SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hill, Bakir, Gray & Broad; ex parte Cth DPP* [2011] QCA 306
PARTIES:	**R** **v** **HILL, Steven Milton** (applicant/appellant/ respondent) **BAKIR, Yassar** (applicant/appellant/ respondent) **GRAY, Candice Ruth** (appellant/ respondent) **BROAD, Anthony Keith** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (respondent/appellant)
FILE NO/S:	CA No 253 of 2010 CA No 254 of 2010 CA No 288 of 2010 CA No 306 of 2010 CA No 310 of 2010 CA No 311 of 2010 CA No 312 of 2010 CA No 313 of 2010 CA No 314 of 2010 SC No 815 of 2010
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeals against Conviction Sentence Appeals by Cth DPP Sentence Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2011
JUDGES:	Muir and White JJA and Atkinson J Separate reasons for judgment of each member of the Court, Muir and White JJA concurring as to the orders made, Atkinson J dissenting in part
ORDER:	**1. In CA No 253 of 2010, CA No 254 of 2010 and CA No 288 of 2010: Appeals against conviction by Hill, Bakir and Gray dismissed.** **2. In CA No 306 of 2010, CA No 310 of 2010, CA No 311 of 2010 and CA No 312 of 2010: Appeals against**

sentence by the Commonwealth Director of Public Prosecutions dismissed.

3. **In CA No 313 of 2010 and CA No 314 of 2010: Applications for leave to appeal against sentence by Bakir and Hill refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where Bakir, Hill and Gray were found guilty by a jury after a trial of drug offences including importation of a commercial quantity of a border controlled drug and attempting to possess a commercial quantity of a border controlled drug – where the appellants argued that the verdicts were unreasonable having regard to the evidence – whether it was open to a properly instructed jury to find the appellants guilty

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellants argued that the learned trial judge erred in ruling as admissible telephone intercept recordings and evidence of drug seizures – whether the evidence was admissible – whether the jury was properly directed with respect to it

CRIMINAL LAW – EVIDENCE – CORROBORATION – DIRECTIONS TO JURY – ADEQUACY OF WARNING – EVIDENCE CAPABLE OF AMOUNTING TO CORROBORATION – where the appellants submitted that the trial judge erred in ruling that there was independent corroborative evidence of a witness' testimony and directing the jury as such – whether the evidence was capable of being corroborative

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the Commonwealth Director of Public Prosecutions (CDPP) appealed against the sentences imposed on Bakir, Hill, Gray and Broad – where the CDPP submitted that the sentences imposed were manifestly inadequate and that they failed to reflect the criminality of the offending and the element of general deterrence and gave too much weight to mitigating factors – whether the sentences imposed were manifestly inadequate so as to demonstrate an error in the exercise of the sentencing discretion

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where Bakir and Hill

also applied for leave to appeal against their sentences on the basis that the sentencing discretion had miscarried – whether leave should be granted

Crimes Act 1914 (Cth), s 16A, s 16E, s 16F
Criminal Code Act 1899 (Qld), s 632, s 668E, s 669A(1)
Criminal Code Act 1995 (Cth), s 3, s 5, s 6, s 11, s 307, s 314
Drugs Misuse Act 1986 (Qld), s 8, s 9
Penalties and Sentences Act 1992 (Qld), s 159A

Adams v The Queen (2008) 234 CLR 143; [2008] HCA 15, followed
Ahern v The Queen (1988) 165 CLR 87; [1988] HCA 39, followed
Crampton v The Queen (2000) 206 CLR 161; [2000] HCA 60, cited
Director of Public Prosecutions (Cth) v De La Rosa (2010) 243 FLR 28; [2010] NSWCCA 194, cited
Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, followed
Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
Gately v The Queen (2001) 232 CLR 208; [2007] HCA 55, cited
Hili v The Queen; Jones v The Queen (2010) 85 ALJR 195; (2010) 272 ALR 465; [2010] HCA 45, considered
Jenkins v The Queen (2004) 79 ALJR 252; (2004) 211 ALR 116; [2004] HCA 57, cited
Lacey v Attorney-General (Qld) (2011) 85 ALJR 508; (2011) 275 ALR 646; [2011] HCA 10, followed
Lowndes v The Queen (1999) 195 CLR 665; [1999] HCA 29, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
R v Barrow [2001] 2 Qd R 525; [1999] QCA 56, cited
R v Chandler [2010] QCA 21, cited
R v Davidson (2009) 75 NSWLR 150; [2009] NSWCCA 150, considered
R v Davies [2007] QCA 416, cited
R v Harris [2009] QCA 370, cited
R v Jackson (1987) 11 NSWLR 318, cited
R v Kevenaar (2004) 148 A Crim R 155; [2004] NSWCCA 210, cited
R v Kuster (2008) 21 VR 407; [2008] VSCA 261, cited
R v Lawrence; R v McDonagh [2007] SASC 106, cited
R v Le Blowitz [1998] 1 Qd R 303; [1996] QCA 451,cited
R v Mbonu (2003) 7 VR 273; [2003] VSCA 52, cited
R v Nguyen; R v Pham (2010) 205 A Crim R 106; [2010] NSWCCA 238, cited
R v Oprea [2009] QCA 184, cited
R v Pektas [1989] VR 239; [1989] VicRp 21, cited
R v Shahrokhey-Zadeh [2006] QCA 4, cited

The King v Baskerville [1916] 2 KB 658, followed
Tripodi v The Queen (1961) 104 CLR 1; [1961] HCA 22, followed
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: M J Byrne QC, with G McGuire, for the applicant/ appellant/ respondent, Hill
B Walker SC, with A J Kimmins, for the applicant/ appellant/ respondent, Bakir
D F Jackson QC, with M J Croucher, for the appellant/ respondent, Gray
D P O'Gorman SC for the respondent, Broad
W J Abraham QC, with L K Crowley, for the respondent/ appellant, Cth DPP

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Peter Shields Lawyers for the applicant/ appellant/ respondent, Bakir
Bell Miller Solicitors for the appellant/ respondent, Gray
McLaughlins Solicitors for the respondent, Broad
Director of Public Prosecutions (Cth) for the respondent/ appellant, Cth DPP

MUIR JA:

The appeals against conviction by Bakir, Hill and Gray

[1] I agree that the appeals against conviction should be dismissed for the reasons given by Atkinson J. Atkinson J's careful recitation of the facts enables me to state my reasons relatively briefly.

The sentence appeals by the Commonwealth Director of Public Prosecutions

[2] The appellant Commonwealth Director of Public Prosecutions appeals against the sentences imposed on the respondents Bakir, Hill, Gray and Broad on grounds that:

1. The sentences were manifestly inadequate;
2. Insufficient weight was given to the circumstances of the case, particularly the objective seriousness of the offences;
3. Too much weight was given to mitigating factors.

[3] It is convenient to consider all three grounds together. The CDPP argued, at least inferentially, that the sentencing judge had sentenced inconsistently with *Adams v The Queen*[1] by assessing the seriousness of the offending conduct by reference to the qualities of the subject drug rather than by reference to the legislative scheme. Reliance was placed on to the following passage from the joint reasons in *Adams*:[2]

> "In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit

1 (2008) 234 CLR 143.
2 At para [10].

> drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme. This problem was recognised by the Court of Criminal Appeal of New South Wales in *R v Poon*http://www.austlii.edu.au/au/cases/cth/HCA/2008/15.html - fn6#fn6. A similar problem in relation to Victorian legislation underlay the decision in *Pidoto and O'Dea* noted above." (citations omitted)

[4] Error was said to be detectable in the sentencing judge's reliance on *R v Davidson*[3] The substance of the argument was that one decision could not provide a sentencing range let alone establish an appropriate range. The argument continued: by finding that *Davidson* was the most relevant comparable case, the sentencing judge must have focused impermissibly on the nature of the subject drug and thus disregarded many other comparable sentences to which recourse should have been had.

[5] The sentencing judge commenced his sentencing remarks by identifying the respective roles of the respondents in the subject importation. He then discussed the aspect of financial gain, finding that Gray was to be paid $17,000 and that the others involved expected to manufacture GHB from the imported GBL and sell the end product for a profit. He found that Broad must have had a total of at least 4,601 grams of pure GBL in his possession from the importation and that some of the imported material had been dissipated by a "cook-up" on 14 June 2006. It was found that Radcliff expected that about 10 to 12 bottles able to produce nine to 10 kilograms of pure GHB was to be imported, and that the likely profit to be made from manufacturing and selling the GHB was between $180,000 and $200,000.

[6] The sentencing judge noted that the subject events occurred in mid 2006, after GBL had been listed as a border controlled drug in s 314.4 of the *Criminal Code* (Cth). He referred to *Adams v The Queen* and quoted the passage from the joint reasons quoted above. His Honour then recorded the CDPP's submission that sentences pre *Adams v The Queen* had not taken into account the principles there expressed and therefore did not reflect the maximum penalty for the importation of GBL which was increased from 6 December 2005.

[7] After discussing: further submissions made by the CDPP; the credit which should be given to Bakir and Hill for pre-sentence custody and mitigating circumstances, his Honour discussed *Davidson* as follows:

> "Taking into account what I have said about Adams, the most useful decision on which I can rely in respect of setting sentences, seems to me to be that of the New South Wales Court of Criminal Appeal in Davidson v. The Queen.
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> There the appellant was convicted of three counts of importing a commercial quantity of a border controlled drug and one count of attempting to do so. He was sentenced to imprisonment for six years on each count, with a total term of eight years, due to partial accumulation of the sentences, and a single non parole period of four years and five months.

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[3] (2009) 75 NSWLR 150.

> The quantity of the drug imported in the three counts was more than 30 kilograms which, depending on what view one takes of the amount imported here, appears to be roughly comparable in respect of each separate importation. The attempt to import was another 19 kilograms.
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> The sentence was imposed by the trial judge on the 8th of February, 2008, before the decision of the High Court in Adams v. The Queen, but the appeal occurred more than a year after the decision in Adams v. The Queen, which was referred to in the Court of Appeal's judgment. It was an appeal against sentence by the defendant which was dismissed. No remarks were made in respect of the adequacy of the sentence otherwise by the Court to suggest that it was less than appropriate, and it does seem to be a reasonably comparable decision to assist me in what I should do.
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> The Court there did point out that Australian courts have not had much familiarity with offences in respect of this drug. It was also pointed out that while it was plainly an offence against Commonwealth law at the time of the offences there, it was then not a drug recognising or proscribed by New South Wales drug law, and it only became illegal in Queensland as was relevant to this trial some years ago.
>
> Justice Simpson went on to say it is true that GBL is not a drug with which the courts of New South Wales have acquired great familiarity.
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> It does seem to me, however, that when one compares decisions in respect of the sentencing of offences of this nature, that it is difficult to say, even in respect of some offences of importation of cocaine, to which I was taken, that there is necessarily a direct correlation sufficient to establish a head sentence range of ten to twelve years as was contended for by the prosecution. It seems to me that an appropriate range is that set in effect of six years in Davidson." (citations omitted)

[8] It is apparent from the above passage that the sentencing judge gave due consideration to *Adams v The Queen* and that his Honour did not disregard sentences imposed in respect of similarly scheduled drugs. When the sentencing judge referred to "an appropriate range…set in effect of six years in *Davidson*" all that his Honour was intending to convey was that *Davidson*, being "reasonably comparable" in terms of the drug and quantities imported, provided something of a yardstick.

[9] The sentencing judge did not err in looking for comparable sentences which related to the drug in respect of which he was sentencing. Nor was it erroneous of him to take into account the quantity of the drug imported or the extent to which the respondents profited or stood to profit from the importation.[4]

[10] As the CDPP submitted, *Davidson* had its limitations as a precedent as the Court was required to determine only whether the sentences, considered against the

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[4] *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28, per Allsop P at para [68], per McClellan CJ at CL at paras [202] and [209], per Simpson J at paras [306], [308]. But see also *R v Nguyen; R v Pham* [2010] NSWCCA 238 at para [72].

background of the decision in *Adams v The Queen*, were manifestly excessive. The quantity of drug imported was more than 30 kilograms and an attempt was made to import another 19 kilograms.

[11] The sentencing judge had been referred to a number of other decisions which may be thought to have played a role in his decision. One of these was ***R v Chandler***[5] in which the 33 year old applicant, who had a criminal history which included convictions for minor drug offences, appealed unsuccessfully against a sentence of five years with a non-parole period of three years for an offence of importing a commercial quantity of a border controlled precursor of a controlled drug (pseudoephedrine). The total weight of the drug imported was between 2,799 grams and 2,988 grams and it could have been used to produce approximately 2 kilograms of pure methylemphatamine with a retail street value in its pure form of between $600,000 and $1.6 m.

[12] The sentencing judge was referred by the CDPP to a number of sentences including the following:

- *R v Davies* [2007] QCA 416. A seven year term of imprisonment with a non-parole period of two years was imposed on appeal for attempted possession of 2,240 grams of cocaine with a street value of $1.6 m.
- *R v Harris* [2009] QCA 370. A seven year term of imprisonment with a non-parole period of four years was imposed for attempted possession of 1,489.7 grams of cocaine with a street value of $2 m.
- *R v Kevenaar* (2004) 148 A Crim R 155. One offender received a seven year term with a non-parole period of four and a half years and another offender received a seven year and nine months term with a non-parole period of five years for attempted possession of 5,987.7 grams of pure MDMA with a street value of $2,441,400. Kevenaar had been sent to Australia to obtain delivery of a shipment of drugs and to facilitate the dissemination of the drugs in Australia.
- *R v De La Rosa* [2010] NSWCCA 194. An eight year term of imprisonment with a non-parole period of five years was imposed for the importation of 1,870 grams of cocaine with a street value of between $374,060 and $841,635. The offender had a role in the importation greater than that of a "mere courier" and stood to make "a very significant financial gain".
- *R v Oprea* [2009] QCA 184. A 10 year term of imprisonment with a non-parole period of six and a half years was imposed for attempted possession of 1,489.7 grams of cocaine with a street value of $2 m.
- *R v Lawrence; R v McDonagh* [2007] SASC 106. A sentence of five years and seven months imprisonment with a non-parole period of two and a half years was imposed for two supplies of GHB each over 17 kg and one supply of in excess of 34 kg.

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5 [2010] QCA 21.

[13] It is immediately obvious that the value of the drugs imported in the cases relied on by the CDPP at first instance was, in each case, greatly in excess of the drugs imported by the respondents.

[14] The circumstances of the offending conduct are rather remarkable. The following is a summary of the "factual overview" in the CDPP's submissions on the sentence appeal. Radcliff and Cook were in the business of importing GBL, manufacturing GHB from it and selling it. After Cook was arrested, Bakir and Hill demanded that Radcliff import GBL for them. As an incentive for him to cooperate, they took his wallet, ATM card and car. Radcliff approached Gray for assistance with the importation. She agreed and said that she would need $7,000 up front, a delivery address and a further $10,000 once "the package" had arrived. Radcliff, for reasons unexplained, approached Broad to assist in funding the venture. Broad agreed to provide $5,500 in return for a proportion of the GBL to be imported. Radcliff provided Gray with the $7,000 made up of Broad's money and $1,500 of his own. He also provided Gray with a delivery address given to him by Broad. The GBL arrived and was collected by Radcliff and given to Broad. Bakir and Hill never offered to pay for, paid for or received any of the GBL, or as far as the evidence discloses, any of the GHB made from it. This account does not suggest that the respondents were engaged in an exercise of any sophistication.

[15] The sentencing judge explained the mitigating factors taken into account by him in respect of each respondent. He found that Bakir suffered from physical and psychiatric problems which may have contributed to his behaviour. He found that after a motor vehicle accident in December 2003, Bakir had "developed significant psychiatric problems" and suffered from continual headaches and schizophrenia. He lost his business and his ability to generate income. All of his offending conduct post dated his motorcycle injuries. The evidence before the sentencing judge was that Bakir suffered from a major depressive disorder and experienced continuing pain and blackouts. The sentencing judge found that time served by him in prison would be more difficult because of the residence of his three young children in Sydney and because of his physical and psychiatric difficulties.

[16] Bakir had served six months in pre-sentence custody in respect of offences of assaulting Radcliff and the unlawful use of Radcliff's car. It was conceded by the CDPP that this period could be taken into account in determining Bakir's non-parole period. Bakir had also spent approximately 12 months in custody in New South Wales for charges which the sentencing judge considered to be unrelated to the offences before him. Although he was of the view that he could take the time spent in custody in New South Wales into account, he did so only to the extent of reducing the non-parole period by nine months rather than the total period of 18 months pre-sentence custody. This is a factor which goes to the question of whether the sentence was manifestly excessive.

[17] Hill had been in prison in Queensland for four and a half months in respect of the Radcliff assaults and the unlawful use of his car. To take this into account, the sentencing judge reduced the non-parole period to be imposed from four years to three years, seven months. Hill, as the sentencing judge noted, had a five and half year old daughter and had a good work history.

[18] Gray was 22 years of age at the time of her offending conduct and had only a minor criminal history. In sentencing Gray, the sentencing judge took into account her youth and strong prospects of rehabilitation. He commented that "she has turned

her life around since her offence" and noted that she had taken up "worthwhile employment, and appears to be succeeding very well in it."

[19] The sentencing judge's remarks, if anything, understated Gray's claims for mitigation. She gave up her studies at Bond University, where she had a scholarship and was performing well in her studies, to care for her dying mother and support herself and her two younger brothers. After her mother died, when Gray was 19 years old, she continued to be the principal carer for her brothers. After the loss of the family home, she housed her brothers in her studio apartment and provided them with material and financial support as well as direction and encouragement. All of this imposed an exceptional emotional and financial burden on such a young woman. Many references speak glowingly of her character, her support and encouragement of others and her business and social accomplishments.

[20] Although Gray's motive for her offending conduct was commercial gain, the amount of gain was overstated by the CDPP. The $7,000 received from Radcliff was to be paid for the importation. It was not contended by the CDPP that her motivation was greed rather than desperation.

[21] The sentencing judge, in sentencing Broad, took into account his plea of guilty and demonstrated rehabilitation. He concluded that his offending was uncharacteristic and commenced after a tragic marital break up and loss of his family support network. Broad's wife had developed schizophrenia. It was also found that his motivation was not entirely commercial.

[22] In respect of each of Bakir, Hill, Gray and Broad, the sentencing judge was entitled to take into account their blameless conduct over the lengthy period between their offending and sentencing.

[23] Before this Court can interfere with a sentence under s 669A(1) of the *Criminal Code*,[6] it is necessary that error on the part of the sentencing judge be demonstrated. Once error is demonstrated, the Court has an unfettered discretion to substitute the sentence it considers appropriate.[7]

[24] In *Lacey v Attorney-General (Qld)*,[8] the majority reasons emphasised "the exceptional character of the Crown appeal against sentence". It was said:[9]

> "The treatment of Crown appeals against sentence as 'exceptional' indicated a judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy."

[25] Where an appeal against sentence is based merely on manifest inadequacy:

> "…appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons."[10]

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6 1899 (Qld).

7 *Lacey v Attorney-General (Qld)* (2011) 85 ALJR 508 at para [62].

8 (2011) 85 ALJR 508 at para [16].

9 At para [17].

10 *Wong v The Queen* (2001) 207 CLR 584 at [58].

[26] In *Hili v The Queen; Jones v The Queen*,[11] French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ rejected the contention that "manifest error is fundamentally intuitive" and accepted the view of the Court below that manifest error "arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it."

[27] In *Lowndes v The Queen*,[12] the Court observed:

> "...a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. ... The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice."

[28] McHugh J in *Everett v The Queen*[13] said:

> "If a sentencing judge imposes a sentence that is definitely below the range of sentences appropriate for the particular offence, the case can be regarded as falling within the rationale for conferring jurisdiction in respect of Crown appeals. It can be regarded as sufficiently exceptional to warrant a grant of leave to appeal to the Crown even if no question of general principle is involved. Such cases, however, are likely to be rare. Defining the limits of the range of appropriate sentences with respect to a particular offence is a difficult task. What is the range in a particular case is a question on which reasonable minds may differ. It is only when a court of criminal appeal is convinced that the sentence is definitely outside the appropriate range that it is ever justified in granting leave to the Crown to appeal against the inadequacy of a sentence. Disagreement about the adequacy of the sentence is not enough to warrant the grant of leave. Sentencing is too inexact a science to make mere disagreement the criterion for the grant of leave to appeal against the inadequacy of a sentence. The requirement of leave gives rise to the inference that Parliament intended that something more than mere error was to be the criterion of the grant of leave."

[29] It appears to me that the sentencing judge performed his task in an orthodox fashion. In particular, it appears that he considered and applied the provisions of s 16A of the *Crimes Act* 1914 (Cth) and the particular circumstances of each of the respondent's offending conduct. As the Court observed in *Hili v The Queen; Jones v The Queen*,[14] his Honour did not apply any erroneous principle.

[30] A judge sentencing for Commonwealth offences is usually required to have regard to decisions concerning similar circumstances with a view to achieving reasonable consistency in penalties imposed for like offences in like circumstances.[15]

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11 (2010) 272 ALR 465 at [60].
12 (1999) 195 CLR 665 at 671, 672.
13 (1994) 181 CLR 295 at 306, 307.
14 [2010] HCA 45 at para 48.
15 *Wong v The Queen* (2001) 207 CLR 584 at 591 per Gleeson CJ and *R v Ruha, Ruha & Harris; ex parte Cth DPP* [2010] QCA 10 at para [49].

[31] But as the Court remarked in *Hili v The Queen; Jones v The Queen*:[16]

> "Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.
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> The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt 1B of the *Crimes Act*. When it is said that the search is for 'reasonable consistency', what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form. That is why this Court held[17] in *Wong* that guidelines that the New South Wales Court of Criminal Appeal had determined should be used in sentencing those knowingly concerned in the importation of narcotics were inconsistent with s 16A of the *Crimes Act*. Those guidelines had made the weight of the narcotic the chief factor determining the sentence to be imposed, thus distracting attention from the several considerations set out in the non-exhaustive list of matters prescribed by s 16A(2) as matters 'the court must take into account' in fixing a sentence, if those matters are relevant and known to the Court.
>
> The first and paramount means of achieving consistency in federal sentencing is to apply the relevant statutory provisions. …"

[32] Whilst it does appear to me that the respondents have each been dealt with leniently, I am not persuaded that when due regard is had to the matters to which I have drawn attention, including the particular circumstances of the offending conduct in each case and mitigating circumstances, that the sentences have been shown to be manifestly inadequate. Accordingly, I would order that the CDPP's appeals against sentence be dismissed.

The applications for leave to appeal against sentence by Bakir and Hill

[33] Generally, for the reasons given by Atkinson J, I would refuse the respondents' applications for leave to appeal against sentence.

[34] **WHITE JA:** I have read the detailed examination by Atkinson J of the circumstances giving rise to the appeals against their convictions by Bakir, Hill and Gray; the applications for leave to appeal against sentence by Bakir and Hill; and

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16 [2010] HCA 45 at paras [48], [49] and [50].

17 (2001) 207 CLR 584 at 608 [65], 612-613 [78], 616 [87] per Gaudron, Gummow and Hayne JJ, 632 [131] per Kirby J.

the appeals against the sentences imposed on Bakir, Hill, Gray and Broad by the Commonwealth Director of Public Prosecutions ("CDPP"). I am grateful to her Honour for that careful analysis. I agree with her Honour's reasons that the appeals against the convictions should be dismissed.

[35] I also agree with her Honour's reasons for refusing Bakir and Hill's applications for leave to appeal against their sentences.

[36] I do not, however, share her Honour's conclusion that the appeals by the CDPP should be allowed. The following are my reasons.

The charges and penalties

[37] Bakir, Hill and Gray were each found guilty that between 22 April 2006 and 9 June 2006 each imported a commercial quantity of a border controlled drug, Gammabutyrolactone ("GBL"). These charges comprised counts 1, 2 and 3 on the indictment. Bakir and Hill were each found guilty that between 5 June 2006 and 11 June 2006 they each attempted to possess a commercial quantity of a border controlled drug, GBL, that was unlawfully imported – counts 5 and 6.

[38] Broad had pleaded guilty that between 22 April 2006 and 9 June 2006 he imported a commercial quantity of border controlled drug, GBL – count 4. He also pleaded guilty that between 5 June 2006 and 6 July 2006 he possessed a commercial quantity of a border controlled drug, GBL, that was unlawfully imported. Broad pleaded guilty to these charges on the first day of the trial. He was sentenced with the other defendants at the end of their trial. Broad also pleaded guilty to two charges under the *Drugs Misuse Act* 1986 (Qld), not the subject of any appeal.

[39] Bakir was sentenced to six years imprisonment on count 1 and four years imprisonment on count 5, both sentences to be served concurrently with a non-parole period of three years and three months. Hill was also sentenced to six years imprisonment on count 2 and four years imprisonment on count 6, those sentences to be served concurrently with a non-parole period of three years and seven months. Gray was sentenced to five years imprisonment on count 3 with a non-parole period of two years and six months. Broad was sentenced to five years imprisonment on count 4 and two years imprisonment on count 7, those sentences to be served concurrently with a non-parole period of two years.

Grounds of appeal

[40] The CDPP's grounds of appeal are:

Ground 1: The sentences imposed for the Commonwealth offences are manifestly inadequate.

Ground 2: The sentencing judge did not give sufficient weight to the circumstances of the case and in particular to the objective seriousness of the offences.

Ground 3: The sentencing judge gave too much weight to mitigating factors.

Discussion

[41] The respondents to the CDPP's appeal accepted the factual overview set out in counsels' appeal outline. It is a convenient summary for my purposes.

"1. During early 2006, Ben Radcliff, was a person involved in the drug trade on the Gold Coast. Radcliff and his associate, Glen Cook, conducted a business importing Gammabutyrolactone ("GBL"), a border controlled drug, and manufacturing that drug into Gammahydroxybutyric acid ("GHB"), a dangerous drug. Cook imported the GBL and then he and Radcliff would "cook" that drug to manufacture GHB. Radcliff found customers and sold the GHB.

2. In March 2006, Cook was arrested and taken into custody for drug importation offences.

3. On 23 April 2006, the Respondents Bakir and Hill "met with" Radcliff and demanded that he import GBL for them. They assaulted Radcliff, took his wallet, ATM card and car and told him that he would only get his car back if he imported the GBL for them.

4. After this meeting Radcliff contacted the Respondent Gray, who had previously been the girlfriend of his associate Cook. Radcliff was aware from an earlier discussion with her that she and Cook wanted to continue the importation of GBL even though Cook was in prison. Radcliff met with Gray, and told her of the demands that had been made of him by Bakir and Hill and asked if she could assist with importing the GBL.

5. Gray agreed to arrange the importation of the GBL. She told Radcliff that he would need to provide her with $7,000 up front, an address for the delivery of the substance and that he would have to provide a further $10,000 once the package had arrived.

6. As Radcliff did not have enough money to pay Gray he approached the Respondent Broad to become involved in the enterprise. Broad agreed to give Radcliff $5,500 to pay for the cost of the importation and to provide the address for delivery of the GBL. In return Broad was to receive a proportion of the GBL that was to be imported by Gray.

7. Radcliff subsequently provided the $7,000 to Gray, which was comprised of Broad's $5,500 and $1,500 of his own money. Radcliff also provided Gray with the delivery address that had been given to him by Broad.

8. On 6 June 2006, a package from overseas containing the GBL arrived at the Eagle Heights Post Office. That day Radcliff collected the package and on 8 June 2006 met Broad and gave it to him.

9. Shortly thereafter Radcliff was confronted by Bakir and Hill who demanded that he hand over the imported GBL. Radcliff explained that he did not have the package as he

had given it to Broad. Bakir told him that he had until the following day to get the package back and hand over to him.

10. In the evening of 8 June 2006, Bakir went to one of Broad's ex-girlfriend's home looking for Broad. Bakir left a message with the ex-girlfriend, asking that Broad contact him.

11. The following morning 9 June 2006, Radcliff met with Broad and his associate, Pita Wilson. Radcliff told them that Bakir and Hill wanted the GBL, but Broad refused to return the package telling him that he intended to keep it for himself.

12. Radcliff then left that meeting with Wilson in his mother's car. A short time later Bakir and Hill drove up behind them, pulled them over and Bakir then pulled Radcliff from the car and took him to his car.

13. Hill and Bakir kept Radcliff with them as they attempted to locate Broad. They attempted to telephone him. They eventually arranged to meet with Wilson to sort out the matter. Bakir and Hill released Radcliff only when they were satisfied he was unable to assist with getting the package back from Broad.

14. On 5 July the police attended a Gold Coast hotel room where Broad was found with three bottles of the GBL, cooking implements and a large quantity of manufactured GHB."

[42] Both GBL and gamma hydroxybutyric acid ("GHB") are border controlled drugs and the commercial quantity for each is one kilogram. Atkinson J has set out the relevant provisions of the legislation as well as the elements and evidence upon which each respondent could be convicted.[18]

[43] The CDPP's principal complaint is that the sentences imposed are too low. The errors identified are that in carrying out the balancing exercise involved in imposing sentence the sentencing judge did not give sufficient weight in each case to the objective wrongdoing by the respondents and gave too much weight to factors favourable to them. Although not a specific ground of appeal, the submissions proceeded on the basis that his Honour was led into error by impermissibly having regard to the nature of GHB and, necessarily, GBL. Error was also said to derive from relying on the sentence imposed in *R v Davidson*[19] to set "the range" because it was one of the few sentences which concerned GHB/GBL. Doing so, it was contended, strengthened the submission that his Honour had regard, impermissibly, to the nature of the drug.

[44] The High Court in *Adams v The Queen*[20] made plain that neither the legislative scheme in the *Customs Act* 1901 (Cth), (now in the *Criminal Code* (Cth)) nor s 16A of the *Crimes Act* 1914 (Cth) supported, as a relevant consideration in sentencing,

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18 At [72] to [86] of her Honour's reasons.

19 (2009) 75 NSWLR 150.

20 (2008) 234 CLR 143; [2008] HCA 15.

a resort to comparable levels of social harm which particular prohibited drugs were thought to cause.[21] The joint judgment said:[22]

> "Generalisations which seek to differentiate between the evils of the illegal trade in heroin and MDMA are to be approached with caution, and in the present case are not sustained by evidence, or material of which judicial notice can be taken."

Their Honours continued:[23]

> "In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme."

Their Honours added:[24]

> "Of course, the fixing of a maximum penalty is not the end of the matter, as was emphasised in *Ibbs v The Queen.*[25] But there is nothing in the *Customs Act*, or the evidence, or the demonstrated state of available knowledge or opinion, which requires or permits a court to sentence on the basis that possessing a commercial quantity of MDMA is in some way less anti-social than possessing a commercial quantity of heroin."

[45] The sentencing judge, after referring to the factual basis upon which each defendant came to be sentenced, commented that Radcliff expected that nine to 10 kilograms pure GHB would be produced from 10 to 12 bottles of GBL. Broad was found on 5 July 2006 to be in possession of 2,263 grams of pure GBL and 2,828 grams of GHB. The GHB would have required at least 2,338 grams of GBL to produce that amount. The conclusion was that Broad must have had a total of, at least, 4,601 grams of pure GBL in his possession at some stage. His Honour noted that there was evidence of some dissipation of some GBL earlier. That amount, he said, was "a significant quantity and well in excess of the commercial quantity required to establish the offence of one kilogram".[26] Calculations made and presented to his Honour were to the effect that 10 to 12 bottles of GHL would give a maximum financial return, after converting it into GHB, of between $180,000 and $200,000. While a significant sum, it was not, his Honour opined, "necessarily" as significant as some of the more serious importation offences where the street value of the drugs involved were many millions of dollars.

[46] His Honour observed that there were few comparable sentences relating to GBL/GHB and particularly since 6 December 2005 when the maximum penalty had increased from imprisonment for five years and/or a fine of $110,000 to life

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21 The sole ground of appeal in *Adams* was the contention that the appellant should have been sentenced on the basis that MDMA is less harmful than heroin.

22 At [9].

23 At [10].

24 At [11].

25 (1987) 163 CLR 447.

26 AR 972.

imprisonment; that GBL had been listed as a border controlled drug since 6 December 2005; and that the subject events occurred six months later. His Honour had been referred to *Adams* and, indeed, quoted in his reasons part of the passage set out above[27] and made other relevant observations. His Honour, therefore, plainly had in mind the strictures against a comparative harm-based approach and the legislative preference for quantities of drug, when sentencing.

[47] After discussing other matters, to which I shall return, his Honour said:[28]

> "Taking into account what I have said about Adams, the most useful decision on which I can rely in respect of setting sentences, seems to me to be that of the New South Wales Court of Criminal Appeal in Davidson v. The Queen …
>
> There the appellant was convicted of three counts of importing a commercial quantity of a border controlled drug [GBL] and one count of attempting to do so. He was sentenced to imprisonment for six years on each count, with a total term of eight years, due to partial accumulation of the sentences, and a single non parole period of four years and five months.
>
> The quantity of the drug imported in the three counts was more than 30 kilograms which, depending on what view one takes of the amount imported here, appears to be roughly comparable in respect of each separate importation. The attempt to import was another 19 kilograms.
>
> The sentence was imposed by the trial judge on the 8th of February, 2008, before the decision of the High Court in Adams v. The Queen, but the appeal occurred more than a year after the decision in Adams v. The Queen, which was referred to in the Court of Appeal's judgment. It was an appeal against sentence by the defendant which was dismissed. No remarks were made in respect of the adequacy of the sentence otherwise by the Court to suggest that it was less than appropriate, and it does seem to be a reasonably comparable decision to assist me in what I should do.
>
> The Court there did point out that Australian courts have not had much familiarity with offences in respect of this drug. It was also pointed out that while it was plainly an offence against Commonwealth law at the time of the offences there, it was then not a drug recognising [sic] or proscribed by New South Wales drug law, and it only became illegal in Queensland as was relevant to this trial some years ago.
>
> …
>
> It does seem to me, however, that when one compares decisions in respect of the sentencing of offences of this nature, that it is difficult to say, even in respect of some offences of importation of cocaine, to which I was taken, that there is necessarily a direct correlation sufficient to establish a head sentence range of ten to twelve years as

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27 At [44].

28 AR 980.

> was contended for by the prosecution. It seems to me that an appropriate range is that set in effect of six years in Davidson."[29]

The word "range" to which exception is taken is no more than a shorthand articulation that six years seems "about right" in the context of what immediately preceded its use.

[48] The CDPP contends that since the sentencing judge concluded that *Davidson* was "the most useful decision" he must have been erroneously influenced by the *nature* of the drug. This is to suggest that *Davidson* was the only decision to which his Honour had reference. He had been referred to many other cases, particularly concerning cocaine which he mentioned in the passage above. On this appeal the CDPP's written outline referred to the prosecutor's sentencing submissions below mentioning many previous decisions involving importation and/or possession of a border controlled drug. Because of the criticism levelled at his Honour about his use of *Davidson* I will set out those submissions:[30]

> "There are very few cases at appellate level concerning the importation of GBL, and indeed there are very few cases across the nation concerning the production or possession of GHB. Davidson … is the most recent of three cases concerning the importation of GBL. The earlier two … are discussed in Davidson…
>
> Davidson was convicted following a trial of three counts of importing a commercial quantity of GBL and one count of attempting to import GBL. Three packages containing a total of 30.5 kg of GBL were imported into Australia from China. He was sentenced to [a] total of 8 years imprisonment with a non-parole period 4 years 5 months. Davidson's appeal against sentence was dismissed. Apparently no Crown appeal was brought against the sentence.
>
> The quantity of GBL imported by Davidson on three occasions, albeit close together in time, is vastly greater than the amount involved in this case. It is submitted by the Crown that the 8 year sentence imposed on Davidson was light and does not sit with the observations of the court in Kevenaar, nor does it sit with the pattern of sentencing in Queensland for the importation of commercial quantities demonstrated by the following cases…"

The submissions then referred to *R v Shahrokhey-Zadeh*;[31] *R v Davies*;[32] *R v Oprea*[33] and *R v Harris*.[34]

[49] Shahrokhey-Zadeh was 21 and had no criminal history. He was convicted after a trial of procuring a person to travel to South America and return carrying 4,143.8 grams of cocaine with an estimated value of $1.6 million. A sentence of 12 years imprisonment with a non-parole period of six years was held not to be manifestly excessive on appeal.

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29 AR 980-982.
30 AR 1130.
31 [2006] QCA 4.
32 [2007] QCA 416.
33 [2009] QCA 184.
34 [2009] QCA 370.

[50] Davies was 33 with no previous convictions and pleaded guilty to attempting to possess a commercial quantity of cocaine – 2,240 grams. He expected to receive $2,000 for arranging for someone to collect the package. He was sentenced to seven years imprisonment with a non-parole period fixed at two years after an appeal.

[51] Oprea had a very old criminal history and was 45 at the time of the offence. He attempted to possess a marketable quantity of cocaine – 1,489.7 grams, with an estimated street value of $2 million. He was convicted after a trial and sentenced on the basis that he was a courier knowing that the parcel contained an illegal drug and was part of a significant importation of cocaine. This Court dismissed his application against his 10 year sentence with a non-parole period of six and a half years.

[52] Harris was Oprea's co-accused and less involved. She accepted the delivery of the package, believed to contain cocaine, in return for the forgiveness of a debt and a second hand motor vehicle. She absconded before her trial and on return she pleaded guilty to attempting to possess a marketable quantity of cocaine. She was a heroin addict with some previous criminal history. She was regarded merely as a "post box" for the delivery of the package. Her sentence of seven years imprisonment with a non-parole period of four years was not considered manifestly excessive by this Court.

[53] In *R v Lawrence; R v McDonagh*[35] there were three sales of GHB in very large amounts – over 17 kilograms for two supplies and 34 kilograms for the third supply. A Crown appeal against a sentence of five years and seven months imprisonment with a non-parole period of two and a half years on the principal offender was dismissed.

[54] The identity of the drug the subject of the charges is important to ascertain the amount of the drug which would constitute a commercial quantity. For example, the threshold commercial quantity for amphetamine and methamphetamine is .75 of a kilogram; cocaine is 2.0 kilograms; heroin is 1.5 kilograms; lysergide (LSD) is .002 of a kilogram; and opium is 20 kilograms. The commercial quantity of cannabis, on the other hand, is 125 kilograms. The selling value of these drugs is a relevant matter. The above comparable sentences to which his Honour was referred concerned, for the most part, drugs with a much greater value than those with which this appeal is concerned. An aspect of deterrence is to make the financial reward not worth the risk.

[55] On this appeal the CDPP referred, additionally, to *Director of Public Prosecutions (Cth) v De La Rosa*.[36] McLellan CJ at CL, with whom Simpson J and Barr AJ agreed (Allsop P and Basten JA dissenting), undertook detailed research into comparable sentences for the offence of importation of a border controlled drug. That case was a CDPP's appeal against the sentence imposed in the District Court of New South Wales in respect of an offender with a previous criminal history for robbery who had pleaded guilty to the importation of a border controlled drug, cocaine, in a marketable quantity, being 1,870 grams with an estimated street value of between $374,060 to $841,635 and a lesser wholesale value. That offender was sentenced to imprisonment for eight years with a non-parole period of five years.

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35 [2007] SASC 106.

36 [2010] NSWCCA 194.

The judge made a close analysis of a vast number of cases but of this exercise Simpson J observed:[37]

> "What can be drawn from the extensive and comprehensive survey of sentences contained in the judgment of the Chief Judge? On their face, they do not appear to establish a clear or coherent sentencing pattern. No doubt that is explicable, at least in part, by the wide variety of factors necessary to be taken into account in every sentencing decision (see, for example, *Wong v The Queen* [2001] HCA 64; 207 CLR 584, and s 16A itself). Nor, however, do they establish inconsistency to a level that might be of concern."

Her Honour also added:

> "… it would be a mistake to regard an established range as fixing the boundaries within which future judges must, or even ought, to sentence. To take that attitude would be, de facto, to substitute judicial selection of sentences in individual cases for the boundaries of sentencing for a particular offence laid down by Parliament. … Of course, it is well established that the maximum sentence is reserved for the most serious cases. It is equally well established that it would be an extraordinary proposition that a person convicted of an offence of importing prohibited drugs would escape any custodial penalty. The point I am making is that the ranges of sentences actually imposed, while illuminating, are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence. But is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned: *Wong* and *Leung*, at [59].
>
> In the end, the sentencing discretion is individual: it must be exercised by the individual judge, in respect of the individual offender. Significant sentencing considerations include the role played by the offender in the particular importation or enterprise, the quantity of the drug involved, and its estimated street or wholesale value (having regard, *inter alia*, where relevant, to its purity). Also of considerable significance are the character and antecedents of the offender (s 16A(2)(m)). This last consideration bears upon the offender's prospects of rehabilitation, and also to any claim for leniency made on his or her behalf by reason of prior good character."[38]

[56] In *Wong v The Queen*[39] Gaudron, Gummow and Hayne JJ spoke of the "elementary principle" involved in the precedent value of sentences:

> "… it is evident in cases like *House v The King*[40] and the discussion of when an appellate court may conclude that a trial judge's exercise of discretion has miscarried. Reference is made in *House* to two

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37 At [293].
38 At [304]-[305].
39 (2001) 207 CLR 584; [2001] HCA 64.
40 (1936) 55 CLR 499.

> kinds of error. First, there are cases of specific error of principle. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons. It follows that for a court to state what *should* be the range within which some or all future exercises of discretion should fall, must carry with it a set of implicit or explicit assumptions about what is, or should be regarded as, the kind of case which will justify a sentence within the specified range. It is those assumptions that may reflect or embody relevant principle, not the result.
>
> Similarly, recording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal."[41]

[57] In *Hili v The Queen; Jones v The Queen*,[42] a sentence appeal concerning income tax evasion, the High Court pronounced upon the proper approach to consistency in Federal sentencing.

> "Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.
>
> The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt 1B of the *Crimes Act*. When it is said that the search is for 'reasonable consistency', what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form. That is why this court held in *Wong* that guidelines that the New South Wales Court of Criminal Appeal had determined should be used in sentencing those knowingly concerned in the importation of narcotics were inconsistent with

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41 At [58]-[59]; 605.

42 [2010] HCA 45.

> s 16A of the *Crimes Act.* Those guidelines had made the weight of the narcotic the chief factor determining the sentence to be imposed, thus distracting attention from the several considerations set out in the non-exhaustive list of matters prescribed by s 16A(2) as matters 'the court must take into account' in fixing a sentence, if those matters are relevant and known to the Court."[43]

[58] Section 16A(1) of the *Crimes Act* (Cth) requires a court to impose a sentence "that is of a severity appropriate in all the circumstances of the offence". Subsection (2) lists certain non-exclusive matters which are relevant and known to the court. They are, relevant to these appeals,

> "(a) the nature and circumstances of the offence; …
>
> (f) the degree to which the person has shown contrition for the offence;
>
> (i) …
>
> (ii) in any other matter; …
>
> (g) if the person has pleaded guilty to the charge in respect of the offence – that fact;
>
> (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
>
> (i) the deterrent effect that any sentence or … may have on the person; …
>
> (k) the need to ensure that the person is adequately punished for the offence; …
>
> (m) the character, antecedents, age, means and physical or mental condition of the person;
>
> (n) the prospect of rehabilitation of the person;
>
> (p) the probable affect that any sentence … would have on any of the person's family or dependants."

[59] The sentencing judge outlined the mitigating factors which he applied in respect of each of the respondents. He dealt with Broad first. His Honour noted that Broad pleaded guilty to the importation offence on the first day of the trial and, while observing that it may have been because of the overwhelming nature of the evidence against him, he noted that Broad appeared to have intimated a willingness to plead guilty to the State offences at an earlier date. His Honour observed that Broad appeared to have uncharacteristically taken on this pattern of criminal behaviour after a tragic marital break up, his move to the Gold Coast and the loss of his family support network which he had since re-established. He was a drug dependent person who was now drug free and had taken significant steps to rehabilitate himself since his arrest by moving to another city, taking on good employment and reverting, to what his Honour observed, the referees regarded as his true character. His Honour made particular reference to his plea of guilty and his rehabilitation.

[60] His Honour noted that there were significant mitigating features for Gray. She had taken steps to rehabilitate herself and was supported by a large number of "glowing

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43 At [48]-[49].

references" speaking of her character and ability and how she had turned her life around since her offence. She had a difficult childhood caused by the early death of her mother. She then took on raising her younger brothers. At the time of sentence she had worthwhile employment and appeared to be succeeding. She had a minor criminal history. As Muir JA has commented,[44] those remarks tended to underestimate Gray's claim for leniency. The evidence revealed that she had given up her studies at Bond University where she had a scholarship and was performing well to care for her dying mother and to support the family. After her mother died she housed her brothers in her apartment and provided them with material and emotional support. It was not suggested that her motives for offending were anything other than for commercial gain but, against the background of her history and the moderate amount of money that she stood to obtain from the conduct, it could not be said, as Muir JA observes, that her motivation was "greed rather than desperation".[45]

[61] The sentencing judge noted that Bakir suffered from physical and psychiatric problems which followed a major motor vehicle accident in 2003. These included continual headaches, a diagnosis of schizophrenia and the loss of his business. He was married with three young children but was separated from his wife. The family lived in Sydney and imprisonment would be more difficult for him with lack of family support and because of his significant physical and mental injuries. Bakir had been in custody in New South Wales in respect of an unrelated charge but which was potentially relevant to the sentencing as that time served in custody which was not declarable. His Honour took that time into account, but not fully.

[62] Hill was noted to have a good work history and may have attempted to be a calming influence on Bakir. He had been in prison in Queensland for four and a half months arising out of the assaults on Radcliff and the unlawful use of his motor vehicle. His Honour took this into account by reducing the non-parole period from four years to three years and seven months.

[63] There can be no doubt that to the extent that he had been made aware of them his Honour took into account relevant matters mentioned in s 16A and other appropriate matters. It could not be said that his Honour overlooked the serious criminal nature of the conduct of each of these respondents. He had presided over a relatively lengthy trial including the pre-trial hearings.

[64] Although s 669A(1) of the *Criminal Code* (Qld) allows this Court "in its unfettered discretion" to vary the sentence and impose such sentence as to the Court seems proper, the exercise of that discretion requires that error by the sentencing judge be demonstrated.[46] The majority in *Lacey v Attorney-General (Qld)* said that "historically" Crown appeals against sentence were to be regarded as "exceptional" and only undertaken "to establish some matter of principle … for the governance and guidance of courts having the duty of sentencing convicted persons".[47] The appellate jurisdiction conferred upon this Court by s 669A requires "that error on the part of the sentencing judge be demonstrated before the Court's 'unfettered discretion' to vary the sentence is enlivened."[48] It was fundamental in the analysis

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44 At [19].

45 At [20].

46 *Lacey v Attorney-General (Qld)* [2011] HCA 10 at [62].

47 At [16] quoting from Barwick CJ's judgment in *Griffith v The Queen* (1977) 137 CLR 293 at 310 and endorsed in *Everett v The Queen* (1994) 181 CLR 295 at 300.

48 [2011] HCA 10 at [62].

of the majority in *Lacey* that s 669A did not involve a substitution by this Court of its own opinion about an appropriate sentence when hearing an appeal under that section.

[65] It cannot be demonstrated that his Honour engaged in any erroneous reasoning or overlooked any relevant factor. Therefore what must be shown is that his Honour arrived at sentences "markedly different" from sentences imposed in other comparable cases such that there must have been some misapplication of principle which is not apparent from the reasons. His Honour did not just consider the sentence imposed in *Davidson* but had reference to other cases. Those relied on, particularly by the CDPP, show that while lenient these sentences are not so low as to indicate error. I would dismiss the CDPP's appeals against the sentences imposed on Bakir, Hill, Gray and Broad.

ATKINSON J:

Introduction

[66] The Commonwealth Director of Public Prosecutions presented a nine count indictment in the Supreme Court of Queensland charging four defendants, Yassar Bakir, Steven Hill, Candice Gray and Anthony Broad, with various offences concerning the dangerous drug, Gammabutyrolactone ("GBL"), and another dangerous drug which can be manufactured from it, Gamma hydroxybutyric acid ("GHB").

[67] On 12 October 2010, Anthony Broad pleaded guilty to one count of importing a commercial quantity of the border controlled drug, GBL, between 22 April and 9 June 2006, contrary to ss 307.1(1) and 11.2(1) of the *Criminal Code Act* 1995 (Cth) (the "Commonwealth Code") (count four); one count of possessing, between 5 June and 6 July 2006, a commercial quantity of the border controlled drug GBL, that was unlawfully imported contrary to s 307.5(1) of the Commonwealth Code (count seven); one count of unlawfully producing the dangerous drug GHB between 2 and 6 July 2006, contrary to s 8(d) of the *Drugs Misuse Act* 1986 (Qld) ("*Drugs Misuse Act*") with the circumstance of aggravation that the quantity of the drug exceeded two grams (count eight); and one count of unlawfully having possession of the dangerous drug GHB in excess of two grams on 5 July 2006 contrary to s 9(c) of the *Drugs Misuse Act* (count nine).

[68] On 27 October 2010 Yassar Bakir, Steven Hill and Candice Gray were found guilty of various offences by a jury after a twelve day trial. Bakir was convicted on one count of importing a commercial quantity of the border controlled drug GBL between 22 April and 9 June 2006 contrary to ss 307.1(1) and 11.2(1) of the Commonwealth Code (count one); and one count of attempting to possess, between 5 and 11 June 2006, a commercial quantity of the border controlled drug GBL that was unlawfully imported contrary to ss 307.5(1) and 11.1(1) of the Commonwealth Code (count five). Hill was convicted by the jury on one count of importing a commercial quantity of the border controlled drug GBL between 22 April and 9 June 2006 contrary to ss 307.1(1) and 11.2(1) of the Commonwealth Code (count two); and one count of attempting to possess, between 5 and 11 June 2006, a commercial quantity of the border controlled drug GBL that had been unlawfully imported contrary to ss 307.5(1) and 11.1(1) of the Commonwealth Code (count six). Gray was convicted by the jury of one count of importing a commercial quantity of the border controlled drug GBL between 22 April and 9 June 2006 contrary to s 307.1(1) of the Commonwealth Code (count three).

[69] The maximum penalties for importing a commercial quantity of a border controlled drug, contrary to s 307.1(1) of the Commonwealth Code, and for possessing a commercial quantity of a border controlled drug, contrary to s 307.5(1) (and s11.1(1)) of the Commonwealth Code are life imprisonment and/or a fine of $825,000. The maximum penalties for producing and for possessing a dangerous drug specified in schedule 2 of the *Drugs Misuse Regulations* 1987 (Qld) (the "Regulations") in excess of the quantity specified in schedule 3 of the Regulations are 20 years imprisonment.

[70] Yassar Bakir was sentenced to six years imprisonment on count one and a concurrent term of four years imprisonment on count five. His non-parole period was specified as three years three months. Steven Hill was sentenced to six years imprisonment on count two and a concurrent term of four years imprisonment on count six. His non-parole period was specified as three years seven months. Gray was sentenced to five years imprisonment on count three with a non-parole period of two years six months. Broad was sentenced to five years imprisonment on count four and concurrent periods of imprisonment of three and a half years on count eight and two years in respect of each of counts seven and nine. His non-parole period was fixed at two years.

[71] Various applications and appeals were filed. Bakir, Hill and Gray appealed against their convictions; Bakir and Hill applied for leave to appeal against sentence; and the Commonwealth Director of Prosecutions (DPP) appealed against the sentences imposed on Bakir, Hill, Gray and Broad on counts one to seven. All applications and appeals were heard together.

The offences of which the appellants were convicted

[72] The counts of which Bakir, Hill, Gray and Broad were convicted concerned breaches of Commonwealth and State laws. Counts one and two of which Bakir and Hill were convicted, alleged breaches of ss 11.1(1), 11.2(1), 307.1(1) and 307.5(1) of the Commonwealth Code. Gray was convicted on count three of an offence contrary to s 307.1(1) of the Commonwealth Code. Broad was convicted of offences contrary to ss 11.2(1), 307.1(1) and 307.5(1) of the Commonwealth Code and ss 8(d) and 9(c) of the *Drugs Misuse Act*.

[73] The Commonwealth Code is a Schedule to the *Criminal Code Act* 1995 (Cth). As its name suggests, it codified the criminal law of the Commonwealth. Division 3 of Part 2.2 applies to all offences under the Commonwealth Code. It provides:

> "**3.1 Elements**
>
> **(1) An offence consists of physical elements and fault elements.**
>
> (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
>
> (3) The law that creates the offence may provide different fault elements for different physical elements.
>
> **3.2 Establishing guilt in respect of offences**
>
> In order for a person to be found guilty of committing an offence the following must be proved:
>
> (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element."

[74] Also relevant to criminal responsibility under the Commonwealth Code is s 5 which deals with the mental or fault element of a crime. Section 5 provides:

"5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness."

[75] However, as provided by s 3.1(2), not all offences or elements of an offence under the Commonwealth Code require a fault element. Division 6 of the Commonwealth Code deals with cases where fault elements are not required:

"Division 6 – Cases where fault elements are not required

6.1 Strict liability

(1) If a law that creates an offence provides that the offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

6.2 Absolute liability

(1) If a law that creates an offence provides that the offence is an offence of absolute liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is unavailable.

(2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.

(3) The existence of absolute liability does not make any other defence unavailable."

[76] Commonwealth drug offences are set out in Part 9.1 of the Commonwealth Code. The substantive offence set out in s 307.1(1) prohibits importing a commercial quantity of a border controlled drug:

"**307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants**

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant; and

(c) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c)."

[77] The definitions relevant to this offence are found in s 300.2 of the Commonwealth Code:

"***import***, in relation to a substance, means import the substance into Australia and includes:

(a) bring the substance into Australia; and

(b) deal with the substance in connection with its importation.

border controlled drug means a substance, other than a growing plant:

(a) listed or described as a border controlled drug in section 314.4; or

(b) prescribed by regulations under paragraph 301.3(1)(a); or

(c) specified in a determination under paragraph 301.8(1)(a)."

Both GBL and GHB are listed as border controlled drugs in s 314.4 of the Commonwealth Code.

"***commercial quantity***, in relation to a controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor means a quantity not less than the quantity specified as a commercial quantity of the drug, plant or precursor in:

(a) Division 314; or

(b) regulations under section 301.5; or

(c) a determination under section 301.10."

The amount of GBL and of GHB which is specified as a commercial quantity is one kilogram.

[78] Section 300.5 provides that the prosecution does not have to prove the identity of the particular border controlled drug. It provides:

"**300.5 Particular identity of drugs, plants and precursors**

If, in a prosecution for an offence against this Part, it is necessary for the prosecution to prove that a person knew, or was reckless as to whether, a substance or plant was a controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border

controlled precursor, it is not necessary for the prosecution to prove that the person knew, or was reckless as to, the particular identity of the controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor."

[79] The substantive offence set out in s 307.5 prohibits the possession of unlawfully imported border controlled drugs:

"**307.5 Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants**

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4)."

[80] Possession is defined in s 300.2:

"***possession*** of a thing includes the following:

(a) receiving or obtaining possession of the thing;

(b) having control over the disposition of the thing (whether or not the thing is in the custody of the person);

(c) having joint possession of the thing."

[81] Also relevant to these offences are ss 11.1 and 11.2 found in Part 2.4 of the Commonwealth Code which deals with extensions of criminal responsibility. Section 11.1 deals with attempts:

"**11.1 Attempt**

(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

(4) A person may be found guilty even if:

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.2A (joint commission), section 11.3 (commission by proxy), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud)."

[82] Section 11.2 extends criminal responsibility to parties to an offence:

"**11.2 Complicity and common purpose**

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

> (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
>
> (a) terminated his or her involvement; and
>
> (b) took all reasonable steps to prevent the commission of the offence.
>
> (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.
>
> (6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).
>
> (7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
>
> (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
>
> (b) is guilty of that offence because of the operation of subsection (1);
>
> but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence."

[83] A "special liability provision" is defined in the Dictionary of the Commonwealth Code to mean:

> "(a) a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or
>
> (b) a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or
>
> (c) a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing."

[84] The prosecution case against Gray that she imported a commercial quantity of a border controlled drug required proof of the following elements beyond reasonable doubt:

1. She imported a substance. The physical element is found in s 307.1(1)(a) and fault element of intention in s 5.6(1) of the Commonwealth Code.

2. The substance was a border controlled drug. The physical element is found in s 307.1(1)(b) and fault element of recklessness in s 307.1(2); and

3. The quantity imported was a commercial quantity. The physical element is found in s 307.1(1)(c). Section 307.1(3) provides the fault element with regard to the quantity is absolute liability.

The case against her, in the alternative, was that she aided and abetted another to commit that offence and therefore was herself guilty of that offence under s 11.2(1) of the Commonwealth Code.

[85] The prosecution case against Bakir and Hill with regard to the importation offence was that they either "counselled or procured" or "aided and abetted" Radcliff's importation of the drug and were therefore guilty of the offence under s 11.2(1) of the Commonwealth Code. The prosecution was required to prove the following elements beyond reasonable doubt with regard to each of them:

1. His conduct in fact aided, abetted, counselled or procured the commission of the importation offence by Radcliff (s 11.2(a)); and
2. The offence was committed by Radcliff (s 11.2(b)); and
3. (a) he intended that his conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type Radcliff committed (s 11.2(3)(a)); or

   (b) he intended that his conduct would aid, abet, counsel or procure the commission of an offence and was reckless about the commission of the offence (including its fault elements) that the other person in fact committed (s 11.2(3)(b)).

[86] The prosecution case against Bakir and Hill with regard to attempted possession was that they each attempted to have possession of a commercial quantity of a border controlled drug which had been imported.

Factual background

[87] The factual basis of the charges against the defendants commence in late 2005 to early 2006 when a person called Ben Radcliff was involved in the drug trade on the Gold Coast. Radcliff was an indemnified witness in the trial of these matters. Radcliff and his associate, Glen Cook, conducted a business importing GBL, a border controlled drug, and manufacturing that drug into GHB, a dangerous drug commonly known as "fantasy" or "fanta". Cook imported the GBL and then he and Radcliff would "cook" that drug to manufacture GHB. The GBL used by Cook, as observed by Radcliff, was found in distinctive purple coloured bottles containing 700-800 millilitres in volume, each with a press-top cap and labels with Asian writing on them. Radcliff found customers and sold the GHB in bottles ranging in size from 500 millilitres to 10 litres. Hill was one of his customers.

[88] On 16 March 2006, Cook was arrested and taken into custody for drug importation offences. When he was arrested, he was found in possession of a suitcase containing four of the distinctive purple bottles. The total quantity of liquid GBL found in bottles was 3,960.5 grams. This was the subject of an admission by Bakir and Hill at the trial. After Cook's arrest, Radcliff stopped selling GHB although he was approached by Gray, Cook's girlfriend, who asked him if he wanted to assist in selling GHB for Cook again.

[89] On 23 April 2006, Bakir and Hill met up with Radcliff and demanded that he import GBL for them. They assaulted Radcliff, took his wallet, ATM card, his PIN number and his car and told him that he would only get his car back if he imported the GBL for them. Bakir said to Radcliff, in the presence of Hill and another person, "You know about this Fanta and how to get it into Australia." Radcliff protested that he did not want to get involved particularly as he had charges pending against him at that time. Then Bakir said, "I don't care about that. You're gonna speak to who you need to speak to to make this happen." Radcliff said he would see what he could do. Bakir said to him, "Well, you've got two weeks to organise it." Radcliff never saw his car again. Radcliff's father saw the injuries to his son that evening.

[90] After this meeting Radcliff immediately contacted Gray on his mobile telephone. Radcliff was aware from the earlier discussion with her that she and Cook wanted to continue with the importation of GBL in spite of the fact that Cook was in prison. Radcliff met with Gray and told her of the demands that had been made of him by Bakir and Hill and asked if she could assist with importing the GBL. The meeting took place outside "The Shores" apartments where Gray lived. He then travelled by taxi to his residence at Sorrento.

[91] From the early evening of 23 April to the early morning of 24 April 2006, Gray and Bakir were in frequent telephone contact through text message and voice calls. Gray then visited Cook in jail on 24 April 2006.

[92] Gray agreed to arrange the importation of the GBL. She told Radcliff that he would need to provide her with $7,000 up front, an address for the delivery of the substance, and that he would have to provide a further $10,000 once the package had arrived. She told him that there would be between 10 and 12 bottles of GBL coming in. As Radcliff did not have enough money to pay Gray, he approached Broad to become involved in the enterprise, specifically mentioning that Bakir and "The Finks" wanted Radcliff to import GBL into Australia. Broad agreed to give Radcliff $5,500 to contribute to the up front cost of the importation and to provide the address for delivery of the GBL. In return Broad was to receive a proportion of the GBL that was to be imported by Gray.

[93] Radcliff subsequently provided the $7,000 to Gray, which was comprised of Broad's $5,500 and $1,500 of his own money. Radcliff also provided Gray with the delivery address that had been given to him by Broad, which was the residence at Eagle Heights of Kayla Smith, Broad's girlfriend at the time. Radcliff met with Gray about a week later when she told him she had received confirmation that the parcel was on its way because she had a tracking number from her overseas contact. At about the same time Hill telephoned Radcliff on a number of occasions to follow up with him how he was going with the importation and giving stern warnings as to what might happen to him if he thwarted Bakir.

[94] On 6 June 2006, a package from overseas addressed to Smith containing the GBL arrived at the Eagle Heights post office on Tambourine Mountain and was collected by Smith and Radcliff. His evidence, which was contradicted by the post office records, was that it arrived on 8 June 2006. The package was a bulky square brown cardboard box of between 20 to 30 centimetres cubed in dimension, weighing about 10 kilograms. The consignment label was written in Asian writing. The Australia Post tracking record showed that it came from China.

[95] Radcliff met Broad at Melba's Bar in Surfers Paradise and Radcliff asked Broad if he wanted to take it as he was driving his mother's car and did not want the parcel in it. Broad agreed and the parcel was transferred to Broad's car. They returned to Melba's Bar and then Broad left. Gray arrived and asked if the parcel had arrived and, when Radcliff confirmed it had, she asked when she would get the $10,000. He told her she would get it in the next day or two.

[96] Shortly thereafter Radcliff was confronted by Bakir and Hill. Bakir angrily demanded of Radcliff "Where's my parcel?" Radcliff explained that he did not have it as he had given it to Broad for safekeeping. When Bakir angrily asked why Broad was involved, Radcliff explained that Broad had put money into the deal. Bakir told him that he had until the following day to get the package back and hand

it over to him. Bakir told him to explain to Broad that Broad would be reimbursed for the money he had put in. After this meeting, Radcliff tried to contact Broad, finally contacting him on the telephone of his girlfriend, Phoebe Brown. Radcliff arranged to meet Broad the next morning at the Northcliffe Surf Club.

[97] During the evening of 8 June 2006, Bakir went to the home of Jennifer Doherty, Broad's ex-girlfriend, looking for Broad. Bakir left a message with Melissa Young, who also lived at that house and asked her to pass on a message to "Tony". Young told Bakir that as Broad did not live there, the only way she could do that was through Broad's ex-girlfriend and she was not at home. As Young went to shut the door, Bakir said his name was "Yassar, Yassar, from the Finks." The message was passed on to Broad by Doherty. Broad telephoned his associate, Peter Wilson. The series of telephone conversations by which the message was passed on will be referred to in detail when dealing with the ground of appeal about their admissibility.

[98] On the following morning, 9 June 2006, Radcliff met with Broad, who was accompanied by Wilson, at the Northcliffe Surf Club. Radcliff had previously been assaulted by Wilson. Radcliff told them that Bakir and Hill wanted the GBL, but Broad refused to return the package telling Radcliff that he intended to keep it for himself. He told Radcliff that, "We'll handle them." Radcliff then left that meeting with Wilson in the car belonging to Radcliff's mother. A short time later Bakir and Hill drove up behind them, pulled them over and Bakir then pulled Radcliff from the car and took him to his own car.

[99] Hill and Bakir kept Radcliff with them as they attempted to locate Broad. They drove around and Bakir yelled at Radcliff who feared for his own safety. They tried to telephone Broad. They eventually arranged to meet with Wilson to sort out the matter. Wilson arrived in Radcliff's mother's car with Matthew Hanrahan as a passenger.

[100] Radcliff explained to Bakir and Hill that he needed to have a urine test done for court. They agreed to drive Radcliff to the pathology collection centre to have the test done. Radcliff rang his father who was required to identify him for the test and they all met at the Southport office of Sullivan Nicoladies. Radcliff's father described Radcliff as looking "petrified" and left after he had identified his son. Bakir and Hill released Radcliff only when they were satisfied that he was unable to assist with getting the package back from Broad.

[101] Hill telephoned Broad's girlfriend, Brown, on 9 June 2006 and told her he was trying to get in contact with Broad. Amongst other things, Hill said, "I'm trying to stop world war 3 from starting today" and "I've got Benny with me". Hill went on to say, "All I need to try and do is try and get Tony to speak with Ben." Brown later said, "Benassi called my phone last night from Melba's saying you had come to stand over him or something and he was about to get beaten up." Hill then said, "He's owes something to a friend of mine … and I'm trying to be the middle man because my friend's got a pretty bad temper." The full transcript of that conversation is reproduced later in these reasons.

[102] On 10 June, Bakir and Gray, who had formerly been in a relationship, flew to Sydney together.

[103] On 14 June 2006, Carmen Hilton observed Broad and Brown in her unit in possession of buckets, measuring cups, caustic soda, demineralised water and

something that looked like it was in methylated spirits bottles. Hilton left the unit as they started to heat up one of the bottles. She could smell a strong burning smell.

[104] On 5 July 2006 the police attended a hotel room at the Maldives Resort on the Gold Coast occupied by Broad, Brown and Hanrahan. They found three bottles of GBL, containing 964.9 grams, 909.5 grams and 438.9 grams respectively, cooking implements and 2.82 kilograms of manufactured GHB. This was the subject of an admission at the trial by Bakir and Hill.

[105] Radcliff was examined in a hearing before the Australian Crime Commission ("ACC"). Radcliff later saw Hill at Melba's Bar. Hill explained that "The Finks" did not want to pursue anything at that time because of the ACC hearings but that Radcliff should be ready to be asked a favour in the next six to 12 months. Smith was also examined at a hearing before the ACC and gave evidence that two or three weeks after the package was collected, Broad gave her 500 millilitres of fantasy.

The trial

[106] The trial was allocated to a specific trial judge who managed it and conducted five days of pre-trial hearings. The trial proceeded in the Supreme Court on 12 October 2010 after various pre-trial rulings were made by the learned trial judge. As previously mentioned, Broad pleaded guilty to four counts in the absence of the jury. His sentence was adjourned for mention at the conclusion of the trial. Bakir, Hill and Gray were tried by jury and convicted of the counts referred to in paragraph [3] of these reasons.

[107] The prosecution called evidence from Australian Federal Police agent David Grant, Queensland Police Service officers, Detective Senior Constable Sean Ryan and Detective Sergeant Murray O'Connell, various witnesses who gave evidence as to records held, *inter alia*, by Australia Post, Customs, the Commonwealth Bank of Australia, Corrective Services and a pathology firm. In addition there was expert evidence called by a forensic chemist and the evidence of four lay witnesses Carmen Hilton, Matthew Hanrahan and Ben Radcliff and his father. There is no doubt that the evidence of Ben Radcliff was critical to the prosecution case. The defendants called no evidence.

[108] Addresses to the jury took place over two days and then the judge summed up comprehensively to the jury with a power point presentation to aid them in their understanding of their task. Both a copy of the summing up and the power point slides were provided to counsel for comment prior to their delivery to the jury. The power point presentation assisted by clearly summarising the matters dealt with in the summing up as well as, of course, making the experience more interesting for the jury and therefore more likely to be remembered. A printed copy of the power point presentation was given to the jury. Thus his Honour engaged the jury with the traditional oral presentation, the visual power point presentation and a written record of that presentation.

[109] His Honour's oral summing up was a model of clarity. After repeating the charges, his Honour told the jury that his summing up would be conducted in four parts:

- how to approach their function of assessing the evidence;
- the elements of the offences in the context of the allegations against the defendants focussing on the principal issue in the case – how far they could rely upon the evidence of Ben Radcliff in deciding whether the

prosecution had established its case against each of the defendants beyond reasonable doubt;

- a summary of the relevant evidence; and
- a summary of the submissions by counsel.

[110] In proceeding in the way in which he did, his Honour avoided inflicting on the jury the boredom and incomprehension referred to so wittily by Lord Justice Moses in the Annual Reform Lecture entitled "Summing Down the Summing-Up" delivered at the Inner Temple in London on 23 November 2010:

> "It is customary at the start for lecturers, after a few words of modest demure at the overblown introduction, to seek to attract their audience's attention ... to permit a glance at the end in view, possibly even a *tour d'horizon* to comfort the listeners and enable them to tick off the milestones as they are led to the summit, confident that the possibility of an early drink or even dinner will not be altogether postponed.
>
> I am sorry to disappoint. I shall speak to you at length; I cannot even say how long I will be. There will be few intervals; about once every 1½ hours if you are lucky, or 2 hours. I cannot say how long this will last, certainly more than a day, so please do not believe you can make any sensible arrangements for the rest of the week. You will not be able to take a proper note; even if you had pen and paper, your neighbour will be pressing hard upon your writing arm. You cannot interrupt or ask questions while I am speaking. To those of you who are not lawyers, or practise only in the commercial court, if that is not tautology, I shall be speaking in a language entirely foreign to you. There will be few visual aids; I shall expect throughout to capture your attention with the power of my voice, speaking faster during those parts of the process which I do not really understand and more slowly when it is really important.
>
> Before I finish my lecture it would be as well if you did not discuss it amongst yourselves because you will not, until I finish, have learnt all I wish to teach nor had the opportunity to appreciate my objective. Please, if I haven't finished today do not discuss it with anyone else when you get home tonight. When I have finished I shall set you an exam. It is not the sort of exam with which you will be familiar. You must all agree the answer. You will receive the same mark and you will never know if you have reached the right answer."

[111] In this case, the judge explained the structure of the summing up during the introduction, told the jury how long it was likely to take and used clear, unambiguous language and visual aids.

[112] After two days of deliberation the jury returned the verdicts referred to earlier in these reasons.

Grounds of appeal against conviction

[113] Bakir argued the following grounds of appeal, as amended by leave at the hearing of the appeal:

"Ground 1
The verdict of guilty in relation to the charges of importation of a commercial quantity of a border controlled drug (Count 1) and of attempting to possess a commercial quantity of a border controlled drug (Count 5) were unreasonable having regard to the evidence.

Ground 2
The learned trial Judge erred in ruling as admissible the series of telephone calls on 8 June 2006 between Anthony Broad, Jennifer Doherty and Pita Wilson between 11.35pm and 11.43pm.

Ground 2A
The learned trial Judge erred in ruling admissible against Bakir:

(i) Call No. 19 (CSN 592) between Hill and Brown at 3.47 pm on 9 June 2006; and
(ii) The series of telephone intercepts on 8 June 2006, between Broad, Doherty and Wilson.

Ground 2B
The learned trial Judge erred in his directions to the jury by failing to indicate how the jury were to use the series of telephone intercepts outlined in Ground 2A(ii).

Ground 3
The learned trial Judge erred in ruling as admissible the evidence in relation to the events surrounding the importation of a package, the searches conducted and subsequent arrest of Glen Christopher Cook in March 2006.

Ground 4
The learned trial Judge erred in rule [*sic*] as admissible the evidence surrounding the production of a dangerous drug by Anthony Broad in June 2006, as well as the search conducted by Police at the Maldives Resort on 5 July 2006 and the arrest at that time of Anthony Broad and Phoebe Brown.

Ground 5
The learned trial Judge failed to properly and adequately direct the jury as to the use that could be made of the evidence complained of in grounds (3) and (4) hereof.

Ground 6
The learned trial Judge erred in ruling that there was independent corroborative evidence to support the testimony of Ben Radcliff.

Ground 6B
The learned trial Judge erred in his directions to the jury on corroboration.

Ground 7
The learned trial Judge erred in his direction to the jury on imports."

[114] The amended grounds of appeal on behalf of Hill were identical save that they omitted reference to Bakir's ground 2A(i) so that ground 2A was:

"The Learned Trial Judge erred in ruling admissible against [Hill] the series of telephone intercepts on 8 June 2006, between Broad, Doherty and Wilson."

[115] Gray argued the following grounds of appeal:

> "Ground 1: It was not open to the jury, on the whole of the evidence, to be satisfied of [Gray's] guilt beyond reasonable doubt.
>
> Ground 2: The learned trial judge erred in permitting the prosecution to adduce evidence of the discovery of a quantity of [GBL] in the possession of Glen Cook on 16 March 2006.
>
> Ground 3: The learned trial judge erred in permitting the prosecution to adduce evidence of the discovery of a quantity of [GBL] in the possession of Anthony Broad on 9 July 2006.
>
> Ground 4: The learned trial judge erred in failing to direct the jury as to the use that they might make of the evidence referred to in Grounds 2 and 3.
>
> Ground 5: The learned trial judge erred in directing the jury that there was evidence capable in law of corroborating the testimony of Ben Radcliff."

Verdicts unreasonable

[116] The statutory basis for ground 1 of the appeals by Bakir, Hill and Gray is found in s 668E(1) of the *Criminal Code Act* 1899 (Qld). Section 668E provides:

> "**668E Determination of appeal in ordinary cases**
>
> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.
>
> (3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

[117] The test to be applied by the court to this ground is that articulated by the High Court in *M v The Queen* (1994) 181 CLR 487 at 493:[49]

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[49] See *Jones v The Queen* (1997) 191 CLR 439 at 452; *MFA v The Queen* (2002) 213 CLR 606 at 614-615, 623-624.

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[118] In the case against Bakir and the case against Hill, the prosecution was required to prove beyond reasonable doubt that the defendant knew that GBL was imported into Australia from overseas as there was no Queensland law at that time making it unlawful to produce or possess GBL. The appellants' argument was that it was not open to the jury to find beyond reasonable doubt that they knew that GBL was to be imported into Australia from overseas.

[119] The appellants argued that the only evidence adduced in the prosecution case touching upon Bakir's and Hill's knowledge that an importation from overseas was to occur was Radcliff's evidence that on 23 April 2006, Bakir said to him, "You know about this fanta and how to get it into Australia." They submitted that the evidence given by Radcliff when he was cross-examined at trial in relation to the evidence he gave at the committal cast grave doubts with regard to this essential part of the prosecution case.

[120] Counsel for Bakir submitted that there were two troubling aspects of his evidence: firstly, it was not "fanta" which was a colloquial name of the finished drug, GHB, which was to be imported at all, but rather its precursor GBL. This attempt to analyse with linguistic precision, a colloquial request for an illicit substance is without substance. Both GHB and GBL are border controlled drugs. Evidence was led from Radcliff that the terms fanta, fantasy, G, GBL and GHB were all used colloquially to describe Gamma hydroxybutyric acid. An independent examination shows that the jury were entitled to be satisfied that when Bakir used the term "fanta" in this context he was referring to GBL. In any event, because of s 300.5 of the Commonwealth Code, the prosecution does not have to prove that the person knew, or was reckless as to, the identity of the particular border controlled drug.

[121] Secondly, and more importantly, it was submitted that the only evidence adduced by the prosecution on the issue of importation from overseas rested on the prosecution proving beyond reasonable doubt that Bakir said the words "into Australia". This was the evidence-in-chief given by Radcliff at the trial. He was cross-examined about the version of the conversation he had given at the committal in which he said Bakir demanded that he source fantasy for him. Radcliff had not initially testified at the committal that Bakir had explicitly mentioned importing it. Radcliff's response was that, "It's a drug that needs to be imported into Australia; it's not produced here … . To the best of my recollection, he was asking me to arrange to get the drug into Australia and speak to to who I had to speak to do it." When he was asked at the committal whether Bakir said where he wanted him to get it from, Radcliff replied, "No, he didn't. He didn't tell me exactly where he wanted to get it from, but he obviously knew that I was – through people – that – knew that I was good friends with Glen and obviously he saw me as a way of getting it."

[122] Cross-examination by Bakir's counsel at the trial was then directed to the questions asked of Radcliff and the answers given by him at the committal about the source of the GBL. Part of the cross-examination at the trial was as follows:

> "The Prosecutor said, 'Did anything happen to make you know or to make you believe he knew where it came from?' Answer, 'Not at that point, no.'? -- Well, I believe he did.
>
> No, no. Your answer is that that I've just put to you; is that right? -- If that's what it says there, yes.
>
> Question: 'After you spoke did he say anything back about that?' You said, 'What's that, sorry?' 'Did he say anything back' – sorry. 'Did you say anything back about getting the Fanta for him?', and you said, 'Well, I was – it was just put on me that I had to do it and I had no option, really. I was to import it and make it all happen and bring it to him once it had happened.' Is that your response? - - Yes.
>
> But you didn't claim that he said that you were to import it, just that you knew if you were going to get it you'd have to import it? -- It's something that needs to be imported into the country."

[123] Cross-examination followed at the trial about Radcliff's assumption that Bakir knew that GBL had to be imported from overseas based on Radcliff's own knowledge of where it had to be sourced. Bakir's counsel at the trial then referred to further questions asked by the prosecutor at the committal in such a way to suggest, without explicitly putting it, that Radcliff had been colouring his answers to assist the prosecution:

> "Anyway, by this stage you'd realised who was asking the questions and the Prosecutor said, 'Well, can you tell me as best you can' – and you said, 'Yep' – 'The words that Mr Bakir used, what he said about getting the Fanta?', and you said, 'He said – he said 'You will organise to bring the drug in from' – 'bring the drug in and get it to me' effectively.'? -- Yes.
>
> Again, what you were saying there was that your interpretation of the requirement to get the drug for you was that it was to be imported? -- He said words to the effect of, 'I want you to get this Fantasy to me from overseas or from wherever.'
>
> Yeah. What you're saying is what he said to you, 'I want you to get me fantasy.'? -- Yes.
>
> Yeah. Nothing more? -- It was words to that effect."

[124] In re-examination, Radcliff confirmed that he had referred to Bakir's asking him to import "fanta" into the country in his police statement dated 11 July 2006, very shortly after the events in question.

[125] The learned trial judge gave comprehensive and detailed directions to the jury on the dangers of acting on Radcliff's evidence and particularly identified the cross-examination of Radcliff as to the discrepancies in his evidence as to the knowledge of Bakir and Hill about the importation of GBL and explicitly and correctly told the jury:

> "It is one of the more significant issues for you to consider in respect of the first two charges on the list against Mr Bakir and Mr Hill as their counsel submit to you that that evidence is not sufficient to establish beyond reasonable doubt that that element of the offence has been made out against them.

> The prosecution case is that you should accept Mr Radcliff's evidence in chief that he was required by Mr Bakir to bring the drug into Australia and that that evidence is sufficient to satisfy you beyond reasonable doubt of that issue. As I said to you, that's a significant issue for you to bear in mind."

[126] The judge fairly articulated all the possible reasons that the jury might not find themselves able to rely on Radcliff's evidence. However, as counsel for the respondent submitted on appeal, the jury were best placed to consider the credibility and reliability of Radcliff as he gave his evidence, an advantage not enjoyed by this Court which must rely on the transcript alone. The jury was entitled to accept the reliability of Radcliff's evidence that in concert with Hill, Bakir demanded of Radcliff that GBL be brought "in", "into Australia" or "from overseas", particularly given the robust cross-examination to which he was subjected which did not lead him to demur from that proposition and the judge's directions.

[127] Notwithstanding the minor discrepancies in his evidence, an independent assessment of Radcliff's evidence on this topic does not lead me to conclude that its sufficiency, quality and nature was such that a reasonable jury must have had a reasonable doubt about its credibility and reliability.

[128] With regard to evidence of "commercial quantity", counsel for Bakir and Hill expressly did not rely on their written submissions on this point but rather submitted that there was nothing by way of admission from what Bakir said as to the quantity to be imported or possessed. The submission has no merit. As has already been noted the question of whether or not the quantity of substance imported is a commercial quantity is, because of s 307.1(3) of the Commonwealth Code, a matter of absolute liability. This applies to parties to such an offence by virtue of s 11.2(6) of the Commonwealth Code.

[129] Gray's submissions with regard to "unsafe verdict" were made following submissions on the other grounds of appeal concerning admissibility of certain evidence and corroboration of Radcliff's evidence which will be dealt with later in these reasons. On this ground she argued:

> "Unsafe as to Gray's involvement: First, it is submitted that, assuming the admissibility of all of the evidence, it was not open to a properly instructed jury to be satisfied beyond reasonable doubt that Gray was involved in the importation. For the reasons given in the final address of counsel for Gray (RB640-661), it was not open to act on the crucial aspects of the evidence of Radcliff.
>
> Unsafe verdict as to commercial quantity in any event: Secondly, it is submitted that, assuming again the admissibility of all of the evidence, it was still not open to a properly instructed jury to be satisfied beyond reasonable doubt that GBL or a commercial quantity of GBL was imported. [A commercial quantity of GBL is one kilogram.] Radcliff did not open the package obtained from the Post Office. It was not open to exclude the possibility that the GBL found at Broad's flat came from other sources."

[130] There is no need to repeat my reasons for rejecting the submission that "it was not open to a properly instructed jury to be satisfied beyond reasonable doubt that Gray was involved in the importation." If the jury accepted the evidence given by

Radcliff, which, unless there was any error in the judge's directions about Radcliff, a matter which will be dealt with later in these reasons, they were entitled to do, there was ample evidence of Gray's involvement in the importation and from which the jury could safely infer that the substance imported, which weighed about 10 kilograms and was given by Radcliff to Broad, was the source of the GBL given by Broad to Smith, the substance which Hilton saw Broad and Brown cooking and the GBL and GHB in Broad's possession in early July.

[131] These grounds of appeal have not been made out.

Telephone intercepts

[132] Grounds 2, 2A and 2B of the appeals by Bakir and Hill concerned the admissibility of various telephone calls and the directions given by the trial judge as to their use.

[133] They will be considered in the groupings in which they were argued.

Series of telephone conversations between Broad, Doherty and Wilson

[134] These telephone conversations were said to have occurred on 8 June 2006. One call was from Broad to Doherty at 11.35 pm on 8 June 2006 which referred to a text message sent by Doherty to Broad. Doherty told Broad that someone, called Yassar, was looking for him and was not happy. Doherty said that Yassar came to her house and had spoken to Young and left a message for Broad to call him. At 11.40 pm, just five minutes later, Broad rang Wilson and told him that Doherty had told him that Yassar was looking for him. Broad said he was at Brown's place. Wilson suggested that Broad call Young and find out exactly what Yassar said. At 11.42 pm Broad called Doherty to ask exactly what Yassar had said to Young. Doherty said:

> "He said um, he said 'call him immediately' and you know he meant it kind of thing but he, he instilled that a few times to Mel ... Um and that was all really. That was the main message."

[135] At 11.43 pm Broad called Wilson and said that Bakir had said for Broad to call him immediately. Wilson told Broad that he, Wilson, would call Bakir but would not say "nothing about nothing". He told Broad that he would call him back.

[136] There followed some further intercepts which were not the subject of an objection to admissibility on appeal. At 2.01 am on 9 June 2006, Wilson sent a text message to Brown's phone with the message, "Ring me Urgent." At 2.02 am Broad rang Wilson and Wilson told Broad, "Just hang in there mate. Um just let me know where you are later?"

[137] At 10.48 am a text message was sent to Radcliff from Brown's phone saying "Northcliffe Surf Club 15 mins, don't call anyone hurry". At 12.36 pm, Wilson rang Broad about "plan A". At 12.40 pm Wilson sent a text message to Brown's phone saying, "Turn all phones off."

Telephone call between Hill and Brown

[138] This telephone conversation was identified as call number 19 (CSN 592) between Hill and Brown at 3.47 pm on 9 June 2006 and was the subject of ground 2A(i) of Bakir's appeal. The telephone conversation involved Hill and Brown speaking about "Tony" [Broad], "Pete" [Wilson], "Ben", "Benny" or "Benassi" [Radcliff]

who was said by Hill to be with him and an unnamed "friend" or "mate" of Hill's who had "a pretty bad temper". The prosecution could not prove that Bakir was in fact present for that conversation but said it could be inferred that Hill's friend was Bakir.

[139] The transcript of the conversation was as follows:

"BROWN: Hello
HILL: Phoebe?
BROWN: Hello who's this?
HILL: It's Steve.
BROWN: Steve?
HILL: Yeah how are you?
BROWN: Good.
HILL: Um I'm so glad I've got in contact with you.
BROWN: Steve who? Hang on.
HILL: Ellen's Steve.
BROWN: Oh hello you, what are you doing?
HILL Oh I've fucking had the worst day.
BROWN: Why, what have you been up to? Actually I've been trying to find your number a little while ago so I can get in contact with you.
HILL: I'm trying to stop world war 3 from starting today.
BROWN: Yeah ok go.
HILL: Um I've got Benny with me.
BROWN: Who?
HILL: Benny
BROWN: Who's Benny? Benassi?
HILL: Yeah.
BROWN: Ok yeah, where are you?
HILL: I'm in Southport at the moment.
BROWN: Yep.
HILL: I've just gone and had a meeting with Pete and I've got a few other people with me. I'm just trying to get him, I've never, I met Tony a couple of weeks ago through Lee.
BROWN: Yeah I don't understand what's, I don't know what's going on?
HILL: Yeah no that's fine. All I need to do is I just need to get Tony to have a conversation over the phone with Benny. I don't even want to be involved; I don't want to have a fucking thing to do with it, so it's just that Pete's got himself involved now, there's other people involved and all these dramas and I'm just trying to just honestly be the middle man, I've got Benny with me now.
BROWN: Yeah
HILL: I'm just, I'm just trying to get in contact with, but what, basically what it looks like is happening is that Pete is trying to hide Tony away now.
BROWN: But hide Tony where, what?
HILL: So no one can get in contact with Tony because Pete's trying to get involved in people's business.
BROWN: Um.

HILL: It's all long and complicated and bullshit as it is, you know how it usually is all I need to try and do is try and get Tony to speak with Ben.
BROWN: Hon I don't, yeah ok. Um sweety um he's not here at the moment.
HILL: Yeah that's fine, that's fine, that's ok.
BROWN: I don't understand, how are you involved Mr PURTABI, you're supposed to be being a good boy?
HILL: I know you ask Benny I'm not involved in a bad way I'm just involved trying to make a peaceful resolution so honestly, like Benny's with me right now, like, like Tony will be reimbursed but it's not for you and me to talk about anyway, all I need if you can I don't want to put you out and I don't want to put you in a position and I don't want to be in a position either, if you can just get Tony to give Benny a call with urgency or something so just so those 2 can talk and get these problems resolved. I'm trying to get this resolved.
BROWN: Yeah how have you been anyway?
HILL: Yeah I've been alright. I've just had a bloody …
BROWN: Yeah so is this your number darling?
HILL: Sorry?
BROWN: Is this your number?
HILL: Yeah this is my number.
BROWN: Ok well fucking I need to talk to you anyway on other matters.
HILL: Yeah that's sweet.
BROWN: And to catch up.
HILL: Yeah.
BROWN: But um so I will speak to Tony when I see him and tell him to call Benassi?
HILL: Yeah but basically what's happening at the moment is I was going to have a chat with Pete but looks like Pete sort of trying to keep Tony to himself.
BROWN: Yeah.
HILL: Like trying to keep him away from everybody.
BROWN: Love is cruel, how is it in the middle. Look at you?
HILL: Yeah fuck.
BROWN: I don't well I don't know, I don't know like I don't know. I'll tell you this much fucking, um like Benassi called my phone last night from Melbas saying you had come to stand over him or something and he was about to get beaten up.
HILL: Yeah and he didn't.
BROWN: But I don't understand what to see how you come in?
HILL: No, no, no, not at all, not all. I'm just, I've got to, he's owes something to a friend of mine.
BROWN: Uh huh.
HILL: And I'm trying to be the middle man because my friend's got a pretty bad temper.
BROWN: Yeah ok.
HILL: So um.
BROWN: Yeah ok um ok, ok well listen um I'll, I'll as soon as I see Tone I'll tell him to call Benassi.

> HILL: He can either call me or call Benassi but just try and get in touch with someone as soon as possible because this, this is going to get bad and I just, like, just let Tony know that his money is fine there's not a problem with him getting cash and getting all sorted out, we just gotta get Pete out of the picture and get this resolved.
> BROWN: How do, how do you even know about it? Benassi.
> HILL: How do I know about it? Because one of my best friends.
> BROWN: Oh yeah because he's a mutual friend, oh yeah, oh yeah.
> HILL: One of my best mates is involved in it and I'm just trying to sort it out and just be the middle man and I knew Benny and my mate knew that I knew Benny and that's how I became involved.
> BROWN: Yeah I know who you're talking about ok yep.
> HILL: Yeah, yeah exactly. So I'm just trying to honestly, Benny's with me now I'm just trying to get it resolved peacefully so as soon as you see Tony just try and invite him to either call me or call Benny but just try and get Pete out of it as much as we can because Pete's not really working for a resolution, Pete's just not really functioning properly.
> BROWN: Yep, yep feeling that, feeling that um yeah ok, ok, ok, I may give you a call, I wouldn't mind meeting up with you this arvo?
> HILL: Yeah not a problem, give me a call.
> BROWN: Ok darling bye.
> HILL: Ok see you babe."

[140] In the course of the submissions during a pre-trial hearing as to the admissibility against Bakir and Hill of a number of telephone intercepts (they were not said to be admissible against Gray), the learned trial judge questioned how the prosecution related the conversation in call number 19 to Bakir. On appeal, Bakir argued that his Honour's initial reaction should be preferred to his final ruling that the conversation was admissible against Hill and also against Bakir on the basis of his combination in criminal activity with Hill.

[141] At the trial the prosecution relied upon *Tripodi v The Queen*[50] and *Ahern v The Queen*[51] and noted that Bakir and Hill were present when both Bakir and Hill were demanding earlier that day that Radcliff get hold of the drugs.

[142] The prosecution submitted that the reasonable evidence of pre-concert it relied upon was:

(a) Radcliff's evidence that Bakir was part of the plan with Hill to obtain the drugs that had been imported; and

(b) Bakir's visit to the former residence of Broad and wanting a message to be given to him. This was in Young's evidence that was dealt with by way of an admission by Bakir and Hill on day 4 of the trial in the following terms:

> "… on the 24th of September of 2008 in the Magistrates Court she was asked the following question by Mr Hannah: 'So the person at the door asked you to pass a message on, did you say? Can you say exactly what was said, if you can?' And the answer was, 'I was asked to pass a message

[50] (1961) 104 CLR 1.
[51] (1988) 165 CLR 87.

> on to Tony and I told him that as he didn't live here the only way I could do it was through his ex-girlfriend. She wasn't home. He asked me what my name was, made sure I passed the message on. I told him I had to go. I had things I had to do. So I went to shut the door and I was told or he said that his name was Yassar, Yassar from the [Finks]."

[143] The prosecution submitted at the trial that from this evidence the jury could infer that the friend Hill was referring to in the telephone conversation was Bakir.

The appellants' submissions

[144] Bakir and Hill submitted, relying on *Ahern v The Queen*, *R v Jackson*[52] and *R v Pektas*[53] that in essence, the prerequisites of admissibility for this type of evidence are:

(a) There should be evidence capable of supporting a finding:

(i) that there was a conspiracy of the type alleged;

(ii) that the subject acts were done or the statements made by the co-accused were in furtherance of the common purpose;

(b) Reasonable evidence apart from the acts or statements sought to be admitted that the accused was a participant in the conspiracy.

[145] Bakir submitted that it was imperative for the Crown to identify such "reasonable evidence"[54] against Bakir that would, independently of the acts or statements made by Radcliff, implicate Bakir in the alleged unlawful enterprise. The trial judge alone should determine the sufficiency of the independent evidence of participation of one accused to make evidence of the acts and declarations of other participants occurring outside the presence of an individual accused admissible against him.[55] It was submitted that there was no evidence to substantiate the proposition that Bakir knew of Radcliff's intention to bring GBL into Australia, nor that he had any knowledge of the alleged agreement to import the drug into the country apart from Radcliff's evidence.

[146] It was submitted that the learned trial judge failed to identify specifically what the reasonable evidence of pre-concert was, excluding any acts and declarations of co-conspirators. If the learned trial judge were taken to have adopted the prosecutor's submitted reasonable evidence of pre-concert, that is Radcliff's evidence, then he erred as the acts and declarations of Radcliff should not be considered.

[147] It was submitted that the readily identifiable reason why such a situation should not occur was clearly illustrated in this case. Once this evidence was admitted in the trial the prosecution was then permitted to rely upon that evidence as evidence capable of corroborating Radcliff. It was submitted that there was no evidence that answered this description. The prosecution should have been confined to identifying evidence other than that of Radcliff upon which it was suggested that there was reasonable evidence of pre-concert.

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52 (1987) 11 NSWLR 318.

53 [1989] VR 239.

54 *R v Pektas* at 270.

55 *Ahern v The Queen* at 103.

[148] I shall deal with the evidence said to corroborate Radcliff's evidence when dealing with grounds 6 and 6B of the appeals by Bakir and Hill and ground 5 of the appeal by Gray.

[149] Bakir and Hill argued that if this submission were not accepted, one must consider what was the alleged agreement to which Bakir and Hill were said to be parties.

[150] It was submitted that the only evidence given by Radcliff in respect of Bakir's alleged involvement was a conversation between the parties in which Bakir requested the drug. Radcliff's evidence was that he approached Gray so she could assist in importing the drug, and only a few days later Gray "told [Radcliff] the details in relation to the importation of the drugs". Radcliff then had his first meeting with Broad to discuss the transaction. Bakir and Hill submitted that that evidence supported their submission that Bakir and Hill were not parties to the transaction and associated agreement.

[151] Further, it was submitted that many of the details of the alleged agreement were not within the knowledge of Bakir or Hill. It was submitted that in light of those matters, no reasonable inference could be drawn as to the knowledge or belief of Bakir or Hill as to how the transaction was to be carried out. It was submitted there was no independent evidence adduced at the trial to afford a reasonable inference as to their acting in furthering of the common purpose and their participation in the illegal enterprise, namely the importation of GBL.

[152] It was submitted that if the court were against those submissions, then the prosecution should not have been permitted to rely upon this telephone intercept as evidence capable of corroborating Radcliff as against Bakir. To do so would be tantamount to the prosecution pulling itself up by its own boot straps. As previously mentioned, I shall deal with the question of corroboration under that ground of appeal.

[153] With regard to ground 2 and ground 2A(ii) of Bakir's appeal, and ground 2A of Hill's appeal, they argued that the learned trial judge erred in his ruling that the series of telephone intercepts of conversations involving Broad, Doherty and Wilson on 8 June 2006 were admissible against them, as they were a "narrative of the sequence of events particularly leading up to the call number 592 [call number 19] at 3.47 pm".

[154] It was argued that the telephone conversations occurred on the evening of 8 June 2006, a time after the package was collected from the post office on 6 June 2006, and therefore after the importation had ceased. The narrative of events on the evening of 8 June 2006 was fully covered by the admission referred to earlier concerning the visit to Young's premises by Bakir. The narrative then continued with the events of 9 June 2006 through the direct evidence of Radcliff up until around 3.30 pm that afternoon.

[155] It was submitted that there was no necessity for the evidence objected to, to be led during the trial. It was all "hearsay or worse", involving persons who were not witnesses in the trial. A number of the participants were not even alleged to be co-conspirators so the evidence was not admissible under the *Ahern v The Queen* reasoning. It was patently clear that much of the material spoken about was incorrect. The evidence had no legitimate probative value while the prejudicial effect was "enormous".

[156] It was submitted that the authorities relied upon by the prosecution to support its contention that the evidence was admissible ("as part of the narrative surrounding the commission of the offence") were readily distinguishable from this.

[157] Counsel for Bakir in his oral submissions argued that as hearsay, the telephone intercepts did not lend themselves, without an appropriate rubric for their admission against Bakir, to admission against him simply as a narrative of events particularly leading up to call number 19 (592). That did not overcome the obvious hearsay objection.

[158] With regard to ground 2B it was submitted that, while the learned trial judge directed the jury on the relevance of the intercepted telephone call made at 3.47 pm on 9 June 2006, he failed to direct the jury in his summing up as to how they were to utilize the other telephone intercepts. It was submitted that without a proper direction as to the relevance of the evidence the jury were able to use this otherwise hearsay and inadmissible evidence to convict Bakir and Hill. It was submitted that the failure to provide a proper direction was a material omission.

Discussion

[159] It is necessary first to state the basis for the admissibility of telephone call number 19 between Hill and Brown at 3.47 pm on 9 June 2006, and the telephone calls leading up to it. The prosecution case was that Bakir and Hill acted in concert or combination with Radcliff to import GBL into Australia. The fact of combination and the identity of the participants in that combination may be proved by the same evidence and may be proved by evidence of the words or acts of individuals alleged to be involved in the combination.

[160] This basis for admissibility of such evidence was set out with reference to *Tripodi v The Queen*, in *Ahern v The Queen* at 94-95 and 99-100:

> "… it is not in all cases that evidence of the separate acts of the alleged conspirators will prove both the fact of combination and their participation. Of course, if the evidence fails to prove a combination at all then that is an end of the matter. But if it proves a combination, although not the participation of an individual alleged to be a conspirator, then the question arises whether there are circumstances in which evidence of the acts and declarations of other participants, outside the presence of the individual, may be led again him, not as separate facts from which, when combined with other facts, an inference of combination may be drawn, but as evidence of his own participation. Evidence of the acts or declarations of others led for this purpose will be led to prove the truth of the assertion or implied assertion contained in those acts or declarations. It would be excluded as hearsay or its equivalent were it not admissible upon some other basis.
>
> **That basis is provided in an appropriate case by the rule which states that when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the common purpose is admissible in evidence against the others.** The combination implies an authority in each to act or speak on behalf of the others: *Tripodi*. Thus anything said or done by one conspirator in pursuit of the common object may be treated as having been said or done on behalf of

> another conspirator. That being so, once participation in the conspiracy is established, such evidence may prove the nature and extent of the participation. The principle lying behind the rule is one of agency and the closest analogy is with partners in a partnership business. Indeed, conspirators have been described as partners in crime. …
>
> …
>
> In *Tripodi* the Court was speaking of the admission in evidence of the acts and declarations of others outside the presence of the accused in proof of larceny rather than conspiracy, but, as we have said, the principle upon which such evidence is admitted extends beyond cases of conspiracy. The significant distinction between conspiracy and other offences for present purposes is that indicated in *Tripodi*, namely, that on a charge of conspiracy combination is also an element in the offence and not merely a ground for the admission of the evidence. The question does not, therefore, arise in cases other than conspiracy of the use of evidence of the acts and declarations of others to prove the combination except as evidence of separate acts from which a combination might be inferred. **Once there is reasonable ground for inferring a combination in cases other than conspiracy, acts and declarations of the participants in furtherance of the common purpose may be used to prove, not the fact of participation in the combination, but the offence charged.**
>
> …
>
> In our view, the test adopted in *Tripodi* is the appropriate one. Where an accused is charged with conspiracy, evidence in the form of acts done or words uttered outside his presence by a person alleged to be a co-conspirator will only be admissible to prove the participation of the accused in the conspiracy where it is established that there was a combination of the type alleged, that the acts were done or the words uttered by a participant in furtherance of its common purpose and there is reasonable evidence, apart from the acts or words, that the accused was also a participant. The words 'reasonable evidence' have provided a standard which has been applied without difficulty in this country for some years, at least in cases where preconcert has been the basis upon which evidence has been led in cases other than conspiracy, and there is no reason to suppose that if it has provided an appropriate test in those cases, it will not do so where conspiracy is charged. If there is any difference between 'reasonable evidence' and 'a prima facie case', which in this context we very much doubt, then the words 'reasonable evidence' are to be preferred providing, as they do, a test of admissibility for which no more precise expression is needed. The aim in limiting the use which might be made of a co-conspirator's acts or declarations is to exclude such evidence when its admission might operate unfairly against an accused. For this purpose, the element of discretion implicit in the term 'reasonable evidence' is desirable." [emphasis added]

[161] The telephone intercepts were admissible in this case as evidence of the existence and nature of the common pursuit of Bakir and Hill and to prove their involvement

in the offences. There was other evidence from which there were reasonable grounds for inferring that there was a combination by Bakir and Hill to import GBL into Australia and to gain possession of it once it had been imported. That evidence was found in Radcliff's testimony as to the conversation with them on 23 April 2006 when they asked him to import GBL for them and in his testimony that they demanded it at Melba's Bar on 8 June 2006 and that Radcliff told them he had given it to Broad. That evidence was corroborated by the independent evidence (other than the phone calls sought to be admitted) as referred to under the next ground of appeal. The telephone calls admitted tended to show the involvement of Bakir and of Hill in the offences of importing a border controlled drug and their attempted possession of it.

[162] The telephone calls showed, following the defence admission as to Young's evidence of "Yassar" coming to her house and asking for a message to be passed onto "Tony," that the message was passed on by Young to Doherty and from Doherty to Broad and from Broad to Wilson. It also showed the use by Broad of Brown's phone and therefore provided the narrative leading up to the telephone call between Hill and Brown on 9 June 2006. Hill's statements are admissible against Bakir as the words of a person who was acting in combination with Bakir in furtherance of that common purpose. It was not of course necessary that Bakir be present for that conversation. Nor was it necessary that either Bakir or Hill be a participant in the earlier conversations.

[163] In *R v Mbonu*[56] evidence given by one person, Mnguni, about his interactions with another in Indonesia, Uche, was admissible against Mbonu. The evidence of Mnguni concerning his interactions with Uche was admissible to establish that arrangements were made for the importation of a quantity of cocaine and as part of the proof that Mbonu was knowingly concerned in that importation. As Vincent JA observed at [26]:

> "The jury would have been entitled on the totality of the evidence to find that Mnguni, Uche and the applicant were all linked in the importation. The inference would arise from the combined effect of a number of pieces of direct relevant and admissible evidence. True it is that some of that evidence involves the activities of other individuals in the absence of the applicant. However, it is common enough for the physical and verbal interactions between third parties to be admitted as constituting facts relevant to the determination of facts in issue in the case of a particular accused. They may, in conjunction with other evidence, provide a strong foundation for the inference of concerted activity to be drawn and may, in some situations and, without more, identify the participants, including the accused concerned."

Appropriate directions

[164] The learned trial judge gave a conventional direction to the jury about the use that could be made of things said or done by Hill or Bakir outside the presence of the other, including with regard to the telephone conversation between Hill and Brown on 9 June 2006. No complaint was made on appeal about that direction. A complaint was made on appeal about the sufficiency of the judge's direction about the other phone calls. His Honour referred in detail to the address made by Bakir's counsel to the jury about those phone calls. No other direction was sought.

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56 (2003) 7 VR 273.

[165] The fact that very experienced trial counsel did not request any further directions must be given great weight in these circumstances, particularly as they had been given a copy of the summing up and the power point slides prior to their presentation to the jury. As Hayne J observed when recording the submissions of the appellant in *Gately v The Queen*:[57]

> "So much follows inevitably from the adversarial nature of a criminal trial. As was said in *R v Birks*, 'As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted'. It is for the parties, by their counsel, to decide how and on what bases the proceeding will be fought." [citations omitted]

[166] There are, as were set out by Gleeson CJ in *Crampton v The Queen*,[58] a number of reasons that explain why the power of an appellate court to entertain a point not raised in the court below is to be exercised only in exceptional circumstances. They are:

> "First, there is what was referred to by L'Heureux-Dube J in the Supreme Court of Canada as 'the overarching societal interest in the finality of litigation in criminal maters' when she said:
>
> > 'Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases.'
>
> Secondly, it is common for appellants in criminal appeals to retain counsel different from the counsel who (by hypothesis, unsuccessfully) conducted the trial. This increases the tendency to look for a new approach to the case, and carries the danger that trial by jury will come to be regarded as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges.
>
> Thirdly, it is usually difficult, and frequently impossible, for a court of appeal to know why trial counsel did, or failed to do, something in the conduct of the case. Decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge may have no way of knowing that. Ordinarily, a barrister knows more about the strengths and weaknesses of his or her client's position than will appear to a judge, whose knowledge of the case is largely confined to the evidence.
>
> Fourthly, as a general rule, litigants are bound by the conduct of their counsel. This principle, which is an aspect of the adversarial system, forms part of the practical content of the idea of justice as applied to

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57 (2001) 232 CLR 208 at [77].

58 (2000) 206 CLR 161 at [15] – [19].

> the outcome of a particular case. For that reason, courts have been cautious in expounding the circumstances in which an appellant will be permitted to blame trial counsel for what is said to be a miscarriage of justice.
>
> Fifthly, in a common law system the adversarial procedure is bound up with notions of judicial independence and impartiality. A criminal trial is conducted before a judge (sitting with or without a jury) who has taken no part in the investigation of the offence, or in the decision to prosecute the offender, or in the framing of the charge, or in the selection of the witnesses to be called on either side of the case, and whose capacity to intervene in the conduct of the trial is limited. One of the objects of a system which leaves it to the parties to define the issues, and to select the evidence and arguments upon which they will rely, is to preserve the neutrality of the decision-making tribunal. Courts are hesitant to compromise features of the adversarial system which have implications fundamental to the administration of justice." [citations omitted]

[167] There are no exceptional circumstances in this case which warrant an appeal being allowed on this ground. The grounds of appeal relating to the admission of the telephone intercepts and the directions given with regard to them have not been made out.

Seizure of GBL from Cook and from Broad

[168] Grounds 3, 4 and 5 of the appeals by Bakir and Hill and grounds 2, 3 and 4 of Gray's appeal relate to the evidence of the seizure of GBL from Cook on 16 March 2006 and the seizure of GBL and GHB from Broad on 5 July 2006.

[169] Cook and two other people were arrested on 16 March 2006 after they were found in possession of GBL which was in purple containers with Asian writing on them. Broad was arrested on 5 July 2006 when he was found with Brown and Hanrahan in a unit at the Maldives Apartments where various pieces of equipment associated with drug production and purple containers of GBL with Asian writing on them were located. Counsel for Bakir conceded that there were no observable differences between the bottles of GBL and that they were exactly similar.

[170] These seizures were referred to on appeal by Bakir's counsel as the "bookends" of material admitted against him as the 16 March seizure was prior to the importation, the subject of count one and the 5 July seizure was after the period of the attempted possession, the subject of count five.

[171] Counsel for Broad noted, in the course of an argument at a pre-trial hearing as to the joinder of State charges relating to the 5 July seizure, that he would be objecting to the evidence of Cook's possession of the GBL. Counsel for Bakir also objected to the joinder of State charges, arguing that there was no sufficient nexus between Bakir and the substance found or any of the persons found in possession of that substance on 5 July 2006. He also objected to the admissibility of evidence of the 16 March 2006 and 5 July 2006 seizures of GBL.

[172] The prosecutor at trial argued for the admissibility of that evidence on two bases: the first was the similarity of the bottles of GBL found in Cook's possession and

Broad's possession some months apart and the second was that evidence of Cook's possession provided some independent support for Radcliff's evidence about Gray's involvement.

[173] In refusing the application for severance, the learned trial judge also ruled that the evidence as to the two seizures was admissible, in any event. His ruling was:

> "The evidence in respect of the package that was delivered to the Eagle Heights Post Office is that it was a box about two feet by one and a half feet of Chinese or Asian writing on the delivery docket. Radcliff did not open it or inspect its contents. He had some evidence about the weight of it and said that it did not seem to have loose contents inside it and he passed it on to Broad. What the prosecution submits in respect of that evidence is that even if the charges against Broad sought to be severed did not proceed it would still be evidence admissible circumstantially to prove that the drug imported was GBL, having regard to the connection between Gray and Cook, the evidence of Radcliff on seeing similar bottles or the same type of bottle with Cook when he was involved with Cook in producing GBL and the evidence that he had sought to arrange with Gray the importation of the substance which they picked up from the post office on the 8th of June. The Crown also seeks to say that it is a strong circumstantial case that the box having been given to Broad and he apparently having been involved in a cook before the 19th of June and then also on the 5th of July with bottles bearing the same description as the type previously imported by Cook or used by Cook, that that is evidence available for the prosecution to establish that Broad was then in possession of the substance that had been imported and that that substance was GBL. It seems to me that that evidentiary link can be established and that the evidence is admissible as circumstantial evidence pointing to that conclusion."

[174] Bakir and Hill submitted on appeal that there was no evidence adduced during the trial that Bakir and Hill had any connection whatsoever with Cook at any relevant time from March to July 2006 or at all, nor was Cook alleged to be a conspirator so far as the importation alleged in the charges.

[175] Count one alleged the importation to have occurred between 22 April 2006 and 9 June 2006. Count five alleged that the offence of attempted possession was committed between 5 and 11 June 2006. The last date of any relevance, so far as Bakir was concerned, was 10 June 2006 when he travelled to Sydney with Gray. There was no other evidence led at trial of Bakir's having anything further to do with this matter subsequent to that date. In fact the trial judge was informed during argument that Bakir was remanded in custody on 13 June 2006. The written submissions of Bakir and Hill argued that the 16 March and 5 July 2006 incidents occurred outside of the dates outlined in the counts they faced. It was, however, fairly conceded in oral argument that in itself did not render the evidence inadmissible since evidence may be led of relevant antecedent and subsequent events.

[176] The nub of the argument was that there was nothing to suggest that either Hill or Bakir had any knowledge of the incidents let alone were involved. Both the 16 March and the 5 July 2006 incidents involved persons who were not called by

the prosecution as witnesses at the trial. This deprived Bakir and Hill of the opportunity to cross-examine any person about the history of the relevant items and how they came into the possession of the respective persons.

[177] The only reason for the admission of this evidence advanced by the prosecution (against Bakir) was because of the exact similarity of the bottles of GBL found in Cook's possession and Broad's possession some months apart. The only issue at trial was whether Bakir and Hill were parties to the offence. This evidence was, it was submitted, irrelevant to any issue in contention in the trial. It was prejudicial to Bakir and Hill and should have been excluded.

[178] As to the directions given by the learned trial judge of the use the jury could make of this evidence, Bakir and Hill argued that the prosecution submitted the relevant evidence was admissible against Bakir and Hill on a singular stated basis, that it showed the similarity of bottles found in Cook's possession and, many months later, in Broad's possession; whereas as against Gray the prosecution alleged it was admissible as it provided corroboration of Radcliff's evidence against her.

[179] By the close of the evidence, it was submitted, the prosecution had elevated this evidence suggesting that it was capable of corroborating Radcliff's evidence against Bakir and Hill which was not the basis on which it was admitted. It was submitted that the learned trial judge erred in directing the jury that both of these areas of evidence could be used to corroborate Radcliff's evidence. This point will be dealt with under the grounds of appeal that deal with corroboration.

[180] The evidence given by Radcliff that he had orchestrated an importation of GBL between April and June 2000 was never challenged or in issue. The only issue at trial was the implication of the relevant defendants in Radcliff's importation. It was submitted that neither item of evidence implicated Bakir and Hill in the commission of either offence.

[181] Gray submitted that the judge erred in admitting the evidence as it was irrelevant to the question whether Gray was involved in an importation of GBL between 22 April 2006 and 9 June 2006 that her boyfriend Cook was, on 16 March 2006, in possession of GBL that, by definition, could have no connection to the alleged importation. It was also irrelevant that Gray had a "connection" with Cook. It was also submitted that the evidence was not capable of providing independent confirmation of Radcliff's account that Gray was involved in the importation. The only way in which this evidence could have had that effect was via speculation and impermissible reasoning. The argument about corroboration will be dealt with under the grounds of appeal dealing with that ground.

[182] Finally, Gray submitted, if the evidence might be thought to have some probative value, its impermissible prejudice – that of guilt by (intimate) association or of a propensity to be involved in or connected with importation of GBL – was so great as to compel the exclusion of the evidence. Accordingly, the evidence should not have been admitted and the conviction must fall in consequence.

[183] It was also submitted by Gray that it was not open to conclude that the GBL found in Broad's flat on 5 July 2006 was the GBL allegedly imported in the package Radcliff and Smith collected from the post office on 8 June 2006. It was impossible to exclude the possibility that the GBL seized from Broad's flat came from a source other than the importation alleged by Radcliff. It was also argued that was not corroborative, an argument that will be dealt with under that ground of appeal.

[184] Gray further submitted that the judge gave no special directions on how the jury were to use the evidence the subject of grounds 2 and 3, other than as corroboration. It was submitted that it was incumbent on the judge to warn the jury not to engage in propensity or bad character reasoning when considering the evidence of Cook's possession of GBL. In particular, the judge ought to have directed the jury that it would be wrong to reason that, just because Gray was the girlfriend of Cook, she was somehow connected with his possession of GBL on 16 March 2006 because to do so would be to attribute guilt by association; and that, even if the jury were satisfied she was aware of or connected with his alleged activities, they were not to reason that she was the kind of person who was likely to have been involved in the importation alleged against her.

[185] It was also submitted that it was incumbent on the judge to direct the jury that, even if they were satisfied beyond reasonable doubt that the GBL found in Broad's flat on 5 July 2006 was (part of) the GBL allegedly received by Radcliff in the package collected from the post office on 8 June 2006, neither that conclusion nor that evidence went to whether or not Gray was involved in that importation.

[186] Gray conceded that no exceptions of this type were taken to the judge's summing up. She nevertheless submitted that, whilst this is relevant to a determination of this ground, given the nature of the evidence and the issues fought at trial, directions of this type were essential to a fair trial and that the failure to give them had resulted in a substantial miscarriage of justice. The failure to take exception did not defeat similar points in *BRS v The Queen*.[59] It was submitted that the conviction must fall in consequence.

Discussion

[187] The evidence as to Cook's possession of GBL on 16 March 2006 and Broad's possession, with Brown and Hanrahan, of GBL and GHB on 5 July 2006 were admissible to show the elements of the offence that there was a border controlled drug imported and the drug imported was GBL. It should not be considered in isolation from the other evidence.

[188] The fact of the earlier importation of GBL also explains why Radcliff went to Gray to inform her he would participate in an importation, Radcliff's evidence that Gray told him she would have to speak to Cook and the context in which Gray was able to organise the importation (as Radcliff said she did) tends to prove that a drug was imported and that drug was GBL.

[189] Contrary to Gray's contention, the evidence did not involve any "guilt by association" or "propensity" reasoning. Contrary to the contention of Bakir and Hill it was irrelevant to the admissibility of this evidence whether they had any connection with Cook or whether he was a co-conspirator.

[190] Gray did not object to the admissibility of this evidence (although Bakir did) in the court below. Nor did Gray suggest that if it was admissible it ought to have been excluded in the exercise of the learned trial judge's discretion.

[191] There was no basis to exclude the evidence.

[192] With regard to the evidence of Broad's possession of GBL and production of GHB on 5 July 2006, on the prosecution case the production of GHB by Broad involved the imported GBL the subject of counts one and two.

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[59] (1997) 191 CLR 275. See also *R v Grech* [1997] 2 VR 609.

[193] The admissibility of this evidence must be considered in the context in which Broad came into possession of the GBL. It was the prosecution case that Broad financed its importation, he was given the drugs by Radcliff and thereafter Bakir and Hill attempted to gain possession of the package.

[194] On 14 June 2006 Broad was observed producing GHB from GBL. When the police searched Broad's premises on 5 July 2006 they located, amongst other things, three distinctive purple coloured bottles with press top caps and with Chinese writing on the labels. An analysis of the contents of these bottles revealed the presence of GBL. These bottles were consistent in appearance with the bottles containing GBL which had arrived in the previous importations by Gray (and Cook) from China in March 2006. Also located in the search was GHB, the drug produced from GBL.

[195] It was open for the jury to find that the bottles located in the search were those which had contained the GBL which was imported by Gray and Radcliff and which Radcliff had given to Broad. Such a conclusion was not mere "speculation".

[196] The fact that Bakir was in custody at the time of the relevant searches does not affect the admissibility of the evidence which is evidence as to an element of the offence: that is that the substance imported was the border controlled drug, GBL, and also as to its quantity.

Judge's directions

[197] No directions as to the use the jury could make of this evidence were sought. No such directions were required.

[198] In any event, the direction now sought by Gray is incorrect because if the jury were satisfied that the GBL found and used by Broad was the subject of the importation in question, that, with other evidence, was relevant to prove Gray's involvement in the importation.

[199] The complaint by Bakir and Hill under this ground relates to the capacity of the evidence to be left as corroboration which is addressed under that ground of appeal.

[200] The grounds of appeal relating to the seizure of GBL and of GHB have not been made out.

Corroboration

Appellants' submissions

[201] Bakir and Hill submitted that the trial judge erred in ruling that there was independent corroborative evidence to support the testimony of Radcliff (ground 6) and in his directions to the jury on corroboration (ground 6B). Ground 5 of the appeal by Gray was that the trial judge erred in directing the jury that there was evidence capable in law of corroborating the evidence of Radcliff.

[202] Gray submitted that none of the items of evidence relied on as corroboration, whether considered individually or in combination, met any of the tests relevant to corroborative evidence. Gray submitted that they did not confirm or tend to confirm her involvement in the offence of importation as related by Radcliff.

[203] She submitted that while the taxi records tended to show that Radcliff left the vicinity of Gray's address on 23 April 2006 it would be merely speculation to

reason that that evidence tended to show that Gray spoke to Radcliff on that occasion or otherwise said or did anything incriminating. Similarly, while the telephone records of 23 April 2006 tended to show contact between the telephones of Radcliff and Gray, they said nothing of the identity of the callers and, in any event, nothing of what was said.

[204] It was submitted that the fact that the Australia Post tracking record showed a parcel came from China to the Eagle Heights Post Office could provide no independent support for Radcliff's account that Gray was involved in the importation.

[205] Gray submitted that other than through impermissible reasoning – that of guilt by association – the evidence of association between the three defendants could not provide any support for Radcliff's account that Gray was involved in the importation.

[206] The same was true, it was submitted, of Gray's visit to Cook in prison on 24 April 2006. The evidence was that Gray regularly visited Cook prior and subsequent to that date and that visits had to be booked in advance, such that it was not open to say that the visit on that date was in any way connected with Radcliff's allegation that he had spoken to Gray about the importation. In his oral submissions Gray's counsel submitted that her visits were equally explicable by the fact that she was devastated by his being in prison.

[207] Similarly, it was submitted that evidence that Cook may have been connected with the GBL discovered on 16 March 2006 could not provide support, other than by way of speculation and impermissible reasoning of guilt by association, for Radcliff's account that Gray was involved in the importation. It was anterior in time to the importation in which she was said to be implicated and so that evidence could not corroborate Radcliff's evidence as to the offence of which she was convicted.

[208] Further, whilst the evidence of Broad's activities after the period the GBL was allegedly imported – Hilton's evidence of Broad and Brown cooking chemicals in Gray's unit, Smith's evidence of Broad's giving her fantasy and the discovery of GBL at Broad's premises on 5 July 2006 – may have had a bearing on whether the offence of importation of GBL was committed by Broad, none of that evidence could confirm or support or strengthen or render more probable Radcliff's account that Gray was involved in the importation.

[209] It was submitted that these pieces of evidence in combination were also incapable of confirming or tending to confirm Radcliff's account that Gray was involved in the importation. The first pieces of evidence required speculation, impermissible reasoning or reliance on irrelevancies. None of those pieces of evidence, individually or in combination, overcame, or was capable of overcoming, the difficulty that "[a] man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only the truth of that history, without identifying the persons, that is really no corroboration at all. … It would not at all tend to show that the party accused participated in it."[60] Adding those pieces of evidence together could not give them any strength in corroborating Radcliff. It was colourfully submitted that no matter how many times zero is added

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60 *The King v Baskerville* [1916] 2 KB 658 at 666 per Lord Reading CJ, citing Lord Abinger CB in *R v Farler* [1839] 173 ER 418.

or multiplied, it still equals zero. The last pieces of evidence concerning Broad could not logically affect the question whether Radcliff's claim that Gray was involved was true.

[210] Bakir and Hill submitted that the fundamental principles that govern the issue of what amounts to corroboration are:

(a) Corroboration must be independent testimony connecting/tending to connect the accused with the crime, confirming the commission of the crime and implicating the accused in some material particular;

(b) The evidence from non-accomplices should support in some material aspect the accomplice's evidence and implicate the accused;

(c) There must be evidence – independent of the witness to be corroborated – which tends to confirm the crime was committed and the accused committed the crime; and

(d) Admissibility and circumstantial relevance of the evidence do not necessarily make it corroborative.

[211] They submitted that it was imperative for the prosecution to show that the evidence, characterised as capable of being corroborative, was true as to the material particular and could implicate Bakir and Hill in the commission of the offences.

[212] The issue was whether there was sufficient evidence, independent of Radcliff's testimony, which required corroboration, to implicate Bakir and Hill in the commission of the crime alleged.

[213] It was never put to Radcliff that there was not an importation of GBL that he had orchestrated in June 2006. That was not in contest at trial. The contest at trial was the implication of Bakir and Hill in Radcliff's and Broad's importation.

[214] Thus, it was submitted, any item said to be capable of corroboration had, at a bare minimum, to implicate Bakir and Hill in the commission of one or other of the offences. None of the items fell into that category.

[215] In the alternative it was submitted that, even if some of the items were capable of corroborating Radcliff, there had been a material misdirection by the learned trial judge in wrongly leaving for the jury's consideration items of evidence that they were told, with force of the judge's position, corroborated the indemnified accomplice and allowing the jury to conclude it was safe to convict Bakir and Hill on Radcliff's evidence.

[216] It was submitted that Cook's possession of GBL on 16 March 2006 and Broad's possession of GBL and GHB on 5 July 2006, which were not contested, were incapable of corroborating Radcliff's evidence as to Bakir's and Hill's involvement in the offences with which they were charged.

[217] It was also submitted that the mere existence of the telephone calls between Gray and Radcliff and Hill and Radcliff and the Australia Post tracking record, Bakir's visit to Young, Radcliff's father's sighting of Radcliff with Bakir and Hill, and the other evidence of association between Bakir, Hill, Gray and Broad did not lend support to Bakir's implication in the offences.

Discussion

[218] At common law, the judge was required to warn the jury that it is dangerous to convict the defendant on the evidence of an accomplice unless it is corroborated.[61] The rationale for the warning was explained by the High Court in *Jenkins v The Queen*[62] at [30]:

> "The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by a reference to a need to look for corroboration. The hypothesis is that the evidence in question is in contest, and that it inculpates the accused."

[219] The common law rule has been modified by s 632 of the *Criminal Code Act* 1899 (Qld) which provides:

> "(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

[220] The learned trial judge dealt with the question of corroboration when he addressed the jury as to factors they might take into account in assessing the evidence of various witnesses. With regard to Radcliff, the learned trial judge gave careful directions as to the caution the jury should exercise before accepting his evidence in view of the fact that he was both an accomplice and an indemnified witness. To the extent that his Honour made generalised statements about the unreliability of accomplices and indemnified witnesses as a class it was overly generous to the appellants but, unsurprisingly, no complaint was made about that.

[221] The power point presentation summarised the full directions given by his Honour as follows:

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61 See former s 632 of the *Criminal Code Act 1899* (Qld), reprint 1B which required a corroboration warning for accomplice evidence: *R v CBR* [1992] 1 Qd R 637 at 642; *R v Button* [1992] 1 Qd R 552. However, as noted in *Jenkins v The Queen* (2004) 211 ALR 116 at [32], the common law rule about accomplice warnings was 'not so mechanical as to call for a warning in any case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case' but required 'a consideration of the issues as they have emerged from the way in which the case has been conducted'.

62 (2004) 211 ALR 116.

"Assessing the Evidence

Accomplice and indemnified witness

- Ben Radcliff admits to being involved in the commission of the offence and is a prosecution witness who has been promised that the evidence he gives in this case will not be used against him in civil or criminal proceedings.
- He may have an incentive not to depart from the statement he gave to police, whether it is right or wrong, so as not to arouse any suspicions of untruthfulness.
- A person who has been involved in an offence may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence.
- Therefore, scrutinize his evidence with great care and only act on it if, after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.
- If not truthful, his evidence has an inherent danger. If it is false in implicating the defendants, it will nevertheless have a seeming plausibility about it, because he will have familiarity with at least some of the details of the crime.
- It would be dangerous to convict the defendant on the evidence of Ben Radcliff unless you find that his evidence is supported in a material way by independent evidence implicating that defendant in the offence."

[222] As to evidence capable of corroborating Radcliff's evidence with regard to Bakir and Hill, the learned trial judge told the jury that there was evidence from independent sources which was capable of supporting Radcliff's evidence in a material way. That evidence was largely circumstantial. He told them it was a matter for them whether they accepted that evidence and, if so, it was a matter for them whether they thought it did support his evidence in that way.

[223] In his power point presentation, the learned trial judge summarised his more extensive oral summing up as to what evidence, taken together, was capable of amounting to corroboration, as follows:

"
- Mr Cook was found in possession of GBL on 16 March 2006.
- The injury to Ben Radcliff at the meeting on 23 April 2006 observed by his father that evening.
- The telephone records show calls between Ms Gray and Mr Radcliff on 23 April 2006.
- The series of telephone calls from Mr Bakir's phone to Ms Gray's phone on 23 April 2006.
- A number of telephone calls between 22 April 2006 and 10 June 2006 between Mr Hill's number and Ben Radcliff's number.
- The Australia Post tracking record of the parcel coming from China to the Eagle Heights Post Office.
- The collection of the package on 6 June 2006 by Kayla Smith.
- Mr Bakir's visit to Melissa Young on the evening of 8 June 2006.

- Evidence of Gary Radcliff's sighting of Mr Bakir and Mr Hill with Ben Radcliff at Sullivan & Nicolaides on 9 June 2006.
- Gary Radcliff's evidence that Ben Radcliff appeared petrified in the presence of Mr Hill and Mr Bakir on that occasion.
- Mr Hill's call to Phoebe Brown on the afternoon of 9 June 2006.
- On 14 June 2006, Carmen Hilton observed Tony Broad and Phoebe Brown "cooking" chemicals in her unit.
- The evidence of Kayla Smith at the Australian Crime Commission hearing that 2 to 3 weeks after the package was collected Tony Broad gave her 500ml of fantasy.
- On 5 July 2006, Mr Broad was found in possession of a commercial quantity of GBL and a commercial quantity of GHB.
- Evidence of association between the three accused from the telephone records and other evidence such as the former relationship between Mr Bakir and Ms Gray and the admitted fact that they flew to Sydney together on 10 June 2006."

[224] The learned trial judge then summarised the evidence capable of corroborating Radcliff's evidence with regard to the case against Gray:

"- Taxi records showing Ben Radcliff leaving the vicinity of her residence.
- The phone calls on 23 April 2006 between her and Ben Radcliff.
- The Australia Post tracking record of the parcel coming from China to Eagle Heights Post Office.
- Evidence of association between the three accused.
- That Mr Cook was found in possession of GBL on 16 March 2006.
- That Ms Gray visited Mr Cook in prison.
- On 14 June 2006, Carmen Hilton observed Tony Broad and Phoebe Brown "cooking" chemicals in her unit.
- Evidence of Kayla Smith at the Australia Crime Commission hearing that 2-3 weeks after the package was collected Tony Broad gave her 500ml of fantasy.
- On 5 July 2006, Tony Broad was found in possession of a commercial quantity of GBL and a commercial quantity of GHB."

[225] The test of whether or not evidence is capable of being corroborative was set out by Lord Reading CJ speaking for the Court of Criminal Appeal in *The King v Baskerville*:[63]

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material

63 [1916] 2 KB 658 at 667.

> particular not only the evidence that the crime has been committed, but also that the prisoner committed it. ... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that **corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused**." (emphasis added)

It is not, however, necessary that the evidence of an accomplice be confirmed in every detail by independent evidence for the accomplice's evidence to be corroborated as, in such a case, the accomplice's evidence would not be necessary but "merely confirmatory of other and independent testimony."[64]

[226] *The King v Baskerville* was applied by the High Court in *Doney v The Queen*:[65]

> "The essence of corroborative evidence is that it 'confirms', 'supports' or 'strengthens' other evidence in the sense that it 'renders [that] other evidence more probable': *Reg v Kilbourne* [1973] AC 729 at 758, per Lord Simon of Glaisdale. It must do that by connecting or tending to connect the accused with the crime charged in the sense that, where corroboration of the evidence of an accomplice is involved, it 'shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused': *R v Baskerville* [1916] 2 KB 658 at 667.
>
> It is well settled that corroboration may be in the form of circumstantial evidence: *Baskerville*; see also *Reg v Tripodi* [1961] VR 186 at 190-191; *Reg v May* [1962] Qd R 456 at 459, per Gibbs J; *Reg v Lindsay* (1977) 18 SASR 103 at 117, per Zelling and Wells JJ; *Medcraft v The Queen* [1982] WAR 33 at 40. Circumstantial evidence is evidence which proves or tends to prove a fact or set of facts from which the fact to be proved may be inferred. Circumstantical evidence can prove a fact beyond reasonable doubt only if all other reasonable hypotheses are excluded: see *Hodge's Case* (1838) 2 Lewin 227 [168 ER 1136]; *Peacock v The King* (1911) 13 CLR 619 at 634, 651-652, 661; *Martin v Osborne* (1936) 55 CLR 367 at 375, 381; *Thomas v The Queen* (1960) 102 CLR 584 at 605-606; *Plomp v The Queen* (1963) 110 CLR 234 at 252; *Barca v The Queen* (1975) 133 CLR 82 at 104, 109. But, if some lesser standard will suffice, the existence of other reasonable hypotheses is simply a matter to be taken into account in determining whether the fact in issue should be inferred from the facts proved: see *Peacock* (1911) 13 CLR 619 at 638, where Griffith CJ noted the different considerations applicable to circumstantial evidence in civil and criminal cases.
>
> It is not necessary that corroborative evidence, standing alone, should establish any proposition beyond reasonable doubt. In the

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64 *The King v Baskerville* at 664.

65 (1990) 171 CLR 207 at 211; see also *BRS v The Queen* (1997) 191 CLR 275.

> case of an accomplice's evidence, it is sufficient if it strengthens that evidence by confirming or tending to confirm the accused's involvement in the events as related by the accomplice: see *Baskerville*; *Reg v Hester* [1973] AC 296 at 325."

[227] Further it is not necessary to consider each item of evidence said to be corroborative separately. In *R v Barrow*,[66] the Court of Appeal considered whether six individual items of evidence should have been left to the jury as potentially corroborative of the prosecution case. In holding that the evidence did have that quality, Pincus JA and Muir J (as his Honour then was) set out the following four propositions at [28]-[31]:

> "(i) **Evidence put forward as being corroborative may, although it consists of a number of disparate items, when appropriate, be considered as a whole, for the purpose of determining whether it is capable of supporting the Crown case**. This appears to us to be a point of particular practical importance; in a complex case the task imposed on the trial judge is sometimes thought to be to identify individually each item of potentially corroborative evidence, whereas it may be necessary to do no more than indicate to the jury a collection of evidence or types of evidence which the judge considers fit for their consideration. Some of the cases are usefully collected in *Kalajzich* (1989) 39 A Crim R 415 at 427-429, where there is reference to a 'chain of circumstances' being considered as corroborative (*Fuhrer* [1961] VR 500 at 509) and a quotation from King CJ in *Duke* (1979) 22 SASR 46 at 52:
>
> > '... potential corroboration is to be found not in the items considered separately, but in the combined weight of the circumstantial evidence ...' (429)
>
> An earlier recognition of the truth that corroboration may be found in a collection of evidence is to be found in *Eade* (1924) 34 CLR 154 at 158. One of the items which, together with others, was held to be corroborative there was that the complainant in an indecent assault case bought some pies and that could hardly, in itself, point to the commission of any offence.
>
> (ii) **Allegedly corroborative evidence which is to some extent consistent with both sides' case may nevertheless be corroborative of that advanced for the prosecution:** we refer to *Kalajzich* (above) and the Queensland cases discussed in it. Connected with this doctrine there is authority that an accused cannot neutralise potentially corroborative evidence by admitting it and giving non-incriminating explanations: see *Harris*, South Australian Court of Criminal Appeal, 17 September 1992, per King CJ. This consideration is particularly applicable to the records of production of batches 1 to 11; on the face of them these records were plainly corroborative of the Crown case and could not be deprived of

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66 [2001] 2 Qd R 525.

that quality by the fact that the appellant admitted that they recorded amphetamine production in which he was involved, but attributed that production to a time and place other than that alleged by the Crown.

(iii) **It is not correct that, in considering whether evidence is corroborative of an accomplice, one must necessarily ignore what the accomplice has said in evidence.** The point is lucidly explained by Macrossan J (as his Honour then was) in *Kerim* [1988] 1 Qd R 426:

> 'It is well understood that the corroborative evidence need not, by itself, have the effect of proving guilt but what will be expected of it and the area in which it must operate will depend on the issues at the trial and the respective versions contended for by the prosecution and defence ...' (447)
>
> '... the evidence of the party to be corroborated may be looked at to provide the setting and to yield a statement of the circumstances of the offence which is alleged. In this sense, the evidence of that party may invest with significance the details of the evidence which is offered as corroboration but still the corroborative evidence must have some independent capacity to implicate the accused in the commission of the offence which has been committed in the detailed circumstances which have been described.' (447)

Therefore, in the present case, in determining whether the collection of evidence mentioned was capable of being corroborative, the judge was entitled to take into account the extent to which it proved facts reconcilable with the version of events given by [an accomplice] and the extent to which they were irreconcilable with the competing account, sworn to by the appellant.

(iv) **The purchase of items suitable for the commission of an offence may, although such items are also capable of an innocent use, be corroborative.** An example is to be found in the decision of this Court in *Le Blowitz* [1998] 1 Qd R 303. There, corroboration was found in evidence of the purchase of items said to be for use in drug production, although all those items were capable of innocent use; *Trevilyan*, Supreme Court of South Australia, 2 November 1990, is a similar decision." (emphasis added)

[228] The judgment in *Barrow* followed an earlier Court of Appeal decision in *R v Le Blowitz*,[67] where Pincus JA had observed at 304 that:

> "…the jury could properly treat the relevant evidence as corroborative, if, taken as a whole, it had that character and ... the jury was not obliged to exclude any item from consideration merely because it would not, considered in isolation, necessarily support the Crown case ..."

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67 [1998] 1 Qd R 303.

[229] The proposition about the cumulative consideration of evidence to determine whether or not it is capable, taken together, of constituting corroborative evidence was elegantly expressed in *Le Blowitz* by Thomas J, as his Honour then was, as follows at 306:

> "Accepting for the moment that evidence needs to be more than intractably neutral before it can be called corroboration, it is in my view a mistake to apply that principle distributively to each item of evidence when collective consideration of that evidence would cause it to lose that neutrality. When corroboration of the evidence of an accomplice or complainant is considered necessary, there is no good reason why multiple individual facts may not fairly be put together as a circumstantial case capable of affording corroboration. 'In the case of an accomplice's evidence it is sufficient if it strengthens that evidence by confirming or tending to confirm the accused's involvement in the events as related by the accomplice' (*Doney v The Queen* (1990) 171 CLR 207, 211, per Deane, Dawson, Toohey, Gaudron and McHugh JJ). If the circumstantial case as a whole does this, it does not matter that some of the items in that circumstantial case may, if they had stood alone, have looked forlorn and intractably neutral."

[230] The fallacy that corroborative evidence must itself be probative that the defendant committed the crime was rejected by the Court of Appeal in Victoria in *R v Kuster*:[68]

> "Whether evidence amounts to corroboration is governed by the fundamental principle that it must be evidence – independent of the witness to be corroborated – which tends to confirm the evidence of that witness that the crime was committed and that the accused committed the crime.[69] This principle has from time to time been misconceived as requiring the corroboration evidence itself to be probative of the fact that the accused committed the crime. Vincent JA in *R v Taylor*[70] noted that there has been a 'remarkable persistence of the misconception' that evidence relied upon as corroboration 'must itself be probative of guilt.' The present argument rests upon this very fallacy.
>
> In *Doney v R* ('*Doney*'), the corroborative evidence did not itself directly link the accused to the crime charged.[71] The High Court rejected a submission that the evidence could not be corroborative because it did not implicate the accused in the offence charged. The joint judgment adopted the classic statement from *R v Baskerville* ('*Baskerville*')[72] that corroborative evidence must:
>
> > '[tend] to show *that the story of the accomplice that the accused committed the crime is true*, not merely that the crime has been committed, but that it was committed by the accused.'[73]

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68 (2008) 21 VR 407 at [14] – [18].

69 *R v Baskerville* [1916] 2 KB 658; *Doney v R* (1990) 171 CLR 207; *R v Kendrick* [1997] 2 VR 699; *R v Pisano* [1997] 2 VR 342; *R v Rayner* [1998] 4 VR 818.

70 (2004) 8 VR 213 at 228.

71 (1990) 171 CLR 207 at 210 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

72 [1916] 2 KB 658.

73 At 667 (emphasis added).

The highlighted words are not always included when *Baskerville* is cited, which may explain why the essence of corroboration is sometimes misunderstood. The passage from the judgment of Callaway JA in *R v McLachlan*,[74] upon which the applicant placed heavy reliance, does refer to the relevant part of the judgment in *Doney*, which was in these terms:

> 'The essence of corroborative evidence is the presence of some confirmation, support or strengthening of other evidence such that that other evidence is rendered more probable...
>
> …
>
> In the case of an accomplice's evidence, it is sufficient if it strengthens that evidence by confirming or tending to confirm the accused's involvement in the events *as related by the accomplice*: see *Baskerville*; *Reg v Hester*.'[75]

This Court has repeatedly rejected the notion that corroborating evidence must itself prove that the crime was committed and that the accused was involved in its commission.[76] Thus, in *R v Rayner*,[77] Winneke P observed:

> 'In truth, the essence of corroboration is that it is evidence coming from a source independent of the person to be corroborated *which renders that person's evidence in a material particular more probable*, in the sense that it tends to show not only that the crime charged was committed but that the accused was involved in its commission: *R v Baskerville* [1916] 2 KB 658 at 667 per Lord Reading CJ; *R v Kendrick* [1997] 2 VR 699 at 708.'[78]

Similar observations were made in *R v Taylor*.[79] In *R v Ngo*,[80] the Court said:

> 'The locus classicus of what amounts to corroborative material is the decision in *Baskerville*. The decision in that case is not authority for the proposition that potentially corroborative material must itself prove the crime was committed and that the accused was involved in its commission.'[81]

In none of these cases did the corroborative evidence, viewed in isolation from the evidence to be corroborated, prove the commission of the offence or that the accused was implicated in it.

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74 [1999] 2 VR 553 at 561.

75 *Doney v R* (1990) 171 CLR 207 at 211 (Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added).

76 See *R v Rayner* [1998] 4 VR 818; *R v Trong Duy Ngo* [2002] VSCA 188; *R v Martin* (2003) 142 A Crim R 153; *R v Taylor* (2004) 8 VR 213; and *R v Gill*; *R v Mitchell* (2005) 159 A Crim R 243 at [30] (Maxwell P, Charles and Nettle JJA) where the Court of Appeal saw no error in the direction given by the trial judge which was in accordance with the ruling at *R v Gill and Anor* (2003) 142 A Crim R 22. See also *R v Berrill* [1982] Qd R 508 at 526-7 (McPherson J); *R v McK* [1986] 1 Qd R 476 at 480 (Connolly J, with whom Thomas J agreed), 483-4 (de Jersey J).

77 [1998] 4 VR 818.

78 At 838 (emphasis added). See also *R v Gill and Anor* (2003) 142 A Crim R 22.

79 (2004) 8 VR 213 at 221 (Winneke P, with whom Ormiston and Vincent JJA agreed).

80 [2002] VSCA 188.

81 At [33] (Winneke P, with whom Chernov JA and O'Bryan AJA agreed) (citations omitted).

> In *BRS v R*,[82] Brennan CJ observed that: '[I]t is sufficient to constitute corroboration that the evidence should strengthen the evidence to be corroborated as to a fact on which proof of guilt depends'.[83] The essential quality of corroborative evidence is that it must independently 'confirm', 'support' or 'strengthen' the evidence to be corroborated, by rendering that 'other evidence more probable.'[84] It does so by providing support, from a separate and more trustworthy source, for the truth and reliability of the evidence to be corroborated.[85] Hence there is no distinction for the purposes of corroboration between evidence which itself tends to implicate the accused in the commission of the offence charged and evidence which is capable of supporting the evidence of the witness to be corroborated.[86] Evidence may be corroborative even though it may itself be regarded either as consistent with innocence or as equivocal.[87] It is for the jury to determine whether it is corroborative.
>
> Typically, it is the evidence to be corroborated which will establish the commission of the crime and the accused's involvement. The corroborative evidence need only render that account more probable in some material particular. The corroborative evidence, 'standing alone',[88] need not establish the commission of the crime or the accused's involvement in it."

[231] Each item of evidence considered by the judge to be corroborative, particularly when considered cumulatively, tended to show that Radcliff's evidence that the appellants committed the crimes charged was true. None of them was intractably neutral. The fact that there may have been an innocent explanation does not make inadmissible evidence which tends to show that the evidence given by Radcliff that the appellants committed the crimes was true.

[232] The objective evidence corroborated Radcliff's story as to the genesis and organisation of the importation and attempted possession. This included the fact and the nature of Cook's possession of GBL; the injury observed to Radcliff on 23 April 2006; the telephone records of calls between Radcliff and Cook's girlfriend, Gray, on that date; the number of calls made between Hill and Radcliff's telephones between 22 April and 10 June 2006 and the records of the parcel being received from China at the Eagle Heights Post Office and collected by Smith. Evidence of the association between Bakir, Hill and Gray through records of the telephone conversations between them, the relationship which had existed between Bakir and Gray and the fact that they flew to Sydney together on 10 June 2006 was also relevant to the importation of the drugs and the attempts by Bakir and Hill to get possession of them. There was other evidence supporting Radcliff's evidence of

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82 (1997) 191 CLR 275.

83 At 285 (Brennan CJ).

84 *Doney v R* at 211 (Deane, Dawson, Toohey, Gaudron and McHugh JJ); *R v Kilbourne* [1973] AC 729 at 757 (Lord Simon of Glaisdale).

85 *R v Martin* at [37] (Vincent JA, with whom Charles and Buchanan JJA agreed).

86 At [31] (Vincent JA, with whom Charles and Buchanan JJA agreed).

87 *R v Nanette* [1982] VR 81 at 88 (Jenkinson J); *R v Berrill* [1982] Qd R 508 at 526-7 (McPherson J); *Kalajzich & Orrock v R* (1989) 39 A Crim R 415; *R v Taylor* (2004) 8 VR 213 at 222 (Winneke P, with whom Ormiston and Vincent JJA agreed).

88 *Doney v R* at 211 (Deane, Dawson, Toohey, Gaudron and McHugh JJ); *R v Taylor* (2004) 8 VR 213 at 228 (Winneke P, with whom Ormiston and Vincent JJA agreed).

attempts by Bakir and Hill to get hold of the drugs which had been imported at their request, such as Bakir's visit to Young on 8 June 2006, Radcliff's father's evidence as to Bakir and Hill's being with Radcliff on 9 June 2006 and Radcliff's appearing petrified and Hill's phone call to Brown on 9 June 2006.

[233] As to the identity and quantity of the drugs imported and attempted to be possessed, corroborative evidence was found in the evidence of Hilton that she observed Broad and Brown cooking chemicals in her unit, the evidence of Smith at the ACC that Broad gave her 500 millilitres of fantasy two or three weeks after she collected the package from the post office and evidence given as to Broad's being found in possession of a commercial quantity of GBL and a commercial quantity of GHB on 5 July 2006.

[234] Evidence which tended to show that Radcliff's evidence that Gray imported a commercial quantity of GBL was true was provided by the objective evidence of taxi records showing he did indeed leave from the vicinity of her residence in accordance with his evidence of a meeting to discuss the proposed importation on 23 April 2006; that there were phone calls between them; that she then visited Cook in prison on the following day; that a parcel did arrive at the Eagle Heights Post Office from China and there was evidence of association between Gray, Bakir and Hill. Corroborative evidence as to the substance imported is found in the evidence referred to in the previous paragraph. Contrary to Gray's contentions the reasoning does not involve "speculation", irrelevant facts or "guilt by association".

[235] The evidence was capable of corroborating Radcliff's evidence in the relevant sense.

Directions

[236] Bakir and Hill submitted that if the court were of the view that some of the items identified as capable of corroborating Radcliff were properly left to the jury, it was submitted that the learned trial judge failed to properly direct the jury.

[237] In their written submissions, Bakir and Hill asserted that different considerations applied to each of the charges, that is, count 1 as opposed to count 5, as the prosecution chose to charge two separate offences as opposed to alternative counts. As such there had logically to be a point in time where the importation had ceased and the attempt to possess commenced. The two offences could not have overlapped. Thus, it was imperative for the learned trial judge to clearly identify:

(a) the point at which the importation had ceased and the attempt to possess commenced; and

(b) what items alleged to be corroborative could be considered on each of the separate charges.

[238] The failure to do so resulted, they submitted, in a material misdirection.

[239] While the offences of importing and attempted possession are separate, it does not follow that evidence relevant to prove one offence is irrelevant to prove the other. There was a clear relationship between these offences as they arose from an ongoing course of conduct commencing with the demand that Radcliff import GBL. On Radcliff's evidence Bakir and Hill were parties to importing a border controlled drug which they then attempted to possess. The dates on the indictment in fact overlap.

[240] Corroborative evidence need not relate to a particular count, it simply need render the witness's evidence that the offences were committed and that the appellants were involved in committing them more probable. In any event, all of the evidence left as capable of being corroborative applied to each count.

[241] No direction, as now contended for by the appellants, was required in the circumstances of this case. This was recognised in the conduct of the matter below when the appellants did not request such a direction. As noted above, this is in the context where prior to the summing up there were submissions made as to the directions to be given and counsel was provided in advance with a written copy of the summing up and the power point slides to be used. Further, at breaks in the summing up and at its conclusion counsel were asked about any requests for redirections. For the reasons previously given, there is no reason that the appellants should not be bound by the course taken at trial.

[242] The grounds of appeal relating to corroboration have not been made out.

Direction on imports

Appellants' submissions

[243] Ground 7 of Bakir's and Hill's grounds of appeal was that the trial judge erred in his direction to the jury on imports.

[244] It was submitted that where the prosecution had charged non-alternate offences, it was imperative for the trial judge to identify for the jury where the importation charge ceased and the attempted possession charge commenced. The directions to the jury did not assist the jury with such a task. It was submitted that the jury should have been directed that the importation was complete when the drugs arrived at a point which would result in them remaining in Australia. The failure to so direct led to a material omission from the summing up.

Discussion

[245] The trial judge directed the jury as to importation as follows:

> "The word 'imports' requires conduct that brings something into Australia. Items are not imported until they are brought into Australia. The act of importing is not something that occurs or ceases at a single moment. The act of importing does not finish the moment that the items containing the substance are brought into the port or are landed.
>
> Delays in the port or the intervention of the authorities do not prevent the process of importing from continuing. The process may continue after the items containing the substance have been landed."

This direction was consistent with the definition of "import" found in s 300.2 of the Commonwealth Code and is unimpeachable. There is no merit in this ground of appeal.

[246] As none of the grounds of appeal against conviction by Bakir, Hill and Gray have been made out, their appeals against conviction should be dismissed.

Applications for leave to appeal and appeals against sentence

[247] As set out earlier in these reasons, the CDPP appealed against the sentences imposed on each of the counts on which Bakir, Hill, Gray and Broad were convicted

and Bakir and Hill applied for leave to appeal against their sentences. Each of those applications and appeals will be dealt with together.

[248] The CDPP relied on three grounds of appeal:

1. That the sentences imposed for the Commonwealth offences were manifestly inadequate;

2. That the sentencing judge did not give sufficient weight to the circumstances of the case and in particular to the objective seriousness of the offences; and

3. That the sentencing judge gave too much weight to mitigating factors.

[249] The CDPP submitted that each of the sentences imposed on the respondents was manifestly inadequate and that this Court ought to intervene to maintain adequate standards of punishment for offences of this nature. In particular it was submitted that the sentences failed to reflect the criminality of the offending and the element of general deterrence and gave too much weight to mitigating factors.

[250] Bakir submitted that the sentencing discretion miscarried due to the following:

1. Misapplication of principles on non-parole periods in sentencing for Commonwealth offences;

2. Failure to apply adequately the principles regarding credit to be given in respect of Bakir's pre-sentence custody in New South Wales; and

3. Failure to give full credit for pre-sentence detention which resulted in erroneous determination of the applicable non-parole period.

[251] Hill submitted that on the basis of parity, he should have been sentenced to the same sentences that were imposed on Gray, namely five years with a non-parole period of two years six months, less the four and a half months his Honour took into account for pre-sentence custody which could not otherwise be declared.

[252] The sentencing remarks shows the matters to which his Honour had particular regard in imposing the sentences which he did upon the defendants. Amongst the factors he listed were:

- Bakir performed a significant role in facilitating the importation and attempting to gain possession of the GBL once it had been imported by his communications with Gray, assaults and threats he made to Radcliff on 23 April 2006 when he also took Radcliff's car, money and wallet and told him he would not get his car back unless he facilitated the importation;
- Hill performed a similar role to Bakir in assaulting Radcliff and demanding he follow through with the importation on 23 April 2006 and thereafter;
- Broad provided the majority of the money for the importation and a destination address for it and took possession of the imported drugs on 8 June 2006 and manufactured some of it on 14 June 2006 and 5 July 2006;
- The offences were committed for financial gain;
- Radcliff expected that about 10 to 12 bottles, able to produce approximately 9 to 10 kilograms of pure GHB, were to be imported;

- On 5 July 2006 Broad was found with 2,263 grams of pure GBL and 2,828 grams of GHB, which would require at least 2,338 grams of GBL to produce so Broad must have had a total of at least 4,601 grams of pure GBL in his possession;

- Some of the GBL that had been imported was dissipated by Broad and/or Brown between 6 June and 5 July 2006 because of the "cook up" that occurred at Hilton's premises on 14 July 2006;

- Smith's evidence that Broad had given her 500 millilitres of GHB showed that he was not in the enterprise for purely commercial reasons;

- There was a significant quantity of the drug well in excess of 1 kilogram, which is the minimum commercial quantity;

- The maximum return that may have been achievable from selling the GHB made from the GBL imported was between $180,000 and $200,000, unlike many serious importations where the street value of the drugs involved can be many millions of dollars;

- There are few comparable sentences in relation to GBL;

- On 6 December 2005, the maximum penalty applicable to the illegal importation of a commercial quantity of GBL increased from five years imprisonment and/or a fine of $110,000 to life imprisonment;

- The prosecution submission that the head sentences in respect of the most serious charges would appropriately be in the range of 10 to 12 years;

- As to the quantity, Gray must have known the quantity to be imported, Broad must have known the quantity that he received and the quantity of GHB manufactured and the jury verdicts showed that Bakir and Hill knew the amount to be imported was a commercial quantity and their knowledge of the actual quantity could be inferred from the fact that Bakir was in telephone contact with Gray at critical points, the value of Radcliff's stolen property was indicative of the size of the stake that Bakir and Hill were taking in the enterprise as was the significant effort expended by Bakir and Hill to obtain the GBL.

- The prosecution submission that general deterrence was a fundamental consideration for a drug importation offence, particularly as all of the parties were willing to involve themselves in the drug enterprise despite the obvious risks, so that the sentences should signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment;

- The sentencing judge also took into account a period of six months which Bakir spent on remand in respect of the offences of assaulting Radcliff and unlawful use of his car. That period on remand was taken into account in setting the non-parole period, as was a period of four and a half months for Hill;

- The sentencing judge held it was not appropriate to deduct the whole of a period of 12 months spent by Bakir on remand in custody in New South Wales in respect of a charge wholly unrelated to these offences which was discontinued after a pre-trial application and where his loss of bail in New South Wales

appeared to have been related to the offences for which he was remanded being alleged to have been committed in breach of his bail in respect of the counts on which he was convicted at the trial;

- There were significant mitigating factors with regard to Broad who pleaded guilty on the first day of the trial and appeared to have uncharacteristically taken on this pattern of criminal behaviour after a tragic marital break up and moved to the Gold Coast and lost his family support network which he had since re-established. He was also drug free and had taken significant steps to rehabilitate himself since his arrest by moving to another city, taking on good employment and reverting to what his referees regarded as his true character;

- Gray was young and had taken steps to rehabilitate herself and was supported by a large of number glowing references, she had a difficult childhood and since the offences had taken up worthwhile employment at which she was succeeding;

- Bakir suffered from physical and psychiatric problems after a significant motorcycle accident. That, together with the need for his family to live in Sydney, would make his time in prison more difficult;

- Hill's mitigating features included the fact that he had a five and a half year old daughter whose mother would not allow him to see her since the allegations associated with this offence and his alleged involvement in the shooting of Peter Wilson. He had a good work history and may have attempted to be a calming influence on Bakir;

- His Honour relied upon *R v Davidson* (2009) 75 NSWLR 150, a decision of the New South Wales Court of Criminal Appeal, which dismissed an appeal against sentence by the defendant. That case involved the importation of a commercial quantity of the border controlled drug GBL. Davidson was sentenced to six years imprisonment on each of three counts of importing a commercial quantity of the border controlled drug GBL and one count of attempting to do so. By reason of partial accumulation of sentences, the total term of imprisonment imposed was eight years which was reduced by three months and fifteen days to take account of time spent in custody on remand. A non-parole period of four years five months and fifteen days was specified. The sentencing judge, who sentenced before the decision in *Adams v The Queen* (2008) 234 CLR 143, had before him a report suggesting that GBL was less harmful than for example heroin. The Court of Criminal Appeal said that no specific error was sought to be attributed to the approach taken by the sentencing judge and could detect none. Simpson J noted that the report as to the relative harmfulness of GBL had significantly reduced weight after the decision of the High Court in *Adams v The Queen*.

- The sentencing judge reduced the non-parole period from the time he would normally have fixed of four years to three years three months to take into account Bakir's incarceration beforehand in Queensland and part of his incarceration in New South Wales;

- His Honour reduced the non-parole period for Hill to three years and seven months because of his previous incarceration;

- In respect of Broad, his Honour took into account his plea of guilty, that he had committed four offences including two State offences and imposed a period of

imprisonment of five years in respect of count four and concurrent terms of imprisonment of two years in respect of count seven and three and a half years in respect of count eight and two years in respect of count nine. Because of his plea of guilty and his demonstrated rehabilitation his Honour fixed a two year non-parole period;

- With regard to Gray, his Honour imposed a penalty of five years imprisonment in respect of count three taking into account her youth and rehabilitation. He fixed a two year six month non-parole period also taking into account her rehabilitation;

- With respect to Bakir, Hill and Gray he declared a period of 24 days from 27 October 2010 until the date of sentencing, 19 November 2010, to be time served by them in respect of the sentences he had imposed.

[253] There are three High Court decisions which particularly affect the role of this court in reviewing the sentences imposed in this case. They are *Lacey v Attorney-General (Qld)* [2011] HCA 10, *Hili v The Queen; Jones v The Queen* [2010] HCA 45 and *Adams v The Queen* (2008) 234 CLR 143.

[254] In *Lacey v Attorney-General (Qld)*, Lacey had been convicted of manslaughter in the Supreme Court of Queensland and sentenced to ten years imprisonment. He subsequently appealed against his conviction and applied for leave to appeal against his sentence to the Court of Appeal. The Attorney-General of Queensland also appealed against his sentence on the grounds that it was "inadequate" or "manifestly inadequate". The Court of Appeal allowed the Attorney-General's appeal and the appellant's sentence was increased to eleven years imprisonment.

[255] Lacey appealed to the High Court. At issue was the proper construction of s 669A(1) of the *Criminal Code 1899* (Qld) which provides that the Attorney-General may appeal to the Court of Appeal against a sentence and "the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

[256] The appellant argued that contrary to the view taken by the Court of Appeal, in determining an Attorney-General's appeal against sentence pursuant to s 669A(1) it did not have the power to vary a sentence absent any demonstrated or inferred error on the part of the sentencing judge. The High Court allowed the appeal and set aside the orders made by the Court of Appeal.

[257] The High Court first set out some general background and principles with respect to Crown appeals against sentence and examined the relevant case law. It concluded at [20]:

> "In construing a statute which provides for a Crown appeal against sentence, common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase of the sentence without the need to show error by the primary judge. That is a specific application of the principle of legality. It is reflected in, and reinforced by, the decisions of this Court. Such a construction also has the vice that it deprives the sentencing judge's order of substantive finality. It effectively confers a discretion on the Attorney-General to seek a different sentence from the Court of Appeal without the constraint of any threshold criterion for that Court's intervention. Such a construction tips the

> scales of criminal justice in a way that offends 'deep-rooted notions of fairness and decency'. It is not therefore a construction lightly to be taken as reflecting the intention of the legislature." [footnote omitted]

[258] The High Court set out the legislative history of s 669A(1) which the Court of Appeal had relied on in reaching its conclusion as to the proper construction of the provision. The High Court then examined the Court of Appeal's reasoning and the proper approach to statutory interpretation that should be taken.

[259] In construing s 669A(1), the High Court drew, at [48], an important distinction between "jurisdiction" and "power". The Court emphasised the need to give content to the word "appeal" in s 669A(1). This led the Court to conclude at [60]:

> "… it is open to construe s 669A(1) as creating an appeal by way of rehearing and conferring appellate jurisdiction to determine only whether there has been some error on the part of the primary judge. Such error having been detected, the Court has a wide power, indicated by the words 'unfettered discretion', to vary that sentence."

[260] And at [62]:

> "In our opinion, the appellate jurisdiction conferred upon the Court of Appeal by s 669A(1) requires that error on the part of the sentencing judge be demonstrated before the Court's 'unfettered discretion' to vary the sentence is enlivened. The unfettered discretion may be taken to confer upon the Court of Appeal in such a case the power to substitute the sentence it thinks appropriate where error has been demonstrated."

[261] This Court will not therefore interfere with the sentences imposed below on an appeal by the CDPP unless error by the sentencing judge is demonstrated.

[262] In *Hili v The Queen; Jones v The Queen*, the applicants pleaded guilty to Commonwealth fraud and money laundering offences and were sentenced in the New South Wales District Court. The prosecution appealed against the sentences imposed on the basis that they were manifestly inadequate. The appeal was allowed by the Court of Criminal Appeal. In the course of its reasons, that court observed "that the 'norm' for a period of mandatory imprisonment under the Commonwealth legislation is between 60% and 66%, which figure will be affected by special circumstances applicable to a particular offender."

[263] On appeal to the High Court, the applicants contended that there is no norm or starting point, expressed as a percentage for a mandatory period of imprisonment before release on a recognizance release order. The High Court upheld this aspect of the appeal but ultimately dismissed the appeal on the ground that the Court of Criminal Appeal was correct in concluding that the sentences imposed were manifestly inadequate.

[264] The High Court took as its "fundamental starting point" the relevant statutory provisions containing the general sentencing principles that are to be applied in Part IB of the *Crimes Act* 1914 (Cth). It held that the proposition that there is a "norm" expressed as a percentage for the relationship between the term to be served and the head sentence imposed should not be accepted. The High Court quoted with approval comments made by this Court in *R v Ruha*:[89]

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89 (2010) 198 A Crim R 430 at [47].

> "…because the relevant factors and the relative differences in the weight to be afforded to each factor in the different aspects of the overall sentencing process may differ according to infinitely variable circumstances, there can be no 'mechanistic or formulaic' approach which requires sentencing judges to ensure that the proportion which the pre-release period bears to the sentence of imprisonment must or must usually fall within a range which is substantially narrower than the whole period of the imprisonment, which is the range the statute expressly contemplates for recognizance release orders."

[265] The High Court said at [44]:

> "These are reasons enough to conclude that there neither is, nor should be, a judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment that a federal offender should actually serve in prison before release on a recognizance release order. More particularly, these are reasons enough to conclude that it is wrong to say, as the Court of Criminal Appeal did, 'that the 'norm' for a period of mandatory imprisonment under the Commonwealth legislation is between 60 and 66%, which figure will be affected by special circumstances applicable to a particular offender.' It is wrong to begin from some assumed starting point and then seek to identify 'special circumstances'. Rather, a sentencing judge should determine the length of sentence to be served before a recognizance release order takes effect by reference to, and application of, the principles identified by this Court in *Power*, *Deakin* and *Bugmy*." [footnotes omitted]

[266] The High Court observed that the need for consistency in federal sentencing is a need for consistency in the application of the relevant legal principles which requires consistency in the application of Part IB of the *Crimes Act* 1914 (Cth). This requires application of those provisions without being distracted or influenced by other and different provisions that would be engaged if a federal offender was not involved:[90]

> "…the provisions of Div 4 of Pt IB are cast in terms that not only provide 'a separate regime for fixing federal non-parole periods rather than relying on applied State or Territory legislation', those provisions deal exhaustively with that subject. State and Territory legislation concerning the fixing of non-parole periods has no application to the sentencing of federal offenders." [footnotes omitted]

[267] Consistency of this kind "is not capable of mathematical expression".[91] For this reason, like cases should be treated alike and different cases differently, however care should be taken in using what has been done in earlier cases. As Simpson J said in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28 at [304]:

> "…They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence."

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90 *Hili v The Queen; Jones v The Queen* at [52].

91 *Hili v The Queen; Jones v The Queen* at [49].

[268] On the question of manifest inadequacy, the High Court noted at [59]-[60]:

> "As was said in *Dinsdale v The Queen*, '[m]anifest inadequacy of sentence, like manifest excess, is a conclusion'. And, as the plurality pointed out in *Wong*, appellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate 'is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases'. Rather, as the plurality went on to say in *Wong*, '[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons'. But, by its very nature, that is a conclusion that does not admit of lengthy exposition. And, in the present matters, the Court of Criminal Appeal, having described the circumstances of the offending and the personal circumstances of the offenders, said that 'the sentence imposed in these matters is so far outside the range of sentences available that there must have been error'.
>
> The Court of Criminal Appeal also said that 'manifest error is fundamentally intuitive'. That is not right. No doubt, as the Court went on to say, manifest error 'arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it'. But what reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence." [footnotes omitted]

[269] Consistency in sentencing is achieved by faithfully applying the sentencing principles set out in Part IB of the *Crimes Act* 1914 (Cth) guided by other sentences imposed in similar cases.

[270] *Adams v The Queen* is a useful High Court authority on the approach taken to the appropriate sentence to be imposed in cases involving a commercial quantity of a border controlled drug.

[271] The appellant was convicted after trial by jury of possession of a commercial quantity of the drug MDMA (commonly known as ecstasy). In sentencing him, the trial judge made the remark, "In general terms the courts equate ecstasy … as being similar to heroin". The appellant appealed on the basis of a factual assertion that "MDMA … is less harmful to users and to society than heroin."

[272] In dismissing the appeal, the High Court noted that the legislation in question, the *Customs Act* 1901 (Cth), adopted a quantity-based penalty regime, fixing "trafficable" and "commercial" quantities of certain drugs, distinguishing between those drugs in setting such trafficable and commercial quantities, but otherwise making no distinction between them in terms of maximum penalties.

[273] The High Court stated that the trial judge's comment, was "an observation that, generally speaking, importing or possessing ecstasy is taken as seriously for sentencing purposes as importing or possessing heroin", which in the context of the present case, was "unexceptionable". Whilst acknowledging that the sentencing judge must take into account the nature and circumstances of the offence, the Court

did not think it was necessary or desirable to engage in the task of comparing the "social evils" of the trade in different illicit drugs.

[274] The Court said at [10] – [11]:

> "… In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme. …
>
> … [T]here is nothing in the *Customs Act*, or the evidence, or the demonstrated state of available knowledge or opinion, which requires or permits a court to sentence on the basis that possessing a commercial quantity of MDMA is in some way less anti-social than possessing a commercial quantity of heroin. Furthermore, the sentencing judge's primary consideration was deterrence. That is not said to involve error. Why there should be a difference in that respect between heroin and MDMA was not explained."

[275] The principle to be drawn from this case is that the sentencing court should take into account the fact that the appellants were convicted of offences in relation to a commercial quantity of a border controlled drug and the penalties set by the legislature for such offences.

[276] The Commonwealth offences of which the appellants were convicted are contained within Part 9.1 of the Commonwealth Code. This now contains the Commonwealth legislative scheme for dealing with serious drug offences. Part 9.1 was inserted into the Commonwealth Code by Schedule 1 to the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth) which commenced operation on 6 December 2005. The Schedule also repealed the previous serious drug offences contained in the *Customs Act* 1901 (Cth). The maximum penalty was increased from five years imprisonment to life imprisonment.

[277] The CDPP submitted and I agree that, given the observations of the High Court in *Adams*, it would be contrary to the legislative regime to look for an appropriate range of sentences by reference to the identity of the substance alone. The relevant principles for sentencing an offender for the importation or possession of a border controlled drug were usefully set out by Johnson J (with whom Macfarlan JA and Hulme J agreed) in the New South Wales Court of Criminal Appeal in *R v Nguyen*; *R v Pham*[92] at [72] and include:

> (a) The criminality of an offender must be assessed by consideration of the involvement of the offender in the steps taken to effect the importation. Where it is capable of being discerned, the role played by the offender is of great importance in assessing the objective criminality of the offence.

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92 [2010] NSWCCA 238.

(b) Problems may emerge when a sentencing court attempts to categorise the role of the offender in the drug enterprise, as in many cases the full nature and extent of the enterprise is unlikely to be known to the Court.

(c) It is the criminality involved in the importation which must be identified. The fact that another person may be characterised as the 'mastermind' does not mean that a person who was responsible for managing the importation into Australia is properly described as having only a middle level of responsibility.

(d) Although the weight of the drug imported is not the principal factor to be considered when fixing sentence, the size of the importation is a relevant factor and has increased significance when the offender is aware of the amount of drugs imported.

(e) Ordinarily, the amount of the drug involved in an importation is a highly relevant factor in determining the objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type. In many cases, the only factor that would lead to a determination that one importation is worse than another would be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar.

(f) As a matter of common sense, it should be inferred, unless there is evidence to the contrary, that a person who is importing drugs is doing so for profit. (The fact that the offender needs money to pay off a debt does not necessarily affect culpability.)

(g) The difficulty of detecting importation offences, and the great social consequences that follow, suggest that deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case.

(h) The sentence to be imposed for a drug importation offence must signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralised by the risk of severe punishment.

(i) Involvement at any level in a drug importation offence must necessarily attract a significant sentence. Otherwise the interests of general deterrence are not served.

(j) The prior good character of a person involved in a drug importation offence is generally to be given less weight as a mitigating factor than it might otherwise be given.

(k) Where offenders are not young, the immaturity of youth cannot be claimed as a factor bearing upon their transgressions.

(l) Where an offender is to be sentenced for an attempted possession offence, it should be kept in mind that the act of attempted possession can be attended by a wide range of moral culpability, so that the circumstances in which a person so charged attempted to come into possession of

the drug, and what it was that the person intended to do with that drug, are relevant to determining the degree of moral culpability attached to the act of attempted possession itself. A sentencing judge should have regard to the offender's involvement in the overall transaction for the purpose of determining the offender's degree of involvement in a drug-smuggling enterprise.

(m) Offences of attempting to possess imported drugs are not, for that reason, in a less serious category than that of importing the drugs.

[278] Bakir argued on appeal that the judge failed to give appropriate credit in respect of presentence detention in New South Wales. Section 159A(1) of the *Penalties and Sentences Act* 1992 (Qld) applies because of the effect of s 16E of the *Crimes Act* 1914 (Cth) on the commencement of sentences. Section 16E is also relevant to the question of non-parole periods under Commonwealth sentences. It provides:

"**Commencement of sentences**

(1) Subject to subsection (2) and (3), the law of a State of Territory relating to the commencement of sentences and of non-parole periods applies to a person who is sentenced in that State or Territory for a federal offence in the same way as it applies to a person who is sentenced in that State or Territory for a State or Territory offence.

(2) Where the law of a State or Territory has the effect that a sentence imposed on a person for an offence against the law of that State or Territory or a non-parole period fixed in respect of that sentence:

(a) may be reduced by the period that the person has been in custody for the offence; or

(b) is to commence on the day on which the person was taken into custody for the offence;

the law applies in the same way to a federal sentence imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence.

(3) Where the law of a State or Territory does not have the effect mentioned in subsection (2), a court (including a federal court) in that State or Territory that imposes a federal sentence on a person or fixes a non-parole period in respect of such a sentence must take into account any period that the person has spent in custody in relation to the offence concerned."

[279] Section 159A of the *Penalties and Sentences Act* provides for the time spent in prison which the court must declare as imprisonment already served under the sentence, unless the court otherwise orders. That is any time that the offender was held in custody in relation to proceedings for the offence and for no other reason.

[280] Section 159A(1) is not, however, an exhaustive statement of a sentencing court's power to take account of presentence custody when arriving at an appropriate sentence. There is no suggestion in this case that Bakir's presentence custody in New South Wales could be declared as part of the sentence already served. A solicitor who acted for Bakir with regard to the New South Wales charge, which

was a charge of discharging a fire arm with intent to murder and "related matters", swore that Bakir had been refused bail with regard to that charge on a number of occasions having regard to a number of matters including the seriousness of the charge. He said both the Supreme Court and the local court identified the fact that Bakir was already on bail in Queensland at the time he was alleged to have committed the New South Wales offences as a significant matter supporting the finding that bail not be granted. A *nolle prosequi* was entered after a pre-trial hearing where the identification evidence was excluded.

[281] The extent to which the sentencing judge could reduce the sentence imposed to take account of the period of imprisonment which was not capable of a declaration is within the sentencing judge's discretion. No error was shown in the way in which his Honour did take the pre-sentence custody in New South Wales into account. As the Court of Appeal said in *R v Ainsworth* [2000] QCA 163, it is not mandatory to take into account any pre-sentence custody which cannot be declared at the first opportunity and nor does the judge have to take into account the whole of the presentence custody in those circumstances.

[282] However, if it falls to this Court to resentence the appellant Bakir because the sentence imposed below displays error and was manifestly inadequate, it would be appropriate to follow the general approach set out by the Court of Appeal in *R v Fabre* [2008] QCA 386, that while it is not mandatory, it is generally desirable to take into account periods of presentence custody which are not declarable under s 159A of the *Penalties and Sentences Act* at the first opportunity.[93] That period of imprisonment was one year and 10 days from 6 February 2008 until 16 February 2009.

[283] Section 16A(1) of the *Crimes Act* 1914 (Cth) provides that in determining the sentence to be passed or the order to be made in respect of any person for a Commonwealth offence, the court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence. A non-exhaustive list of the matters that the court must take into account are set out in s 16A(2) as follows:

> "(a) the nature and circumstances of the offence;
> (b) other offences (if any) that are required or permitted to be taken into account;
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct;
> (d) the personal circumstances of any victim of the offence;
> (e) any injury, loss or damage resulting from the offence;
> (f) the degree to which the person has shown contrition for the offence:
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
> (ii) in any other manner;
> (fa) the extent to which the person has failed to comply with:
> (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
> (ii) any obligation under a law of the Commonwealth; or

93 *R v Fabre* at [14]-[15].

(iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;

about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;

(g) if the person has pleaded guilty to the charge in respect of the offence – that fact;

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;

(j) the deterrent effect that any sentence or order under consideration may have on the person;

(k) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, age, means and physical or mental condition of the person;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants."

[284] The CDPP submitted that the appropriate sentencing range for the most serious offences was between 10 to 12 years.

[285] It is not possible, nor even desirable, to attempt to provide for mathematical consistency in sentencing throughout the Commonwealth; what is important is consistency in the principles to be applied. However, it is useful to consider the sentences imposed both in Queensland and elsewhere in Australia in determining whether the sentences imposed failed to give full effect to the relevant matters set out in s 16A together with any other relevant matters.

Queensland authorities

[286] In *R v Tran* (2007) 172 A Crim R 436, the applicant pleaded guilty to importing a marketable quantity of the border controlled drug heroin (1,473 grams pure) and was initially sentenced to 15 years imprisonment with a non-parole period of seven years. The maximum penalty for this offence was 25 years imprisonment. The applicant was a courier with no prior criminal record. The Court of Appeal held that the applicant's sentence was manifestly excessive in comparison to sentences imposed in other jurisdictions and reduced his sentence to 10 years imprisonment with a non-parole period of five years.

[287] Keane JA observed at [8]:

> "Gleeson CJ in *Wong v The Queen* said of the administration of criminal justice: 'It should be systematically fair, and that involves, amongst other things, reasonable consistency.' Where the system of criminal justice is enforced by the judicial power of the Commonwealth, State courts exercising that power should strive for reasonable consistency in the sentences imposed throughout the Commonwealth. That objective will usually require recognition of decisions of other States where those decisions concern like cases." [footnotes omitted]

[288] In *R v Shahrokhey-Zadeh* [2006] QCA 4, the applicant was convicted after a trial by jury of one count of importing a commercial quantity of cocaine (4,143.8 grams pure) and sentenced to a term of imprisonment of 12 years with a non-parole period of six years. In dismissing his appeal and holding that the sentence imposed was not manifestly excessive, the Court of Appeal noted that the applicant had been sentenced on the basis that another person had acted as his courier in the importation which was organised by him for his benefit; the cocaine was more than twice the commercial quantity prescribed in the *Customs Act* 1901 (Cth); the cocaine had a street value of approximately $1.6 million and it was a planned commercial venture designed to yield him with substantial financial gain; and the maximum penalty for the offence was life imprisonment.[94]

[289] In *R v Davies* [2007] QCA 416, the applicant pleaded guilty to possession of a commercial quantity of cocaine (2,240 grams pure) and was initially sentenced to seven and a half years imprisonment with a non-parole period of two years six months. The Court of Appeal allowed the appeal and for reasons of parity with a co-offender, substituted his sentence for a period of imprisonment of seven years with a non-parole period of two years. The applicant's involvement was described as lower than that of his co-offenders who were at "a higher level of the pyramid of drug distribution."[95] Cook was one of those co-offenders. He had been sentenced to eight years six months imprisonment with a non-parole period of two years ten months.

[290] In *R v Chandler* [2010] QCA 21, the applicant pleaded guilty to importing a commercial quantity of a border controlled precursor with the intention that it be used to manufacture a controlled drug contrary to s 307.11 of the Commonwealth Code. The applicant had collected three parcels containing between 2,799 grams and 2,988 grams of pseudoephedrine which could have been used to produce approximately 2 kilograms of methylamphetamine with a street value of between $600,000 and $1.6 million. The maximum penalty for this offence was 25 years imprisonment with or without a fine. The Court of Appeal refused the applicant leave to appeal against his sentence of five years imprisonment with a non-parole period of three years. On the question of the relevance that the drug in question was a precursor, Keane JA said at [24]:

> "…the fact that the legislature has prescribed a maximum penalty of 25 years imprisonment as opposed to life imprisonment for the importation of drugs reflects the view (which is hardly surprising) that the level of criminality involved in the case of the importation of precursors with the intention of using them to make drugs is less serious, but not greatly less serious, than the importation of drugs."

[291] These cases all involved commercial quantities of the drug in question (apart from *Tran*). It is also relevant to review the sentences imposed in cases involving a lesser amount or marketable quantity of a drug.

[292] In *R v Oprea* [2009] QCA 184, the applicant was convicted after a trial of attempting to possess a marketable quantity of the border controlled drug cocaine (1,489.7 grams pure) and sentenced to 10 years imprisonment with a non-parole period of six years six months. The Court of Appeal (Keane and Chesterman JJA, McMurdo P dissenting) dismissed the appeal and held that the sentence imposed

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94 *R v Shahrokhey-Zadeh* at 5.

95 *R v Davies* at [25].

was within the range of sentences reasonably available in the case. In reaching this conclusion, Keane JA noted that despite the applicant's submission that he played a relatively limited role, he was a "necessary part of an international network engaged in the importation of cocaine."[96] Further, "his case compares distinctly unfavourably with that of *Tran* who had no previous convictions and confessed immediately on his apprehension… [and] gave information to the authorities about others involved in the importation."[97]

[293] In *R v Harris* [2009] QCA 370, the applicant pleaded guilty to attempting to possess a marketable quantity of the border controlled drug cocaine (1,489.7 grams pure) and was sentenced to a period of imprisonment of seven years with a non-parole period of four years. Her application for leave to appeal against sentence was dismissed by the Court of Appeal. The Court of Appeal considered that her sentence was appropriate in the circumstances of the case, which included her guilty plea (although it was not particularly early) and the fact that she "had no involvement in planning or funding of the offence and that her role was simply to receive the drugs and pass them on."[98]

[294] In *R v Jimson* [2009] QCA 183, the applicant pleaded guilty to importing a marketable quantity of the border controlled drug cocaine which consisted of 1,686.8 grams pure cocaine with an estimated street value ranging from $750,000 to $2 million. The applicant had acted as a courier and assisted the authorities with their investigations. The Court of Appeal refused to disturb the applicant's sentence of a period of eight years imprisonment with a non-parole period of four years six months.

Other jurisdictions

[295] The cases of *R v Davidson* (2009) 75 NSWLR 150 and *R v Lawrence; R v McDonagh* [2007] SASC 106 are two of the few cases dealing with the drugs GBL and GBH.

[296] In *R v Davidson*, the appellant was convicted following a jury trial of three counts of importing a commercial quantity of the border controlled drug GBL and one count of attempting to do so. The total amount in question was approximately 30.5 kilograms. He was sentenced to imprisonment for six years on each count but by reason of partial accumulation of sentences the total term of imprisonment was eight years, with a single non-parole period of four years five months and 15 days. In dismissing his appeal against sentence, Simpson J noted at [96]-[97]:

> "It was pointed out that, while the importation of GBL was plainly an offence against Commonwealth law, at the time of these offences, GBL was not a drug recognised in or proscribed by New South Wales drug law; and that, in some comparable jurisdictions (for example Canada) it is not prohibited. It has legal uses even in Australia.
>
> It is true that GBL is not a drug with which the courts of New South Wales have acquired great familiarity. Two precedents only were provided to this Court."

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96 *R v Oprea* at [29].
97 *R v Oprea* at [31].
98 *R v Harris* at [20].

[297] In *R v Lawrence; R v McDonagh*, the respondents were convicted on their pleas of guilty of three counts of taking part in the sale of GHB contrary to s 32(1)(d) of the *Controlled Substances Act* 1984 (SA). The quantities involved in total were in excess of 51 kilograms and attracted a maximum penalty of a $5,000 fine and life imprisonment. The first respondent was sentenced to five years seven months imprisonment with a non-parole period of two years six months. The second respondent, who was acknowledged to have a lesser role, was sentenced to four years imprisonment with a non-parole period of one year ten months. The prosecution appealed against the sentences on the basis that they were "so low as to shock the public conscience and erode sentencing standards … [and] that the sentencing judge erred in reducing the sentences to the extent of 20 per cent on account of the pleas of guilty".[99]

[298] The South Australian Court of Criminal Appeal held that there was no error of approach and that the sentences imposed were within the range that was appropriate. With respect to the particular drug involved of GHB, the Court said at [21]:

> "It was accepted on both sides that fantasy is to be regarded as a substance not as dangerous as heroin, but more dangerous than cannabis. There was no evidence before the sentencing judge as to how it compared with other so-called "middle range" prohibited substances."

This case was before the High Court's decision in *Adams v The Queen*. As referred to earlier in these reasons, in light of the observations of the Court in that case it is no longer the correct approach to consider the nature of a particular drug or how harmful it may be in comparison to other types of drugs in sentencing for Commonwealth offences of importing and possessing (or attempting to possess) a commercial quantity of a border controlled substance.

[299] In *Chan, Lo and Nguyen v R* [2010] NSWCCA 153, the applicants Chan and Lo were charged with attempting to possess a commercial quantity of the border controlled drug methylamphetamine (approximately 10.01 kilograms pure) and the applicant Nguyen was charged with aiding and abetting the importation of the same. The maximum penalty in each case was life imprisonment and/or a fine not exceeding $825,000.

[300] The applicants pleaded guilty and their sentences were not disturbed by the Court of Criminal Appeal which, after a comprehensive analysis of the relevant authorities, held that the sentences imposed were not manifestly excessive. The applicant Chan was sentenced to imprisonment for 12 years six months, with a non parole period of seven years six months; the applicant Lo was sentenced to imprisonment for seven years six months, with a non parole period of four years six months; and the applicant Nguyen was sentenced to imprisonment for 10 years, with a non parole period of six years.

[301] In *R v Kevenaar* (2004) 148 A Crim R 155, Hulme J undertook a thorough review of the relevant case law and the sentences imposed for the importation of border controlled drugs. In that case, the three respondents pleaded guilty shortly before the trial to attempting to possess a commercial quantity of MDMA (5,987.7 grams pure). The maximum penalty for their offences was life imprisonment and/or a fine. The New South Wales Court of Criminal Appeal allowed the prosecution appeal

[99] *R v Lawrence; McDonagh* at [3].

against the sentences on the basis that a number of errors were made and they were manifestly inadequate.

[302] Hulme J considered it appropriate to exercise the court's discretion to resentence the respondents . In doing so, he considered that the appropriate starting point for Kevenaar and Dedoes was 12 years imprisonment. In the case of Kevenaar, he discounted this by 40 per cent to reflect his plea and assistance, resulting in a head sentence of seven years with a non-parole period of four years six months. In the case of Dedoes, he discounted the starting point by 35 per cent to reflect his plea and assistance, resulting in a head sentence of seven years nine months with a non-parole period of five years . In the case of Pan, his Honour noted that his greater role meant that his starting point should be higher. He set this at 13 years eight months, and reduced it by 20 per cent for his plea and assistance, resulting in a head sentence of 11 years with a non-parole period of seven years.

[303] The Court was also referred by the parties to a number of authorities dealing with marketable quantities of a drug.

[304] In *R v Onuorah* (2009) 76 NSWLR 1, the appellant was convicted by a jury of one count of attempting to possess a marketable quantity of the border controlled drug cocaine, for which the maximum penalty is 25 years imprisonment and/or a fine. He was sentenced to nine years imprisonment with a non-parole period of six years, however this was adjusted to take into account periods of pre-trial custody. The appellant's appeal against his sentence was dismissed by the New South Wales Court of Criminal Appeal.

[305] In *El-Ghourani v The Queen* (2009) 195 A Crim R 208, the applicant pleaded guilty to attempting to possess a marketable quantity of the border controlled drug heroin (181.5 grams pure) and was sentenced to nine years imprisonment with a non-parole period of six years. The maximum penalty for this offence is 25 years imprisonment and/or a fine. The New South Wales Court of Criminal Appeal held that the sentence imposed was within the range appropriate for the case. The Court found that it was appropriate for the sentencing judge to take into account the applicant's "central role in the overall transaction" and involvement in a drug smuggling syndicate, despite the fact that he had not been charged with importation, and that her Honour was "entitled to sentence the applicant with regard to the high degree of culpability involved in the particular act of possession with which he was charged."[100]

[306] In *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28, the respondent pleaded guilty to the importation of a marketable quantity of the border controlled drug cocaine (1,870 grams pure) and was sentenced to eight years imprisonment with a non-parole period of five years. The prosecution appeal against this sentence on the basis that it was manifestly inadequate was dismissed by the New South Wales Court of Criminal Appeal.

Sentences

[307] With regard to Bakir, his offending was objectively serious. He was the instigator of the importation and threatened Radcliff to ensure that it happened. He played a most significant role in attempting to gain possession of the GBL once it had been

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100 *El-Ghourani v The Queen* at [44].

imported. He committed the offences for financial gain and knew that the amount imported was to be a commercial quantity. The amount imported was to be some nine or 10 kilograms, which was nine or ten times the minimum required for a commercial quantity, although there was no evidence that Bakir knew precisely how much was to be imported. His actions showed however that he was intent on obtaining a significant amount of GBL, consistent with its being well over the minimum commercial quantity. He showed no contrition for his offending, had not demonstrated any prospect of rehabilitation and none of his personal antecedents, apart from the fact that he had been injured in a motorcycle accident which had left him with physical and psychiatric sequelae, demonstrated any reason to mitigate the sentence. It should however be reduced to take account of time spent in custody which could not be declared. Hill played a similar role to that of Bakir and was essentially his partner in crime, although apparently subservient to him. There was no reason apart from the different period spent in presentence custody to reduce his sentence.

[308] With regard to Gray, she arranged the actual importation after she had earlier encouraged Radcliff to assist her and Cook, who by then had been imprisoned, to continue Cook's business of importing GBL. As with the others her motive was financial gain and the events involved a significant quantity of the drug well in excess of the commercial quantity. She however had significant mitigating factors referred to by the sentencing judge.

[309] Broad's role was to provide money for the importation and a destination address. He took and retained possession of the GBL after it had arrived and been given to him by Radcliff. Thereafter he manufactured some of the GBL into the drug GHB on two separate occasions. Although he committed the offences for financial gain his role was not purely commercial as he gave away some of the drugs that he manufactured. There were significant mitigating features in respect of Broad referred to by the sentencing judge.

[310] I have come to the conclusion that the sentences were so manifestly inadequate that an error in the exercise of the sentencing discretion is demonstrated. That error appears to have its basis in his Honour using *R v Davidson* as the only relevant comparative sentence and not explicitly referring to the factors in s 16A of the *Crimes Act* 1914 (Cth).

[311] While *R v Davidson* was a relevant comparative, in order to establish the appropriate sentencing range the court should have regard to s 16A of the *Crimes Act* 1914 (Cth) and other sentences regarding offences involving a commercial quantity of a border controlled drug, taking into account the quantity of the drug imported in terms of how much more than a commercial quantity was imported and the expected financial rewards from the criminality and all of the exacerbating and mitigating factors set out in the statute as they apply to these particular defendants.

[312] Because of the error in the exercise of the sentencing discretion it falls to this Court to resentence the defendants. With regard to Bakir, the relevant starting point for the offences he committed of importing and attempting to possess a commercial quantity of a border controlled drug is 11 years imprisonment. From this should be deducted the 18 months spent in custody in Queensland and in New South Wales which cannot be declared as time spent in custody under the sentence. He should therefore be sentenced on each of counts one and five to nine and a half years imprisonment to be served concurrently. He has no persuasive claims to mitigation

of his sentence and so, in my view, the non-parole period should be set at seven years imprisonment. The time spent in custody from 27 October 2010 should be declared as time spent in custody under the sentence.

[313] With regard to Hill, his slighter lesser role means that the starting point should be 10 years imprisonment. From this should be deducted the four and a half months spent in custody which cannot be declared as time spent under the sentence. He should be sentenced to nine years seven months imprisonment on each of counts two and six to be served concurrently with a non-parole period of six years seven months. The time spent in custody from 27 October 2010 should be declared as time spent in custody under the sentence.

[314] Gray's head sentence on count three should be increased to seven years imprisonment to reflect her criminality and the mitigating factors in her favour. Because of the significant mitigating factors I would not disturb the non-parole period of two years six months imprisonment. The time spent in custody from 27 October 2010 should be declared as time spent in custody under the sentence.

[315] Broad's head sentence for the offences of importing and possessing a commercial quantity of a border controlled drug (counts four and seven) should be increased to seven years imprisonment to be served concurrently to reflect the seriousness of that offending and the mitigating factors in his favour. It is not necessary to increase the penalties on counts eight and nine. Because of the significant mitigating factors including his pleas of guilty I would not disturb the non-parole period of two years.

[316] Because of s 16F(1) of the *Crimes Act* 1914 (Cth) this Court must explain, or cause to be explained, to the person sentenced in language likely to be readily understood by that person the purpose and consequences of affixing a non-parole period. In particular the court is required to explain:

> "(a) that service of the sentence will entail a period of imprisonment of not less than the non-parole period and, if a parole order is made, a period of service in the community, called the parole period, to complete service of the sentence; and
>
> (b) that, if a parole order is made, the order will be subject to conditions; and
>
> (c) that the parole order may be amended or revoked; and
>
> (d) of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions."

[317] As a result it should be explained to each of Bakir, Hill, Gray and Broad in language they can understand the length of the head sentences imposed upon him or her, the non-parole period that each must serve and the length of the parole period, that parole will be subject to conditions, that parole may be amended or revoked and that if he or she fails, without reasonable excuse to fulfil the parole conditions, the parole may be revoked by the Attorney-General and will be automatically revoked if he or she is sentenced to a period of imprisonment of more than three months.

The orders I propose are:

1. Appeals against conviction by Bakir, Hill and Gray be dismissed;
2. Applications for leave to appeal against sentence by Bakir and Hill refused.
3. Appeals against sentence by the Commonwealth Director of Public Prosecutions allowed.

4. Sentence on Yassar Bakir varied by increasing from six years to nine and one half years the term of imprisonment imposed on count one and increasing from four years to nine and one half years the term of imprisonment imposed on count five to be served concurrently with the non-parole period on those sentences fixed at seven years. The time spent in custody from 27 October 2010 should be declared as time spent in custody under the sentence.
5. Sentence on Steven Milton Hill varied by increasing from six years to nine years seven months the term of imprisonment imposed on count two and increasing from four years to nine years seven months the term of imprisonment imposed on count six to be served concurrently with the non-parole period on those sentences fixed at six years seven months. The time spent in custody from 27 October 2010 should be declared as time spent in custody under the sentence.
6. Sentence on Candice Ruth Gray varied only to the extent of increasing from five years to seven years the term of imprisonment imposed on count three. The non-parole period should remain fixed at two years six months. The time spent in custody from 27 October 2010 should be declared as time spent in custody under the sentence.
7. Sentence on Anthony Keith Broad varied only to the extent of increasing from five years to seven years the term of imprisonment imposed on count four and increasing from two years to seven years the term of imprisonment imposed on count seven to be served concurrently with each other and the sentences imposed on counts eight and nine which have not been varied. The non-parole period should remain fixed at two years. The time spent in custody from 19 November 2010 should be declared as time spent in custody under the sentence.