SUPREME COURT OF QUEENSLAND

CITATION:	*R v JAA* [2018] QCA 365
PARTIES:	**R** **v** **JAA** (applicant)
FILE NO/S:	[Redacted]
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: [Redacted]
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	[Redacted]
JUDGES:	Sofronoff P and Douglas and Brown JJ
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is dismissed.**
CATCHWORDS:	[Redacted] STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – PRESERVATION OF RIGHTS, LIABILITIES AND LEGAL PROCEEDINGS ON AMENDMENT, REPEAL, LAPSING ETC OF ACT OR PROVISION – APPLICATION TO OFFENCES – where the applicant contends that the repeal of the VLAD Act prior to his guilty plea meant that thereafter, there was no power to impose any sentence for the circumstance of aggravation under the VLAD Act, pursuant to s 11(2) of the *Criminal Code* – whether s 11(2) of the *Criminal Code* prevails over s 20 of the *Acts Interpretation Act* 1954 (Qld) *Acts Interpretation Act* 1954 (Qld), s 20 *Criminal Code* (Qld), s 11 *Penalties and Sentences Act* 1992 (Qld), s 9(2)(i), s 9(2)(r), s 13A, s 161, s 161R, s 161S, s 161Q, s 161V, s 188(4)(b)

Vicious Lawless Association Disestablishment Act 2013 (Qld), s 7, s 9

Commissioner of Taxation v Price [2006] 2 Qd R 316; [2006] QCA 108, considered
Mansray v Rigby (2014) 292 FLR 404; [2014] NTSC 62, cited
R v HBT [2018] QCA 227, considered
R v HXY [2017] QSC 108, considered
R v PAZ [2018] 3 Qd R 50; [2017] QCA 263, followed
R v Pritchard (1999) 107 A Crim R 88; [1999] NSWCCA 182, cited
Wilson v Director of Public Prosecutions (DPP) (NSW) (2017) 94 NSWLR 450; [2017] NSWCA 128, cited

COUNSEL: B J Power for the applicant
V A Loury QC for the respondent

SOLICITORS: McMillan Criminal Law for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Brown J and the orders her Honour proposes.

[2] **DOUGLAS J:** I agree with the reasons and orders proposed by Brown J.

[3] **BROWN J:** The applicant, JAA, pleaded guilty to the following offences contained on two indictments: assault occasioning bodily harm, while armed, in company; and, trafficking in a dangerous drug as a vicious lawless associate. Trafficking in a dangerous drug while a vicious lawless associate was a circumstance of aggravation under the *Vicious Lawless Association Disestablishment Act* 2013 (Qld) (**VLAD Act**).

[4] The sentencing judge considered that if it were not for the mitigating circumstances, the head sentence would have been an order for, in aggregate, seven years' imprisonment. His Honour however determined:

> "With the very substantial claims to leniency arising out of your significant cooperation with the administration of justice, in the result, the offences should attract sentences of imprisonment in respect of the trafficking of five years' imprisonment, suspended after one year has been served in custody, and a concurrent sentence of imprisonment for one year in respect of the assault. The circumstance of aggravation in respect of the charge referred by indictment number [Redacted] should attract a concurrent sentence of imprisonment for five years suspended after two years has been served. The suspended sentences will have an operational period of five years."

[5] – [70] [Redacted].

Was there a power to impose additional punishment for the VLAD Act circumstances of aggravation?

[71] The applicant was charged with the relevant offences in 2015. The indictments for each of the offences were presented in June and July 2016. On 2 February 2017, the applicant entered the pleas of guilty for all the offences on the two indictments. The applicant was sentenced in August 2017.

[72] The VLAD Act was repealed on 9 December 2016 by the *Serious and Organised Crime Legislation Amendment Act* 2016 (Qld), prior to the guilty pleas being entered but after the offences were committed and the applicant was charged.

[73] Part 9D of the PSA was introduced by the *Serious and Organised Crime Legislation Amendment Act* 2016 (Qld) (**the SOCLA**). In particular, s 161Q provided for a "serious organised crime aggravation" with different elements from the "circumstance of aggravation" arising from being a "vicious lawless associate" under the VLAD Act. The mandatory sentence for the serious organised crime aggravation was a cumulative sentence of seven years to be wholly served in a corrective services facility. Rather surprisingly, the SOCLA incorporated no transitional provisions in relation to the operation of s 7 and s 9 of the VLAD Act. While it made provision for resentencing within three months after the commencement of Part 9D,[1] it omitted to deal with the position of someone who had been charged under the VLAD Act but was yet to be sentenced.

[74] Part 9D of the PSA did not merely effect a change in the penalty, but rather the circumstance of aggravation is defined differently to that applicable under the VLAD Act. The new maximum penalty applies only to an offence committed after the SOCLA commenced.[2]

[75] The learned sentencing judge determined that the VLAD Act applies to this sentencing despite its repeal, and relied on *R v HXY*.[3]

[76] Ground 5 raises the continuing tension between the operation of s 20 of the *Acts Interpretation Act* 1954 (Qld) (**the AIA**) and s 11 of the *Criminal Code*, since s 20 was amended in 1995 so that the carve out for s 11 was removed.

[77] The applicant seeks to have this Court determine that *R v HXY* and a decision of this Court *R v PAZ*, which followed *R v HXY*, were incorrectly decided and should be overturned. A decision of the Court of Appeal will not be overturned unless the Court of Appeal considers it is plainly wrong.[4] The applicant contends that *R v PAZ* is plainly wrong because it relies upon an incorrect interpretation of *Commissioner of Taxation v Price*,[5] as did *HXY*. The applicant submits that *Price* relied upon the

[1] Sections 245 and s 246 of the PSA.
[2] Section 20(2)(c) of the Acts Interpretation Act 1954 (Qld); R v HXY [2017] QSC 108 at [37].
[3] [2017] QSC 108.
[4] R v Perrin [2018] 2 Qd R 174 at [71], per Morrison JA with whom Atkinson J agreed.
[5] [2006] QCA 108; [2006] 2 Qd R 316.

wording of s 4F of the *Crimes Act* 1914 (Cth) and that that provision offered no protection if the offence itself was repealed and replaced. Section 11(2) of the Code however uses different terminology. The applicant contends that s 11(2) is not limited to the continued existence of an "offence" and has broader application than s 4F of the *Crimes Act*.

[78] The applicant contends that s 20 of the AIA has general application, whereas s 11(2) of the Code specifically applies to the degree of punishment available for criminal offences. On that basis, the applicant submits that it is entirely consistent with the reasoning in *Price* for the specific provisions in s 11(2) to prevail over the general provision in s 20 of the AIA.

[79] Section 11 of the Code provides that:

> "(1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.
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> (2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[80] Section 20(2) of the AIA provides that:

> "(2) The repeal or amendment of an Act does not—
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> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
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> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
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> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or
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> (d) affect a penalty incurred in relation to an offence arising under the Act; or
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> (e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d)."

[81] The contention of the applicant in this case is that the law in force at the time of the conviction did not include the circumstance of aggravation as contained in the VLAD Act and therefore the punishment that could be imposed was nil, by operation of s 11(2) of the Code, because the "latter law" imposed no punishment. The applicant does not contend that Part 9D of the PSA would operate as the law in force at the time of the conviction given that the "serious organised circumstance of aggravation"

requires different matters to be proven to apply than s 7 of the VLAD Act. The "circumstance of aggravation" provided for under Part 9D of the PSA contains different requirements from the VLAD Act, requiring the offender to be a participant in a criminal organisation and for the participant to have actual or constructive knowledge of the matters outlined in s 161Q of the PSA at the time the offence was committed.

[82] The Crown submits that *R v PAZ* was correctly decided and should be followed by this Court.

[83] In *R v HXY*, the learned judge had to consider the effect of the repeal of the VLAD Act in circumstances where the defendants were charged with trafficking of heroin and methylamphetamine with the circumstances of aggravation because they were vicious lawless associates and office bearers of a relevant association at the time the offences were committed. There were additional drug-related charges with the same circumstances of aggravation. It was contended that the VLAD Act did not apply to set the punishment in respect of the charges, nor did the SOCLA.

[84] His Honour determined that s 20(2)(c), s 20(2)(d) and s 20(2)(e) of the AIA allow the liabilities and penalties allegedly incurred under the relevant *Drugs Misuse Act* 1986 (Qld) and the VLAD Act to continue to be the subject of a proceeding in relation to a liability and penalty as if the repeal of the VLAD Act had not happened. In particular his Honour followed the decision of *Commissioner of Taxation v Price*,[6] which determined that a penalty is incurred at the time at which the offence takes place, and found that the liability incurred includes the liability to the increased penalties under the VLAD Act.[7]

[85] In *Commissioner of Taxation v Price*,[8] Keane JA (as his Honour then was, with whom McMurdo P and Holmes J agreed) considered s 8(d) and (e) of the Commonwealth AIA, which was in substantively the same terms as s 20 (2)(d) and (e) of the AIA. Keane JA stated that the authorities made it plain that "proceeding" in s 8(e) referred to a "penalty" and it was sufficient for a penalty to have been incurred.[9] His Honour found that a penalty is incurred at the time an offence takes place.

[86] In *Price*, the relevant provisions of the Act with respect to the penalty and the underlying offences had been repealed. It was argued that s 4F of the *Crimes Act* prevailed over s 8(d) of the Commonwealth AIA. That was rejected by Keane JA, who stated that:

> "[80] The respondent's argument is that s 4F of the *Crimes Act* applies only on the occasion when a Commonwealth Act reduces the penalty component of an offence provision, which may include the removal of a penalty; but in this case the amending legislation

[6] [2006] 2 Qd R 316.
[7] At [22].
[8] [2006] 2 Qd R 316 at [58]-[59].
[9] At [58].

repealed the offence provisions and substituted different provisions. As Whealy J said in *R v Ronen & Ors*, s 4F(2) of the *Crimes Act* "is concerned with the reduction of the maximum penalty for an offence contained within the legislation rather than with the situation arising following the repeal of legislation".

[81] The respondent's submission must be accepted. The situation wrought by the amendments to the Act is not sensibly described as effecting a reduction of penalty for offences which remain on the statute books. There has been a repeal of those offences and the replacement of those provisions by offences with different elements.

[82] The provisions which were substituted for the repealed provisions create a different range of offences constituted by different elements. Each new proscription contains its own penalty provision which specifies only a maximum penalty. That means that, contrary to the appellant's further contention, it is not possible to apply the new penalty provisions to offences involving different elements committed before the new provisions took effect.

[83] In my view, s 4F(2) of the *Crimes Act* has no relevant operation. Rather, the case is governed by s 8(d) of the *Acts Interpretation Act*." (footnotes omitted)

[87] Section 4F of the *Crimes Act* relevantly provided that:

"(1) Where a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision.

(2) Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement."

[88] *R v HXY* determined that the penalty relevant to the circumstances of aggravation will have been incurred "in relation to" an offence for the purposes of s 20(2)(d) of the AIA if the applicants were found guilty of the substantive offence, in that case trafficking, with a relevant circumstance of aggravation.[10]

[89] His Honour considered that s 20(2)(d) of the AIA preserves the potential liability of the applicants to a penalty incurred in relation to an offence arising under the *Drugs Misuse Act* as well as to a penalty incurred in relation to such an offence under the

[10] At [27].

VLAD Act.[11] His Honour found that s 11(2) of the Code did not apply, because the law in force at the notional time of conviction includes the potential liability to the mandatory penalty incurred in relation to the offences charged by operation of s 20(2)(d) of the AIA. Therefore the "law in force" did not differ from that applicable at the time the act or omission occurred.[12]

[90] The reasoning in *R v HXY* was followed by the Court of Appeal in *R v PAZ*.[13] That case was dealing with, *inter alia*, the repeal of s 208 of the Code. Relevantly to the present case, Morrison JA (with whom the rest of the Court agreed) determined that the effect of s 20(2)(d) was that the repeal of s 208 of the *Criminal Code* and the amendment of s 229 of the Code did not affect the penalty incurred in relation to each offence. His Honour followed *Commissioner of Taxation v Price*, that the penalties were incurred when the offence was committed.

[91] The High Court refused special leave from *R v PAZ*.[14] The applicant in seeking special leave, raised very similar arguments to those raised in this appeal.

[92] *R v PAZ* was considered recently by the Court of Appeal in *R v HBT*,[15] however in that case the Court found that s 11(2) was not relevantly engaged.

[93] In *HBT*, however, McMurdo JA stated in *obiter* that he disagreed with *PAZ* and *HXY* on the basis that the effect of the reasoning in those cases would erode the operation of s 11(2) of the Code and make the second limb, which applies when the authorised punishment has been decreased between the commission of the offence and the conviction, redundant. His Honour preferred an interpretation whereby s 11(2) of the Code qualifies s 20(2)(d) of AIA, rather than the other way around.[16] His Honour considered that the "law in force" at the time of the conviction, as described in s 11(2) refers to the law in force generally. Section 11(2) is engaged where the law changes, which is consistent with "law in force" in s 11(1). His Honour considered that the effect of s 20(2)(d) of the AIA is to preserve the offender's liability to punishment, but the extent of that punishment may be affected by the operation of s 11(2) of the Code. His Honour found that this had some support in s 20C(3) of the AIA, which only refers to the situation where there is an increase in penalty and not a decrease for an offence committed after an Act commences. His Honour preferred the interpretation which permitted s 11(2) and s 20(2)(d) of the AIA to operate together. He noted that

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[11] At [40].
[12] At [35].
[13] [2017] QCA 263 at [176]-[180] and [187].
[14] [2018] HCATrans 148.
[15] [2018] QCA 227 at [66] per Morrison JA. His Honour stated that there was no basis to doubt or distinguish PAZ, although he stated that he agreed with McMurdo JA that there was no change in penalty such that s 11(2) applied.
[16] See discussion at [113] and [115], although in that case his Honour considered that there was no change in penalty such that s 11(2) applied.

the tension had previously been addressed by providing that s 20 of the AIA was excluded where s 11 of the Code applied.[17]

[94] McMurdo JA's interpretation has much to be said for it, given the fact that a penal statute is involved. His Honour's interpretation in *HBT* gives effect to both s 11(2) and s 20(2)(d) of the AIA so that both have meaning. Adopting such an interpretation would generally be more beneficial to the individual who is the subject of the legislation.[18] However, given the repeal of the VLAD Act and that Part 9D of the PSA provides for a different circumstance of aggravation containing different elements from s 7 of the VLAD Act, it is difficult to see how his Honour's interpretation, particularly that the "law in force" would be the "law in force generally" would have any application to a case such as the present.

[95] In the circumstances of the present case, I consider that *R v PAZ* was not plainly wrong and should be followed. Specifically, I consider that the learned judge's finding in *R v HXY* which was approved in *R v PAZ* that:

> "[34] Section 11(2) then sets out the principle that, the offender cannot be punished to any greater extent than is authorised by the law in force at the time of conviction. Where, as here, the law in force at the notional time of conviction when this application was heard includes the potential liability to the mandatory penalty incurred in relation to the offences charged because of the effect of s 20(2)(d) of the *Acts Interpretation Act*, it cannot be said that the law differs from that applicable at the time the act or omission occurred.
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> [35] Even though the maximum sentence for the offence of trafficking with the circumstances of aggravation alleged under the VLAD Act has been reduced because of the repeal of the legislation creating those circumstances of aggravation, the applicants, if convicted, can still be punished to the extent authorised by the former law, including the relevant circumstances of aggravation. So s 11(2) does not limit the extent of the punishment that may apply to the applicants."

was correctly relied upon by the learned sentencing judge in the present case.

[96] One of the chief contentions of the applicant is that the Court in *R v PAZ* and *R v HXY* was in error in failing to recognise that the decision in *Commission of Taxation v Price* was based on different wording in s 4F of the *Crimes Act*, such that Keane JA (with whom the rest of the Court agreed) determined it had no operation and that s 8 of the Commonwealth AIA, the equivalent of s 20 of the AIA, applied.

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[17] This was provided for in s 20(3) Acts Interpretation Act 1954 (Qld) but was subsequently removed in 1995 by s 458 and schedule 2 of the Criminal Code Act 1995 (Qld) in anticipation of the Code being repealed which never occurred.

[18] See Beckwith v The Queen (1976) 135 CLR 569 and 576; North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569 at [11].

[97] The applicant contends that s 11 of the Code should prevail over s 20 of the AIA. It was contended on his behalf that in *Commissioner of Taxation v Price*, s 4F of the *Crimes Act* was in narrower terms than s 11(2), as it was limited to offences whereas s 11(2) refers to the "latter law" and necessarily contemplates that the law in force at the time of the offence could differ from the law in force at the time of the conviction. The applicant submits that Keane JA in *Commissioner of Taxation v Price* did not suggest that there was any principle of interpretation that should limit the effect of any statute that could be read as altering the effect of s 8 of the Commonwealth AIA. The applicant submits that the interpretation of Douglas J that the "law in force" in s 11(2) of the Code refers to the AIA such that the latter law is always the same as the former law, means s 11(2) has no work to do where a statute is fully repealed.

[98] The Crown submits that *Commissioner of Taxation v Price* is relevantly no different from the present case. Section 4F of the *Crimes Act* did not apply because the offence and penalty provisions had been repealed and replaced by different offences as was the case here in relation to s 7 of the VLAD Act. It also claims that the applicant's focus on the "latter law" ignores "the law in force at the time of conviction" which could only refer to the AIA, given the repeal of the VLAD Act. Other than the preserving effect of s 20 of the AIA, there is no latter law which authorises punishment for an offence convicted as a vicious lawless associate.

[99] The determination in *Commissioner of Taxation v Price*, that a penalty is incurred at the time at which the offence takes place, did not depend on the operation of s 4F of the *Crimes Act* or its exclusion.[19] Douglas J in *R v HXY* and Morrison JA in *R v PAZ* both relied upon Keane JA's determination of the meaning of "liability" and of when a penalty was incurred. The contention of the applicant that both *HXY* and *PAZ* relied upon an incorrect interpretation of the effect of *Commissioner of Taxation v Price* by virtue of paragraphs [75] to [83] of the judgment of Keane JA (as his Honour then was) is misconceived. In this regard, it is noted that his Honour in *R v HXY* and Morrison JA in *R v PAZ*, in determining that s 20(2)(d) operated such that the repeal of the VLAD Act did not effect a penalty incurred in relation to an offence arising under the VLAD Act, also placed reliance upon *R v Brancourt*,[20] which was followed in *Mansray v Rigby*.[21] Although single judge decisions, both decisions adopted the same meaning of "liability" as Keane JA in *Price* in relation to the similar provision in the Northern Territory Interpretation Act to s 20, notwithstanding s 14 of the Northern Territory Interpretation Act, which is of similar effect to s 11 of the Code. In those cases, the mandatory sentencing provisions had been repealed and a new mandatory sentencing regime introduced which applied prospectively. The latter did not provide for a lesser sentence but it was argued as a result of the repeal of the relevant provisions that the punishment should be nil. Morrison JA also relied on the reasoning in *Wilson v DPP (NSW)*,[22] which followed *Commissioner of Taxation v Price*,

[19] [2006] QCA 108; [2006] 2 Qd R 316.
[20] (2013) 280 FLR 356.
[21] (2014) 292 FLR 404.
[22] (2017) 94 NSWLR 450 at [48] to [49].

as to when a "penalty" was incurred as well as a preceding decision of *R v Pritchard*,[23] although his Honour acknowledged that there was not an equivalent provision to s 11 of the *Criminal Code* in New South Wales. Relevantly, in *R v Pritchard* the Court commented in relation to the operation of s 30(1) of the *Acts Interpretation Act* 1987 (NSW) at [53]:

> "That there may be continuation of liabilities and penalties under a repealed Act is well recognised. Section 30 itself recognises such. Indeed, s 30 of the *Interpretation Act* in continuing the liability to prosecution for breach of a repealed Act reverses the common law position that a liability to punishment for contravention of a penal statute did not continue after the repeal of the enactment: see *R v Scarlett; Ex parte McMillan* (1972) 20 FLR 349 per Fox J at 351-352."

[100] The difference in the wording of s 11 of the Code and s 4F of the *Crimes Act* does not suggest that there should be a different outcome from *Price*. Given the definition of "offence" in the Code, it is doubtful that there is a real distinction between s 11 of the Code and s 4F of the *Crimes Act*.[24] Even assuming that it is broader, the "act or omission" in s 11(2) on its proper construction refers to the "act or omission" by which the offender is liable to punishment,[25] given that s 11(2) operates so that "the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law".[26] In the present case that relevantly refers to the act or omission by which the applicant was liable to be punished on the basis of the circumstance of aggravation under s 7 of the VLAD Act.[27] Part 9D of the PSA does not provide for a lesser punishment in relation to the "act or omission" by which the applicant is exposed to punishment because the elements for the serious organised crime circumstance of aggravation require additional elements to be proven. There is no law in force providing for a lesser punishment because there is no law imposing punishment for the same circumstance of aggravation provided in the VLAD Act. There is relevantly no distinguishing feature in the present case from that considered in *Commissioner of Taxation v Price*.

[101] The provisions by which the applicant was liable for punishment under s 7 of the VLAD Act in relation to the offence of trafficking no longer existed, and the new laws contain different "acts or omissions" which give rise to a circumstance of aggravation under Part 9D of the PSA. No lesser punishment was "authorised" by a latter law.

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[23] (1999) 107 A Crim R 88.

[24] Offence is defined in Schedule 1, Section 2 of the Code to be "an act or omission which renders the person doing the act or making the omission liable to punishment".

[25] This is supported by the definition of "offence" under the Criminal Code.

[26] This is given some support by Keane JA in R v Pham [2009] QCA 241 at [5].

[27] As to the question of whether the circumstance of aggravation was distinct from the offence with which the accused is charged. "Circumstance of aggravation" is defined in s 1 of the Code to be "any circumstance by reason whereof an offender would be liable if the offence were committed without the existence of that circumstance". See discussion in R v HXY at [24] to [27].

The applicant fell to be punished by the former law, the liability and penalty for which was preserved by s 20(2) of the AIA. In my view, s 11(2) of the Code in the present case has no application and does not override s 20 of the AIA. The position may well be different however, where the repealed legislation is replaced and the new statutory regime provides for punishment on the basis of the same "act or omission" and for a reduction in penalty.[28]

[102] It should not be assumed that Part 9D of the PSA necessarily provides for a lesser penalty than that which was provided for under ss 7 and 9 of the VLAD Act. In that regard, the learned sentencing Judge noted what appears to be a curious anomaly in the way Part 9D operates where there is cooperation. Section 9 of the VLAD Act operated so as to allow a court where there was s 13A cooperation to order that the mandatory additional sentence, which a court sentencing a vicious lawless associate for a declared offence had to impose pursuant to s 7(1), not be imposed cumulatively nor be served wholly in a corrective services facility. Further, it permitted a court to ameliorate the length of that sentence itself.

[103] Section 161R(2) – (4) provides that:

> "(2) The court must impose on the offender a term of imprisonment consisting of the following components—
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> (a) a sentence of imprisonment for the prescribed offence imposed under the law apart from this part and without regard to the following (the ***base component***)—
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> (i) the sentence that must be imposed on the offender under paragraph (b);
>
> (ii) the control order that must be made for the offender under section 161V;
>
> (b) (other than if a sentence of life imprisonment is imposed as the base component or the offender is already serving a term of life imprisonment) a sentence of imprisonment (the ***mandatory component***) for the lesser of the following periods—
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> (i) 7 years;
>
> (ii) the period of imprisonment provided for under the maximum penalty for the prescribed offence.
>
> (3) The mandatory component—
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> (a) must be ordered to be served cumulatively with the base component; and

[28] Cf R v Melville (2003) 27 WAR 224 at [27]-[30] per Anderson J with whom Murray J agreed.

(b) despite any other provision of this Act under which another sentence may be ordered, must be ordered to be served wholly in a corrective services facility; and

(c) must not be mitigated or reduced under this Act or another Act or any law.

(4) Also, if the offender is serving, or has been sentenced to serve, imprisonment for another offence, the mandatory component must be ordered to be served cumulatively with the imprisonment for the other offence."

[104] Section 161S applies if there is cooperation. Curiously, s 161S applies despite s 161R(3) and (4).[29] It does not apply despite s 161R(2). Thus, if there is a circumstance of aggravation under Part 9D, the Court must impose, relevant to the present case, a seven year sentence. However if s 13A or s 13B of the PSA apply, s 161S(4) provides that the sentencing judge may discount the sentence such that the sentence does not need to be ordered to be served wholly at a corrective services facility or cumulatively. Given that s 161S(4) does not however refer to s 161R(2), the sentencing judge may not be able to ameliorate the length of the sentence from seven years.

[105] That arguably means that a court is still obliged to impose a sentence of imprisonment of seven years where there is cooperation under s 13A or s13 B of the PSA, although it can set an early parole eligibility date.

[106] That would be particularly significant in the present case, where his Honour imposed a sentence of five years with a suspended sentence, which arguably would not be open under s 161R and s 161S of Part 9D of the PSA. In those circumstances, s 11(2) of the Code arguably had no operation at all, even if it applied.[30] As the matter was not the subject of argument, I reach no concluded view in this regard.

[107] The applicant contends that the interpretation of s 20(2)(d) of the AIA would, in a case like the present, where the relevant Act has been repealed and replacement laws are in different terms and require different elements to be proved, mean that s 11(2) has no work to do. Section 20(2)(d) of the AIA, which is the latter legislation, operates to preserve, *inter alia*, rights, liabilities and privileges, both in a criminal and civil context when legislation is repealed or amended, which s 11(2) of the Code does not. Section 11 of the Code is confined to the concept of punishment consequential upon liability. While it is true that s 20(2) of the AIA is broader in its operation applying to both civil and criminal legislation, s 11(2) by its terms cannot be said to impliedly exclude or override the operation of s 20(2) of the AIA where the Act is repealed and replacement laws are in different terms. Section 11(2) of the Code may prevail over s 20(2) to the extent of the punishment to be imposed, where the replacement laws provide for punishment to be imposed for the same "acts or omission".

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[29] See s 161S(4).

[30] See discussion in R v Mason; R v Saunders [1998] 2 Qd R 186 at 189.

[108] I do not consider that, in respect of the case of a repeal of s 7 of the VLAD Act, the decisions of *R v PAZ* or *R v HXY* are plainly wrong and should not be followed. In my view, the repeal of the VLAD Act did not affect the penalty which was preserved by s 20(2)(d) of the AIA, and s 11(2) of the Code did not apply.

[109] Ground 5 of the appeal therefore fails.

Conclusion

[110] Based on the above analysis, none of the grounds of appeal are made out. Leave to appeal should be granted, but the appeal dismissed.

[111] The discussion with respect to the inter-relationship between the VLAD Act laws and Part 9D of the PSA highlights what appears to be some anomalies in Part 9D of the PSA which may require consideration by the legislature. It also reflects the ongoing tension between s 20(2) of the AIA and s 11(2) of the *Criminal Code* (Qld). Given the continuing debate about the relationship between s 20(2) of the AIA and s 11(2) of the *Criminal Code* (Qld) since the 1995 amendments, it may be appropriate for the legislature to revisit that issue.