HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

CHAD JOHNSON APPELLANT

AND

THE QUEEN RESPONDENT

Johnson v The Queen
[2004] HCA 15
30 March 2004
P44/2003

ORDER

1. *Appeal allowed.*

2. *Set aside the order made by the Court of Criminal Appeal of Western Australia on 1 May 2002 dismissing the appeal.*

3. *Remit the proceeding to the Court of Criminal Appeal for consideration and determination in accordance with the reasons of this Court.*

On appeal from Supreme Court of Western Australia

Representation:

D Grace QC with M L Tudori for the appellant (instructed by Michael Tudori & Associates)

D J Bugg QC with D W L Renton for the respondent (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Johnson v The Queen

Criminal law – Sentencing – Federal offences – Appellant convicted of two counts of attempting to obtain possession of prohibited imports to which s 233B, *Customs Act* 1901 (Cth) applied – Whether sentencing judge applied peculiarly Western Australian sentencing principles – Whether express reference to relevant considerations in s 16A(2), *Crimes Act* 1914 (Cth) necessary.

Criminal law – Sentencing – Federal offences – Appellant convicted of two counts of attempting to obtain possession of prohibited imports to which s 233B, *Customs Act* 1901 (Cth) applied – Totality principle where sentencing for commission of several offences – Whether sentencing judge must fix sentence for each offence and aggregate them before determining questions of totality or concurrence – Whether sentencing judge may in some circumstances lower each sentence before aggregation – Instinctive or intuitive synthesis approach to sentencing.

Criminal law – Sentencing – Federal offences – Appellant convicted of two counts of attempting to obtain possession of prohibited imports to which s 233B, *Customs Act* 1901 (Cth) applied – One transaction rule – Where two offences contain common element – Effect of factual errors made by Court of Criminal Appeal – Whether factual errors made by Court of Criminal Appeal in dismissing appeal necessarily leads to conclusion that sentencing judge erred – Whether sentence properly reflects consideration of whether defendant was truly engaged upon one multi-faceted course of criminal conduct.

Crimes Act 1914 (Cth), ss 16A, 16B, 19(2).
Customs Act 1901 (Cth), s 233B.

1 GLEESON CJ. For the reasons given by Gummow, Callinan and Heydon JJ, I agree that the appeal should be allowed and the matter remitted to the Court of Criminal Appeal for further consideration.

2 I agree with Gummow, Callinan and Heydon JJ that the errors identified in the reasoning of the Court of Criminal Appeal do not necessarily require the conclusion that there was error on the part of the sentencing judge. I also agree that the appellant failed to make good a number of arguments suggesting that the Supreme Court of Western Australia has systematically adopted an erroneous approach to the sentencing of federal offenders for multiple offences, or to the application of what is sometimes called the principle of totality. In particular, the submission that there is inconsistency between the principles stated in *Mill v The Queen*[1] and *Pearce v The Queen*[2], and that *Pearce* effectively eliminated one of the two alternative courses said in *Mill* to be available to sentencing judges[3], should be rejected.

3 Despite an unsuccessful attempt by the appellant to construct various issues of sentencing principle, the ultimate question in the case is whether there was adequate consideration of the merits of the appellant's contention that the sentences imposed paid insufficient regard to the common aspects of the two offences of which he was convicted.

4 In *Attorney-General v Tichy*[4], Wells J said:

> "It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. When an accused is on trial it is part of the procedural privilege to which he is entitled that he should be made aware of precisely what charges he is to meet. But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his

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1 (1988) 166 CLR 59.

2 (1998) 194 CLR 610.

3 (1988) 166 CLR 59 at 63.

4 (1982) 30 SASR 84 at 92-93.

> criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient."

5 It may be added that the *Crimes Act* 1914 (Cth), in s 19, allows for sentences that are partly cumulative, and partly concurrent. And, as was observed in *Mill*[5], a sentencing judge, in a suitable case, may respond to considerations of the kind discussed by Wells J by lowering individual sentences rather than by making sentences wholly or partly concurrent. Ultimately, justice requires due consideration of whether, and to what extent, the appellant "was truly engaged upon one multi-faceted course of criminal conduct", and whether the sentences imposed properly reflected the outcome of that consideration.

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5 (1988) 166 CLR 59 at 63.

6 GUMMOW, CALLINAN AND HEYDON JJ. This appeal raises questions as to the proper approach to sentencing by State Courts of offenders against Federal criminal law who have committed more than one offence.

Facts

7 Schwarz was a "drug runner". He entered Australia on 2 November 2000, carrying more than 5000 tablets containing a substantial quantity of 3,4 Methylenedioxymethamphetamine ("ecstasy"), a prohibited import to which s 233B of the *Customs Act* 1901 (Cth) applied. That quantity was not less than a commercial quantity within the meaning of s 233B(1)(c) of the *Customs Act*. He also had in his possession more than a trafficable quantity of cocaine, another prohibited import. He was apprehended and agreed to participate in a controlled delivery of inert substances in substitution for the drugs that had by then been confiscated.

8 In accordance with instructions he had been given in Indonesia by the organiser of the importation, Schwarz checked into an hotel at Como in Perth. He telephoned the organiser to seek further instructions. He was asked to provide his room number and was informed that a person would call on him some time before midday to collect the drugs and to pay him for the importation. The person who was to collect the drugs, for which by then inert substances packaged in one parcel had been substituted, was the appellant. The appellant came to Schwarz's room. As he attempted to leave it he was arrested by Australian Federal Police officers. A second co-offender, Smart, who had been sitting in the appellant's sister's car outside the hotel, was also arrested. He was in possession of a substantial sum of cash.

At first instance

9 The appellant was charged with four offences, two of which were subsequently withdrawn. The remaining counts to which he pleaded guilty were:

> "1. On or about 2 November 2000 at Perth the [appellant] did without reasonable excuse, attempt to obtain possession of prohibited imports to which s 233B of the *Customs Act* 1901 (Cth) applied namely, narcotic goods consisting of a quantity of 3,4 Methylenedioxymethamphetamine (commonly called 'Ecstasy'), being not less than the commercial quantity applicable to that narcotic substance, contrary to s 233B(1)(c) of the *Customs Act* 1901.
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> 2. On or about 2 November 2000 at Perth the [appellant] did without reasonable excuse, attempt to obtain possession of prohibited

imports to which s 233B of the *Customs Act* 1901 applied namely, narcotic goods consisting of a quantity of Cocaine, being not less than the trafficable quantity applicable to that narcotic substance, contrary to s 233B(1)(c) of the *Customs Act* 1901."

10 The appellant's plea was heard by the Supreme Court of Western Australia (Scott J). His Honour's sentencing remarks included the following:

"The pre-sentence report indicates that you are aged 22, single and unemployed. The report indicates that at the time of this offending conduct you were in debt on a bank loan arising out of your purchase of a motor vehicle which had been damaged in an accident. At a rave party you had been offered $2000 to collect a package and you agreed to do that because the money would assist you with the loan.

The pre-sentence report also speaks of your family life and the difficulties that you encountered as a child. It is not insignificant that since the end of 1999 you had a problem with cocaine but always pay for the drugs which you use. That having been said, however, it is quite clear that your motive in being involved in this criminal enterprise was to obtain money for the purpose of meeting your liability under the loan.

Your counsel has stressed that you did not know the quantity of drugs that you were to obtain, and I accept that as a fact, but nonetheless you were prepared to take whatever the quantity was and facilitate the release of that quantity into the community in exchange for $2000.

Your counsel has also indicated that you made a further statement to the Federal Police which purports to exculpate Smart, the man who was downstairs in your sister's car. It is not necessary for me to make any determination as to whether that statement is the truth or not. It is sufficient for the purposes of sentencing to express the conclusion that a statement made by you for the purpose of exculpating an accomplice is not a matter that entitles you to any credit.

You are, however, entitled to credit for pleading guilty on the fast-track and accepting responsibility for your criminal conduct. You are not, in my view, however, entitled to any credit for cooperation, having elected to conceal the identity of Craig[6] and having sought to exculpate Smart from criminality. The other matter in your favour is your relative youth and I note that you are only 22 years of age.

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6 The person who offered the appellant the money.

I also take into account the many character references presented on your behalf that speak highly of you. It is frequently the case in matters of this sort that persons who are well regarded in the community are selected as couriers. The reason is that they attract no suspicion. For that reason references do not carry the same weight as they would in relation to other offences.

Counsel for the Crown submitted that your involvement should be seen as equivalent to that of Schwarz. In my view, that is not so. Schwarz was responsible for bringing these illicit drugs into Australia while you had no direct involvement in that aspect of this illegal transaction. Your part was to collect the drugs from Schwarz and to facilitate the distribution of those drugs in this country by passing them on to Craig or disposing of them at his direction.

I have taken into account the authorities referred to both by your counsel and by the prosecutor which relate to similar quantities of ecstasy and the matters contained in section 16A(2) of the *Crimes Act* 1914. In this case, however, not only were you involved in attempting to obtain the ecstasy but also the cocaine, which was part of the package which you were to take possession of. That, in my view, adds to the seriousness of your conduct."

11 His Honour said that he considered the appropriate sentence on count 1 to be imprisonment for 10 years, and on count 2 imprisonment for 5 years to be served cumulatively. His Honour reduced the sentence imposed upon count 2 on account of the "totality principle". A deduction of 3½ years was made for the appellant's "fast-track" plea of guilty. Because of his acceptance of responsibility for his actions, the appellant's head sentence was therefore reduced to 11½ years. His Honour ordered that the term of imprisonment on count 1 be 8 years, and on count 2, 3½ years to be served cumulatively. A single minimum term of 5½ years was imposed in respect of the total of the head sentences. That sentence was deemed to have commenced on 6 March 2001, the date on which the plea was entered and the appellant was taken into custody.

The Court of Criminal Appeal of Western Australia

12 The appellant successfully applied for leave to appeal to the Western Australian Court of Criminal Appeal (Malcolm CJ, Wallwork J and White AUJ)[7] but the appeal was unanimously dismissed. The Court rejected the appellant's first argument, that the sentencing judge should have, but did not, fix a separate

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7 *Johnson v The Queen* (2002) 26 WAR 336.

sentence for each offence and then proceed to reduce the aggregate of the sentences by directing that one of them be served wholly or partially concurrently with the other. The appellant also argued that the sentencing judge erred by not applying the totality principle. The appellant further submitted that his Honour had disregarded that the actus reus was the same for both counts. Malcolm CJ, with whom the other members of the Court agreed, dealt with the submissions in this way[8]:

> "It was submitted that the practice of determining an appropriate aggregate sentence for all offences and then fixing specific sentences for each separate offence so as to arrive at the appropriate aggregate was in error. It was submitted that the approach that ought to have been adopted by the sentencing judge was to affix appropriate penalties for each of the offences and then, by orders effecting concurrency or cumulation, achieve the intended result of the total effective sentence. In my opinion, it is apparent from the approach adopted by the learned judge that his Honour considered that the appropriate sentence for possession of the ecstasy was imprisonment for 10 years, and for attempting to obtain possession of the cocaine was imprisonment for five years. It is clear that the latter sentence was reduced on account of the totality principle, but was made cumulative. While the learned judge did not indicate what the sentence would have been for the attempt in respect of the cocaine, but for the application of the totality principle, it is apparent that the sentence of five years represented a substantial reduction, having regard to the range of sentences commonly imposed in such circumstances for the possession of cocaine or the attempt to obtain possession of heroin.
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> In *Serrette v The Queen*[9] the offender pleaded guilty to the import into Australia of a trafficable quantity of cocaine and also to being in possession of the cocaine so imported. He had 1,431 g (equivalent to 925.4 g pure) of cocaine. Concurrent terms of imprisonment for 10 years were imposed with a non-parole period of six years, after taking into account co-operation with the authorities. This represented a reduction of one-third from 15 years, so far as the head sentence was concerned. Kennedy J noted[10] that the credit given for assistance given or provided was now enshrined in legislation: ss 8(5) and 37A of the *Sentencing Act 1995* (WA) and s 21E of the *Crimes Act*. Kennedy J, after referring to

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8 (2002) 26 WAR 336 at 343-344 [21]-[23].

9 (2000) 118 A Crim R 204.

10 (2000) 118 A Crim R 204 at 205.

R v Gallagher[11], noted that where an offender is entitled to have assistance to the authorities taken into account, that will usually be on a number of grounds, some of which may overlap with other subjective matters to be taken into account in his favour. Kennedy J also said[12] that any intervention by the Court of Criminal Appeal would amount to a mere substitution of the opinion of the appeal court for that of the sentencing judge.

In *Pearce v The Queen*[13], McHugh, Hayne and Callinan JJ said that:

> 'To an offender, the only relevant question may be "how long", and that may suggest that the sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality[14].
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> Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision[15]. It is, then, all the more important that proper principle be applied throughout the process.
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> Questions of cumulation and concurrence may well be affected by particular statutory rules (see *Crimes Act*, s 444(2) and (3) [now repealed]; *Sentencing Act 1989* (NSW), s 9; see also *Sentencing Act 1991* (Vic), s 16). If, in fixing the appropriate sentence for each offence, proper principle is not applied, orders made for cumulation or concurrence will be made on an imperfect foundation.

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11 (1991) 23 NSWLR 220 at 227 per Gleeson CJ.

12 (2000) 118 A Crim R 204 at 206.

13 (1998) 194 CLR 610 at 623-624 [45]-[48].

14 *Mill v The Queen* (1988) 166 CLR 59.

15 cf *House v The King* (1936) 55 CLR 499.

> Further, the need to ensure proper sentencing on each count is reinforced when it is recalled that a failure to do so may give rise to artificial claims of disparity between co-offenders or otherwise distort general sentencing practices in relation to particular offences[16].'

It may be accepted that the approach, which ought to have been adopted by the sentencing judge in the present case, was to fix appropriate penalties for both offences, then consider the application of the totality principle and, in particular, whether any adjustment needed to be made to either of the sentences imposed to achieve the total effective sentence which was consistent with the application of the principle. In my opinion, it is implicit that the learned judge determined what he considered to be an appropriate sentence for the possession of cocaine and then reduced that on account of the totality principle. To the extent there was an omission in the process, it was a failure to refer to the starting point or the sentence which would otherwise have been imposed, so that the reduction or discount on account of the totality principle was not articulated.

While the approach adopted by the learned Judge was not exactly in accord with principle, it does not necessarily follow that there has been a miscarriage of justice: see *Heryadi v The Queen*[17]; *Kilner v The Queen*[18]. It was also submitted on behalf of the applicant, however, that, in this case, a different sentence ought to have been passed, as the learned judge had failed to give effect to the 'one transaction' rule, which applies where the one act gives rise to more than one criminal offence. Reliance was placed on a further passage in the judgment of McHugh, Hayne and Callinan JJ in *Pearce*[19], namely:

> 'To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common.'

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16 *R v Lomax* [1998] 1 VR 551 at 564 per Ormiston JA.

17 (1998) 19 WAR 383.

18 [1999] WASCA 189.

19 (1998) 194 CLR 610 at 623 [40].

In my opinion, *the application of that approach* [reflected in the passage quoted above from *Pearce*] *in the present case would obscure the fact that the* [*appellant*] *took possession of two separate parcels of two separate drugs*. It was not a case where there were two offences where, for example, an act which was itself an offence was also an element of the second offence. There were two separate offences. *There was no common element*. The relevant circumstance was that two separate offences of possession and attempting to obtain possession of two different drugs occurred at the same time. In my opinion, this is not an example of the one act comprising two separate offences, but two separate acts, one of obtaining possession of ecstasy and one of attempting to obtain possession of cocaine." (emphasis added)

The appeal to this Court

13 As well as relying upon the arguments advanced in the Court of Criminal Appeal to which we have referred, the appellant contends in this Court that the sentencing judge applied sentencing principles applicable to offences under Western Australian law, and not those dictated by Pt 1B of the *Crimes Act* 1914 (Cth) ("the Act").

14 The appellant's grounds of appeal in this Court are stated in this way:

"The Court of Criminal Appeal of the Supreme Court of Western Australia erred in law in failing to find that the Learned Sentencing Judge had erred in law in failing to apply the provisions of Part 1B of the *Crimes Act* 1914 (Cth) (specifically, sections 16A and 16B[20]), as supplemented by the common law of Australia, in the sentencing of the Appellant.

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20 "**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;

(Footnote continues on next page)

(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;

...

(f) the degree to which the person has shown contrition for the offence . . .

(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;

...

(n) the prospect of rehabilitation of the person;

...

16B Court to have regard to other periods of imprisonment required to be served

In sentencing a person convicted of a federal offence, a court must have regard to:

(a) any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and

(b) any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory."

Particulars

(a) Failing to apply the sentencing principles enunciated in *Mill v The Queen* (1988) 166 CLR 59, *Postiglione v The Queen* (1997) 189 CLR 295 and *Pearce v The Queen* (1998) 194 CLR 610.

(b) Failing to order total concurrence in circumstances where the same actus reus gave rise to separate offences, thus misconstruing and/or misapplying the 'one transaction' rule of sentencing.

(c) Imposing an overall effective sentence which infringed the totality principle of sentencing."

15 The proposition contained in the first of the appellant's grounds is largely uncontroversial: that except to the extent stated in ss 16A and 16B of the Act, general common law and not peculiarly local or state statutory principles of sentencing are applicable. That common law principles may apply follows from the use of the words "of a severity appropriate in all the circumstances of the offence ..." in s 16A(1) and the introductory words "In addition to any other matters ..." to s 16A(2) of the Act.

The appellant's submissions

16 The appellant put his submission on this ground in various ways. He submitted that although the sentencing judge stated "I have taken into account the authorities referred to both by your counsel and by the prosecutor which relate to similar quantities of ecstasy and the matters contained in section 16A(2) of the *Crimes Act* 1914", no effort was in fact made by his Honour to particularise those matters and to correlate them with the facts of the case. No reference was made by the sentencing judge to two paragraphs of s 16A(2) of relevance to the circumstances of this case emphasizing the need to ensure that an offender be adequately punished for the offence, and his or her prospects of rehabilitation. The appellant argued that in making the deduction that he did for the "fast track" plea of guilty, the sentencing judge erroneously applied a peculiarly Western Australian sentencing practice, contrary to Pt 1B of the Act. The range of discounts for fast track pleas of guilty to Western Australian offences is between 20-35%[21]. He submitted that his Honour failed to sentence him by a process of

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21 *Little v The Queen* [2001] WASCA 87 at [13], [17] per Malcolm CJ, Wallwork and Anderson JJ; *Chua v The Queen* [2001] WASCA 353 at [29] per Wallwork J; *Cameron v The Queen* (2002) 209 CLR 339 at 352 [42]-[43] per McHugh J, 357 [61] per Kirby J.

instinctive synthesis[22]. Bearing in mind that the sentencing judge had concluded that the appellant's character references "d[id] not carry the same weight as they would in relation to ... offences [other than those involving narcotic goods]", and that there were no other significant mitigating factors, the approach taken by his Honour resembled a two-stage approach, as opposed to one of instinctive synthesis. The appellant urged that a sentence (for the second offence) of five years imprisonment, wholly cumulative, could not be considered to be a sentence of a severity appropriate to all the circumstances of the offence as required by sub-ss 16A(1), (2), and the relevant common law. Such a sentence appeared to be calculated and structured to accord with the Western Australian practice of determining an appropriate aggregate sentence for all offences and then fixing sentences for each separate offence, rather than with the Act.

17 Furthermore, the appellant submitted, the sentencing judge overlooked s 19(2) of the Act which provides that:

> "Where:
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> (a) a person is convicted of 2 or more federal offences at the same sitting; and
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> (b) the person is sentenced to imprisonment for more than one of the offences;
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> the court must, by order, direct when each sentence commences, but so that no sentence commences later than the end of the sentences the commencement of which has already been fixed or of the last to end of those sentences."

His Honour was not empowered by Commonwealth law to order that the second sentence be served cumulatively upon the first[23].

18 The next ground argued was that the "totality principle", as part of the common law unaffected by the Act, could and should have been, but was not applied here. The appellant submitted that the principle has been expressed in different ways from time to time, and that there was an inconsistency between

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22 *AB v The Queen* (1999) 198 CLR 111 at 121-122 [16]-[17] per McHugh J, 156 [115] per Hayne J (both in dissent); *Wong v The Queen* (2001) 207 CLR 584 at 611-612 [74]-[76] per Gaudron, Gummow and Hayne JJ.

23 *O'Brien* (1991) 57 A Crim R 80 at 87 per Crockett, McGarvie and Phillips JJ.

Mill v The Queen[24] and *Pearce v The Queen*[25]. In *Mill*[26], Wilson, Deane, Dawson, Toohey and Gaudron JJ adopted a statement from Thomas, *Principles of Sentencing*[27]:

> '"The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong["]; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".'"

19 Their Honours added[28]:

> "Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

20 The inconsistency was said to arise between the possibility contemplated in the second last sentence of the passage quoted, of the lowering of each sentence and ordering then that an aggregation of the lowered sentence be served,

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24 (1988) 166 CLR 59.

25 (1998) 194 CLR 610.

26 (1988) 166 CLR 59 at 63.

27 2nd ed (1979) at 56-57 (footnotes omitted).

28 (1988) 166 CLR 59 at 63.

and the statement in the joint judgment in *Pearce* quoted by Malcolm CJ[29], that a sentencing judge must fix an appropriate sentence for each offence before considering questions of cumulation and concurrence.

21 Reference was made by the appellant to *Postiglione v The Queen*[30]. There McHugh J referred to a statement of King CJ in *R v Rossi*[31], in which the latter sought to identify the sorts of circumstances in which the totality principle should be invoked:

> '"There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect."'

22 We would with respect doubt that it is only in a case of an otherwise crushing burden of an aggregation of sentences that the totality principle may be applied. We did not take the respondent here to be submitting that the appellant should serve the aggregate of the two sentences imposed upon him.

23 The contention that the sentencing judge erroneously applied peculiarly Western Australian sentencing principles to the appellant's disadvantage has no merit. To give the appellant the benefit of the so-called "fast track plea", a benefit which was in recognition of his early plea of guilty, was a recognition which all criminal jurisdictions in this country afford to accused persons in various ways and in varying degrees according to the circumstances from time to time. The Court of Criminal Appeal did not err in refusing to intervene in relation to that matter.

24 The submission that the Court of Criminal Appeal should have held that the sentencing judge must have overlooked ss 16A(2)(j) and (m) of the Act because his Honour made no express reference to them should be rejected. It is clear that his Honour was concerned to ensure that the appellant was adequately punished for each offence. That was his purpose in evaluating the nature and seriousness of the appellant's conduct. No express reference to s 16A(2)(j) was necessary to make that clear. The same may be said about the absence of a reference to rehabilitation. His Honour was plainly aware of the appellant's prior

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29 *Johnson v The Queen* (2002) 26 WAR 336 at 344 [23].

30 (1997) 189 CLR 295 at 308.

31 (1988) 142 LSJS 451 at 453.

good character and the excuse which he offered for committing the crimes. He said so in terms, but in the exercise of his sentencing discretion regarded these, and accordingly the prospect of rehabilitation, as of less importance than the gravity of the offences.

25 The appellant's submission that the Court of Criminal Appeal failed to appreciate that the sentencing judge, in structuring the sentences in the way in which he did, acted contrary to the principles stated in the joint judgment in *Pearce*, and again adopted a peculiarly Western Australian sentencing approach, requires further consideration of *Mill* and *Pearce*.

26 The first matter to be noticed in this regard is that the joint judgment in *Pearce* recognizes the currency of *Mill* by referring to the principle of totality which it reiterates[32]. The joint judgment in *Mill* expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining concurrency. *Pearce* does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served. To do that, is not to do what the joint judgment in *Pearce* holds to be undesirable, that is, to have regard *only* to the total effective sentence to be imposed on an offender. The preferable course will usually be the one which both cases commend but neither absolutely commands. Judges of first instance should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected. The trial judge here did not offend any of the principles stated in *Mill* or *Pearce*. His only error may have been to fail to state starting and ending dates, but this was neither to apply a uniquely Western Australian principle, nor otherwise to make an appealable error. What his Honour intended was obvious enough and did not fail in substance to give effect to the Act.

27 The appellant's better argument does not depend upon any actual or perceived difference in approach between *Mill* or *Pearce*, but is based upon this statement in the joint judgment in *Pearce*[33]:

> "To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative

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32 (1998) 194 CLR 610 at 624 [45] per McHugh, Hayne and Callinan JJ.

33 (1998) 194 CLR 610 at 623 [40] per McHugh, Hayne and Callinan JJ.

> intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts."

28 Some additional reference to the facts is necessary in discussing this argument. The appellant claimed by his counsel at first instance that he had "a strong feeling" that the package contained ecstasy. The facts read during the sentencing proceedings and not disputed by the appellant included that:

> "he did not really want to think about what may be inside the package that he was to collect – he needed the money".

29 It was put that notwithstanding these matters the Court of Criminal Appeal erred. Error, it was said, is manifest in this passage from the judgment of Malcolm CJ[34]:

> "In my opinion, the application of that approach [reflected in the passage quoted above from *Pearce*] in the present case would obscure the fact that the [appellant] took possession of two separate parcels of two separate drugs. It was not a case where there were two offences where, for example, an act which was itself an offence was also an element of the second offence. There were two separate offences. There was no common element. The relevant circumstance was that two separate offences of possession and attempting to obtain possession of two different drugs occurred at the same time. In my opinion, this is not an example of the one act comprising two separate offences, but two separate acts, one of obtaining possession of ecstasy and one of attempting to obtain possession of cocaine."

30 One obvious error, the reference to two packages instead of one, may be more than an incidental or trivial one. His Honour certainly appears to have been influenced by the fact of two packages as a basis for treating the offences as entirely separate, and for holding that there was no common element.

31 The appellant points to other factual errors in the judgment of Malcolm CJ: one, being the reference to "the range of sentences commonly

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34 (2002) 26 WAR 336 at 344-345 [26].

imposed … for the possession of cocaine"[35], an offence with which the appellant was not charged; and another, the erroneous attribution to the appellant's counsel of a failure to provide the court with calculations of the dates of the commencement and duration of the times of imprisonment which he contended were the appropriate ones[36].

32 It is unfortunate that these errors have been made. The appellant was entitled to have the relevant factual matters carefully and accurately considered by the appellate court.

33 It is true that the appellant pleaded guilty to two offences, but they had much in common: one inducement, one payment for performance, one occasion, one package and one receipt of it by the appellant. This commonality did require that careful regard be had, in deciding the appellant's appeal, to the totality principle. The error in relation to the number of packages and the failure to refer to the numerous common elements strongly suggests that this did not occur.

34 A further error has been demonstrated. It was not for the Court of Criminal Appeal (per Malcolm CJ) to reject a principle stated by this Court, that account must be taken of the commonality of elements of offences in the sentencing process, on the erroneous basis that the application of the principle would, or indeed possibly could, obscure a particular fact, "that the [appellant] took possession of two separate parcels of two separate drugs"[37]. Application of a principle cannot obscure a fact. Facts either lend themselves to the application of a particular principle or not. The error in this regard was compounded by the serious factual misconception in relation to the fact in question, that there were two parcels rather than one.

35 Although the appellant has therefore shown error on the part of the Court of Criminal Appeal in not having proper regard to the commonality of elements of the offences, and in accordingly not applying the totality principle to relevant facts fully and correctly stated, it does not necessarily follow that there was any error on the part of the sentencing judge, either in his application of the principles stated in *Pearce,* or otherwise. That has given us reason to pause in allowing the appeal. In the event we have, however, formed the view that we must do so. This Court is not a sentencing court in any conventional sense. Although the

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35 (2002) 26 WAR 336 at 343 [21].

36 (2002) 26 WAR 336 at 340 [12].

37 (2002) 26 WAR 336 at 344 [26].

appellant needed leave to appeal to the Court of Criminal Appeal, he was granted that leave and accordingly became entitled to a proper consideration of his appeal, something which he has been denied for the reasons we have given.

36 We would allow the appeal. The orders of the Court of Criminal Appeal of Western Australia should be set aside. The proceeding should be remitted to the Court of Criminal Appeal for consideration and determination in accordance with these reasons.

37 KIRBY J. This is another appeal concerned with the application of sentencing law and the principles applicable to the sentencing of a prisoner convicted of federal offences.

Errors in the Court of Criminal Appeal

38 I agree with the reasons of Gummow, Callinan and Heydon JJ that errors have been shown on the part of the Court of Criminal Appeal of Western Australia. These include errors in setting out accurately the facts relevant to the sentences proper to the appellant's pleas of guilty[38]; an error in omitting to correct the primary judge's sentence for failing to take into account the common factual elements in the two offences[39]; and an error in failing to observe and apply the principle governing common elements in offences, stated by this Court in *Pearce v The Queen*[40]. In these respects I agree with the joint reasons.

39 I myself do not have the same reaction to the resulting sentence as is expressed at the conclusion of the joint reasons[41]. With respect, in my view that sentence was excessive and unsurprisingly so given the nature of the errors of principle and fact that occurred in arriving at it at first instance and confirming it on appeal. The appeal to this Court must be allowed for these reasons. The appellant must be resentenced by the Court of Criminal Appeal.

Instinctive synthesis or transparent stages in sentencing

40 This is not, therefore, a case in which it is necessary to revisit the controversy over the "instinctive synthesis"[42] approach to the sentencing process favoured by some members of this Court or the approach of transparent structuring of the sentence that I favour[43]. This Court has not yet conclusively held, in a determination of a majority essential to the orders disposing of a

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38 Reasons of Gummow, Callinan and Heydon JJ ("the joint reasons") at [29]-[32].

39 Applying *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40]. See the joint reasons at [27].

40 (1998) 194 CLR 610 at 623 [40]. See also the joint reasons at [33]-[35].

41 Joint reasons at [35].

42 See *Wong v The Queen* (2001) 207 CLR 584 at 611-612 [75]-[76] referred to in the joint reasons at [16].

43 *Wong v The Queen* (2001) 207 CLR 584 at 621-622 [101]-[103]; cf *Director of Public Prosecutions (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370 at 380.

matter, which of these approaches is required by law. Upon each, there are merely *obiter dicta*.

41 I remain of the view that proper procedure in judicial analysis – and in some cases statutory provisions – require the process of reasoning to be performed in stages. In my opinion, *Pearce*[44] says as much. The issue is, therefore, whether that process of reasoning should be secret and undisclosed or as transparent as the court can make it for the prisoner, the community and the appellate court to view, criticise and where appropriate, to correct.[45] A so-called "instinctive synthesis" can become a hiding place for legal error, prejudice and sloppy work in a matter touching liberty where correctness of approach, transparency of method and manifestly just outcomes are specially desirable[46]. Before the great advances in administrative law that were such an important development in legal doctrine in the twentieth century, there were similar controversies in that field[47]. Judges accept a higher duty of reasoned justice, as this Court has affirmed[48]. The Court should adhere to that approach.

42 None of this denies that, in sentencing, as in many other judicial tasks there is a role for instinct. I have confessed to it myself[49]; but also referred to the need to keep it under tight control[50]. In sentencing there must ultimately be a decision expressed in quantitative terms that cannot be analysed or explained any further. But stages there certainly are. Disclosing them ensures that no

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44 (1998) 194 CLR 610.

45 cf *R v Place* (2002) 81 SASR 395 at 424 [78]; Warner, "Sentencing Review 2001-2002", (2002) 26 *Criminal Law Journal* 349 at 358.

46 cf Warner, "The role of guideline judgments in the law and order debate in Australia", (2003) 27 *Criminal Law Journal* 8 at 14-15; Bagaric and Edney, "What's instinct got to do with it? A blueprint for a coherent approach to punishing criminals", (2003) 27 *Criminal Law Journal* 119 at 125-131.

47 See eg Davis, *Discretionary Justice: A Preliminary Inquiry* (1971).

48 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666 applying *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388.

49 See eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 307-308; cf at 277; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 642 [164].

50 See eg *Purvis v New South Wales (Department of Education and Training)* (2003) 78 ALJR 1 at 7 [19]; 202 ALR 133 at 140 (joint reasons with McHugh J).

important stage is missed by the judicial traveller. As Gleeson CJ observed in *Wong v The Queen*[51]:

> "[t]he outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner."

43 The dicta in *Pearce*[52], mentioned in the Court of Criminal Appeal[53] and extracted in the joint reasons[54], imply that it is possible to tame the judicial mind in a way that takes the applicable stages of reasoning in a strictly logical order. In a sense, this analysis tends to support the structured approach that I favour. However, I must acknowledge that, in an appellate response to sentences at first instance, there is much to be said for the fact that an "instinctive" reaction to a sentence at the threshold, based on judicial experience when all the facts are known, plays a part in outcomes (as it may also do in appeals against other qualitative assessments committed to judges, such as the determination of monetary damages for personal injury[55]).

44 Whether the instinctive reaction to all of the facts drives the ultimate result or whether it is based on relevant considerations weighed and evaluated in a strictly logical order, I do not stay to examine. Perhaps this merely demonstrates that logical analysis and instinctive synthesis each plays a part in the ultimate orders that judges make. However, I agree that, to the fullest extent possible, the stages described in *Pearce* should, where applicable, be followed by sentencing judges in arriving at their sentencing dispositions, so far as the issues of cumulation or concurrence or of totality are concerned.

Conclusion: errors require resentencing

45 Had the course described in *Pearce* been taken by the sentencing judge in the present case it would have demonstrated the common elements in the two offences to which the appellant had pleaded guilty. That fact would either have suggested (as I would have been inclined to favour) that the sentences should

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51 (2001) 207 CLR 584 at 591 [6].

52 (1998) 194 CLR 610 at 623-624 [45]-[48].

53 *Johnson v The Queen* (2002) 26 WAR 336 at 343-345 [21]-[26].

54 Joint reasons at [12].

55 *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124; *Wong v The Queen* (2001) 207 CLR 584 at 622 [102].

have been structured to be served concurrently because parts of the criminal enterprise were common to the offences of which the appellant was convicted[56]. Or, at the very least, if cumulative sentences were ordered, it would have ensured that a proper, that is, substantial, allowance was made to reflect the common factual features of the two offences.

Orders

46 The sentencing judge erred. The sentence, in consequence, was excessive. The Court of Criminal Appeal erred, once it granted leave, in failing to correct the sentence. The orders proposed in the joint reasons should be made.

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56 Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999), par 9.601. See also *R v Longford* [1970] 3 NSWR 276 at 277-278; *R v Mantini* [1998] 3 VR 340 at 346-348; *Miles v The Queen* [2001] NTCA 9 at [35].