HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

JOHN LEONARD CAMERON APPELLANT

AND

THE QUEEN RESPONDENT

Cameron v The Queen
[2002] HCA 6
14 February 2002
P59/2001

ORDER

1. *Appeal allowed.*

2. *Set aside order of the Court of Criminal Appeal of the Supreme Court of Western Australia of 3 October 2000 dismissing the appeal.*

3. *Remit the matter to that Court for further hearing and determination consistent with the reasons for judgment of this Court.*

On appeal from the Supreme Court of Western Australia

Representation:

T F Percy QC with D J Davies for the appellant (instructed by D G Price & Co)

R E Cock QC with L Petrusa for the respondent (instructed by Director of Public Prosecutions (Western Australia))

CATCHWORDS

Cameron v The Queen

Criminal Law – Sentence – Drug offence – Complaint wrongly particularised prohibited drug – Guilty plea entered as soon as complaint amended – Whether plea entered at first reasonable opportunity

Criminal Law – Sentence – Guilty plea as mitigating factor in sentencing – Whether guilty plea as mitigating factor in sentencing discriminatory.

Sentencing Act 1995 (WA), ss 7 and 8.
Commonwealth Places (Application of Laws) Act 1970 (Cth), ss 3, 4, and 7.

1 GAUDRON, GUMMOW AND CALLINAN JJ. The appellant, John Leonard Cameron, was arrested at Perth airport on 22 April 1999 after a quantity of tablets was found in his hand luggage. In a police interview conducted shortly thereafter, the appellant denied any knowledge of the contents of his luggage. He was then charged that he "[h]ad in his possession a Prohibited Drug, namely 3, 4 Methylenedioxy-n, Alpha-Dimethylphenylethyl-Amine with Intent to Sell/Supply". The substance referred to in the charge is commonly known as "Ecstasy".

2 It appears that Perth airport, the location at which the appellant was said to have had the possession with which he was charged was a "Commonwealth place" within the meaning of the definition in s 3 of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth). The consequence was that s 4 of that statute rendered the laws of Western Australia applicable there in accordance with their tenor and s 7 invested the several courts of that State with federal jurisdiction in all matters arising under those applied provisions. The laws of Western Australia "picked up" in this way included the *Misuse of Drugs Act* 1981 (WA). The charge against the appellant, set out above, alleged contravention of s 6(1)(a) of the State law.

3 When charged, the appellant was remanded in custody. He subsequently appeared on a number of occasions before the Perth Court of Petty Sessions. On one appearance, on 2 July 1999, the appellant elected to have a preliminary hearing on 19 November 1999. Thereafter, he appeared on "cycle remand" on 30 July, 31 August, 30 September and 29 October 1999. Apparently, on a "cycle remand", the person concerned appears by video-link from prison.

4 Analysis of the substance found in the appellant's possession established that it contained Methylamphetamine, which is commonly known as "Speed", and not the substance charged. The analyst's certificates in that regard are dated 28 June 1999. On 10 November 1999, Legal Aid, which was then acting for the appellant, wrote to the Director of Public Prosecutions indicating that the appellant wished "to enter a plea of guilty to the charge of possession of a prohibited drug with intent to sell and supply." The letter concluded with the observation "that the complaint as it's currently drafted is incorrect and should be amended to properly reflect the drug which was in Mr Cameron's possession." The complaint was accordingly amended on 17 November. The appellant then entered a plea of guilty and was committed to the District Court for sentence.

5 On 12 January 2000, the appellant was arraigned before the District Court where he maintained his guilty plea. It was submitted on the appellant's behalf that he should be sentenced on the basis that he pleaded at "the earliest possible opportunity" and that he should be credited "as if [it] were a fast-track plea of guilty". Prosecuting counsel did not put submissions in opposition to that course.

6 It will later be necessary to say something as to the "fast-track" plea of guilty. For the moment, it is sufficient to note that the practice in Western Australia in respect of such a plea is to substantially reduce the sentence that would otherwise be imposed, the reduction ranging "between 20–25 per cent up to 30–35 per cent depending upon the circumstances"[1]. The appellant's sentence was reduced for his plea of guilty by 10%, the sentencing judge, Blaxell DCJ, saying only that, ordinarily, the appellant "could have expected a sentence of 10 years' imprisonment but in view of the fact that [he had] pleaded guilty [it would be reduced] to 9 years' imprisonment."

7 The appellant sought leave to appeal to the Court of Criminal Appeal of the Supreme Court of Western Australia. The only ground argued was that insufficient credit was given for the early plea of guilty. It was submitted on the appellant's behalf that, in the circumstances, the sentence should have been reduced "by at least 20 to 25 per cent". In that context, a question arose as to when the appellant first knew of the contents of the analyst's certificates. That question was unresolved, the Court being informed only that the certificates were dated 28 June 1999.

8 Prosecuting counsel resisted the application for leave to appeal, arguing that "[t]he plea of guilty was entered at an early stage but not at the earliest point" and that, in all the circumstances, the sentencing judge "did not err in giving insufficient credit for the [appellant's] plea of guilty."

Decision of the Court of Criminal Appeal

9 The Court of Criminal Appeal granted the appellant leave to appeal to that Court but dismissed the appeal. In his reasons for judgment, Pidgeon J, with whom Ipp and Owen JJ agreed, rejected the argument that it was not possible for the appellant to plead guilty until the charge was amended. His Honour said:

> "The charge when first brought had the element of being a prohibited drug and if it contained the wrong drug, it would still have been open to the applicant at a much earlier stage to indicate that he did have a prohibited drug but it was methylamphetamine and not ecstasy. It is simply that the particulars were wrong."

---

1 *Miles v The Queen* (1997) 17 WAR 518 at 521 per Malcolm CJ. See also *Verschuren v The Queen* (1996) 17 WAR 467; *De Luce v The Queen* unreported, Court of Criminal Appeal, Western Australia, 19 July 1996.

His Honour added:

> " The particulars refer to a drug of equal seriousness so I see no difficulty to his pleading guilty earlier and it did not save the administration of justice to have the number of remands that there were and to have time set aside for the preliminary hearing."

10 A little later in his judgment, Pidgeon J said that although the plea of guilty had resulted in an important saving of time and administration in the District Court, "there was no saving in the Magistrates Court".

The relevance of a plea of guilty

11 It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In *Siganto v The Queen* it was said:

> "a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."[2]

It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

12 Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial[3]. The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

13 It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if,

---

2 (1998) 194 CLR 656 at 663-664 [22] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

3 *Siganto v The Queen* (1998) 194 CLR 656 at 663 [22] per Gleeson CJ, Gummow, Hayne and Callinan JJ. See also *R v Gray* [1977] VR 225 at 231.

in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.

14 Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.

15 This treatment of the matter is consistent with what in their joint judgment in *Castlemaine Tooheys Ltd v South Australia*[4] Gaudron and McHugh JJ identified as the general considerations which result in particular treatment being treated as discriminatory. One aspect of the legal notion of discrimination "lies in the unequal treatment of equals"[5]. The "equals" here are those required to plead guilty or not guilty; they stand as equals before the criminal law and processes of Western Australia. But is the differential treatment of such persons and the unequal outcome with respect to sentence the product of a distinction which is appropriate and adapted to the attainment of a proper objective, here the facilitation of the course of justice by the willingness of the accused to plead in a particular fashion? The answer, as indicated above, is in the affirmative.

The "fast-track" plea

16 So far as sentencing is concerned, the practice with respect to a "fast-track" plea has developed in Western Australia, consistently with the *Sentencing Act* 1995 (WA) ("the Sentencing Act"), in parallel with the statutorily sanctioned procedure whereby, on a plea of guilty to an indictable offence, a person may be committed to a superior court for sentence without the presentation of evidence or the filing of statements[6].

---

4 (1990) 169 CLR 436 at 478-479.

5 (1990) 169 CLR 436 at 480.

6 Part V of the *Justices Act* 1902 (WA) sets out the procedure in respect of indictable offences. Where a charge is not dealt with summarily, s 100 requires that the prosecution serve on the defendant a statement of material facts and a copy of any statements signed by the defendant or other records of statements made by the defendant to the police, as well as notice of any tape or videotape recording of

(Footnote continues on next page)

17 The Sentencing Act, which sets out sentencing principles applicable to all persons convicted of an offence[7], specifies, in s 8, mitigating factors to be taken into account on sentence. One such factor is that the offender pleaded guilty. By s 8(2) it is provided that "the earlier in proceedings that [the guilty plea] is made, or indication is given that it will be made, the greater the mitigation." Provision is also made in s 7 with respect to aggravating factors. The fact that the offender pleaded not guilty is expressly excluded from those aggravating factors by s 7(2)(a) of the Sentencing Act.

18 It was suggested for the respondent in this Court that the full reduction for a "fast-track" plea of guilty is only available where the person concerned has pleaded guilty in circumstances relieving the prosecuting authorities of the necessity to present evidence or file statements. There would be force in that suggestion if s 8(2) of the Sentencing Act were to be read in isolation from s 7(2)(a) which gives effect to the common law rule that a person should not be penalised for exercising the right to trial. So, too, there would be force in the suggestion if the rationale for allowing a plea to be taken into account in mitigation were, to any extent, based on the objective consideration that the plea has resulted in the saving of court and prosecution time.

19 Once it is appreciated that s 8(2) of the Sentencing Act is to be reconciled with s 7(2)(a), which gives effect to the common law requirement that an offender not be penalised for pleading not guilty, s 8(2) must be read as allowing that a plea of guilty may be taken into account in mitigation for the reason that a guilty plea evidences a willingness to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice. That being so, the relevant question is not simply when the plea was entered but, as was accepted by the Court of Criminal Appeal in this matter, whether it was possible to enter a plea at an earlier time.

---

conversations between the defendant and a person in authority. Once this material has been served on the defendant, the defendant is given the opportunity to plead to the charge. If the defendant pleads guilty to the charge, he or she is committed to a court of competent jurisdiction for sentence pursuant to s 101. If there is no expedited committal, then, under s 101A, the prosecution must serve on the defendant any statements proposed to be tendered in evidence, and, if the defendant elects to have a preliminary hearing, the prosecution must then call witnesses for examination under s 102.

7 By s 4(1) of the Sentencing Act, "offence" means an offence under a written law.

20 The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet. As was acknowledged in *Atholwood*[8] by Ipp J, in the Court of Criminal Appeal of Western Australia, the question is when it would first have been reasonable for a plea to be entered.

21 In *Atholwood*, the person concerned had been charged with several counts. After a process of negotiation, the prosecution withdrew a number of the charges and the offender pleaded guilty to one of the remaining charges. Ipp J said this:

> "It is particularly important in such circumstances to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted. Regard should be had to the forensic prejudice that the offender would have suffered were he to have pleaded guilty to counts persisted in by the prosecution while others (that were subsequently withdrawn) remained pending against him. During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts ... to persist in a not guilty plea to all counts. In such circumstances it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity."[9]

22 The remarks of Ipp J in *Atholwood* reflect what has earlier been said in relation to the rationale for the rule that a plea may be taken into account in mitigation, namely, that, leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And once that rationale is accepted, the respondent's suggestion that the extent to which a plea of guilty may be taken into account in mitigation may vary according to whether it was or was not a "fast-track" plea must be rejected. Rather, the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

---

8 (1999) 109 A Crim R 465.

9 *Atholwood* (1999) 109 A Crim R 465 at 468.

First reasonable opportunity

23 Although the original charge specified the elements of the offence charged, it was not reasonable to expect the appellant to plead to an offence which wrongly particularised the substance to which the charge related. And that is so even if the identity of the substance would not have affected sentence. In this regard, it should not be assumed that the appellant knew that the sentence would be the same regardless of the nature of the substance.

24 More importantly, the appellant should not have been expected to acquiesce in procedures which might result in error in the court record or, indeed, in his own criminal record. At the very least, a plea of guilty to a charge wrongly particularising the substance he had in his possession would not necessarily provide the basis for a plea of autrefois acquit to a subsequent charge specifying the correct substance.

25 The Court of Criminal Appeal was in error in holding that the appellant could have pleaded guilty before the charge was amended to correctly specify the substance which he had in his possession. Moreover, it was in error in stating that there had been "no saving in the Magistrates Court" for the appellant's plea of guilty rendered a preliminary hearing unnecessary.

Conclusion and orders

26 The appeal should be allowed, the order of the Court of Criminal Appeal dismissing the appeal should be set aside and the matter remitted to that Court for further hearing and determination.

27 McHUGH J. The issue in this appeal is whether the District Court of Western Australia erred in discounting the appellant's sentence by only 10% after he had pleaded guilty to possession of a prohibited drug – methylamphetamine (popularly known as speed) – with intent to sell or supply. The sentencing judge (Blaxell DCJ) said "ordinarily you could have expected a sentence of 10 years' imprisonment but in view of the fact that you have pleaded guilty I'm going to reduce that to 9 years' imprisonment." The appellant complains that he pleaded guilty to the charge as soon as it was possible to do so and that, ordinarily, Western Australian courts discount a sentence by 20-35% if the accused has pleaded guilty to the charge as soon as it was reasonably practicable to do so.

28 Subsequently, the appellant appealed to the Court of Criminal Appeal of Western Australia, but it dismissed the appeal[10]. The Court of Criminal Appeal held that the appellant did not qualify for the ordinary discount because he had delayed pleading until shortly before the preliminary hearing of the charge in the Court of Petty Sessions. The appellant responds that he could not have pleaded guilty to the charge before he did. He points out that, until the day of his sentence, the only charge against him was possession of a prohibited drug, namely 3, 4 Methylenedioxy-n, Alpha-Dimethylphenylethyl-Amine (popularly known as ecstasy), with intent to sell or supply. Only on the day of sentencing was the prohibited drug identified as "speed".

29 In my opinion, the appeal should be dismissed. Upon the facts of the case, the change in the identification of the prohibited drug played no part in the appellant's change of plea from not guilty to guilty. Because that was so, it was open to the District Court to discount the appellant's sentence by 10% instead of the usual 20-35%. Nor did the Court of Criminal Appeal err in refusing to interfere with the sentence.

The material facts

30 On 22 April 1999, the appellant arrived in Perth after travelling by plane from Sydney. On arrival, police officers took him to an office in the airport terminal, searched him and his luggage and found a plastic package containing 5,268 tablets in a travel bag. The appellant denied all knowledge of the tablets. The arresting police officers evidently believed that the tablets were ecstasy tablets. They charged the appellant with having possession of a prohibited drug, but the charge identified the drug as 3, 4 Methylenedioxy-n, Alpha-Dimethylphenylethyl-Amine. Later analysis of the tablets showed that they were methylamphetamine.

---

10 *Cameron v The Queen* [2000] WASCA 286.

31 The appellant came before the Court of Petty Sessions on a number of occasions. On 29 April 1999, he was granted legal aid. On 7 May 1999, represented by a solicitor, he pleaded not guilty to possession of the prohibited drug. He was remanded until 4 June 1999 when he was again remanded until 2 July 1999 for an "election date". On 2 July 1999 he elected to have a preliminary hearing of the charge; on 30 July 1999 he was further remanded until 31 August 1999. On the latter date, he was again remanded to 30 September 1999 when there was a remand until 29 October 1999. He was then remanded until 17 November 1999 for the preliminary hearing of the charge.

32 Meanwhile on 28 June 1999, an approved analyst had analysed and identified the tablets found in the appellant's travel bag. The analyst found that they were speed tablets and not ecstasy tablets. Despite this fact, the particulars of the charge were not changed until 12 January 2000 when the appellant was sentenced.

33 Sometime before 10 November 1999, the solicitor acting for the appellant received a copy of the analyst's certificate. On that day, she wrote to the Director of Public Prosecutions. After referring to the matter being listed "for a preliminary hearing in relation to a charge of possession of MDMA with intent to sell and supply" – MDMA being a synonym for ecstasy – she wrote:

> "In relation to the charge, I confirm that Mr Cameron wishes to enter a plea of guilty to the charge of possession of a prohibited drug with intent to sell and supply.
>
> For this purpose, please can you have Mr Cameron's matter listed in the video Court in the Perth Court of Petty Sessions on Wednesday 16 November 1999, agreed upon for Mr Cameron to enter a plea of guilty.
>
> However, I would be grateful if your office could please determine whether or not they are of the opinion that the appropriate particular is possession of MDMA, as the analysts (sic) certificate indicated the following:
>
> …
>
> Given the analyst (sic) certificate, it's submitted that the complaint as it's currently drafted is incorrect and should be amended to properly reflect the drug which was in Mr Cameron's possession."

34 The appellant came before the District Court on 12 January 2000 for sentence. The indictment was amended on that day to identify the prohibited drug as "speed". The appellant did not give evidence. However, Mr Hogan, his counsel, said:

> "I would ask your Honour to treat that as the earliest possible opportunity; to give him credit as if this were a fast-track plea of guilty. The position is that the tablets were characterised as ecstasy as mentioned in the statement of material facts and on the complaint form ... That amendment was made on the election date so that he was able then to plead guilty. He couldn't plead guilty up until then.
>
> BLAXELL DCJ: So previously that chemical was ecstasy, was it?
>
> HOGAN, MR: Yes. In the complaint form it's said to be ecstasy. I presume because when police charge people straightaway they do their own screening test, whatever one calls it, and they take their best guess, but then it turns out of course it's, as the indictment says, methylamphetamine, *so he wasn't able to plead guilty until the election date and then he did.* That's why I'm asking your Honour to treat it as if it was a fast-track and give him full credit for that.
>
> There would be no doubt that if he had been charged that way in the beginning that's what he could have pleaded guilty to." (emphasis added)

35 Later, Mr Hogan referred to a psychiatric report concerning the appellant "to the effect that his drug use now includes ecstasy and amphetamine".

36 The "fast-track plea of guilty" referred to by Mr Hogan is a procedure that the Director of Public Prosecutions for Western Australia told us was unique to that State. When a charge cannot be dealt with summarily, s 100 of the *Justices Act* 1902 (WA) requires the prosecution to serve certain materials on the defendant. They include "a statement of the material facts relevant to the charge", copies of material in the possession of the prosecution that contain evidence of statements made by the defendant and notices of the existence of recordings. If, after service of this material, the defendant pleads guilty, s 101 of the *Justices Act* requires the justices to commit the defendant for trial and, as soon as possible, forward the papers to the Attorney-General or person appointed to present indictments.

The Court of Criminal Appeal

37 In the Court of Criminal Appeal, Pidgeon J gave the leading judgment. His Honour said[11]:

> "It was submitted to this Court that it was not possible for him to enter that plea till the charge had been amended. For my part I do not

---

11 *Cameron v The Queen* [2000] WASCA 286 at [14]-[16].

consider that that is the situation. The charge when first brought had the element of being a prohibited drug and if it contained the wrong drug, it would still have been open to the applicant at a much earlier stage to indicate that he did have a prohibited drug but it was methylamphetamine and not ecstasy. It is simply that the particulars were wrong.

The particulars refer to a drug of equal seriousness so I see no difficulty to his pleading guilty earlier and it did not save the administration of justice to have the number of remands that there were and to have time set aside for the preliminary hearing. So at that stage in the Court of Petty Sessions there was not a saving to the administration of justice.

There was an undoubted saving to the administration of justice as far as the District Court was concerned because one of the objects of the fast-track is to indicate at the earliest stage to a Court what is to be a plea and it is not going to be a trial. That is a significant saving for which credit must be given. So we have the situation where there was no saving in the Magistrates Court, there was an important saving of time and administration in the District Court."

38 Pidgeon J went on to say[12]:

"His Honour, with those factors before him, made the reduction of 1 year and the question is – and I see it as a difficult question – whether that is sufficient. In the circumstances of this case I do not consider precedents are of any assistance. It is a matter of judgment that must be made on the facts but it is important that the credit is a meaningful and recognised credit and not just a nominal credit. Percentages are not always easy, particularly when the term is a higher one, because percentages then reach a higher figure when they might not necessarily have much meaning to them. It was a reduction of 10 per cent.

In the end when one sees the factors before his Honour, the plea being the only mitigating circumstance, the absence of remorse, the fact that there was no earlier cooperation in the Court of Petty Sessions but an important cooperation in the District Court, the question is whether his Honour was in error in limiting the credit to 1 year. It is, I feel, a credit of some significance.

Weighing up all the factors and the fact that his Honour was the sentencing judge, I am not persuaded that his Honour was wrong in not making a greater credit than he did, having regard to the number of

---

12 *Cameron v The Queen* [2000] WASCA 286 at [19]-[21].

> negative factors and I do not want to detract from the positive factor, but having regard to the other negative factors, I am not persuaded that his Honour is wrong."

The trial judge did not err in discounting the sentence by only 10%

39 Australian courts have enthusiastically embraced the proposition that a person who pleads guilty should receive a lesser sentence than one who pleads not guilty and is convicted. In so far as a plea of guilty indicates remorse and contrition on the part of the defendant, the courts have long recognised it as a mitigating factor of importance[13]. But in recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present[14]. They have taken the pragmatic view that giving sentence "discounts" to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty[15].

40 State legislatures have also encouraged their courts to give discounts to defendants who plead guilty. On moving the Second Reading Speech of the Bill for the *Crimes Legislation (Amendment) Act* 1990 (NSW), for example, the Attorney-General for that State said that the aim of the Bill was "to provide appropriate encouragements to those who are guilty of an offence to plead guilty to that offence[16]." The Attorney went on to say[17]:

---

13 *R v Shannon* (1979) 21 SASR 442; *R v Holder* [1983] 3 NSWLR 245; *R v Morton* [1986] VR 863.

14 *Winchester* (1992) 58 A Crim R 345 at 350; *Verschuren v The Queen* (1996) 17 WAR 467 at 473; *Atholwood* (1999) 109 A Crim R 465 at 467; *Kalache* (2000) 111 A Crim R 152; *Pop v The Queen* [2000] WASCA 283; *Aconi v The Queen* [2001] WASCA 211.

15 *R v Shannon* (1979) 21 SASR 442 at 448, 451; *R v Morton* [1986] VR 863 at 867; *Dodge* (1988) 34 A Crim R 325 at 331; *Winchester* (1992) 58 A Crim R 345 at 350; *Atholwood* (1999) 109 A Crim R 465 at 467.

16 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 April 1990 at 1689.

17 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 April 1990 at 1690.

> "Even where the Crown case is strong and a guilty plea may be thought to be inevitable, it will usually be appropriate to reduce the sentence to take account of the plea of guilty because the State has been saved the expense of a trial, witnesses have been spared the necessity of attending court and giving evidence, and police have been able to better carry out their duty of protecting the community."

41 The result is that a person who pleads guilty at the earliest possible time almost always obtains a shorter sentence than a person who pleads not guilty and is convicted. The courts are well aware that it "is impermissible to increase what is a proper sentence for the offence committed in order to mark the court's disapproval of the accused's having put the issue to proof or having presented a time-wasting or even scurrilous defence[18]." But the courts maintain that the accused who pleads not guilty is not being punished and given an increased sentence for pleading not guilty. Rather, the accused who pleads guilty merely gets a lighter sentence than he or she otherwise deserves. The subtlety of this scholastic argument has not escaped criticism from those who see legal issues in terms of substance rather than form. In *Shannon*[19], Cox J said that a defendant "will need a very subtle mind, unusually sympathetic to the ways of the law" to accept this argument. And, speaking extra-judicially, Pincus J has said that "people are being punished for insisting on a trial, at least in the sense that they may receive a longer sentence if they plead not guilty than they would if they pleaded guilty[20]." In earlier cases[21], I have criticised the two-tiered approach to sentencing which requires or permits a judge to select a sentence by reference to objective factors and then to discount that sentence by percentages to take into account other factors relevant to the accused. However, neither party criticised that approach in this case. They fought the case on the issue of whether the judge had erred in giving only a 10% discount and whether the Court of Criminal Appeal had erred in upholding the sentence.

---

18 *R v Shannon* (1979) 21 SASR 442 at 445.

19 (1979) 21 SASR 442 at 458-459.

20 Pincus, "Court Involvement in Pre-trial Procedures", (1987) 61 *Australian Law Journal* 471 at 477.

21 *AB v The Queen* (1999) 198 CLR 111 at 120-123 [13]-[19]; *Ryan v The Queen* (2001) 75 ALJR 815 at 819 [17]; 179 ALR 193 at 197. See also *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; *AB v The Queen* (1999) 198 CLR 111 at 156 [115] per Hayne J.

42 Like other Australian courts, the Western Australian courts give substantial discounts to those who plead guilty even when the plea is not accompanied by any remorse or contrition. In *Atholwood*[22], Ipp J said:

> "A bare plea of guilty (that is, a plea that is not accompanied by genuine remorse), even when made at the last moment, is a mitigating factor as it avoids the expense of a defended trial, inconvenience to witnesses and delay to other cases in the list. This is so even when the case of the prosecution is strong …"

43 Under the fast-track system, the discount in Western Australia "is often of the order of somewhere between 20 to 25 per cent and 30 to 35 per cent[23]."

Federal jurisdiction

44 It is, however, one thing for courts, exercising State jurisdiction, to give a discount for a bare plea of guilty even though it results in persons who plead guilty receiving shorter sentences than persons in similar circumstances who plead not guilty. But it is another matter whether, consistently with the exercise of the judicial power of the Commonwealth, courts exercising federal jurisdiction can give "discounts" in such cases. If there is one principle that lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory. To deny that proposition is to deny that equal justice under the law is one of the central concerns of the judicial power of the Commonwealth. And it is at least arguable that it is relevantly discriminatory to treat convicted persons differently when the *only* difference in their circumstances is that one group has been convicted on pleas of guilty and the other group has been convicted after pleas of not guilty. As Gaudron, Gummow and Hayne JJ pointed out in *Wong v The Queen*[24]:

> "Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect." (emphasis in original)

45 Where the facts and circumstances of crimes and the subjective factors of those who commit them are the same, arguably equal justice requires that there

---

22 (1999) 109 A Crim R 465 at 467.

23 *Stretton v The Queen* unreported, Court of Criminal Appeal of Western Australia, 1 June 1995 per Malcolm CJ. See also *De Luce v The Queen* unreported, Court of Criminal Appeal of Western Australia, 19 July 1996; *Verschuren v The Queen* (1996) 17 WAR 467 at 469.

24 (2001) 76 ALJR 79 at 92 [65]; 185 ALR 233 at 250.

be an identity of, and not different, outcomes in the punishments that they receive. That the State and others may be advantaged by a plea of guilty is arguably not a relevant difference in cases where the plea of guilty throws no light on the contrition, remorse or future behaviour of the defendant.

46 The appellant in this case was sentenced in the exercise of federal jurisdiction. By reason of s 52(i) of the Constitution[25], no law of Western Australia applied of its own force at Perth Airport. And it was at Perth Airport that the appellant was charged with possession of the prohibited drug. However, by the operation of ss 3 and 14 of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth), s 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA) – under which the appellant was charged – operated within the boundaries of the airport as surrogate federal law. In sentencing the appellant, the District Court was therefore exercising federal jurisdiction and the judicial power of the Commonwealth although that fact seems to have escaped notice until the case reached this Court.

47 Despite the case being in federal jurisdiction, the Director of Public Prosecutions for Western Australia declined to take any point that the appellant was not entitled to a discount for the bare plea of guilty. Perhaps he thought that the point was not arguable. Perhaps he would not like to undermine a system that helps clear the lists and has the other pragmatic advantages to which I have referred. Whatever the reason, the case was argued, and must be decided in this Court, on the basis that in Western Australia a person who pleads guilty as soon as practicable is entitled to have the otherwise appropriate sentence substantially "discounted". Determining whether the discount principle applies in federal jurisdiction must therefore be left for another day. Given the advantages that the prosecution authorities see in the discount system, a challenge to the applicability of that system in federal jurisdiction will probably have to come from a person who has been sentenced after being convicted on a plea of not guilty. If such a person has been denied the discount received by those pleading guilty, the sentence may be arguably discriminatory in a relevant sense.

---

25 "**Exclusive powers of the Parliament**

52. The parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;"

The failure to plead was not motivated by the terms of the charge

48 The appellant did not give evidence. Consequently, there was no direct evidence:

- that he appreciated the nature of the drug that was identified under its pharmacological name in the original charge;

- that he erroneously believed that possession of ecstasy was a more serious offence than possession of amphetamines;

- that he had seen and understood the significance of the analyst's report which described the result of the analysis by reference to the pharmacological contents of the tablets;

- that the change in the particulars of the prohibited drug had induced him to plead guilty; or

- that he had originally pleaded not guilty only because he did not wish to plead guilty to possession of ecstasy.

49 Nor did the appellant's counsel say that his client had instructed him that he had pleaded not guilty only because of the terms of the charge. Mr Hogan appears to have chosen his words carefully, saying only "but then it turns out of course it's, as the indictment says, methylamphetamine, *so he wasn't able to plead* guilty until the election date and then he did". (emphasis added)

50 Nor, given the appellant's case, is it likely that the particulars of the drug were responsible for his original plea and his change of plea. From the beginning, he denied knowing that he was carrying drugs. Even on sentence, his counsel appears to have been submitting that the appellant was unaware that he was carrying drugs to Perth. Early in his submissions, Mr Hogan said to Blaxell DCJ:

> "Can I go first to the matter which arises in all of the reports; that is, a denial of knowledge of the contents of the travel bag? That of course isn't the case as demonstrated by his understanding plea of guilty."

But Mr Hogan went on to submit:

> "Those tablets were in fact put into his bag, yes, at the airport I think in Sydney; that's his hand baggage that goes onto the aircraft with him. *He didn't see them, have a look at them, and everything he did was on the basis of not asking, not looking but knowing*, so the less that was said the

> better. He knew the person. The person travelled with him. The person got off the aircraft with him. That person passed through and then police stopped him, and that person doesn't need to be mentioned." (emphasis added)

On this version, the appellant was an innocent patsy, doing a good turn for a friend or acquaintance – although perhaps suspecting that he was carrying some form of contraband.

51 The facts of the case put a rather different complexion on the appellant's journey from Sydney to Perth and the reason for it than this version suggests. The facts included travelling under a false name "to visit friends", having a piece of plastic in his clothing that matched the plastic in which the drugs were wrapped, claiming to have made a spur of the moment decision to buy a one-way ticket with cash at Sydney airport and arriving in Perth with $1.25 in his pocket. But whatever conclusion is reached concerning the appellant's knowledge of the tablets, nothing before the sentencing judge indicated that his delay in pleading guilty was induced by the particulars of the prohibited drug.

52 The terms of the letter from the appellant's solicitor to the Director of Public Prosecutions confirm that the particulars of the drug were not a factor that influenced the course that the appellant took. After stating that the appellant "wishes to enter a plea of guilty", the solicitor asked "if your office could please determine whether or not they are of the opinion that the appropriate particular is possession of MDMA". The contents of this letter indicate that the identity of the prohibited drug was not a factor that influenced the appellant's plea. Given the terms of the letter, it is impossible to conclude that the appellant would have again wished to plead not guilty if the charge had remained in its original form.

53 In my opinion, it was open to the sentencing judge to conclude that this was not the usual fast-track case and did not call for a "discount" somewhere in the range of "between 20 to 25 per cent and 30 to 35 per cent"[26]. Given the evident lack of remorse and contrition on the part of the appellant, a "discount" at the bottom of the range would have been appropriate even if the case was within the fast-track paradigm. The essence of the charge was possession of a prohibited drug, and it was open to the sentencing judge to conclude – although he made no express finding on the point – that the particulars of the charge were not an operative factor in the course that the appellant followed. The appellant was obviously an intelligent person who had "commenced university on two

---

26 *Stretton v The Queen* unreported, Court of Criminal Appeal of Western Australia, 1 June 1995; *De Luce v The Queen* unreported, Court of Criminal Appeal of Western Australia, 19 July 1996; *Verschuren v The Queen* (1996) 17 WAR 467 at 469.

occasions to study economics and accounting" and who knew from his own drug use the difference between ecstasy and amphetamines. And as Pidgeon J pointed out in his reasons, it was open to the appellant much earlier than 10 November 1999 – almost six months after the charge – to plead guilty. In these circumstances, the sentencing judge was entitled to hold that the public interest in avoiding the expense and inconvenience of a District Court trial warranted a discount of no more than 10%.

54 In my opinion, the Court of Criminal Appeal did not err in refusing to intervene.

Order

55 The appeal should be dismissed.

56 KIRBY J. This is another appeal[27] concerning principles of sentencing. Specifically, it relates to the discount applicable to the sentence of an accused person where that person pleads guilty at the first reasonable opportunity after the charge is accurately specified by the prosecution.

The facts

57 In April 1999, Mr John Cameron ("the appellant") was apprehended at Perth Airport following a flight from Sydney. A search disclosed that he had in his possession a large quantity of tablets that police believed contained prohibited drugs. He was interviewed. He made no admissions. He was charged on a complaint alleging that he "[h]ad in his possession a Prohibited Drug namely 3, 4 Methylenedioxy-n, Alphadimethylphenylethyl-Amine with Intent to Sell/Supply" contrary to the *Misuse of Drugs Act* 1981 (WA)[28]. The identified drug is commonly known as "ecstasy."

58 The appellant was remanded in custody. He did not immediately indicate that he would plead guilty. The tablets were sent for chemical analysis. As the analysis was to show, although the tablets did in fact contain a prohibited drug, the drug nominated in the complaint was incorrect. The tablets contained methylamphetamine (commonly known as "speed").

59 In July 1999, before the chemical analysis was completed, the appellant elected in favour of a preliminary hearing. This was listed to occur on 17 November 1999. In the meantime, there were a number of "cycle" remands ordered in hearings conducted by videolink from the prison where the appellant was held. In due course (it can be inferred) the certificate of chemical analysis came to the attention of Legal Aid (WA) who were acting for the appellant. On 10 November 1999 they wrote to the Director of Public Prosecutions ("DPP") submitting that the complaint against the appellant should be amended "to properly reflect the drug" that had been found in the appellant's possession. They requested that the matter be listed to amend the charge. The complaint was duly amended. The appellant immediately signified a plea of guilty to the amended charge. The arrangements for the preliminary hearing were vacated. The appellant was again remanded in custody to await sentence.

---

27 From the Court of Criminal Appeal of Western Australia: *Cameron v The Queen* [2000] WASCA 286.

28 s 6(1)(a).

60 In January 2000, in the District Court of Western Australia, Blaxwell DCJ sentenced the appellant to nine years imprisonment to commence from the date on which he originally went into custody. His Honour stated that, because of the plea of guilty, he had reduced the sentence from what otherwise the appellant "could have expected", namely ten years imprisonment. Accordingly, the discount for the plea amounted to one of 10%.

61 In Western Australia a "fast-track" procedure for sentencing offenders who plead guilty has been in operation for some time. It is described in judicial decisions[29]. It represents an elaboration of statutory provisions that permit the expedition of the sentencing of a defendant who pleads guilty[30]. By the "fast-track" procedure, a "significant discount" is afforded for those who, "at the earliest opportunity available to him or her" indicate a desire to acknowledge their guilt[31]. It was common ground that this discount is normally between 20 and 35% of the sentence otherwise applicable[32].

62 The appellant sought leave to appeal against his sentence to the Court of Criminal Appeal of Western Australia. His first ground, that the sentence was manifestly excessive, was abandoned. But his second ground was pressed. It is the subject of his appeal to this Court. It complains that the sentencing judge erred in providing insufficient credit for the guilty plea.

63 The Court of Criminal Appeal rejected this submission. The reasons of that Court were given by Pidgeon J (with the concurrence of Ipp and Owen JJ) [33]. As McHugh J has extracted the essential passages in his reasons, I will not repeat them but incorporate them by reference.[34]

---

29 cf *Verschuren v The Queen* (1996) 17 WAR 467 at 474. The procedure followed a report of the Criminal Practice and Procedure Review Committee established by the Chief Justice of Western Australia.

30 *Justices Act* 1902 (WA) ss 100-101.

31 *Verschuren v The Queen* (1996) 17 WAR 467 at 475.

32 *Salaminah Radebe v The Queen* [2001] WASCA 254 at [21] per McKechnie J, Malcolm CJ and Anderson J concurring, referring to authorities in Western Australia including *Trescuri v The Queen* [1999] WASCA 172.

33 [2000] WASCA 286 [14]-[15].

34 Reasons of McHugh J at [37]-[38].

64 After noting that there had been no original admission nor any real indication of remorse and that percentages were "not always easy, particularly when the term is a higher one", Pidgeon J concluded that no error on the part of the sentencing judge had been shown. The application for leave to appeal was dismissed. By special leave, the appellant now appeals to this Court.

The applicable sentencing principles

65 This Court has recognised that a plea of guilty is ordinarily a consideration to be taken into account in mitigation of punishment and reduction of the sentence that would otherwise have been imposed on a prisoner[35]. By reference to established authority, it is possible to elaborate this principle so that it may be understood in context and more easily applied to varying circumstances:

(1) In all States and Territories[36], and in respect of federal offences[37], legislation addresses in various ways the approach to be adopted, and procedures to be followed, where a person is to be sentenced who has pleaded guilty to a criminal charge. It is the first obligation of the sentencing judge to conform to such legislation[38]. No rule of the common law, nor any judicial practice, may contradict valid legislative prescriptions[39].

(2) To the extent that common law sentencing principles elaborate statutory provisions, they operate within a context that recognises the need for appellate courts to respect the discretion belonging to a sentencing judge[40]. Sentencing is not a mathematical exercise, apt to be reduced to fixed

---

35 *Siganto v The Queen* (1998) 194 CLR 656 at 663-664 [22]-[23].

36 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 22; *Sentencing Act* 1991 (Vic) s 5(2)(e); *Penalties and Sentences Act* 1992 (Q), s 13; *Criminal Law (Sentencing) Act* 1988 (SA), s 10(g); *Sentencing Act* 1995 (WA), s 8(2); *Crimes Act* 1900 (ACT), s 429A(1)(u); *Sentencing Act* (NT), s 5(2)(j).

37 *Crimes Act* 1914 (Cth), s 16A(2)(g).

38 *Thomson and Houlton* (2000) 115 A Crim R 104 at 107 [11].

39 *Wong v The Queen* (2001) 76 ALJR 79 at 92-93 [67]-[73], 103-107 [118]-[140], 112 [167]; 185 ALR 233 at 250-252, 265-271, 278.

40 *Ryan v The Queen* (2001) 75 ALJR 815 at 826 [61]; 179 ALR 193 at 208; cf *R v Shannon* (1979) 21 SASR 442 at 453 per Wells J (diss).

formulas and equations[41]. Unless specifically authorised by legislation, no principle or guideline could be adopted that obliged the application of a rigid approach or an unchanging discount for a plea of guilty. In each case, it is necessary for the sentencing judge to take such a plea into account but having regard to all the circumstances. It is not the law that a sentencing judge *must* exercise a discretion to provide a given reduction in sentence for a plea of guilty. If a reduction is properly available, the sentencing judge may provide for it in the course of performing the complex task of imposing criminal punishment[42].

(3) The provision of a discount for a plea of guilty must not be, or appear to be, a judicial discouragement to an accused person against exercising rights to silence conferred by law or the right to put the prosecution to the proof of criminal accusations. An accused who insists upon such rights must not be penalised. An accused must not have the sentence increased to mark the sentencing judge's conclusion that the prisoner has wasted the court's time or the public's resources by insisting on a trial[43]. Yet, necessarily, reliance on such rights will deprive the accused of any mitigation that might otherwise have resulted from a plea of guilty[44]. Judges have acknowledged "a certain illogicality"[45] in these distinctions. Nevertheless, such distinctions have been endorsed by this Court[46]. Although they have been said to border on the "metaphysical"[47], they reflect a difference between permissible and impermissible judicial approaches[48]. They discourage inappropriate judicial involvement in plea bargaining that could dissuade a prisoner from exercising his or her legal

---

41 cf *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]; *Ryan v The Queen* (2001) 75 ALJR 815 at 821 [33]; 179 ALR 193 at 201.

42 *R v Gray* [1977] VR 225 at 229.

43 *R v Richmond* [1920] VLR 9 at 12, per Cussen J.

44 *Shannon* (1979) 21 SASR 442.

45 *Shannon* (1979) 21 SASR 442 at 445.

46 *Siganto* (1998) 194 CLR 656 at 663-664 [22].

47 *JCW* (2000) 112 A Crim R 466 at 468-469 [16]-[22].

48 *R v Hansen* [1961] NSWR 929 at 931 per Evatt CJ and Ferguson J; *R v Gray* [1977] VR 225 at 229; *Shannon* (1979) 21 SASR 442 at 449.

rights[49]. They alert judges to the susceptibility of prisoners generally (and some categories, such as Aboriginal prisoners, in particular[50]) to pressure to induce them, even if innocent, to plead guilty. And they restrict excessive discounts for a plea of guilty that could indeed undermine the accusatorial feature of our criminal justice system[51].

(4) The discount for a plea of guilty to the charge brought against the accused is to be distinguished from a discount for a spontaneous and immediate expression of remorse conducive to reform and for immediate cooperation with investigating police. The latter has always been treated as deserving of such recognition in the sentencing of an accused[52]. In many cases such feelings of repentance will continue and manifest themselves in an early plea of guilty that is adhered to at the trial. Obviously, the timing of any plea of guilty has a large bearing on the credit that should be given to the prisoner[53]. A plea of guilty at the last moment (as on the day set down for the trial) will ordinarily attract a smaller discount in sentence than one that is entered at the first reasonable opportunity[54]. But even a belated plea will normally attract a discount.

(5) In some of the older judicial authorities, the chief or the only basis advanced for a discount for a plea of guilty was that it evidenced contrition, repentance and remorse on the part of the prisoner[55]. The basis for affording a discount in a sentence on this footing was the oft stated belief that such a response indicated the intention of the prisoner to reform and not to re-offend[56]. To that extent, remorse could vindicate one of the

---

49 *Shannon* (1979) 21 SASR 442 at 447-448 citing Cross, *The English Sentencing System*, 2nd ed (1975) at 105.

50 *Thomson and Houlton* (2000) 115 A Crim R 104 at 107-108 [12].

51 *Shannon* (1979) 21 SASR 442 at 449.

52 eg *James and Sharman* (1913) 9 Cr App R 142; *R v Caust* [1936] SASR 170; *Shannon* (1979) 21 SASR 442 at 450; *Heferen* (1999) 106 A Crim R 89 at 92 [12].

53 *R v Holder* [1983] 3 NSWLR 245; *R v Bulger* [1990] 2 Qd R 559.

54 cf *Dodge* (1988) 34 A Crim R 325 at 331; *Heferen* (1999) 106 A Crim R 89 at 92 [12]; *Thomson and Houlton* (2000) 115 A Crim R 104 at 134 [132].

55 See eg *Shannon* (1979) 21 SASR 442 at 454 per Wells J (diss); see eg *R v Tiddy* [1969] SASR 575 at 579.

56 cf *Atholwood* (1999) 109 A Crim R 465 at 467 [9].

> basic purposes of the system of criminal justice. Cases do exist where, upon apprehension, a prisoner expresses genuine and believable regret. However, judges have lately expressed doubt as to the extent to which pleas of guilty really proceed from such motives[57]. In a prisoner who has been caught red-handed[58], the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime. In the present case, Pidgeon J correctly observed[59] that it was difficult for the appellant to be treated as truly remorseful when a considered decision had been made by him to bring such a large quantity of drugs into Western Australia. No doubt some suppliers of prohibited drugs view themselves (as suppliers of non-prohibited but regulated drugs and formerly prohibited goods and services now do) as simply serving a market that is rendered illegal by outmoded laws. At least in this context, much of judicial writing about remorse is somewhat unrealistic. The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount. Nevertheless, where genuine remorse is established to the satisfaction of the sentencing judge, it may be in the public interest to mitigate punishment further as a reinforcement for the prisoner's resolve to avoid repetition of such conduct in the future and as an example to others. However, "remorse" is not, as such, a precondition for the provision of a discount for a plea of guilty. There are other features of the public interest that need to be given weight[60].

The consideration of the public interest

66 The main features of the public interest, relevant to the discount for a plea of guilty, are "purely utilitarian"[61]. They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken[62]. It also involves a saving in costs that must

---

57 *Shannon* (1979) 21 SASR 442 at 452.

58 *Heryadi* (1998) 98 A Crim R 578 at 584.

59 [2000] WASCA 286 [17].

60 *R v Perry* [1969] QWN 17; *Shannon* (1979) 21 SASR 442 at 445-446; *R v Gray* [1977] VR 225; *Verschuren* (1996) 17 WAR 467 at 473.

61 *Winchester* (1992) 58 A Crim R 345 at 350.

62 *Shannon* (1979) 21 SASR 442 at 447; *Atholwood* (1999) 109 A Crim R 465 at 467 [9].

otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service[63]. Even a plea at a late stage, indeed even one offered on the day of trial or during a trial, may, to some extent, involve savings of all these kinds.

67 Given that under our criminal justice system it is the right of the accused to put the State to the proof of the crime charged; given that by pleading guilty the accused surrenders any chance of being acquitted, even undeservedly; and given some empirical evidence that sentences following contested trials are not always substantially different from sentences upon a plea[64], it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held[65]. It also encourages the clear-up rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws[66]. A plea of guilty may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered[67]. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence.

68 All of the foregoing are reasons why it is normally in the public interest to encourage a plea of guilty to a criminal charge whilst recognising, in its "full strength", the rule that the accused is entitled to plead not guilty, to put the prosecution to the proof and cannot be punished more severely for having exercised these rights. The considerations that I have mentioned are not separate categories, or sub-rules, of the applicable principle. They are merely illustrations of aspects of the public interest to which the law of sentencing pays regard following a plea of guilty.

---

63 *Thomson and Houlton* (2000) 115 A Crim R 104 at 134 [131].

64 *Thomson and Houlton* (2000) 115 A Crim R 104 at 112-113 [33]-[39].

65 *Shannon* (1979) 21 SASR 442 at 448.

66 *Ryan* (2001) 75 ALJR 851 at 831 [93]; 179 ALR 193 at 215; *Simpson* (1993) 68 A Crim R 439; *Doyle* (1994) 71 A Crim R 360.

67 *Ryan* (2001) 75 ALJR 815 at 831 [93]; 179 ALR 193 at 215.

Two controversial questions

69 *Transparency of the discount:* In this Court, there has been something of a controversy about whether it is appropriate, in sentencing, to proceed explicitly by way of a "two-stage approach" or not. In Victoria, the courts have long been hostile to this notion[68]. Subject to overriding statutory obligations, they have favoured what is described as the "instinctive synthesis" of factors resulting in a single "appropriate sentence"[69].

70 The latter view has been propounded in this Court on a number of occasions by Hayne J[70]. His Honour has attracted the support of McHugh J[71] and perhaps others[72]. With respect, I remain of the opinion that where a "discount" for a particular consideration relevant to sentencing is appropriate, it is desirable that the fact and measure of the discount should be expressly identified[73]. Unless this happens, there will be a danger that the lack of transparency, effectively concealed by judicial "instinct", will render it impossible to know whether proper sentencing principles have been applied. Moreover, if the prisoner and the prisoner's legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in proper cases, although this is in the public interest as I have shown. Knowing that such a discount will be made represents one purpose of such discounts. Unless it is known it may not be possible for an appellate court to compare the sentence imposed with other sentences for like offences or to check disputed questions of parity[74].

---

68 *O'Brien* (1991) 55 A Crim R 410; *R v Williscroft* [1975] VR 292 at 300.

69 *Tierney* (1990) 51 A Crim R 446 at 448.

70 See eg *AB v The Queen* (1999) 198 CLR 111 at 156 [115]-[116].

71 *AB v The Queen* (1999) 198 CLR 111 at 121-122 [15]-[18]. See also the other cases referred to in the reasons of McHugh J at [41].

72 cf *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]; *Wong v The Queen* (2001) 76 ALJR 79 at 93-94 [76]; cf at 99 [101]; 185 ALR 233 at 252-253; 260-261.

73 *AB v The Queen* (1999) 198 CLR 111 at 148-149 [99]-[100]; *Wong v The Queen* (2001) 76 ALJR 79 at 99-100 [101]-[103]; 185 ALR 233 at 260-261; cf *R v McDonnell* [1997] 1 SCR 948 at 986-988 [57]-[61] cited by Gleeson CJ in *Wong v The Queen* (2001) 76 ALJR 79 at 83 [11]; 185 ALR 233 at 237.

74 cf *Thomson and Houlton* (2000) 115 A Crim R 104 at 128 [99] citing *R v Gallagher* (1991) 23 NSWLR 220 at 227-228.

71 The difference that has emerged in this Court on this question may be one of semantics rather than of substance[75]. However that may be, in my view it is desirable, and certainly permissible, by the common law, for a judge to identify the measure of the discount which he or she has allowed for a plea of guilty. If that means that a "two-stage approach" is involved, including identification of the primary and then the discounted sentence, I regard it as inherent in the provision of an identifiable discount for such a plea. No such discount can be reduced to a set formula. Elements of intuition and judgment remain to be given weight in arriving at the aggregate sentence finally imposed.

72 In the present case, it is unnecessary to explore this issue further. This is because the sentencing judge (and the Court of Criminal Appeal) clearly identified the sentence that would have been imposed but for the plea of guilty and the discount considered proper to the appellant's case. However, it is appropriate to observe that, effectively, this appeal would not have been possible (and a miscarriage of justice might have been irreparably masked) had the sentencing judge contented himself with stating generally that he had taken the plea of guilty into account and simply announced his "instinctive synthesis" represented by the sentence of nine years imprisonment. The appeal would have been without redress.

73 The appeal therefore reveals the need for "two stages" and the general importance of transparency in judicial reasons for sentence. The history of administrative law in the past quarter century has seen a retreat from unaccountable decision-making. In the context of the higher duty of judges to state reasons that facilitate the judicial process[76], considerations important to judicial orders should likewise be revealed for the scrutiny of the litigants, the public and the appellate process. They should not be hidden in judicial formulae about "instinct".

74 *Earliest reasonable opportunity:* Correctly, the Court of Criminal Appeal regarded it as important to the quantification of the discount that it was open to the sentencing judge to impose on the appellant, to have regard to the time that the appellant pleaded guilty in comparison with the "much earlier stage" when it was felt he could have indicated his guilt[77]. What is the principle that applies in

---

75 *Tierney* (1990) 51 A Crim R 446 at 448; *R v Nagy* [1992] 1 VR 637 at 645-646.

76 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 277-281; *Thomson and Houlton* (2000) 115 A Crim R 104 at 113-114 [42].

77 [2000] WASCA 286 [14].

this regard? In my view, it was correctly stated by Ipp J in an earlier decision of the same court in *Atholwood*[78]. There, his Honour emphasised the need to examine closely the circumstances preceding the plea of guilty in order to reach a conclusion as to the credit for the plea proper to the circumstances. As the passage from Ipp J's reasons is set out in the joint reasons of Gaudron, Gummow and Callinan JJ, I will not repeat it.[79]

75 The Court of Criminal Appeal ought to have applied the approach in *Atholwood* to the present appellant's application. Nothing in the applicable legislation providing for expedited hearings of cases where the defendant pleads guilty[80] is inconsistent with that principle. Whilst the judicial practice of the "fast-track" system adopted in Western Australia would be better known to the judges of that State, because it lacks a statutory foundation I am unconvinced that it would warrant a different approach. The test is not the time when theoretically or physically a prisoner might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced. That question is to be answered in a reasonable way, not mechanically or inflexibly.

The Court of Criminal Appeal's decision miscarried

76 When the foregoing approach is applied to the circumstances of the present case, it is my opinion that the Court of Criminal Appeal fell into error in considering the appellant's application. No statute governed what the sentencing judge should do. He had a broad discretion. As he acknowledged, it was proper in the circumstances to provide a discount for the plea of guilty. The sole basis for refusing to apply what in Western Australia appears to be a fairly standard discount for an accused's plea of guilty (one involving a discount significantly larger than the 10%) was the view which the appellate judges formed about the value to be attributed to the appellant's plea in the circumstances having regard to its timing.

77 There are two errors in the reasons of the Court of Criminal Appeal. First, that Court suggested that it was open to the appellant to plead guilty although the particulars of the complaint were wrong. Whilst this was a theoretical or physical possibility, it was an unreasonable one. It involved imposing on the appellant an obligation to plead guilty to a complaint particularised by the

---

78 (1999) 109 A Crim R 465 at 467-468 [8]-[11].

79 Joint reasons at [21].

80 *Justices Act* 1902 (WA), ss 100, 101.

prosecution in terms that are now accepted to have been erroneous. Although it is suggested that the offence of having in his possession a prohibited drug remained unchanged, and that all that was altered was the identification of the drug concerned, it is no part of the function of a prisoner, or the prisoner's legal representatives, to frame the charge in the complaint or the particulars to that charge. This is something exclusively within the power and functions of the prosecution. Our criminal justice system is accusatorial. It is unreasonable to penalise an accused person for failing to plead guilty earlier to an incorrectly particularised charge.

78 From its early days, this Court has emphasised the importance of correct specification of the accusation against an accused[81]. Such particularisation is essential, amongst other reasons, so that any plea of guilty is rendered unequivocal, relates to the identified charge and thus provides the true foundation for subsequent sentencing[82]. The Court of Criminal Appeal suggested that the drugs (ecstasy and speed) were of equal seriousness. However, the applicant was not necessarily to know this. He was entitled to be informed, accurately, of the precise offence and particulars of the offence with which he was charged before being expected to plead. When this eventually occurred, he acted promptly. Indeed, it was he who, through his representatives, took the initiative to secure a change of the complaint.

79 Secondly, the suggestion by the Court of Criminal Appeal[83] that there was no saving to the administration of justice in the Court of Petty Sessions by virtue of the appellant's plea was, with respect, inaccurate. By pleading guilty before the preliminary hearing, it was possible to vacate immediately the day set aside for that purpose. Time of the magistrate was thereby saved. So was the time of the prosecutor and the Legal Aid representatives. The witnesses who would otherwise have been required at the preliminary hearing were no longer needed. Inconvenience and public cost were spared. These are all considerations which, in the public interest, it was proper for a sentencing judge to take into account in considering the discount that should be given for a plea of guilty, and in particular where such a plea has been entered as soon as it became reasonably practicable to do so.

80 There are many factors that can affect the fixing of that time when it is reasonable to expect that the accused person who intends to plead guilty will do

---

81 *Johnson v Miller* (1937) 59 CLR 467 at 488-489, 495-497.

82 *Maxwell v The Queen* (1996) 184 CLR 501 at 510-511.

83 [2000] WASCA 286 [15].

so. They include any delay on the part of the prosecution in finalising its charges; any delay in reasonable negotiations for a plea to a lesser charge; any difficulties that arise in securing adequate instructions from the accused, especially if the accused is in custody; any limitations on the resources of Legal Aid and its lawyers representing the accused; and the absence of a clearly stated and consistently applied discount for a plea on the part of sentencing judges[84]. The repeated, peremptory video remands of the appellant's case, whilst the chemical analysis was awaited, suggests (as this Court's experience permits it to infer) that facilities of effective legal assistance to a person in custody such as the appellant were limited. When he appeared in person to argue for the grant of special leave, the appellant told the Court that this was so. To penalise the appellant in sentencing for this lack of provision of alternative legal advice whilst in custody would work a double injustice upon him. Sentencing judges, and appellate courts, should be alert to the realities that govern the access by indigent prisoners to legal advice when determining a question such as that presented by these proceedings.

81 In his reasons McHugh J[85] refers to the excuses the appellant gave, after his apprehension, about the offence to which he later pleaded guilty. His Honour also refers to the many adjournments of the proceedings before the appellant's plea was proffered. So far as the first consideration is concerned, McHugh J considers it relevant that the applicant was "no patsy".[86] With respect, I regard each of these considerations to be irrelevant.

82 As to the first, the issue was not the innocence or guilt of the appellant or his subjective motives. By his plea the appellant accepted his guilt. In our system of criminal justice the issue is whether, according to the requisite standard, the prosecuting authority can prove that the accused was guilty *of the offence charged*. Until the prosecutor sorted out the accurate identity of the particulars of the charge it was presenting against the appellant, it was unreasonable for the prosecutor, or the court, to expect the applicant to plead guilty. Especially was this so because the charge as originally particularised was subsequently shown to have been inaccurate. Earlier excuses, defences, alibis and protests of innocence by the accused, true or false, are therefore immaterial

---

84 *Thomson and Houlton* (2000) 115 A Crim R 104 at 109 [19]-[22] citing Weatherburn and Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, (2000) and Mack and Anleu, *Pleading Guilty: Issues and Practices*, (1995) at 34.

85 Reasons of McHugh J at [48].

86 Reasons of McHugh J at [50].

to the issue under consideration. When apprehended, many criminal accused prevaricate. But the moment of truth does not really arise until the change is finally propounded. In this case, when that was done, the appellant pleaded guilty without delay. With respect, I believe that the approach by McHugh J treats the only consideration relevant to the discount as that of genuine remorse demonstrated by immediate acknowledgment of criminality. As I have shown, there are other considerations of the public interest that warrant a discount. Remorse, when present, is icing on the cake.

83 As to the multiple adjournments, they were made by consent and conducted by videolink from the prison where the appellant was being held in custody. The appellant was unrepresented. And the real reason for the adjournments was that both sides were waiting for the analyst's certificate, apparently delayed by resource considerations. Neither consideration mentioned alters my opinion.

84 Because error on the part of the Court of Criminal Appeal has been demonstrated, the orders of that Court must be set aside. It was accepted that, in this event, the matter would have to be returned to the Court of Criminal Appeal to reconsider the application before it and to resentence the prisoner conformably with the reasons of this Court. Such are the orders that I favour. However, before concluding my consideration of this appeal I wish to refer to three additional matters.

Three matters of detail

85 *Evidence on appeal:* In support of his argument, the DPP tendered an affidavit of a Crown Prosecutor disclosing the details of her inspection of the DPP's file in the appellant's case. The affidavit was reproduced in the appeal book. It sets out the contents of the file, the circumstances and date of the DPP's receipt of the chemical analysis of the tablets found in the appellant's possession and annexes a letter from Legal Aid confirming, immediately after receipt of the report of the analysis, the appellant's wish to enter a plea of guilty.

86 In accordance with the prevailing doctrine of this Court[87], this affidavit was not admissible. This Court has ruled that, in the exercise of its appellate jurisdiction, it may not receive any evidence whatever additional to the record of the courts below, however relevant and important, even critical. When, during argument, I pointed this out, it was suggested that the Court could receive the

---

87 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 297-299; *Eastman v The Queen* (2000) 203 CLR 1 at 11 [13], 24 [69], 34 [109], 52 [160], 63 [190], 97 [290]; cf 91 [273], 117-118 [356].

information in the affidavit as facts agreed between the appellant and the DPP. Both parties wished to rely on the chronology and detail contained in the affidavit which supplemented the Court's record in material respects.

87 I remain of the view that the exclusion of important new evidence in an appeal, in every appeal, is contrary to the requirements of the Constitution and apt to work injustice and to prevent the correction of miscarriages of justice in cases that are still before the Judicature. This case is yet another illustration of the inconvenience of the present rule. There is only one precedent that I know of for distinguishing between the evidence in the affidavit (which may not be received) and a statement of agreed facts (which may be). This is the supposed distinction between the use of a view of the locus of an event for the purpose of understanding the evidence given but not as evidence in the case[88]. Such fictions bring the law into disrepute. Conforming to the holding of this Court on this subject, I have entirely disregarded the DPP's affidavit and the evidence contained in it.

88 *Federal jurisdiction:* Helpfully, and correctly, the DPP drew to the Court's attention a question of jurisdiction that appears to have been overlooked in the courts below, including by the prosecution. The appellant's offence occurred at the Perth Airport. The DPP acknowledged, and it was accepted for the appellant, that this was a "Commonwealth place". By s 52(i) of the Constitution the Federal Parliament has, subject to the Constitution, "exclusive power to make laws for the peace, order, and good government … with respect to … all places acquired by the Commonwealth for public purposes". The Perth Airport is one such place. Accordingly, the *Misuse of Drugs Act*, under which the appellant was charged[89], was not applicable of its own force to the appellant's conduct.

89 However, in the present circumstances the *Commonwealth Places (Application of Laws) Act* 1970 (Cth)[90] has the effect of rendering applicable to the Perth Airport as "the applied provisions"[91], the corresponding provisions of the *Misuse of Drugs Act*. As a consequence, the proceedings charging the appellant with an offence against a law of a State, before the District Court of the State are, by force of the federal statute, "continued as though [the appellant] had

---

88 *Scott v Numurkah Corporation* (1954) 91 CLR 300 at 313 applying *London General Omnibus Co Ltd v Lavell* [1901] 1 Ch 135 at 139.

89 s 6(1)(a).

90 s 14.

91 Defined in the *Commonwealth Places Act*, s 3.

been charged with the corresponding offence under that part of the applied provisions"[92]. The DPP submitted that the relevant principles of sentencing contained in the *Sentencing Act* 1995 (WA) also applied to the case in the same way. I shall assume that that was so, although the matter was not fully argued. Nothing appears to turn on the provisions of that statute.

90 The relevance of the foregoing is that the courts of Western Australia, in sentencing the appellant and in disposing of his application for leave to appeal against his sentence, were exercising federal jurisdiction. This fact was not called to the notice of the courts involved in the earlier aspects of these proceedings.

91 Two questions arise. The first is whether there is any applicable federal legislation that governs the sentencing of the appellant that has likewise been overlooked. Provision, of a general character, with respect to sentencing principles, is made in the *Crimes Act* 1914 (Cth)[93]. However, those provisions apply only in respect of the determination of the sentence to be passed on a person "for a federal offence"[94]. That expression is defined to mean "an offence against the law of the Commonwealth"[95].

92 A consequential question arises as to whether the appellant's offence is for this purpose one against the *Misuse of Drugs Act* of Western Australia (which does not apply of its own force having regard to the place of the offence) or one against the *Commonwealth Places Act* of the Commonwealth (applying by its force the State law which is ousted by s 52(i) of the Constitution). This point has also not been argued. I am prepared to act on the basis that the appellant's offence remained one against a law of the State of Western Australia, picked up and applied as such by a federal law. This approach can be safely taken in the present appeal because, in any event, there appears to be nothing in the general sentencing principles of the federal Act that is inconsistent with the principles that have been stated concerning discounts for pleas of guilty applicable to a case within State jurisdiction[96].

---

92 *Holmes* (1988) 38 A Crim R 245 at 249, 253. See also *Judiciary Act* 1903 (Cth), ss 79, 80.

93 s 16A.

94 s 16A(1).

95 s 16(1), definition of "federal offence".

96 s 16A(2)(g) merely says that "In addition to any other matters, the court must take into account … (g) if the person has pleaded guilty to the charge in respect of the offence - that fact".

93 Secondly, an issue was raised in exchanges between the Court and counsel for the parties as to whether the case, being within federal jurisdiction, it was contrary to an implied constitutional principle of "legal equality" suggested in *Leeth v The Commonwealth*[97], to treat a person who pleads guilty to an offence more advantageously than a person who pleads not guilty.

94 Apart from observing that the status of the "general doctrine of legal equality" in this Court's jurisprudence is contentious and that, ordinarily, it has been propounded to advance, and not subtract from, the rights of vulnerable people, there are three reasons why the issue so raised should not be decided in this appeal. First, when proffered from the Bench, neither the appellant nor the DPP embraced it. It is not before the Court in a ground of appeal. Secondly, it raises a constitutional question. No notice has been given as required by the *Judiciary Act*[98]. Thirdly, and in any case, the proceeding in which it would be appropriate to consider any such argument would be one where a party propounding it is a prisoner who had suffered from the suggested want to equality, ie one who had pleaded not guilty, been tried, found guilty, convicted and then treated unequally when compared to a prisoner who had pleaded guilty. It would not be applicable to a prisoner who has been the supposed beneficiary of inequality, makes no complaint about it and has no complaint made against him on that ground.

95 As I understand the "general doctrine of legal equality" it applies to ensure equality of treatment between those whose position is comparable. At least arguably, in this country as in most others with like criminal justice systems[99], discounts for pleas of guilty are afforded out of a recognition of a public interest to treat somewhat differently those who acknowledge their guilt of the offence. There are some disparities within Australia in the extent to which discounts are provided by State and Territory courts for pleas of guilty[100]. There are also differences in the procedures followed in different Australian jurisdictions. However, the principle is uniformly accepted. In practice, the amount of the

---

97 (1992) 174 CLR 455 at 486.

98 s 78B.

99 Hall, "Sentencing", *Butterworths Current Law* (New Zealand), par 1.7.3; *Buffrey* (1993) 14 Cr App R(S) 511; ("between one quarter and one-third"): Thomas, *The Principles of Sentencing*, 2nd ed (1979), at 52; cf *Thomson and Houlton* (2000) 115 A Crim R 104 at 137 [146]-[147].

100 The variations are described in *Thomson and Houlton* (2000) 115 A Crim R 104 at 137 (148]-[152].

discount and the rules applied in arriving at it, do not appear to vary greatly. This is not the occasion to explore this question further.

96 *Legal representation of prisoners:* The appellant was obliged to apply for special leave to appeal to this Court, in person, without legal representation. Inferentially, such representation had been refused by Legal Aid. When special leave was granted by the Court counsel appeared for the appellant at the hearing of the appeal. In accordance with the practice observed in Western Australia (but not in some other States and Territories of the Commonwealth) the appellant was brought to court so that he could argue his special leave application in person. There is a risk that, but for his appearance and oral argument, the error of the Court of Criminal Appeal that is now exposed might not have been detected. The limitations on the resources of Legal Aid, in Western Australia, as elsewhere, make it inevitable that cases occur where legal representation before this Court is not provided. This Court cannot forfeit its judicial responsibilities to the decisions of legal aid bodies constrained by resource allocations of the Executive Government.

97 Where an applicant is not legally represented, a heavy burden is cast on the Justices of this Court to scrutinise often voluminous and ill-expressed materials against the risk that an error of law or miscarriage of justice has occurred. As is perfectly proper, the Crown is commonly represented on the return of such applications by one and sometimes two counsel and by solicitors, as happened here. The principle established by this Court in *Dietrich v The Queen*[101] in respect of criminal trials does not, in its terms, apply to appeals or applications for leave or special leave to appeal to this Court. Appellate courts, including this Court, are sometimes forced to rely on their own resources or voluntary assistance occasionally provided by legal professional bodies. Yet if *Dietrich* rests, as I think it does, on a broader, and possibly a constitutional, foundation[102], whether generally or at least in cases within federal jurisdiction, improved arrangement for the presentation of applications by indigent prisoners in custody may be required. If necessary, it would be open to the courts, by their orders, to ensure such arrangements in defence of the utility of their exercise of the judicial power in a just way to all persons invoking that power. Ultimately,

---

101 (1992) 177 CLR 292 overruling *McInnis v The Queen* (1979) 143 CLR 575.

102 Such as the implied constitutional right to due process of law: *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-489, 501-503; cf at 466-469, 475-478; Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341; McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235 at 240-241.

in proper cases, such orders might be enforced by requiring the release of a prisoner on bail pending the provision of proper representation before the appellate court.[103] The courts of the Australian Judicature, including this Court, are not helpless in the face of a lack of provision of legal facilities to indigent prisoners who seek to enliven a right of appeal or of an application for leave or special leave that is now standard to prisoners who are not indigent or who can secure public legal assistance.

98 In the present case, the Court of Criminal Appeal's error has been detected, in part because the applicant, although unrepresented, was intelligent and able to explain his case in writing and orally with sufficient clarity. But how many cases occur when, for default of an advocate or in the absence of any possibility of oral argument by an unrepresented prisoner, an important point is missed by the prisoner and by hard-pressed judges? The appellant's success in this appeal does not demonstrate that improved arrangements are unnecessary. On the contrary, it demonstrates the opposite. In my opinion, this Court should not be content with the present unequal arrangements for prisoner applications. Equal justice before the law[104] is not a principle confined to trials.

Orders

99 I agree in the orders proposed by Gaudron, Gummow and Callinan JJ.

---

103 cf *United Mexican States v Cabal* (2001) 75 ALJR 1663 at 1679 [77]; 183 ALR 645 at 668.

104 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480.