HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL AND KEANE JJ

Matter No M29/2013

GEORGE ELIAS — APPELLANT

AND

THE QUEEN & ANOR — RESPONDENTS

Matter No M25/2013

CHAFIC ISSA — APPELLANT

AND

THE QUEEN & ANOR — RESPONDENTS

Elias v The Queen
Issa v The Queen
[2013] HCA 31
27 June 2013
M29/2013 & M25/2013

ORDER

Matter No M29/2013

Appeal dismissed.

Matter No M25/2013

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

P F Tehan QC with D D Gurvich for the appellant in M29/2013 (instructed by Emma Turnbull Criminal Law)

L C Carter for the appellant in M25/2013 (instructed by C. Marshall & Associates)

G J C Silbert SC with B L Sonnet for the first respondent in both matters (instructed by Solicitor for Public Prosecutions (Vic))

Submitting appearance for the second respondent in both matters

CATCHWORDS

Elias v The Queen
Issa v The Queen

Criminal law – Sentence – Where offence carries higher maximum penalty than other offence for which offender could have been prosecuted – Whether sentencing judge required to take lesser maximum penalty for other offence into account as mitigating factor – Whether *R v Liang* (1995) 124 FLR 350 should be followed.

Criminal law – Respective roles of prosecution and sentencing judge – Whether appropriate for sentencing judge to have regard to other offence which judge considers as appropriate or more appropriate to facts of case.

Sentencing Act 1991 (Vic), s 5(1), (2).

1 FRENCH CJ, HAYNE, KIEFEL, BELL AND KEANE JJ. These appeals were heard together. They raise for consideration the existence and scope of a claimed common law principle of sentencing. The principle, stated by the Court of Appeal of the Supreme Court of Victoria in *R v Liang*, requires a sentencing judge to take into account in mitigation of sentence that there is a "less punitive offence" on which the prosecution could have proceeded and which is "as appropriate or even more appropriate" to the facts than the charge for which the offender is being sentenced[1].

2 The appellants and a man named Bassillios Pantazis pleaded guilty before the Supreme Court of Victoria to offences which included in each case a count of attempting to pervert the course of justice. This is a common law offence for which the *Crimes Act* 1958 (Vic) provides a maximum penalty of imprisonment for 25 years[2]. The appellants and Pantazis were each sentenced to eight years' imprisonment for this offence[3]. The conduct constituting the attempted perversion of justice consisted of acts of assistance given to a fugitive who had been sentenced for a Commonwealth offence. Under Commonwealth law, an

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1 (1995) 124 FLR 350 at 355 per Winneke P, Ormiston JA and Crockett AJA agreeing.

2 *Crimes Act* 1958 (Vic), s 320.

3 Issa pleaded guilty before King J to counts in a presentment charging him with (i) attempting to pervert the course of justice, (ii) trafficking in a large commercial quantity of a drug of dependence under s 71 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), (iii) dealing with proceeds of crime contrary to s 194(2) of the *Crimes Act* 1958 (Vic), and (iv) possession of cannabis under s 73 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic). On 24 November 2009, he was sentenced to an aggregate term of 12 years and six months' imprisonment with a non-parole period of eight years and six months. On 5 September 2011, Elias was sentenced by Whelan J for (i) attempting to pervert the course of justice, (ii) trafficking in a large commercial quantity of a drug of dependence contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), (iii) dealing with proceeds of crime contrary to s 194(2) of the *Crimes Act* 1958 (Vic), (iv) possession of cannabis under s 73 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), and (v) three counts of possession of an unregistered longarm firearm under s 6A(1) of the *Firearms Act* 1996 (Vic). Elias was sentenced to an aggregate term of 11 years' imprisonment with a non-parole period of eight years.

attempt to pervert the course of justice in relation to the judicial power of the Commonwealth is an offence which carries a maximum penalty of imprisonment for five years[4].

3 The appellants and Pantazis appealed to the Court of Appeal of the Supreme Court of Victoria (Warren CJ, Redlich, Hansen and Osborn JJA and Curtain AJA) against the severity of their sentences. They submitted on the authority of *Liang* that it was an error not to take into account the lesser maximum penalty for the Commonwealth offence in mitigation of their sentences. The first respondent submitted that the *Sentencing Act* 1991 (Vic) ("the Sentencing Act") does not permit a judge sentencing for an offence under State law to have regard to some other maximum penalty prescribed for a Commonwealth offence. That submission was accepted. The Court of Appeal rejected the appellants' alternative submission that their sentences should have been mitigated to take into account that they could have been prosecuted as accessories after the fact under State law[5]. The maximum penalty in that event would also have been five years' imprisonment. The Court of Appeal considered that maximum penalty to be inadequate to punish the appellants for their participation in a sophisticated and prolonged criminal combination which had struck at the heart of the administration of criminal justice[6]. How the State provisions about accessories after the fact could have been engaged when the alleged acts of assistance were given to a fugitive who not only had been sentenced, but had been sentenced for a Commonwealth offence, was not explored. The appeals were dismissed.

4 The appellants appeal by special leave. Pantazis died before the hearing and his appeal has been discontinued. The appellants rely on a single ground which asserts error in the failure to apply the principle stated in *Liang*. They contend that the Court of Appeal was wrong to confine the application of the principle to offences within the same jurisdiction. Alternatively, they maintain

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4 *Crimes Act* 1914 (Cth), s 43. Schedule 2, item 15 of the *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act* 2011 (Cth) amended s 43 to increase the maximum penalty to imprisonment for 10 years.

5 *Crimes Act* 1958 (Vic), s 325.

6 *Pantazis v The Queen* (2012) 268 FLR 121 at 147 [92].

that the Court of Appeal was wrong not to have regard to the maximum penalty for the less serious State offence[7].

5 The *Liang* "principle" has been applied by the Court of Appeal of Victoria on a number of occasions. The first respondent's challenge to the principle in the Court of Appeal was confined to its application to Commonwealth offences. By notice of contention in this Court, the first respondent submits that *Liang* does not state a principle of sentencing known to the law. For the reasons to be given, the first respondent's contention must be accepted and the appeals must be dismissed.

Factual background

6 The appellants' offences arose out of their association with a man named Antonios (Tony) Mokbel. Mokbel was the principal of a criminal enterprise known as "The Company", which was engaged in the manufacture and distribution of very large quantities of methylamphetamine. The appellants' convictions for drug trafficking offences related to their activities on behalf of "The Company".

7 In March 2006, Mokbel was on trial in the Supreme Court of Victoria on a presentment that charged him with drug trafficking contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth). On 20 March 2006, he failed to appear at his trial and a warrant was issued for his arrest. The trial continued in his absence. On 31 March 2006, Mokbel was convicted and sentenced in his absence. He remained at large until his arrest in Greece on 5 June 2007. Throughout this period Mokbel continued to control his drug manufacturing and distribution business.

8 Mokbel enlisted the assistance of the appellants in his successful attempt to flee the jurisdiction. The appellants jointly owned a property in Bonnie Doon, Victoria which they used to hide Mokbel until October 2006. They facilitated the supply of a substantial quantity of cash to Mokbel. He was then moved to Elphinstone, Victoria before being transported to Fremantle, Western Australia by Pantazis. The appellants met up with Mokbel and Pantazis on the trip. Issa

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7 The appellants did not controvert the proposition in the judgment of the Court of Appeal that the sentencing judge was exercising the judicial power of the State. The question whether the sentencing judge was exercising federal jurisdiction or the judicial power of the State was not argued on the appeals to this Court.

booked and paid for their accommodation in South Australia and on arrival in Western Australia.

9 On 11 November 2006, Mokbel left Fremantle on a yacht bound for Greece. Issa was involved in engaging a crew to refit the yacht and sail it to Greece. Elias also procured equipment for the yacht. In February 2007, Issa assisted in the transfer of $120,000 in cash and two passports to Mokbel. A forged passport based on the documents supplied by Issa was found on Mokbel at the time of his arrest in Greece.

10 A submission based on *Liang* was unsuccessfully advanced at Pantazis' sentencing hearing[8]. It was submitted that he might have been charged with attempting to pervert the course of justice under the Commonwealth statute[9] or with being an accessory after the fact under the State statute[10]. He asked the sentencing judge to take into account the lesser maximum penalty for those offences as a guide to the appropriate range of sentence. The prosecutor accepted that the offence under the State statute could have been charged but submitted that, having regard to the extent and nature of the offending conduct, the appropriate offence was the one on which the prosecution had proceeded. The prosecutor did not address the submission respecting the Commonwealth offence. A submission based on *Liang* was also unsuccessfully advanced at Elias' sentencing hearing[11]. The submission was confined to the Commonwealth offence as a guide to the appropriate range of sentence. A submission based on *Liang* was not made at Issa's sentencing hearing, but it was made to, and considered on its merits by, the Court of Appeal.

11 Some reference should be made here to *Liang* and the other cases on which the appellants rely for the existence of the suggested principle.

Liang

12 The applicants in *Liang* were jointly presented before the County Court of Victoria on counts arising out of a scheme of dishonesty against the interests of

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8 *R v Pantazis* [2011] VSC 54 at [27] and fn 2.

9 *Crimes Act* 1914 (Cth), s 43.

10 *Crimes Act* 1958 (Vic), s 325.

11 *R v Elias* [2011] VSC 423 at [27] and fn 5.

Telecom, a Commonwealth authority. Each was charged with dishonestly obtaining a financial advantage under State law[12] and with defrauding a carrier of a charge payable for a telecommunications service under Commonwealth law[13]. The State offence had a maximum penalty of 10 years' imprisonment. The Commonwealth offence had a maximum penalty of five years' imprisonment. The applicants successfully appealed to the Court of Appeal against the severity of the sentence imposed for the State offence in circumstances in which it was held that the sentencing judge had proceeded on a misconceived basis. However, Winneke P, giving the leading judgment, went on to say[14]:

> "For my part, I think there is much substance in the argument that the applicants were exposed to an injustice by being charged with the offence created by s 82(1) of the *Crimes Act* (Vic). This injustice flowed … because that charge (exposing the applicants, as it did, to higher penalties) did not, in my view, appropriately fit the nature of the applicants' conduct."

13 His Honour stated the principle in these terms[15]:

> "although it is *for the prosecuting authority in its absolute discretion* to determine which particular charge it will lay against an accused person, it is nonetheless *relevant and proper for the judge on sentence to take into account* as a relevant sentencing principle the fact that there was *another and less punitive offence* which not only could have been charged but indeed was as appropriate or even more appropriate to the facts alleged against the accused." (emphasis added)

14 Winneke P traced the principle to the decision of the South Australian Supreme Court in *Scott v Cameron*[16]. The appellant in that case had been sentenced to a term of three months' imprisonment following conviction for social security frauds charged under s 29C of the *Crimes Act* 1914 (Cth). It was

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12 *Crimes Act* 1958 (Vic), s 82(1).

13 *Crimes Act* 1914 (Cth), s 85ZF(a).

14 *R v Liang* (1995) 124 FLR 350 at 354.

15 *R v Liang* (1995) 124 FLR 350 at 355.

16 (1980) 26 SASR 321.

successfully contended on appeal before White J that the offences should more appropriately have been charged under the *Social Services Act* 1947 (Cth). White J acknowledged that the prosecution had "an absolute discretion" whether to lay the complaints under the *Crimes Act* or the *Social Services Act.* He went on to say that the court's discretion was not to be "fettered" by the prosecutor's choice, at least in a case in which the prosecution could equally appropriately have been brought under the other provision[17].

15 Winneke P also took into account the observations made by Drummond J in *R v Whitnall*[18]. Drummond J, joining in the making of orders dismissing a Crown appeal against the inadequacy of sentence for a fraud offence under s 29D of the *Crimes Act* 1914 (Cth), noted that the respondent could have been prosecuted for other offences which might have been dealt with summarily. His Honour acknowledged that the selection of the charge is "solely for the prosecuting authority" but he, too, said that the court was not bound to treat the prosecutor's decision as a "fetter" requiring the court to impose a heavier sentence than the court considered to be appropriate[19].

16 The first time the *Liang* principle was applied by the Victorian Supreme Court appears to have been in *R v Young*[20]. The applicant had pleaded guilty to attempted perversion of the course of justice. On appeal against the severity of a sentence of two and a half years' imprisonment, Starke J identified as a "most significant matter"[21] that the maximum penalty for the equivalent Commonwealth offence was two years' imprisonment. His Honour said that it was appropriate to take into account the maximum penalty for the Commonwealth offence albeit that in "special circumstances" a judge might impose a sentence greater than two years for the common law offence[22].

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17 *Scott v Cameron* (1980) 26 SASR 321 at 325.

18 *R v Liang* (1995) 124 FLR 350 at 354-355, citing (1993) 42 FCR 512 at 520.

19 *R v Whitnall* (1993) 42 FCR 512 at 520.

20 Unreported, Court of Criminal Appeal of Victoria, 2 December 1982.

21 *R v Young* unreported, Court of Criminal Appeal of Victoria, 2 December 1982 at 10.

22 *R v Young* unreported, Court of Criminal Appeal of Victoria, 2 December 1982 at 10.

17 The Victorian Court of Appeal again considered the *Liang* principle in *R v Vellinos*[23]. Winneke P, again giving the leading judgment, described the *Liang* principle as a "little-used, but none the less significant, sentencing principle of fairness"[24]. In that case it was held that the sentencing judge did not err in refusing to take into account the maximum penalty for lesser offences which were not more appropriate to the extent and nature of the offending conduct[25]. In *R v McEachran*, Redlich JA was critical of *Vellinos* for placing a gloss on the *Liang* principle by requiring that the alternative offence be "more appropriate" than the offence charged[26].

18 In *R v El Helou*, the New South Wales Court of Criminal Appeal rejected a contention that in sentencing for a New South Wales offence the Court should take into account the lesser penalty for a Commonwealth offence for which the appellant could have been, but was not, charged[27]. The Court did not refer to *Liang* or the other authorities that have applied the approach in *Liang*. It rejected the invitation to consider the lesser maximum penalty for the Commonwealth offence as a matter of principle. The New South Wales Court of Criminal Appeal has since followed *El Helou*[28].

The Sentencing Act

19 The sentencing of offenders in Victoria is subject to the Sentencing Act. The Sentencing Act contains an exhaustive statement of the purposes for which sentences may be imposed in s 5(1):

> "(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

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23 [2001] VSCA 131.

24 *R v Vellinos* [2001] VSCA 131 at [11].

25 *R v Vellinos* [2001] VSCA 131 at [11].

26 *R v McEachran* (2006) 15 VR 615 at 636 [51].

27 *R v El Helou* (2010) 267 ALR 734 at 750 [90] per Allsop P, Grove and Hislop JJ agreeing.

28 *Standen v Commonwealth Director of Public Prosecutions* (2011) 254 FLR 467 at 478 [29] per Hodgson JA, Adams and Hall JJ agreeing.

(b) to deter the offender or other persons from committing offences of the same or a similar character; or

(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or

(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or

(e) to protect the community from the offender; or

(f) a combination of two or more of those purposes."

20 Section 5(2) contains a non-exhaustive list[29] of the matters that a court must have regard to in sentencing an offender. Relevantly, they include:

"(a) the maximum penalty prescribed for the offence; and

(b) current sentencing practices; and

(c) the nature and gravity of the offence; and

…

(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances."

The Court of Appeal

21 In this case a bench of five judges was constituted to consider the scope and nature of the principle in *Liang*[30]. The Court of Appeal said that the principle serves to ensure that the exercise of the prosecutorial discretion does not "constrain the [c]ourt's sentencing discretion" with the result that the court is required "to impose a heavier sentence than it would regard as appropriate"[31].

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29 At [25].

30 *Pantazis v The Queen* (2012) 268 FLR 121 at 124 [3].

31 *Pantazis v The Queen* (2012) 268 FLR 121 at 129-130 [28], citing *R v Whitnall* (1993) 42 FCR 512 at 520 per Drummond J.

The Court of Appeal approved Redlich JA's statement of the rationale for the principle in *McEachran*[32]:

> "[It is] part of a broader principle requiring fairness in the sentencing process. Consistency in sentencing is a mechanism by which fairness in the sentencing process is to be achieved. It requires that the court should strive to impose similar punishment for similar offences committed by offenders in similar circumstances. Conversely, disparity in sentencing can only be justified if there are acceptable and convincing grounds for differentiating between offences or offenders. Unfairness will arise where there is an inconsistent application of legal principles."

22 The Court of Appeal agreed with the New South Wales Court of Criminal Appeal that it is contrary to principle when sentencing for a State offence to take into account that the Commonwealth Parliament has prescribed a lesser maximum sentence for an offence with which the offender could have been charged[33]. It considered that the *Liang* principle should be confined to offences of differing seriousness within the same jurisdiction[34]. Subject to this confinement, the Court of Appeal said that the *Liang* principle is consistent with the Sentencing Act. The requirement to have regard to the maximum penalty for the offence (s 5(2)(a)) was said not to be inconsistent with also having regard to the maximum penalty for a "more appropriate less punitive offence"[35] as a relevant circumstance (s 5(2)(g))[36]. This approach was suggested to conform to the requirement under s 5(2)(b) to have regard to current sentencing practice as well as serve the purpose of imposing "just punishment" under s 5(1)(a)[37].

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32 *Pantazis v The Queen* (2012) 268 FLR 121 at 130 [28], citing (2006) 15 VR 615 at 637 [55].

33 *Pantazis v The Queen* (2012) 268 FLR 121 at 138-139 [56]-[58].

34 *Pantazis v The Queen* (2012) 268 FLR 121 at 139 [57].

35 *Pantazis v The Queen* (2012) 268 FLR 121 at 139-140 [59].

36 *Pantazis v The Queen* (2012) 268 FLR 121 at 134 [41].

37 *Pantazis v The Queen* (2012) 268 FLR 121 at 139-140 [59].

The parties' submissions

23 The appellants submit that the principle applied in *Liang* is one that has been recognised for more than 30 years[38] and applied by courts in a number of Australian jurisdictions[39]. They submit that it is based on considerations of fairness and equal justice of the kind recognised in the joint reasons in *Green v The Queen*[40]. They acknowledge that those statements were made in an analysis of the principle of parity in sentencing. However, in their submission, the same considerations are raised by the circumstances of their cases. They say that the course of justice that they attempted to pervert was in relation to the judicial power of the Commonwealth and they ask why their sentences should not be consistent with the sentencing of offenders for the Commonwealth offence.

24 The first respondent contends that it is contrary to principle for a judge to sentence on a view that the prosecutor should have preferred a count for a lesser offence. In this respect, the *Liang* principle is said to be subversive of prosecutorial independence[41]. Compliance with the statutory injunction to have regard to the maximum penalty is said to be inconsistent with also having regard to the maximum penalty for a different, less serious, offence.

Sentencing under the Sentencing Act

25 Each appellant pleaded guilty to the common law offence of attempting to pervert the course of justice. By that plea, each appellant admitted all of the elements of that offence. It was the duty of the sentencing judge to impose sentence for that offence. The sentencing of offenders in Victoria is subject to the governing principles contained in the Sentencing Act. As earlier noted, the statutory statement of the matters that the court must have regard to in determining the sentence is not exhaustive. It may be accepted that, subject to

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38 *Scott v Cameron* (1980) 26 SASR 321; *R v Young* unreported, Court of Criminal Appeal of Victoria, 2 December 1982.

39 *R v Whitnall* (1993) 42 FCR 512; *Asfoor v The Queen* [2005] WASCA 126; *R v Gordon; Ex parte Director of Public Prosecutions (Cth)* [2011] 1 Qd R 429.

40 (2011) 244 CLR 462 at 472-473 [28] per French CJ, Crennan and Kiefel JJ; [2011] HCA 49.

41 *Likiardopoulos v The Queen* (2012) 86 ALJR 1168 at 1177 [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; 291 ALR 1 at 11; [2012] HCA 37.

any contrary statutory intention, common law principles such as proportionality[42], totality[43] and parity[44] apply in the sentencing of offenders under Victorian law. However, it should not be accepted that *Liang* states a principle of that kind.

A constraint on the sentencing discretion?

26 It will be recalled that the Court of Appeal said that the *Liang* principle serves to ensure that the prosecutor's selection of the charge does not "constrain the [c]ourt's sentencing discretion" with the result that the court is required to "impose a heavier sentence" than the court considers to be appropriate[45]. Implicit in that statement is the idea that the court sentences on its assessment of the offending conduct and not for the offence. How else could it be relevant to take into account the maximum penalty for a different offence for which the offender could have been, but was not, convicted? The starting point in any consideration of the imposition of criminal punishment must be that it is imposed for the offence for which the offender has been convicted. If it is right for the judge to take into account the circumstance that the offender's conduct might have resulted in conviction for a less serious offence, it is difficult to see why as a matter of principle the judge should not take into account facts disclosing a circumstance of aggravation that could have been, but was not, charged[46].

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42 *Veen v The Queen [No 2]* (1988) 164 CLR 465; [1988] HCA 14.

43 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70.

44 *Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46; *Green v The Queen* (2011) 244 CLR 462.

45 *Pantazis v The Queen* (2012) 268 FLR 121 at 129-130 [28], citing *R v Whitnall* (1993) 42 FCR 512 at 520 per Drummond J.

46 *R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31, in which Gibbs CJ said at 389:

> "the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. … The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into

(Footnote continues on next page)

Recognition that the court is sentencing *the* offender for *the* offence does not mean that the court is engaged in a mechanical exercise with a predetermined range of outcomes[47].

27 The suggestion that the court's sentencing discretion is subject to constraint requires examination. Plainly enough, the "constraint" on the court's discretion that is said to arise from the exercise of the prosecutorial discretion is the maximum penalty for the offence charged. The maximum penalty is one of many factors that bear on the ultimate discretionary determination of the sentence for the offence[48]. It represents the legislature's assessment of the seriousness of the offence[49] and for this reason provides a sentencing yardstick. Commonly the maximum penalty invites comparison between the case with which the court is dealing and cases falling within the category of the "worst case"[50]. As explained in *Markarian v The Queen*, for these reasons careful attention is almost always required to the maximum penalty[51]. However, this is not to suggest that consideration of the maximum penalty will necessarily play a decisive role in the final determination. As also explained in *Markarian*, in some instances – as where the maximum sentence was fixed at a very high level in the 19th century – reference to it may be of little relevance[52]. As this Court has explained on more than one occasion, the factors bearing on the determination of sentence will

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account circumstances of aggravation which would have warranted a conviction for a more serious offence."

47 *Weininger v The Queen* (2003) 212 CLR 629 at 638 [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2003] HCA 14; *Engert* (1995) 84 A Crim R 67 at 68 per Gleeson CJ.

48 Sentencing Act, s 5(2).

49 *Muldrock v The Queen* (2011) 244 CLR 120 at 133 [31]; [2011] HCA 39.

50 *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452; [1987] HCA 46; *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25.

51 (2005) 228 CLR 357 at 372 [31] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

52 (2005) 228 CLR 357 at 372 [30] per Gleeson CJ, Gummow, Hayne and Callinan JJ, citing Stockdale and Devlin, *Sentencing*, (1987), pars 1.16-1.18.

frequently pull in different directions[53]. It is the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances. The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion[54]. It is wrong to suggest that the court is constrained, by reason of the maximum penalty, to impose an inappropriately severe sentence on an offender for the offence for which he or she has been convicted.

Consistency and parity

28 In exercising the sentencing discretion, the judge must act in accordance with statutory and any applicable common law principles and in a manner that is consonant with reasonable consistency. The concept of consistency in this context is discussed in *Hili v The Queen*[55]. The joint reasons approved Gleeson CJ's statement in *Wong v The Queen*[56]:

> "All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. *It should be systematically*

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53 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ; *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; [1998] HCA 57; *AB v The Queen* (1999) 198 CLR 111 at 156 [115] per Hayne J; [1999] HCA 46; *Ryan v The Queen* (2001) 206 CLR 267 at 283-284 [49] per McHugh J, 307 [136] per Hayne J; [2001] HCA 21.

54 *House v The King* (1936) 55 CLR 499 at 503 per Starke J; [1936] HCA 40; *Engert* (1995) 84 A Crim R 67 at 68 per Gleeson CJ; *Ryan v The Queen* (2001) 206 CLR 267 at 283-284 [49] per McHugh J; *Wong v The Queen* (2001) 207 CLR 584 at 612 [77] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64.

55 (2010) 242 CLR 520; [2010] HCA 45.

56 *Hili v The Queen* (2010) 242 CLR 520 at 535 [47], citing (2001) 207 CLR 584 at 591 [6].

> *fair, and that involves, amongst other things, reasonable consistency*." (emphasis added in *Hili*)

29 The consistency of which Gleeson CJ was speaking and which is the subject of *Hili* is consistency in sentencing for an offence. Offences have differing elements and differing maximum penalties. These differences form part of the constellation of factors taken into account in the determination of the appropriate sentence. As consistency requires that like cases be treated alike and different cases differently, it does not promote consistency to reduce an appropriate sentence for an offence to take into account the lesser maximum penalty for a different offence.

30 The invocation of parity in support of the *Liang* principle is also misconceived. Parity is concerned with the equal treatment of co-offenders. As *Green v The Queen* explains, the principle is not confined to co-offenders in the strict sense. It has application in the sentencing of persons involved in the same criminal enterprise[57]. The norm of equality[58] discussed in *Green v The Queen* is not disturbed by sentencing an offender for the offence for which he or she has been convicted and not by reference to a different, less serious, offence which the court considers to be more appropriate to the offending conduct.

Consistency with the mandate of s 5(2)(a)

31 The appellants submit that there is no inconsistency in requiring a sentencing judge to take into account both the maximum penalty for the offence charged and, where appropriate, the maximum penalty for a lesser offence. In such a case the lesser maximum penalty is said to be an additional yardstick. However, if the principle is invoked to prevent the perceived unfairness of prosecuting the offender for an offence having a higher maximum penalty, it must surely follow that in redressing the unfairness the court treats the lesser maximum penalty as the effective maximum. The point is illustrated by the statements in *R v Young*[59] on which the appellants rely. In that case, it will be

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57 (2011) 244 CLR 462 at 473-474 [30] per French CJ, Crennan and Kiefel JJ.

58 *Green v The Queen* (2011) 244 CLR 462 at 472-474 [28]-[30] per French CJ, Crennan and Kiefel JJ.

59 Unreported, Court of Criminal Appeal of Victoria, 2 December 1982.

recalled, the maximum penalty for the lesser offence was said to apply in all save "special circumstances"[60].

32 The fact that it is possible to identify another offence having a lesser maximum penalty which might have been charged does not make the decision to prosecute for the offence charged unjust. Nor is there substance in the appellants' complaint that the sentencing judge in each case was constrained to impose an excessive sentence as the result of the prosecutor's decision to proceed with the common law count. In a case in which an offender's conduct is of a minor character, the sentencing judge is not constrained to impose a lengthy sentence because the common law offence has a high maximum penalty. In the appellants' cases, the sentencing judges determined that the nature and extent of their involvement in a scheme which enabled Mokbel to evade justice for many months called for sentences of considerable severity (albeit less than one third of the maximum). There is no good reason in principle to disturb those sentences in order to take into account as a matter of mitigation that a different offence for which it was open to prosecute the appellants has a lesser maximum penalty.

The independence of prosecutorial discretion

33 For the reasons given, the "principle" stated in *Liang* is without a sound foundation. However, the first respondent's submissions identify a more fundamental reason for rejecting it. There is an undeniable tension between the statement in *Liang* that it is "relevant and proper" for the judge to take into account the existence of another offence which the judge considers to be "as appropriate or even more appropriate" and the recognition that the selection of the charge is within the "absolute discretion" of the prosecutor[61]. That the "principle" can be traced to decisions that date to more than 30 years ago[62] and that it has been applied (albeit infrequently) in a number of Australian jurisdictions does not mean that it should be accepted as part of the common law of Australia if, as appears, it is inconsistent with recognition of the separation of prosecutorial and judicial functions, which in this country has a constitutional dimension.

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60 *R v Young* unreported, Court of Criminal Appeal of Victoria, 2 December 1982 at 10-11 per Starke J.

61 *R v Liang* (1995) 124 FLR 350 at 355.

62 *Scott v Cameron* (1980) 26 SASR 321; *R v Young* unreported, Court of Criminal Appeal of Victoria, 2 December 1982.

34 It may be accepted that the prosecutor's selection of the charge is capable of having a bearing on the sentence. Commonly this will be the case where the prosecution has a discretion in determining whether to proceed summarily or on indictment. However, the separation of functions does not permit the court to canvass the exercise of the prosecutor's discretion in a case in which it considers a less serious offence to be more appropriate any more than when the court considers a more serious charge to be more appropriate. In this context, the observations of Dawson and McHugh JJ in their joint reasons in *Maxwell v The Queen* bear repeating[63]:

> "No doubt a court may, if it thinks it desirable to do so, express its view upon the appropriateness of a charge or the acceptance of a plea and no doubt its view will be accorded great weight. But if a court does express such a view, it should recognise that in doing so it is doing no more than attempting to influence the exercise of a discretion which is not any part of its own function and that it may be speaking in ignorance of matters which have properly motivated the decision of the prosecuting authority."

35 Prosecutors are subject to a duty of fairness in the exercise of their important public functions[64]. In the unlikely event that the discretion to prosecute a particular charge (or at all) was exercised for some improper purpose, the court has the power to relieve against the resulting abuse of its process[65]. The time for debate as to any claimed abuse arising out of the selection of the charge is before the entry of a plea. After an offender has been convicted of an offence it risks compromising the impartiality and independence of the court to require

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63 *Maxwell v The Queen* (1996) 184 CLR 501 at 514; [1996] HCA 46.

64 *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J, 675 per Dawson J; [1983] HCA 42; *R v Apostilides* (1984) 154 CLR 563 at 575-576; [1984] HCA 38; *Libke v The Queen* (2007) 230 CLR 559 at 576-577 [34]-[35] per Kirby and Callinan JJ, 586-587 [71]-[72] per Hayne J; [2007] HCA 30.

65 *Barton v The Queen* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J; [1980] HCA 48; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28-30 per Mason CJ, 47-48 per Brennan J, 56 per Deane J, 71 per Toohey J; [1989] HCA 46; *Williams v Spautz* (1992) 174 CLR 509 at 518-519 per Mason CJ, Dawson, Toohey and McHugh JJ; [1992] HCA 34; *Maxwell v The Queen* (1996) 184 CLR 501 at 514 per Dawson and McHugh JJ, 535 per Gaudron and Gummow JJ.

that it sentence by reference to an offence of which the offender has not been convicted but which it considers the prosecution should have charged[66].

36 As has been explained, the appellants' submission that the *Liang* principle is necessary to enable the court to impose a just sentence is misconceived. Consideration of different offences for which an offender might have been convicted is merely a distraction. Before the Court of Appeal and in this Court there was debate respecting the availability and appropriateness of the lesser Commonwealth and State offences in light of the facts. It is unnecessary to address these questions. However, it should be observed that it will often be possible to conceive of other charges upon which the prosecution might arguably have proceeded. There is force to Callaway JA's observation, in dissent, in *McEachran* that "[s]entencing is hard enough without requiring a judge or magistrate to consider another offence that, properly, was not charged"[67].

Conclusion and orders

37 There is no warrant under the common law of sentencing for a judge to take into account the lesser maximum penalty for an offence for which the offender could have been, but has not been, convicted.

38 The appeals should be dismissed.

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66 *Barton v The Queen* (1980) 147 CLR 75 at 94-97 per Gibbs ACJ and Mason J; *Maxwell v The Queen* (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at 355 [81] per Kirby J; [2006] HCA 30.

67 (2006) 15 VR 615 at 619 [15].