SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dehghani; Ex parte Director of Public Prosecutions (Cth)* [2011] QCA 159
PARTIES:	**R** **v** **DEHGHANI, David John** (respondent) **EX PARTE DIRECTOR OF PUBLIC PROSECUTIONS (CTH)** (appellant)
FILE NO/S:	CA No 127 of 2010 SC No 354 of 2008 SC No 355 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by DPP (Cth)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2011
JUDGES:	Margaret Wilson AJA, Ann Lyons and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. Set aside sentence and non-parole period imposed on count 1;** **3. On count 1 the respondent is sentenced to 14 years imprisonment from 8 February 2007 to expire on 7 February 2021;** **4. On count 1 set a non-parole period of 7 years 9 months from 8 February 2007 to expire on 7 November 2014.** **5. Declare that the period of 897 days between 8 February 2007 and 24 July 2009 is imprisonment already served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where respondent pleaded guilty to one count of importing 3,4-Methylenedioxymethamphetamine, counts of structuring transactions to avoid the reporting requirements of the *Financial Transaction Reports Act* 1988 (Cth) and the *Anti-*

Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and one count of dealing with the proceeds of crime in contravention of the *Criminal Code Act* 1995 (Cth) – where the respondent was sentenced to 10 years 10 months imprisonment with a non-parole period of six years six months for the drug importation offence and concurrent terms of two years for each of the money transactions – where respondent made undertaking to cooperate – where respondent made a statement implicating two co-offenders in the drug importation – where s 21E of the *Crimes Act* 1914 (Cth) states that a person who co-operates with law enforcement agencies should receive a benefit in sentencing – where respondent partially cooperated at the pre-trial *Basha* inquiry – where respondent minimally cooperated at the trial of his co-offenders – where appeal brought against the inadequacy of the sentence in light of the partial failure to cooperate – whether court should set aside the sentence and impose a new sentence

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), s 142(1)
Crimes Act 1914 (Cth), s 16(1), s 19(2), s 19AB, s 21E
Criminal Code Act 1995 (Cth), s 307.1, s 400.4(1)
Financial Transaction Reports Act 1988 (Cth), s 31(1)

DPP (Cth) v Haunga (2001) 4 VR 285, considered
DPP (Cth) v Parsons (1994) 74 A Crim R 172, considered
Hili v The Queen; Jones v The Queen (2010) 85 ALJR 195, applied
R v Basha (1989) 39 A Crim R 337, cited
R v Dehghani [2009] QCA 362, considered
R v Gladkowski (2000) 115 A Crim R 446, cited
R v Minh Cheun [2011] NSWCCA 5, cited
R v Vo; R v Tran [2006] NSWCCA 165, cited

COUNSEL: G R Rice SC for the appellant
M J Croucher for the respondent

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
Qld Law Group for the respondent

[1] **MARGARET WILSON AJA**: This is an appeal against sentence brought by the Commonwealth Director of Public Prosecutions pursuant to s 21E of the *Crimes Act* 1914 (Cth). The appellant appeals against the inadequacy of the sentence imposed on the respondent for a drug importation offence[1] on the ground that the respondent, without reasonable excuse, did not co-operate in accordance with an undertaking he gave to co-operate with law enforcement agencies.

[1] At the commencement of his oral submissions, senior counsel for the appellant clarified that although four sentences were listed in the notice of appeal, it was only the sentence for the drug importation offence which was actually the subject of appeal.

The Sentence

[2] On 3 November 2008 the respondent pleaded guilty to one count of importing a commercial quantity of the border controlled drug 3,4-Methylenedioxymethamphetamine (MDMA – ecstasy) between 15 January 2007 and 8 February 2007 in contravention of s 307.1 of the *Criminal Code Act* 1995 (Cth).

[3] On 24 July 2009 he pleaded guilty to the following:

(i) one count of structuring two or more transactions so as to avoid reporting conditions in contravention of s 31(1) of the *Financial Transaction Reports Act* 1988 (Cth) between 25 September 2006 and 12 December 2006;

(ii) one count of structuring two or more transactions so as to avoid reporting conditions in contravention of s 142(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) between 13 December 2006 and 3 January 2007; and

(iii) one count of dealing with the proceeds of crime to a value of more than $100,000 in contravention of s 400.4(1) of the *Criminal Code Act* 1995 (Cth) between 24 October 2006 and 5 January 2007.

[4] The maximum penalty for the drug importation offence was life imprisonment.

[5] On 24 July 2009 the respondent was sentenced to 10 years 10 months imprisonment with a non-parole period of six years six months (60 per cent) for the drug importation offence. He was sentenced to concurrent terms of two years for each of the money transactions. A declaration was made that the 897 days he had served in pre-sentence custody between 8 February 2007 and 24 July 2009 be deemed time already served under the sentence.

[6] In arriving at the sentence for the drug importation, the sentencing judge started at 18 years, which she reduced to 15 years with a non-parole period of nine years on account of the plea of guilty and past co-operation.[2] Her Honour then reduced that notional sentence to 10 years 10 months with a non-parole period of six years six months to take account of an undertaking to co-operate with the authorities pursuant to s 21E of the *Crimes Act* 1914 (Cth). Thus her Honour took 27.78 per cent off the sentence which would have been imposed but for the future co-operation. She indicated that had the head sentence been 15 years, she would still have imposed two years for each of the money offences.

[7] In setting the non-parole period her Honour referred to debate during submissions as to the point at which the non-parole period should be fixed. She said:

> "In relation to serious drug offending charges, there seems to be a preponderance of authority in favour of 60 per cent to two-thirds of the sentence being served before parole arises. I have, therefore, decided to fix the non-parole period as a period of six years, six months."

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[2] Under the *Crimes Act* 1914 (Cth) the sentence is the period of imprisonment, and the non-parole period is ancillary to the sentence. See ss 16(1) and 19AB.

[8] The respondent applied for leave to appeal against his sentence for the drug importation on the ground it was manifestly excessive. In that application he raised no issue in relation to the sentencing judge's fixing the non-parole period as 60 per cent of the effective head sentence. Leave to appeal against sentence was refused on 27 November 2009.[3]

The facts on which the respondent was sentenced

[9] On 6 February 2007 Customs officers at Brisbane airport intercepted two boxes that had been posted from the UK on 31 January. Two more similar boxes were intercepted later the same day. All were addressed to "K Gill" at 5 Laurel St Redbank Plains. They were labelled as containing "Toys, DVDs, children's games." Customs Declarations affixed to the boxes were all in the same hand and were signed "D Campbell" (the maiden name of the respondent's partner, Dawn Burling). Police dismantled the boxes and found packages of ecstasy pills. There were about 81,000 pills weighing 26.096 kg with a pure weight of MDMA of 5.219 kg. A substitution was made with a view to police conducting a controlled delivery of two of the boxes. A surveillance device was placed in one of the boxes and Gill's phone was intercepted.

[10] The respondent and Burling had travelled with their children to the UK between 15 January and 6 February. Upon their return late on 6 February, their luggage was searched. A postal receipt signed "D Campbell" relating to two of the boxes was found in the respondent's possession.

[11] Two boxes were delivered to Karen Gill on the morning of 8 February. Within minutes of taking delivery Gill telephoned the respondent and spoke in coded terms about making "two cups of coffee". Pending the arrival of the respondent and Burling, the surveillance device recorded Gill repositioning the boxes in a toy room, using a t-shirt to remove any fingerprints. The respondent and Burling visited Gill between about 1 pm and 1.30 pm during which the surveillance device recorded sounds of Burling and Gill removing a Customs declaration from one of the boxes. Police intercepted the respondent's car, in which Burling was the front seat passenger, soon after leaving Gill's premises. The declaration removed at Gill's house was found, ripped into pieces, on the console, front passenger floor and verge of the road.

***Crimes Act* s 21E**

[12] The law recognises that a person who co-operates with law enforcement agencies should receive a benefit in sentencing. The co-operation may take the form of self-incrimination, incrimination of others up to the time of sentence or a promise or undertaking to provide further co-operation in other proceedings. By providing information about co-offenders, an offender puts himself, and sometimes his family and associates, at the risk of retribution. Under the *Crimes Act* 1914 (Cth), co-operation in the form of self-incrimination and past information about co-offenders is recognised in s 16A(2)(h). Prospective co-operation is recognised in s 21E.[4]

[13] Section 21E provides :-

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3 *R v Dehghani* [2009] QCA 362.

4 See *R v Vo; R v Tran* [2006] NSWCCA 165, [36]; *R v Gladkowski* (2000) 115 A Crim R 446, 447-449 [6], [7], [11], [12].

"**21E Director of Public Prosecutions may appeal against reductions where promised co-operation with law enforcement agencies refused**

(1) Where a federal sentence, or a federal non-parole period, is reduced by the court imposing the sentence or fixing the non-parole period because the offender has undertaken to co-operate with law enforcement agencies in proceedings, including confiscation proceedings, relating to any offence, the court must:

(a) if the sentence imposed is reduced—specify that the sentence is being reduced for that reason and state the sentence that would have been imposed but for that reduction; and

(b) if the non-parole period is reduced—specify that the non-parole period is being reduced for that reason and state what the period would have been but for that reduction.

(2) Where:

(a) a federal sentence is imposed or a federal non-parole period is fixed; and

(b) the sentence or non-parole period is reduced because the offender has undertaken to co-operate with law enforcement agencies as described in subsection (1); and

(c) after sentence, the offender, without reasonable excuse, does not co-operate in accordance with the undertaking;

the Director of Public Prosecutions may, at any time while the offender is under sentence, if the Director of Public Prosecutions is of the opinion that it is in the interests of the administration of justice to do so, appeal against the inadequacy of the sentence or of the non-parole period.

(3) Where an appeal is begun under this section against the inadequacy of a sentence, or of a non-parole period, that was reduced because of a person's undertaking to co-operate with law enforcement agencies, the court hearing the appeal:

(a) if it is satisfied that the person has failed entirely to co-operate in accordance with the undertaking—must substitute for the reduced sentence or reduced non-parole period the sentence, or non-parole period, that would have been imposed on, or fixed in respect of, the person but for that reduction; and

(b) if it is satisfied that the person has failed in part to co-operate in accordance with the undertaking—may substitute for the reduced sentence or reduced non-parole period such a sentence, or such a non-parole period, not

> exceeding in length the sentence that could be imposed, or the non-parole period that could be fixed, under paragraph (a), as it thinks appropriate.
>
> (4) In subsection (1):
> ***confiscation proceedings*** includes:
> (a) proceedings for freezing orders, forfeiture orders, pecuniary penalty orders, literary proceeds orders and restraining orders under the *Proceeds of Crime Act 2002*; and
> (b) proceedings for forfeiture orders, pecuniary penalty orders and restraining orders under the *Proceeds of Crime Act 1987*; and
> (c) proceedings for restraining orders and pecuniary penalty orders under Part XIII of the *Customs Act 1901*."

[14] Where the Crown alleges a failure to fulfil an undertaking to give prospective co-operation, it must establish the failure and the absence of reasonable excuse for it. It probably must do so to the standard of beyond reasonable doubt.[5] In the present case both of these factors were conceded.

[15] A failure to co-operate in accordance with an undertaking may be entire or partial. Where the failure is entire, the court must restore the original sentence.[6] Where the failure is partial, it may substitute a sentence not exceeding in length that which would have been imposed but for the reduction as it thinks appropriate.[7]

[16] In *R v Gladkowski* this Court said:-

> "[11] ...The purpose of ss 21E(2) and (3) is to enable an appeal court to know what variation to make to the sentence in the event that the future co-operation 'in proceedings', presumably against other persons, is not forthcoming...
>
> [12] ...Section 21E is concerned with giving the courts power to remove a provisional benefit granted on the basis of an undertaking in circumstances where the undertaking is not fulfilled."

And in *R v Vo; R v Tran* McClellan CJ at Common Law, with whom the other members of the New South Wales Court of Criminal Appeal agreed, said:-

> "[38] The purpose of s 21E(3)(a) or (b) is not to punish the offender for failing to cooperate but rather to restore the sentence which would have been imposed if the offer of cooperation had not been made."

[17] In oral submissions senior counsel for the appellant submitted that this is a case of partial lack of co-operation.[8]

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5 *DPP (Cth) v Haunga* (2001) 4 VR 285, 289-290, [11]; *R v Minh Cheun* [2011] NSWCCA 5, [47].
6 Section 21E(3)(a).
7 Section 21E(3)(b).
8 This submission was made despite an earlier written submission that the failure was total.

The respondent's undertaking

[18] The respondent's undertaking was in the following terms:

> "1. To give truthful evidence for the Crown in any court proceedings relating to offences committed by Dawn Andrea Burling, Karen Leanne Gill, Robert Charles Simich, or anyone else, including all current proceedings arising out of events disclosed in my statement dated 1 July 2009 and any other statement given in furtherance of this undertaking.
>
> 2. To participate in conferences with law enforcement agencies in relation to any court proceedings referred to above and to provide upon request a supplementary voluntary statement of any further evidence in relation to matters arising from those conferences.
>
> 3. To produce to officers from the Australian Federal Police any documents that are within my custody or control which relate to the matters referred to above and to disclose to the best of my knowledge and belief the existence and whereabouts of other documents which may be relevant to this matter but not currently in my possession.
>
> 4. In giving evidence and providing statements I shall fully and frankly disclose my knowledge of the circumstances of the offence/s referred to in paragraph (1) above and in matters related to those offences, and I shall fully and frankly detail my involvement and that of all other persons in the offence/s and matters related to the offence/s.
>
> 5. The assistance and information that I have given in these matters is true and correct.
>
> 6. My counsel/solicitor has explained to me the provisions of section 21E of the *Crimes Act* 1914.
>
> 7. This undertaking has been read to me as I did not bring my glasses and I fully understand its contents and effect. I understand the consequences of any failure by me to honour this undertaking."

The respondent's statement dated 1 July 2009

[19] In his statement the respondent implicated Burling and Gill in the drug importation. He made only brief mention of another person, Robert Simich.

[20] He said that towards the end of 2006 he and Burling discussed asking Gill to let them use her address as a delivery address for pills. He said it was in fact Burling's idea. In his presence Burling asked Gill whether she would be prepared to accept packages containing drugs from overseas. Gill said she would have no problem in doing so, and that she would accept as many packages as were sent. Gill agreed to being paid $20,000 to $30,000 for the first delivery and asked whether there would be other deliveries.

[21] The respondent and Burling visited Gill. He explained that the packages would be sent when he and Burling went to England in January.

[22] In January 2007 the respondent and Burling travelled to the United Kingdom and stayed in a hotel in Bournemouth. They bought boxes, wrapping, vacuum packs and a vacuum machine at the Argos store in Boscombe. Then they went to Foodland to buy a vacuum packing machine. They returned to the hotel where they were staying, and Burling asked the respondent when and where he would pick up the pills. After he went out to pick them up, she telephoned him to ask whether he had done so. As soon as he had received the pills, he returned to the hotel and picked up Burling. They proceeded to an associate's boardroom where they re-vacuum packed some of the pills he had been given.

[23] The respondent and Burling returned to their hotel where they packed all the 80,000 pills into four boxes. She said they should put them in some of the boxes of children's toys and handheld video machines they had purchased.

[24] The next morning they went to a post office over the road from their hotel and posted two of the boxes to Gill. Then they went to Boscombe and posted the other two boxes to Gill. The four boxes were addressed to Gill at her home address at Redbank Plains in Queensland. Burling wrote the details on the boxes and used her maiden name as sender of the boxes.

[25] The day before boarding their flight back to Australia, they stayed at an airport hotel in London. While there they had a telephone conversation with Gill, in which she was told that the packages had left the United Kingdom and that they would arrive in Australia between 5 and 8 February 2007.

[26] The only mention the respondent made of Simich was of seeing him at Gill's house when he and Burling called on 8 February 2007, and then seeing him sitting in his car outside that house as he walked to his own car to leave.

The trial of Burling and Gill

[27] Burling, Gill and Simich went to trial on the following charges:-

(i) Burling: one count of importing a commercial quantity of the border controlled drug 3,4-Methylenedioxymethamphetamine between 15 January 2007 and 8 February 2007;

(ii) Gill: one count of aiding in the commission of the offence of importing a commercial quantity of the border controlled drug 3,4-Methylenedioxymethamphetamine between 15 January 2007 and 8 February 2007;

(iii) Simich: attempting to possess a commercial quantity of the border controlled drug 3,4-Methylenedioxymethamphetamine which had been unlawfully imported on 8 February 2007.

[28] The Crown case against Burling was that she and the respondent had packaged the boxes containing the ecstasy pills and sent them from the United Kingdom. The Crown case against Gill was that she had assisted in the importation by agreeing to receive the packages of drugs that Burling and the respondent would send from the United Kingdom at her house.

[29] There was a pre-trial *Basha* inquiry[9] into the respondent's evidence on 15 October 2009. He adopted a copy of the statement and the undertaking, and agreed that he

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9 *R v Basha* (1989) 39 A Crim R 337.

was aware that if he breached the undertaking he could be re-sentenced. Although his evidence was not on all fours with the statement, it was not materially different.

[30] The trial commenced on 2 March 2010. The respondent was called on the third day. To some extent he confirmed the contents of his statement, but he refused to implicate Burling and Gill. He gave evidence that he and Burling travelled overseas together; that he collected the drugs; that she was with him when he purchased the vacuum machine; that she was with him when he re-vacuum packed some of the pills; that she accompanied him back to the hotel and was in the hotel when he repackaged the drugs; and that she was with him when they went to post the packages. But he refused to acknowledge that she did anything culpable. His evidence with respect to Gill vacillated: at one point he agreed he was going to send the packages to her and at another he said it was not necessarily to do with drugs. He was not asked to give any evidence against Simich.

[31] The respondent was declared hostile, the trial judge observing –

> "When giving oral evidence, the witness exhibited a belligerent and uncooperative demeanour. He rarely answered questions directly, was prone to making speeches and portrayed a concern not to say anything which might incriminate either Ms Burling or Ms Gill.
>
> I confidently conclude that the inconsistencies to which I have referred, and there were others, were not explained by loss of memory, but by a desire not to tell the truth."

The prosecutor was given leave to cross-examine the respondent. A redacted version of his statement was tendered and read to the jury. He admitted having sworn to the truth of the statement at the pre-trial hearing on 15 October 2009. When defence counsel sought confirmation of the denials of their respective clients' involvement, he answered in terms of having made a statement to which he adhered. On a couple of occasions he acknowledged being well aware of the consequences of failing to abide by his undertaking.

[32] Apart from the respondent's potentially direct evidence, there was circumstantial evidence linking Burling and Gill to the importation in the way alleged.

[33] In relation to Burling, the prosecution relied on the following circumstances as tending to provide support for the evidence of the respondent implicating her:-

i. Postage receipts and photographs of the various boxes showing that the second two boxes were posted separately from the first two, two post offices being used;
ii. All the labels had apparently been written by the same hand, and the Customs declarations all bore the signature "D Campbell", which resembled a specimen found at Burling's house;
iii. Burling was not normally known by the name "Campbell";
iv. The consignor's address on the first two boxes was shown as Flat 6, while that on the other two boxes was shown as Flat 5, arguably suggesting a conscious decision to alter the address for labelling purposes;
v. Labels had been attached in an apparently consistent manner, suggesting they had been attached by the consignor rather than postal officers at two separate post offices. The contention was that this had

been done prior to the taking of the boxes to the post offices, thus placing the accused closer to the point of packing and sealing of the boxes;

vi. The packages weighed in excess of 27 kilograms in the aggregate: it was improbable that they contained a quantity of toys;

vii. The total cost of the freight might be considered excessive for the declared contents and value;

viii. Burling's conduct on the day the parcels were delivered included the labels at Gill's house even though there was no evidence that the respondent requested her to do so, and he was not present during that activity.

[34] In relation to Gill, the prosecution relied on the following circumstances as supporting the respondent's evidence implicating her:-

i. Her conduct on the day of delivery was said to reflect the existence of a prior arrangement to receive boxes containing drugs;

ii. Within a couple of minutes of the first two boxes being delivered, she telephoned the respondent;

iii. She made that call even though there was already an arrangement that the respondent and Burling would visit her;

iv. They spoke in coded language about two cups of coffee and purchasing toys for the children;

v. After that call ended, Gill made comments to a family member apparently confirming that they had spoken in code and mentioning concern over phone taps;

vi. The boxes were repositioned in the toy room to avoid leaving fingerprints and so that the labels were not visible;

vii. Gill and Burling tore off one of the labels when the respondent was not present;

viii. Gill continued to remove the labels with Simich after Burling and the respondent had left, and arranged for Simich to hide the boxes until they were collected by some third party.

[35] In due course the trial judge directed the jury that it would be dangerous to convict on the respondent's evidence unless it were corroborated. The direction focussed on his demonstrated unreliability by reference to the fact that there were diametrically opposed versions he had sworn to. His Honour drew attention to the evidence the Crown relied on as corroboration and defence counsel's submissions in relation to it.

[36] Burling and Gill were found guilty, and Simich was found not guilty.

[37] Burling was sentenced to 12 years imprisonment with a non-parole period of seven years three months (approximately 60 per cent). Gill was sentenced to nine years imprisonment with a non-parole period of five years six months (approximately 60 per cent). Burling and Gill appealed against their convictions and sought leave to appeal against their sentences. They were unsuccessful. In reviewing the sentences, the Court of Appeal observed that the sentencing judge was concerned to ensure parity with the sentence imposed on the present respondent, and that that consideration, rather than the existence of some "norm", led to the same proportionality in the length of the non-parole periods.[10]

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[10] *R v Burling & Gill* [2011] QCA 51, 8, [31] per Chesterman JA with whom Philippides J agreed.

Partial co-operation

[38] Senior counsel for the appellant and counsel for the respondent both submitted that this was a case of partial lack of co-operation, enlivening subsection (3)(b) of s 21E of the *Crimes Act* 1914 (Cth). However, they differed in their submissions as to the nature and extent of the respondent's non-compliance with his undertaking.

[39] The partial co-operation acknowledged by senior counsel for the appellant was limited to the respondent's evidence at the *Basha* inquiry. He reneged on that evidence at trial, refusing to inculpate Burling and Gill. Senior counsel for the appellant submitted that the respondent's confirming at the trial that he had said at the *Basha* inquiry that his statement was true and correct simply demonstrated his unreliability. He submitted that the fact Burling and Gill were convicted despite the respondent's refusal to implicate them did not affect the degree to which the respondent failed to honour his undertaking. He submitted that it was for this Court to measure the extent of the breach, and that the quality of the residual evidence did not provide a measure of that breach.

[40] Counsel for the respondent submitted that his client partially fulfilled his undertaking by the evidence he gave at the trial. He gave truthful evidence in respect of many matters about his own involvement and that of Burling, although he did not give truthful evidence in relation to her knowledge. He said everything in substance he had previously said about Gill, except when it came to her agreeing to receive drugs.

Discussion

[41] The sentencing judge rightly took the respondent's statement dated 1 July 2009 into account as past co-operation in reducing his sentence from 18 years to 15 years. The undertaking which resulted in his sentence being reduced from 15 years to 10 years 10 months was an undertaking to co-operate prospectively by giving truthful evidence against Burling, Gill and Simich in proceedings arising out of the events described in his statement. He breached that undertaking in relation to Burling and Gill.

[42] In my view, the extent of the respondent's co-operation at the trial was minimal. The jury may well have considered that his evidence before he was declared hostile, which failed to inculpate Burling and Gill, was glaringly improbable. Then upon being cross-examined, he was shown to have made statements inconsistent with what he had already said at the trial – the statement dated 1 July 2009 and his confirmation at the *Basha* inquiry that the statement was true and correct. The jury may have accepted the statement as truthful, or they may have rejected all his evidence as thoroughly unreliable, acting on other evidence to convict.

[43] This appeal is against the inadequacy of the sentence of 10 years 10 months imprisonment. In light of the respondent's partial breach of his undertaking, this Court may substitute such a sentence not exceeding 15 years imprisonment as it thinks appropriate.

[44] Counsel for the respondent urged this Court to take the following matters into account in exercising the discretion –

i. Parity with the sentences imposed on Burling and Gill;

ii. That the sentencing judge's approach to the fixing of the non-parole period was erroneous in light of the subsequent decision of the High Court in *Hili*;[11]

iii. That the Crown induced that error by her Honour;

iv. That the sentencing judge erred in not stating the commencement date of the sentence.[12]

The thrust of his submission was that this Court should take into account matters relevant at the time of re-sentencing – that this followed from the wording of s 21E subs (3)(b), in particular –

- "may"
- "not exceeding". Even though there was only a partial failure, there might be reason still to impose the same sentence. This implies a discretion to take into account circumstances other than the failure itself.
- "as it thinks appropriate". It could not be other than inappropriate to disregard the sentences imposed on the co-accused.

[45] The scope of the discretion is defined by the purpose for which and context in which the Legislature has given it to the Court. Its purpose is to allow the Court to redress a reduction in sentence given on the strength of an undertaking which is not fulfilled. It has been given in the context of a legislative scheme which envisages that the sentencing judge will have taken all other relevant factors into consideration in arriving at what would otherwise have been a proper sentence and will have then reduced that notional sentence on account of the offender's undertaking to co-operate prospectively.

[46] In *DPP (Cth) v Haunga*, Tadgell JA, with whom the other members of the Victorian Court of Appeal agreed, accepted that the appellate court is not empowered to reconsider the appropriateness of the original sentence, but may only substitute a sentence that properly reflects all relevant circumstances surrounding the respondent's failure to co-operate in accordance with the undertaking that led to the reduced sentence.[13] Similar views have been expressed by other intermediate courts of appeal. In *R v Vo; R v Tran*, McClellan CJ at Common Law, with whom the other members of the New South Wales Court of Criminal Appeal agreed, said:-

> "[38] ...If the failure is as to part the court has a discretion. However, that discretion is confined so that the court may not impose an additional sentence which exceeds the maximum by which the original sentence was reduced. In my opinion the additional sentence should so far as the appeal court is able reflect an increase in the sentence which reflects the extent to which the offered cooperation has not been forthcoming."[14]

And in *DPP (Cth) v Parsons* the Western Australia Court of Criminal Appeal said –

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11 *Hili v The Queen; Jones v The Queen* (2010) 85 ALJR 195.
12 *Crimes Act* 1914 (Cth), s 19(2).
13 *Cth DPP v Haunga* (2001) 4 VR 285, 290-291, [14].
14 *R v Vo; R v Tran*, [38].

> "The reference to 'inadequacy' in s 21E(2) is not, in our view, a basis for a court acting under s 21E(3) to review the sentence other than as subs (3) mandates. The reference to inadequacy, in our view, is a reference to the reduction in sentence made in anticipation of co-operation and nothing more."[15]

[47] In the recent decision of the High Court in *Hili*[16] the majority discussed the quest for consistency in federal sentencing. They said (*inter alia*) that the consistency that is sought is consistency in the application of relevant legal principles,[17] and the role of intermediate courts of appeal. Their Honours said –[18]

> "[57] In dealing with appeals against sentences passed on federal offenders, whether the appeal is brought by the offender or by the prosecution, the need for consistency of decision throughout Australia is self-evident. It is plain, of course, that intermediate courts of appeal should not depart from an interpretation placed on Commonwealth legislation by another Australian intermediate appellate court, unless convinced that that interpretation is plainly wrong. So, too, in considering the sufficiency of sentences passed on federal offenders at first instance, intermediate appellate courts should not depart from what is decided by other Australian intermediate appellate courts, unless convinced that the decision is plainly wrong." (References omitted).

[48] Even if this Court had doubts about the correctness of the approach in *Haunga*, *R v Vo; R v Tran*, and *Parsons*, it would be obliged to follow it unless convinced it were plainly wrong. But in my respectful opinion that approach was plainly correct. This Court is neither required nor permitted to re-exercise the discretion exercised by the sentencing judge in deciding that the appropriate sentence, but for the undertaking to co-operate, would have been 15 years imprisonment.

[49] By s 668D of the *Criminal Code* 1899 (Qld) a convicted person may appeal against sentence with leave. That provision is applicable to a federal offender convicted in a Queensland court by virtue of s 68 of the *Judiciary Act* 1903 (Cth). The jurisdiction is statutory.[19] After a final determination, the sentence cannot be reopened even if, in light of a subsequent authoritative decision, it is shown to have based on an error of law.[20] The respondent applied for leave to appeal against his

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15 (1994) 74 A Crim R 172, 177.

16 (2010) 85 ALJR 195.

17 205, [49].

18 207, [57].

19 See *Grierson v The King* (1938) 60 CLR 431, 435 per Dixon J; *Elliott v The Queen* (2007) 234 CLR 38.

20 The position is similar at common law. See the discussion in *Precedent and Law: Dynamics of Common Law Growth*, 1985, 187. Where a previous interpretation of the law has been over-ruled, this affects only legal relations which mature into litigation after the new ruling. Disputes which never mature and those which have already been adjudicated (and therefore become conclusive under the *res judicata* doctrine before the new ruling) are not affected. Exceptionally, criminal convictions may be re-opened by *habeas corpus* on constitutional grounds. The common law doctrine takes it for granted that a rule newly laid down by the court is to be applied not only to future facts, as well as to the necessarily past facts of the very case in which it emerges, but to all cases thereafter litigated, even if they involve conduct which occurred before the establishment of the new rule.

sentence, and his application was dismissed. He has exhausted his rights of appeal to this Court, and if he is dissatisfied with the determination made on his appeal, he may apply to the High Court for special leave to appeal.

[50] In any event –

(a) Parity was not a relevant issue before her Honour, as Burling and Gill had not yet been convicted and sentenced.

(b) If her Honour erred in her approach to fixing the non-parole period, this Court cannot rectify that error in this appeal pursuant to s 21E. However, as was acknowledged by senior counsel for the appellant, if this Court alters the sentence, it will have to determine the non-parole period afresh.[21] In doing so, it must take account of the High Court's ruling in *Hili* that there is no norm or starting point (whether expressed as a percentage of the head sentence or otherwise) that an offender should serve as a pre-release period.

(c) Her Honour did not err in failing to state the date from which the sentence was to commence. In the course of submissions on sentence, she correctly observed that there was no need to state that the sentences would commence on the day of sentence because she was about to make a pre-sentence custody declaration so that they would effectively commence on the day the respondent went into custody.

[51] In *Haunga* the offender was convicted in the County Court of a drug importation offence. His sentence was reduced under s 21E of the *Crimes Act* because he gave an undertaking to give evidence against a co-offender O'Neill. He did so at the co-offender's committal, but refused to do so at his trial, resulting in the trial being aborted. He was sentenced to 12 months imprisonment for contempt, that sentence being expressed to commence after the end of the non-parole period fixed in relation to his own offending. The Commonwealth Director of Public Prosecutions appealed against the original sentence under s 21E, and he was re-sentenced pursuant to subsection (3)(b). Applying the totality principle, the Court had regard to the sentence imposed for the contempt, which was intended to be served cumulatively upon the original sentence and would be so served upon the new sentence. Tadgell JA discussed the other factors relevant to the re-sentencing as follows –

> "21. The sentence that we impose cannot exceed that which the County Court judge specified he would have imposed but for the respondent's undertaking. It might or might not be a lesser sentence than that so specified by the judge. With a view to persuading us that we should impose a lesser sentence, the respondent is of course entitled to point to such co-operation as he gave and to any other circumstance tending to minimise the seriousness of the repudiation of his undertaking in terms of its circumstances (remembering that there was no reasonable excuse for it) and consequences. We have no doubt to make an evaluation of these things as

[21] *DPP (Cth) v Haunga* (2001) 4 VR 285, 289, [10].

> a matter of overall impression and estimation, taking account, for example, of the extent to which the Crown and the community have been disadvantaged by the respondent's repudiation. At the very least it may be said that one trial was aborted and money therefore wasted by reason of the respondent's conduct. There is no evidence of the effect of the repudiation on the Crown's ability to prove a case against O'Neill at trial, but clearly enough it must have suffered some disadvantage. The transcript indicates that Judge Smith proposed to empanel another jury but we do not know whether that was done or, if it was, the result of any subsequent trial. Our re-sentencing task is rendered the more difficult in the absence of information of this kind, but we should proceed, I think, on the footing that the respondent's breach was a serious one, going to the heart of the considerations that justified the leniency shown him by the learned judge."

Outcome

[52] In recognition of the respondent's undertaking to co-operate by giving truthful evidence against Burling, Gill and Simich, the sentencing judge discounted his sentence substantially. He breached that undertaking without reasonable excuse by his refusal to give evidence inculpating Burling and Gill.

[53] The appellant conceded that the respondent's failure to co-operate in accordance with his undertaking was partial rather than complete. It was nevertheless very serious, and there was no excuse for it. In the event, Burling and Gill were convicted, but their trial was made longer and more complex by the respondent's behaviour, with attendant cost to the community.

[54] It is not open to this Court to take into account matters relevant to fixing the notional sentence of 15 years. Its task is limited to substituting such sentence not exceeding 15 years as properly reflects the circumstances surrounding the respondent's partial failure to fulfil his undertaking.

[55] I would make the following orders –

(i) Appeal allowed.
(ii) Set aside sentence and non-parole period imposed on count 1.
(iii) On count 1 the respondent is sentenced to 14 years imprisonment from 8 February 2007 to expire on 7 February 2021.
(iv) On count 1 set a non-parole period of 7 years 9 months from 8 February 2007 to expire on 7 November 2014.
(v) Declare that the period of 897 days between 8 February 2007 and 24 July 2009 is imprisonment already served under the sentence.

[56] **ANN LYONS J:** I agree with the orders proposed by Margaret Wilson AJA for the reasons given by her Honour.

[57] **MARTIN J:** I agree, for the reasons given by Margaret Wilson AJA, with the order she proposes.