SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gerhardt* [2019] QCA 283
PARTIES:	**R** **v** **GERHARDT, Brett Anthony** (applicant)
FILE NO/S:	CA No 181 of 2019 SC No 13 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Date of Sentence: 13 May 2019 (Crow J)
DELIVERED ON:	Date of Orders: 1 November 2019 Date of Publication of Reasons: 6 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2019
JUDGES:	Fraser JA and Henry and Brown JJ
ORDERS:	**Date of Orders: 1 November 2019:** **1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. Quash the decision to reopen the original sentence proceeding and the resentence imposed on 3 June 2019.** **4. In lieu thereof, order that the original sentence proceeding not be reopened.** **5. Confirm the orders made in the Supreme Court upon the sentencing of the applicant on 13 May 2019.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – IRREGULARITIES – PARTICULAR CASES – where the applicant was sentenced to three years imprisonment on a plea of guilty to aggravated possession of methylamphetamine – where, after sentence, the applicant was called as a witness against his co-accused on the indictment – where the applicant was warned he would expose himself to resentence if his evidence varied from the agreed statement of facts tendered at sentence – where the applicant attempted to claim privilege against self-incrimination and was wrongly compelled to give evidence – where that evidence was inconsistent with the aforesaid

statement of facts, and this was relied upon as evidencing a clear factual error of substance in order to reopen the sentence, resentencing the applicant to nine months more – whether there was any admissible evidence in support of the application to resentence – whether inconsistency with the agreed schedule of facts amounted to a clear factual error justifying the reopening of the sentence proceeding – whether the alleged error was an error of substance – whether the reopening of the sentence miscarried

Criminal Code (Qld), s 668, s 668D, s 668E, s 669, s 671B
Evidence Act 1977 (Qld), s 10(1), s 132C
Penalties and Sentences Act 1992 (Qld), s 15(1), s 188(1)(c), s 188(5)(b)
Uniform Civil Procedure Rules 1999 (Qld) r 766(4)

Azzopardi v The Queen (2001) 205 CLR 50; [2001] HCA 25, cited
Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq) (2014) 46 VR 583; [2014] VSCA 182, followed
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, applied
Power v R (2014) 43 VR 261; [2014] VSCA 146, cited
R v Blow [1963] QWN 1, applied
R v Cassar; Ex parte Attorney-General (Qld) [2002] 1 Qd R 386; [2001] QCA 300, cited
R v D [1996] 1 Qd R 363; [1995] QCA 329, followed
R v Garbett (1847) 1 Den 236; (1847) 169 ER 227; [1847] EngR 36, followed
R v Marriner [2007] 1 Qd R 179; [2006] QCA 32, cited
R v Norden [2009] 2 Qd R 455; [2009] QCA 42, cited
R v Riley [1896] 1 QB 309, applied

COUNSEL: A Hoare with R Lake for the applicant
J A Geary for the respondent

SOLICITORS: Madden Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** The applicant was sentenced to three years imprisonment for aggravated possession of methylamphetamine, a charge to which he pleaded guilty. His parole release date was fixed as 23 June 2019, after serving 11 months of the head sentence (allowing for declared pre-sentence custody).

[2] A week after the sentence the prosecution called the applicant as a witness in a pre-trial hearing against Neil Cooper and Rein Henry, the co-accused remaining upon the indictment to which the applicant had pleaded guilty. In taking that course, the prosecution was not armed with a witness statement from the applicant, let alone an undertaking per s 13A *Penalties and Sentences Act* 1992 (Qld). The prosecutor was evidently of the erroneous understanding that the schedule of agreed facts upon

which the applicant had been sentenced amounted to what the prosecutor described as the applicant's "proof".[1]

[3] The evidence the applicant was there compelled to give, despite a legitimate privilege claim, did not help the prosecution. It was also inconsistent in some respects with the agreed facts upon which the applicant had been sentenced.

[4] On the illusory strength of that development the prosecution applied for the reopening of the applicant's sentence proceeding pursuant to s 188(1)(c) *Penalties and Sentences Act*. That provision permits the reopening of a sentence if the court "imposed a sentence decided on a clear factual error of substance". The application was successful and the applicant received a sentence of imprisonment nine months longer than the original sentence.

[5] The applicant sought this court's leave to appeal the sentence on the ground: "The reopening of the sentence pursuant to s 188(1)(c) *Penalties and Sentences Act* miscarried". The applicant's complaint was well founded.

[6] On 1 November 2019 this court ordered:

1. Application for leave to appeal granted.
2. Appeal allowed.
3. Quash the decision to reopen the original sentence proceeding and the resentence imposed on 3 June 2019.
4. In lieu thereof, order that the original sentence proceeding not be reopened.
5. Confirm the orders made in the Supreme Court upon the sentencing of the applicant on 13 May 2019.

These are our reasons for those orders.

The offending

[7] The facts involved a scenario familiar to sentencing courts. The applicant and his companions, Cooper and Henry, were travelling from south-east Queensland to Mackay in a car hired by the applicant's girlfriend. The vehicle was intercepted for a random breath test at Miriam Vale. Henry was driving. Police noticed Henry's hand was shaking, Cooper was moving as if placing something under his seat and the applicant appeared drug affected. A search ensued. The applicant and Henry each possessed small amounts of methylamphetamine and Henry was in possession of a phone which, when later examined, evidenced three instances of him supplying methylamphetamine. More significantly, the police found, in a bag in the centre console of the car, a gross amount of 74.117 grams of crystalline substance containing 54.956 grams pure of methylamphetamine.

[8] In interviews with the police Cooper denied any knowledge of drugs in the car. Henry admitted to possession of his phone and the small amount of methylamphetamine found on him but denied knowledge of the methylamphetamine in the centre console. The applicant told police the methylamphetamine in the centre console was his alone and that he had stolen it without the knowledge of the other two men.

[9] The prosecution evidently did not believe the applicant's claim of sole possession because count 4 of the indictment presented against the three men charged all of

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1 Pre-trial hearing 1-19 L42.

them with unlawful possession of methylamphetamine in a quantity exceeding two grams.

The course of proceedings below

The original sentence occurs

[10] The applicant pleaded guilty on 10 April 2019 and was sentenced on 13 May 2019, at a stage of the proceeding when it was understood his two co-accused would later be going to trial.

[11] A "schedule of agreed facts" was tendered and received as exhibit 4 on the sentence. Further to reciting the facts we have summarised, the schedule of facts asserted the applicant "falsely told police that the methylamphetamine was his alone and that he had "stolen" it without the knowledge of the other two men".

[12] The applicant's counsel asserted in written submissions at sentence:

> "The defendant admits the schedule of facts as far as it relates to his offending." (emphasis added)

The qualification emphasised above added an element of ambiguity about what was being admitted – a point seemingly overlooked in subsequent proceedings.

[13] Under the sub-heading "Liability" the schedule of facts noted:

> "The defendant is criminally responsible for possession of the methylamphetamine in the console because he knew it was there because this venture was a joint one between all three for (sic) concerned in the transport of that package. It was a commercial amount of the drug destined for supply to others, although not necessarily by the defendant." (emphasis added)

The allegation emphasised above identified behaviour constituting an act of "supply" because the definition of that word in s 4 *Drugs Misuse Act* 1986 (Qld) includes "transport" and "acts preparatory to or in furtherance of" supply. However, the applicant only fell to be sentenced on a charge of unlawfully possessing dangerous drugs (with circumstance of aggravation), the words of which charge alleged the possession occurred at Miriam Vale.

[14] The circumstances under which the schedule of agreed facts came into existence were not revealed below or to this Court. It is not known, for example, which side proposed it should be agreed on sentence that the applicant's confession to the police of sole possession was false and that he had been in joint possession.

[15] When sentencing the learned sentencing judge said, inter alia:

> "Now, you are criminally liable for possession of methylamphetamine in the console, because you knew it was there, and because the venture was a joint one between all three concerned in the transport of the package. That is a large commercial amount of drug. It was destined for supply to others, although not necessarily by you."

[16] His Honour noted of what the applicant told police:

> "You falsely told police that the methylamphetamine was yours alone, and you had stolen it without the knowledge of the other men."

[17] The ensuing head sentence of three years with a parole release date after 11 months was within the range contended for by both counsel below.

The prosecution calls the applicant as a witness

[18] On 20 May 2019, the prosecution called the applicant to give evidence in a pretrial hearing against Cooper and Henry in respect of proceedings on the same indictment for which the applicant had been sentenced. The foundation for the hearing is vague. It may be the prosecution informed the representatives of Cooper and Henry it proposed to call the applicant against them at trial and conceded they were entitled to know what evidence he would give and to cross-examine him in advance of trial.

[19] When the applicant commenced giving evidence in chief he was taken through events in a generally chronological sequence. The applicant's answers were to the effect that he was travelling to Mackay to collect a vehicle owned by him and that the other two men were travelling with him for company. This prompted the prosecutor to submit:

> "Your Honour, we're straying into territory where, in my submission, Mr … Gerhardt ought to be warned. The basis for that is that he was sentenced on a certain basis and exposes himself to being sentenced on a different basis if he departs from the first one. And he may want an opportunity to take some legal advice about his circumstances."

[20] The prosecutor apparently suspected the applicant was showing signs of drifting from the account the prosecution hoped the applicant would give, as can happen when the prosecution calls criminals as witnesses. But that was the prosecution's problem. What was not apparent was how the applicant was exposing himself to being resentenced or, even if he was, why the judge should warn him about it. Regrettably no one appeared for the applicant and no one else explained to the presiding judge why the prosecutor's submission lacked legal foundation. His Honour warned the applicant:

> "[I]f you have been sentenced on a particular factual basis and provided evidence with respect to that factual basis and you depart from it knowingly and willingly and dishonestly, then you may be resentenced on a serious basis."

[21] The proceeding was adjourned for a while to allow the applicant an opportunity to seek legal advice.

The applicant claims privilege

[22] When the proceeding resumed the applicant testified he had put the drugs in his bag in the centre console and he had not discussed the drugs in the centre console with the other two men during their trip. This exchange followed between the prosecutor and applicant:

> "And you said to the police that the other two fellows didn't know about the drugs in the centre console?---Yes.
>
> Is that what you told them?---Yes.
>
> But you were lying when you were telling them that, weren't you? When you were trying to claim responsibility solely for yourself and

> shield the others?---I won't – I don't really want to answer that without incriminating myself. I don't know how to answer that.
>
> Your Honour, in my submission, the witness should be directed to respond to the question – answer the question. He does not have the – available to him the right against self-incrimination because he's been sentenced on this basis." (emphasis added)

[23] The applicant's response highlighted above was an attempt, albeit in layperson's terms, to claim the right of privilege against self-incrimination. It was obviously perceived that way given the prosecutor's immediate response to it, also highlighted above.

[24] The prosecutor's assertion the applicant did not have the right to claim privilege against self-incrimination went unchallenged by any argument to the contrary (no lawyer entered an appearance for the applicant). Nor did it prompt any clarification of the applicant's position or confirmation of the right to claim privilege by the presiding judge. The applicant was merely further warned that he was sentenced on a particular factual basis and that he could be resentenced if he departed from it.

The applicant is compelled to answer

[25] The proceeding adjourned for a while. When the applicant resumed giving evidence the learned judge told him:

> "We're proceeding, Mr Gerhardt. You have to answer the questions on oath". (emphasis added)

His Honour may have said this merely to remind the applicant he was under his former oath. However, the applicant had tried to claim privilege before the adjournment. Then being told by a judge that he had to answer questions would have dispensed with any belief by the applicant that he had the right to refuse to answer questions if his answers might incriminate him. The upshot is the applicant was compelled to answer questions subsequent to his attempt to exercise a right not to answer them.

[26] The prosecutor put the agreed statement of facts from the applicant's sentence before the applicant in the witness box. The prosecutor asked the applicant questions about the trip being a joint venture. The applicant's answers were inconsistent. At first, he adhered to the position the trip was a joint venture. However, in later answers he asserted it was not a joint venture. He said, in apparent reference to what occurred at his sentence:

> "I basically just agreed to that to – I just wanted to plead guilty, get sentenced. I didn't contest any facts that were put forward."

[27] He went on to give evidence that he was in possession of the drugs, that he had stolen the drugs the day before and that while the other men knew he had drugs they did not know how much he had or where it was.

The co-accuseds' charges resolve

[28] The prosecution subsequently discontinued count 4 of the indictment as it related to Cooper. In the end result Henry pleaded guilty to that count, receiving a three year head sentence for it. The factual basis for Henry's sentence was that, as he was driving at the time of the intercept, he was in control of the vehicle and thus

deemed, per s 129(1)(c) *Drugs Misuse Act*, to be in possession of the drugs in the console, which he knew were there but did not belong to him. He was sentenced on 3 June 2019 during the same proceeding in which the applicant was resentenced.

The prosecution applies to reopen the applicant's sentence

[29] The prosecution's application to reopen the applicant's sentence per s 188(1)(c) *Penalties and Sentences Act* was heard earlier on 3 June.

[30] A transcript of the evidence the applicant gave at the pre-trial hearing was exhibited in an affidavit filed and read in support of the application. In that application the prosecutor submitted the applicant's testimony at the pre-trial hearing established there had been a clear error of substance. He submitted that evidence showed, contrary to the factual basis of the original sentence by which a shared possession was alleged:

> "The true, and more serious, state of things is the drugs, and their commercial ends, were his and his alone."

[31] The sole evidence relied on in proof of this alleged error was the evidence the applicant was compelled to give at the pre-trial hearing, after his unsuccessful attempt to claim right of privilege against self-incrimination. No objection was made to the admissibility of that evidence in the application to reopen.

The application is granted

[32] The learned sentencing judge found there had been an error of a kind justifying a reopening pursuant to s 188.

[33] His Honour found the applicant's false claim his original assertion of sole ownership to the police was not an error which, standing alone, would constitute an error of substance. However, he reasoned the error as to the false fact the applicant was involved in a "joint venture" and that instead the commercial amount of methylamphetamine "was destined for supply to others by himself personally" was a factual error of substance. Implicit in that conclusion is the premise that, as the prosecutor seemed to submit, it is a more serious offence to be the sole possessor of drugs destined for supply by the offender personally than a joint possessor of drugs destined for supply by persons unknown. If it were not thought to be more serious the alleged error would hardly have been regarded by his Honour as an error of substance.

The resentencing ensues

[34] When the resentence proceeding ensued, the applicant's counsel conceded:

> "I accept there has to be a marginal increase in the head sentence to reflect the greater degree of criminality upon which he now falls to be sentenced."

That concession was presumably made in deference to the view implicit in the finding his Honour had already made in deciding to reopen the sentence.

[35] The applicant was resentenced to three years and nine months imprisonment with parole eligibility set at the one third mark, which, allowing for declared pre-sentence custody, was 24 October 2019. This represented an uplift of nine months

imprisonment from the original head sentence. It also involved a substitution of the original fixed parole release date of 23 June 2019 with a later parole eligibility date.

Consideration

[36] The learned sentencing judge erred in granting the application to resentence, and, it follows, erred in resentencing the applicant, because:

1. there was no admissible evidence of the alleged error; and in any event
2. the alleged error was not a clear factual error; and even if it was
3. it was not an error of substance.

There was no admissible evidence of the alleged error

[37] It will be recalled that at the pre-trial hearing, immediately upon the applicant's attempt to claim the right of privilege against self-incrimination, the prosecutor submitted the applicant had no such right. That submission was at odds with the prosecutor's position, as confirmed by ensuing events, that the applicant could be resentenced if he did not give evidence in accordance with the factual basis upon which he was sentenced.

[38] For reasons given below, the prosecution's position regarding resentence was misconceived. But the applicant did not know that and the learned judge had already warned him as if the prosecution's position was correct. As far as the applicant knew, he was being asked questions the answers to which could well expose him to resentence and, it must follow, the risk of an increased sentence.

[39] Whether a right to claim privilege against self-incrimination is exhausted by the conclusion of the jeopardy posed by a particular proceeding against the person will depend on the circumstances. The relevant test, well explained in the review of pertinent authority by Ashley JA in *Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq)*,[2] is whether there persists a real risk of the person being placed in additional or increased jeopardy.

[40] Here the prosecution's unambiguous position, and indeed the judge's, was that if the applicant did not give evidence in accordance with the factual basis of his sentence he could be resentenced. This amply demonstrated there was a real risk the applicant was in jeopardy of increased criminal sanction. In light of some of the applicant's earlier answers there was no reason to doubt the legitimacy of his concern that his answers would tend to incriminate him. His claim to a right not to answer questions was properly made on the basis his answers would tend to place him in jeopardy of increased criminal sanction.

[41] In light of that finding it is unnecessary to determine whether there was another legitimate foundation for the claim of privilege, namely whether there was a real risk the applicant's answers to questions about the drug possession would expose him to prosecution for other hitherto uncharged offending, such as supplying a dangerous drug.

[42] While there was no objection to the use of the applicant's evidence in the application to reopen, we can conceive of no forensic reason for the failure to object to the evidence. The applicant's privilege claim was legitimately made yet the

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2 (2014) 46 VR 583, 603-605.

applicant was compelled to answer. This was contrary to the common law rule, affirmed in s 10(1) *Evidence Act* 1977 (Qld), that a witness shall not be compelled to answer a question tending to criminate the witness. That the applicant was compelled to answer the question dispenses with any prospect the applicant waived the privilege he had claimed.

[43] Since *R v Garbett*[3] in 1847 the common law rule has been that where there appear reasonable grounds for a witness claiming a right of privilege against self-incrimination but in breach of that claimed right the witness is compelled to answer, the answers of the witness are not admissible in evidence against the witness. *Garbett* was described by McHugh J in *Azzopardi v The Queen*[4] as a turning point in the conception of the common law rule, the former position having been that breach of the right did not render the evidence inadmissible.

[44] In the present case the answers the applicant gave after being wrongly deprived of his right not to answer them do not fall within some statutory exception permitting their subsequent use contrary to the common law rule.[5] As a matter of law the evidence of his ensuing answers was inadmissible against him and should not have been received as evidence in the application to reopen.

[45] The respondent conceded on the appeal that if such a conclusion was reached then there was no evidence capable of supporting the application. The application should have been dismissed for want of any evidence of the alleged error.

The alleged error was not a clear factual error

[46] The prosecution's application for reopening, made per s 188(5)(b), was contested. It was incumbent on the prosecution to satisfy the court that the sentence originally imposed had, as s 188(1)(c) requires, been "decided on a clear factual error of substance". Assuming, contrary to our conclusion above, that the evidence of the applicant at the pre-trial hearing after he had given evidence was admissible in the application, it is not apparent how that evidence established there had been any "clear factual error" in imposing sentence.

[47] The assumed error was that the applicant had been sentenced on the basis he was in joint possession in the context of a joint venture with Cooper and Henry and that basis was wrong because – as he had told the police in the beginning – he had been in sole possession and the others were not involved. The perception that this meant there had been a factual error in imposing sentence seemingly derived from the prosecution's misconception, regrettably urged upon the learned judge, of the status of the so-called schedule of agreed facts.

[48] It has for decades been the custom in Queensland that sentencing courts are usually informed of the facts by information advanced from the bar table. That custom explains the origin of s 15(1) *Penalties and Sentences Act* 1992, which provides a sentencing court may "receive any information … that it considers appropriate to enable it to impose the proper sentence".

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3 (1847) 1 Den 236; 169 ER 227.
4 (2001) 205 CLR 50, 101.
5 See for example *Crime and Corruption Act* 2001 (Qld) s 197(3).

[49] Traditionally the court was informed of the facts orally from the bar table, with some evidentiary documents, such as photographs and recording extracts, also being received as exhibits. Occasionally, in factually complex cases or cases involving large numbers of charges, schedules detailing the facts in greater detail than outlined in oral submissions were received as exhibits.

[50] In recent years, even in non-complex cases, some judges have sought out in advance a documentary version of the facts to be advanced at sentence, to better prepare to be able to decide the sentence promptly and give ex tempore reasons, as is also the custom in sentencing in Queensland. That practice has in turn been accompanied by some prosecutors tendering such a document at sentence. Some such documents are styled as the "prosecution schedule of facts" and some as an "agreed schedule of facts".

[51] It is no more necessary that parties agree on every fact to be placed before the court than it is that the facts are contained in a document which becomes an exhibit. A plea of guilty is an admission of the elements of the offence, not an admission of the facts in the depositions or in any other information the prosecution want to rely upon at sentence.[6] Each party is at liberty to admit, or to not challenge, or to challenge an allegation of fact in the information the other seeks to advance. It will remain for the sentencing judge to determine whether it is appropriate to receive the information and what weight it should be given.

[52] Section 132C(2) *Evidence Act* provides the judge may act upon an allegation that is admitted or not challenged. The effect of s 132C(3) and (4) is that the judge may act upon a challenged allegation if "satisfied on the balance of probabilities that the allegation is true", with the level of satisfaction required varying depending upon "the consequences, adverse to the person being sentenced, of finding the allegation to be true".

[53] One party's challenge to the factual allegation of another sometimes results in one or the other adducing oral evidence on sentence. However, many factual disputes on sentence do not have that consequence because they are of such minor consequence to sentence. Many parties try to reach agreement on factual allegations about the offending to be put before the court, whether orally or in writing, in the hope of avoiding distracting or unexpected arguments about matters of minor consequence to sentence. To this pragmatic end, parties to sentence proceedings sometimes negotiate some aspects of the factual allegations to be placed before the court. This process may result in the prosecution foregoing or pressing reliance upon particular facts just as it may result in the defence foregoing or pressing reliance upon particular facts. None of this prevents either party electing to argue the truth of and adducing evidence about a challenged factual allegation.

[54] In this case the parties evidently reached agreement on the factual allegations about the offending to be placed before the court on sentence. The court was informed of the factual allegations via a document, marked as an exhibit, and not by oral information from the bar table. It is ordinarily desirable in the interests of open justice that the court is informed orally of the factual information material to sentence; sentencing being an area of the court's work which attracts public interest and occasional misunderstanding. Such a practice also mitigates the risk of error because of illiteracy or poor pre-sentence communication between client and

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6 *R v Riley* [1896] 1 QB 309, 318.

lawyer. However, the fact that in this instance the information was advanced in writing did not alter the information's status.

[55] A schedule of facts does not become evidence in the conventional sense because it happens to be written down and received as a sentence exhibit. It does not become akin to a witness statement or affidavit of the defendant merely because the defendant agrees to or elects not to challenge the factual allegations in it.

[56] In the normal course, when the court is informed on sentence of factual allegations and told the parties agree on those allegations, the inference arising is that the agreement was made for the purpose of the court determining the sentence to be imposed. There might be cases in which there are circumstances known to the parties that displace the inference of singular purpose and demonstrate the agreement or admission was made for some additional purpose. There is no evidence this is such a case.

[57] We are fortified in concluding there was no additional purpose by the fact the applicant's counsel qualified the extent of agreement, explaining the schedule of facts was admitted "as far as it relates to his offending". This qualification blurred the line between what factual allegations advanced were agreed to as distinct from not challenged. Such uncertainty did not matter for the purpose of sentence – a judge may act on an allegation of fact which is admitted or not challenged.[7] But that uncertainty is inconsistent with the agreement, to the extent there was one, having any purpose other than the court being informed of the factual allegations upon which the sentence should be imposed.

[58] The status of such agreement as there was, regarding the factual basis of sentence, is to be understood in the light of its singular purpose. As already explained parties often make pragmatic choices about the factual allegations to be placed before the court for the purpose of sentence. It was acknowledged by Dawson J in *Meissner v The Queen*[8] that a defendant may for all manner of reasons accept criminal culpability on a basis the accused does not believe to be correct. The applicant was here entitled to agree to a factual basis for sentence which the prosecution was evidently happy to advance, even if he did not believe the truth of all of those facts. His agreement to a set of facts being asserted for the purpose of him being sentenced did not bind him to testify to the truth of such facts if subsequently called as witness.

[59] That said, if a defendant is prepared to agree to facts for the purpose of sentence, such agreement might later provide fodder for cross-examination as to credit should the defendant give evidence in a subsequent court proceeding inconsistently with those facts. Depending upon how the agreement was communicated, it might potentially be open to infer in that later proceeding that the agreement was an admission to the truth of the agreed facts and might thus be used as a prior inconsistent statement for the purpose of that proceeding.[9] We are not concerned with that scenario here. Even if we were, the qualified nature of the admission communicated by the applicant's counsel would tell against it being an admission by the applicant of the complicity of his co-accused.

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7 Section 132C(2) *Evidence Act*.
8 (1995) 184 CLR 132 at 157.
9 See *Power v R* (2014) 43 VR 261, 280-281.

[60] As with the defence, so too the prosecution may have any number of reasons for pressing, abandoning or amending allegations against a defendant on sentence. In the present case the prosecution well knew the applicant had confessed sole possession to police yet for its own reasons chose to advance joint possession as the factual basis of sentence. Perhaps it desired factual consistency with its case theory, reflected in its decision to indict all three occupants with the possession. In any event, in the application to reopen, there was no evidence led to suggest the prosecution's choice had been the result of a fraud or misrepresentation upon it.

[61] The fact of sole possession which the prosecution relied upon to assert error in applying for the reopening was a fact the prosecution chose not to press at sentence and which it had known all along had been confessed by the applicant to police. It was no error of fact that the applicant's sentence was decided on the basis he was a joint possessor rather than a sole possessor. It was the result of the informed choices of both parties.

[62] By these reasons we do not suggest cases can never arise in which an offender's subsequent contradiction of an agreed factual basis on which the offender was sentenced could be used to evidence that a sentence was imposed on a factual error. Nor do we suggest the presence of a secondary purpose, fraud or misrepresentation might be the only potential foundations for such use. However, in this case, no circumstance has been identified as to how the sentence could have been decided on a factual error when the parties agreed for the singular purpose of the sentence proceeding that the applicant should be sentenced on the factual basis the applicant was duly sentenced on.

[63] Even if, contrary to these reasons, the applicant's evidence at the pre-trial hearing meant he might have been sentenced on a factual error, it is not apparent how that possibility supported a positive finding that there had been a "clear factual error". The applicant gave one factual version to the police, he was sentenced on a different version and at the pre-trial hearing gave inconsistent answers before effectively reasserting his version given to the police. There was no source other than the applicant to inform any assessment of the truth of those various versions. It was objectively difficult to discern where the real truth lay. There could be no "clear" error. There lingered the real possibility that in order to protect his travel companions the applicant lied in asserting sole possession to the police and in later giving evidence, and that this was in truth a joint possession case, as had been alleged at sentence.

[64] For all of these reasons the learned judge erred in finding there had been a clear error of fact.

The alleged error was not an error of substance

[65] Assuming if, contrary to these reasons, there had been a clear error of fact, it was also necessary pursuant to s 188(1)(c) for it to be an "error of substance".

[66] In resentencing the applicant his Honour remarked of the alteration of the factual basis of sentence that it was a "significant alteration" and said, "it increases the level of criminality that you need to be sentenced for". This was a reiteration of the flawed premise inherent in the conclusion, in granting the application, that the supposed error of fact had been an error of substance.

[67] No explanation was advanced below or before this Court as to why a man caught travelling in possession of an inherently commercial load of methylamphetamine should receive a greater or lesser sentence merely dependent upon the number of his fellow travellers, if any, who also possessed the load. Of course, there will be cases in which the fact that a group of offenders rather than a sole offender was the possessor of drugs may make a difference to penalty. It might for example support an inference that a large quantity of drugs was possessed for a shared personal use purpose, an inference which might not be so readily open if the same quantity were possessed by one person alone. But this was not that type of case. The volume of methylamphetamine here was so large that it was obviously possessed for a commercial purpose, regardless of whether it was possessed by one or three persons. The applicant was originally sentenced on the basis that his aggravated possession was a commercially motivated possession. It is the fact it was a possession of that character, not how many others were guilty of a possession of that same character, which was the material feature of the sentence.

[68] That the applicant was the sole possessor might possibly have bolstered an argument that he was transporting the drugs in an act preparatory to a significant commercial supply by him, which would itself be an act of supply by virtue of the definition of supply in s 4 *Drugs Misuse Act* 1986. The learned sentencing judge's observation in granting the application verged on such reasoning when he placed particular emphasis on the supposed fact the commercial amount of methylamphetamine "was destined for supply to others" by the applicant "personally". However, the fact of the applicant's transportation of the drug preparatory to him personally supplying it could not support an increased sentence here.

[69] Such an outcome would be prevented by the principle, affirmed in *R v D*,[10] that an offender must not receive a higher penalty for an offence on account of acts or omissions which do not form part of the charged offence and constitute an uncharged offence or circumstance of aggravation. Whether the applicant was transporting the drugs preparatory to others, not necessarily him, supplying the drug, or preparatory to him alone supplying the drug, could make no substantive difference to penalty. That is because the applicant was not being sentenced for the offence of unlawfully supplying a dangerous drug.

[70] The mathematical reduction in the number of other criminals who were said to be in possession of this large quantity of drugs at Miriam Vale could not alone, in the context of this case, constitute a change of substance in the level of criminality for which the applicant had already been sentenced. It follows, if there had been an error of fact, it was not an "error of substance" and thus not an error sufficient to justify the reopening of the sentence.

Appropriate orders?

[71] Our reasons have exposed why there was no proper basis to disturb the original sentence, the application to reopen sentence should not have been granted and the resentencing should not have occurred. The form of appropriate relief requires further exposition.

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10 [1996] 1 Qd R 363.

[72] It will be recalled the applicant sought leave to appeal his sentence on the ground that the reopening of the sentence pursuant to s 188 miscarried.

[73] Section 668D(1)(c) of the *Criminal Code* confers upon a person convicted on indictment or of a summary offence under s 651 a right of appeal to the Court of Appeal, with leave, "against the sentence passed on the person's conviction." Section 668(1) provides that

> "***sentence*** includes any order made by the court of trial on conviction of a person with reference to the person's person or property whether or not the person is adversely affected thereby and whether or not the order is made instead of passing sentence."

[74] In *R v Marriner*[11] the Court held that an order dismissing an application by a convicted person under s 188(1) of the *Penalties and Sentences Act* 1992 to reopen a sentence was not a "sentence" within the meaning of s 668(1). McPherson JA, de Jersey CJ and Williams JA agreeing, applied the decision in *R v Blow*[12] that the expression "on conviction" in the definition of "sentence" does not mean "at the time of conviction" but "in consequence of conviction". McPherson JA observed that, whilst the meaning of "in consequence of" adopted in *R v Blow* was wide, something more was required than merely a sequence in time between the sentence imposed on conviction and the order subject to challenge:

> "There must be a relationship of some discernible kind between the two in order to make it an order or 'sentence' in the defined sense. In *R v Blow*, such a relationship was found to subsist in the circumstance that the recognizance suspending the sentence has been breached by later committing another offence, which re-activated the original sentence or sentencing order. As Gibbs J said there, the order committing the offender to prison to undergo the whole or part of the suspended sentence was made to punish him 'not for the breach of his recognizance … but for the offence for which the suspended sentence was imposed'. It was, his Honour considered, a sentence for that offence that was in effect 'imposed in two stages instead of one'."[13]

[75] The reasoning in *R v Blow* was also applied in *R v Norden*,[14] in which the Court held that a convicted person sentenced to imprisonment with an order suspending the imprisonment may appeal against a sentence imposed upon the activation of the suspended sentence.

[76] Applying the reasoning in *R v Blow*, the definition of "sentence" in s 668(1) comprehends a resentence in a reopened proceeding. The resentence is a consequence of the conviction even though it flows more directly from the decision to reopen the proceeding. That conclusion is consistent with the provision in s 188(7) of the *Penalties and Sentences Act* that for an appeal against a sentence imposed under s 188(3) or (4), the time within which the appeal must be made starts from the day the sentence is imposed under the relevant subsection. That provision contemplates that there may be an appeal against the resentence.

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11 [2007] 1 Qd R 179.
12 [1962] QWN 1.
13 [2007] 1 Qd R 179 at [10].
14 [2009] QCA 42.

[77] The better view is that in such an appeal the Court has jurisdiction to hear and decide a challenge to the correctness of the sentencing court's decision that the evidence satisfies one of the conditions under s 188(1) such as to enliven the power to reopen the proceeding.[15] It would be surprising if it were otherwise when the powers to resentence in s 188(3)(b)(i)-(iii) mirror the conditions requiring satisfaction before a sentence may be reopened under s 188(1). Subsections 188(1) and (3) mandate a staged process. The reopening and the resentence occur in different stages in the same proceeding. The reopening is interlocutory in character, the final decision being the imposition of the resentence. In a criminal appeal against a final decision, as in a civil appeal, an interlocutory decision does not constrain the powers of the court hearing the appeal to set aside the final decision: see *Criminal Code*, s 671B (concluding paragraph), UCPR r 766(4), and *Bunning v Cross*.[16]

[78] The *Penalties and Sentences Act* does not attribute any effect to a decision merely to reopen a proceeding under s 188(1) other than that the decision empowers the sentencing court to proceed to resentencing after giving the parties an opportunity to be heard. Although reference is often made to reopening a sentence, s 188(1) empowers the sentencing court only to reopen the proceeding in which the sentence was imposed. The original sentence is deprived of effect only by the combined effect of s 188(1) and s 188(3) upon both a reopening of the proceeding and a resentence in the reopened proceeding. That is one reason why the decision in *R v Marriner* does not support a view that the Court lacks jurisdiction or power to quash a reopening of the sentence proceeding where a resentence is imposed in a reopened proceeding. The conclusion in that case, that a decision to refuse to reopen a proceeding under s 188(1) is not a "sentence", was also influenced by the availability of an appeal from the sentence which remained in force in that case in the absence of any resentence.

[79] The effect of an order on appeal quashing a resentence imposed under s 188(3) appears to be that the original sentence would again take effect as though it had never been replaced by the resentence. But whether or not that is so, unless the sentencing judge's decision to reopen the sentence is also quashed, the sentencing court's records would convey that the criminal proceeding remained reopened, so that the sentencing court would remain empowered to resentence. That would be a very undesirable result in a case in which it has been found on appeal that there was no power to reopen the proceeding.

[80] In *R v Blow* Gibbs J, Hanger and Stable JJ agreeing, referred with approval to English cases decided upon provisions in the *Criminal Appeal Act* 1907 of the United Kingdom which are substantially identical with the relevant parts of s 668D and the definition of "sentence" in s 669 of the Code. Gibbs J observed that under the United Kingdom provisions it had been held that a convicted person who had been discharged conditionally upon entering into a recognizance to be of good behaviour and to appear for sentence when called upon and who had been sentenced for breach of the recognizance possessed a right of appeal both against the quantum of the sentence and against the determination of the question whether or not the recognizance had been broken.[17] Section 188 of the *Penalties and Sentences Act* is not in all respects analogous with the statutory provisions concerning recognizances, but

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15 The Court proceeded upon this premise in *R v Cassar; Ex parte Attorney-General (Qld)* [2002] 1 Qd R 386 at [11] – [14].

16 (1978) 141 CLR 54, 82 (Jacobs J).

17 See in particular *R v Frank Smith* [1925] 1 KB 603 at 605.

those decisions nevertheless suggest that where a resentence is imposed in a proceeding reopened under s 188(1) both the sentence and the reopening may be challenged on appeal.

[81] Upon the footing that a reopening of a proceeding under s 188(1) in which a resentence is subsequently imposed under s 188(3) is, like the resentence itself, an order falling within the definition of "sentence" in s 668(1) of the Code, if the Court finds that the order was made without power the Court is obliged to quash both the order and the sentence. That follows from the provision in s 668E(3) of the Code that on an appeal against sentence,

> "the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

In such a case, the "other sentence in substitution therefor" required by s 668E(3) is that, in lieu of the sentencing judge's ruling that the proceeding be reopened, it is ordered that the proceeding not be reopened.

[82] It is for those reasons that we adopted the aforementioned form of orders. The respondent conceded on the appeal that those orders were appropriate in the event the applicant was successful.