SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wedge* [2011] QCA 11
PARTIES:	**R** **v** **WEDGE, Michael Adam** (applicant)
FILE NO/S:	CA No 185 of 2010 SC No 59 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	11 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2011
JUDGES:	Muir and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant was convicted after a trial of producing a dangerous drug with a circumstance of aggravation – where the applicant played a less significant role in the offence than his co-offender – where the applicant's sentence involved a greater custodial component than his co-offender – where the co-offender had pleaded guilty and shown remorse – whether the disparity gave rise to a justifiable sense of grievance on the part of the applicant CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the trial judge made a mistake of fact during sentencing submissions which was corrected by counsel – whether the trial judge wrongly took that fact into consideration in passing sentence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where a submission as to an appropriate sentence was made while the trial judge was labouring under a mistake of fact – where

the sentence ultimately imposed was in accordance with that submission – whether the trial judge ought to have imposed a more lenient sentence once the mistake of fact had been corrected

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

COUNSEL: H C Fong for the applicant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application should be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** The applicant was convicted after a trial of unlawfully producing the dangerous drug cannabis sativa with the circumstance of aggravation that the quantity of the drug exceeded 500 grams. The trial judge sentenced the applicant to two years imprisonment with a parole release date fixed after he had served 12 months of that term. The applicant filed a notice of appeal against conviction and an application for leave to appeal against sentence. He has since abandoned his appeal against conviction. The ground of his application for leave to appeal against sentence is that the trial judge had regard to irrelevant matters and as a consequence imposed a sentence which was manifestly excessive in the circumstances. It was also contended for the applicant that his sentence lacked parity with the sentence of a co-offender.

Circumstances of the offence

[3] At the slipway premises owned and occupied by the applicant's co-offender, Mr Van Honste, police found a substantial cannabis crop which was being grown hydroponically. There were 64 plants with a gross weight of 76 kilograms as well as some loose cannabis. The set-up included lights, tubs, fans and air conditioners.

[4] The Crown case was that the applicant knowingly aided and assisted the production of cannabis by Van Honste by supplying and installing hydroponic equipment and providing advice in relation to the cultivation of cannabis. The defence case at trial was that although the applicant had sold and installed the hydroponic equipment used by Van Honste the applicant was unaware that Van Honste intended to use it and did use it to cultivate cannabis. The jury evidently accepted the Crown case.

[5] In sentencing the applicant, the trial judge noted that the extent of the applicant's involvement in the production of the cannabis crop could not be quantified accurately, but that as a minimum the applicant was responsible for supplying the initial equipment for the setting-up of the crop site and that the applicant was also involved in maintaining the plants and ensuring their continued growth. The trial judge found that the applicant's involvement was at a lesser level than that of Van Honste, "but not by a great deal". With reference to a notebook which was in evidence, the trial judge also found that the applicant made a profit on the

equipment and nutrients that he supplied which could reasonably be quantified at about $20,000. Otherwise there was no evidence the applicant stood to gain from the production of the drug and there was no evidence that any crop was harvested before the harvest which was drying when the police raided Van Honste's premises.

The applicant's personal circumstances

[6] The applicant was 53 at the time of the offence and 56 when he was sentenced. He had no relevant criminal history. The trial judge took into account also the applicant's good character, and that he was seen widely as a good person and otherwise a good citizen. His Honour referred also to the applicant's ongoing concern about the welfare of his son and the effect that the applicant's absence in prison would have on his son.

Comparison with Van Honste's sentence

[7] On 12 July 2010 Van Honste pleaded guilty to the aggravated production of the dangerous drug cannabis sativa, and to a second offence of aggravated possession of the drug. He was sentenced to three years imprisonment with a parole release date fixed after nine months. The sentencing judge referred to the necessity to make allowance for the fact that Van Honste pleaded guilty; although it was not a completely timely plea it did save the community the cost of a trial. The sentencing judge also took into account that Van Honste had no relevant prior convictions, he had the benefit of a good education and a good work record, and references tendered on his behalf showed that he had good standing in the community and he had contributed to the community by caring for disadvantaged children. Van Honste had shown remorse and he had suffered a great deal from the destruction of his reputation and financially.

[8] The applicant's counsel did not argue that the applicant's sentence was manifestly excessive. As the applicant's counsel acknowledged, the sentence might be regarded as a moderate one. The main submission for the applicant was that the greater length of the custodial component of his sentence, as compared with that imposed upon Van Honste, was such as to give rise to a justifiable sense of grievance in the applicant and the appearance that justice has not been done. The applicant's counsel referred the Court to the following passages in *Lowe v The Queen*:[1]

Per Gibbs CJ at 609 - 610:

> "The true position in my opinion may be briefly stated as follows. It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account. The fact that one co-offender has received a sentence which is more severe than that imposed on a co-offender whose circumstances are comparable would provide no reason in logic for reducing the former sentence, if the only question were whether that sentence, viewed in

1 (1984) 154 CLR 606.

> isolation, was manifestly excessive. However, the Court of Criminal Appeal in Queensland, on an appeal against a sentence, may quash the sentence imposed and substitute another "if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed": s. 668E of the *Criminal Code* (Q.). The same or similar words appear in the statutes of the other Australian States, and they are wide enough to empower the court in its discretion to reduce a sentence not in itself manifestly excessive in order to avoid a marked disparity with a sentence imposed on a co-offender. It may be said that the very existence of the disparity reveals that an error must have been committed, but I would prefer frankly to acknowledge that the reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done. The decision whether the existence of a disparity calls for intervention is a matter which lies very much within the discretion of the Court of Criminal Appeal."

Per Mason J at 610 - 611:

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice."

[9] In relation to a similar submission made to the trial judge, his Honour made the following remarks in the course of sentencing the applicant:

> "Because you have taken your chances in front of a jury and ran a trial, and the jury has drawn the inferences contrary [to] those which you would have wished, I must sentence you in accordance with the jury's verdict. As part of that, I see no basis for giving you any additional benefit to that which applies under the general practice in relation to the date in which you become eligible for parole.
>
> One consequence of this is that you will probably serve more time in gaol than Mr Van Honste, who took the course of pleading guilty and for which he must receive a benefit. That approach is usually indicative of some remorse on the part of an offender. In your case, there's no plea of guilty, no co-operation with the authorities, and as far as I can see, no remorse. There's no basis then, it seems to me, for making any order or special consideration in relation to your release."

[10] It was open to the trial judge to take that view. In *Lowe v The Queen*, Gibbs CJ referred to the desirability that persons who have been parties to the commission of the same offence should, "if other things are equal", receive the same sentence. As Gibbs CJ also noted, other things are not always equal. That is the case here. One of the points of distinction between the applicant and his co-offender was that the co-offender pleaded guilty whereas the applicant did not. Unlike the co-offender, the applicant could not rely upon a plea of guilty as a mitigating factor by reference

to the saving of the cost of a trial, co-operation with the authorities, or evidence of remorse. Those were significant points of distinction between the applicant's position and that of his co-offender. It was within the trial judge's discretion to treat those matters as justifying the sentence under which the applicant's term of imprisonment should be shorter than his co-offender's term but the applicant should spend a longer period in actual custody.

[11] The applicant's counsel submitted that the trial judge should not have taken into account the fact that the applicant went to trial. However the sentencing judge did not increase the severity of the applicant's sentence because the applicant exercised his right to plead not guilty. Rather, the trial judge proceeded on the basis that the applicant could not claim the benefit associated with a plea of guilty which was available to Van Honste. That was a conventional approach.

[12] The applicant's sense of grievance is not objectively justifiable. He has not made out his contention that justice has not been seen to be done.

Irrelevant matters

[13] In addition to arguing that the fact that the applicant went to trial was irrelevant, the applicant's counsel argued in his written outline that the trial judge wrongly took into account that the applicant himself grew cannabis using a hydroponic system in his bedroom. The Court was referred to an exchange between defence counsel and the trial judge. The trial judge adverted to a "curious coincidence" that both Van Honste and the applicant had a small bedroom set-up of hydroponics in their houses. The trial judge observed that it would be surprising if those similar activities had been conducted by one without the other knowing about it. Defence counsel opposed that inference, pointing out that Van Honste's "home crop" was in a sophisticated false room. The prosecutor confirmed in her submissions in reply that there was nothing like Van Honste's false wall set-up found in the applicant's house. The trial judge then observed that he would put that point to one side. It is clear that his Honour did not rely upon the coincidence.

[14] At the hearing of the application the applicant's counsel advanced a new point. He argued that during defence counsel's submissions at the sentence hearing, and when his Honour contemplated relying upon the coincidence, the trial judge referred to a possible sentence of two years imprisonment with parole eligibility after 12 months, which was the sentence actually imposed. Counsel's proposition was that a less severe sentence should have been imposed once the trial judge decided not to rely upon the coincidence.

[15] There is no merit in that argument. The prosecutor had sought a term of three years imprisonment and it was defence counsel, not the trial judge, who referred to a possible sentence of two years imprisonment. Defence counsel argued for two years imprisonment with a suspension at some point. The trial judge did not comment upon the length of the term but remarked that "eligibility" (meaning eligibility for parole) should be at "the ordinary time". Plainly enough, the purpose of the remark was to facilitate a submission by defence counsel upon an issue of concern to the trial judge. The remark in fact did have that effect. It is impossible to infer that when the trial judge made the remark his Honour had decided to impose the sentence ultimately imposed. There is no ground for displacing the usual assumption that the judge fixed upon the sentence after the conclusion of argument from both parties.

Proposed order

[16] I would refuse the application.

[17] **CHESTERMAN JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Fraser JA.