HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DANNY WEININGER APPELLANT

AND

THE QUEEN RESPONDENT

Weininger v The Queen
[2003] HCA 14
2 April 2003
S24/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with H K Dhanji for the appellant (instructed by Legal Aid Commission of New South Wales)

P S Hastings QC with M M Cinque for the respondent (instructed by Director of Public Prosecutions (Commonwealth))

CATCHWORDS

Weininger v The Queen

Criminal law – Sentencing – Absence of prior conviction – Requirement to take into account "character and antecedents" in s 16A(2)(m) *Crimes Act* 1914 (Cth) – Whether absence of prior conviction gave rise to inference of lack of prior criminal conduct – Neither negative nor positive inference drawn – Absence of prior conviction did not demonstrate absence of prior criminal conduct – Whether absence of prior conviction relevant to sentencing apart from significance as to past character.

Criminal law – Sentencing – Relevance of uncharged criminal acts – Whether sentencing judge entitled to take such acts into account in determining sentence – Whether acts relevant to prisoner's entitlement to leniency otherwise on the ground that he was a first offender – Whether relevant to consideration of the prisoner's character – Whether in context of very heavy sentence such consideration indicated error of sentencing principle.

Words and Phrases – "character and antecedents".

Crimes Act 1914 (Cth), ss 16A(2), 16A(2)(m).

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. This matter was said to present two issues of sentencing principle. They were identified as being, first, is a sentencing judge entitled to take into account an offender's commission of other offences with which the offender has not been charged and commission of which the offender does not admit? Secondly, if those matters may be taken into account, which party bears the onus of proof and what is the requisite standard of proof?

2 The present appeal is not to be decided by consideration of questions framed at this level of abstraction and generality. In so far as the appellant was to be sentenced as a federal offender, the principles to be applied in fixing the sentence were prescribed by Pt 1B of the *Crimes Act* 1914 (Cth) ("the Crimes Act") and, in particular, Divs 1 to 4 (ss 16 to 19AK) of that Part. Although it may be doubted that sentencing the appellant on the third count to which he pleaded guilty (a State rather than federal offence) engaged principles having any different content, the argument in the courts below and in this Court has focused only on the federal offences. No doubt this was because the sentences imposed for the federal offences were heavier than the sentence imposed for the State offence, and the term of imprisonment to be served for the State offence was to be served concurrently with the federal sentences.

3 The general principles that were to be applied in sentencing the appellant are not in doubt. The determinative question in this matter is whether the primary judge (Judge Latham) erred in applying those principles to the particular facts and circumstances of the case. On a proper understanding of her Honour's sentencing remarks, in light of the material tendered at the sentencing hearing, no error is shown. The appeal to this Court should be dismissed.

The charges and sentence

4 The appellant pleaded guilty to two federal offences and one State offence. The federal offences to which he pleaded guilty were one count of being knowingly concerned in the importation into Australia of prohibited goods to which s 233B of the *Customs Act* 1901 (Cth) applied, namely, a commercial quantity of cocaine[1] and one count of conspiring[2] to commit an offence of money

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1 Schedule VI of the *Customs Act* 1901 (Cth) fixes the commercial quantity of cocaine as 2 kilograms. The quantity imported in this case was more than 4.3 kilograms.

2 Contrary to s 86 of the *Crimes Act* 1914 (Cth).

laundering contrary to s 81 of the *Proceeds of Crime Act* 1987 (Cth). The State offence to which he pleaded guilty was an offence of conspiring with others to supply a commercial quantity of cocaine contrary to s 26 of the *Drug Misuse and Trafficking Act* 1985 (NSW).

5 The appellant was, given the nature of the federal offences, prosecuted on indictment as required by s 4G of the Crimes Act. Had it not been for the guilty pleas, s 80 of the Constitution would have been engaged and a trial by jury mandated. However, as was pointed out in *Cheng v The Queen*[3], following the pleas of guilty there was no occasion to empanel a jury because there was, with respect to sentencing, no function for a jury to perform.

6 The primary judge sentenced the appellant to 18 years imprisonment for being knowingly concerned in the importation of cocaine, 10 years (commencing on the same date as the first sentence) for the offence of conspiracy to launder money and 10 years (again commencing on the same day as the first sentence) for the State offence.

The sentencing hearing

7 At the sentencing hearing, counsel for the prosecution tendered, without objection, a statement of facts. There having been no objection to its receipt, the primary judge was entitled to act on the facts described in the statement. It recorded that, in October 1996, an informant of the Australian Federal Police had approached the appellant and offered his services as a drug courier. The appellant told the informant that he, the appellant, "was involved in a continuing cocaine importation syndicate [of which another man was the principal] and that the syndicate had encountered difficulties with an established method of bringing cocaine into Australia from America".

8 Footnotes to that passage of the statement of facts invited attention to two transcripts of recorded conversations between the informant and the appellant. In those conversations the appellant had described in some detail the way in which cocaine had been imported by the syndicate into Australia in the past and the difficulties that had been encountered. The transcripts of conversations were tendered in evidence at the sentencing hearing, again without objection.

9 At no time was it suggested that the statement of facts or the transcripts of conversations were in any respect inaccurate. On the appeal to this Court, the

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3 (2000) 203 CLR 248 at 266 [41]-[42].

appellant sought to emphasise that the statement of facts recorded what the appellant had *said* in the course of conversations, as distinct from asserting the truth of the contents of his statements. It is by no means clear that this was a distinction drawn in the course of the sentencing hearing.

10 The appellant gave no evidence at the sentencing hearing. Evidence of statements that the appellant had made after his arrest, to the woman with whom he had lived and to a psychologist, was tendered to the primary judge. He had said that the commission of the charged offences was "a one off thing" occasioned by "very pressing financial difficulties" and he had denied any prior involvement in drug importation.

11 Under the heading "Antecedents", the statement of facts tendered at the sentencing hearing recorded that, before his arrest, the appellant had lived in the de facto relationship to which we have referred, and was a self-employed painter working in Sydney. It noted that he held dual Australian and Israeli citizenship and had lived in Australia for about nine years. It concluded by saying that he "has no prior convictions recorded". A document showing that he had no criminal convictions in his country of birth, Israel, was tendered at the sentencing hearing.

12 The material tendered to the primary judge thus revealed the following. The appellant had no prior convictions. He had said to his de facto partner, and to a psychologist, in effect, that he had not previously engaged in conduct of the kind to which he pleaded guilty. By contrast, the statement of facts recorded his earlier assertions that he was involved in a *continuing* cocaine importation syndicate and that the syndicate had encountered difficulties with an *established* method of bringing cocaine into Australia.

The primary judge's reasons

13 In her sentencing remarks, the primary judge recited the substance of the matters recorded in the statement of facts. Her Honour summarised the appellant's role as being in "a relatively senior position in the hierarchy of what was clearly an extensive organisation, experienced in the importation of cocaine on a large scale". Her Honour then dealt with a number of particular submissions made on the appellant's behalf, including references that had been made to what were said to be comparable sentences, the quantity of cocaine imported, and the significance to be attached to the appellant's plea of guilty. The primary judge said that she took into account the contrition inherent in the pleas of guilty and the utilitarian benefits of those pleas, but went on to say that "the weight to be attached to them is tempered by what can only be described as an overwhelming

prosecution case". She concluded that independently of the pleas of guilty there was no real contrition for the commission of the offences.

14 The primary judge then turned to deal with evidence that had been adduced on behalf of the appellant in the course of the sentencing hearing. She recorded the evidence given by the appellant's de facto partner, including her report of the appellant's statement that commission of the offences was "a 'one off thing' occasioned by 'very pressing financial difficulties'". Having noted that there was no evidence of any pressing financial difficulty, her Honour then referred to the appellant's reported statement to the psychologist denying any prior involvement in drug importation. This, she said, she rejected as being entirely inconsistent with the evidence. It was in this context that her Honour then made the statements upon which so much of the argument in this Court and in the Court of Criminal Appeal focused. She said:

> "The prisoner's prior good character in the sense that he comes before this court without any prior convictions is a matter which must receive some recognition. However, in the face of strong evidence establishing the prisoner's participation in cocaine importation by the same syndicate for some period of time before the commission of the instant offences, he cannot be treated as a first offender with the attendant leniency that that status usually attracts."

It was this passage of the sentencing remarks that was said to reveal error. It was said to reveal that the primary judge sentenced the appellant for offences with which he had not been charged and of which he had not been convicted and, further, to reveal error in the judge's fact finding because, if prior discreditable conduct was to be taken into account, it was for the prosecution to assert it and prove it beyond reasonable doubt.

The Court of Criminal Appeal

15 The Court of Criminal Appeal, by majority (Dowd and Bell JJ, Simpson J dissenting), dismissed the appellant's appeal against sentence[4]. All three members of the Court of Criminal Appeal agreed that the primary judge had not sentenced the appellant for crimes with which he was not charged[5]. Indeed,

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4 *Weininger* (2000) 119 A Crim R 151.

5 (2000) 119 A Crim R 151 at 162 [67] per Simpson J, 163 [78] per Dowd J, 165 [87] per Bell J.

Simpson J, who concluded that the appeal should be allowed, noted that it was not suggested in the Court of Criminal Appeal that the primary judge had regarded the existence of prior criminality by the appellant as an aggravating factor increasing the sentence otherwise to be imposed on him[6]. Rather, the Court of Criminal Appeal divided on whether, in order to deny the appellant the leniency to which he would otherwise have had legitimate claim as a person of good character, because of his earlier commission of other criminal acts, the prosecution had to assert and prove those acts beyond reasonable doubt[7].

Applicable principles

16 Sentencing any federal offender must begin with a consideration of the applicable legislation – in this case Pt 1B of the Crimes Act and, in particular, s 16A. Section 16A(2) obliges a court sentencing a federal offender to take into account such matters referred to in that sub-section "as are relevant and known to the court". The court must do that with a view to imposing on the offender a sentence or making an order that is "of a severity appropriate in all the circumstances of the offence"[8]. Among the matters which the court must take into account, if relevant and known to the court, are "the character, antecedents, cultural background, age, means and physical or mental condition of the person"[9].

17 The phrase "known to the court" which qualifies the list of "matters" in pars (a)-(p) of s 16A(2) which the court "must take into account" presents the evidentiary and other procedural questions upon which this appeal turns. By what means and at whose instigation are these "matters" to be made known? Are issues of fact to be tendered for resolution by the judicial officer who constitutes "the court" for this purpose? If so, do questions of onus of "proof" arise? Are there here the distinctions found elsewhere between ultimate and evidentiary burdens? To what degree, if at all, is the procedure inquisitorial rather than adversarial?

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6 (2000) 119 A Crim R 151 at 160 [59].

7 (2000) 119 A Crim R 151 at 160-161 [59] per Simpson J, 163 [78] per Dowd J, 165 [90]-[91] per Bell J.

8 s 16A(1).

9 s 16A(2)(m).

18 In *R v Olbrich*[10], the Court examined a number of questions relating to fact finding in sentencing, usually discussed under the rubric of the onus and standard of proof in sentencing. As the joint reasons point out[11], "[r]eferences to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in sentencing proceedings". The Court adopted what was said by the majority in the Court of Appeal of Victoria, in *R v Storey*[12], that a sentencing judge:

> "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities."

19 For present purposes, however, attention to questions of onus and standard of proof may distract attention from another important aspect of the decision in *Olbrich*. Framing the question in terms of the onus and standard of proof may suggest that all disputed issues of fact related to sentencing must be resolved for or against the offender. That is not so. As was recognised in *Olbrich*, some disputed issues of fact cannot be resolved in a way that goes either to increase or to decrease the sentence that is to be imposed. There may be issues which the material available to the sentencing judge will not permit the judge to resolve in that way.

20 It had been submitted in *Olbrich* that, in sentencing a person knowingly concerned in the importation of narcotic drugs into Australia, it was necessary to classify that person's participation in the importation as that of a principal or a courier, and it was further submitted that, if it was not established beyond reasonable doubt that the offender was a principal, the offender should be sentenced as a courier. As the majority pointed out in *Olbrich*[13], prosecuting authorities and a sentencing judge will often have only the most limited and imperfect information about how it was that the accused came to commit the offence for which he or she is to be sentenced. Although s 16A(2)(a) requires a

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10 (1999) 199 CLR 270.

11 (1999) 199 CLR 270 at 281 [25] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

12 [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell AJA.

13 (1999) 199 CLR 270 at 278 [16].

sentencing judge to take account of the nature and circumstances of the offence, that requirement is not absolute. They are to be taken into account only to the extent that they are relevant and known to the court. The sentencing judge may not be able to make findings about all matters that may go to describe those circumstances. In particular, an offender may urge a particular view of the nature and circumstances of the offence, favourable to the offender. The sentencing judge may be unpersuaded that the view urged is, more probably than not, an accurate view of the circumstances. In such a case, it is not correct that the judge is bound to sentence the offender on that favourable basis, unless the prosecution proves the contrary beyond reasonable doubt[14]. Accordingly, in the particular facts of *Olbrich*, where the offender asserted that he was no more than a courier of the drugs, but the sentencing judge disbelieved him, it was neither necessary nor appropriate to sentence him on the basis that he was a courier.

21 To frame the relevant question in terms of the onus and standard of proof may also suggest that the only material which may be treated as being "known to the court", and on which the judge may act in sentencing an offender, is material revealed by the plea or verdict of guilty, admission by the offender, or evidence received on the sentencing hearing. The use of the phrase "known to the court", rather than "proved in evidence", or some equivalent expression, suggests strongly that s 16A was not intended to require the formal proof of matters before they could be taken into account in sentencing. Rather, having been enacted against a background of well-known and long-established procedures in sentencing hearings, in which much of the material placed before a sentencing judge is not proved by admissible evidence, the phrase "known to the court" should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.

22 In addition to the points just made about what is known to the sentencing judge, there is another important feature of fact finding in sentencing which must be recognised. Many matters that must be taken into account in fixing a sentence are matters whose proper characterisation may lie somewhere along a line between two extremes. That is inevitably so. The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.

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14 (1999) 199 CLR 270 at 280 [24].

23 Further, a sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender. Some matters may be fixed by the plea or verdict of guilty although, even there, there may be ambiguities (as for example, in some homicide cases where a verdict of manslaughter is returned). Many of the matters relevant to fixing a sentence are matters which either the prosecution or the offender will draw to the attention of the sentencing judge. Some matters will remain unknown to the sentencing judge. The question then becomes, what use is the sentencing judge to make of what is known, and of the matters urged by the parties? This is not just a series of choices for the judge between alternatives. Not only may some things be unknown, some will concern matters in which a range of answers may be open.

24 As was pointed out in *Storey*[15], it is important to avoid introducing "excessive subtlety and refinement" to the task of sentencing. That object is advanced if sentencing and appellate courts pay close attention to identifying those matters that the sentencing judge takes into account in a way that is adverse to the interests of the accused, and those matters that the sentencing judge takes into account in favour of the accused. It must be recognised that not every matter urged on the judge who is to pass sentence has to be, or can be, fitted into one or other category. The judge may be unpersuaded of matters urged in mitigation or in aggravation. The absence of persuasion about a fact in mitigation is not the equivalent of persuasion of the opposite fact in aggravation. So to conclude would ignore the different standards of proof that are to be applied. It would also be wrong because it would assume that human behaviour can always be described as a dichotomy. It cannot. Human behaviour and characteristics are more varied than that. Further, it would be wrong because it would assume that sentencing is a syllogistic process. It is not. It is a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money.

The present case

25 In this case, the appellant emphasised that he was a person who had not previously been convicted. From that fact, unchallenged as it was, he sought to have the primary judge draw a wider conclusion, namely, that he was a person of previously good character or, at least, a person who had not previously engaged in conduct of the kind giving rise to the present charges. For the reasons given in

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15 [1998] 1 VR 359 at 372.

Melbourne v The Queen[16], there are difficulties in treating "good character" as a single undifferentiated whole. For present purposes, the "character" of the appellant had at least two relevant aspects – his absence of previous convictions and whether he had previously engaged in other criminal conduct. No doubt other aspects of his "character" could have been identified.

26 The appellant's out of court assertions that this was a "one off thing" were tendered to persuade the sentencing judge that he had not previously engaged in drug importation or money laundering. The issue tendered by the appellant was not to be resolved by choosing between satisfaction on the balance of probabilities that the appellant had not previously been engaged in drug importation and money laundering or being satisfied beyond reasonable doubt that he had.

27 The difference in standard of proof means that it is necessary to recognise the possibility that the sentencing judge may be persuaded of neither conclusion to the requisite standard. But more fundamentally than that, the relevant sentencing fact was what was known about the character and antecedents of the appellant[17]. That task was not to be performed by assigning a single label to the appellant's character or his antecedents as either "good" or "bad". Rather, the question for the primary judge was, what was known about the appellant's character and antecedents? Was what was known of those matters to be taken into account in a way that favoured the appellant, or in a way that did not? Importantly, did the case fall between these extremes? Was the state of the material before the primary judge such that the appellant's character and antecedents worked neither in his favour nor against him?

28 The impugned passage of the primary judge's sentencing remarks must be understood against that background. Her Honour spoke of the absence of prior convictions as "a matter which must receive some recognition". She contrasted that with what she described as "the strong evidence" establishing his participation in cocaine importation before the commission of the offences for which he stood for sentence. From this she concluded that he could not be "treated as a first offender *with the attendant leniency* that that status usually attracts".

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16 (1999) 198 CLR 1.

17 s 16A(2)(m).

29 Taken in isolation the reference to "first offender" may have been unfortunate. Divorced from its context it appears to suggest that the primary judge was treating the appellant as a person guilty of crimes with which he had not been charged. But set in its context it is evident that the primary judge was doing no more than expressing a conclusion that the absence of prior convictions did not, as ordinarily would be the case, demonstrate absence of prior criminal behaviour. That is, the primary judge concluded from the evidence before her, that what was known of the character and antecedents of the appellant did not show that these offences were the first criminal conduct in which he had engaged. The fact that the primary judge was not persuaded that the appellant was probably a person who had not previously engaged in drug importation or money laundering reveals no error. Her Honour treated what was known of the appellant's character and antecedents as neither working in his favour nor against him.

30 It follows that the appeal should be dismissed.

31 It is, however, desirable to make three further points about this matter. First, it may well have been open to the sentencing judge to conclude beyond reasonable doubt that the appellant had previously been knowingly concerned in the importation of cocaine. The statement of facts provided a sound basis for that conclusion and the hearsay statements by the appellant reported in other evidence may not ordinarily be thought to excite any doubt about it. Such a conclusion would have entitled the primary judge to take it into account as a matter warranting the imposition of a heavier sentence than might otherwise have been imposed. But, as all members of the Court of Criminal Appeal rightly concluded, that is not what the primary judge did. She concluded only that the appellant should not have the benefit that would flow from a conclusion that this was truly a "one off thing".

32 Secondly, there is no reason to doubt the conclusion of the Court of Criminal Appeal that the primary judge had not sentenced the appellant for crimes with which he was not charged. Of course it would have been wrong to do so. A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative,

of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.

33 Finally, principles of the kind dealt with in *R v De Simoni*[18] are not engaged in this case. *De Simoni* was a case in which an offender had been sentenced for an aggravated form of offence when the offence charged was the simple rather than aggravated offence. That is not this case.

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18 (1981) 147 CLR 383.

34 KIRBY J. This is an appeal concerning sentencing principles. It comes from a decision of the New South Wales Court of Criminal Appeal in which that Court divided[19]. Problems of the kind presented by the appeal have sometimes been described as "metaphysical"[20]. Certainly, they demonstrate the truth of the observation that, in the difficult task of sentencing, facts can, "Janus-like"[21], take on a dual aspect. The importance of the appeal is that it affords an opportunity to consider the way in which the "metaphysical" problem should be approached, given that it can have large practical consequences for the liberty of a prisoner.

The facts

35 Mr Danny Weininger ("the appellant") appeared for sentence in December 1999 in the District Court of New South Wales before the sentencing judge (Latham DCJ). He had pleaded guilty to an indictment containing three counts, two relating to federal offences. One of the federal offences was against the *Customs Act* 1901 (Cth)[22] ("the importation offence"). The other was against the *Crimes Act* 1914 (Cth) ("the Crimes Act")[23]. The third count of the indictment alleged an offence against the *Drug Misuse and Trafficking Act* 1985 (NSW), a State Act[24]. The State offence related to the same quantity of cocaine that was the subject of the federal charges.

36 Upon the appellant's plea, the sentencing judge convicted him. Without objection, she received a statement of facts, two transcripts of intercepted conversations, a prison psychologist's report, written testimonials, and a document showing that the appellant had no criminal record in Israel, the country of his birth. The sentencing judge heard oral evidence from the appellant's de facto wife and from the mother of his former de facto wife, the carer of the appellant's young son.

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19 *Weininger* (2000) 119 A Crim R 151.

20 *R v Reiner* (1974) 8 SASR 102 at 105 per Bray CJ; *JCW* (2000) 112 A Crim R 466 at 472 [34] per Spigelman CJ.

21 *Ryan v The Queen* (2001) 206 CLR 267 at 310 [144].

22 s 233B(1)(d) (knowingly concerned in an importation of a commercial quantity of cocaine).

23 s 86 (conspiracy to launder money contrary to s 81 of the *Proceeds of Crime Act* 1987 (Cth)).

24 ss 25, 26 (conspiracy to supply a large commercial quantity of cocaine).

37 One of the transcripts of an intercepted conversation, recorded pursuant to warrants issued under the *Customs Act*, contained only minor interventions by the appellant. However, the other transcript included a lengthy recorded conversation between an informant of the Australian Federal Police and the appellant from which it might be inferred that the appellant acknowledged dealing in drugs in Australia over a period before the subject offences and being involved in unspecified earlier acts of importation of prohibited drugs[25]. The appellant gave no evidence of his own in the sentencing proceedings. It was accepted that he had no prior criminal convictions in Australia. Extracts from the statement of facts tendered before the sentencing judge appear in other reasons[26].

The sentence

38 In relation to the importation offence, the sentencing judge imposed on the appellant a sentence of eighteen years imprisonment. She specified a non-parole period of twelve years imprisonment. In relation to the additional federal and State offences, her Honour fixed terms of imprisonment each of ten years. Accordingly, the relevant sentence governing the appellant's entitlement to eventual release was that imposed for the importation offence. By ordering the other sentences to be served concurrently, the sentencing judge treated all of the offences of which the appellant had been convicted as substantially involving the one enterprise connected with the importation of a commercial quantity of cocaine into Australia, proved to have occurred in early May 1997.

39 The sentences imposed on the appellant were very heavy. They were so described by all judges in the Court of Criminal Appeal[27]. One of the judges described the sentences as at "the very top of the available range"[28]. That description appears justified.

40 The principal in the May 1997 importation, Mr Geraghty, charged as a co-offender with the appellant, had not been dealt with at the time of sentencing the appellant. Indeed, he had not been sentenced when the Court of Criminal Appeal heard the appellant's application for leave to appeal[29]. However, Mr Geraghty was subsequently sentenced by the same judge. Without objection, the details of

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25 Extracts appear in the reasons of Callinan J at [99].

26 Reasons of Callinan J at [100].

27 *Weininger* (2000) 119 A Crim R 151 at 162 [69] per Simpson J; 165 [92] per Bell J, Dowd J concurring at 163 [78].

28 *Weininger* (2000) 119 A Crim R 151 at 163 [77] per Simpson J.

29 *Weininger* (2000) 119 A Crim R 151 at 156 [35].

his sentences were placed before this Court. From the reasons for sentence, it emerges that Mr Geraghty, unlike the appellant, was charged with, pleaded guilty to and was convicted of and sentenced in relation to, three acts of importation. These were accepted as having occurred in November 1996, December 1996 and May 1997. His role was described as that of "the principal organiser"[30] of all of the subject importations.

41 Mr Geraghty was sentenced to twenty-five years imprisonment on the first count relating to the first importation. In respect of each other count of importation he was sentenced to eighteen years imprisonment. A single non-parole period of fifteen and a half years was imposed on him in relation to those three sentences. On the other counts, which mirrored the two further offences of which the appellant had been convicted, Mr Geraghty was sentenced, like the appellant, to fixed terms each of ten years imprisonment. Such sentences were ordered to be served concurrently. This Court has not been concerned with Mr Geraghty's sentence, save as it throws light on the sentence imposed on the appellant.

Reasons for the sentence

42 Three passages are pertinent in the sentencing judge's reasons for sentence. After reviewing the appellant's role in the offences, her Honour observed[31]:

> "In summary, he occupied a relatively senior position in the hierarchy of what was clearly an extensive organisation, experienced in the importation of cocaine on a large scale. He occupied that position by dint of his expertise and his proven worth to the principal of the organisation, Mr Geraghty. In that respect I regard it as entirely appropriate that the prisoner should be treated as a junior partner, or a middle level participant for the purposes of this sentencing exercise. I do not regard him as low in the hierarchy of the organisation."

43 Later, after dealing with submissions put on the appellant's behalf, including to the effect that the appellant was remorseful for the offences and that they were a "one off thing", the sentencing judge said[32]:

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30 Remarks on sentencing of Kevin Michael Geraghty, Latham DCJ, 11 December 2000 at 1.

31 Remarks on sentencing of Danny Weininger, Latham DCJ, 17 December 1999 at 5-6 ("sentencing judge's sentence").

32 Sentencing judge's sentence at 10 (emphasis added).

> "He claimed not to have any insight into the effects of drugs prior to his incarceration and denied any prior involvement in drug importation, both of which I reject as being entirely inconsistent with the evidence and the prisoner's personality and background. … The prisoner's prior good character in the sense that he comes before this court without any prior convictions is a matter which must receive some recognition. However, in the face of *strong evidence establishing the prisoner's participation in cocaine importation by the same syndicate for some period of time before the commission of the instant offences*, he cannot be treated as a first offender with the attendant leniency that that status usually attracts."

44 Later still, the sentencing judge acknowledged that the appellant was "facing a lengthy sentence of imprisonment for the first time"[33], that Mr Geraghty "has pleaded guilty to two additional offences of importation of a commercial quantity of cocaine" and that it was necessary to "take into account the factors referred to in s 16A of the [Crimes Act]"[34]. Her Honour's only reference to the federal and State charges, additional to the importation offence, was that they demonstrated that "[T]his is not a case of objective criminality ceasing at the point of importation"[35]. The evidence was not differentiated with respect to those separate offences.

The decision of the Court of Criminal Appeal

45 In the Court of Criminal Appeal, the appellant raised a number of complaints concerning the severity of his sentence. Most of these[36] were unanimously rejected by that Court. They do not concern this Court. However, upon two points the judges disagreed. The majority (Bell J, with whom Dowd J concurred without separate reasons) rejected two errors identified by Simpson J. These were that the sentencing judge had, in effect, increased the sentence imposed on the appellant in the light of a finding of criminal activity by him for which he had not been charged or convicted and wrongly attributed to him a greater level of involvement in such criminal conduct than had been proved beyond reasonable doubt by the evidence adduced in the sentencing proceedings.

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33 Sentencing judge's sentence at 11.

34 Sentencing judge's sentence at 12.

35 Sentencing judge's sentence at 13.

36 Including that the sentencing judge had sentenced outside the range proposed by the prosecutor without giving reasons or due notice; and that the sentencing judge had erred in departing from a guideline judgment in *R v Wong* (1999) 48 NSWLR 340; cf *Wong v The Queen* (2001) 207 CLR 584.

46 In rejecting these arguments, Bell J, for the majority[37], pointed out that the sentencing judge had acknowledged the appellant's lack of prior criminal convictions and that he was entitled to receive some recognition for that fact. So far as the references to involvement in uncharged criminal acts, Bell J said[38]:

> "I understand her Honour's remarks … to convey that she was not persuaded that the absence of criminal convictions spoke of the applicant's good character. Accordingly, she was not disposed to mitigate the sentence to any significant degree on this account.
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> [The sentencing judge] considered that the applicant had failed to make good a claim for leniency (that generally he was a person of good character as evidenced, in part, by his lack of criminal convictions). It was not necessary for the Crown to prove beyond reasonable doubt that the applicant had participated in cocaine importation prior to the commission of the subject offences before it was open to her Honour to so conclude."[39]

47 The dissenting judge, Simpson J, rejected this analysis. She said that the prosecution carried the onus of proof to the criminal standard of establishing facts that would deprive "the offender of a significant benefit to which the absence of any criminal record would otherwise entitle him (or her)"[40]. Moreover, in Simpson J's opinion, the reasons of the sentencing judge amounted to "a finding of criminal conduct for which the offender has not been charged"[41]. Her Honour was not satisfied that the evidence supporting the stated conclusion permitted such an adverse finding to be reached according to the criminal standard[42]. She regarded the finding as amounting to "a finding of guilt of

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37 *Weininger* (2000) 119 A Crim R 151 at 165 [90]. See also extracts in the reasons of Callinan J at [105]-[107].

38 *Weininger* (2000) 119 A Crim R 151 at 165 [90]-[91].

39 Citing *R v Olbrich* (1999) 199 CLR 270 at 280-281 [24]-[28].

40 *Weininger* (2000) 119 A Crim R 151 at 161 [59].

41 *Weininger* (2000) 119 A Crim R 151 at 161 [59].

42 *Weininger* (2000) 119 A Crim R 151 at 161 [60].

criminal activity with which the applicant was not charged"[43]. Her Honour said[44]:

> "Although I do not think it could be said that Latham [DCJ] sentenced the applicant for crimes with which he was not charged, she did, in my opinion, deny him leniency, to which he had otherwise established his entitlement, on that basis."

48 In the opinion of Simpson J, the very heavy sentences imposed on the appellant (which went beyond what she found to have been the sentences that the prosecutor had proposed during the sentencing hearing[45]) illustrated the fact that an error had been made authorising appellate intervention.

49 The Court of Criminal Appeal granted the appellant leave to appeal but, by majority, dismissed his appeal. Simpson J, in dissent, favoured allowing the appeal and the substitution of a different sentence in place of that imposed by the sentencing judge. Her Honour proposed the substitution on the importation offence of a sentence of imprisonment for sixteen years with a non-parole period of ten and a half years[46]. It is from the judgment that followed the opinion of the majority that, by special leave, the appeal comes to this Court.

50 At the outset I remind myself that sentencing is a most complex judicial function[47]. It is not a mechanical task[48]. Nor is it capable of being reduced to a mathematical process[49]. Appellate courts, including this Court, should approach judicial reasons for sentence with realism, avoiding an overly pernickety attention to particular words or phrases deployed in such reasons. They should remember that, in explaining a partly intuitive judgment that depends upon

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43 *Weininger* (2000) 119 A Crim R 151 at 162 [66].

44 *Weininger* (2000) 119 A Crim R 151 at 162 [67]. See also extracts set out in the reasons of Callinan J at [108]-[109].

45 *Weininger* (2000) 119 A Crim R 151 at 158 [42].

46 *Weininger* (2000) 119 A Crim R 151 at 163 [77].

47 *Ryan* (2001) 206 CLR 267 at 306 [129].

48 *Pearce v The Queen* (1998) 194 CLR 610; *Ryan* (2001) 206 CLR 267 at 294 [89].

49 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]; *Ryan* (2001) 206 CLR 267 at 278 [33], 309 [144]. See also the reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ ("the joint reasons") at [24].

multiple considerations, a sentencing judge can only ever express the main considerations that have influenced his or her sentence[50].

51 These reminders notwithstanding, I agree with the conclusion reached in the Court of Criminal Appeal by Simpson J. The appeal to this Court should be allowed.

The Constitution and federal legislation

52 *The Constitution, s 80*: It is convenient to start my analysis with a comment that the approach taken by the sentencing judge and the majority in the Court of Criminal Appeal sits uncomfortably with the provision of the Constitution that guarantees a right to trial by jury of contested federal indictable offences. Knowing concern in other and earlier offences of importation of cocaine are such offences. They are offences against the laws of the Commonwealth triable on indictment. They therefore attract the constitutional entitlement to jury trial. Once attracted, the requirements of constitutional jury trial must be observed; they cannot even be waived by a consenting accused, still less by the conduct of the prosecutor[51].

53 The common law, including the principles of judicial sentencing, may not be incompatible with the requirements of the Constitution[52]. Any possible offence with which the appellant might have been charged, involving "participation in cocaine importation … for some period of time before the commission of", would have entitled the appellant to a trial by jury of any contested questions. In respect of such offences, it was his *right* to plead not guilty and to have a jury of his fellow citizens decide whether the prosecution had proved his guilt of *such offences*, beyond reasonable doubt.

54 The entitlement stated in s 80 of the Constitution is an important constitutional privilege. It may not be whittled down by any supposed practice or principle of sentencing affecting persons accused of federal offences. The appellant did not explicitly raise a constitutional ground; nor did he need to do so. The Constitution is a central provision of the law. Countless cases show how it colours the meaning of other laws that the courts administer. In my view, the propositions embraced by the majority in the Court of Criminal Appeal, and now

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50 *Ryan* (2001) 206 CLR 267 at 309-310 [144]. See also *Biogen Inc v Medeva plc* [1997] RPC 1 at 45 per Lord Hoffmann.

51 *Brown v The Queen* (1986) 160 CLR 171; cf *Brownlee v The Queen* (2001) 207 CLR 278 at 319-320 [120]-[121].

52 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566.

in this Court, are difficult to reconcile with the right stated in s 80 of the Constitution. If the prosecution wished to have the appellant punished in any way, directly or indirectly, for participation in earlier acts of cocaine importation, besides those of which it charged him, it was obliged to add additional counts to the indictment charging him in respect of such acts. With regard to such counts, the appellant would then have had the opportunity to consider, and if he so decided, to insist upon observance of the constitutional prescription. Indirect circumvention of the constitutional norm should not occur[53]. This is the starting point of legal analysis of the present case.

55 *The Crimes Act, s 16A*: Under the Crimes Act, applicable to the sentencing of the appellant, the Parliament has enacted that courts, sentencing a person convicted of a federal offence, must "take into account" a list of specified considerations, so far as they are "relevant and known to the court"[54]. Such matters are expressed to be "in addition to any other matters" that may be relevant[55]. By reference to the facts of the present case, three paragraphs of this section of the Crimes Act should be considered. They require account to be taken of:

> "(2)
>
> ...
>
> (b) other offences (if any) that are required or permitted to be taken into account;
>
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct;
>
> ...
>
> (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person".

56 It is clear that the "offences" referred to in pars (b) and (c) are those offences of which the person has been convicted and for which he or she stands

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53 cf *Dyers v The Queen* (2002) 76 ALJR 1552 at 1557 [23]; 192 ALR 181 at 188.

54 The Crimes Act, s 16A(2). The provisions of s 16A of the Crimes Act appear in the reasons of Callinan J at [111].

55 cf *Director of Public Prosecutions (Cth) v Said Khodor el Karhani* (1990) 21 NSWLR 370.

for sentence. This is clear from the context. It is confirmed by par (k) which refers to "the need to ensure that the person is adequately punished for the offence". Punishment should not be imposed by a court for something other than an "offence" of which the person is convicted. At least it should not happen without the full consent of the prisoner, publicly stated[56].

57 Where other circumstances may be taken into account in sentencing, they are expressly referred to in pars (b) and (c). To take other offences into account it is necessary that that course should be "required" or "permitted". Otherwise, the only offence for which the person should be sentenced is the one before the court in relation to which the offender has been charged and convicted. Nor does par (c) expand this notion to permit uncharged "criminal acts" to be taken into account in sentencing. That paragraph is an attempt to express in the language of the Crimes Act the totality principle, reflected in decisions of this Court[57].

58 The terms of par (m) also make it clear that "character" and "antecedents" are viewed by the Parliament, as by the common law, as separate considerations. Each of them is relevant to sentencing. "Antecedents" refers to any past criminal conviction, agreed or proved. Of course, past criminal convictions may also be relevant to a court's assessment of the "character" of the person being sentenced. However, for a very long time, the absence (or existence) of prior convictions and the fact that a person is a first offender have been regarded as separate and special considerations in sentencing. The absence of prior convictions (quite apart from issues of character) will usually attract more lenient punishment. In part, it recognises the fact that a first offender's lapse may be treated as exceptional, atypical and out of character. In part, it also reflects the experience of the criminal justice system that many of those who come before courts for sentencing are repeat offenders who, for that reason, must be treated more seriously because they have been repeatedly shown to be in breach of the law and have repeatedly obliged the mobilisation of the agencies established by society to defend it from crime.

59 A first offender may, or may not, otherwise have a good character. He or she may simply have been lucky in not having been apprehended before. But

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56 cf *Clark* [1996] 2 Cr App R 282. In this appeal, the Court is not dealing with "representative charges" or other charges which a prisoner asks to be taken into account in imposing sentence about which separate questions may arise: *R v D* [1996] 1 Qd R 363; cf *R v Reiner* (1974) 8 SASR 102; *SBL* (1998) 105 A Crim R 83 at 102-103; *JCW* (2000) 112 A Crim R 466; *CA v The Queen* [2000] WASCA 176.

57 eg *Mill v The Queen* (1988) 166 CLR 59 at 63; *Postiglione v The Queen* (1997) 189 CLR 295 at 308.

this fact does not justify disregard for the separate consideration of a first offender's status as such, apart from any consideration of the character of that offender. The express differentiation between the two concepts in s 16A(2)(m) makes this point abundantly plain.

60 Although, in the present case, the sentencing judge acknowledged the objective fact that the appellant was a first offender and entitled to receive "some recognition" for this consideration, she went on immediately to say that he could *not* be "treated as a first offender". The supposed reason for this judicial reclassification of the appellant was the sentencing judge's consideration of the appellant's "participation in cocaine importation … for some period of time" before the "instant offences", that is, those for which he had been convicted and was subject to sentence.

61 In my opinion, the sentencing judge's approach effectively deprived the appellant of proper consideration of his "antecedents" (or lack thereof) as s 16A(2)(m) of the Crimes Act requires. The appellant was entitled to a proper measure of leniency for the fact that he had no antecedent criminal convictions either in Australia or Israel. That status was untouched by the transcript of the intercepted conversation tendered at the sentencing hearing. It is important that this Court should insist that, even in serious and heinous crimes, offenders who establish affirmative considerations that by law warrant allowance and reduction in sentence, receive the benefit of such considerations. Those considerations should not be swept aside, denied or minimised. When that happens it is error and, if uncorrected below, it is this Court's duty to correct it on appeal[58].

The negative and positive aspects of character

62 In *Ryan v The Queen*[59] this Court, by majority, made clear its acceptance of the principle that a person, standing for sentence, is entitled to have taken into account evidence of good character, outside the offending conduct. Even before *Ryan*, it had been pointed out that sometimes "good character" had been taken as referring, negatively, to an absence of prior convictions[60]. But, often, as in *Ryan*, it refers to more positive indications by which, otherwise than in respect of the offences acknowledged before the court, the offender has demonstrated good personal qualities and conduct that should be taken into account. The object is to

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58 *Ryan* (2001) 206 CLR 267 at 278 [33]-[35], 297-298 [99]-[102], 319 [178].

59 (2001) 206 CLR 267.

60 *R v Levi* unreported, Court of Criminal Appeal (NSW), 15 May 1997 at 5 per Gleeson CJ.

ensure a sentence that reflects more than a "one-dimensional" view of the offender's criminal record or personal characteristics[61].

63 In the present case, the appellant approached his sentencing without any court of law having, in Australia or Israel, convicted him of any past offences, including relevantly, for any long-term or multiple participation in cocaine importation "for some period of time" before his conviction of the "instant offences". Unless the prosecution chose to charge the appellant with prior offences of importation or, at least proved such prior acts to the criminal standard to rebut his reliance on good character and lack of prior convictions, the appellant was entitled to have credit both for being a first offender and for any affirmative evidence that was accepted as relevant to his character.

64 Were it otherwise, the appellant was effectively placed in the invidious position of having to *disprove* any prior involvement in cocaine importation although this was not an offence with which he was charged and subject to sentence. In the present case, as in *Ryan*, the appellant adduced affirmative and apparently believable evidence that he was of "good character". But instead of that evidence being given the weight that, on the face of things, it was entitled to receive, it was discounted and negatived by the sentencing judge's conclusion that the appellant had participated in cocaine importation for some period of time otherwise than in respect of the charged offences of which he was convicted.

65 As the "very heavy" sentences imposed on the appellant tend to confirm, the course adopted by the sentencing judge went beyond simply refusing to afford him credit for lack of prior convictions and proved good character otherwise. The better view of the heavy increment in the appellant's sentence detected by Simpson J is that the view taken of the subject offences was exacerbated by the conclusion reached by the sentencing judge as to the appellant's extensive prior involvement in other and different acts of "cocaine importation".

66 Two practical considerations lend still further support to this analysis of the sentence in question. Even now, it would be open to the federal authorities (possibly if more evidence came into their hands) to charge the appellant with the serious federal offences of being involved in importation of cocaine on occasions earlier than May 1997. If the appellant were so charged, he could not plead autrefois convict. Upon conviction, he would be liable to separate punishment in respect of such offences. Nor could he claim relief against double jeopardy. On the record, he has not, as a matter of law, been exposed to punishment for such offences. These considerations illustrate the grave dangers inherent in failing to observe strictly the rule that an accused is only liable to be sentenced for the

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61 *Ryan* (2001) 206 CLR 267 at 277 [31]-[32], 297 [100].

"instant offences" for which a conviction has been entered following a plea of guilty, a trial and (if a contested federal indictable offence) a trial by jury as mandated by the Constitution.

Analogous past authority of this Court

67 The error of the approach of the sentencing judge is also demonstrated by a reflection upon a common theme running through a number of analogous decisions of this Court.

68 In *R v De Simoni*[62], this Court held that, where an indictment does not refer to particular circumstances of aggravation, a judge imposing sentence may have regard to such circumstances only if they would not render the accused liable to a greater punishment under a different offence. In his reasons, Gibbs CJ (with whom Mason and Murphy JJ agreed[63]) traced the applicable principle to common law doctrine recognised as early as the eighteenth century[64]. Modern applications of the doctrine may be dated to *R v Bright*[65].

69 In *Bright*, the prisoner had pleaded guilty to a charge of attempting to elicit information concerning the manufacture of war materials contrary to wartime regulations. In sentencing him, the trial judge had expressed a conclusion that the prisoner, in committing the acts charged, had intended to assist the enemy. However, if such an intention had been charged, proved and accepted by a jury, the prisoner was liable to the penalty of death. The judge sentenced the prisoner to penal servitude for life. The Court of Criminal Appeal substituted a sentence of ten years penal servitude. It concluded that the trial judge should not have taken into account, as aggravation, a consideration that had not been charged in the indictment as a separate offence with which, (as it was implied) it would have been open to the prosecution to charge the prisoner. By implication, it would also have been open to the prisoner to defend the greater charge raising the possibility that the prosecution might have failed to obtain a conviction upon it.

70 In *Baumer v The Queen*[66] this Court called attention to the need to differentiate between withholding any degree of leniency to which a person

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62 (1981) 147 CLR 383. See also *Savvas v The Queen* (1995) 183 CLR 1 at 5.

63 *De Simoni* (1981) 147 CLR 383 at 395.

64 *De Simoni* (1981) 147 CLR 383 at 389 referring to *Dominus Rex v Turner* (1718) 1 Str 140 [93 ER 435] and Chitty, *Criminal Law* 2nd ed (1826), vol 1 at 231b.

65 [1916] 2 KB 441.

66 (1988) 166 CLR 51.

appearing for sentence might otherwise be entitled and increasing the sentence beyond what was considered appropriate for the instant offence[67]. Concentration on the "instant offence" was the instruction of this Court. In the present case, the sentencing judge used those exact words ("commission of the instant offences"). However, she then cast her attention backward to the offender's suggested participation in earlier uncharged acts of cocaine importation for a period of time prior to the "instant offences".

71 In *Siganto v The Queen*[68], whilst acknowledging that a plea of guilty might ordinarily be taken into account in mitigation of a sentence, this Court unanimously insisted that a person who pleads not guilty must not be penalised by the imposition of a higher sentence because of such a plea or the consequent need for a trial and the conduct of the defence.

72 Most recently in *R v Olbrich*[69], the Court considered whether the sentencing judge had erred in concluding that the prisoner was not entitled to mitigation because he was a "courier", as distinct from a "principal", in the importation of prohibited drugs. Although in this case Bell J[70], in the Court of Criminal Appeal, relied on what was said in *Olbrich*, there is a vital point of distinction between the two cases. In *Olbrich*, the issue was how the offender should be punished for his level of involvement in the instant offence. So much was made clear by the statement of the sentencing judge in that case that, while he harboured suspicions as to the offender's involvement in illegal activity other than the offences charged, he would "put them completely out of [his] mind" for the purpose of determining the sentence for the instant offence[71]. In the present case, this is not the way the sentencing judge reasoned. Quite the opposite. She put the suspected past offences in the forefront of her mind, as is indicated by her reference to them and as is confirmed by the "very heavy" sentence she then imposed.

73 Far from indicating any departure from a specific focus on the "instant offence" (as distinct from other aggravating acts of criminality), the remarks of this Court in *Olbrich* confirm the consistent instruction of this Court in *De Simoni*, *Baumer*, *Siganto* and other cases. The majority in *Olbrich* said[72]:

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67 (1988) 166 CLR 51 at 57.

68 (1998) 194 CLR 656 at 663 [21] approving *R v Gray* [1977] VR 225 at 231.

69 (1999) 199 CLR 270.

70 *Weininger* (2000) 119 A Crim R 151 at 165 [91].

71 *Olbrich* (1999) 199 CLR 270 at 283 [35] per Howie DCJ quoted.

72 (1999) 199 CLR 270 at 278-279 [18] (emphasis added).

> "… inquiring about what was done or intended by a person who imported drugs into Australia (apart, that is, from the acts which constitute the importation) will not always be relevant to sentencing that offender for the crime of importation. The offender may have conspired with others to import the drugs; the offender may very well have intended to deal with the drugs in Australia in ways that amount to the commission of other offences in this country. *But it would be quite wrong to sentence an offender for crimes with which that offender is not charged*[73]."

74 Moreover, in *Olbrich*, the majority in this Court endorsed the reasoning of the Court of Appeal of Victoria in *R v Storey*[74]. That decision sustains the additional principle by reference to which Simpson J dissented in this case. In *Storey*, it was held that a sentencing judge "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt". In the present case, the sentencing judge did not so express herself when taking into account, as a matter *adverse* to the appellant, her conclusion that he had been a participant in acts of cocaine importation for some period of time before the commission of the instant offences.

Adherence to a basic sentencing principle

75 *The basic principle*: The foregoing rules, upheld by this Court, are illustrative of a fundamental principle of fair procedure in sentencing. In *Olbrich*[75] I expressed this principle as follows:

> "It is fundamental that the respondent only be sentenced in respect of the particular offence to which he had pleaded guilty and of which he had been convicted. Where there are multiple offences of possible relevance to the facts but the accused has been charged and convicted of one or some only, it is a fundamental error to punish the accused on a basis dependent upon particular circumstances of aggravation which would constitute a different offence of which the accused has not been charged or convicted. If the Crown wishes to secure the punishment of an accused in respect of such aggravated circumstances, it is obliged to lay the charge which would present the guilt of the accused of such offence as an issue

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73 *De Simoni* (1981) 147 CLR 383.

74 [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell AJA, cited in *Olbrich* (1999) 199 CLR 270 at 281 [27] (original emphasis).

75 (1999) 199 CLR 270 at 291 [53] (footnotes omitted).

> for trial. This is a rule of law derived from the basic requirements of fair procedure. This Court has insisted upon it and it has been regularly applied."

Although I was in dissent in *Olbrich* as to the outcome of that appeal, I do not take my statement of this principle to be contrary to the approach of the majority in that case.

76 *Overseas applications*: The fundamental principle I expressed is reflected in English judicial authority old and new. In one English case, bearing some similarity to the present, *R v Foo*[76], the accused pleaded guilty to attempting to possess heroin contrary to the applicable statute[77]. A letter was found on his person that indicated that he may have been a drug trafficker. On the basis of the letter, the judge sentenced him to four years imprisonment. On appeal it was held that, as the offender had not been charged under the provisions of the English Act that made it an offence to be in possession with intent to supply, it was erroneous to sentence him as a trafficker. Similar sentencing principles have been applied in other countries[78].

77 Recently, because of disparity of practice in England, the Court of Appeal has reiterated, in strong terms, the impermissibility of punishing a person beyond the "instant offences". In *Canavan*[79], Lord Chief Justice Bingham, giving the reasons of the Court of Appeal in what was treated as a test case, said[80]:

> "A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence[81]. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy

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76 [1976] Crim LR 456. See also *De Simoni* (1981) 147 CLR 383 at 390.

77 *Misuse of Drugs Act* 1971 (UK).

78 eg *R v Kirk* (1901) 20 NZLR 463 at 472-474; *R v Martini* [1941] NZLR 361 at 364-366.

79 [1998] 1 Crim App R 79.

80 [1998] 1 Crim App R 79 at 81-82.

81 *Director of Public Prosecutions v Anderson* [1978] AC 964 at 975.

> to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit.
>
> It is said that the trial judge, in the light of the jury's verdict, can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the instances specified in individual counts. But this, as it was put in *Huchison*[82] is to 'deprive the appellant of his right to trial by jury in respect of the other alleged offences.' Unless such other offences are admitted, such deprivation cannot in our view be consistent with principle."

78 Lord Bingham acknowledged that the approach established in *Canavan* might sometimes necessitate the inclusion of more counts in indictments. However, that obligation was a manageable imposition. In his Lordship's view as in mine, it was preferable to sentencing such persons, and thus providing for their punishment, upon uncharged offences.

79 There can be no gainsaying that the words used by the sentencing judge ("participation in cocaine importation … for some period of time") implied participation by the appellant in actual earlier serious criminal offences contrary to federal law. To the extent that this consideration influenced her Honour's sentence, directly or indirectly, significantly or marginally, it amounted to a breach of the fundamental principle of sentencing recognised in Australia, England and elsewhere. Even more, it represented a breach of basic rules of procedural fairness and due process.

Respecting the prosecution role

80 There is yet another consideration that supports these conclusions. In several cases this Court has insisted upon respect for the prerogatives of the prosecution[83]. The primacy of the prosecutor in determining the accusations that will be placed before a court, and in deciding whether or not to accept a plea of guilty to a lesser offence, is clear law in this country[84]. This delineation of functions arises from a recognition of the different roles of prosecutors and courts in our system of criminal justice. It is not for courts to determine what the accusation will be but whether the accusation, as made, is established according to law in a trial lawfully conducted.

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82 *R v Huchison* [1972] 1 WLR 398 at 400; [1972] 1 All ER 936 at 937.

83 See eg *R v Apostilides* (1984) 154 CLR 563 at 575; *Dyers v The Queen* (2002) 76 ALJR 1552 at 1557 [23], 1568 [85], 1577 [135]; 192 ALR 181 at 188, 204, 216.

84 *Maxwell v The Queen* (1995) 184 CLR 501.

81 As many of the cases that I have mentioned illustrate, occasions arise where judges reach a conclusion that a prosecutor has not charged an accused person with a more serious offence or offences when that course would have been open to the prosecutor, on the judge's view of the evidence. For a judge to give effect to such an opinion is to intrude impermissibly into prosecutorial discretions. This is forbidden. It is also imprudent and unwarranted.

82 A judge will rarely have available all of the considerations that lead a prosecutor to a conclusion concerning the number and severity of the offences that will be charged. Where the offender pleads guilty to a particular offence, although some other more serious offence might seem applicable, the judge will usually be unaware of the considerations behind such an outcome. Those considerations might reflect a professional evaluation of the available evidence, the prospects of securing conviction of other or aggravated offences, the burden of other charges on witnesses, public costs and other matters of which the judge will be unaware. Prosecutors will doubtless also take into account assessments personal to the offender, evaluations of the risks of reoffending, the contemporary significance of like offences and such considerations as the encouragement to other similar or connected persons guilty of offences to plead guilty to involvement in connected or other crimes.

83 When, in the face of such prosecutorial prerogatives, judges effectively shift the focus of their attention in sentencing, from the "instant offences", which are the subject of the charges placed before them, and import into their sentencing considerations relevant to other and different offences, not charged, they effectively substitute their views of the relevant offences for those of the prosecution. This is undesirable in principle. Still more, in this country it is legally impermissible.

84 In the present case, the sentencing judge was found[85] to have imposed a sentence higher than that propounded by the prosecutor appearing before her. Although such a course was certainly open to her Honour (and was held by the Court of Criminal Appeal not to have involved in itself any procedural unfairness in the circumstances[86]), it does show the risk of allowing the mind to shift its focus from the "instant offences" to other, uncharged, offences of a serious kind thought to have occurred in the past "for some period of time".

85 The prosecutor in the instant case was experienced. He was able to draw on nation-wide statistics concerning sentences imposed for the offences

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85 *Weininger* (2000) 119 A Crim R 151 at 158 [42].

86 *Weininger* (2000) 119 A Crim R 151 at 158 [44], [46]; cf *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282.

charged[87]. The sentencing judge was not obliged to comply with the prosecutor's range. However, the fact that she exceeded it lends colour and force to the passages in her reasons of which the appellant complains in this Court. It suggests that her Honour may indeed have added to the appellant's punishment for earlier participation in offences of cocaine importation other than on the single occasion charged. Certainly, she wrongly deprived him of established entitlements to leniency.

86 Furthermore, properly and candidly, the prosecutor before this Court accepted that the "very high" sentence imposed on the appellant "does create some concern about the disparity issue" in relation to the sentence later imposed on Mr Geraghty. Although the prosecutor submitted that such concern would not be sufficient to persuade the Court to intervene, if other considerations require intervention, as I believe they do, this one tends to reinforce the need to correct demonstrated error.

87 The prosecutor charged the appellant with being knowingly concerned in only one act of importation, namely that in May 1997. It was open to the prosecutor to lay charges in respect of other earlier acts of importation. Such was the course adopted in the case of Mr Geraghty. The absence of such other charges in the case of the appellant reflects the exercise by the prosecutor of the applicable discretion belonging solely to him and not to the judiciary. In such circumstances, out of respect for the prosecutor's prerogatives, and to uphold the differentiation in the charges respectively laid (in respect of which the two offenders severally pleaded guilty and were each convicted) it was important that the sentencing judge should not, directly or indirectly, magnify the significance of suspected prior "participation in cocaine importation" in the case of the appellant. To the extent, however small, that she did so, she substituted her opinion of the crimes that should be before the court for that which the prosecutor had determined.

Proof of adverse facts beyond reasonable doubt

88 The only facts accepted by the appellant's pleas of guilty were those essential to the elements of the offences charged in the indictment presented against him by the prosecutor. Those counts were all addressed to the acts involved in the importation of May 1997. Before the case reached this Court, it was never suggested that the conspiracy charges in the second and third counts could provide an umbrella to justify evidence relevant to earlier non-specific, but serious and separate, federal crimes of cocaine importation.

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87 *Weininger* (2000) 119 A Crim R 151 at 158 [43].

89 Assuming, however, that in some way, it was permissible for the prosecution to rely on facts suggesting earlier participation in distinct acts of cocaine importation, any such facts would undoubtedly have to be proved beyond reasonable doubt[88]. Yet the most that appears in the incriminating transcript of the intercepted conversation tendered in the sentencing proceedings is proof of what the appellant *said* in conversation with an individual (now known to have been a police agent) whom the appellant was attempting to inveigle into participation in what became the May 1997 offences. There was no separate proof of the *fact* of such earlier involvement. Nor was such involvement charged, as it might have been had the prosecutor considered that there was sufficient evidence of the facts of the appellant's involvement to prove other and earlier offences to the requisite standard.

90 People in circumstances such as those facing the appellant when he engaged in the recorded conversation sometimes lie out of bravado or to suggest an experience or seniority in criminal or other affairs that they do not in fact have. With Simpson J, I am of the opinion that the sentencing judge did not turn her attention specifically to the standard of proof resting on the prosecution for the establishment of the degree of serious criminal involvement in other offences which she recounted in her reasons. Like Simpson J, I am not satisfied that the conversation recorded in the relevant transcript of intercepted conversations sustained adverse findings against the appellant according to the criminal standard of proof[89]. Least of all does it do so in a case where the prosecutor had not included such offences in the counts of the indictment.

Conclusion: the sentencing miscarried

91 It follows that the sentencing of the appellant miscarried. The sentencing judge's errors are brought into sharp focus when regard is had to the charges preferred against the appellant when compared to the additional charges preferred against Mr Geraghty and the sentence imposed on him. Having regard to the foregoing errors, the excess of the appellant's sentence (beyond the range propounded by the prosecutor) can be seen in a stark light.

92 With all respect, this is not a conclusion reached by divorcing the sentencing judge's remarks from the context in which they were made[90]. To the contrary, it is one that is reinforced by reading those remarks in the context of the "very heavy" sentence that she proceeded to impose on the appellant. The

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88 *Olbrich* (1999) 199 CLR 270 at 278-279 [17]-[18] and 291-292 [53]-[54].

89 *Weininger* (2000) 119 A Crim R 151 at 161 [60].

90 cf the joint reasons at [29].

sentence reflected, and gave effect to, her Honour's view about the appellant's involvement in earlier uncharged, unproved and unconvicted serious criminal offences. Respectfully, I regard that course as incompatible with sentencing law and fundamentally unfair.

93 In the end, there is nothing "metaphysical" about the problem presented in this case. This is not, in my view, a case of lack of clear expression[91] on the part of the sentencing judge but of erroneous expression leading to excess in sentencing.

94 Whatever different views may be taken of complex sentencing facts known to a court on sentencing a federal offender convicted on the basis of a plea or verdict, when it is suggested that other and different *offences* are relevant to sentencing, beyond those contained in the indictment giving rise to such plea or verdict, such other and different *offences* must either be added to the indictment so that the accused can decide how to plead to them; or they must be openly acknowledged by the accused as relevant to the sentencing process to be taken into account in the sentence; or they must be disregarded in imposing the sentence. If such facts are advanced by the prosecution in a purely defensive way to rebut suggestions of good character, two rules must be strictly observed. If the facts are adverse to the interests of the accused they must not be taken into account by the sentencing judge unless they have been established beyond reasonable doubt. In considering any such rebuttal, the sentencing judge must be careful not to allow the evidence tendered for the purpose of rebuttal effectively to assume a role that increases the criminal punishment of the person standing for sentence, including by depriving that person of any established legal rights to leniency. Such an increase, I believe, is what occurred in the present case. It explains the "very high" sentence imposed on the appellant. The consequent miscarriage of justice requires the intervention of this Court.

Orders

95 The appeal should be allowed. The orders of the Court of Criminal Appeal of New South Wales should be set aside, save in so far as that Court granted leave to appeal. In place of that Court's judgment, there should be substituted orders that the appeal be allowed, the sentence imposed with respect to the first count of the indictment be set aside and a sentence of imprisonment for sixteen years be substituted with a non-parole period of ten and a half years, as proposed in the Court of Criminal Appeal by Simpson J[92].

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91 cf Reasons of Callinan J at [117].

92 *Weininger* (2000) 119 A Crim R 151 at 163 [77].

96 CALLINAN J. This appeal raises questions as to the relevance and use of facts tending to establish the commission of uncharged offences on the sentencing of an offender who has pleaded guilty.

Facts and previous proceedings

97 The appellant pleaded guilty in the District Court of New South Wales (Latham DCJ) on 27 May 1999 to one charge of being knowingly concerned in an importation of a commercial quantity of cocaine under s 233B(l)(d) of the *Customs Act* 1901 (Cth), and one charge each of conspiracy under s 86 of the *Crimes Act* 1914 (Cth) to launder money contrary to s 81 of the *Proceeds of Crime Act* 1987 (Cth), and of conspiring to supply a commercial quantity of cocaine under sub-s 25(2) of the *Drug Misuse and Trafficking Act* 1985 (NSW). The State offence carries a maximum penalty of life imprisonment. The Federal importation offence also carries a maximum penalty of life imprisonment The money laundering offence carries a maximum penalty of 20 years imprisonment.

98 In sentencing the appellant the primary judge, Latham DCJ, had before her a statement of facts relative to the commission of the offences, transcripts of two covertly recorded conversations, a psychologist's report, numerous testimonials to the appellant's previous good character, and various certificates relating to the appellant's capacity to work and other matters. Her Honour also heard evidence from a woman who was living with him before his arrest, and another woman with whose daughter he had lived for a time and with whom he had a child. The evidence of the two women was that the appellant was a person of previous good character. It is necessary to refer to the details of some of that material.

99 One of the two conversations that were recorded took place on 20 March 1997. These were some of the exchanges that occurred during it:

> "When you've got money, you've got money, you know, you spend it on what you want you don't go out raging with it or buying new cars, houses, there are ways to launder it you know, there are ways [to] launder it, I speak to my mates. It's not too hard to send it to Tel Aviv [to] launder back there.
>
> ...
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> So the one with the money that's what's costing us a lot of money to try and get him out, see [he's] not talking he just had money that's it ... to try and get him out ... you know because ... for as long as they want, as far as ... the other two got caught with 5 kilos each, you know, so work ... pay for their families here, to support them, we put 100 grand, 100 thousand in each one, that's it, they don't talk, you know they get out after six years, that's it.

...

It should be easy, see our guy, the guy there that [we're] sending has done it before, but not with the other mob, so [he's] done it once or twice I think and once ... twice, [he's] got the stuff stuff is waiting there now, stuff ready to go, and then its new, you know, no connection with the other mob that got caught with, don't have to worry about that, you know.

...

Nothing can really go wrong. Nothing people they're saying and that people get caught on the plane with it, and ... they're saying that used to get scared put it and destroy it just before they got to the front ... airport the toilets you see ... you know but we told them if you feel unsafe, if something goes wrong just throw it in the loo, that's it. They used to do it, some of them, you know. So ... (over talk).

...

You know I ... Jack knows me I used to get some of this stuff. We ... as much as yours both in the same situation basically you know I don't know you but Jack knows you I know Jack for a couple or two years, so that's it. If [he's] alright and I'm alright that's it.

...

Big one, see grow them for six weeks before they head them, and grow to this big, and they are all like, the main head is huge, like one big head. They go up to 5oz, usually its 5oz, the seven and a half the other week, the biggest one we've ever had, so from one plant.

...

But otherwise you know, that's it. We got, see with him, used to get the stuff over there cause I tried to establish contacts there, used to buy stuff from him, so I, and he said could get rid of, it so, okay, I get you some and it was such a journey, you know. Just weeks of waiting and he goes here and he tries there you know has this contact not that contacts, its a bit hard. ..."

100 The unchallenged statement of facts before her Honour included this statement.

"In October 1996, an AFP Informant (hereinafter referred to as 'Gordon') approached Danny Weininger and offered his services as a drug courier. *Weininger told Gordon that he was involved in a continuing cocaine importation syndicate, of which Kevin Michael Geraghty was the*

> *principal, and that the syndicate had encountered difficulties with an established method of bringing cocaine into Australia from America.* The AFP sought assistance from the USA Drug Enforcement Administration (DEA) and an operation was commenced, during which an undercover DEA officer (hereinafter referred to as Keegan) was to act as a friend of Gordon." (emphasis added)

101 After summarizing the facts her Honour said this of the appellant:

> "In summary, he occupied a relatively senior position in the hierarchy of what was clearly an extensive Organisation, experienced in the importation of cocaine on a large scale. He occupied that position by dint of his expertise and his proven worth to the principal of the Organisation, Mr Geraghty. In that respect I regard it as entirely appropriate that the prisoner should be treated as a junior partner, or a middle level participant for the purposes of this sentencing exercise. I do not regard him as low in the hierarchy of the Organisation."

102 Her Honour referred, among other relevant matters, to the quantity of the cocaine imported, the appellant's age, an absence of real contrition, and the appellant's personality traits. In the course of discussing the appellant's character, she made the statement which is central to the appellant's appeal:

> "The prisoner's prior good character in the sense that he comes before this court without any prior convictions is a matter which must receive some recognition. However, in the face of strong evidence establishing the prisoner's participation in cocaine importation by the same syndicate for some period of time before the commission of the instant offences, he cannot be treated as a first offender with the attendant leniency that that status usually attracts."

103 In the result Latham DCJ imposed these sentences: a term of 18 years imprisonment on the importation charge; 10 years imprisonment (commencing on the same date as the first sentence) on the Federal conspiracy charge; and 10 years (commencing on the same date as the first sentence) on the third charge. Her Honour fixed a non-parole period of 12 years in respect of the first two offences but declined to fix a minimum term regarding the State offence.

104 An appeal by the appellant to the Court of Criminal Appeal of New South Wales (Dowd and Bell JJ, Simpson J dissenting) was dismissed[93]. It is unnecessary to consider any of the grounds relied on there except for the one which was relied on in this Court also: that the sentencing judge erred in taking

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93 *Weininger* (2000) 119 A Crim R 151.

into account in the determination of sentence prior alleged criminal conduct of the appellant when that conduct has not been proved beyond a reasonable doubt.

105 In the intermediate court of appeal Dowd J agreed with the reasons of Bell J who relevantly said[94]:

> "The indictment charged the applicant in each case with the commission of the subject criminal conduct between 20 January and 5 May 1997. At the sentence hearing an agreed statement of facts was before the court. In addition to the statement of facts, the transcripts of lawfully recorded conversations between the applicant and others said to be involved in the criminal enterprise were tendered without objection. The first paragraph of the statement of facts includes the assertion: 'Weininger told Gordon that he was involved in a continuing cocaine importation syndicate.'
>
> That assertion found support in the transcript of the conversation between the applicant and an informant named Gordon. That conversation took place within the period limited by the indictment. In the course of this conversation the applicant made statements suggestive of his involvement in the importation of cocaine as having commenced prior to the subject offences.
>
> I am not persuaded that Latham J erred in the approach she took to this material. In his written submissions [counsel] contended:
>
> > 'There was a distinct flavour throughout the remarks on sentence that Mr Weininger was being penalised for what the learned judge concluded to be other criminal activity in which he was engaged but for which he was not charged. It was not suggested on his behalf that this conduct represented an "isolated lapse", but the principle is clearly explained in this Court's decision in *JCW*[95]. Where there are other offences apparently committed but they have not been charged, they cannot be relied upon to aggravate the sentence imposed.'
>
> As Simpson J observed, the submission that it had not been put on the applicant's behalf that his conduct was an isolated lapse is untenable.

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94 *Weininger* (2000) 119 A Crim R 151 at 164-165 [83]-[88].

95 (2000) 112 A Crim R 466.

I agree with Simpson J's view that an analysis of Latham J's reasons do not suggest that she sentenced the applicant for crimes with which he was not charged.

On the applicant's behalf, evidence was led with a view to suggesting that the applicant's involvement in the subject offences was uncharacteristic. ... It is in this context that Latham J's observations ... need to be considered."

106 Bell J referred to s 16A(2)(m) of the *Crimes Act* 1914 (Cth) and then said[96]:

"Latham J considered that the applicant had failed to make good a claim for leniency (that generally he was a person of good character as evidenced, in part, by his lack of criminal convictions). It was not necessary for the Crown to prove beyond reasonable doubt that the applicant had participated in cocaine importation prior to the commission of the subject offences before it was open to her Honour to so conduct: *R v Olbrich*[97]."

107 Her Honour's conclusions were stated in this way[98]:

"I respectfully agree with Simpson J that the sentences imposed upon the applicant were very heavy ones. I consider that they were at the top of the range. However, I am not of the view that they were outside the proper exercise of discretion. In this regard I take into account her Honour's finding that the applicant occupied a relatively senior position in the hierarchy of the importation syndicate. Further, although the three offences represented a single episode of criminal offending, it was appropriate for her Honour to reflect in the sentence imposed with respect to the s 233B count the totality of the applicant's criminality. This included that the applicant's involvement extended beyond the importation of the cocaine and embraced an agreement to distribute prohibited drugs."

108 Simpson J, although she did not think that the primary judge had sentenced the appellant for uncharged crimes, was of a different opinion with respect to an aspect of the case which is before this Court. She said[99]:

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96 (2000) 119 A Crim R 151 at 165 [91].

97 (1999) 199 CLR 270 at 280-281 [24]-[28].

98 (2000) 119 A Crim R 151 at 165-166 [92].

99 (2000) 119 A Crim R 151 at 160 [57].

"[Her Honour's] conclusion that the applicant could not be treated as a first offender and therefore entitled to that leniency, essentially deprived the applicant of something to which he would have been entitled had she accepted the claim of good character. She rejected the claim on the basis that the evidence before her established that the applicant had been guilty of cocaine importation for some period of time before the commission of the offences for which he stood to be sentenced. Although her Honour did not expressly say so, it is, to my mind, clear that what she held was not that the applicant's involvement in the present offences extended beyond the date specified in the indictment (which may have been of relatively limited importance) but that he had been involved in cocaine importation on other occasions – that is, in relation to shipments of cocaine different to that the subject of the charges which he faced. This finding is a matter of considerable importance and it was a finding that drew some support from the evidence of the transcripts of the conversations."

109 Her Honour added[100]:

"The applicant put himself forward as a person of good character. Specifically, he put himself forward as a first offender. Latham J rejected the claim of good character. If her findings stopped there (leaving aside the question of reasons for the finding that might have arisen) it would have been analogous to the rejection by the sentencing judge in *Olbrich* of the claim to low level participation. But the finding did not stop there. The judge, in effect, also rejected the applicant's claim that he was a first offender. In order to reject that claim it was necessary that her Honour make a finding (as she did) that the applicant had previously been involved in drug importations. Notwithstanding that that finding of fact was made in the context of rejecting a claim made by the applicant of circumstances attracting leniency, it denotes error for two reasons. Firstly, it was a fact used adversely to the applicant and therefore could not be used unless it had been proved beyond reasonable doubt. Her Honour did not purport to be satisfied beyond reasonable doubt of the applicant's guilt of drug importations on occasions other than that the subject of the charges and, on the material before her, it would not have been open to her to do so.

Secondly, the finding amounted to a finding of guilt of criminal activity with which the applicant was not charged. In an earlier passage in

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100 (2000) 119 A Crim R 151 at 161-162 [65]-[70].

Olbrich[101] the majority in the High Court gave, as one reason for rejecting the proposition that a sentencing court must ascertain the role of the offender, that exploring that question might disclose the commission of other offences, or the intention to commit other offences, and that it would be 'quite wrong' to sentence an offender for crimes with which the offender was not charged. Their Honours referred to *De Simoni*[102] in this context.

Although I do not think it could be said that Latham J sentenced the applicant for crimes with which he was not charged, she did, in my opinion, deny him leniency, to which he had otherwise established his entitlement, on that basis.

Moreover, and while the absence of notice to the applicant that her Honour was contemplating the finding is not raised as a ground of the application, it is impossible to know what the applicant may have put forward had her Honour's views, in tentative form, been brought to his attention.

A final circumstance relates to the length of the sentences actually imposed which were, by any standard, very heavy. In the absence of her Honour's reference to additional criminality, I may not have concluded that the sentences were outside the applicable range; but if they were not, they were certainly at the very top of that range.

This would suggest that the finding of prior criminality operated in a real way against him. In my opinion it was an error to take into account, in rejection of the applicant's claim to good character, the fact or the possibility of the commission of another offence or other offences. It will be necessary to consider the consequences of that conclusion below."

110 Her Honour would have granted leave to appeal, allowed the appeal, quashed the sentence and re-sentenced the applicant by substituting a term of imprisonment for 16 years with a non-parole period of $10^1/_2$ years for the s 233B charge. She would not have interfered with the sentences on the other charges[103].

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101 (1999) 199 CLR 270 at 278-279 [18].

102 *R v De Simoni* (1981) 147 CLR 383.

103 (2000) 119 A Crim R 151 at 163 [77].

The appeal to this Court

111 In this Court the appellant has substantially adopted the reasoning of Simpson J. He also seeks to rely on some passages in *Olbrich*[104], *De Simoni*[105] and *Siganto v The Queen*[106]. Before discussing the appellant's submissions it is appropriate to set out s 16A of the *Crimes Act*:

> **"16A Matters to which court to have regard when passing sentence etc.**
>
> (1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
>
> (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
>
> (a) the nature and circumstances of the offence;
>
> (b) other offences (if any) that are required or permitted to be taken into account;
>
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct;
>
> (d) the personal circumstances of any victim of the offence;
>
> (e) any injury, loss or damage resulting from the offence;
>
> (f) the degree to which the person has shown contrition for the offence;
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;

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104 (1999) 199 CLR 270.

105 (1981) 147 CLR 383.

106 (1998) 194 CLR 656.

(g) if the person has pleaded guilty to the charge in respect of the offence – that fact;

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;

(j) the deterrent effect that any sentence or order under consideration may have on the person;

(k) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(l), 20(l) or 20AB(l) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order."

112 It is necessary at this point to draw attention to the differences in language between pars (b) and (c) of sub-s 2. The fact that the former provision refers to "other offences" and the latter to a "course of conduct" provides a basis for distinguishing between them, and for taking into account under the latter, relevant conduct, albeit that it might involve criminal acts which in turn might not have resulted in charged and established, (by verdict or plea) facts constituting other offences.

113 The appellant's principal submission was this. The evidence in the proceedings on sentence was not capable of supporting a finding beyond reasonable doubt that the appellant had been involved in the importation of cocaine on other occasions apart from the offence for which he had pleaded guilty and for which he was to be sentenced. Whilst the sentencing judge might describe the evidence of the appellant's prior involvement in cocaine importation as "strong", it was based on the statements of the appellant to an undercover operative. It is not unknown, it was submitted, for people involved in illegal drug dealing to claim expertise and experience in the business of drug dealing which they do not in truth possess.

114 The appellant referred to the adoption in *Olbrich*[107] of the principle stated by the majority (Winneke P, Brooking and Hayne JJA and Southwell AJA, Callaway JA dissenting) in *R v Storey*, that a sentencing judge[108]:

> "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities." (original emphasis)

115 In *Storey* the majority said[109]:

> "It may very well be that the descriptions of aggravating and mitigating circumstances will be useful shorthand expressions to refer to the distinction we draw. They are, however, no more than shorthand expressions. ... 'Aggravating' and 'mitigating' must be understood in a wide sense, and without, for example, drawing the distinction which might be drawn between the significance for another purpose on the one hand of a circumstance which renders the crime more serious (for example, the use of a weapon) and on the other hand of a prior or subsequent conviction."

116 The appellant's submissions continue that the majority in the Court of Criminal Appeal failed to distinguish properly between a matter that cannot be used as a circumstance of aggravation, and a matter adverse to an offender. A prior conviction is a matter that cannot be used as a circumstance of aggravation, although it is still a matter distinctly adverse to an accused and will usually produce a heavier sentence. An allegation of prior criminal conduct is no different in substance from a suggestion that the offender has a prior conviction. Each of these is a matter which, before it can be taken into account on sentence, must be proved beyond reasonable doubt.

117 In my opinion the appeal should be dismissed. Perhaps the passage in the sentencing judge's remarks to which the appellant points might have been more clearly expressed. But properly understood her Honour's remarks have these components. First, she accepted that his presence before the court as a person without prior convictions required recognition, a recognition which her remarks showed she gave it. Secondly, the appellant's repeated, knowledgeable and

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107 (1999) 199 CLR 270 at 281 [27].

108 [1998] 1 VR 359 at 369.

109 [1998] 1 VR 359 at 371.

detailed remarks about earlier participation in the importation of cocaine, on any view, provided strong evidence of at least a disposition to commit and recommit such a crime if he had the opportunity to do so. The sentencing judge's treatment of the appellant therefore required that the same degree of leniency as might be bestowed upon a first offender of good character (which included of course his disposition) could not be bestowed upon this appellant. That did not mean that no leniency at all should be, or was not, bestowed upon him as a first offender.

118 What I have said is sufficient to dispose of this appeal but there are some other bases upon which it might perhaps have been rejected.

119 The appellant's admissions during the recorded conversations were well capable of establishing his guilt beyond a reasonable doubt. There is a real air of verisimilitude about them. They were substantially repeated in the agreed statement of facts. They were made in circumstances in which the appellant might have been expected to be speaking freely. He offered no explanation as to how he knew the matters that he discussed, or why he might find it necessary to make the claims that he did to the other conspirators. All that the sentencing judge really had in denial was the appellant's submission that it was not unknown for people (including presumably the appellant) to claim an expertise which they did not have in the importation of drugs.

120 One of the charges was of conspiracy. The matter was not fully explored in argument but it may be that the admissions were admissible in proof of, and were overt acts evidencing the conspiracy. Once they became admissible on that basis, and in the light of the plea of guilty to conspiracy, they might be taken to have been admitted for all relevant purposes, including for sentencing. A sentencing judge should take into account all relevant acts forming part of the offence. It should also be kept in mind that when parties engage in conspiracy, the participants sometimes come and go, and the objectives of the conspirators may contract or expand. Furthermore, in a case of conspiracy, as a practical matter the evidence which may be relevant to guilt may be different from, and not subject to quite the same strictures of relevancy and directness as with other charges[110].

121 Another matter that was not explored was whether the admissions might have constituted similar fact evidence and therefore have been probative of one or more of the offences to which the appellant pleaded. If that were so, again they might have constituted evidence relevant to guilt and also therefore to penalty.

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110 *Ahern v Deputy Commissioner of Taxation (Q)* (1987) 76 ALR 137.

122 The activities in which the appellant claimed he had participated were also at least possibly capable of being regarded as part of a relevant course of conduct within the meaning of s 16A(2)(c) of the *Crimes Act*. They were also indicative of a disposition, that is, of an aspect of the appellant's character, or an aspect of his antecedents, that is of his past, and therefore relevant sentencing matters within s 16A(2)(m) of the *Crimes Act*.

123 Having regard to the true meaning of the sentencing judge's remarks it is unnecessary for me to reach firm conclusions on the last four matters that I have discussed. Nothing that was said or done however by the sentencing judge and the Court of Criminal Appeal was contrary to what this Court has held in *Olbrich*[111].

124 I would dismiss the appeal.

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111 (1999) 199 CLR 270.