SUPREME COURT OF QUEENSLAND

CITATION:	*R v Isherwood* [2005] QCA 251
PARTIES:	**R** **v** **ISHERWOOD, Ronald Keith** (appellant/applicant)
FILE NO/S:	CA No 419 of 2004 CA No 7 of 2005 SC No 335 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2005
JUDGES:	Jerrard JA and Muir and Wilson JJ Separate reasons for judgment of each member of the Court, Muir and Wilson JJ concurring as to the orders made, Jerrard JA dissenting in part
ORDERS:	**1. Appeal against conviction dismissed** **2. Allow the application for leave to appeal against sentence** **3. Substitute a non-parole period of eight years for the nine years imposed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – appellant convicted of conspiracy to import cocaine – police recorded numerous conversations where appellant spoke with co-conspirators in coded language – in cross-examination appellant stated that a person with criminal convictions could not apply for a massage parlour licence – appellant's answer to the prosecutor's next question indicated that he was unable to apply for such a licence – prosecutor made reference shortly thereafter to the appellant's 'criminal cohorts' – whether these combined questions offended s 15 of the *Evidence Act* 1977 (Qld) by showing that the appellant

had criminal convictions – whether trial judge erred in failing to discharge the jury at that point

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – AVAILABILITY AT TRIAL – appellant claimed his co-accused had misled him into thinking that they were importing gemstones not cocaine – co-accused pleaded guilty – appellant's counsel apparently made forensic decision not to subpoena co-accused at trial – Buddhist nun gave evidence at trial that co-accused had confessed during counselling sessions to having misled the appellant regarding the importation – co-accused denied this evidence in sentencing submissions – no new knowledge on appeal as to what the co-accused would say if subpoenaed – whether the situation had changed since trial such that it was necessary to allow the appellant to subpoena his co-accused

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – appellant received same head sentence as co-accused – non-parole period of nine years imposed on appellant whilst only eight and a half years imposed on co-accused – co-accused pleaded guilty but had committed more offences whilst on bail – appellant had longer criminal history – whether differences between appellant and co-accused justified a different non-parole period

Evidence Act 1977 (Qld), s 15(2), s 17

Gallagher v The Queen (1986) 160 CLR 392, cited
Jones v Director of Public Prosecutions (1962) 46 Crim App R 129, distinguished
Ratten v the Queen (1974) 131 CLR 510, cited

COUNSEL: B W Walker SC, with B Farr, for the appellant/applicant
M Johnson, with J Wagner, for the respondent

SOLICITORS: Robertson O'Gorman for the appellant/applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **JERRARD JA:** On 11 November 2004 Ronald Isherwood was convicted by a jury of the offence of conspiring with others between 6 January 2002 and 17 April 2002 at Brisbane and elsewhere to import into Australia a commercial quantity of cocaine. On 13 December 2004 he was sentenced to 18 years imprisonment with a non-parole period of nine years. He has appealed against his conviction and applied for leave to appeal against that sentence. His grounds of appeal against conviction are that the learned trial judge erred in failing to discharge the jury when, arising out of cross-examination, reference was made to his criminal convictions; and a ground

which he sought leave to add, namely to call evidence from a co-conspirator Francis Burns which might exculpate Mr Isherwood, that evidence assertedly being unavailable at the time of trial. He also contends that his sentence was manifestly excessive, although the reduction his counsel sought was not momentous, being imposition instead of a sentence of 16 years imprisonment with an eight year non-parole period.

Background circumstances

[2] The prosecution case was that Mr Isherwood was involved with others in conspiring to import into Australia a large quantity of cocaine in two separate shipments, sent from Brazil via Bali. In fact no actual cocaine was imported into Australia, because the shipments were intercepted before they left Brazil and the cocaine intended to be sent was replaced by an inert substance of similar weight. A List of Admitted Facts[1] (exhibit 10) admitted there was 6.15 kg of impure cocaine intended for importation in the first shipment, intercepted and substituted in Brazil on 27 February 2002; and 6.56 kg of impure cocaine in the second intended shipment, intercepted and substituted on 12 March 2002 in Brazil. Each shipment had consisted of one box containing within it six identical black metal boxes, with each of those containing approximately 1 kg of impure cocaine.

[3] The prosecution case was that Mr Isherwood and Mr Burns were partners in the scheme, with Mr Isherwood responsible for that part of the plan which involved receiving the two boxes in Bali and subsequently transporting those to their ultimate destination in Australia. Mr Burns was responsible for the Brazilian enterprise.

[4] Mr Isherwood's case in defence of the charge was that while he at all times had been involved with Mr Burns in a conspiracy to import objects into Australia in contravention of Australian law, he believed that he was importing gemstones from Brazil to Australia via Bali, not cocaine; he had been tricked by Mr Burns. Mr Burns pleaded guilty to conspiring to import cocaine on the first day of the trial and was not called as a witness by any party. Four other co-accused who stood trial with Mr Isherwood were acquitted by the jury.

The evidence against Mr Isherwood

[5] There was extensive electronic and other surveillance of the alleged co-conspirators. By the time that commenced the plan to import had already been formed and the conspirators allocated their different roles. The prosecution evidence did not reveal how the plan originated or at whose instance, what the financial arrangements were for the supply of the drug, or what drug distribution networks were in place in Australia, and to whom the drugs would be sold. The facts put before the jury by the prosecution, by and large, were not disputed by Mr Isherwood, whose challenge to the prosecution case was as to the inferences which might be drawn from the facts established in the circumstantial evidence.

[6] In brief summary, those facts included the following evidence relevant to Mr Isherwood:[2]

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1 At AR 1371

2 The facts described so far, and the summary of the prosecution case, are taken from the lengthy and helpful outline of argument prepared by Mr Isherwood's junior counsel, Mr B Farr

- Mr Burns and Mr Isherwood went to Brazil together in August 2001;
- Mr Isherwood arranged for his co-accused Gregory Malcolm to travel to Bali to identify a suitable address to which the boxes could be sent, and to receive them on arrival in Bali and pass them on to the next receiver;
- Mr Isherwood paid for Mr Malcolm's travel and expenses while in Bali;
- Mr Isherwood supplied Mr Burns with the designated name and address to which the boxes would be sent;
- Mr Isherwood co-ordinated with Mr Burns during the transit phase regarding the whereabouts of the two boxes and their arrival date in Bali;
- Mr Isherwood kept Mr Burns informed about the anticipated arrival of the drugs in Australia;
- Mr Isherwood arranged with his co-accused Patrick Tarpey and through him, his co-accused Peter Dennis, for the receipt of the two boxes from Gregory Malcolm and for the secretion of the boxes believed to contain the cocaine during their shipment to Australia;
- Mr Isherwood arranged for Mr Malcolm to transport the boxes from Byron Bay to their next destination, using a vehicle that Mr Isherwood had purchased and repaired;
- Mr Isherwood attended at Byron Bay on 16 and 17 April 2002 to further those arrangements.

[7] A considerable portion of the prosecution case comprised covert tape recordings of telephone conversations between Mr Isherwood and others. He made no direct statements admitting guilt in those conversations. Many were conducted using code language, which the prosecution said was indicative of his involvement and guilt. He gave evidence at the trial, during which he swore that:

- his trip to Brazil in 2001 was for the purpose of looking for gemstones to buy;
- he had worked in the jewellery trade for many years;
- when in Brazil, Mr Burns introduced him to people who offered him a 70 per cent share of the profits in an emerald mine if he assisted them by unlawfully exporting gemstones from Brazil to Australia;
- he was shown a video of the emerald mine in operation;
- he agreed to participate in that plan in exchange for that 70 per cent profit share and for the sum of $100,000 Australian dollars, to be paid to him when he handed the gemstones to Mr Burns in Australia;
- the reason of unlawfully exporting gemstones from Brazil via Bali to Australia was to avoid taxes in both countries, and to prevent corrupt officials in Brazil from stealing some of the stones;
- all of his conversations were in relation to gemstones;

- he spoke on the phone in code partly because that was his usual manner of speech, and partly because he was concerned about mobile phone security being poor and thus allowing for potential eavesdroppers to listen in;

- prior to his arrest that he did not know cocaine was the subject matter of the plan.

[8] There were about 75 intercepted conversations to which he was a party, and much of his evidence-in-chief and in cross-examination was taken up with questioning as to the true meaning of the recorded conversations expressed in coded language. Mr Isherwood occasionally had difficulty explaining when cross-examined why it had been necessary to speak in code; for example, about the arrival in Bali of the computer in which he understood the gemstones were hidden, and which gemstones he believed he was unlawfully bringing into Australia. His first ground of appeal arises out of cross-examination by the Crown prosecutor about his explanation for one of his statements made in code.

[9] His evidence had been that he expected the gemstones being brought in would have a wholesale value of $2,000,000, and a resale value potentially three times that. He was challenged in cross-examination as to why the Brazilian exporter of gemstones would be in the slightest concerned at the possibility that an Australian importer would have to pay either customs duty or GST, and Mr Isherwood could offer no sensible explanation in reply. He agreed with the propositions put in cross-examination that, in summary,[3] his case was that he went to Brazil as a legitimate and successful businessman; came away from that country committed to a large scale international gem smuggling operation, having signed a contract in a language which he could not read, giving him a 70 per cent right in a mine which he had not seen, and whose existence and capacity to produce gemstones of any quality he had not verified by any means; as a result had been entrusted with up to $6,000,000 (retail value) of gemstones by a person whose name he did not know, for whom he had no contact phone number, and whom he had only once met; and those gemstones would be sent to Australia without any possibility of insuring them against loss in transit, theft, or damage. The jurors were entitled to find his account of his actions entirely unconvincing, once those points had been so clearly made in the cross-examination, and there is no ground of appeal suggesting the verdict was unreasonable or could not be supported by the evidence.

First ground of appeal

[10] On 19 March 2002 Mr Isherwood was recorded getting advice by telephone from Mr Malcolm, that the second box had been delivered to Mr Malcolm in Bali. At that stage all that the conspirators still needed to do was repackage the 12 smaller metal boxes into some cement pedestals obtained for that purpose, and ship them to Australia. Those metal boxes in fact arrived in Australia on 12 April 2002. Returning to the narrative, later on 19 March 2002 Mr Isherwood was recorded seeking a loan of "40" from a person "Fred" for two to three weeks, in return for "half a box". The prosecution asserted there was a significant coincidence between Mr Isherwood's offer to "Fred" of "half a box", and the fact that the cocaine had been housed in metal boxes; and between the length of time proposed for the loan and repayment of the money, and Mr Isherwood's knowledge of the advanced stage

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3 At AR 497

of the importation. Mr Isherwood claimed in his evidence-in-chief that "Fred", whom he had described in a telephone conversation with Mr Burns as "the skinny guy", was an associate of Mr Isherwood's in Sydney. Mr Isherwood was asked about the following statement he made to "Fred", namely "This is a guarantee. I either give you back a cheque, or I give you half a box". He swore that by half a box, he meant half of the ownership of a massage parlour intended to be opened in Queensland. His evidence was that "box" was a slang term for a parlour.

[11] His conversations with "Fred" had included the use by him of the phrase "if the box comes", which he said meant "if we open the place, you get your money"[4]. The prosecutor challenged Mr Isherwood's interpretation of the expression "half a box" as being a reference to half a massage parlour, and asked Mr Isherwood if he had a massage parlour. The answer was "I have had massage parlours and I was about to open another one now yes".

[12] The prosecutor pressed with the question "But you hadn't at this point in time?"; and was told that "We were – they had just become legal in Queensland, Mr Rice, and we were in the process of trying to open a massage parlour." The prosecutor established that Mr Isherwood was speaking of a legal brothel, that being by then possible in Queensland, and immediately returned to attacking Mr Isherwood's explanation of his recorded conversations, by challenging Mr Isherwood as to the progress made by 19 March 2002 on his announced object of attempting to open a licensed massage parlour. He asked if an application had been made to the relevant council, and was told "We had started that – we had started that, yes, we had." The evidence continued.

> "What does that mean? – There was a business card there from an accountant in the evidence and he was organising it – a guy from Rockhampton. It is actually in the evidence of the business cards.[5] I guess you would need to speak to him. He was the one that was organising it, him and another chap. I am trying to think of his name. His name escapes me at the moment. He was an athlete from the Sunshine Coast who was also talking about it with me. We had already started. We already had the paper work sent to us. As you are aware, if you have criminal convictions you can't open a massage parlour in this State and that's what the steps were taking, yes, we were starting to take steps. We had the accountant who was going to become a share holder in it as well.
>
> Okay. Had you made your application? – I couldn't have made an application, Mr Rice.
>
> Had anyone made an application? -- At this stage we were still going through it -- no.
>
> No? -- No.
>
> You had nothing to promise this man, did you? -- Yes, I did.

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4 At AR 548

5 A quantity of business cards for various apparent enterprises had been found in Mr Isherwood's possession

By way of a massage parlour, I meant -----?-- We would have got it.

[13] It was the answer "I couldn't have made an application, Mr Rice" upon which ground one was based. The submission advanced was that the question, to which that answer was in fact non-responsive, had offended against the provisions of s 15(2) of the *Evidence Act* 1977 (Qld), which relevantly provides that:

> "Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that that person has committed or been convicted or been charged with any offence, other than with which the person is there charged, or is of bad character, unless" (and then follow certain exceptions, none of which are applicable).

[14] The submission advanced for Mr Isherwood was that the prosecutor had been aware that he had a criminal history at the time of asking the question, that had leave been sought to ask that question (which leave can be obtained pursuant to s 15(3)) it would not have been granted, and that Mr Isherwood was denied a fair trial by the question being asked. This was because the only effect the question could have would be to cause, or tend to cause, the jurors to infer that Mr Isherwood had a prior or a number of prior criminal convictions; the prejudice resulting from that inference was then exacerbated by another question asked a few minutes later, in which the prosecutor had put to Mr Isherwood that the recorded conversation was evidence that Mr Isherwood had promised half a box of cocaine, in return for a loan of $40,000, to "one of your criminal cohorts".

[15] Dealing with the question to which objection on the basis of it contravening s 15 is now taken on appeal,[6] and considering it in context, it did not invite the inference, or directly suggest, that Mr Isherwood had prior criminal convictions. The prosecutor was testing Mr Isherwood's claim to be able to offer another person one half of a proprietary interest in a licensed brothel, by challenging the proposition that Mr Isherwood either then had or was actually engaged in obtaining a licensed brothel. The lengthy preceding answer, in which Mr Isherwood had made reference to criminal convictions preventing a parlour being opened, readily invited further questions designed to expose that long answer as simply bluster by which Mr Isherwood had endeavoured to conceal that no application to the council had been made. As the cross-examiner established with his next two questions, a responsive answer to the question to which objection is taken was simply "no". The question did not offend against s 15, because it did not tend to show anything about Mr Isherwood other than that neither he nor any of his unnamed potential partners had actually made any application to the council. Mr Isherwood's answer avoided admitting that about both himself and those unnamed others, but he was then forced to.

[16] His counsel's submissions referred to *Jones v Director of Public Prosecutions*,[7] but that decision does not assist Mr Isherwood. What was stressed there was that the challenged questions must be regarded, not in isolation, but in context and in

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6 At the trial Mr Isherwood's senior counsel complained that the question referring to "criminal cohorts" had breached s 15; and while senior counsel asked for the jury's discharge because of the combined prejudice from "criminal cohorts" and the question now under consideration, he specifically excluded the latter question as contravening s 15 (AR 565)

7 (1962) 46 Crim App R 129 at 163

relation to the evidence already given.[8] The prosecutor was not suggesting to Mr Isherwood that he could not apply for a licence to conduct a brothel, but simply that neither he nor his associates had done so. In the context of his defence and the prosecution case, that question was quite proper, and Mr Isherwood gets no advantage on appeal for having briefly avoided answering it.

[17] There is no ground of appeal dependent upon the prosecutor's suggestion that Mr Isherwood was attempting to obtain a loan from one of his criminal cohorts; on the prosecution case, namely that the proposed source of the money was being offered half a kilogram of cocaine for $40,000, that was an appropriate if avoidable and unnecessary description by the prosecutor. Mr Isherwood's own case was that he was engaged in an unlawful conspiracy to import gemstones, and the $40,000 was to be repaid either in cash or by a half share in a brothel, offered to a man who understood without needing to ask that "box" meant brothel, and who Mr Isherwood assumed would accept a half interest in one. On Mr Isherwood's defence, "one of your cohorts" was a fair description of "Fred", and "unsavoury" would have been justified; on the prosecution case "criminal" added nothing to what was already before the jury. That particular question does not in any way affect the propriety of the question alleged to contravene s 15(2). That ground of appeal should be dismissed.

Calling Mr Burns

[18] The alternative ground of appeal relies on the assumption that if Mr Burns was called and gave evidence, it would support Mr Isherwood's defence. His senior counsel contended that evidence from Mr Burns was not available at the time of trial, because Mr Burns had not provided a statement to Mr Isherwood or to his legal representatives, having refused to speak to Mr Isherwood's solicitor both before and after the trial. Accordingly, all that this Court could be told about what Mr Burns would say to it was the statement, in the written outline of argument, that Mr Isherwood "believed that if called to give evidence, Burns will say that he did in fact mislead the appellant into believing that the importation referred to gemstones". There was no affidavit filed in this Court from Mr Isherwood explaining why Mr Burns had not been called at his trial, or why he believed that Mr Burns would support Mr Isherwood's defence, let alone any affidavit or statement, signed or unsigned, from Mr Burns. All this Court was given was affidavit evidence from Mr Isherwood's solicitor, merely annexing written advice given by Mr Burns' legal representatives both before the trial and after it, to the effect that Mr Burns would not agree to be interviewed by Mr Isherwood's solicitor.

[19] That affidavit from the solicitor, the only one filed in support of an application to call now what was asserted to be evidence not actually available to Mr Isherwood for his defence at his trial, falls a mighty long way short of what could be described as evidence to be given on Mr Isherwood's behalf, or "fresh". Mr Burns had pleaded guilty, and Mr Isherwood could have subpoenaed Mr Burns and forced him into the witness box at the trial, just as he proposed to do on the hearing of this appeal. Mr Isherwood's senior counsel on the appeal protested that Mr Isherwood could not have been expected to accept the forensic challenge of calling Mr Burns "cold", that is, without possessing a statement supporting Mr Isherwood's case and without knowledge that Mr Burns would do that, but the position is no different on

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[8] At 154, 160, and 172

this appeal. Mr Isherwood is apparently engaged now, as counsel for the respondent submitted, on a fishing expedition which he was unwilling to risk at his trial.

[20] In fact the jurors actually heard, albeit second-hand, of Mr Burns' support for Mr Isherwood's defence. Mr Isherwood's senior counsel at his trial called evidence from a Lisa Clues, who described herself as a Buddhist nun who carried out work at the Arthur Gorrie Correctional Centre, the remand centre for prisoners awaiting trial. She knew both Mr Burns and Mr Isherwood, and explained that she taught classes in positive lifestyle skills based on Buddhist principles, and also did counselling in "one on one" visits. She had undertaken counselling with Mr Burns, who had told her that he was the one who was guilty of "changing whatever was in the box from stones to cocaine," and that Mr Burns said "they weren't aware of it". She added that counselling sessions, generally speaking, were confidential and she made that known to prisoners.

[21] When cross-examined by the prosecutor, she said she did not appear in the court voluntarily and had been subpoenaed, and that she was embarrassed and felt compromised at having had to disclose confidential discussions. She had made no notation of their content. Despite those answers, when cross-examined by counsel for Mr Malcolm, she revealed further that Mr Burns had had the conversation she described "a couple of months before he was let out" on bail, that Mr Burns had said he was going to plead guilty because "they didn't deserve to go to jail for things that he had done", that he had taken "Ron" (Mr Isherwood) to meet the person who was selling gemstones, that he had betrayed a friendship with Mr Isherwood, and that Mr Burns would have had a realistic expectation that anything Ms Clues told Mr Burns would not be reported to the authorities. More than once that cross-examination elicited that Mr Burns had told her that Mr Isherwood knew about the gemstones, but did not know about the plan "to switch".

[22] That evidence was admitted after consideration by the learned trial judge of the rulings by this Court in its decision in *R v Freer & Weekes* [2004] QCA 97; and the jury accordingly heard that Mr Burns exculpated Mr Isherwood. They also heard all of the rest of the evidence, including the Crown case and Mr Isherwood's cross-examination, and they convicted him. In those circumstances no grounds have been established by Mr Isherwood's application to call Mr Burns, without knowing what he would say, for the opinion that if the jury had heard during the trial from Mr Burns, a different result was a significant possibility[9], or for this Court entertaining a reasonable doubt as to Mr Isherwood's guilt.[10] If Mr Isherwood's evidence at the trial was the truth, wrongly rejected by the jury, then it is very odd that Mr Burns would tell Ms Clues the truth but not Mr Isherwood's lawyers, and even odder that Mr Burns was not subpoenaed by or on behalf of Mr Isherwood. After all, through Ms Clues, Mr Isherwood's lawyers had a proof of evidence Mr Burns could give. Had he been called and given different evidence to the jury, Mr Isherwood's counsel could have sought leave under s 17 of the *Evidence Act* 1977 to prove that Mr Isherwood had at other times made a statement inconsistent with evidence incriminating of Mr Isherwood, and could prove that those statements were made by calling Ms Clues. However, Mr Isherwood's legal advisors did not take the risk that Mr Burns would give evidence adverse to Mr Isherwood and be believed; when Mr

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9 Applying the test stated in *Gallagher v The Queen* (1986) 160 CLR 392 at 399 and 402

10 Applying the text in *Ratten v the Queen* (1974) 131 CLR 510 at 518

Burns was sentenced after the trial, his counsel told the learned judge that Mr Burns vehemently denied he said anything to Ms Clues of the sort which she had described in evidence.

[23] It was made plain during the argument on the application that his senior counsel on the appeal (different from his senior counsel at the trial) expected that if Mr Burns was called, that counsel would ask Mr Burns only two questions in evidence-in-chief. The first would be whether he had told Ms Clues what she had sworn he told her, and the second would be whether what he had told Ms Clues was the truth. Those would actually be rather leading questions, but apart from that, affirmative answers would have carried no weight in the circumstances. To assess the credibility of evidence from Mr Burns exculpating Mr Isherwood, it would be necessary to refer in considerable detail to the recorded conversation held between them, and to hear from Mr Burns about his account of what had transpired when he and Mr Isherwood visited Brazil. Mr Isherwood's account had been given before the jury, but Mr Burns had not heard Mr Isherwood's version. No attempt was made or foreshadowed by Mr Isherwood's lawyers to put any of that important information before the Court. The application to call Mr Burns should be dismissed.

Sentence application

[24] The learned judge sentenced Mr Isherwood on the basis that the judge was satisfied both he and Mr Burns were substantially and significantly involved in organising the importation of both consignments. Both knew the drug supplier, one Claudio. The judge accepted that little distinction could be made between the participation of each of them in the venture. Mr Isherwood was a 50 year old property renovator and jeweller, married with an eight year old daughter, with a criminal history which was old, but which contained a conviction for an offence of knowingly making a false statement for the purpose of obtaining an Australian passport. That offence was committed in 1992 or 1993, and he was sentenced for it in August 2000 to six months imprisonment, suspended on his entering into a recognisance to be of good behaviour for three years. His conspiracy offence was in breach of that bond. His last criminal offence prior to committing the offence in 1992 or 1993 was a conviction on three counts of breaking, entering and stealing, in the Sydney District Court in October 1982. Prior to that he had had court appearances for offences including possessing a shortened firearm, and one for possessing drugs, those appearances being in the mid to late 1970s.

[25] The judge quoted his senior counsel as accepting that an appropriate range of head sentence began with a sentence of between 17 to 19 years imprisonment, with the further submission that the sentence should be reduced to one of no more than 15 years with a non-parole period of seven and a half years. His senior counsel had submitted that the fact that no drugs came into Australia had some relevance, as was the fact that admissions made by his counsel had substantially shortened the duration of the trial. Reference was also made to the effect of his imprisonment on his family. The learned judge was satisfied that deterrence featured as an important consideration in sentencing those conspiring to import cocaine or other narcotics, and that even making allowance for the matters raised by Mr Isherwood's counsel, a substantial sentence was warranted, which the judge considered to be the 18 years imposed. The judge sentenced Mr Burns to the same head term of imprisonment, but with a non-parole period of eight and a half years. But there were some

significant differences between Mr Burns and Mr Isherwood. The first was that Mr Burns had committed offences on bail after being released from custody on the conspiracy charge. One offence was an attempt by him to obtain a passport in a false name from an undercover federal police officer, and the second was an offer to supply that undercover officer with 2 kg of cocaine in payment for that false passport. It is difficult to avoid the conclusion that the false passport would have been used, if obtained, to flee the jurisdiction. The effort to obtain the passport advanced to the extent of the provision of a name, a photograph, and $4,000 in cash.

[26] Mr Burns had only one prior conviction, but that was incurred in 1998 for the offence of attempting to possess a trafficable quantity of a prohibited import, namely cocaine, and he was sentenced to four years imprisonment to date from 17 June 1997, and to be released on a two year recognisance on 16 June 1999. That offence related to an attempt to possess 112 grams of cocaine held in a safety deposit box in Sydney. That sentence was ordered to be finished on 16 June 2001, and accordingly that sentence had concluded only six months before he began involvement in this conspiracy to import.

[27] In those circumstances I consider the fact that he pleaded guilty and Mr Isherwood did not, and accordingly the latter exhibited both less remorse by his conduct and less co-operation with the administration of justice, still results in Mr Isherwood's sentence appearing excessive when compared to his co-offender who had a critical prior conviction and who then offended on bail, and that Mr Isherwood has a justified sense of grievance at getting a sentence with a longer non-parole period. The sentencing judge quoted Mr Burns' counsel as conceding that an incremental increase of six months to 12 months actual custody was warranted for the conspiracy offence, if concurrent sentences for the other two offences were imposed, and the judge determined that the starting point for the head sentence for conspiracy for Mr Burns should be 20 years, but that taking into account Mr Burns' plea and other matters raised in his favour, the sentence would be reduced to 18 years with a non-parole period fixed at eight and a half.

[28] The effect of those sentences was that Mr Burns would serve six months less than Mr Isherwood, although in my respectful opinion an appropriate sentence for an intending importer of a large quantity of cocaine who re-offended by promising to supply a considerable quantity of cocaine to another for a false passport when on bail, after a prior and recent conviction for a serious offence involving cocaine, meant that any disparity should favour Mr Isherwood. He had committed only one major offence involving cocaine, the conspiracy to import it. Mr Burns had committed three. In the circumstances I respectfully consider that the learned trial judge did err in principle in imposing sentences which resolved that disparity against Mr Isherwood, and that accordingly it falls to this Court to re-exercise the discretion and re-sentence him. In the circumstances I would allow the application and appeal and impose the sentence contended for in this Court by his counsel, namely one of 16 years imprisonment with a non-parole of eight years.

[29] **MUIR J:** I agree that the appeal against conviction should be dismissed for the reasons given by Jerrard JA. As for the application for leave to appeal against sentence, I agree with the reasons of Wilson J and with the orders she proposes.

[30] **WILSON J:** I have read the reasons for judgment of Jerrard JA, and I respectfully agree that the appeal against conviction should be dismissed for the reasons His Honour gives.

[31] Mr Isherwood was convicted by the jury of 1 offence - conspiracy to import cocaine. Mr Burns was convicted on his own pleas of guilty of 3 offences - conspiracy to import cocaine, an offence involving attempting to obtain a false passport, and unlawful supply of cocaine. They were sentenced together. Mr Isherwood was sentenced to 18 years imprisonment with a non-parole period of 9 years. Mr Burns was sentenced to 18 years imprisonment with a non-parole period of 8 1/2 years for the conspiracy offence, and 12 months imprisonment for each of the other offences, with all of the sentences to be served concurrently. In each case the trial judge declared that time served in pre-sentence custody be deemed time already served under the sentence.

[32] The trial judge did not see any significant distinction between the involvement of Mr Isherwood in the conspiracy offence and that of Mr Burns. But the following matters did weigh with Her Honour:

(a) their different criminal histories;

Mr Isherwood's history was old, except for convictions on 2 counts of knowingly making a false statement for the purpose of obtaining an Australian passport. The offences were committed in 1992 or 1993, but he was not sentenced until August 2000. He was sentenced to 6 months imprisonment, deferred on entering a recognizance to be of good behaviour for 3 years. The conspiracy offence was in breach of that bond.

Mr Burns' criminal history, although shorter, included a conviction for attempting to possess a trafficable quantity of cocaine in 1998, for which he was sentenced to 4 years imprisonment to be released on a 2 year recognizance after 2 years. After his arrest on the conspiracy charge, he was released on bail. Whilst on bail he committed the other 2 offences for which Her Honour sentenced him.

(b) that Mr Burns' sentences for the other two offences were arrived at by way of an increment to the head sentence to be imposed for the conspiracy offence coupled with short concurrent terms;

(c) that Mr Burns had pleaded guilty while Mr Isherwood had been found guilty after a trial.

[33] Viewed in isolation, Mr Isherwood's sentence was within the appropriate range, as is clear from Her Honour's thorough review of comparable decisions. But I am unpersuaded that the factors distinguishing his case from that of Mr Burns were sufficient to justify a differential in the non-parole periods. I would allow the application for leave to appeal against sentence and impose a different sentence only to the extent of substituting a non-parole period of 8 years for the 9 years fixed by Her Honour.