SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hurst* [2014] QCA 168
PARTIES:	**R** **v** **HURST, Dean** (applicant)
FILE NO/S:	CA No 6 of 2014 DC No 363 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	25 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2014
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant was convicted on his own pleas of guilty of one count producing a dangerous drug (methylamphetamine) and one count possessing a dangerous drug (methylamphetamine) – where the applicant and Hollingworth had been charged with the same offences and both pleaded guilty – where on count 1, the applicant was imprisoned for three years and four months, with parole eligibility after four months – where on count 2, the applicant was imprisoned for four months, with parole eligibility after four months – where on count 1, Hollingworth was imprisoned for two years, with a parole release date after six months – where on count 2, Hollingworth was imprisoned for nine months, with a parole release date after six months – where the applicant contends the sentencing judge did not give sufficient weight to the principle of parity when determining the applicant's sentence – where there was disparity between the co-offenders with regard to their culpability, criminal history, and personal circumstances, including personal safety in prison, reason for turning to drugs, and rehabilitation efforts – whether the sentencing judge erred

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered

COUNSEL: C Reid for the applicant
B J Merrin for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Morrison JA's reasons for refusing this application for leave to appeal against sentence.

[2] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[3] **MORRISON JA:** The applicant seeks leave to appeal against a sentence imposed on him on 19 December 2013. He entered a guilty plea to two offences: count 1 – producing a dangerous drug (methylamphetamine); and count 2 – possessing a dangerous drug (methylamphetamine).

[4] The applicant and one Hollingworth had each been charged with the same offences. Each of them pleaded guilty on 6 November 2013. The sentencing proceedings commenced on 21 November 2013 where there was a disparity between the position of the applicant and that of Hollingworth. The applicant accepted the facts agreed in a schedule tendered to the court, but Hollingworth did not. As a consequence Hollingworth gave evidence as to the disputed facts, and was cross-examined.

[5] On 19 December 2013 the learned primary judge handed down her findings on the various facts contested by Hollingworth.[1] Submissions then followed on the sentencing itself, followed by the sentences imposed, which were:

(a) as to the applicant –

(i) count 1 - imprisonment for a period of three years and four months; 5 May 2014 fixed as the parole eligibility date;

(ii) count 2 - imprisonment for a period of four months, to be served concurrently with the sentence under count 1; parole eligibility date fixed at 5 May 2014;

(b) as for Hollingworth:

(i) count 1 – imprisonment for a period of two years; parole release date after six months, namely 18 June 2014;

(ii) count 2 – imprisonment for a period of nine months, to be served concurrently with the sentence under count 1; parole release date on 18 June 2014.

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1 AB 100.

The grounds of the appeal

[6] The sole ground advanced on the application was that the learned sentencing judge did not give sufficient weight to the principle of parity when determining the sentence of the applicant.[2] A second ground, namely that the sentence was manifestly excessive, was abandoned.

The circumstances of the offence

[7] Hollingworth and his wife owned a house in which they lived, with their two year old daughter. Another woman also lived at the house, and the applicant occupied a room on the lower level.

[8] Police attended at the house looking for the applicant in relation to a traffic accident. Mrs Hollingworth consented to a search being conducted and whilst the police did not locate the applicant (as he was absent) they did locate a methylamphetamine laboratory in a concealed room under an internal staircase.

[9] The house was on three levels. On the lower level there was a garage, a large decked area, a kitchen, lounge room, two bedrooms, a bathroom and a study. A set of stairs went from the lower level to the middle level, which included a large kitchen area and an open lounge. The stairs then continued to the third level, which had the main bedroom with ensuite and walk-in wardrobe.

[10] During the search of the house police entered a storage area located under the internal staircase on the lower level. Once inside the storage area, the police observed that one of the walls was false and there was a sliding partition that led to a hidden room. The partition was moved and a number of items were found, consistent with a clandestine laboratory. The items included:

(a) various apparatus, glassware and chemicals consistent with the production of methylamphetamine; forensic analysis showed the presence of that drug, and other chemicals consistent with the production of methylamphetamine;

(b) a television screen and recording device, connected via cabling to outside of the room; this was connected to an external surveillance camera at the front of the house;

(c) a double-barreled shortened shotgun, a firearm stock and various ammunition; and

(d) two notebooks containing various entries relating to chemicals, the production of amphetamine and other personal notes, passwords and phone numbers.

[11] Finger print analysis revealed the applicant's fingerprints on a number of the items. Hollingworth's fingerprints were not located on any of the items from the clandestine laboratory.

[12] The applicant's bedroom on the lower level was also searched. That revealed a number of items including:

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2 AB 315.

(a) a shotgun cartridge;

(b) a notebook containing partial instructions on the production of amphetamines;

(c) clipseal bags in which methylamphetamine was detected;[3]

(d) a plastic container holding a brown substance which contained pseudoephedrine and chlorpheniramine (chemicals typically seen together as by-products of methylamphetamine distillation);

(e) a glass inner coil, a chemical catalogue; and

(f) a bag containing personal paperwork in the applicant's name (including text referring to chemicals and notations relating to the production of amphetamines, and outstanding monies owed by apparent drug supply transactions).

[13] The lower level of the house also contained a number of items that were associated with the production of methylamphetamine, notebooks including references to drug supply transactions and outstanding debts, a homemade pistol and ammunition, and a barrel sawn off from a .22 rifle.

[14] On the middle level of the house further items to do with the production of methylamphetamine were found. This included a book of the technique of manufacture of amphetamines, on which the applicant's (but not Hollingworth's) fingerprints and palmprints were found. Also pipes and clipseal bags in which methylamphetamine was detected.

[15] The master bedroom shared by the Hollingworths was on the top level of the house. In a storage area off that bedroom a 20 litre plastic container was found full of a liquid which revealed the presence of chlorpheniramine. That is an antihistamine frequently used in cold and flu preparations together with pseudoephedrine. It remains unchanged in the reduction process to methylamphetaimine. A portable gas cooker and a stained white plastic tube were also found in that area.

[16] A search of a vehicle parked outside the house revealed a variety of items connected with drug production, including scales, an esky with brown fluid, glassware revealing the presence of chlorpheniramine, and empty blister packs of cold and flu medication. Similar items were found in the bins outside the house.

[17] The maximum theoretical amount of methylamphetamine that could have been produced, from the pseudoephedrine in the cold and flu tablets from the empty blister packs located in the utility and the bin, was 18.85 grams.

[18] Hollingworth's mobile phone contained text messages which revealed that the phone had been used interchangeably by the applicant and Hollingworth. Between 30 May 2012 and 17 July 2012 there were multiple text messages sent and received which indicated the phone had been used to offer or arrange the supply of drugs for money, and the purchase of drugs. Text messages were sent or received from approximately five people which related those persons obtaining drugs from the phone user, i.e. Hollingworth or the applicant. The user of the phone also sent text

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3 This was the basis of the second count against the applicant.

messages to six persons attempting to arrange to purchase dangerous drugs from them. The monetary amounts discussed for the sale or purchase of the drugs varied from $50 to $650.

[19] The production of methylamphetamine was done for a commercial purpose.

[20] In an interview with the police Hollingworth said that the applicant was an "uninvited, forced upon, living standover".[4] He said that none of the items in the clandestine laboratory were his, that they had been brought onto his property without his consent, and he was not responsible for them. His version of events was that the applicant had moved in uninvited, and subjected him to violence and threatened his family.

[21] Hollingworth said that he avoided the area under the stairs because he had a problem with his hip and he had difficulty bending. Further, when he protested about the items under the stairs he was violently attacked by the applicant, hospitalised, almost killed, and his family were threatened. He said that he knew the glassware under the stairs was to make amphetamines but said it was there without his consent and he resented it.

[22] Hollingworth admitted he was a user of methylamphetamine. He said that he last used the methylamphetamine in his garage at home, and the applicant had supplied it to him, though he did not know where the applicant had got it from.

[23] The applicant participated in an interview with the police. He told police that his "best mate who was like family had gone and passed the buck and accused him of all of his own habits and behaviours".[5] He gave police to understand that he, the applicant, "gotta wear the acts of fuckin [Hollingworth's] top form".[6] He admitted that he had been involved "around the processes of" the making of drugs, and that he knew how to make amphetamine.[7]

[24] The applicant declined to answer a question as to whether he had ever made amphetamine at the house. He said that the items located in the utility in the rubbish bin were all rubbish that he had been getting from around the house, from a time when he had not been there.

[25] The applicant admitted he knew about the concealed storage area, but said it was there when he arrived at the house. After initially denying that he knew what was in the room, he admitted that he did, but denied that he had used any of the items in the room. He admitted that he had purchased the CCTV cameras for the house. He denied that any of the firearms were his and suggested they belonged to Hollingworth.

The result of Hollingworth's contest as to the facts

[26] Unlike the applicant, who admitted there was a commercial element to the production of the methylamphetamine, Hollingworth contested that fact. His evidence was that he was not engaged in the commerciality of the enterprise, and that the nature of his relationship with the applicant meant he had little control over the applicant's activities under his roof. Indeed, he said he was the subject of threats

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4 AB 149.
5 AB 149.
6 AB 149.
7 AB 159.

from the applicant which prevented him from evicting the applicant, or demanding that he cease his illegal activities. His account included that he had been physically assaulted on more than one occasion. One of the occasions recounted was when he had discovered the remains of "what looked like an attempt at production",[8] and in response the applicant assaulted him so severely that he ended up in intensive care in hospital for seven days. At the same time the applicant threatened Hollingworth's wife, and (as Hollingworth perceived it) their daughter. The applicant did not accept any of those assertions.

[27] Hollingworth's account was that the applicant left the home after having seriously assaulted Hollingworth, but he was allowed to return later on the express basis that there would be no more drug production, and he would not hurt Hollingworth again.

[28] Hollingworth gave an account of a hip injury which he had sustained, which, he said, meant that it was difficult for him to stoop down and move around and therefore he did not go into the storage area. He said that after the accident to his hip, his wife became seriously mentally ill and as a result he turned to amphetamines. He said he had been a user since 2004.

[29] The learned primary judge considered all of that evidence and rejected Hollingworth's account. She found:

> "… at the time of the offending the two defendants were on good terms and Hollingworth was not so in fear of, or intimidated by [the applicant] as to have no control over [the applicant's] activities in his home."[9]

[30] The learned primary judge then examined the extent to which Hollingworth was aware that the production of methylamphetamine was done for a commercial purpose. She found that "Hollingworth had knowledge of the presence of equipment and apparatus in his home which could, and was being used in an attempt to produce methlylamphetamine".[10]

[31] The learned primary judge's conclusion on the disputed areas of fact was expressed in this way:

> "Hollingworth should be sentenced on the basis that at the time of the offending he and Hurst were on good terms and the drug paraphernalia was in his house with his full knowledge and consent. Neither defendant is to [be] sentenced on the basis that there had been any successful production of methylamphetamine, but both are to sentenced on the basis that there was a commercial purpose to the production in that the amount likely to be produced would be more than could be expected to be consumed by either or both of them."[11]

[32] **Legal principles – parity**

[33] In *Green v The Queen*[12] the High Court restated the principle that has become known as the "parity principle" in these terms:

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8 AB 102.
9 AB 104.
10 Reasons [27]; AB 105.
11 Reasons [28]; AB 105.
12 *Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49.

> ""Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties". It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:
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> > Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect. (Emphasis in original.)
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> Consistency in the punishment of offences against the criminal law is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice". It finds expression in the "parity principle" which requires that like offenders should be treated in a like manner. As with the norm of "equal justice", which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances."[13]

[34] In an earlier case, *Postiglione v The Queen*[14] McHugh J summarised the principles of parity in these terms:

> "The principle of parity of sentencing between co-offenders is not in terms recognised in the Act but is a well established principle. In *R v Tiddy*, the Court of Criminal Appeal of South Australia defined the principle as follows:
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> > "Where other things are equal persons concerned in the same crime should receive the same punishment; and where other things are not equal a due discrimination should be made."
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> A sentencing judge must give effect to the parity principle in cases to which the Act applies.
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> If a judge wrongly fails to give effect to the parity principle, an appellate court will intervene to correct what is an error in sentencing principle. In *Lowe v The Queen*, Gibbs CJ, with whom Wilson J agreed, said that an appellate court should intervene where "the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done'. Mason J stated that an appellate court is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance. Dawson J, with whom Wilson J also agreed, was of the

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13 *Green v The Queen* at [28]. Internal citations omitted.

14 *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26.

> view that "[t]he difference between the sentences must be manifestly excessive and call for the intervention of an appellate court in the interests of justice"."[15]

[35] Dawson and Gaudron JJ expressed the principle in these terms:

> "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 allowance 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."[16]

The approach of the sentencing judge

[36] The learned sentencing judge treated the applicant and Hollingworth differently from the point of view of imposing sentences. That is evident not just from the different sentences which were imposed, but from the express terms of her Honour's sentencing comments. The relevant factors can be identified as follows:

(a) the applicant was the principal offender and the prime mover behind the attempts at production; whilst Hollingworth was well aware of what was going on, and stood to gain from successful production, the learned sentencing judge could not find that he played an active role in that production other than by allowing his premises to be used;[17]

(b) both were sentenced on the basis that there had not been any successful production of methylamphetamine, but there was a commercial purpose to the production, in that the amount likely to be produced would be more than for personal consumption;[18]

(c) the prior criminal history was considerably different; the applicant's criminal history[19] revealed consistent offending since 1992 when the applicant was 17; offences involving the possession of dangerous drugs and drug implements occurred in 1992, 1994, 1996, 2003 and 2007; production offences in 1996 and 2007; the 2007 production and possession offences resulted in a term of imprisonment; in addition there were multiple offences for stealing, receiving, various assaults, grievous bodily harm, perjury, burglary, breach of bail conditions, failure to appear in response to an undertaking and property offences; those other offences covered the period from 1993 through to 2012;

(d) by contrast, Hollingworth's criminal history was short and recent; in 2011 there were two offences involving possession of dangerous drugs and implements, but in both cases no conviction was recorded; in 2012 there was a third offence of a similar type, for which

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15 *Postiglione* at 309.
16 *Postiglione* at 301.
17 AB 129.
18 Reasons [28]; AB 105.
19 AB 134-139.

a conviction was recorded and he was fined; a breach of bail conditions occurred in 2013; in no case had a period of imprisonment been imposed; further, the convictions were all drug related, whereas the applicant had a history spanning a variety of offences;

(e) the culpability of the applicant was all the greater because he was the principal offender and prime mover behind the attempt at production, and it was now his third[20] conviction for production;[21]

(f) in Hollingworth's case threats of physical retribution had been made against him whilst he was in prison, with the result that he would have to be housed in protective custody;[22] no such factor was applicable in the applicant's case;

(g) Hollingworth had taken "impressive steps to address [his] drug rehabilitation" as revealed in exhibit 9, a letter from Drug Arm; the same was not the case with the applicant; because of an accident which the applicant had sustained and for which he still required surgery at the date of sentencing, he was on significant doses of morphine which would be a complicating factor in whether he could remain drug free in prison;[23]

(h) whilst each of the applicant and Hollingworth had aspects of significant personal loss in their past, Hollingworth was different to the applicant in one respect, namely that he turned to drugs after being involved in a serious motor vehicle accident in 2004, in which both he and his wife were seriously injured; as a consequence Hollingworth's wife became severely mentally ill, as a result of which he turned to drug use; the same was not the case for the applicant who, although he had suffered significant personal loss during the 2011 floods, had a history of drug involvement going back 20 years; in those circumstances there was a different significance in terms of the aspect of personal deterrence.

[37] The learned sentencing judge identified all of the above factors as reasons why she was treating the applicant and Hollingworth differently. Her findings were open on the agreed schedule of facts, and on her findings on the matters contested by Hollingworth.

Discussion

[38] The applicant contends that there is such a marked disparity in the sentences, the applicant's being effectively double that of Hollingworth, that the principle of parity has been breached. In my view that submission cannot be accepted. In truth there was a marked disparity between the positions of the applicant and Hollingworth, in terms of their culpability, the serious criminal history of the applicant, the applicant being the prime mover behind the attempts at production, and the rehabilitation

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20 The applicant's criminal history reveals that he was convicted of one charge "production dangerous drug" in 1996 (AB 135) and two charges of "producing dangerous drugs" in 2007 (AB 137). Accordingly, this was actually his fourth conviction for a production charge.

21 AB 130.

22 AB 131.

23 AB 130.

prospects: see paragraph [36] above. Of particular significance is the fact that the applicant has a criminal, drug related history, that stretches back nearly 20 years. Within that history there are five[24] court appearances for offences similar to the one with which he was imprisoned in this case, the last of which involved a period of three years imprisonment, albeit suspended after nine months.

[39] As was said in *Green* and *Postiglone*, equal justice requires differential treatment and different outcomes in cases where there are differences between offenders. There were substantial differences between the applicant and Hollingworth necessitating substantially different outcomes. The applicant's greater degree of culpability, his extensive criminal history, and lesser prospects of rehabilitation, explains the greater severity of his sentence.[25]

[40] In my opinion it cannot be said, once a proper consideration of the circumstances of the applicant compared with that of Hollingworth is given, that the sentences imposed could give rise to a justifiable sense of grievance.

[41] In my view the application should be refused.

Conclusion

[42] I would order that the application be refused.

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[24] These being convictions for: possession in 1992, 1994, and 2003; and production and possession in 1996 and 2007.

[25] *R v Burrell* [2013] QCA 41 at [22].