HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S146/2011

BRETT ANDREW GREEN — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No S143/2011

SHANE DARRIN QUINN — APPELLANT

AND

THE QUEEN — RESPONDENT

Green v The Queen
Quinn v The Queen
[2011] HCA 49
Date of Order: 3 August 2011
Date of Publication of Reasons: 6 December 2011
S146/2011 & S143/2011

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside the Order of the Court of Criminal Appeal of New South Wales of 17 December 2010 and, in its place, order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with D P Barrow for the appellant in S146/2011 (instructed by Legal Aid NSW)

G A Bashir with A Betts for the appellant in S143/2011 (instructed by Ford Criminal Lawyers)

C K Maxwell QC with P A Leask for the respondent in both matters (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Green v The Queen
Quinn v The Queen

Criminal law – Appeal – Appeal against sentence – Appeal by Crown – Parity principle – Where primary judge imposed sentence having regard to parity principle as between appellants and other co-offender – Where s 5D of *Criminal Appeal Act* 1912 (NSW) provided that primary purpose of appeals against sentences by the Crown is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons" – Where appellate court increased each appellant's sentence – Whether appellate court erred in allowing Crown appeal and thereby creating disparity between sentences of appellants and other co-offender – Whether appellate court erred in finding, absent any submission from Crown, that sentence imposed on other co-offender manifestly inadequate.

Words and phrases – "appeal", "Crown appeal", "parity principle", "sentencing".

Criminal Appeal Act 1912 (NSW), s 5D.
Drug Misuse and Trafficking Act 1985 (NSW), ss 23(2), 25(2).

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 The primary purpose of appeals against sentence by the Attorney-General or Director of Public Prosecutions ("Crown appeals") under s 5D of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act") is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."[1] That purpose distinguishes Crown appeals from appeals against severity of sentence by convicted persons, which are concerned with the correction of judicial error in particular cases. The Court of Criminal Appeal of New South Wales, in the exercise of its jurisdiction under s 5D, has a discretion to decline to interfere with a sentence even though the sentence is erroneously lenient. That discretion is sometimes called the "residual discretion".

2 In Crown appeals, circumstances may combine to produce the result that if the appeal is allowed the guidance provided to sentencing judges will be limited and the decision will occasion injustice. Relevant circumstances include consequential disparity relative to an unchallenged sentence imposed on a co-offender and delay in the appeal process which may be associated with disruption of the offender's progress towards rehabilitation. In such cases it may be appropriate for a court of criminal appeal, in the exercise of its residual discretion, to dismiss a Crown appeal.

3 The Court of Criminal Appeal allowed appeals by the Crown against sentences imposed upon Shane Quinn and Brett Green[2], participants in a substantial enterprise involving the cultivation of cannabis plants. The sentences imposed upon them by the primary judge were, in part, calculated by reference to the level of their involvement relative to that of Kodie Taylor, a lesser, but nevertheless significant, participant in the enterprise. He had been sentenced two and a half months earlier and his sentence was not challenged by the Crown. The decision of the Court of Criminal Appeal disturbed that relativity. It created an unjustified disparity between the punishments imposed on the co-offenders. It

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1 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ; [1977] HCA 44; *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ; [1994] HCA 49, discussed in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 578-584 [8]-[20] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10. See also *R v Borkowski* (2009) 195 A Crim R 1 at 18 [70].

2 *R v Green* (2010) A Crim R 148.

did so, inter alia, upon the basis that Taylor's unchallenged sentence was "manifestly inadequate". No such characterisation of that sentence had been argued by the Crown, nor suggested by the Court of Criminal Appeal during the hearing of the appeals.

4 The Court of Criminal Appeal erred in failing to give adequate weight to the purpose of Crown appeals and the importance of the parity principle. It also erred in allowing the appeals partly on a basis that was never raised in argument. The sentences imposed upon Quinn and Green were, as all of the judges who heard the appeal agreed, manifestly inadequate. They were, however, as the dissenting members of the Court (Allsop P and McCallum J) said, "not derisory" and entailed "a substantial measure of punishment by full-time imprisonment."[3] The intervention of the Court, as observed by the dissenting judges, created "unacceptable disparity" between the new sentences which it imposed and the sentence that stood unchallenged in respect of the co-offender, Taylor[4]. The result, as their Honours said, was that the Court became "the instrument of unequal justice."[5]

5 Having regard to the disparity consequential upon allowing the appeals and the significant delays which occurred in the appellate process, the Court ought to have exercised its discretion to dismiss the appeals. On 3 August 2011, the High Court allowed the appeals against the decision of the Court of Criminal Appeal, set aside its orders and in lieu thereof ordered that the appeals to that Court be dismissed. Our reasons for joining in those orders follow.

Factual and procedural background

6 On 20 July 2009, Shane Quinn and Brett Green each pleaded guilty in the District Court of New South Wales to an indictment alleging that between July 2007 and May 2008 he cultivated a number of prohibited plants, namely 1,354 cannabis plants, which was not less than the relevant "large commercial quantity" of 1,000 applicable to cannabis plants prescribed by the *Drug Misuse and Trafficking Act* 1985 (NSW) ("the Drug Act")[6]. The offence to which they

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3 (2010) 207 A Crim R 148 at 155 [20].

4 (2010) 207 A Crim R 148 at 156 [23].

5 (2010) 207 A Crim R 148 at 156 [23].

6 Drug Act, s 33(4) and Sched 1.

pleaded guilty carries a maximum penalty of 5,000 penalty units and 20 years' imprisonment[7].

7 On 14 August 2009, Quinn was sentenced by Boulton ADCJ to six years' imprisonment, with a non-parole period of three years to commence on 30 April 2008 and expire on 29 April 2011. Green was sentenced to four years' imprisonment, with a non-parole period of two years commencing on 17 May 2009 and expiring on 16 May 2011.

8 As appears from a statement of agreed facts before the sentencing judge, Quinn and Green took part with others, including Taylor, in a commercial enterprise for the cultivation of cannabis plants and the production of cannabis leaf for supply. One thousand three hundred and fifty four cannabis plants connected with the enterprise were seized by the police. The weight of the cannabis leaf seized exceeded 145 kilograms.

9 Quinn was the principal of the enterprise. Green was involved "at a senior level"[8], as was Taylor. Green's position was slightly more senior than Taylor's. Taylor was, however, a significant player in the organisation and administration of the enterprise. Both he and Green were active in carrying out tasks related to the enterprise and were to be paid for their work by sharing in the cannabis leaf finally produced.

10 The cannabis was cultivated at a number of sites between late 2007 and 30 April 2008. The cultivation was sophisticated and involved the use of fertiliser, watering, cameras and observers. There were up to nine crop sites, and three sheds for drying the leaf. A vehicle pool was established for use by members of the enterprise. The crop was valued at $2.7 million and the harvested cannabis was worth between $1.33 million and $1.47 million.

11 When he sentenced Quinn and Green, the primary judge had already sentenced eight other offenders involved in the enterprise, including Taylor. Taylor was sentenced on 2 June 2009 to three years' imprisonment with a non-parole period of 18 months for an offence relating to the supply of a commercial quantity of a prohibited drug, contrary to s 25(2) of the Drug Act. The maximum penalty applicable to that offence was 3,500 penalty units and 15 years' imprisonment[9].

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7 Drug Act, ss 23(2)(a) and 33(1)(a) and (3)(b).

8 *R v Green* (2010) 207 A Crim R 148 at 154 [14].

9 Drug Act, s 33(1)(a) and (2)(b).

12 On 22 September 2009, the Crown lodged appeals in the Court of Criminal Appeal against the sentences imposed on Quinn and Green. Those appeals were heard before a five-judge bench on 30 July 2010. The Court delivered judgment on 17 December 2010 allowing the appeal by a 3-2 majority (McClellan CJ at CL, Hulme and Latham JJ; Allsop P and McCallum J dissenting)[10]. The majority held that appropriate sentences were nine years with a non-parole period of six years for Quinn and six years with a non-parole period of four years for Green[11]. In the event, and without explanation of the discrepancy, the actual sentences imposed were eight years' imprisonment with a non-parole period of five years for Quinn, and five years' imprisonment with a non-parole period of three years for Green[12].

13 The discrepancy was the subject of further consideration by the Court of Criminal Appeal and on 11 March 2011 the Court indicated that it would not be varying the orders made on 17 December 2010. It published reasons for that decision on 15 April 2011[13].

14 On 8 April 2011, Quinn and Green were each granted special leave to appeal to this Court against the decision of the Court of Criminal Appeal. The sole ground of each grant was that the Court of Criminal Appeal had erred in finding it appropriate to allow the Crown appeal in respect of each appellant, thereby creating a disparity between the appellants' sentences and the sentence imposed on Taylor, which had not been the subject of a Crown appeal. At the hearing of the appeals, the grant of special leave in each matter was extended to allow the addition of a second ground of appeal arising out of the finding by the Court of Criminal Appeal, absent any submission from the Crown or prior intimation by that Court, that the sentence imposed upon Taylor was manifestly inadequate.

15 Four statutes, and the common law principles informing their construction and application, are the principal sources of the legal rules governing the disposition of these appeals.

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10 *R v Green* (2010) 207 A Crim R 148.

11 (2010) 207 A Crim R 148 at 181 [143].

12 These sentences corresponded with the "proposed orders" in the judgment of Hulme J: (2010) 207 A Crim R 148 at 180 [144].

13 *R v Green and Quinn* [2011] NSWCCA 71.

Statutory framework

16 The first of the applicable statutes is the Drug Act. The offence to which Quinn and Green pleaded guilty is created by s 23(2) of that Act, which provides:

> "A person who:
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> (a) cultivates, or knowingly takes part in the cultivation of, a number of prohibited plants which is not less than the commercial quantity applicable to prohibited plants,
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> …
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> is guilty of an offence."

Section 33(3)(b) of the Drug Act relevantly provides that if the court is satisfied that an offence against s 23(2) involved not less than "the large commercial quantity" of the prohibited plant concerned, the maximum penalty is 5,000 penalty units and 20 years' imprisonment.

17 The offence to which Taylor pleaded guilty is created by s 25(2) of the Drug Act:

> "A person who supplies, or who knowingly takes part in the supply of, an amount of a prohibited drug which is not less than the commercial quantity applicable to the prohibited drug is guilty of an offence."

Although Taylor was initially charged with the supply of a large commercial quantity of the plant, the prosecution ultimately chose to proceed against him only on the basis of the lesser offence of commercial supply created by s 25(2) of the Drug Act. The lesser offence attracts a maximum penalty of 3,500 penalty units and 15 years' imprisonment. The offence initially charged would have attracted the same maximum penalty as that faced by Quinn and Green.

18 The second statute is the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"), which sets out sentencing procedures, including the fixing of non-parole periods and the application of standard non-parole periods for particular offences.

19 The exercise of sentencing discretions by courts in New South Wales must be informed by the purposes for which, under s 3A of the Sentencing Act, a court may impose a sentence on an offender. Those purposes include "to ensure that

the offender is adequately punished for the offence"[14]. When determining the appropriate sentence for an offence the court is required by s 21A to take into account a broad range of listed aggravating and mitigating factors and any other factors affecting the relative seriousness of the offence. These are in addition to matters that are "required or permitted to be taken into account by the court under any … rule of law."[15] The last category, as explained in these reasons, includes the avoidance of unjustifiable disparity between the sentences imposed upon offenders involved in the same criminal conduct or a common criminal enterprise.

20 When sentencing an offender to imprisonment for an offence, a court is required to set a non-parole period for the sentence[16]. The balance of the term of the sentence, after the expiry of the non-parole period, must not exceed one third of the non-parole period unless the court decides that there are special circumstances[17]. In that event, the court must make a record of its reasons for that decision[18]. The primary judge held that special circumstances applied to both Quinn and Green to justify balance terms which exceeded one-third of their non-parole period.

21 The Sentencing Act also sets out standard non-parole periods applicable to offences listed in the Table included in s 54D of that Act. The standard non-parole period is that which must be set by the sentencing court unless there are reasons for setting a period that is longer or shorter[19]. If the court sets a different period, it must make a record of its reasons for doing so[20]. The allowable reasons for departing from a standard non-parole period are those referred to in s 21A of the Act[21].

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14 Sentencing Act, s 3A(a).

15 Sentencing Act, s 21A(1).

16 Sentencing Act, s 44(1).

17 Sentencing Act, s 44(2).

18 Sentencing Act, s 44(2).

19 Sentencing Act, s 54B(2).

20 Sentencing Act, s 54B(4).

21 Sentencing Act, ss 21A(1) and 54B(3).

22 The standard non-parole period for an offence against s 23(2) of the Drug Act, where the offence involves not less than the large commercial quantity specified for the prohibited plant, is 10 years[22]. The standard non-parole period for an offence against s 25(2) of the Drug Act does not cover the case in which the relevant prohibited drug relates to cannabis leaf[23]. There was therefore no standard non-parole period applicable to the offence to which Taylor pleaded guilty.

23 The third statute relevant to this appeal is that which governs Crown appeals in New South Wales. The jurisdiction of the Court of Criminal Appeal to entertain such appeals is found in s 5D(1) of the Criminal Appeal Act, which provides:

> "The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper."

24 Section 5D was enacted in its original form in 1924[24]. Crown appeals under s 5D and like provisions in other States and Territories have long been regarded by this Court as exceptional. That exceptional character, reflected in the primary purpose of such appeals, informs the exercise of the Court's "residual discretion" embedded in the words "may in its discretion" in s 5D(1). That "residual discretion" is a discretion to dismiss a Crown appeal notwithstanding that the sentence appealed against is shown to be erroneously lenient. Where an appeal is allowed, the powers to vary the sentence and to impose such sentence as seems proper are engaged. Those powers should be read with the general provisions of the Sentencing Act which constrain and inform their exercise.

25 The fourth relevant statute is the *Crimes (Appeal and Review) Act* 2001 (NSW) ("the CAR Act"). The characterisation of Crown appeals as "exceptional" has rested in part upon long-standing judicial concern about exposing sentenced persons to double jeopardy, that is, the risk of being re-sentenced[25]. In New South Wales that concern must now yield to the operation

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22 Sentencing Act, s 54D, Table, Item 15C.

23 Sentencing Act, s 54D, Table, Items 18 and 19.

24 *Crimes (Amendment) Act* 1924 (NSW), s 33.

25 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 582-583 [17]-[19] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

of s 68A of the CAR Act. That section implements part of a model agreement made in 2007 by the Council of Australian Governments ("COAG") for Double Jeopardy Law Reform[26]. COAG agreed, inter alia, that:

> "All jurisdictions should implement reforms to provide that when a court is considering a prosecution appeal against sentence, no principle of 'sentencing double jeopardy' should be taken into consideration by the court when determining whether to exercise its discretion to impose a different sentence, or in determining what sentence to impose."

Provisions to give effect to that agreement with respect to Crown appeals against sentence have been introduced in all States except Queensland, and in the Northern Territory[27]. Those provisions have been considered in a number of recent decisions in State courts[28].

26 Section 68A provides that an appeal court must not dismiss a prosecution appeal against sentence because of any element of double jeopardy involved in the respondent being sentenced again[29]. It applies to appeals commenced, but not fully determined, before it was inserted in the Act[30]. It therefore applied to the appeals to the Court of Criminal Appeal in this case. The effect of s 68A was discussed in *R v JW*[31] in which the Court of Criminal Appeal sat as a bench of five judges. Spigelman CJ, with whom the other members of the Court

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26 Council of Australian Governments, *Double Jeopardy Law Reform: Model Agreed by COAG*, (2007).

27 CAR Act, s 68A; *Criminal Procedure Act* 2009 (Vic), s 289(2); *Criminal Law Consolidation Act* 1935 (SA), s 340; *Criminal Appeals Act* 2004 (WA), s 41(4); *Criminal Code* (Tas), s 402(4A); *Criminal Code* (NT), s 414(1A).

28 NSW: *R v JW* (2010) 77 NSWLR 7; Vic: *Director of Public Prosecutions v Karazisis (Vic)* (2010) 206 A Crim R 14; SA: *R v Abdulla* (2011) 109 SASR 258; *R v Saunders* [2011] SASCFC 37; WA: *Western Australia v Atherton* (2009) 197 A Crim R 119; Tas: *R v Talbot* [2009] TASSC 107; *Director of Public Prosecutions v Chatters* [2011] TASCCA 8.

29 CAR Act, s 68A(1).

30 CAR Act, Sched 1, Pt 8. Section 68A came into effect on 24 September 2009: *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2009 (NSW), s 2 – date of assent 24 September 2009.

31 (2010) 77 NSWLR 7.

relevantly agreed, concluded that the section removed from consideration by the Court of Criminal Appeal the distress and anxiety to which respondents to a Crown appeal are presumed to be subject if they have to undergo sentencing for a second time[32]. It prevents an appellate court from basing on such distress and anxiety a decision not to intervene or to impose a sentence less than that which it otherwise believes to be appropriate[33]. Moreover the Court cannot, it was said, have regard to the frequency of Crown appeals as a sentencing principle. On that view, s 68A is relevant to the exercise and scope of the residual discretion, in s 5D of the Criminal Appeal Act, to dismiss a Crown appeal against sentence notwithstanding that the sentence is shown to have been erroneous. It is not necessary for this Court to review the correctness of the construction of s 68A in *JW*. On any view of its operation it does not extinguish the residual discretion[34]. The Crown, in this appeal, did not take issue with that proposition. Indeed, the Crown appeared to accept the proposition in its written submissions.

27 The application of the four statutes to this appeal is informed by the common law norm of equal justice. That norm in its application to sentencing is considered next in these reasons.

Equal justice and the parity principle

28 "Equal justice" embodies the norm expressed in the term "equality before the law"[35]. It is an aspect of the rule of law[36]. It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal

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32 (2010) 77 NSWLR 7 at 32 [141] per Spigelman CJ, 41 [205] per Allsop P, 42 [209] per McClellan CJ at CL, Howie and Johnson JJ.

33 (2010) 77 NSWLR 7 at 19-20 [54]-[64] per Spigelman CJ.

34 A similar conclusion was reached in relation to the Victorian equivalent of s 68A in *Director of Public Prosecutions v Karazisis (Vic)* (2010) 206 A Crim R 14 at 39 [99] per Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P agreeing at 17 [1].

35 A norm said to be traceable to Solon's "isonomia" transported to England in the 16th century as "isonomy" and displaced in the 17th century by "equality before the law", "government of laws" and "rule of law": Hayek, *The Constitution of Liberty: The Definitive Edition*, (2011) at 238.

36 Dicey, *Introduction to the Study of the Law of the Constitution*, 7th ed (1908) at 198; Holdsworth, *A History of English Law*, (1938), vol X at 649.

order."[37] It has been called "the starting point of all other liberties."[38] It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*[39]:

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

Consistency in the punishment of offences against the criminal law is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice"[40]. It finds expression in the "parity principle" which requires that like offenders should be treated in a like manner[41]. As with the norm of "equal justice", which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances[42].

29 General concepts of "systematic fairness" and "reasonable consistency" in sentencing, as an aspect of the administration of federal criminal justice, were

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37 Kelsen, *What is Justice?*, (1971) at 15, cited in Sadurski, "Equality Before the Law: A Conceptual Analysis", (1986) 60 *Australian Law Journal* 131 at 132. The distinction between "equality before the law" and the substantive "equality in the law" is usefully described in that article. See also Bailey, *The Human Rights Enterprise in Australia and Internationally*, (2009) at 400-423; Bingham, *The Rule of Law*, (2010) at 55-59.

38 Lauterpacht, *An International Bill of the Rights of Man*, (1945) at 115.

39 (2001) 207 CLR 584 at 608 [65]; [2001] HCA 64.

40 *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Mason J; [1984] HCA 46.

41 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ; [1992] HCA 29.

42 *Postiglione v The Queen* (1997) 189 CLR 295 at 301 per Dawson and Gaudron JJ; [1997] HCA 26.

discussed in *Hili v The Queen*[43]. They apply to persons charged with similar offences arising out of unrelated events. The consistency they require is "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence."[44] That kind of general consistency is maintained by the decisions of intermediate courts of appeal[45]. The consistency required by the parity principle is focussed on the particular case. It applies to the punishment of "co-offenders", albeit the limits of that term have not been defined with precision.

30 In *Lowe v The Queen*[46] and in *Postiglione v the Queen*[47], this Court was concerned with the application of the parity principle to persons charged with the same offences arising out of the same criminal conduct or enterprise. Those decisions are not authority for the proposition that the principle applies only to persons so charged. The foundation of the parity principle in the norm of equality before the law requires that its application be governed by consideration of substance rather than form. Formal identity of charges against the offenders whose sentences are compared is not a necessary condition of its application. Nevertheless, as Campbell JA recognised in *Jimmy v The Queen*[48], there can be significant practical difficulties in comparing the sentences of participants in the same criminal enterprise who have been charged with different crimes. The greater the difference between the crimes, the greater the practical difficulties, particularly where disparity is said to arise out of a sentence imposed on a co-offender who has been charged with an offence that is less serious than that of the appellant. The existence of those difficulties may be accepted. So too may the inability of a court of criminal appeal to undertake, under the parity rubric, a de facto review of prosecutorial charging discretions. Those practical difficulties and limitations, however, do not exclude the operation of the parity principle.

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43 (2010) 242 CLR 520 at 535-538 [47]-[56] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 45.

44 (2010) 242 CLR 520 at 527 [18] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

45 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 595-596 [54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

46 (1984) 154 CLR 606.

47 (1997) 189 CLR 295.

48 (2010) 77 NSWLR 540 at 588-589 [201]-[203]. See also *Farrugia v The Queen* [2011] VSCA 24 at [8]-[19].

The effect given to it may vary according to the circumstances of the case, including differences between the offences with which co-offenders are charged.

31 Because appeals are creatures of statute, the parity principle in appeals against sentence arises in a statutory context. The jurisdictions to entertain such appeals, conferred by statutes on courts of criminal appeal in Australia, are supported by powers to increase or reduce sentences affected by appealable error. In the exercise of those powers in appeals by convicted persons, and subject to the applicable sentencing statutes, a court may "reduce a sentence not in itself manifestly excessive in order to avoid a marked disparity with a sentence imposed on a co-offender."[49] The exercise of the statutory discretion is informed by the common law norm. Gibbs CJ said in *Lowe v The Queen*[50]:

> "the reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done."

The sense of grievance necessary to attract appellate intervention with respect to disparate sentences is to be assessed by objective criteria. The application of the parity principle does not involve a judgment about the feelings of the person complaining of disparity[51]. The court will refuse to intervene where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise[52].

32 A court of criminal appeal deciding an appeal against the severity of a sentence on the ground of unjustified disparity will have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders. Where there is a marked disparity between sentences giving rise to the appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive. Disparity can be an indicator of appealable

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49 *Lowe v The Queen* (1984) 154 CLR 606 at 609-610 per Gibbs CJ.

50 (1984) 154 CLR 606 at 610.

51 *Postiglione v The Queen* (1997) 189 CLR 295 at 323 per Gummow J, 338 per Kirby J.

52 *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ.

error[53]. It is also correct, as Mason J said in *Lowe*, that logic and reality combine to favour the proposition that discrepancy is a ground for intervention in itself[54]. Unjustifiable disparity is an infringement of the equal justice norm. It is appealable error, although it may not always lead to an appeal being allowed. If an appeal is allowed on the ground of disparity, a court of criminal appeal in re-sentencing is not required to achieve identity of punishment. It must have regard to the sentence imposed on the co-offender and give it appropriate weight[55]. In such a case, an appeal to this Court on the question whether a disparity identified in a court of criminal appeal was unjustifiable and called for intervention by that court would also involve review of a qualitative and discretionary judgment[56].

33 There is a question whether a sentence which would otherwise be appropriate *can* be reduced on the ground of disparity to a level which, had there been no disparity, would be regarded as erroneously lenient. In *Lowe* that question was answered explicitly in the affirmative by Mason J[57] and less explicitly but to like effect by Dawson J, with whom Wilson J agreed[58]. It has also been answered in the affirmative in a number of cases in the Court of Criminal Appeal of New South Wales[59]. On the other hand, as Simpson J

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53 *Lowe v The Queen* (1984) 154 CLR 606 at 617-618 per Brennan J; *Postiglione v The Queen* (1997) 189 CLR 295 at 301 per Dawson and Gaudron JJ.

54 (1984) 154 CLR 606 at 613.

55 *R v Kucharski* unreported, Supreme Court of Victoria Court of Appeal, 23 June 1997 at 10 per Hayne JA, Brooking JA and Ashley AJA agreeing at 11.

56 *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ, Wilson J agreeing at 616.

57 (1984) 154 CLR 606 at 613-614.

58 (1984) 154 CLR 606 at 623 per Dawson J, Wilson J agreeing at 616. And see *R v Diamond* unreported, Court of Criminal Appeal of New South Wales, 18 February 1993 per Hunt CJ at CL, James J agreeing, which so interpreted the observation by Dawson J.

59 *R v Tisalandis* [1982] 2 NSWLR 430 at 435 per Street CJ; *R v Anastasio* unreported, 21 November 1986 at 3; *R v Smith* unreported, 5 December 1986; *R v Draper* unreported, Court of Criminal Appeal of New South Wales, 12 December 1986 at 5 per Street CJ, Hunt and Wood JJ agreeing at 5; *R v Diamond* unreported, Court of Criminal Appeal of New South Wales, 18 February 1993 at 5 per Hunt CJ at CL, James J agreeing at 11; *Maslen* (1995) 79 A Crim R 199 at 207-208 per Hunt CJ at CL, Sully and Smart JJ agreeing at 212.

correctly pointed out in *R v Steele*[60], the existence of a discretion, where unjustified disparity is shown, to reduce a co-offender's sentence to one which is inadequate does not amount to an obligation to do so. Certainly, the discretion of the Court of Criminal Appeal to reduce a sentence to a less than adequate level would not require it to consider reducing the sentence to a level which would be, as Street CJ put it in *R v Draper*, "an affront to the proper administration of justice."[61] Moreover, if the relevant sentencing legislation, on its proper construction, does not permit an inadequate sentence to be imposed, there can be no discretion on appeal to impose one[62]. Whether or not the discretion to reduce a sentence to an inadequate level is available, marked and unjustified disparity may be mitigated by reduction of the sentence appealed against to a level which, although lower, is still within the range of appropriate sentences.

34 The preceding discussion of the parity principle has been concerned with its application in appeals by offenders against the severity of their sentences. These appeals are concerned with its application in appeals by the Crown against the inadequacy of sentences. The application of the parity principle in such cases

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60 Unreported, Court of Criminal Appeal of New South Wales, 17 April 1997 at 8-11, Sheller JA and Grove J agreeing. See also *Pecora v The Queen* [1980] VR 499 at 503; *R v MacGowan* (1986) 42 SASR 580 at 583 per KingCJ, Mohr and von Doussa JJ agreeing at 584; *Cox* (1991) 55 A Crim R 396 at 401 per Thomas J; *Reardon* (1996) 89 A Crim R 180 at 182 per Gleeson CJ, 183 per Sully J, cf 191 per Hulme J; *R v Djukic* [2001] VSCA 226 at [29]-[30] per Vincent JA, Brooking and Phillips JJA agreeing at [1] and [2]; *Newburn v The Queen* [2004] WASCA 108 at [44] per EM Heenan J, Templeman J agreeing at [1]; *R v Hildebrandt* (2008) 187 A Crim R 42 at 49-52 [51]-[65] per Dodds-Streeton JA, Ashley JA and Lasry AJA agreeing at 43 [1] and 56 [93].

61 *R v Draper* unreported, Court of Criminal Appeal of New South Wales, 12 December 1986 at 5 per Street CJ, Hunt and Wood JJ agreeing at 5; *R v Diamond* unreported, Court of Criminal Appeal of New South Wales, 18 February 1993 at 5-6 per Hunt CJ at CL, James J agreeing at 11; *R v McIvor* (2002) 136 A Crim R 366 at 371 [10] per Heydon JA, Levine J and Carruthers AJ agreeing at 372 [12] and [13].

62 That proposition seems to have been implicit in the construction placed on s 6(1) of the *Sentencing Act* 1995 (WA) by Murray J in *Goddard v The Queen* (1999) 21 WAR 541 at 562 [61]. That subsection required that "a sentence imposed on an offender must be commensurate with the seriousness of the offence".

is different[63]. It is shaped by the content of the statutory jurisdiction and powers conferred on the court and by the purpose of Crown appeals which informs the exercise of that jurisdiction. Nevertheless, it is necessary that its application in Crown appeals not be logically inconsistent with its application in appeals by convicted persons.

The parity principle in Crown appeals

35 In a Crown appeal against sentence in New South Wales, the Court of Criminal Appeal is invariably asked to exercise its powers under s 5D of the Criminal Appeal Act to impose upon a convicted person a heavier sentence than that imposed by the primary judge[64]. Assuming the Court of Criminal Appeal considers the sentence under appeal to be inadequate on account of error by the primary judge, two questions arise. Their answers involve the exercise of the different discretions conferred by s 5D. They are:

1. Whether, notwithstanding the inadequacy of the sentence, the Court should decline, in the exercise of its "residual discretion" under s 5D, to allow the appeal and thereby interfere with the sentence appealed from.

2. To what extent, if the appeal is allowed, the sentence appealed from should be varied.

36 A primary consideration relevant to the exercise of the residual discretion is the purpose of Crown appeals under s 5D which, as observed earlier in these reasons, is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."[65] That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion[66].

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63 *R v Bavin* [2001] NSWCCA 167 at [60] per Spigelman CJ, Wood CJ at CL and Greg James J agreeing.

64 The language of s 5D does not preclude the possibility that the Crown might appeal against an erroneously excessive sentence.

65 See above at [1].

66 In *Director of Public Prosecutions (Vic) v Karazisis* (2010) 206 A Crim R 14 at 39-42 [104]-[115] it was suggested that relevant factors in Victoria include delay, parity, the totality principle, the rehabilitation of the offender and the conduct of the Crown.

37 The parity principle has been the focus of debate in these appeals. Its undisputed significance does not mean that the Court must dismiss a Crown appeal in every case in which allowing the appeal would give rise to disparity. Where disparity is apprehended, the residual discretion is enlivened[67]. However, a powerful consideration against allowing a Crown appeal would be the resultant creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender. The question would then arise: would the purpose of Crown appeals under s 5D be served by allowing the appeal? If the result of doing so would be a sentence "adequate" on its face, but infected by an anomalous disparity which is an artifact of the Crown's selective invocation of the Court's jurisdiction, the extent of the guidance afforded to lower courts may be questionable[68]. As was said in *R v Borkowski*[69]:

> "the purpose of a Crown appeal is not simply to increase an erroneous sentence imposed upon a particular individual. It has a wider purpose, being to achieve consistency in sentencing and the establishment of sentencing principles. That purpose can be achieved to a very significant extent by a statement of this Court that the sentences imposed upon the respondent were wrong and why they were wrong."

38 There was a thread in the reasons of Hulme J in the Court of Criminal Appeal which did not adequately attend to the difference between Crown appeals against sentence and appeals by sentenced persons. Hulme J observed that "a first instance judge, faced with an earlier but inadequate sentence imposed on a co-offender, is entitled to impose a sentence that is not inadequate"[70]. His Honour then posed the rhetorical but inapposite question: "[w]hy should the Court of Criminal Appeal not have and exercise the same freedom?"[71] The answer to the rhetorical question is: because the purpose of Crown appeals

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67 *R v Elzakhem* [2008] NSWCCA 31 at [65] per Hulme J, Beazley JA and Latham J agreeing at [1] and [72], and cases there cited.

68 The Crown's justification for such choices would not ordinarily be examinable by the Court of Criminal Appeal. Nevertheless, the effect of such choices on the utility of a Crown appeal may affect its outcome.

69 (2009) 195 A Crim R 1 at 18 [70] per Howie J, McClellan CJ at CL and Simpson J agreeing at 4 [1] and [2].

70 (2010) 207 A Crim R 148 at 176 [122].

71 (2010) 207 A Crim R 148 at 176 [122].

constrains the Court of Criminal Appeal in a way that a first instance judge is not constrained.

39 Hulme J also suggested that the parity principle has less significance in Crown appeals than in appeals against severity of sentence. Hulme J paraphrased dicta in *Director of Public Prosecutions v Bulfin*[72] as proposing that the parity principle "should be given less emphasis or more cautiously applied when considering a Crown appeal when not all offenders were brought before the appeal court."[73] The proposition was based upon the former rarity of Crown appeals, derived from concerns about double jeopardy which have now been displaced by statute in New South Wales. In any event the proposition is attended with difficulty. Equal justice is not to be diminished in order to preserve an opportunity, however rare, for a court of criminal appeal to make a point of principle to sentencing judges.

40 It may be that a Crown appeal, if allowed, would give rise to disparity between punishment imposed on an offender and a manifestly inadequate but unchallenged punishment imposed on a co-offender. As discussed earlier, there is authority for the proposition that, in appeals against severity of sentence by sentenced persons, the parity principle may support reduction of an otherwise appropriate sentence to one which, save for the application of that principle, would be erroneously lenient. However, those authorities do not mandate such a reduction. Having regard to the purpose of Crown appeals, the Court in such a case may decide not to intervene so as not to disturb parity between the sentence appealed from and that imposed on the co-offender. That proposition was accepted in *R v McIvor*[74] and *Cvitan v The Queen*[75]. It also reflected the approach taken by the Court in *Borkowski*.

41 Hulme J was critical of what was said in *McIvor*, *Cvitan* and, to a degree, in *Borkowski*[76]. With respect to his Honour, those criticisms were misplaced. Those three decisions properly reflected the considerations that arise on Crown

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72 [1998] 4 VR 114 at 137 per Charles JA.

73 (2010) 207 A Crim R 148 at 175 [116].

74 (2002) 136 A Crim R 366 at 371 [10] per Heydon JA, Levine J and Carruthers AJ agreeing at 372 [12] and [13].

75 [2009] NSWCCA 156 at [93]-[94] per Simpson J, McClellan CJ at CL and James J agreeing at [1] and [2].

76 (2010) 207 A Crim R 148 at 175-177 [117]-[124].

appeals and their interaction with the parity principle. McClellan CJ at CL was of the view that *McIvor* should not be followed[77]. His Honour held that disparity could only give rise to a justified sense of grievance if "defined by comparison with the sentence imposed on a co-offender who has been appropriately sentenced"[78]. Only then could issues of parity cause the Court to reject a Crown appeal[79]. Having regard to the purpose of Crown appeals, that proposition was, with respect, too absolute.

42 A case might arise in which the Court of Criminal Appeal concludes that the inadequacy of the sentence appealed from is so marked that it amounts to "an affront to the administration of justice" which risks undermining public confidence in the criminal justice system. In such a case the Court would be justified in interfering with the sentence notwithstanding the resultant disparity with an unchallenged sentence imposed on a co-offender[80]. That, however, is not this case. While all the members of the Court of Criminal Appeal considered that the sentences imposed upon Quinn and Green were "manifestly inadequate" there was no suggestion that they were so inadequate as to displace other considerations and mandate the Court's intervention. Moreover, in this case the primary judge took Taylor's unchallenged sentence into account in applying the parity principle to the sentences under appeal. Notwithstanding the leniency of Taylor's sentence, the prospective creation of disparity was a factor militating against allowing the appeal. That the Crown, in submissions before the Court of Criminal Appeal, did not attack the sufficiency of the sentence imposed on Taylor, gave that prospective disparity greater weight in the circumstances.

43 Other circumstances may combine to produce injustice if a Crown appeal is allowed. They include delay in the hearing and determination of the appeal, the imminent or past occurrence of the respondent's release on parole or unconditionally, and the effect of re-sentencing on progress towards the respondent's rehabilitation. They are relevant to the exercise of the residual discretion. The guidance afforded to sentencing judges by allowing the appeal should not come at too high a cost in terms of justice to the individual.

44 The preceding matters are relevant to the exercise of the Court's residual discretion not to allow a Crown appeal. Also relevant is the extent to which

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77 (2010) 207 A Crim R 148 at 157 [33].

78 (2010) 207 A Crim R 148 at 157 [32].

79 (2010) 207 A Crim R 148 at 157 [33].

80 *R v Harris* (2007) 171 A Crim R 267 at 283 [83] and [86].

disparity between co-offenders is able to be mitigated in the exercise of the re-sentencing discretion[81].

45 If the Court does decide to allow an appeal under s 5D it will, in exercising its re-sentencing discretion, have regard to the matters to which it must have regard by virtue of ss 3A and 21A of the Sentencing Act. The parity principle will require the Court, if it is possible to do so, to avoid or minimise unjustified disparity between the sentence it imposes and the sentence which has been imposed on a co-offender. In so doing, the Court, like the primary judge, must have regard to differences between the person being re-sentenced and the co-offender which justify differences in the sentences imposed.

46 It is necessary now to outline the way in which the primary judge approached the sentencing of Quinn, Green and Taylor and the reasoning of the Court of Criminal Appeal which led the Crown appeals against the sentences imposed on Quinn and Green to be allowed.

The sentencing of Kodie Taylor

47 Although Taylor was not a principal in the criminal enterprise, he was a partner. He arranged for the acquisition of motor vehicles for the vehicle pool and repairs to one of them, and was involved in the planting of seedlings at the crop sites and the purchase of equipment to dry the cannabis leaf. He communicated with the principals on operational matters. He had a close connection with senior members of the syndicate.

48 Taylor was arrested on 25 May 2008. He was charged with offences, including supply of a "large commercial quantity" of the drug. Those charges were later withdrawn and he pleaded guilty to the offence of supply of a commercial quantity "simpliciter" under s 25(2) of the Drug Act.

49 Taylor had a brief criminal history with no convictions for drug-related matters. He had a drug problem of long standing, had been a poly substance drug user from about age 16, and had a poor post-school work history. At the time he was sentenced he was, according to a report before the Court, continuing to struggle with drug abstinence. He turned 22 on the date on which he was sentenced.

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81 See, eg, *R v Guthrie* [2002] NSWCCA 77 at [18] and [33] per Grove J, Simpson J agreeing at [35]; *R v Harris* (2007) 171 A Crim R 267 at 282 [77] and 283 [86].

50 A report before the Court stated that Taylor had little insight into the impact of his offending on the wider community and appeared not to have terminated his connections with his associates. The primary judge said that he could not be described as previously a person of good character. Nor was he unlikely to reoffend. He had a need for supervision for a significant period to give him some prospect of rehabilitation.

51 The primary judge specified four years as a starting point for the term of imprisonment that should be imposed on Taylor but applied a 25 per cent discount for his guilty plea, which reduced the sentence to three years. His Honour fixed a non-parole period of 18 months, which was less than two-thirds of the total sentence, on the basis of special circumstances, two such circumstances being, in his Honour's assessment, Taylor's need for a significant period of supervision and his youth.

The sentencing of Quinn and Green

52 The primary judge rejected as "a serious understatement" a submission made on behalf of Quinn that the cannabis growing enterprise was "lacking in sophistication". He referred to its scale and nature and the respective roles of Quinn and Green in it.

53 Matters personal to Quinn referred to in the sentencing remarks included the following:

(i) He was 32 years of age with a de facto partner and four children aged between one and nine years.

(ii) His childhood had been difficult and his school performance poor – he had suffered violence from his father and lack of support from his mother because of her alcoholism. He began using cannabis at age 14, alcohol from about age 15 to 16 and amphetamines and cocaine from about age 24.

(iii) His time in custody and separation from his wife and children had borne very heavily upon him. This was motivating him significantly to try to rehabilitate himself when finally released from custody.

(iv) A pre-sentence report recommended that he receive treatment for alcohol and cocaine dependence while on parole.

There were some relatively minor charges, which Quinn asked to be taken into account in his sentencing, including possession of small quantities of drugs and possession of two weapons, namely a baton and a paint gun[82]. They do not appear to have played a significant part in the sentencing disposition and no issue was raised about them on appeal to this Court.

54 In respect of Green, the primary judge observed:

(i) He was aged 25 years and 8 months. He did not have a significant criminal history. He had a very satisfactory childhood and a very satisfactory domestic relationship with his wife and children, which boded well for his future rehabilitation.

(ii) He had poor schooling because of a learning disability, which affected his reading. However, on tests of intelligence and cognitive capacity, he performed in the high average range.

(iii) He had a praiseworthy work ethic which was likely to be of significant benefit to him in his rehabilitation.

(iv) He did not appear to have developed any significant problem with either alcohol or cannabis.

55 On the question of parity, the primary judge referred to the need to achieve "at least comparability between the sentences handed down to various offenders." He had imposed on Taylor a more significant sentence than had been imposed on the casual labourers in the operation. He proposed that Quinn, as the principal organiser of the enterprise, would receive a "significantly more severe sentence than Taylor" and that Green should receive a sentence that was "somewhat greater than that of Taylor in order to reflect his greater participation in the enterprise."

56 His Honour allowed each of Quinn and Green a 20 per cent discount arising out of their pleas of guilty. The trial of either or both would have been lengthy and complex. In respect of Quinn, the primary judge took a starting point of seven and a half years' imprisonment, discounted to six years. In respect of Green, he took as a starting point five years' imprisonment, discounted to four years.

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82 Division 3 of Pt 3 of the Sentencing Act provides a means by which an offender may request the sentencing court to take into account offences for which he or she has been charged but not convicted.

57 The primary judge found special circumstances existed in respect of Quinn and Green and, on that basis, ordered that their non-parole periods be fixed at three years' imprisonment for Quinn and two years' imprisonment for Green.

The appeal to the Court of Criminal Appeal

58 The Crown appealed to the Court of Criminal Appeal against the sentences imposed on Quinn and Green on a number of grounds including:

- the degree of departure from the applicable standard non-parole period was so great that it manifested error; and

- the sentence imposed was manifestly inadequate.

The Crown did not appeal against the sentence imposed upon Taylor.

The decision of the Court of Criminal Appeal

59 Hulme J wrote the principal judgment for the majority in the Court of Criminal Appeal. McClellan CJ at CL wrote a separate concurring judgment. Latham J agreed with both. Aspects of the majority's treatment of the parity principle in relation to Crown appeals have been discussed above and will not be repeated here.

60 Hulme J held that despite subjective features favouring each of Quinn and Green, a number of matters led to the conclusion that the sentences imposed on them were manifestly inadequate[83]. Those matters included[84]:

(i) the sophistication of the growing operation, its planned deliberate criminality, the quantity of cannabis and the extent of the likely rewards from the operation;

(ii) the roles of Quinn and Green in the operation;

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83 (2010) 207 A Crim R 148 at 166-167 [86]-[88].

84 (2010) 207 A Crim R 148 at 165-166 [82]-[85].

(iii) the absence of circumstances mitigating the objective criminality of Quinn's offence which lay at the "mid-point of offences of the nature charged"; and

(iv) Green's offence being appreciably, though not greatly below the mid-point.

61 Hulme J said that the sentence imposed upon Taylor did not give rise to a case of "strict parity" as Taylor was charged with a different offence carrying a different penalty. However, because of the similarity in the charges and the similarity of offending, particularly as between Taylor and Green, "relative parity" should be taken into account[85]. His Honour held that there was no "blanket rule that the Court could not or should not increase manifestly inadequate sentences if the result of doing so is to create disparity."[86] In a Crown appeal upon the ground of manifest inadequacy of a sentence, any disparity between co-offenders that would be created by allowing the appeal and by the unexplained conduct of the Crown in permitting that situation to arise, was a factor to be taken into account in deciding whether the appeal should be allowed and the extent of any substituted sentence to be imposed[87]. However, neither the disparity nor the Crown's conduct should be a bar to the success of the appeal[88].

62 His Honour said[89]:

> "In the case of both offenders some allowance should be made for the fact that the sentences imposed will create disparity with the sentence imposed on Mr Taylor. Particularly relevant in that connection is that Mr Taylor's sentence was *so obviously manifestly inadequate* that it is prima facie extraordinary that the Crown did not appeal and the Crown provided no reason why it did not." (emphasis added)

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85 (2010) 207 A Crim R 148 at 168-169 [100].

86 (2010) 207 A Crim R 148 at 177 [126].

87 (2010) 207 A Crim R 148 at 178-179 [133]. His Honour appropriately recognised the distinction between the "residual discretion" and the sentencing discretion under s 5D of the Criminal Appeal Act.

88 (2010) 207 A Crim R 148 at 178-179 [133].

89 (2010) 207 A Crim R 148 at 180 [142].

As asserted in the second ground of appeal to this Court, there was no argument put to the Court of Criminal Appeal, nor any intimation made by the Court in the course of argument, to the effect that Taylor's sentence was manifestly inadequate. To the contrary, the Crown, while submitting that Taylor had been treated "leniently", sought to distinguish his position from that of Quinn and Green by reference to the different offences to which they pleaded guilty, their different levels of involvement in the enterprise and the differences in their ages – Taylor being 22 years old and Quinn and Green 32 years and 25 years of age respectively. The Crown did not submit in this Court that there had been any intimation by the Court of Criminal Appeal that Taylor's sentence should be regarded as manifestly inadequate.

63 Hulme J concluded that Quinn should be re-sentenced to imprisonment for a total term of nine years with a non-parole period of six years, and Green for a total period of six years with a non-parole period of four years[90].

64 McClellan CJ at CL, who agreed in substance with Hulme J, accepted that where a judge was sentencing a number of offenders the sentence imposed on others involved in the criminal enterprise was a relevant circumstance, although its significance would vary from case to case[91]. His Honour said[92]:

> "Where one offender has received a sentence which is so inadequate as to be erroneous the community is entitled to expect that the sentence of a co-offender when reconsidered by this Court will not be fixed by using the sentence imposed by error as the appropriate comparator."

Although Taylor was not sentenced for the same offence as Quinn and Green that did not mean that the sentence imposed on him was irrelevant to the sentences to be imposed on them. If it were erroneously lenient, it could not preclude the Court of Criminal Appeal from intervening to re-sentence Quinn and Green[93].

65 Allsop P and McCallum J, who dissented, did not differ materially from the majority on the principles to be applied, but rather on their application to the facts of the case before the Court. They held, inter alia:

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90 (2010) 207 A Crim R 148 at 180 [143].

91 (2010) 207 A Crim R 148 at 156 [27].

92 (2010) 207 A Crim R 148 at 157 [33].

93 (2010) 207 A Crim R 148 at 157-158 [34].

- the sentences imposed upon Quinn and Green were manifestly inadequate[94];

- the similarity between the charges against Taylor and those against Quinn and Green, and in the nature of the offending conduct, meant that considerations of relative parity should be taken into account[95];

- the sentences proposed by Hulme J would create relative disparity with that imposed on Taylor. While the head sentences and non-parole periods imposed on Quinn and Green were inadequate, the degree of departure from the appropriate range was not so great that it would be an affront to justice not to intervene. To intervene would create unacceptable disparity between the sentences passed by the Court of Criminal Appeal on Quinn and Green and the sentence that stood in respect of Taylor[96].

Contentions

66 The question agitated in these appeals is whether the Court of Criminal Appeal erred in failing to exercise its discretion under s 5D of the Criminal Appeal Act to dismiss the appeals. Counsel for Quinn and Green submitted, inter alia:

- the primary judge had sentenced Taylor two and a half months before he sentenced Quinn and Green and there had been no appeal from Taylor's sentence;

- the primary judge imposed sentences on Quinn and Green which had regard to the parity principle as between them and Taylor. He took into account differences of charge, prescribed standard non-parole periods, maximum penalty, role, discount for timing of the pleas, age and favourable subjective aspects of the respective offenders' cases;

- the parity principle, having been properly applied by the primary judge as between Quinn and Green on the one hand and Taylor on the other, the Court of Criminal Appeal should not have intervened to create disparity;

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94 (2010) 207 A Crim R 148 at 154 [13].

95 (2010) 207 A Crim R 148 at 154 [13].

96 (2010) 207 A Crim R 148 at 156 [23].

- the majority in the Court of Criminal Appeal erred in identifying consistency in sentencing generally, with consistency in punishment;

- the majority failed to refer to the principle of restraint and underlying considerations of fairness affecting Crown appeals;

- the majority adopted an approach that put the onus on Quinn and Green to persuade the Court that it should exercise the residual discretion;

- circumstances of delay and rehabilitation were not taken into account as relevant to the decision whether to allow the appeals; and

- as assessed by Allsop P and McCallum J, the degree of departure of the sentences imposed upon Quinn and Green from the appropriate range was not so great that it would be an affront to justice not to intervene having regard to considerations of equal justice and matters pertinent to Crown appeals.

67 It was submitted for the Crown that:

- all members of the Court of Criminal Appeal agreed that parity was one of a number of factors to be taken into account in deciding whether to allow the appeal;

- there is no general rule that a manifestly inadequate sentence should not be increased where that would create disparity with the sentence of a co-offender, even where the lesser sentence was manifestly inadequate;

- Hulme J took into account the different considerations that apply in relation to parity in Crown appeals;

- the sentences imposed on Quinn and Green, as held by all members of the Court of Criminal Appeal, were manifestly wrong;

- parity considerations operate as a constraint on allowing a Crown appeal but that does not mean that the Crown appeal will not be allowed where to do so would create disparity with a manifestly inadequate sentence;

- the Court of Criminal Appeal did not fail to take into account the conduct of the Crown in not appealing against Taylor's sentence, the delay in the appellate process or the extent of Quinn and Green's rehabilitation;

- in any event this was not a case of parity because Taylor was not charged with the same offence as Quinn and Green; and

- the major difference between the majority and the minority judgments was in their assessment of the extent of the inadequacy in the sentences imposed on Quinn and Green.

Disposition

68 The point of departure in the reasoning of the majority was the conclusion of all of the members of the Court of Criminal Appeal that the sentences imposed upon Quinn and Green were manifestly inadequate. Given the limited basis of the grant of special leave to appeal to this Court, it was not open to Quinn and Green to contend otherwise. In any event, having regard to the factors referred to in the reasons for judgment of Hulme J, that characterisation of the challenged sentences was correct.

69 The majority did not attach to the inadequacy of the sentences under appeal such epithets as "gross" or "an affront to the administration of justice". While such epithets have a visceral character which limits their utility, they are indicative of a qualitative judgment that the inadequacy of the sentences imposed is so marked that the need for its correction to maintain public confidence in the criminal justice system outweighs other considerations, including any resulting disparity with unchallenged sentences against a co-offender.

70 A similar epithet was applied in *R v Kumar and Feagaiga*[97]. Hulme J referred to that decision and the decision of this Court refusing special leave to appeal against it as providing "substantial support for the Crown position."[98] But *Kumar* was a case in which his Honour, writing the principal judgment, identified a "*vast disparity* between what Parliament has indicated is an appropriate non-parole period for the offences of the nature of those committed by the Respondents and the sentences imposed."[99] In *Kumar* the Court relied, inter alia, upon the proposition in *Lowe* that where adhering to parity would result in a sentence or a second sentence which was manifestly inadequate, the Court was entitled to take a different course[100]. In *Lowe*, however, that observation was made in the context of an appeal by a convicted person against the severity of the sentence imposed upon him. The word "entitlement" in that

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97 [2008] NSWCCA 328.

98 (2010) 207 A Crim R 148 at 175 [115].

99 [2008] NSWCCA 328 at [77] (emphasis added).

100 [2008] NSWCCA 328 at [76].

context does no more than indicate the subsistence of a discretion to refuse the sentenced person's appeal. For reasons already explained, it takes on a different significance in a Crown appeal. There the discretion is informed by the particular purpose of such appeals. Neither *Kumar* nor the dismissal of the application for special leave to appeal against it provides support for the Crown position in this case.

71 Whatever might be said of the inadequacies of the sentences imposed upon Quinn, Green and Taylor by the primary judge, the submissions made on behalf of Quinn and Green that his Honour applied the parity principle appropriately should be accepted. The relationship between their respective sentences at first instance was appropriate and reflected, inter alia:

1. Their ascending levels of participation in the criminal enterprise.

2. The different maximum penalties applicable to Quinn and Green on the one hand and Taylor on the other.

3. Matters personal to each of them.

72 The basis of relativities between the sentences was not attacked in the Court of Criminal Appeal, nor on the appeal to this Court. Quinn's sentence was twice that imposed on Taylor. Green's was one third greater than Taylor's sentence. As a result of the increase in the sentences imposed upon Quinn and Green, the relationship between their punishments and that imposed on Taylor was significantly affected.

73 It may be accepted that when it decided to allow the appeal, there was little that the Court of Criminal Appeal could do other than to increase the sentences to the extent that it did. Anything less would have been pointless tinkering. The disparity that emerged after re-sentencing was effectively unavoidable.

74 If it be assumed that Taylor's sentence was not erroneously lenient then, even allowing for differences in the offences charged, the respective ages of the three co-offenders and their circumstances, all of which were taken into account by the primary judge, there was no real answer to the complaint that the justifiable disparity between them was significantly disturbed as a consequence of allowing the Crown appeal.

75 Hulme J said that in the case of both Quinn and Green "some allowance should be made for the fact that the sentences imposed will create disparity with

the sentence imposed on Mr Taylor."[101] The allowance was not quantified and the relative parity devalued by his Honour's comment that it was "[p]articularly relevant … that Mr Taylor's sentence was so obviously manifestly inadequate that it is prima facie extraordinary that the Crown did not appeal and the Crown provided no reason why it did not."[102] McClellan CJ at CL observed that[103]:

> "Where one offender has received a sentence which is so inadequate as to be erroneous the community is entitled to expect that the sentence of a co-offender when reconsidered by this Court will not be fixed by using the sentence imposed by error as the appropriate comparator."

On that basis it is reasonable to infer that notwithstanding passing reference to the relevance of Taylor's sentence the majority, to all intents and purposes, discounted it as a comparator of any significance.

76 Having regard to the absence of any argument put to the Court of Criminal Appeal that Taylor's sentence was manifestly inadequate and the absence of any intimation by the Court to the parties that it took that view, it was not entitled to dispose of the appeal on the basis that Taylor's sentence was manifestly inadequate. On any view the majority's approach to the parity principle in the context of Crown appeals impermissibly diminished its significance.

77 As noted earlier in these reasons and as pointed out in the submissions made on behalf of Quinn and Green, there was a thread in the reasons of the majority with respect to the application of the parity principle which did not appear adequately to distinguish between Crown appeals against sentence and appeals by sentenced persons. This thread perhaps explains the different outcomes favoured by the majority and the minority respectively.

78 There were practical implications arising out of the delay in the appellate process. In his reasons for judgment, Hulme J referred to affidavit evidence before the Court of Criminal Appeal which provided up to date information about the circumstances of Quinn and Green. His Honour and the majority appear to have accepted that evidence which was to the effect that:

- Quinn was making a serious attempt to reform. He had been working, had demonstrated a willingness to pursue drug and alcohol counselling and

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101 (2010) 207 A Crim R 148 at 180 [142].

102 (2010) 207 A Crim R 148 at 180 [142].

103 (2010) 207 A Crim R 148 at 157 [33].

had undertaken courses to enable him to enter upon tertiary education. He had completed one such course. He was motivated and his marks had been excellent[104].

- Green was also pursuing educational courses and was seeking to better himself. He had received a C3 classification on 13 July 2010. That classification meant he was eligible for day and later weekend release. As at the date of his affidavit he had been home on one day. He was due for another day release on 7 August 2010. If his sentence were increased he would lose that classification. He had also been working in prison[105].

His Honour was of the view that Quinn had good, and perhaps better than good, prospects of rehabilitation[106]. Green also had good prospects of rehabilitation. The effect upon him of reversion to a higher classification and removal from the day or weekend pre-release program would impose an emotional burden[107]. This was not a matter that came within the double jeopardy concept. It was a matter that could be taken into account[108].

79 The reference by the majority, reflected in the reasons for judgment of Hulme J, to the circumstances of Quinn and Green at the time of the appeal related to the exercise of the re-sentencing discretion. As submitted on behalf of Quinn and Green, those factors do not appear to have been taken into account as relevant to the decision whether or not to exercise the residual discretion.

80 As pointed out in the dissenting judgment of Allsop P and McCallum J, the sentences imposed upon Quinn and Green by the primary judge were not derisory and entailed "a substantial measure of punishment by full-time imprisonment."[109] There were appropriate relativities between them and the sentence imposed upon Taylor. The Court was not entitled to allow the appeal on the basis that the sentence imposed upon Taylor was manifestly inadequate. To do so involved a breach of procedural fairness. The correct approach was that taken by the dissenting judges. The appeal should be allowed.

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104 (2010) 207 A Crim R 148 at 179 [136].

105 (2010) 207 A Crim R 148 at 179 [137].

106 (2010) 207 A Crim R 148 at 180 [139].

107 (2010) 207 A Crim R 148 at 180 [140].

108 (2010) 207 A Crim R 148 at 180 [141].

109 (2010) 207 A Crim R 148 at 155 [20].

Conclusion

81 For the preceding reasons the appeals against the decision of the Court of Criminal Appeal were allowed, the orders of that Court set aside and, in lieu thereof, orders made that the appeals to that Court be dismissed.

82 HEYDON J. As Bell J explains, the Court of Criminal Appeal took the unusual course of sitting with five members in order to resolve an inconsistency in the authorities in relation to applying the principle of parity to prosecution appeals[110]. In their dissenting judgment, Allsop P and McCallum J upheld and endeavoured to apply existing authorities in that Court[111]. Those authorities were *R v McIvor*[112] and *R v Borkowski*[113], in which Howie J made a statement with which McClellan CJ at CL concurred. The approach of the majority to those authorities was as follows. R S Hulme J criticised those two cases partly as supposedly having been decided per incuriam – in ignorance of other and inconsistent authority – and partly for reasons of principle[114]. McClellan CJ at CL denied that the statement in *R v Borkowski* was to be read as the appellants in this Court submitted it should be read and said that *R v McIvor* should not be followed[115]. Latham J agreed with both McClellan CJ at CL and R S Hulme J.

83 It is true that the Court of Criminal Appeal is not strictly speaking bound by its own earlier decisions. But whatever a later Court of Criminal Appeal thinks of one of its earlier decisions, that earlier decision is to be followed, not overruled, unless two conditions are satisfied.

84 The first condition is that the later Court must do more than disagree with the earlier decision. The test has been put in various ways. One is that the earlier decision must be "manifestly wrong"[116]. Another is that the later Court entertains "a strong conviction as to the incorrectness of the earlier decision."[117] Another

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110 See below at [104] and [109].

111 *R v Green* (2010) 207 A Crim R 148 at 152-153 [5]-[7].

112 (2002) 136 A Crim R 366.

113 (2009) 195 A Crim R 1.

114 *R v Green* (2010) 207 A Crim R 148 at 175-177 [117]-[125].

115 *R v Green* (2010) 207 A Crim R 148 at 156-157 [28]-[33].

116 This is employed in decisions of the Court of Appeal, to which the same approach applies: *Bennett & Wood Ltd v Orange City Council* (1967) 67 SR (NSW) 426 at 432 per Walsh JA; *Flanagan v H C Buckman & Son Pty Ltd* [1972] 2 NSWLR 761 at 781 per Hutley AJA.

117 *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 100 per Gleeson CJ (Samuels JA, Priestley JA and Hope AJA concurring) – a Court of Appeal case followed in the Court of Criminal Appeal by *R v Arnold* (1993) 30 NSWLR 73 at 74-75 and 85.

way of putting the test lies in the following precept: "Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong."[118] In the Federal Court of Australia the Full Court often uses language like "clearly erroneous"[119] or "plainly wrong"[120]. It has been said that those expressions require "the strong conviction of the later court that the earlier judgment was erroneous and not merely the choice of an approach which was open, but no longer preferred" and that they require that the error be one "that can be demonstrated with a degree of clarity by the application of correct legal analysis."[121]

85 The second condition is that there be a consideration of various factors stated in relation to the question of this Court overruling its own authorities in *John v Federal Commissioner of Taxation*[122]. The first is "that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases." The second is "a difference between the reasons of the justices constituting the majority in one of the earlier decisions." The third is "that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience". The fourth is "that the earlier decisions had not been independently acted on in a manner which militated against reconsideration". These factors are not exhaustive[123]. Mutatis mutandis, considerations of this kind are relevant to whether the Court of Criminal Appeal should overrule its own decisions.

86 The majority of the Court of Criminal Appeal indicated disagreement with *R v McIvor* and *R v Borkowski* and gave detailed reasons for that disagreement.

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118 *Nguyen v Nguyen* (1990) 169 CLR 245 at 269 per Dawson, Toohey and McHugh JJ; [1990] HCA 9.

119 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 560 [29] per Black CJ, Hill, Sundberg, Marshall and Kenny JJ.

120 *New Zealand v Moloney* (2006) 154 FCR 250 at 275 [138] per Black CJ, Branson, Weinberg, Bennett and Lander JJ.

121 *Gett v Tabet* (2009) 254 ALR 504 at 565-566 [294]-[295] per Allsop P, Beazley and Basten JJA.

122 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5.

123 See *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630; [1977] HCA 60.

Whether those reasons were sound or not, the majority did not in terms state whether either condition was satisfied.

87 The retort might be made: "So what?" The reason for the retort lies in what might be called Lord Salmon's paradox. In *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds*[124] Lord Salmon repeated his contention in *Gallie v Lee*[125] that what an ultimate appellate court says about the rules of precedent which an intermediate appellate court applies in relation to its own prior decisions can only be "of persuasive authority" (ie obiter dicta). That is because the point could never come before the ultimate appellate court as a material issue for decision. The material issue for decision would be the correctness in fact or law of the intermediate appellate court's order. On that question the ultimate appellate court would be free to depart from the intermediate appellate court's view whether or not the intermediate appellate court had correctly applied the rules of precedent governing it. Even if Lord Salmon is correct, a perception by an ultimate appellate court that an intermediate court had erred in applying the rules of precedent would be a ready passport to the grant of leave to appeal, or, in the case of Australia, special leave. Further, the rules of precedent in the Court of Criminal Appeal are not rules which rest only on authorities in that Court: they rest also on statements in this Court. The good sense of those rules is a matter which goes beyond the Court of Criminal Appeal itself. Non-compliance with the rules is capable of producing grave difficulties for trial judges and for those who appear in trials. That is so particularly because non-compliance increases the velocity and unpredictability of legal change. As Dawson, Toohey and McHugh JJ said, exercise of the appropriate degree of caution reduces uncertainty[126]: "The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law". Further, the requirement to satisfy the two conditions referred to above provides an important intellectual discipline.

88 The Court of Criminal Appeal, then, should not have overruled *R v McIvor* and *R v Borkowski*. No party invited this Court to overrule those cases. They stand as authorities binding on the Court of Criminal Appeal and other New South Wales courts until overruled by the Court of Criminal Appeal in accordance with the two conditions stated above, or until overruled by this Court. However – and this is another reason why they should not have been overruled – strictly speaking *R v McIvor* and *R v Borkowski* do not apply. Those cases

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124 [1980] AC 637 at 659.

125 [1969] 2 Ch 17 at 49.

126 *Nguyen v Nguyen* (1990) 169 CLR 245 at 269.

involve co-offenders – persons charged with the same offence and perhaps persons charged with closely similar offences – whose positions are indistinguishable. They do not deal with issues of proportionality between persons who have committed different offences as part of an overall criminal enterprise and whose antecedents may differ. The present appeal is a case of the latter kind, for there are key distinctions between the position of Taylor on the one hand and the appellants on the other.

89 Taylor was sentenced for a different offence from the offence of which the appellants were convicted. He was convicted of knowingly taking part in the commercial supply of cannabis, an offence carrying a maximum penalty of 15 years and a fine. The offence was one for which a standard non-parole period has not been prescribed. The appellants were sentenced for cultivating a large commercial quantity of cannabis, an offence carrying a maximum sentence of 20 years' imprisonment to which a standard non-parole period of 10 years applies, and also carrying liability to a greater fine. It does not matter that the prosecution resiled from its original decision to charge Taylor with the more serious offence because that charge had problems of proof. What matters is what he was convicted of. Further, Taylor had pleaded guilty earlier than the appellants. He occupied a different position in relation to the hierarchy and the conduct it engendered. It was not the case that Green's position was slightly senior to that of Taylor: according to the sentencing judge's remarks Green's participation was "somewhat greater" than Taylor's, while Quinn was the principal organiser. At the time of the offence, Taylor was 20, while Quinn was 31 and Green 24. The culpability of Taylor was thus different from that of the appellants, and so were his antecedents.

90 All five judges comprising the Court of Criminal Appeal held, and the appellants did not deny, that the sentences imposed by the sentencing judge on the appellants were manifestly inadequate. The argument employed in relation to the first ground of appeal which was most strongly pressed by the appellants proceeded on the assumption that Taylor's sentence was not erroneously lenient. The contention was that the proportions between the sentences for Taylor and for the appellants were correctly set by the sentencing judge. The sentence he imposed on Taylor was half, and the sentence he imposed on Green was two-thirds, of the sentence imposed on Quinn. The appellants' complaint in this Court was that the allowing of the appeal by the Court of Criminal Appeal significantly altered those proportions. However, a key reason why the sentences on the appellants were too light was because the relativities between their sentences and Taylor's were not correct. The trial judge does not refer to the fact that the appellants, unlike Taylor, were being sentenced for cultivating a large commercial quantity of cannabis, rather than knowingly taking part in the commercial supply of cannabis. It is to be inferred from this silence that he did not take that fact into account. The Court of Criminal Appeal majority accepted

that "considerations of relative parity should be taken into account"[127]. They, unlike the sentencing judge, took account of the difference in the offences. For that reason, the Court of Criminal Appeal majority, contrary to the complaint in the first ground of appeal, did not create a relevant "disparity", and nor did their Honours create any disproportion. Their Honours did not generate unequal justice. I agree with the specific reasons given by Bell J for rejecting the first ground of appeal[128].

91 I also agree with Bell J's reasons for rejecting the second ground of appeal[129].

92 Like Bell J, I would have dismissed the appeals.

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127 *R v Green* (2010) 207 A Crim R 148 at 169 [100].

128 See below at [124]-[127].

129 See below at [128]-[131].

93 BELL J. These two appeals were heard together. On 3 August 2011, the Court made orders allowing the appeals and reinstating the sentences imposed on the appellants in the District Court of New South Wales. I did not join in the making of those orders. I would have dismissed the appeals for the reasons set out below.

94 The appellants and a man named Kodie Taylor were convicted of offences arising out of the cultivation of cannabis. They were sentenced by Boulton ADCJ on the basis of an agreed statement of facts.

The facts

95 The cultivation was a sophisticated enterprise involving a number of cannabis plants in excess of the large commercial quantity specified in the statute[130]. The plants were grown at a number of crop sites in bushland surrounding Port Macquarie. The appellant Shane Quinn and his younger brother, Shannon, selected the sites, which were cleared and fertilised. Perimeter fencing and netting were installed. Irrigation piping connected to water storage bins was laid out. A sum of $39,500 in cash was expended in the early stages of the enterprise in acquiring vehicles for use in connection with it. The source of all of this money is unknown, though part of it clearly came from Shane Quinn.

96 The plants had matured and were ready to harvest in March and April 2008. Shane Quinn organised labourers to assist with harvesting, drying and packaging the crop. The labourers were picked up from premises in Kendall belonging to a member of the Quinn family and transported to the crop sites. On at least some occasions, they were required to wear blindfolds or hoods to prevent them learning of the location of the sites. They were paid an hourly rate and their hours of work were duly recorded in timesheets.

97 Once harvested, the crop was transported to drying sheds at three locations, Yarrowitch, Elands and Hannam Vale. Each property was privately owned. Shane Quinn arranged with the owners of the Elands and Hannam Vale properties for the use of their sheds. There was no evidence concerning the arrangements made for the use of the shed on the Yarrowitch property. The sheds at Elands and Hannam Vale were connected to permanent power supplies. Shane Quinn was involved in the purchase of a portable generator for use at the shed at Yarrowitch. The sheds were lined with insulation material and shade cloth. Gas heaters and pedestal fans were used to dry the cannabis.

98 The police executed search warrants on premises associated with the Quinn brothers and on the Yarrowitch, Elands and Hannam Vale properties on

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130 *Drug Misuse and Trafficking Act* 1985 (NSW) ("the Drugs Act"), Sched 1.

30 April 2008. They seized 74.4 kg of cannabis leaf from the Yarrowitch shed and 67 kg of cannabis leaf from the Hannam Vale shed. Only 4 kg of cannabis was located at the Elands shed. It would seem that the bulk had been removed some time before the arrival of the police. Hydroponic equipment and $20,800 in cash was located in a spare bedroom at the Kendall premises. A further sum of $9,365 in cash was found during the search of the property at which Shane Quinn, his partner, Simone, and their children were living. The police also located topographical maps of the crop sites, several two-way radio sets and mobile telephones, a radio scanner and a diary recording the names of labourers at those premises.

99 Shane Quinn was the principal of the enterprise. The second most senior member of the enterprise was Shannon Quinn. The third most senior member was Brett Green. Taylor and a man named Garry Mason were the two other offenders who were involved in the enterprise "at a senior level". Boulton ADCJ characterised Green, Mason and Taylor as "partners". The expression was used to distinguish their involvement from the involvement of the labourers. The labourers received an hourly rate whereas Green, Mason and Taylor were to receive a share of the harvested cannabis leaf. Garry Mason was to receive 30 lbs of cannabis leaf. Taylor's and Green's shares were likely to be the same. The nature of the partnership may be judged by a comparison between the value of Green's, Mason's and Taylor's "partnership" share and the value of the growing plants and the harvested crop. The estimated value of the harvested cannabis was between $9,500 and $10,500 per kilogram. This would suggest that 30 lbs of the cannabis leaf might have been worth as much as $142,885. The 140 kg of harvested cannabis had an estimated value of between $1.33 million and $1.47 million. The mature cannabis plants had an estimated value of $2.7 million.

The sentencing of offenders connected with the cultivation

100 Neither Shannon Quinn nor Garry Mason had been sentenced for their involvement in the enterprise at the date of the appellants' sentence hearing. Boulton ADCJ had imposed non-custodial sentences on some of the labourers before he sentenced any of the offenders who were involved in the cultivation at a senior level. The material on the appeal does not reveal the offences of which the labourers were convicted. It was not submitted that the sentencing of those offenders bears any relevant relationship to the sentencing of the appellants.

101 Taylor pleaded guilty in the Local Court to one count of knowingly taking part in the commercial supply of cannabis[131]. The offence has a maximum

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131 Drugs Act, s 25(2).

penalty of imprisonment for 15 years[132]. It is not an offence for which a standard non-parole period has been prescribed. Taylor had been involved in planting the seedlings. Intercepted telephone calls showed that he was in regular contact with Shane and Shannon Quinn. There was no evidence that Taylor had supplied any of the cash used to buy vehicles or other equipment. He had been involved in purchasing some equipment used for drying the cannabis. Taylor was aged 20 years at the date of offending. Boulton ADCJ took his youth into account in finding that special circumstances justified a departure from the statutory proportion between the non-parole period and the head sentence[133]. His Honour reduced the sentence by 25 per cent to reflect Taylor's early plea of guilty[134].

102 The appellants each pleaded guilty in the District Court of New South Wales to the offence of cultivating a large commercial quantity of cannabis[135]. The offence carries a maximum sentence of 20 years' imprisonment[136]. From 1 January 2008, a standard non-parole period of 10 years has applied to the offence[137]. Boulton ADCJ sentenced Quinn to a non-parole period of three years with a balance of term of three years. Green was sentenced to a non-parole period of two years with a balance of term of two years. The sentences were in each case reduced by 20 per cent to reflect the pleas of guilty.

103 Boulton ADCJ said that he had given consideration to "achieving some level of parity or at least comparability between the sentences handed down to various offenders". Quinn, as the principal organiser of the enterprise, he said, should receive "a significantly more severe sentence than Taylor" and Green should receive a sentence that was "somewhat greater than that of Taylor" to reflect Green's greater participation in the enterprise. Quinn was aged 31 and Green was aged 24 at the date of offending.

The Crown appeals

104 The Director of Public Prosecutions ("the Director") appealed against the inadequacy of the sentences imposed on Quinn and Green. He did not appeal

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132 Drugs Act, s 33(2)(b).

133 *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"), s 44(2).

134 Sentencing Act, s 22(1); *R v Thomson* (2000) 49 NSWLR 383.

135 Drugs Act, s 23(2)(a).

136 Drugs Act, s 33(3)(b).

137 Sentencing Act, s 54B and Table to Div 1A of Pt 4; *Crimes (Sentencing Procedure) Amendment Act* 2007 (NSW), Sched 1.

against the sentence imposed on Taylor. The appellants submitted that the Director's failure to appeal against the sentence imposed on Taylor was material to the proper disposition of the appeals. They relied on the statements made by Heydon JA (as he then was) in *R v McIvor*[138] for the proposition that the Court of Criminal Appeal should not intervene on a Crown appeal and re-sentence where to do so would be to create disparity. The determination of the appeals was said to require the resolution of an inconsistency between *McIvor* and the later decision of the New South Wales Court of Criminal Appeal in *R v Harmouche*[139] respecting the application of the principle of parity to the disposition of Crown appeals.

The parity principle

105 The principle of parity in sentencing, stated by this Court in *Lowe v The Queen*, applies to the sentencing of co-offenders whose culpability for the offence and whose antecedents are comparable[140]. Where there is a marked disparity in the sentences imposed on co-offenders engendering a justifiable sense of grievance, the appellate court is entitled to intervene and to reduce an otherwise appropriate sentence[141]. The disparity in *Lowe* was between sentences imposed on co-offenders for an offence of armed robbery. Their culpability and antecedents were comparable. They were sentenced by different judges. The first judge sentenced one offender to probation and the performance of community service work. The second judge sentenced the other offender to six years' imprisonment recommending that he be eligible for parole after two years. In *Lowe*, there was a division of opinion as to the basis for appellate intervention in cases of disparity. Four Justices said that the disparity itself entitled the appellate court to intervene in order to reduce the more severe sentence[142]. Brennan J did not consider that disparity alone justified intervention. His Honour considered it wrong to formulate a principle requiring the appellate court to take the lesser sentence as the norm despite the inappropriate leniency of that sentence[143]. Mason J appeared to accept that the reduction might lead to the

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138 (2002) 136 A Crim R 366.

139 (2005) 158 A Crim R 357.

140 *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ, 611-612 per Mason J, 616 per Wilson J, 617 per Brennan J, 623 per Dawson J; [1984] HCA 46.

141 *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ, 611-614 per Mason J, 623-624 per Dawson J.

142 *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ, 611 per Mason J, 616 per Wilson J, 623 per Dawson J.

143 *Lowe v The Queen* (1984) 154 CLR 606 at 617-619.

imposition of a sentence that otherwise might be regarded as inadequate[144]. This was the issue on which the New South Wales Court of Criminal Appeal in the earlier decision in *R v Tisalandis*[145] was divided. Dawson J's observations respecting the dilemma confronting an appellate court in eliminating disparity suggest that his Honour (with whom Wilson J agreed) favoured the approach apparently stated by Mason J[146]. However, his Honour's agreement with the statement of the principle by Moffitt P in *Tisalandis*[147] may not suggest that.

106 In decisions since *Lowe*, the New South Wales Court of Criminal Appeal has held that the elimination of disparity is not justified where it requires the reduction of an appropriate sentence to the level of an inadequate sentence imposed on a co-offender. In these circumstances, it has been said that the inadequacy of the sentence imposed on a co-offender may be of such a degree that any sense of grievance engendered in the offender sentenced to the more severe sentence can no longer be regarded as legitimate[148]. The correctness of the principle explained in this way was not raised by these appeals. The issue that was said to be raised was whether the reasoning justifying the rejection of parity to reduce a sentence in the case of offenders' appeals should be applied to the disposition of Crown appeals. It is this issue which is the subject of the inconsistent decisions in *McIvor* and *Harmouche*.

The parity principle and Crown appeals

107 In *Harmouche*, the Court of Criminal Appeal said that, in a case in which adherence to parity would result in a manifestly inadequate sentence remaining in place, the appellate court was "entitled to take a different course"[149]. The authorities cited in support of that conclusion were decisions involving offenders' appeals. The Court of Criminal Appeal did not address the features of Crown

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144 *Lowe v The Queen* (1984) 154 CLR 606 at 613-614.

145 [1982] 2 NSWLR 430.

146 *Lowe v The Queen* (1984) 154 CLR 606 at 623.

147 *Lowe v The Queen* (1984) 154 CLR 606 at 624, citing *R v Tisalandis* [1982] 2 NSWLR 430 at 438.

148 *R v Diamond* unreported, New South Wales Court of Criminal Appeal, 18 February 1993; *R v Steele* unreported, New South Wales Court of Criminal Appeal, 17 April 1997; *R v Doan* (2000) 50 NSWLR 115; *Chen* (2002) 130 A Crim R 300 at 383-384 [289]; *R v Ismunandar* (2002) 136 A Crim R 206 at 214-220 [15]-[38].

149 *R v Harmouche* (2005) 158 A Crim R 357 at 373 [68] per Hulme J (Sully and Latham JJ concurring).

appeals that distinguish them from offenders' appeals. It appears that the Court of Criminal Appeal in *Harmouche* was not referred to its earlier decision in *McIvor*.

108 In *McIvor*, the respondent to a Crown appeal and his co-offender, Hernando, were each sentenced to almost identical sentences for two armed robbery offences committed in circumstances in which each was equally culpable. Nothing in the subjective cases distinguished either offender from the other. A Crown appeal against the inadequacy of the sentence imposed on Hernando was dismissed because of the lateness with which it was brought[150]. The Crown's appeal against the inadequacy of the sentence imposed on McIvor was brought in a timely fashion. Nonetheless, the dismissal of the challenge to Hernando's sentence produced the result that allowing the appeal in McIvor's case and increasing his sentence would produce disparity in the sentences of the two co-offenders. Heydon JA distinguished the authorities holding that a sentence should not be reduced to achieve parity with an inappropriately lenient sentence[151]. Analogous reasoning was said not to apply to the disposition of Crown appeals. In the latter, the appellate court is asked to increase a sentence, while the identical sentence imposed on the co-offender remains unchanged. His Honour observed that, in this context, questions of a justified grievance arising from a move from parity to the lack of parity possess a different quality[152].

The Court of Criminal Appeal

109 The hearing of the Crown appeals was adjourned on the appellants' application to enable the Court of Criminal Appeal to be constituted by five judges (Allsop P, McClellan CJ at CL, RS Hulme, Latham and McCallum JJ) in order to resolve the inconsistency between *Harmouche* and *McIvor*. Resolution of this question was said to be a necessary step in the appellants' argument based on a concept of "relative parity". The Court was unanimous in concluding that the sentences imposed on the appellants were manifestly inadequate[153]. It was divided on the question of whether the appeals should be dismissed in the exercise of the residual discretion[154].

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150 *R v Hernando* (2002) 136 A Crim R 451.

151 *R v McIvor* (2002) 136 A Crim R 366 at 371 [10].

152 *R v McIvor* (2002) 136 A Crim R 366 at 371 [10].

153 *R v Green* (2010) 207 A Crim R 148 at 154 [13] per Allsop P and McCallum J, 158 [35] per McClellan CJ at CL, 164 [74], 165-168 [82]-[97] per RS Hulme J, 183 [145] per Latham J.

154 *Criminal Appeal Act* 1912 (NSW), s 5D.

110 The minority (Allsop P and McCallum J) said that the principle of parity operates with different effect in the determination of Crown appeals[155]. Their Honours referred with approval to Heydon JA's reasons in *McIvor* and to the remarks of Howie J dismissing the Crown appeal in *R v Borkowski*[156]. *McIvor* and *Borkowski* both involved the dismissal of Crown appeals which, if allowed, would have created disparity in the sentences imposed on co-offenders whose circumstances were relevantly similar. That was not the case with these appeals. Their Honours' reasons for dismissing the Crown appeals do not turn on the resolution of the conflict between *Harmouche* and *McIvor*. They depend upon the proposition taken from *Jimmy v The Queen*[157] that parity is not confined to co-offenders in "the strict sense". In the Court of Criminal Appeal minority's view, the principle, whether described as parity, proportionality or relativity, is one that applies to the sentences imposed upon persons who engaged in the same criminal enterprise[158]. It was by reason of the application of the principle of parity understood in this wider sense that the Court of Criminal Appeal minority would have dismissed the Crown appeals.

111 The Court of Criminal Appeal majority considered that *McIvor* should not be followed[159]. McClellan CJ at CL said that, when the Court considers it appropriate to increase a sentence, it may do so notwithstanding that a sense of grievance may result. Only if the sentence would result in a justified sense of grievance, being one defined by comparison with the sentence imposed on a co-offender who has been appropriately sentenced, could the question of parity cause the court to reject the appeal[160]. RS Hulme J's views were to similar effect[161].

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155 *R v Green* (2010) 207 A Crim R 148 at 152 [5].

156 *R v Green* (2010) 207 A Crim R 148 at 152 [5], citing *R v Borkowski* (2009) 195 A Crim R 1 at 18 [69]-[70] per Howie J, and at 153 [7], citing *R v McIvor* (2002) 136 A Crim R 366 at 371 [10] per Heydon JA.

157 (2010) 77 NSWLR 540 at 596 [245] per Howie J.

158 *R v Green* (2010) 207 A Crim R 148 at 151 [2].

159 *R v Green* (2010) 207 A Crim R 148 at 157 [33] per McClellan CJ at CL, 177 [126]-[127] per RS Hulme J, 183 [145] per Latham J.

160 *R v Green* (2010) 207 A Crim R 148 at 157 [32].

161 *R v Green* (2010) 207 A Crim R 148 at 176 [122].

112 Their Honours did not address the distinctive nature of Crown appeals, which is that they should be brought as a rarity to establish a matter of principle including, where appropriate, to redress manifest inadequacy in sentencing standards[162]. In a case involving co-offenders whose culpability and antecedents are comparable, in which the Crown does not appeal against the sentence imposed on one offender but appeals the sentence on the other, it is difficult to see how the appeal can be said to have been brought to establish a sentencing standard. The respondent selected by the Director in such a case to be the medium for the setting of the standard has an objectively justifiable sense of grievance. The discretionary reasons favouring dismissal of the Crown appeal in such a case, stated by Howie J in *Borkowski*, are cogent[163]. In a case in which the Crown's tardiness or other conduct is the reason for the failure to bring (or to successfully maintain) a Crown appeal against one co-offender, that circumstance is a matter properly considered by the appellate court in the exercise of the residual discretion. As McHugh J observed in *Everett v The Queen*, even where a sentencing judge has erred in a fundamental way, fairness to the sentenced person requires that the conduct of the Crown is weighed in the exercise of the discretion[164]. The circumstances in which a Crown appeal should succeed when brought against only one of two or more co-offenders whose culpability and antecedents are comparable and who have been sentenced to the same inappropriately lenient sentence are likely to be very rare.

The orders of the Court of Criminal Appeal

113 The circumstance that the Court of Criminal Appeal was specially constituted to consider the differing approaches in *McIvor* and *Harmouche* explains the analysis of those decisions notwithstanding that neither is concerned with the concept of "relative parity". *McIvor* correctly held that a respondent to a Crown appeal may entertain a justifiable sense of grievance in circumstances in which it is sought to increase the respondent's inadequate sentence, while leaving in place the inadequate sentence imposed on a co-offender whose culpability and antecedents are indistinguishable. That, as earlier noted, is not this case. The Court of Criminal Appeal majority rightly took into account that Taylor had not been sentenced for the same offence[165]. The Crown appeals were upheld and the

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162 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ; [1977] HCA 44; *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ; [1994] HCA 49.

163 (2009) 195 A Crim R 1 at 17-19 [67]-[71].

164 *Everett v The Queen* (1994) 181 CLR 295 at 307.

165 *R v Green* (2010) 207 A Crim R 148 at 157-158 [34] per McClellan CJ at CL, 168-169 [100] per RS Hulme J, 183 [145] per Latham J.

Court of Criminal Appeal re-sentenced the appellants. Quinn was sentenced to a non-parole period of five years with a balance of term of three years. Green was sentenced to a non-parole period of three years with a balance of term of two years.

The first ground of challenge in this Court

114 The appellants each appealed by special leave on the ground:

> "The Court of Criminal Appeal erred in finding that it was appropriate to allow the Crown appeal regarding the [appellant] and thereby create disparity between the [appellant's] new sentence and that imposed on [Taylor] who had not been the subject of a Crown appeal."

115 The legal error for which the appellants contended was the allowing of the Crown appeals in circumstances in which the Crown did not challenge the sentence imposed on Taylor. It is a ground that invokes the principle of parity in sentencing stated in *Lowe*.

116 Taylor was 20 at the date of offending and for that reason he was still entitled to have his youth taken into account as a mitigating factor justifying a more lenient sentence than would otherwise be appropriate. Taylor was convicted of a different, lesser, offence than that of which the appellants were convicted. The Crown did not appeal against the inadequacy of the sentence imposed on Taylor because the Director considered that the sentence, while "very lenient", was not manifestly inadequate.

117 The principle of parity for which the appellants contended would produce the result that the Director's acceptance, that the sentence imposed on the youthful offender for the lesser offence is not manifestly inadequate, constrains the appellate court's discretion in the disposition of an appeal against the acknowledged inadequacy of the sentences imposed on offenders, including the principal, sentenced for the more serious offence. If the principle of parity operated with this effect, it would be necessary to review it. It does not. The appellants' argument conflates the principle of parity, which applies to co-offenders whose culpability and antecedents are comparable, with ideas of proportion or relativity in the sentencing of offenders for different offences arising out of the same overall criminal enterprise.

118 In *Lowe*, the discretionary nature of appellate intervention on the ground of disparity was emphasised[166]. When this Court again considered parity in

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166 *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ.

Postiglione v The Queen[167], each of the Justices identified it as a principle of sentencing that, when engaged, requires the appellate court to intervene to reduce the more severe sentence[168]. Recognition of parity as a principle of sentencing which applies with this effect underlines the importance of distinguishing it from broader ideas of proportion in the sentencing of offenders who are convicted of different offences in connection with the same criminal enterprise.

Is the parity principle confined to co-offenders?

119 *Lowe* was concerned with the sentences imposed on offenders convicted of the same offence. The principle enunciated in that case was with respect to co-offenders. In neither *Lowe* nor *Postiglione* was it necessary to give consideration to the meaning of the expression "co-offenders". Co-offenders are offenders who commit the same crime. It may be accepted that the principle of parity stated in *Lowe* is not confined to co-offenders so defined. Two or more offenders who successively have sexual intercourse with the same unconsenting complainant on the same occasion are not co-offenders and yet it would favour formality over substance to hold that parity did not apply in sentencing them (provided that their culpability and antecedents were otherwise comparable). A different but related question was raised in *Jimmy*. In that case, it was held that parity applied to the sentencing of offenders for similar money laundering offences[169]. Each offender had deposited sums of cash just under $10,000 in various bank accounts, acting on the instructions of a man named Chen. Jimmy's culpability and subjective circumstances were comparable to another of Chen's recruits who had been convicted of the same offence.

120 The question raised by these appeals is the application of the principle of parity stated in *Lowe* to the sentencing of offenders for different offences arising out of the same criminal enterprise. Although this question was not raised in *Jimmy*, Campbell JA's comprehensive review of the decisions of intermediate appellate courts included those in which such a question had been considered[170]. The clear trend of authority was against the principle applying in these

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167 (1997) 189 CLR 295; [1997] HCA 26.

168 *Postiglione v The Queen* (1997) 189 CLR 295 at 301 per Dawson and Gaudron JJ, 309 per McHugh J, 323 per Gummow J, 338 per Kirby J.

169 *Criminal Code* (Cth), s 400.4(1).

170 *Wurramarbra v The Queen* (1979) 28 ALR 176; *R v Watson* unreported, New South Wales Court of Criminal Appeal, 25 February 1992; *Krakouer v The Queen* (1999) 107 A Crim R 408; *R v Kerr* [2003] NSWCCA 234; *R v Formosa* [2005] NSWCCA 363.

circumstances. However, in *R v Kerr*[171], the New South Wales Court of Criminal Appeal had applied the principle of parity to reduce a sentence that was considered to exhibit gross disproportion to that imposed on another offender convicted of a different and lesser offence. Subsequent decisions of the New South Wales Court of Criminal Appeal had been consistently critical of the reasoning in *Kerr*[172]. In *Jimmy*, the Court held that *Kerr* should not be followed[173]. The statements in *Jimmy* on which the Court of Criminal Appeal minority relied are to be understood in the context of the reasons of their Honours in *Jimmy* for concluding that *Kerr* was wrongly decided.

121 *Kerr* was an offender's appeal against a sentence imposed for the offence of aggravated robbery. Another offender, Oliver, was convicted of the offence of robbery simpliciter arising out of the same incident and received a more lenient sentence. A third offender, Tickner, who drove the vehicle in connection with the robbery, was convicted of concealing a serious indictable offence. Kerr was sentenced to 13 and a half years' imprisonment and Oliver to perform 500 hours of community service. Miles AJ, giving the leading judgment of the Court, said that the policy behind the principle of parity in sentencing was not to be avoided by the prosecuting authority charging cooperative offenders with less serious offences. Rather, the whole of the circumstances of the offence should be considered[174]. His Honour characterised the parity principle as one "of wide application" and said that it was "not to be applied or withheld in a technical or pedantic way"[175]. It was, he said, a reflection of the wider principle that consistency in sentencing is desirable in the public interest[176]. In the result, the Court held that the lenient sentence imposed on Oliver "should have alerted the judge sentencing the applicant to the need to avoid a sentence of gross disproportion"[177]. The appeal was upheld and the applicant's sentence reduced.

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171 [2003] NSWCCA 234.

172 See, for example, *R v Formosa* [2005] NSWCCA 363; *Spinks v The Queen* [2007] NSWCCA 52; *Pham v The Queen* (2009) 193 A Crim R 190; *Woodgate v The Queen* (2009) 195 A Crim R 219.

173 *Jimmy v The Queen* (2010) 77 NSWLR 540 at 571 [130] per Campbell JA, 596 [247] per Howie J, 599 [267] per Rothman J.

174 *R v Kerr* [2003] NSWCCA 234 at [13].

175 *R v Kerr* [2003] NSWCCA 234 at [19].

176 *R v Kerr* [2003] NSWCCA 234 at [19].

177 *R v Kerr* [2003] NSWCCA 234 at [26].

122 The New South Wales Court of Criminal Appeal was correct in *Jimmy* to hold that *Kerr* was wrongly decided. As Campbell JA observed, the parity principle is not applied to correct differences in the sentences imposed on offenders involved in a common criminal enterprise who are convicted of different offences[178]. The selection of the charge or charges upon which offenders are brought before the court is a matter for the prosecuting authority. The justifiable sense of grievance which informs the parity principle arises from the manifest disparity in the sentences imposed by the court on offenders convicted of the same offence. As Simpson J explained in *R v Formosa*, where the discrepancy in sentences derives from the difference in charges between offenders, any sense of grievance is engendered in consequence of a prosecutorial decision and is not a grievance in the *Lowe* or *Postiglione* sense[179].

123 In *Postiglione,* Gummow J said that the parity principle only applies to co-offenders[180]. As explained above, since the issue was not raised in *Postiglione,* his Honour's statement may not have been intended to exclude persons who are not co-offenders in the strict sense. However, the extension of a principle concerned with equality of treatment to offenders charged with different offences raises distinct difficulties. In *Jimmy*, the Court said that significant limitations attend the application of the principle in such a case[181]. These limitations included the "particular difficulties" attending a disparity argument that is based upon comparison with an offender convicted of a less serious offence[182]. Howie J's statement that the principle should not be confined to a consideration of the sentences imposed upon co-offenders in the strict sense was subject to his agreement with the significant limitations identified by Campbell JA[183].

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178 *Jimmy v The Queen* (2010) 77 NSWLR 540 at 567 [117] per Campbell JA.

179 *R v Formosa* [2005] NSWCCA 363 at [50].

180 *Postiglione v The Queen* (1997) 189 CLR 295 at 325, citing *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ, 611 per Mason J, 617-618 per Brennan J.

181 *Jimmy v The Queen* (2010) 77 NSWLR 540 at 589 [203] per Campbell JA, 596 [246] per Howie J, 598 [261] per Rothman J.

182 *Jimmy v The Queen* (2010) 77 NSWLR 540 at 589 [203] per Campbell JA.

183 *Jimmy v The Queen* (2010) 77 NSWLR 540 at 596 [245]-[246].

Parity for offenders sentenced for different offences?

124 In *Postiglione*, Dawson and Gaudron JJ said that discrepancy or disparity is not confined to the imposition of different sentences for the same offence and that the concept encompassed the existence of "due proportion" between sentences in a case in which co-offenders have differing degrees of criminality or other differing circumstances[184]. The Crown accepted that, in sentencing offenders for their respective roles in a criminal enterprise, it is appropriate for the judge to assess the respective levels of culpability and relevant differences in subjective cases with a view to achieving due proportion in the sentences imposed on each. The respondent did not submit that it had been an error for Boulton ADCJ to have regard to considerations of proportion in sentencing all of the offenders charged in connection with the cultivation of the cannabis at the crop sites.

125 It is important to distinguish the principle of parity stated in *Lowe* from recognition that a sentencing judge may take into account consideration of the proportion or relativity between the sentences imposed on persons convicted of different offences arising out of the same criminal enterprise. One does not start in the latter case from a position of equality subject to the making of any adjustment to reflect relevant differences in the offenders' culpability and antecedents. The starting point is the different offences for which the offenders are being sentenced. Conflating the principle of parity with ideas of proportion in the sentencing of offenders for different offences arising out of the same criminal enterprise is very likely to obscure the proper consideration of the appropriate sentence for each offender. The point may be illustrated by these appeals.

126 Taylor was originally charged with the same offence as Quinn and Green. While the proceedings were still before the Local Court, the Director withdrew the charge of cultivation of a large commercial quantity and substituted the charge for the lesser offence. Commonly, the court will not know the reasons for the decision to charge offenders with different offences arising out of the same venture. In this case, the Crown Prosecutor informed Boulton ADCJ of the reason why the Director proceeded against Taylor for the lesser offence. The Crown was unable to establish any link between Taylor and the shed at Yarrowitch. It could not prove that Taylor knew that the enterprise involved the cultivation of a large commercial quantity of cannabis. It is true that Taylor was involved in the cultivation of cannabis in the Port Macquarie area together with Quinn and Green. In this sense, the three might be said to have been involved in the same criminal enterprise. However, Taylor was not a party to an enterprise to cultivate a large commercial quantity of cannabis. There was no unfairness or

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184 *Postiglione v The Queen* (1997) 189 CLR 295 at 301-302.

want of justice or equality in sentencing Taylor for the offence to which he pleaded guilty and in sentencing the appellants differently for the offences to which they pleaded guilty. The significant difference in the statutory maximum penalties for the offences required such a result.

127 Senior counsel for the appellant Green, in oral submissions, identified as the error in the Court of Criminal Appeal majority's approach that their Honours disregarded Boulton ADCJ's assessment of the appropriate proportion in the sentences that he imposed on each of the persons involved in the enterprise. This argument accepted that the failure to appeal against the sentence imposed on Taylor was not fatal to the appeals. It relied instead on the Crown's acceptance that Boulton ADCJ was correct to take into account considerations of due proportion in the sentencing of all of the offenders involved in the enterprise. Boulton ADCJ said that Quinn should receive a "significantly more severe sentence" than Taylor since Quinn was, on the agreed facts, "the principal organiser of this enterprise" and that Green should receive a sentence "somewhat greater" than Taylor's to reflect Green's "greater participation in the enterprise". The proportion between the sentences that his Honour imposed was, in the case of Taylor, one-half of the sentence imposed on Quinn, and, in the case of Green, two-thirds of the sentence imposed on Quinn. The proportions are those that might be expected had all been sentenced for the same offence after making proper allowance for relevant differences. The proportions that his Honour fixed were with respect to relative levels of participation in "the enterprise". Nothing in his Honour's reasons suggests that he took into account that the sentence imposed on Taylor was for a different and less serious offence. In the result, he imposed sentences on the appellants which were held to be manifestly inadequate.

The appellants' additional ground of appeal

128 RS Hulme J, in a concluding paragraph of his reasons, described the sentence imposed on Taylor as being "so obviously manifestly inadequate that it is prima facie extraordinary that the Crown did not appeal and the Crown provided no reason why it did not"[185]. The appellants were given leave at the hearing of the appeal to add a second ground arising out of his Honour's assessment in this regard. The additional ground is framed in this way:

> "The Court of Criminal Appeal erred in finding, as an essential step in the reasoning that the sentence on the appellant was manifestly inadequate, that the sentence previously imposed on Taylor was also manifestly inadequate, in the circumstances where such finding was not sought by the

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185 *R v Green* (2010) 207 A Crim R 148 at 180 [142].

> Crown and the Court did not give the parties an opportunity to be heard on the point before making such finding."

129 As has been explained, the Crown did not submit that Taylor's sentence was manifestly inadequate, much less seek such a finding. It has consistently maintained that the sentence imposed on Taylor was lenient. In its written submissions in the Court of Criminal Appeal, the Crown contended that:

> "Although treated leniently in any event, the charge for which [Taylor] was sentenced carried the lesser maximum penalty of 15 years imprisonment, and attracted no standard non-parole period."

130 It is correct to say that the parties were not given an opportunity to comment on RS Hulme J's view that the sentence imposed on Taylor was manifestly inadequate. Whether it is right to characterise this as a "finding" or not, it is difficult to accept that it was essential to the conclusion that the sentences imposed on the appellants were manifestly inadequate and that the Court should intervene and re-sentence. All five judges were unanimous in holding that the sentences imposed on the appellants were manifestly inadequate. The reasoning of the minority for that conclusion did not depend upon an assessment that the sentence imposed on Taylor was manifestly inadequate. There is nothing in RS Hulme J's reasons that makes the conclusion of manifest inadequacy respecting the appellants' sentences, or the conclusion that the appeals should be allowed notwithstanding the residual discretion, dependent upon the assessment of the inadequacy of Taylor's sentence.

131 The delay in the appellate process was not due to neglect by the Crown. The appellants applied for, and the Crown opposed, the adjournment of the appeals. Nonetheless, the appellants' progress to reform and the closeness to the date of their eligibility for parole were matters that the Court of Criminal Appeal was entitled to take into account as reasons for dismissing the appeals in the exercise of the residual discretion. However, the exercise of that discretion was a matter for the Court of Criminal Appeal and was not the subject of the appellants' grounds of challenge. Since, in my opinion, neither of those grounds was established, I would have dismissed the appeals.