SUPREME COURT OF QUEENSLAND

CITATION:	*R v Van Wensveen* [2014] QCA 225
PARTIES:	**R** **v** **VAN WENSVEEN, Stanley Floyd** (applicant)
FILE NO/S:	CA No 63 of 2014 DC No 364 of 2013 DC No 78 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	9 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2014
JUDGES:	Margaret McMurdo P, Fraser JA and Alan Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal against sentence and allow the appeal.** **2. Vary the sentences imposed in the District Court as follows:** **(a) in relation to counts 1 and 2 on the indictment, omit the order that the date the offender is eligible for parole be fixed at 10 January 2015, and in lieu thereof fix a parole release date of 18 December 2014.** **(b) In relation to the summary offence of possessing dangerous drugs:** **(i) Omit the order that the sentence of imprisonment for a period of one month is to be served cumulatively upon the sentences imposed for Counts 1 and 2 of the indictment, and in lieu thereof order that the sentence is to be served concurrently with the other sentences; and** **(ii) Omit the order that the date the offender is eligible for parole be fixed at 10 January 2015, and in lieu thereof fix a parole release date of 18 December 2014.** **3. Otherwise confirm the sentence imposed upon the applicant in the District Court.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to one count of producing a dangerous drug in excess of 500 grams, one count of possessing a thing for use in connection with producing a dangerous drug, and one summary charge of possessing dangerous drugs – where the applicant was sentenced to a head sentence of three years imprisonment for the indictable offences, and one month imprisonment for the summary charge, to be served cumulatively – where the applicant committed the summary offence on 16 September 2012 – where the primary judge, in ordering the imprisonment be served concurrently, acted on the basis it was committed on 16 September 2013 – whether the primary judge erred – whether, in re-exercising the sentencing discretion, the sentences should be ordered to be served concurrently

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where this court proposes to sentence the offender to three years imprisonment, with a parole release date after serving about 12 months – where the applicant's co-offender pleaded guilty to the same two indictable offences and also to a third count of unlawful possession of a dangerous drug – where the co-offender received a head sentence of three years imprisonment suspended after four months – where the co-offender had terminal cancer – whether there was a manifest discrepancy in the differing pre-release periods such as to engender a justifiable sense of grievance in the applicant

Penalties and Sentences Act 1992 (Qld), s 160B

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Applewaite & Jones (1996) 90 A Crim R 167; [1996] QCA 533, cited
R v Shepherd & Anor [2001] QCA 181, cited

COUNSEL: J P Benjamin for the applicant/appellant
J A Wooldridge for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for granting this application for leave to appeal against sentence and allowing the appeal and with the orders proposed by his Honour.

[2] **FRASER JA:** The applicant was convicted on his pleas of guilty to one count of unlawfully producing the dangerous drug cannabis, the quantity of which exceeded 500 grams, and one count of having in his possession irrigation equipment, fertilizer and a mattock for use in connection with the commission of producing a dangerous drug. On 12 March 2014 the applicant was sentenced to concurrent terms of imprisonment of three years on the first count and one year on the second count. The applicant also pleaded guilty to a summary offence of possessing dangerous drugs, for which he was sentenced to imprisonment for one month to be served cumulatively upon the concurrent sentences on counts 1 and 2. The period of 69 days which the applicant had served in pre-sentence custody between 2 January 2014 and 11 March 2014 was declared to be time already served under the sentences imposed on counts 1 and 2. It was ordered that the applicant was to be eligible for parole on 10 January 2015 (when, taking into account pre-sentence custody, he will have served one year and eight days of an effective sentence of three years and one month).

[3] The applicant has applied for leave to appeal against his sentence. The ground of appeal stated in the application is that the sentence creates a genuine sense of grievance given the lack of parity with the sentence imposed upon a co-offender. At the hearing of the application the applicant was given leave to add a second ground of appeal, that "the learned sentencing judge erred in imposing a cumulative sentence on the summary offence in that His Honour [acted] on an incorrect fact, namely that the date of that offence was 16 September 2013, rather than 16 September 2012."

Circumstances of the offences

[4] Upon a search of dense bushland in the area of Mt Amos near Cooktown on 24 July 2012 police found a cleared area in which there were 2868 cannabis plants growing in rows in two separate plots, each about 40 square metres in area. One plot contained mature plants about one to two metres tall and the other contained plants about 30 centimetres tall. The cannabis plants were watered through a drip-feed irrigation system that drew water from an elevated, man-made reservoir. Police also found four kilograms of dried or drying cannabis, a large quantity of cannabis seeds, and a mattock and fertiliser. The 33 year old applicant was sitting in a camp area, which contained bedding, cooking facilities and stocks of food. The applicant's co-offender, Hepburn, who was 60 years old, was tending to the plants. Hepburn fled. The applicant was arrested and taken to the Cooktown police station, where he declined to be interviewed.

[5] The sentencing judge accepted that Hepburn, rather than the applicant, was the instigator of the production. It was unclear whether this was a joint enterprise or whether the applicant was just helping Hepburn. Hepburn was sentenced earlier by a different judge, Shanahan DCJ. The sentencing judge in this matter referred to that earlier sentence, in which Shanahan DCJ accepted that Hepburn embarked upon the commercial cultivation of cannabis because he had been diagnosed with lung cancer and wished to earn something to leave to his family. Hepburn had engaged the applicant to do the heavier work. At the applicant's sentence hearing, his solicitor submitted that the primary purpose of the cannabis production was to sell

the cannabis to benefit Hepburn, but he accepted that the applicant was to obtain a pecuniary benefit. The amount of that benefit had not been agreed upon before the police interception.

[6] The summary offence related to two morphine tablets found in the applicant's possession on 16 September 2012. After being intercepted driving a car by police, the applicant was asked to empty his pockets. When he did so he produced a rolled up piece of paper. When police asked him to hand it over he put it in his mouth. Police restrained him and prevented him from swallowing it. He then spat out two morphine tablets. The applicant committed that offence whilst he was on bail for the indictable offences.

The applicant's personal circumstances

[7] Between 1996, when the applicant was 17 years old, and 2010 the applicant was convicted of 32 offences, 16 of which concerned possession of dangerous drugs or utensils. These offences attracted fines, save that the applicant was given 12 months probation for an offence of which he was convicted in the Cairns Magistrates Court on 4 April 2006. He breached that order and was subsequently resentenced to a fine. With the exception of one appearance in the District Court, the applicant was prosecuted summarily on each occasion. Mostly he offended by unlawfully possessing small quantities of cannabis for personal use, but he also had convictions in 2006 and 2010 for possession of a small quantity of methylamphetamine and (on the latter occasion) also oxycontin.

[8] The applicant had a history of employment working in unskilled capacities, including as a tiler. At the time of sentence he was engaged to be married. There was one child of that relationship, and the applicant was also responsible for caring for three of his fiancée's children. They also intended to adopt a young child the applicant had fathered overseas. Three references tendered at the sentence hearing spoke of the applicant's good character and his assumption of responsibilities as a father and step-father.

[9] The applicant was committed for trial on 14 December 2012, an indictment was first presented on 15 April 2013, and he was to be sentenced with his co-offender on 29 August 2013. The applicant failed to appear and a warrant issued for his arrest. The applicant had found employment in New South Wales and was sending money to his family. For that reason he did not return to the jurisdiction for sentence until his employment was completed, when he was arrested at his home. The applicant was remanded in custody on 2 January 2014 and sentenced, as I have mentioned, on 12 March 2014. In light of this history, at the sentence hearing the applicant's solicitor accepted that the applicant's plea should not be treated as a timely plea.

Ground 2: the cumulative sentence on the summary offence

[10] Ms Wooldridge, who appeared for the respondent, frankly and properly conceded that the sentencing judge imposed the cumulative sentence on the summary offence upon the incorrect basis that that offence occurred on 16 September 2013 rather than 16 September 2012. (The error arose because a column headed "Date" in the schedule of facts for the summary offence included the entry "On 16/09/2013". The sentencing judge must have overlooked the less prominent entry for the date of the summary offence of 16 September 2012 in the body of the text under the heading "Facts".

Unfortunately, although the sentencing judge incorrectly referred to 16 September 2013 as the relevant date more than once in the course of the sentence hearing, neither party's lawyer drew the error to the sentencing judge's attention.) The error was significant. It was reflected in the sentencing judge's remarks that the summary offence was "quite at odds with what is stated in the references… which include you facing up to your responsibilities as a parent and a step-parent" and showed "a disturbing return" to offending. In fact, the references were dated 7 and 9 March 2014, which was nearly one and a half years after the applicant committed the summary offence on 16 September 2012. That was the last offence on the applicant's criminal history before he commenced to serve the pre-sentence custody in January 2014.

[11] On this ground, I would grant the application, allow the appeal, and re-sentence the applicant.

The appropriate sentence

[12] Counsel for the applicant acknowledged that the head sentence of three years imprisonment for the offence of unlawfully producing dangerous drugs was appropriate. It is therefore necessary to observe only that comparable sentencing decisions of this Court[1] demonstrate that a head sentence of three years imprisonment could not be regarded as excessive in the context of the applicant's offending and his personal circumstances (including his criminal record).

[13] The applicant did not challenge the sentence of one month imprisonment imposed for the summary offence, but he argued that this sentence should not be made cumulative upon the sentences for the indictable offence. The respondent argued that a cumulative sentence was open to the Court. I would decline to exercise the discretion to impose a cumulative sentence in all of the circumstances, particularly because the summary offence was less serious than the indictable offences, the three offences were of a similar general character, and a relatively short period of time elapsed after the indictable offences before the applicant committed the summary offence.

[14] Accordingly, I would propose a head sentence of three years imprisonment. It is necessary therefore to fix a parole release date, rather than a parole eligibility date.[2] As a result of the applicant's misguided conduct in leaving the jurisdiction and not attending court upon the date listed for sentence, the mitigating effect of the applicant's plea of guilty was less significant than it otherwise might have been. Nevertheless, the plea should be seen as reflecting remorse, and it avoided the need for a trial. In all of the circumstances, it is appropriate to fix a parole release date on 18 December 2014 (when, taking into account the pre- sentence custody of 69 days, the applicant will have served about one year of his effective three year term of imprisonment).

Parity with the co-offender's sentence

[15] At the hearing of the application, the Court sought submissions about parity with respect to such a sentence. The applicant's counsel argued that such a sentence would still lack parity with the sentence imposed upon the applicant's co-offender, Hepburn,

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1 *R v Applewaite & Jones* (1996) 90 A Crim R 167 at 170 – 171; *R v Shepherd & Kyriakou* [2001] QCA 181 at p 3; and, generally, *R v Lindsay; R v Lindsay* [2013] QCA 381 at [31].

2 *Penalties and Sentences Act* 1992 (Qld), s 160B(3).

although counsel acknowledged that that the suggested disparity would be less marked than it was in relation to the sentence imposed by the sentencing judge. The applicant's argument invoked the principle expressed by Mason J in *Lowe v The Queen*:[3]

> "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.
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> …
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> [A] court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance,[4] 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."

[16] In *Postiglione v The Queen*,[5] Dawson and Gaudron JJ observed that the parity principle does not concern merely the imposition of different sentences for the same offence: it concerns the due proportion between those sentences, which must be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality. Similarly, in *Green v The Queen*, French CJ, Crennan and Kiefel JJ more recently observed that disparity between sentences may be "justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise…".[6]

[17] Hepburn pleaded guilty to the same two indictable offences of which the applicant was convicted and he also pleaded guilty to a third count on the indictment, unlawful possession of cannabis, on 31 July 2012. In August 2013 he was sentenced to concurrent terms of three years imprisonment on Count 1, 12 months imprisonment on Count 2, and two years imprisonment on Count 3. He was sentenced to three months imprisonment on two summary offences to which he pleaded guilty, arising out of his having decamped from the cultivation site when police arrived and having again run away when they later found him. It was ordered that the sentences be suspended after he had served four months, the operational period of that order being three years. Hepburn's substantial history of drug offences dating back to 1985 included convictions for production of dangerous drugs in 1993, 2002 and 2005. He had been sentenced to terms of imprisonment in New South Wales, although since 1985 he had not been sentenced to any period of actual imprisonment until he was sentenced for the current offences. In June 2005, when he was last convicted of the offence of production of a dangerous drug, he was sentenced in the Supreme Court to six months imprisonment, wholly suspended for an operational period of three years.

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3 (1984) 154 CLR 606 at 610 – 611, 613 – 614.

4 The relevant sense of grievance is to be assessed by objective criteria: *Green v The Queen* (2011) 244 CLR 462 at 474 – 475 [31] (French CJ, Crennan and Kiefel JJ).

5 (1997) 189 CLR 295.

6 (2011) 244 CLR 462 at 474 – 475 [31].

[18] Whilst Hepburn's criminal record was worse than the applicant's, unlike the applicant Hepburn did not offend whilst on bail (although in June 2013 he was sentenced for offences of possession of cannabis and possession of utensils which he committed in December 2012). In fixing upon a head sentence of three years imprisonment for Hepburn, Shanahan DCJ took into account that it was Hepburn's diagnosis of lung cancer and the fact that he had nothing to leave his family which motivated him to embark upon the cultivation of cannabis. Shanahan DCJ acknowledged that this was a "studied decision by a man who clearly knew how serious the cultivation of cannabis was regarded", but regarded the nature of that commercial purpose as a matter to be taken into account in mitigation of the head sentence. Whilst some might regard that unusual motive for offending as being less culpable than some other motives (such as funding an offender's own extravagant lifestyle), it should not have been given any significant weight in Hepburn's favour; his motivation remained the purely commercial one of benefiting his family from his production of a dangerous drug, and he formed that motive in studied disregard of the seriousness with which successive legislatures have treated such an offence.

[19] The applicant did not argue that a relevant disparity could be discerned by reference to the same head sentences of three years imprisonment for the applicant and Hepburn. Rather, the applicant argued that a disparity was revealed by the order suspending Hepburn's imprisonment after four months and a parole release date for the applicant after he has served about one-third of an effective term of three years imprisonment. The argument did not draw a distinction between suspension and parole release, but was confined to a comparison between the pre-release periods.

[20] That argument should not be accepted. In sentencing Hepburn, Shanahan DCJ took into account two factors bearing upon the pre-release period which have no counterpart in relation to the applicant. The first was that Hepburn's plea of guilty was treated as an early plea. The second, and more important factor, was that, as a result of Hepburn's ill health, he was under the care of a fulltime carer who looked after many of his everyday needs. Shanahan DCJ found that although Hepburn's medical needs could be met in prison, imprisonment would be more arduous for him because of his medical condition. The sentencing judge was provided with Shanahan DCJ's sentencing remarks and took them into account, specifically noting that Shanahan DCJ reduced the time that Hepburn otherwise would have to serve in prison to recognise his health issues. That was appropriate. Reviewing the matter afresh, I would hold that those circumstances sufficiently justify the difference which is in issue between Hepburn's sentence and the sentence which I have found to be appropriate for the applicant.

Proposed order

[21] I would make the following orders:

1. Grant the application for leave to appeal against sentence and allow the appeal.
2. Vary the sentences imposed in the District Court as follows:
   (a) In relation to Counts 1 and 2 on the indictment, omit the order that the date the offender is eligible for parole be fixed at 10 January 2015, and in lieu thereof fix a parole release date of 18 December 2014.
   (b) In relation to the summary offence of possessing dangerous drugs:

(i) Omit the order that the sentence of imprisonment for a period of one month is to be served cumulatively upon the sentences imposed for Counts 1 and 2 of the indictment, and in lieu thereof order that the sentence is to be served concurrently with the other sentences; and

(ii) Omit the order that the date the offender is eligible for parole be fixed at 10 January 2015, and in lieu thereof fix a parole release date of 18 December 2014.

3. Otherwise confirm the sentence imposed upon the applicant in the District Court.

[22] **ALAN WILSON J:** I agree with Fraser JA's reasons, and with the orders his Honour proposes.