere.*"[11]

10 6. 7 Contrary to the appellants' submission, there is no difference between the position in NSW and Victoria on this issue. As Young CJ emphasised in the leading case of ***Pecora***[12] over 30 years ago, where the lesser sentence is manifestly inadequate it cannot be disregarded entirely but the court is not obliged to impose a manifestly inadequate sentence. The lesser sentence is to be taken into account and given such weight as it "deserves" given the inadequacy of that sentence. The degree to which that sentence affects the result will depend on all the circumstances of the case. In some cases, this may mean that while the lesser inadequate sentence cannot be matched, some reduction is made to reduce the degree of the disparity.[13] This remains the accepted approach in Victoria.[14]

20 6. 8 The same approach has been applied NSW. Gleeson CJ in ***Reardon*** held that: "*Equally, however, justice does not require that the court should seek, so far as possible, to match the sentence imposed upon the appellant with that imposed upon Newman. Rather, it is a matter to be taken into account in a broader discretionary exercise.*"[15]

6. 9 It was in this sense that Street CJ's comments in ***Tisalandis*** on which the appellants rely are to be understood: "*But equally, as the first decision is an established fact, the second judge is bound to take into consideration and to give it appropriate weight in deciding what sentence to pass.*"[16] Street CJ

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[11] ***R v Draper*** (unreported) NSWCCA 12/12/1986 at p 2; ***R v Diamond*** (unreported) NSWCCA 18/2/1993.
[12] ***R v Pecora*** [1980] VR 499 at 297.
[13] ***R v Kucharski*** (Unreported) VSCA, 23 June 1997 per Hayne JA.
[14] ***R v Hildebrandt*** (2008) 187 A Crim R 42 at [56] – [65]; ***R v Farrugia*** [2011] VSCA 24 at [31]; ***DPP v Gregory*** [2011] VSCA 145 at [37] – 39].
[15] ***R v Reardon*** (1996) 89 A Crim R 180 at 182 per Gleeson CJ.
[16] ***R v Tisalandis*** [1982] 2 NSWLR 430 at 435A.

acknowledged that in some cases the disparity may not be eliminated but merely reduced. [17]

6. 10 The position is the same in Western Australia[18]and South Australia: "*It is a matter for the discretion of the Court. There may be considerations against interference. The protection of the public may require the higher sentence to stand. The lower sentence may be so inadequate that to establish parity may be felt to compound the error in a way which would be unacceptable to the public conscience. The sense of grievance experienced by the offender may have to be tolerated in the public interest. But in the absence of strong countervailing considerations, the Court of Criminal Appeal will interfere to eliminate marked disparities which cannot be justified in the circumstances of the case.*"[19]

6. 11 The rationale for not reducing the higher sentence to the level of manifest inadequacy to equal the co-offender's sentence was that, as Brennan J noted in ***Lowe***, such a course would multiply the error. Gleeson CJ expressed similar concerns in ***Rexhaj***: "*The principle which underlies that view is that inconsistency in punishment may lead to an erosion of public confidence in the administration of justice (Lowe, above, at 611). There are, however, other things which may also lead to an erosion of public confidence in the administration of justice, and they include the multiplication of manifest errors. That is why numerous judges have stressed the unattractiveness of responding to one wrong decision by making another wrong decision.*"[20]

6. 12 The same rationale was applied in Victoria by Vincent JA in ***Djukic***: "*I must confess to the possession of serious doubt concerning the notion that the 'impassive representative of the community, the 'objective bystander' would perceive greater injustice in the imposition of two or more inadequate sentences in order to maintain parity of treatment of the offenders involved, than that created by the acceptance of a measure of disparity to avoid the handing down of an inadequate sentence on one of them.*"[21] Vincent JA also doubted that there

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[17] ***R v Tisalandis*** [1982] 2 NSWLR 430 at 435C. Also in Western Australia Goddard v R (1999) 21 WAR 541 at [31] per Kennedy J, at [47] per Murray J,

[18] ***Goddard v R*** (1999) 21 WAR 541 at [31] per Kennedy J, at [40] per Pidgeon J, at [47], [54] per Murray J; ***R v Newburn*** [2004] WASCA 108 at [42] – [44].

[19] ***R v MacGowan*** (1986) 42 SASR 580 at 583 per King CJ, ***R v Cox*** (1996) 66 SASR 152 at 159 per Doyle CJ.

[20] ***R v Rexhaj*** (unreported) NSW CCA 29 February 1996.

[21] ***R v Jovica Djukic*** [2001] VSCA 226 at [30].

could be a justifiable sense of grievance because a manifestly inadequate was not imposed. The same observation was made by Hunt CJ at CL in ***R v Diamond***.[22]

6. 13 This was the approach adopted in the present case. McClellan CJ at CL observed that there was no principle that a sentence could not be increased to create disparity with a co-offender even where the co-offender's sentence is excessively lenient (CCA at [28], AB288.20). His Honour referred to Gleeson CJ's comment in ***Rexhaj*** about compounding error (CCA at [29],AB288.25) and stated that considerations of parity and avoiding a justifiable sense of grievance "must" be taken into account in deciding whether to exercise the discretion to intervene (CCA at [32], AB289.20) however where the lesser sentence is "erroneously lenient" the Court is not bound to adopt it as the norm. It is a matter of discretion in all the circumstances of the case whether the sentence will be increased (CCA at 32] – [33], AB289).

6. 14 Hulme J also held that the creation of disparity and the conduct of the Crown in appealing the sentences of only some of the co-offenders "should be factors to be taken into account on the issue of whether the appeal should be allowed and, if it is, on the extent of the sentence to be imposed." (CCA at [133], AB324.20). However, his Honour emphasised that there was no "blanket rule" or automatic "bar" against allowing a Crown appeal where to do so would create disparity (CCA at [130], AB322.55). It was a matter of discretion to be weighed in light of all the relevant factors. A rigid principle which required that a sentence would not be increased even though it was manifestly inadequate was contrary to the discretionary nature of sentencing (CCA at [133], AB324.15).

6. 15 This was no different from the general approach adopted in the minority judgement of Allsop P and McCallum J where their Honours considered that parity was one of a number of factors that had to be taken into account: "*These individual and community aspects of the importance of this attribute of equal justice must also be recognised to take their place alongside other important considerations in the administration of justice. One such consideration is that a sentence that is clearly inadequate should not be permitted to dictate or to govern the sentencing of others involved in the offending if to do so would bring about an affront to the administration of justice, and thereby undermine*

[22] ***R v Diamond*** (unreported) NSWCCA 18/2/1993.

confidence in it." (CCA at [4], AB280.25). It was noted that the decision not to intervene so as not to create disparity was part of the exercise of the "residual discretion in an appropriate case and where it would not be an affront to justice to do so." (CCA at [11] AB283.30).

6. 16 This reference to an "affront to justice" clearly echoed the remarks of Street CJ in ***Draper*** and Hunt CJ at CL in ***Diamond***. In this way, Allsop J and McCallum J, like the majority, accepted that a "clearly inadequate" sentence did not dictate the norm or "ceiling" for the sentencing of others.

6. 17 There was nothing in ***R v McIvor*** (2002) 136 A Crim R 366, ***R v Cvitan*** [2009] NSWCCA 156, ***R v Bavin*** [2001] NSWCCA 167 or ***R v Borkowski*** (2009) 195 A Crim R 1 that contradicted that approach or propounded a general rule that a manifestly inadequate sentence should not be increased where that would create disparity with the sentence of a co-offender even where the lesser sentence was manifestly inadequate. That would have entailed overturning a long standing course of authority which had treated the issue as a matter of discretion. None of these cases purported to adopt such a course. If anything, the 3 cases cited in ***McIvor*** [23] by Heydon JA all endorsed the opposite approach. His Honour quoted Brennan J in ***Lowe*** about not reducing a sentence to the level of a wrong sentence and cited ***Diamond*** and ***Steele***[24] both of which had held that a manifestly inadequate sentence should not dictate the norm to be applied. Both ***Steele*** and ***Diamond*** also accepted, as Vincent JA had in ***Djukic***, that any sense of grievance over not receiving a manifestly inadequate was not justifiable. Similarly, in ***Borkowski***, Howie J stated that the applicable principle was that the Court will *not* reduce a sentence because of disparity where the lesser sentence is manifestly inadequate and that any sense of grievance over not receiving an excessively lenient sentence was "unjustified".[25]

6. 18 In the present case, McClellan CJ at CL noted that ***Borkowski*** (AB288.10), a decision to which his Honour was a party, did not establish the principle for which the appellants contended that the CCA would not, or should not, increase a sentence if that would create disparity with the sentence imposed on the co-offender (CCA at [98], AB308.10), but appeared to think that ***McIvor*** did.

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[23] ***R v McIvor*** (2002) 136 A Crim R 366 at 371[10].
[24] ***R v Steele*** (unreported) NSW CCA 17/4/1997.
[25] ***R v Borkowski*** (2009) 195 A Crim R 1 at [10].

McClellan CJ at CL (CCA at [33], AB289.30) and Hulme J (CCA at [119] – [121], AB319.22 – 320.30) held that no such general principle applied and to the extent that ***McIvor*** established such a principle it should not be followed.

6. 19 It was perhaps unnecessary, in rejecting the appellants' submission, to hold that ***McIvor*** should not be followed for the decision in ***McIvor*** was but a particular application of the discretion to dismiss a Crown appeal, largely for the reason that to increase the sentence would create a discrepancy that was not warranted by the circumstances of the case: "*That sense of grievance would be justifiable, because the difference would not depend on anything in the objective circumstances of the crimes or in the subjective circumstances of each co-offender's background.*"[26] On the level of principle, it would appear from the authorities cited, that the decision in ***McIvor*** was actually based on the approach that a manifestly inadequate sentence should not dictate the norm to be applied for co-offenders.

6. 20 Contrary to the appellants' submission that the majority in the present case failed to take into account the different considerations that apply in relation to parity in Crown appeals (AWS at [39] – [43]), Hulme J dealt with that issue at length (CCA at [119] – [133], AB 319 - 24). The difference in the operation of the principle of equal justice in Crown appeals arises not because of any difference in the application of the principle itself but because of the nature of Crown appeals. Indeed it would be somewhat antithetical if the principle of equal justice did not apply equally to sentences in both severity and Crown appeals.

6. 21 The statutory provisions in relation to Crown appeals in NSW, as in Victoria, do not require leave for a Crown appeal under s5D *Criminal Appeal Act*. Considerations of double jeopardy also do not apply to Crown Appeals (CCA at [138], AB325.52). Although no leave is required and double jeopardy does not apply, the approach adopted is that the CCA will not intervene unless there is a finding of error in the ***House***[27] sense and even then, as the Victorian Court of Appeal noted in ***DPP v Karazisis***[28], Crown appeals are regarded with reticence and not readily entertained. In Victoria, as in NSW[29], even where the sentence

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[26] ***R v McIvor*** (2002) 136 A Crim R 366 at 371- 2[11].
[27] ***House v The King*** (1936) 55 CLR 499
[28] ***DPP v Karazisis*** [2010] VSCA 350 at [87] [98].
[29] ***R v JW*** (2010) 199 A Crim R 486; ***R v Allpass*** (1993)72 A Crim R 561; ***R v Wall*** (2002) 71 NSWLR 692 at [70].

has been found to be manifestly inadequate there remains a residual discretion to dismiss the appeal despite that error. A number of factors, such as delay, rehabilitation, and of course, parity, are relevant to the exercise of that discretion not to intervene.[30]

6. 22 It is these considerations, which apply only to Crown appeals, that differentiate the context for the application of the parity principle rather than any difference in the application of the principle itself. In severity appeals, the parity principle may warrant intervention in respect of sentences that are otherwise appropriate but for the disparity. In severity appeals, disparity is a ground of appeal in itself. In contrast, in Crown appeals, disparity is not a ground of appeal in itself. The parity principle does not warrant intervention in respect of sentences appropriate in themselves. The Crown must establish that the sentence is manifestly inadequate other than by reference to parity considerations. Even where the sentence is found to be manifestly inadequate, there is a residual discretion not to intervene. This was the approach adopted in the present case.

6. 23 The appellants contend that there were 3 main errors in the approach of the majority in the present case. Firstly, that the appellants' sentences, taking into account the sentence imposed on Kodie Taylor, should not have been interfered with as they were not "manifestly wrong" (AWS at [27]). Secondly, that Hulme J erred in stating that the principle of parity could not be given full weight in the case of manifestly inadequate sentences (AWS at [36] – [39]). Thirdly, that Hulme J failed to take into account relevant considerations, such as the Crown's conduct in failing to appeal the sentence of Kodie Taylor, delay, and rehabilitation (AWS at [49] – 55]).

Sentences manifestly wrong.

6. 24 The appellants' contention that the sentences were not manifestly wrong contradicts the unanimous findings of the CCA. Both the minority (CCA at [13], AB283.40) and majority (CCA at [87] – [88], AB305.15; at [134] – [135], AB324.40) agreed that the appellants' sentences were manifestly inadequate.

The weight to be given to the principle of parity

[30] ***DPP v Karazisis*** [2010] VSCA 350 at [99] – [104].

6. 25 The appellants quote (AWS at [35]) the following passage from ***Karazisis*** and submit that Hulme J departed from this approach:

> "*Parity can also operate as a constraint upon a Crown appeal against sentence. It sometimes happens that the Crown elects to appeal against the sentence imposed upon one offender, but not another. In the same way as want of parity can require a court to moderate a sentence that it would otherwise consider appropriate, it may act as a limiting factor when the Crown challenges the adequacy of just one of a number of sentences. In such circumstances, a sentence which is regarded as inadequate might still be permitted to stand.*"

6. 26 This statement of principle is not challenged. It is correct that parity considerations may operate as a constraint upon allowing a Crown appeal but that does not mean that Crown appeals will not be allowed where to do so would create disparity with a manifestly inadequate sentence. As McClellan CJ at CL and Hulme J acknowledged in the present case, parity was a relevant consideration in the discretion whether to intervene and as such operated as a constraint. Hulme J held that parity considerations also operated as a constraint after the decision to intervene by limiting the degree of increase of the sentence (CCA at [133], AB324.30; at [142], AB326.52).

6. 27 The appellants contend that Hulme J erred by taking an approach whereby the parity principle was subsumed to other sentencing principles such as proportionality (AWS at [36]). It is correct that Hulme J used expressions indicating that parity may not always "prevail" and that there may be cases where it cannot be given "full weight" (CCA at [131] AB323.40), however, these criticisms may be more formal than of substance. They are similar to a comment made by Murray J in ***Goddard***[31] about the passage from the judgement of King CJ in ***MacGowan*** quoted at [6.10] above where King CJ noted that one consideration against interference was where the lower sentence was so inadequate that to use it as the yardstick would be to compound the error. Murray J quoted the passage with approval but added the qualification that "I would not agree if his Honour was intending to convey that the need to apply the parity

[31] ***Goddard v R*** (1999) 21 WAR 541 at [54].

principle to any degree is removed when the other sentence is not within the range of sentences open on the facts."

6. 28 Murray J was correct that the application of the parity principle is not "removed" where the lesser sentence is manifestly inadequate although, if there was any ambiguity in King CJ's formulation, it was reasonably evident from King CJ's earlier statement that marked disparity was a ground of appeal in itself and that the Court of Criminal Appeal would, in the absence of "strong countervailing considerations", intervene to eliminate marked disparities that his Honour did not intend to "remove" the parity principle from consideration when the lower sentence was manifestly inadequate.

6. 29 Similarly in the present case, there may have been some ambiguity in Hulme J's references to the parity principle not being given "full weight" where the lesser sentence is manifestly inadequate but it is reasonably clear from the judgement as a whole that his Honour did not intend to convey that the principle did not apply in such circumstances. On the contrary, McClellan CJ at CL stated that such factors "must" be taken into account and may lead to a Crown appeal being dismissed (CCA at [32] AB289.18), Similarly, Hulme J held that "any disparity with the sentence imposed on a co-offender that would be created by the allowing of that appeal, and any conduct or inaction on the part of the Crown, particularly if unexplained or unjustified ... ... that has allowed that situation to arise should be factors to be taken into account on the issue of whether the appeal should be allowed and, if it is, on the extent of the sentence to [be] imposed." (CCA at [133] AB324.20). His Honour repeatedly emphasised that the significance of the parity principle in any particular case was a matter of discretion which always applied (CCA at [132] AB323.20).

6. 30 Perhaps the ambiguity arose from the references to whether the parity principle applied or applied fully in cases where the co-offender's sentence was manifestly inadequate whereas it was not so much whether the principle applied but the effect of the principle in the particular case. The principle applied and was to be considered in every case, but its effect on the decision in an individual case depended on all the other relevant circumstances.

No failure to take into account conduct of the Crown, delay and rehabilitation.

6. 31 Contrary to the appellants' submission that Hulme J "excluded" (AWS at [52]) consideration of factors such as conduct of the Crown, delay and rehabilitation, Hulme J referred expressly to the affidavits filed by the appellants as to their conduct in custody and the educational courses and counselling they had undertaken (CCA at 136] – [137], AB325.20). His Honour also noted that Mr Green had progressed in his classification to the stage of day release and if the sentence were increased he would lose that classification (CCA at [137], AB325.40). His Honour stated the decision whether to allow the appeal was a matter of discretion and that parity and the conduct of the Crown in not appealing the lesser sentence were matters to be taken into account (CCA at [133], AB324.20). In the final paragraphs of his Honour's reasons these matters were referred to again in arriving at the sentences to be imposed (CCA at [140] – [143], AB326.33).

6. 32 The appellants rely on the conduct of the Crown in not appealing Kodie Taylor's sentence as a matter which should militate against allowing the appeal. It was accepted that the fact that Kodie Taylor's sentence was not appealed gave rise to an issue of disparity, or rather of relativity, and that that was a factor that must be taken into account. The fact that Kodie Taylor's sentence had not been appealed should be taken into account in that way, as a circumstance giving rise to issues of parity, rather than categorised separately as conduct by the Crown militating against an appeal as that term is usually used. Conduct by the Crown usually refers to conduct such as leading the court into error or undue delay in lodging the appeal. In ***R v Bavin*** [2001] NSWCCA 167 at [70] – [71] for example, the Crown conceded before the sentencing judge that a non-custodial sentence was appropriate for the co-offender yet on appeal submitted that both sentences were manifestly inadequate. That conduct may well have led the court into error and prejudiced the position of the respondent. Similarly, undue delay by the Crown in lodging the appeal may have adverse consequences on a respondent and is a matter which should be taken into account on the discretion to intervene. However, not appealing a co-offender's sentence is in a different category. As Hulme J pointed out in the present case, there may be good reasons why a co-offenders sentence was not appealed against without any fault on the part of the Crown (CCA at [129] – [130]). That circumstance is reflected in the fact that the appellate court is in the position of creating disparity between co-offenders and

is a matter to be taken into account but it should not be weighed separately under the rubric of conduct of the Crown, unless there are particular aspects of that decision which have adverse effects on the respondent in addition to the circumstance that an issue of parity with a co-offender's sentence arises.

6. 33 Of the 3 issues said to be raised in this appeal, the first 2 (AWS [2] (a) and (b)) do not arise for they are based on the premise that the sentences imposed by the sentencing judge achieved parity with the sentence imposed on Kodie Taylor and that any disparity that arose was created by the CCA.

6. 34 Unlike the situation in cases such as ***McIvor***, ***Bavin***, or ***Borkowski***, upon which the appellants rely, where the offenders were charged with the same offences and where the relevant circumstances were equivalent, this was not a case of parity. The appellants and Kodie Taylor were not charged with the same offences. They were not subject to the same penalties and there were significant differences in the roles they played.

6. 35 The sentencing judge found that Mr Quinn's role as principal in the enterprise warranted "a significantly more severe sentence" than Kodie Taylor (ROS at 13.9, AB242.54) and that Mr Green "should receive a sentence that is somewhat greater than that of Taylor in order to reflect his greater participation in the enterprise." (ROS at 13.9 – 14.1). It is conceptually contradictory to describe sentences intended to be significantly more severe as being on par. There were significant differences between the offences with which the appellants were charged and the roles they played compared to Kodie Taylor which warranted significantly different sentences, as the sentencing judge acknowledged. The real issue was not parity but just how different they should be.

6. 36 Mr Quinn was 31 at the time of the offences, in a de-facto relationship with 4 children (AB238.40). Mr Green was 24, married, with 3 children (AB240.50). In contrast, Kodie Taylor was 20, single, and living with his mother (AB226.20, AB308.30).

6. 37 All 3 offenders had prior criminal records. Mr Quinn had a relatively minor criminal history comprising 12 offences dating over 15 years between 1992 – 2007 (CCA at [52], AB293.50). Mr Green had a minor criminal history consisting of two offences for which he had been fined (AB131). Kodie Taylor

had a "brief" criminal history (ROS p 7.2, AB226.15) comprising 7 minor offences over a 2 year period.

6. 38 There seemed to be some misapprehension in the CCA that the appellants were of good character whereas Kodie Taylor was not: "On the other hand, contrary to the situation with Messrs Quinn and Green, Mr Taylor was not of good character, could not be said to be unlikely to re-offend and had a need for supervision for a significant period." (CCA at [99], AB308.35). A similar comment was made in the minority judgment: "Otherwise, as noted in the judgment of Hulme J, unlike the respondents Mr Taylor was not of good character and could not be assessed as unlikely to re-offend." (CCA at [19], AB285.42). In addition to the fact that all 3 offenders had criminal records, Mr Quinn had significant problems with drug addiction, perhaps more significant than Kodie Taylor. He also had a need for a lengthy period of supervision, including the possibility of undertaking a residential drug rehabilitation program on release (ROS at p11.2, AB240.20).

6. 39 Mr Quinn had made "some efforts" (AB239.47) at drug rehabilitation and the pre-sentence report recommended a medium to high level of intervention by the Probation and Parole Service because of his alcohol and "other drug peer associations" (ROS at p 11.22, AB240.22). Kodie Taylor had been a poly drug user since the age of 16 and the pre-sentence report indicated that he demonstrated little insight into the impact of his offending on the wider community and that while he had engaged in counselling he would continue to struggle with abstinence while he continued to associate with the same peer group. (ROS at p 7.6 – 8.3, AB226.35). He was assessed as requiring a moderate level of intervention by the service. Mr Green had no problems with drug addiction which the sentencing judge considered boded well for his prospects of rehabilitation (ROS at p 12.30, AB241.30).

6. 40 On the basis of these findings, it is not clear that any meaningful distinction could be drawn between the personal circumstances of the appellants and Kodie Taylor such as to merit a finding of good character for the appellants as distinct from Kodie Taylor. All 3 had criminal records, both Mr Quinn and Kodie Taylor had disturbed backgrounds and significant drug addiction problems. Only Mr Green had a stable and supportive family background and no drug or alcohol

problems. Mr Green was said to be "willing and cooperative for probation and parole" and was assessed as being a "very low risk" of re-offending (AB241.30).

6. 41 The interaction between these factors in the respective cases was complex and pointed in different directions.[32] Kodie Taylor's "blasé" attitude and lack of insight reflected his youth and immaturity. His youth also meant that he may well struggle with abstinence for a considerable time into the future. Those considerations affected his prospects of rehabilitation. However, his youth and immaturity also reflected on his moral culpability in becoming involved in an enterprise of this scale. In contrast, Mr Green's maturity and the absence of any significant addiction problems may have meant that his prospects of rehabilitation were better than Kodie Taylor's, but those factors also reflected on his culpability as a principal at a "somewhat" higher level of the operation than Kodie Taylor.

6. 42 The Crown had conceded at the sentence proceedings for Kodie Taylor that he was at a somewhat lower level than Mr Green: "During the hearing Mr O'Neill who appears on behalf of the Crown conceded that the involvement of Brett Green was somewhat greater than that of Mason and Taylor. However, that does not change the character of Mr Taylor's involvement" (ROS at 4.2, AB223.12). The sentencing judge used the same terminology later when finding that the sentence for Mr Green should be "somewhat greater" than that of Kodie Taylor (ROS at 13.9 – 14.1, AB243.10). His Honour held that the sentence for Mr Quinn should be "significantly more severe" (AB242.53).

6. 43 In the event, the non-parole period imposed on Mr Green was only 6 months longer than that imposed on Kodie Taylor and Mr Quinn's 18 months longer. The offences for which the appellants were sentenced were subject to standard non-parole periods of 10 years whereas Kodie Taylor's offence was not subject to a standard non-parole period. The issue on appeal was whether, in the context of the more serious offences for which the appellants were sentenced, the different penalties which applied to them and the sentencing judge's stated intention of imposing significantly more severe sentences, the sentences imposed were manifestly inadequate.

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[32] ***Veen [No 2] v The Queen*** (1988) 164 CLR 465 at 476.

6. 44 Ultimately, both the majority and minority in the CCA accepted that the sentences were manifestly inadequate. It was also accepted that the disturbance of the general relativity with Kodie Taylor's sentence was an important consideration on the exercise of the discretion whether to intervene.

6. 45 The major difference between the majority and minority judgments as to whether or not the discretion should be exercised was on the extent of the inadequacy of the sentences imposed. Hulme J considered that the appropriate penalty was "nowhere near the 6 years total sentence imposed." (CCA at [87], AB305.15) and there was nothing "that could come close to justifying" the 3 year NPP (for Mr Quinn). Hulme J considered that the sentence of 6 years with a 3 year NPP failed to serve the purposes of retribution "for many months of calculated criminality" and of deterrence where the possible rewards were millions of dollars (CCA at [134], AB324.55). In contrast, Allsop P and McCallum J considered that the 6 year head sentence "entail[ed] a substantial measure of punishment by full-time imprisonment" (CCA at [20], AB285.55) and the degree of departure from the appropriate range was not "so great that it would be an affront to justice not to intervene."(CCA at [23], AB286.45).

6. 46 Those different assessments as to the degree of the inadequacy of the sentences had a commensurate effect on the countervailing considerations. Allsop P and McCallum J considered that the degree of inadequacy did not "outweigh the competing, and important, consideration of the Court itself creating the appearance of unequal justice by its own order." (CCA at [9], AB282.54). However, the majority considered that the degree of the inadequacy was so marked that it outweighed the other discretionary considerations. The different conclusions as to whether to intervene were based on the different assessments as to the appropriate range for the offences in this case.

6. 47 That determination as to the appropriate range for the offences in this case remains relevant because the other major principals in this enterprise are still to be sentenced. Shannon Quinn, the appellant's brother, was at the top tier of the enterprise, just below his brother. Gary Mason was at a level below that, comparable, but not as senior as Mr Green. Both Mason and Shannon Quinn are to be sentenced later this year.

6. 48 The sentences imposed by the CCA on the appellants Quinn and Green established an appropriate benchmark for those at the upper echelons of this enterprise charged with cultivating a large commercial quantity of cannabis. Kodie Taylor's sentence was of less significance for he had been sentenced for a lesser offence. The sentences imposed by the CCA also established the relativities between the offenders at the higher levels charged with the more serious category of offence. Those benchmarks will be important for the other offenders charged with the same offences still to be sentenced in this particular case and for sentencing in NSW generally for offences of large commercial cultivation.

Dated: 3 June 2011

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