SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBS* [2020] QCA 1
PARTIES:	**R** **v** **DBS** (applicant)
FILE NO/S:	CA No 88 of 2019 DC No 996 of 2018 DC No 1772 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction & Sentence)
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction and Sentence: 10 August 2018 (Burnett DCJ)
DELIVERED ON:	29 January 2020
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2019
JUDGES:	Morrison and McMurdo JJA and Crow J
ORDERS:	**1. Extend the time to appeal to 4 April 2019.** **2. Dismiss the appeal against the conviction for the offence of robbery with actual violence.** **3. Vary the sentence imposed for that offence, from a term of two years' imprisonment to a term of one year's imprisonment, but otherwise make no change to the orders made on 10 August 2018.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – PURPOSE OF SENTENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENCES – GENERAL PRINCIPLES – where the applicant pleaded guilty to one charge of robbery in company with actual violence and 15 summary charges – where the applicant and another woman, Ms White, entered a store which bought and sold second-hand mobile phones –where the complainant stole two mobile phones from the store – where the complainant, a salesperson who worked at the store, was pushed during the robbery – where the complainant was unable to say whether the applicant or Ms White pushed her – where the applicant was sentenced to two years' imprisonment for the offence of robbery, and various terms, the longest being 12 months, for the summary offences – where Ms White pleaded guilty to a less serious offence and was sentenced to two years' probation – whether there were significant differences between the

applicant's and Ms White's offending, criminal histories and circumstances – whether the disparity of outcomes violated the parity principle of sentencing – whether the sentence was manifestly excessive

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, applied

COUNSEL: The applicant appeared on his own behalf
S J Bain for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have had the advantage of reading the draft reasons for judgment of McMurdo JA. I am able to gratefully adopt, with some exceptions, his Honour's summary of the proceedings and the law. That enables me to state in short terms my own reasons for reaching a conclusion contrary to that of his Honour.

[2] It is true to say that at the sentencing hearing the applicant's counsel said that it was Ms White who had pushed the complainant. That was in a written submission based upon the applicant's statement given pursuant to an undertaking under s 13A of the *Penalties and Sentences Act* 1992 (Qld). However, that statement did not conform with the agreed statement of facts upon which the applicant was sentenced. As to the issue of who pushed the complainant, the agreed statement of facts simply said it was "one of the defendant's [*sic*]"[1] and that the complainant was not sure which of the co-offenders had pushed her.[2] In submissions, the Crown Prosecutor tendered the schedule of facts[3] on the basis that they were agreed. Counsel for the applicant did not challenge that statement.[4] In the Prosecutor's recitation of those facts the learned sentencing judge was told that "one of the offenders pushed the complainant" and the complainant was "unsure which of the two pushed her".[5]

[3] In the course of submissions made in closed court in respect of the s 13A issues, the prosecutor again made it clear that it was proceeding upon the agreed schedule of facts. The Prosecutor identified that there was "one difference between [the applicant's] statement and the schedule of facts that the Crown proceeds upon", and that simply related to which of the co-offenders grabbed the phone from the counter, not which offender pushed the complainant.[6] Once again, that was not challenged by counsel for the applicant.

[4] Therefore, in my respectful opinion, the Crown made it clear that they were proceeding at all times upon the agreed schedule of facts, under which the person who pushed the complainant was not identified. Therefore, it was a matter for counsel for the applicant to pursue the finding of fact, if that was sought, that it was Ms White who pushed the complainant, and not the applicant. That was not done.

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1 Para 10 of the agreed statement of facts.
2 Para 11 of the agreed statement of facts.
3 Exhibit 5.
4 Sentencing hearing, T1-4, lines 23-34.
5 T1-5, lines 4-5.
6 T1-2, lines 1-25.

[5] Therefore, in my respectful view, the applicant did not fall to be sentenced on the basis that it was Ms White who had pushed the complainant.

[6] That points to one of a number of significant differences between the case of the applicant and the case of Ms White when she was sentenced. Those differences can be summarised in short order.

[7] First, Ms White was sentenced on the basis that the Crown expressly stated that it was not alleged that it was she who pushed the complainant. In other words, unlike the case of the applicant, the Crown, in Ms White's case, proceeded on a particular footing more favourable to her.

[8] Secondly, there was a substantial difference between the criminal histories of the applicant on the one hand, and Ms White on the other. The applicant's Queensland offending started when he was 22 and ended, except for the sentences the subject of these proceedings, when he was 36. That history indicated a gradual progression from offences of public nuisance to wilful damage, dangerous operation of a vehicle,[7] possession of dangerous drugs, assault and unauthorised dealing in shop goods, and then several offences of stealing when he was 35 or 36 years old. There is no suggestion of anything on Ms White's history to match that. Her criminal history was described by that sentencing judge as having "started only in recent years", in Queensland from 2016, and in New Zealand in 2004 but confined to one relevant offence. The Prosecutor described her history as "relevant but a minor history". Unlike the applicant, whose first term of imprisonment was in 2011,[8] Ms White had never been subject to an order that involved supervision.

[9] Thirdly, the applicant's offending included a number of offences while on bail for the current offences. Specifically, the stealing offences of which he was convicted in 2018, as well as the 15 summary charges of which he was convicted in the current proceedings, were all committed while on bail. No such aggravating circumstance applied in the case of Ms White.

[10] Fourthly, the commission of the summary offences led to bail being revoked, as a consequence of which the applicant spent a total period of 192 days in pre-sentence custody. In Ms White's case, the sentencing judge specifically noted that whilst she had a "relevant criminal history", she had "remained offence-free since September last year", which coincided with her current employment, suggesting that "perhaps, you are getting your life in order".[9] The circumstance of Ms White's having remained offence-free, and in employment, for a year prior to sentencing finds no parallel in the case of the applicant. The sentencing judge in Ms White's case referred to that as the reason why her appropriate sentencing option was "one which focuses upon your rehabilitation".

[11] Finally, whilst it is right to say that the foundation of the parity principle requires that its application be governed by a consideration of substance rather than form,[10] in my respectful view, the difference in the offences with which the applicant and Ms White were charged, cannot be ignored. Ms White was ultimately indicted on only one count of entering premises and stealing. She had originally been charged

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7 When he was 29.

8 A term of 12 months for three offences of dangerous operation of a vehicle.

9 Sentencing remarks for Ms White, T2, lines 28-32.

10 *Green v The Queen* (2011) 244 CLR 462 at [30], 473-474; [2011] HCA 49 at [30].

with the same count as that of the applicant, that being robbery in company with actual violence. The change in the indictment can perhaps be seen to have reflected the fact that in Ms White's case the Crown did not allege that the violence was offered by her. Once that difference is seen in the context of the other matters to which I have referred above, it is difficult to reach the conclusion that the disparity between the sentences was such as to "give rise to a justifiable sense of grievance, or … to give the appearance that justice has not been done".[11]

[12] I would therefore have refused the application.

[13] **McMURDO JA:** On 10 August 2018, the applicant pleaded guilty in the District Court to one charge of robbery in company with actual violence and 15 summary charges. He was sentenced to two years' imprisonment for the offence of robbery, and various terms, the longest being 12 months, for the summary offences. The terms for the summary offences were ordered to be served concurrently with each other, but cumulatively upon the sentence for the offence of robbery. A total of 192 days of pre-sentence custody was declared, and a parole release date was set at 29 September 2018.

[14] On 4 April 2019, he applied for an extension of time in which to challenge his sentence for the robbery offence. The applicant is without legal representation, but it is clear that his grievance is that a co-offender, Ms White, who was sentenced to a period of probation, was charged with, and pleaded guilty to, a less serious offence, namely one of entering premises and stealing from within those premises. She was sentenced on 29 August 2018, but it appears that the applicant did not become aware of that outcome until shortly before he filed the present application. After his release on parole, he was placed in immigration detention.

[15] The applicant was legally represented when he was sentenced. At the sentencing hearing, a schedule of facts was tendered by the prosecutor, without objection, by which the following facts were proved about the offence of robbery.

[16] On the afternoon of 1 March 2017, the applicant and Ms White entered premises at Sunnybank, at which second hand mobile telephones were bought and sold. They went there to steal a phone or phones. The applicant asked the complainant, a woman who worked there as a salesperson, to show him a certain type of phone. Ms White showed to the complainant her own phone which was damaged and which she said she wished to trade for another one. The complainant went to the storeroom of the premises, to retrieve a phone to be shown to her. She returned and handed it to the applicant, who looked at it and passed it to Ms White, who then handed it back to the applicant. Ms White then asked the complainant whether there was the same phone in another colour. The complainant left the first phone with the applicant and went to the storeroom to retrieve another one. When she returned with the second phone, the applicant went to grab it from her.

[17] The complainant resisted. She did not let go of the phone until one of the two, either the applicant or Ms White, pushed her, causing her to fall back and release the phone. According to the schedule of facts:

> "The complainant was not sure which of the two defendants pushed her."

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[11] *Lowe v The Queen* (1984) 154 CLR 606 at 610; [1984] HCA 46.

The complainant suffered bruising to her leg, which came into contact with a table when she was pushed.

[18] The applicant and Ms White then fled. The applicant managed to get away, but Ms White was detained by the complainant, who had chased her. The two phones were stolen, and neither was recovered by police. Their total value was $2,898.

[19] About a week later, police went to the applicant's address to execute a search warrant, and during the search they found text messages on his phone in which he had discussed the sale of the stolen phones. In May 2017, they executed another search warrant, during which Ms White made admissions to being present at the premises and being stopped by police.

[20] In his sentencing hearing, the applicant, through his counsel, said that it was Ms White who had pushed the complainant. That was not challenged by the prosecutor. The sentencing judge made no finding about that matter. There was no evidence from the applicant on that matter, and as I have just noted, the complainant had been unable to say whether it was the applicant or Ms White who had done so. It was that act of pushing which was the element of violence in the offence of robbery. Consequently, in the absence of a finding that it was the applicant who had pushed the complainant, being sought from and made by the sentencing judge, the applicant was to be sentenced on the premise that it was Ms White who had done so.

[21] The sentencing judge noted that this was an early plea of guilty, for which the applicant was to be given full credit, and that the robbery introduced "an element of violence that had not otherwise been evident in [the applicant's] criminal history". His Honour noted the applicant's good work history and his behaviour in prison, in which he had undertaken various programs towards his rehabilitation.

[22] In essence, the applicant's complaint is that there is such a disparity of outcomes, between his case and his co-offender's, that this Court should interfere. The applicant's submission, without the benefit of legal assistance, is not so much that this Court should reduce the sentence of two years' imprisonment for the robbery offence, but that instead this Court should quash the conviction for that offence, substitute a conviction for the same offence to which Ms White pleaded guilty, and sentence for that offence.

[23] In *Meissner v The Queen*,[12] Brennan, Toohey and McHugh JJ said:

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."
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> (Footnotes omitted.)

In the same case, Dawson J said:[13]

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12 (1995) 184 CLR 132 at 141; [1995] HCA 41.

13 Ibid at 157.

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside."
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> (Footnotes omitted.)

[24] In *R v Wade*,[14] Muir JA said:

> "A miscarriage of justice may be established in circumstances in which for example: in pleading guilty, the accused did not appreciate the nature of the charges or did not intend to admit guilt; on the admitted facts, the accused would not, in law, have been liable to conviction of the subject offences; the plea was not made freely and voluntarily, such as where it was obtained by an improper inducement or threat or it is shown that the plea was "not really attributable to a genuine consciousness of guilt". And, of course, it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established."

[25] There was at least one basis of criminal responsibility, by which the applicant could have been guilty of the offence of robbery, consistently with the facts upon which he was, or ought to have been, sentenced. By s 8 of the *Criminal Code*, it could be said that he and Ms White had formed a common intention to prosecute an unlawful purpose, namely stealing from these premises, in conjunction with one another, and that an offence of robbery was a probable consequence of the prosecution of that purpose. It was probable that there would be some violence as did occur, in the sense that the pushing of the complainant was something which "could well happen".[15] The applicant may not have understood the legal basis for his criminal responsibility. But on the facts advanced by him, there was a basis for his being responsible for the offence which he had admitted that he had committed. There was no miscarriage of justice by his being convicted and sentenced for that offence. And the fact that his co-offender was sentenced for a less serious offence does not mean that there was a miscarriage of justice by his being convicted of, and sentenced for, the offence of robbery.

[26] However, there remains the question of the disparity in outcomes between these two cases. The parity principle of sentencing must be considered in this case. The operation of that principle is not precluded by the fact that co-offenders are not

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14 [2012] 2 Qd R 31 at 42 [51]; [2011] QCA 289 at [51].

15 *Darkan v The Queen* (2006) 227 CLR 373 at 398 [79]; [2006] HCA 34 at [79].

sentenced for the same offence. The fact that the offender who receives a lower sentence is convicted of a less serious offence is relevant, but depending upon the facts and circumstances, it need not bar the application of the principle. This was explained by French CJ, Crennan and Kiefel JJ in *Green v The Queen*[16] as follows:

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

[27] As I have said, the applicant was sentenced, or ought to have been sentenced, upon the factual premise that it was his co-offender who pushed the complainant. Ms White was sentenced upon the basis that it was her co-offender who pushed the complainant. There was no material difference between them, in the planning of the stealing of phones. Each of them attempted to flee the scene and was not immediately co-operative when apprehended by police. Neither was shown to have benefited from the stolen property to any greater extent than the other. The degree of criminality in one case was the same in the other.

[28] The applicant had a more serious criminal history than Ms White. He was being sentenced for other offences, whereas Ms White was sentenced only for this incident. But in that respect, the judge who sentenced the applicant said that he moderated the sentence for, in effect, the totality principle.

[29] Ms White was given a non-custodial sentence of two years' probation. For his involvement, which was no more serious than hers, he was sentenced to two years' imprisonment, with his sentences for his other offending being made cumulative upon that term. In my opinion, the result was such a marked disparity of outcomes,

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16 (2011) 244 CLR 462 at [30] 473-474; [2011] HCA 49 at [30].

as to "give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done."[17]

[30] The applicant requires an extension of time. But his delay is explained by the fact that he was unaware of the outcome of Ms White's case, until shortly before he filed his proceeding in this Court. He has satisfactorily explained the delay.

[31] In my conclusion, his sentence for the robbery offence should be varied by the application of the parity principle. This does not require him to receive an identical sentence to that imposed on his co-offender. There were differences, most importantly in relation to their criminal histories, which were relevant. But I would re-sentence him to a term of one year's imprisonment for that offence. The parole release date was set at 29 September 2018, well before he filed this proceeding. Since then he has been in immigration detention. The effect of the order which I propose would be that his overall period of imprisonment will expire one year earlier, that is to say on 30 January 2020.

[32] I would order as follows:

1. Extend the time to appeal to 4 April 2019.
2. Dismiss the appeal against the conviction for the offence of robbery with actual violence.
3. Vary the sentence imposed for that offence, from a term of two years' imprisonment to a term of one year's imprisonment, but otherwise make no change to the orders made on 10 August 2018.

[33] **CROW J:** I agree with the reasons of McMurdo JA and with the orders proposed by his Honour.

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17 *Lowe v The Queen* (1984) 154 CLR 606 at 610; [1984] HCA 46.