SUPREME COURT OF QUEENSLAND

CITATION:	*R v Floyd* [2013] QCA 74
PARTIES:	**R** **v** **FLOYD, Graham Michael** (applicant)
FILE NO/S:	CA No 263 of 2012 SC No 432 of 2011 SC No 908 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2013
JUDGES:	Muir JA and Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – whether an objectively justifiable sense of grievance could arise in this case having regard to the sentence imposed upon a co-offender after the applicant was sentenced – whether the sentence imposed upon the applicant was in marked disparity to the sentence imposed upon his co-offender *Drugs Misuse Act* 1986 (Qld) *Jones v The Queen* (1993) 67 ALJR 376, followed *Kelly v The Queen* (1992) 33 FCR 536; [1992] FCA 7, applied *Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46, considered *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26, applied *R v MacGowan* (1986) 42 SASR 580, applied *Taylor v The Queen* [1984] FCA 149, cited

COUNSEL:	A J Kimmins, with Y Chekirova, for the applicant S Vasta for the respondent
SOLICITORS:	Potts Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: I agree with the reasons of Atkinson J and with the orders she proposes.

[2] **ATKINSON J:** On 6 July 2012 the applicant was convicted on his own plea of guilty on two counts of supplying dangerous drugs (counts 2 and 3 on the indictment) and one count of possessing the dangerous drugs cannabis, methylamphetamine, testosterone, heroin, methandienone, and alprazolam (count 4). He also pleaded guilty to two summary counts under the *Drugs Misuse Act*. The prosecution entered a *nolle prosequi* on count 1 on the indictment.

[3] On 7 September 2012 he was sentenced to three years imprisonment on the first count of supplying a dangerous drug (count 2), six years imprisonment on the second count of supplying a dangerous drug (count 3) and 18 months imprisonment for the possession of dangerous drugs (count 4). On the summary charges convictions were recorded but no further penalties imposed. A period of 63 days spent in pre-sentence custody between 6 July 2012 and 7 September 2012 was deemed to be time already served under the sentence. His parole eligibility date was fixed at 5 January 2015. The parole eligibility date was effectively after he had served two and a half years of the sentence imposed.

[4] His application for leave to appeal against sentence was filed on 4 October 2012.

[5] The circumstances of the offending were set out in a schedule of facts tendered before the learned sentencing judge. That schedule showed that from March 2009 to May 2010 the Crime and Misconduct Commission ("CMC") conducted a controlled operation codenamed "Operation Warrior". The operation targeted the activities of an organised crime network operating through the eastern states of Australia which concerned the distribution and supply of significant commercial quantities of dangerous drugs. The investigation used covert policing methods including telephone interception, surveillance devices (both optical and audio), covert searches, physical surveillance and tactical intercepts. The principal person of interest in the operation was Daniel Kalaja. During the initial stages of the operation Spike Sinclair was identified through his criminal association with Kalaja. Shortly afterwards the applicant, Graham Floyd, was identified to be a criminal associate of Sinclair.

[6] A transaction between Floyd and Sinclair which occurred on about 24 December 2009 formed the basis of the first count of supplying dangerous drugs. On that occasion Floyd supplied Sinclair with an ounce of "speed". One ounce of methylamphetamine bought in a bulk amount is worth about $3,500.

[7] The transaction which formed the basis of the second count of supplying dangerous drugs occurred on the Gold Coast on about 13 January 2010 when Floyd supplied Sinclair with almost half a kilogram of methylamphetamine. Half a kilogram of methylamphetamine, purchased in bulk, is worth at least $50,000.

[8] Sinclair then drove north intending to go to Cairns to distribute the drugs. He was intercepted by police in Gympie on 14 January 2010 at a random breath testing site and found with 451 grams of methylamphetamine. After being granted bail, Sinclair did not continue to Cairns but instead returned to his home on the Gold Coast. After Sinclair's interception, Sinclair and Floyd constantly discussed the large drug debt which they had accumulated by not on-selling the intercepted drugs. Sinclair arranged payment to Floyd of smaller amounts of money on a number of occasions and sourced large sums of money for further significant drug purchases which did not ultimately go ahead. When the operation was closed and a warrant executed at Floyd's house, a small amount of a number of different drugs were located there. They were the subject of count 4.

[9] During the search at Floyd's house police located and seized a number of drugs and drug related items including two mobile phones, two small plastic containers which contained a cream coloured crystalline powder, a number of utensils which had been used for smoking dangerous drugs, 17 coloured tablets, a number of boxes containing 21 vials of liquid steroids, a clip sealed bag containing cannabis and a small metal bowl. The drug items located on that date were indicative of personal use. The analyst's certificate showed less than a gram of cannabis and a gross weight of 3.145 grams of methylamphetamine which resulted in a calculated weight of 0.742 grams of methylamphetamine. This was from the contents of two clip sealed bags. Methylamphetamine was also detected in a glass pipe. Cocaine was detected in a glass pipe and a metal pipe. Cocaine, cannabis and nicotine were detected in another smoking utensil. Testosterone was detected in the glass vials. Heroin, methandienone and alprazolam were detected in the tablets found.

[10] The applicant was born on 3 August 1967 and so was 42 at the time of the offences. He was 45 at the time of sentencing. His criminal history in Queensland began on 11 July 1996 with a relatively minor offence when he was fined in respect of speeding in breach of the *Transport Operations (Marine Safety) Regulation* 1995. On 16 January 2001 he was convicted of offences that were committed on 1 January 2001 - consuming liquor on a road, contravening a direction or a requirement of a police officer and obstructing a police officer.

[11] His first drug conviction came on 10 September 2001 when he was convicted of possessing dangerous drugs. The conviction was in relation to seven grams of cannabis. He was fined and no conviction recorded.

[12] After the offences for which he was convicted on this occasion were committed, he committed further drug offences while on bail.

[13] The applicant was convicted of the present offences after he pleaded guilty. There was, however, a committal hearing on 17 November 2010 where four police officers had been cross-examined. At that stage the applicant was charged with trafficking and that charge was discontinued in the Supreme Court. On 9 June 2011, the applicant's solicitors notified the prosecution that he would plead guilty on the factual basis that was accepted by the court on the sentencing hearing. The case was listed for sentence on 12 December 2011 but on the morning of sentence the applicant indicated he would no longer be pleading guilty and his lawyers were given leave to withdraw. A trial was listed for the sittings of 9 July 2012 and on 6 July 2012, the applicant again said that he would plead guilty and he was then arraigned. This is therefore not an early plea of guilty. Nevertheless his plea of guilty did assist in the administration of justice in saving the cost of a trial.

[14] The prosecution submitted that the appropriate range of sentences on the major charge was six to seven years imprisonment. The prosecution submitted that in view of his late plea of guilty and the fact that he offended whilst on bail it would appropriate to set the parole eligibility date at greater than one-third but less than one half of the sentence. The prosecution submitted that on count 2 that there should be a concurrent sentence of three years imprisonment and on count 4, a concurrent sentence of 18 months imprisonment.

[15] The applicant's submissions before the learned sentencing judge were that the general range was six to seven years and that it could be as low as five and a half years so that the appropriate range was about five and a half to six and a half years. Defence counsel agreed with the sentencing judge's comment that six years imprisonment "sounds about right". Equally the applicant's submission on sentence was that a parole eligibility date set at two years would be too early but that it could still be set at two and a half years. This was the sentence imposed by the learned sentencing judge on count 3, the most serious count on the indictment.

The applicant's submissions

[16] The applicant submitted that leave should be granted to appeal against sentence because the learned sentencing judge failed "to properly apply the parity principle" and failed "to give any sufficient weight to the totality of the applicant's circumstances". As a result, it was submitted, the sentencing discretion miscarried and the sentence was manifestly excessive in all of the circumstances.

[17] On the hearing of the application for leave to appeal, the applicant told the court that he did not rely on the first ground of appeal that the sentencing judge failed properly to apply the parity principle and failed to give any sufficient weight to the totality of the applicant's circumstances. He relied on the second ground of appeal that the sentence was manifestly excessive in all of the circumstances. The grounds of appeal were amended by leave to add the ground that there had been a miscarriage of justice in that there was fresh and/or new evidence of the sentences imposed upon the applicant's co-offenders, namely Sinclair, Morton and King, which gave rise to an objectively justifiable sense of grievance due to misapplication of the parity principle.

[18] The applicant frankly conceded that he would be unable to make any argument that the learned sentencing judge erred by misapplication of the parity principle when the only sentence on a co-offender which, it was submitted, could give rise to a justifiable sense of grievance was a sentence imposed subsequently to that imposed by the learned sentencing judge, that is the sentence imposed on Sinclair.

[19] The submissions made by the applicant in supplementary submissions were that an objectively justifiable sense of grievance could arise in this case having regard to the sentence imposed upon Sinclair some two weeks after the applicant was sentenced. Counsel on behalf of the Director of Public Prosecutions conceded that there was no principle that would stop the court considering the application on its merits.

[20] As the argument was said to be somewhat novel it may be useful to refer to the authorities and state the content of the principle which applies to such a case.

[21] A convenient starting point is the appellate decision in the Supreme Court of South Australia of *R v MacGowan*.[1] That case came to the court sitting as a full court by way of a petition referred by the Chief Secretary with the concurrence of the Attorney-General where MacGowan sought a reduction in the sentence imposed on him. MacGowan was sentenced in respect of a number of breaking, entering and larceny offences committed in company with a man called Watson. He was sentenced to an aggregate of six years imprisonment with a non-parole period of four years. His application for leave to appeal against sentence had been dismissed.

[22] Prior to MacGowan's being sentenced, his co-offender, Watson, had been released on bail in respect of separate charges of abduction and assault. Watson absconded and was not apprehended until some time after MacGowan was sentenced and his application for leave to appeal dismissed. Watson pleaded guilty to the breaking, entering and larceny counts (to which MacGowan had pleaded guilty) and also to a charge of abduction and a charge of assault, before a different judge from the judge who sentenced MacGowan. Watson was sentenced to five years' imprisonment on each of the breaking charges to be served concurrently. He was also sentenced to six months' imprisonment on the abduction charge and two months' imprisonment on the assault charge to be served concurrently with each other but cumulatively on the five years' imprisonment. His non-parole period was three years and nine months.

[23] There was no distinction between the parts played by the co-offenders in the various offences they committed together although Watson, who received the markedly more lenient sentence, was older and had a much more serious criminal history. Unsurprisingly MacGowan's complaint to the Full Court was that there was a gross disparity between the punishment imposed on him and the punishment imposed on Watson for the same offences, notwithstanding his age and lesser criminal record.

[24] The Full Court referred to the leading High Court authority on the parity principle, *Lowe v The Queen*.[2] The basis for the principle was set out in the judgment of Mason J at 610-611:

> "Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."

[25] The effect of this principle on sentence appeals was set out by Mason J at 613-614:

> "… a court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate."

[26] Lowe was sentenced before his co-offender. That was not held, however, to affect his capacity to complain about disparity in the sentences imposed.

---

1 (1986) 42 SASR 580.

2 (1984) 154 CLR 606; [1984] HCA 46.

[27] The Full Court in *MacGowan*[3] set out the principles which it applied to the question of parity of sentencing between co-offenders:

> "1. Where two or more persons are sentenced by the same judge for the same crime or crimes the sentences imposed on them should be proportionate to their respective degrees of culpability and to the various personal factors of aggravation and mitigation. …
>
> 2. Sentences imposed by different judges on co-offenders should also be proportionate to the respective degrees of culpability and the individual circumstances of the co-offenders. …
>
> 3. Marked disparity of sentences imposed upon co-offenders by different judges is a ground upon which the Court of Criminal Appeal may intervene on an appeal by the Attorney-General or an offender. If both sentences are within the maximum authorized by law and are within the range of sentences properly open on the facts of the case, the Court of Criminal Appeal is not bound to intervene. In such circumstances disparity, although a ground for interference, will not necessarily lead the Court of Criminal Appeal to interfere. It is a matter for the discretion of the Court. There may be considerations against interference. The protection of the public may require the higher sentence to stand. The lower sentence may be so inadequate that to establish parity may be felt to compound the error in a way which would be unacceptable to the public conscience. The sense of grievance experienced by the offender may have to be tolerated in the public interest. But in the absence of strong countervailing considerations, the Court of Criminal Appeal will interfere to eliminate marked disparities which cannot be justified in the circumstances of the case."

[28] Parity between sentences imposed upon co-offenders is a matter that is taken into account by a judge sentencing an offender after a co-offender has earlier been sentenced. This explains the practice often adopted of sentencing co-offenders at the same time although there will be occasions where that is not practicable.

[29] In *MacGowan*, it was not practicable to sentence the co-offenders at the same time as one had absconded. The sentences imposed on each of the offenders were held by the Full Court to be within the range of sentences reasonably open to the sentencing judge. However the Full Court held that the disparity was marked. MacGowan received a longer head sentence and non-parole period notwithstanding that there was no distinction in the degree of their participation and MacGowan was younger and had a much better record that his co-offender. King CJ (with whom Mohr and von Doussa JJ agreed) allowed the petition, treated it as an appeal, allowed the appeal, set aside the sentence and imposed a head sentence of five years, saying of the disparity:[4]

> "This state of things is an affront to one's sense of fairness. I discern no countervailing consideration which would inhibit this Court from rectifying the injustice."

---

3 (1986) 42 SASR 580 at 582-583.

4 At 583.

[30] Referring to the decisions in *Lowe*, *MacGowan* and a decision of the Full Court of the Federal Court in *Taylor v The Queen*,[5] the Full Court of the Federal Court in *Kelly v The Queen*[6] acknowledged that "it is obvious that the subject of disparity can never arise before the first of two or more sentencing judges; there is no other sentence then extant to guide one towards parity." However, O'Loughlin J (with whom Jenkinson and Higgins JJ agreed) held that:[7]

> "The existence of disparity in the sentences of co-offenders can, but does not always, reveal that an error in the sentencing process may have been committed. There can be occasions when an appellate court will intervene, not because the higher sentence is manifestly excessive, but because a comparison of the sentences shows a disparity of such a size as 'to engender a real sense of grievance': see *Lowe v The Queen* (1984) 154 CLR 606 at 622-623, per Dawson J; see also per Gibbs CJ (at 610), per Mason J (at 612) and per Wilson J (at 616). But the difference between the sentences must be manifestly excessive and the difference must call for the intervention of an appellate court in the interests of justice: see *Lowe* (supra) (at 624), per Dawson J."

[31] The court concluded:[8]

> "[An appellate court] clearly has the power to consider the question of disparity irrespective of the order in which sentences were imposed."

[32] The principle was put beyond doubt by the High Court in *Jones v The Queen*[9] where Brennan J delivering the judgment of the court held:

> "It is erroneous to regard the principle of comparability of sentences laid down in *Lowe* as incapable of application in favour of the first of two or more co-offenders to be sentenced."

[33] In *Postiglione v The Queen*[10] the High Court set out the principles relating to parity of sentencing of co-offenders by reference to *Lowe*. Postiglione, whose appeal to the High Court was allowed, had been sentenced and his appeal to the Court of Criminal Appeal determined before his co-offender, Savvas, was sentenced. Dawson and Gaudron JJ held:[11]

> "The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowances should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However,

---

5 [1984] FCA 149.
6 (1992) 33 FCR 536 at 537; [1992] FCA 7 at [7] per O'Loughlin J.
7 (1992) 33 FCR 536 at 538; [1992] FCA 7 at [8] per O'Loughlin J.
8 (1992) 33 FCR 536 at 539; [1992] FCA 7 at [13] per O'Loughlin J.
9 (1993) 67 ALJR 376 at 377.
10 (1997) 189 CLR 295; [1997] HCA 26.
11 (1997) 189 CLR 295 at 301-302.

> the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to 'a justifiable sense of grievance.' If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.
>
> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality. The different circumstances involved in this case, namely, the fact that Savvas was the principal organiser in both conspiracies and that Postiglione rendered significant assistance to police and prosecuting authorities, clearly require that Postiglione receive a markedly lesser sentence than that imposed on Savvas." (citations omitted)

[34] It follows that marked disparity in the sentences imposed upon an applicant for leave to appeal against sentence and his or her co-offenders is an appropriate ground of appeal where an applicant can demonstrate an objectively justifiable sense of grievance, whether the applicant was sentenced before or after his co-offenders.

[35] It is appropriate therefore to consider the sentences imposed upon the applicant's co-offenders, whether those sentences were imposed before or after the applicant was sentenced. The applicant referred to sentences imposed upon Benjamin Morton, who was sentenced in the Supreme Court in Townsville on 10 October 2011, Myles Gregory King, who was sentenced in the Supreme Court in Brisbane on 28 October 2011, and Spike Sinclair, who was sentenced by another judge in the Supreme Court in Brisbane on 21 September 2012.

[36] Of these, only Sinclair was sentenced after the applicant. The schedule of facts relied upon for the sentences of Benjamin Morton and of Myles King show that neither was a co-accused of the applicant. It was not pressed on the appeal that the sentences imposed upon them could give rise to a justifiable sense of grievance.

[37] Sinclair was however a co-offender for some of the offences for which the applicant was sentenced. On 24 August 2012, Sinclair pleaded guilty to one count of trafficking in the dangerous drug, methylamphetamine. The period of trafficking covered 10 months from 1 June 2009 to 20 March 2010. In the period from 1 June to November 2009, the source of the drugs Sinclair purchased was Kalaja (or Carter on behalf of Kalaja). Telephone intercepts showed Sinclair subsequently purchased drugs from Floyd. He was arrested on his way to Cairns as previously set out in these reasons. Sinclair was a regular user of methylamphetamine. The learned sentencing judge referred to the sentences imposed upon Carter and Kalaja. Her Honour then referred to the sentence imposed on the applicant, Floyd. Of that sentence she said:

> "Floyd has been sentenced to 6 years with parole after 2 and a-half years, but even though he was higher in the chain than you in the Floyd syndicate, he was not charged with trafficking and his sentence was for two counts of supply, one of 1 ounce to you and the one of 1 pound."

[38] Sinclair was sentenced to imprisonment for seven years and nine months with a parole eligibility date of 18 October 2012 after serving one-third of that sentence (a period of two years and seven months). The 917 days spent in pre-sentence custody from 19 March 2010 to 20 September 2012 was declared to be time already served under the sentence. In imposing that sentence, her Honour referred to Sinclair's personal circumstances including his promising rehabilitation prospects, his remorse, his good work history and his timely guilty plea. These all operated to mitigate the sentence imposed upon him.

[39] In the applicant's case the learned sentencing judge referred to the facts of his offending, his earlier criminal conviction for a drug offence in 2001, his regular use of amphetamine, his further offending whilst on bail and his late plea of guilty.

[40] There are a number of factors therefore that distinguish the applicant from Sinclair. Sinclair was charged with the trafficking and engaged in transactions with Kalaja and then with the applicant. On the other hand, the applicant was higher in the chain than Sinclair. He sold a significant quantity of drugs to Sinclair. Sinclair entered a timely plea of guilty whereas the applicant's plea of guilty was a late plea. Sinclair had more personal mitigating factors in his favour.

[41] In all of the circumstances the sentence imposed upon the applicant was not in marked disparity to the sentence imposed upon Sinclair. It could not give rise to an objectively justifiable sense of grievance.

[42] The appeal raised a question of the application of the parity principle to an offender who was sentenced before his co-offenders which was a matter of some significance. I would therefore grant the application for leave to appeal against sentence but dismiss the appeal.

[43] **MARTIN J:** I agree with Atkinson J.