SUPREME COURT OF QUEENSLAND

CITATION:	*R v Owen* [2015] QCA 46
PARTIES:	**R** **v** **OWEN, Benjamin Troy** **(**applicant**)**
FILE NO/S:	CA No 239 of 2014 DC No 265 of 2014 DC No 264 of 2014 DC No 194 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	10 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2015
JUDGES:	Morrison JA and Douglas and Peter Lyons JJ 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.** **2. Allow the appeal.** **3. Vary the orders made in the District Court on 20 August 2014, by varying the parole eligibility date from the 31 October 2015 to 10 October 2015.** **4. Otherwise confirm the orders made 20 August 2014 in the District Court.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – PARITY BETWEEN CO-OFFENDERS – GENERAL PRINCIPLES – where the first co-offender was sentenced on an incomplete view of the facts – where the court sentencing the second co-offender was informed of the complete circumstances of the offending – whether the second sentencing judge should approach the sentencing by treating the co-offender's sentence as significantly less relevant, or, depending on the degree of error, as irrelevant to the parity principle *Director of Public Prosecutions (Cth) v Peng* [2014] VSCA 128, followed *Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49, followed

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, considered
Nguyen v The Queen [2010] VSCA 180, not followed
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered
R v Kite (1971) 2 SASR 94, followed
R v Phu Dinh, Julie Le, Van Le & Tri Ton [2008] VCC 1771, considered
R v Tiddy [1969] SASR 575, considered

COUNSEL: F D Richards for the applicant
G P Cash for the respondent

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

[1] **MORRISON JA:** I have had the advantage of reading the draft reasons of Douglas J. I agree with those reasons, but wish to add some observations of my own.

[2] The parity principle as explained in *Postiglione v The Queen*[1] is an aspect of equal justice, requiring that like be treated alike, but with due allowance being made for the differing circumstances of different offenders. As was said in *R v Tiddy*:[2]

> "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."

[3] Mr Owen's co-offender, Mr Whatley, was fortunate to be sentenced by a learned magistrate who was not told all the relevant facts, and specifically, not the value of the damage caused. However that error occurred, it was an error of fact, and has the result that there are significantly different circumstances between the two co-offenders. Those differences are reflected in the sentences, with the result that one is not comparing like with like.

[4] In *Nguyen v The Queen*[3] the Victorian Court of Appeal dealt with a case where Mr Nguyen's co-offender was sentenced more than a year after him, and received a lesser sentence.[4] The Court of Appeal said that:

> "In sentencing the co-offender, the judge appears to have acted on a mistake as to the maximum applicable to the offence of trafficking in a large commercial quantity. That was a mistake which operated to the advantage of the co-offender and, because of parity, it operates to the advantage of the appellant."[5]

[5] In this Court it was submitted that the second sentence of that passage was authority for the proposition that an uncorrected mistake in the sentencing of one co-offender, which operated to the benefit of that co-offender, could nonetheless operate to the

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1 (1997) 189 CLR 295, at 301-302. (***Postiglione***)
2 [1969] SASR 575, at 577, per Bray CJ, Bright and Mitchell JJ.
3 [2010] VSCA 180, per Maxwell P and Weinberg JA. (***Nguyen***)
4 The sentencing remarks are in *R v Phu Dinh, Julie Le, Van Le & Tri Ton* [2008] VCC 1771. (***Ton***)
5 *Nguyen* at [23].

benefit of another co-offender. Thus it was submitted that this Court should ignore the fact that the sentencing magistrate for Mr Whatley was mistaken about the value of the damage done.

[6] Mr Nguyen and his co-offender, Mr Ton, were charged with trafficking in a "large commercial quantity" of drugs of dependence, for which the maximum penalty was, at the relevant time, life imprisonment. It had previously been 25 years imprisonment.

[7] The sentencing remarks delivered in *Ton* reveal that the sentencing judge did refer to the maximum penalty as being 25 year's imprisonment for trafficking in not less than a commercial quantity.[6] However, at the end of the sentencing remarks that error was identified and corrected,[7] without any alteration to the sentence pronounced. In my view it is evident that the sentence imposed did not proceed from a mistake as to the maximum penalty applicable.

[8] If there had been a mistake as to the applicable maximum penalty that would be a mistake of law, not fact. If the statement in *Nguyen* was intended to mean that the application of the parity principle required a court in one co-offender's case to ignore that a mistake of law had been made another co-offender's case, I must respectfully disagree with it. There are a number of reasons for that.

[9] First, the sentencing remarks in *Ton* reveal that there was no error. The foundation for the statement was therefore lacking.

[10] Secondly, I doubt that it was intended to be understood as establishing such a proposition. The way in which the statement is made suggests that it was not in response to a live issue as to whether the mistake should have that effect under the parity principle. Had that been so one might have expected some more detailed analysis of the reasoning leading to that conclusion. Rather, it appears to be a passing observation.

[11] Thirdly, the consequence of adopting that approach would be to propound the error of law, and abandon the court's duty to do justice according to law. It would be what Brennan J referred to in *Lowe v The Queen*,[8] as "tantamount to saying that 'where you have one wrong sentence and one right sentence [the] Court should produce two wrong sentences' – a proposition that cannot be accepted: per Roskill L.J. in *Reg. v Stroud*".[9]

[12] Fourthly, the approach in *Director of Public Prosecutions (Cth) v Peng*[10], referred to in paragraph [31] of the reasons of Douglas J, reflects the approach taken in other courts.[11] In *R v Kite*,[12] Bray CJ, Hogarth J and Sangster AJ spoke of the importance

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6 *Ton* at [12].
7 *Ton* at [31]-[32].
8 *Lowe v The Queen* (1984) 154 CLR 606, at 617.
9 See also *Yanko v The Queen* [2004] WASCA 37, at [41].
10 [2014] VSCA 128, at [33]-[38].
11 *"I" (a child) v The State of Western Australia* [2006] WASCA 9, at [65]- [66] per Steytler P; *Steer v The Queen* [2000] FCA 462 at [84], per Weinberg J; see also *R v Lagana* [2012] SASCFC 135, per White J at [40], [51], [53]-[59].
12 *R v Kite* (1971) 2 SASR 94, at pg 96 per Bray CJ, Hogarth and Sangster JJ; *"I" (a child) v The State of Western Australia* [2006] WASCA 9, at [65]- [66] per Steytler P; *Steer v The Queen* [2000] FCA 462 at [84], per Weinberg J; see also *R v Lagana* [2012] SASCFC 135, per White J at [40], [51], [53]-[59].

of not allowing interference on the grounds of disparity to result in the imposition of an inadequate sentence:

> "[T]he mere fact that one convicted person has received too light a sentence is no reason why another convicted person should receive similar treatment. If there is excessive disparity, it does not follow that the one with the heavier sentence was treated too severely; it may be that the one with the lighter sentence was treated too leniently. Often in these cases the disparity should ideally be remedied by increasing the sentence of the one, rather than by reducing the sentence of the other. But we can only deal with the appeal before us. We have no power to interfere with the sentence imposed on Beattie. That sentence is not before us. If the applicant was treated justly he has no right to complain if someone else was treated more leniently than he deserved."

[13] Fifthly, the parity principle applies where there is disparity between the sentences imposed on offenders. As the High Court said in *Green v The Queen*:[13]

> "The court will refuse to intervene where disparity is 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."

I do not understand that to have been intended as an exhaustive list. There is no reason to think that a demonstrated error of law in the sentencing of one offender, even if not the subject of appeal in that case, is not a difference that should be taken into account. In such a case one cannot say that "things are equal".[14]

[14] Sixthly, in the application of the parity principle one can take into account the maximum possible sentence applicable to the offence.[15] That being so, it is irrational not to take into account an error in that respect.

[15] Seventhly, the example posed by Douglas J in paragraph [33] demonstrates the difficulty with the proposition. The parity principle applies when there is a "**justifiable** sense of grievance".[16] There could not be a justifiable sense of grievance once it is known that one decision was affected by error of law.

[16] In any event there was a concession made in *Nguyen* that had a significant impact on the resolution of the parity issue. In *Ton* the Crown had submitted that the co-offender's culpability was greater than that of Mr Nguyen.[17] The Crown adhered to that position in *Nguyen*. The court held that to be one of the main reasons why a lower sentence was called for in Mr Nguyen's case.[18]

[17] The orders of the court are:

1. Grant the application for leave to appeal.

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13 (2011) 244 CLR 462 at [31]; [2011] HCA 49, per French CJ, Crennan and Kiefel JJ.
14 To adopt the phrase in *R v Tiddy*.
15 *Siganto v The Queen* [1998] HCA 74, at [51]-[52].
16 *Postiglione* at 301, 309, 323, 338; emphasis added.
17 *Ton* at [7], [23].
18 *Nguyen* at [22] and [24].

2. Allow the appeal.

3. Vary the orders made in the District Court on 20 August 2014, by varying the parole eligibility date from the 31 October 2015 to 10 October 2015.

4. Otherwise confirm the orders made 20 August 2014 in the District Court.

[18] **DOUGLAS J:** This application for leave to appeal against sentence raises as an issue how the parity principle should apply where the first co-offender is sentenced on an incomplete view of the facts and the court sentencing the second co-offender has been told the true or more complete circumstances of the offending. It is my view that the second sentencing judge should approach the task by treating the first sentence as significantly less relevant, or, depending on the degree of error, as irrelevant to the parity principle.

Background

[19] The applicant had pleaded guilty to breaking and entering premises and stealing. He was sentenced to six years' imprisonment for that offence in the District Court on 20 August 2014. The learned sentencing judge ordered that he be eligible for parole on 31 October 2015. At the same time the applicant pleaded guilty to 36 other offences, including possessing and supplying dangerous drugs, property offences and driving offences committed over the period from April 2012 to October 2013.

[20] The sentences for those offences were not challenged on this appeal but the six year term imposed for the count of breaking, entering and stealing was. It was argued that the sentence was manifestly excessive and that 21 days pre-sentence custody not declared as such should have been taken into account by his Honour, and was not. Further, it was submitted that his Honour erred in giving insufficient weight to the parity principle such that the sentence imposed left the applicant with a justifiable sense of grievance.

[21] The latter argument was based on the fact that the applicant's co-offender on the charge of breaking, entering and stealing also pleaded guilty, before a magistrate, and was sentenced simply to 15 months' imprisonment with a parole eligibility date set three months and eight days after his conviction.

[22] There were several significant distinctions between the circumstances of the two offenders but the principal difference discussed in the submissions was that the learned sentencing magistrate of the co-offender, Mr Whatley, was not told fully of the nature and extent of the damage to the premises which the offenders entered. That may have been because Mr Whatley was sentenced less than one month after the offence, perhaps before full details of the costs associated with the damage were available.

[23] The information provided to the learned District Court judge made it clear, to use his Honour's words, that it was "a break and enter and steal of the most serious kind." More than $230,000 damage was done to an optometrist's business. A large amount of stock and other items were taken, and a fire extinguisher was used throughout the premises to damage expensive scientific equipment and computers.

The optometrist was compelled to close the business for seven weeks while he repaired the damage and restocked the shop.

[24] The information given to the learned magistrate who sentenced Mr Whatley was simply that there had been heavy damage to a door, items strewn across a storage room floor and the theft of a large number of sunglasses frames for prescription lenses, as well as a 32 inch television set. No value was placed on the extent of the damage in the submissions made by the prosecution to the magistrate.

[25] Mr Whatley was about two years older than the applicant at the time of the offence, 36 to his 34, but the applicant's criminal history was substantially more serious. It involved many offences of dishonesty, including ones which resulted in a sentence of six years' imprisonment with parole after two years in 1997. Mr Whatley had offended while on parole. The applicant had been on probation which was revoked before he committed this offence; he had been re-sentenced because of other offences which led to the revocation of his probation. The other 36 offences to which the applicant pleaded guilty were many more than Mr Whatley faced. Mr Whatley had, apparently, pleaded guilty to two other charges related to an attempt to break into a motor vehicle which caused damage. Mr Whatley had also confessed to police when first apprehended while the applicant initially lied to police but soon after that made a confession.

[26] Mr Whatley's case before the learned sentencing magistrate was that he was not responsible for breaking into the pharmacy but entered in the hope of getting something quickly, realised the severity of what was going on and left quickly. Similar submissions were made before the learned District Court judge for the applicant but it appeared clear that the applicant was being sentenced on the basis that he had accepted responsibility for the damage caused.

[27] The learned sentencing judge decided that Mr Whatley's sentence was not relevant to the task facing him because of these factual differences and, notably, because the magistrate had not been given all the facts he should have received, including the amount of the loss. Nonetheless, his Honour considered that he had to give some allowance to the accused because of the parity principle. His Honour also considered that it was appropriate to take into account his pleas of guilty to a large number of other offences and his significant criminal history when assessing the appropriate sentence on the charge of breaking, entering and stealing.

The parity principle

[28] The parity principle was usefully explained by Dawson and Gaudron JJ in *Postiglione v The Queen*[19] as follows:

> "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. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of

[19] (1997) 189 CLR 295, 301-302 (footnotes omitted). See also Kirby J at 338, [5]-[6].

> the error will result in there being a due proportion between the sentences and there will then be equal justice. However, 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.
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> 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."

[29] Here the disparity between the sentences imposed on the co-offenders was marked, as the sentencing judge recognised. However, one of the reasons his Honour gave for the disparity, that the magistrate was not given all the facts he should have been given, was clearly correct.

[30] Is there a principle then that a mistaken view of the facts provided to the sentencing magistrate for one offender should dictate a lesser sentence than would otherwise be appropriate for the co-offender sentenced on a proper understanding of the evidence? One view of a brief statement in passing by the Victorian Court of Appeal in *Nguyen v The Queen*[20] is that a mistake in one sentence can operate to the advantage of the co-offender because of parity. That approach does not appear to be reflected in more comprehensive statements of principle about parity in sentencing in more recent Victorian decisions such as *Director of Public Prosecutions (Cth) v Peng*.[21] In particular, Nettle and Redlich JJA, with whom Priest JA agreed, said in their reasons:[22]

> "[36] The approach required where the co-offender's sentence is inappropriately low is different. A sentence that is manifestly inadequate will require that a co-offender's sentence be placed toward the lower end of the range of sentences that are available. But a sentence that is viewed as excessively lenient cannot justify the reduction of a co-offender's sentence to one that is inappropriately low. As Neave and Weinberg JJA recently concluded in *Taleb v The Queen*, based on their review of the relevant decisions of this Court:
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> > '[T]he avoidance of an unjustifiable disparity between the sentence imposed on an appellant and a co-offender may require the reduction of the appellant's sentence to a level which might otherwise be regarded as at the bottom end of the range, but not to the point where the offender's sentence is wholly inappropriate or outside the range.'

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20 [2010] VSCA 180 at [23].

21 [2014] VSCA 128 at [33]-[38]. See also *Taleb v The Queen* [2014] VSCA 96 at [48] and [52].

22 [2014] VSCA 128 at [36]-[37] (citations omitted).

> [37] The logic of that was explained by Chernov JA, with whom Winneke P and Buchanan JA agreed, in *Wilson v The Queen*. As Chernov JA said, to fix a sentence that is inappropriately low 'would give rise to a justifiable concern in the mind of the public that there is a failure to maintain appropriate sentences'. Accordingly, where the co-offender's sentence is regarded as being excessively low, the task is not to match the prisoner's sentence to the lenient one, but to re-sentence. The approach required in constructing the new sentence is to have regard to the sentence that was imposed on the co-offender, 'thereby taking it into account in the broad sense in the course of exercising the sentencing discretion'. His Honour referred to *R v Kucharski*, in which Hayne JA followed the course suggested in *Pecora v The Queen* in the context of re-sentencing of having regard to the sentence that was imposed on the co-offender 'but giving to it the weight which it deserves when it comes to resentencing th[e] applicant'."

[31] There, the facts affecting the two co-offenders were significantly different and affected the degree to which there should have been parity between their sentences. Here, where the first, inappropriately low, sentence was imposed at least partly because of an inaccurate apprehension of the true facts, it is difficult to see why a sentence imposed on the proper view of the facts should lead to "a justifiable sense of grievance" in the second co-offender. He should be regarded as someone properly informed about the differences between his situation and that of his co-offender. Rather, it is the first offender who should be counting his blessings.

[32] Looked at from another point of view: if two offenders were convicted and sentenced on the one day and the sentencing judge erred in respect of the statutory maximum applicable to the offences, could it be argued sensibly that, if only one sentence was taken on appeal, notions of parity should prevent a variation of the sentence imposed by the appellate court on a proper understanding of the available statutory maximum? There may well be a marked disparity between the two sentences in the result on such an appeal but no properly justifiable sense of grievance.

[33] The true information about the extent of the damage caused in the offence required the sentencing judge in this case to impose a significantly longer sentence than was imposed by the magistrate on the co-offender. As his Honour pointed out, had the magistrate been informed of the amount of the loss, it is likely that he would have declined to exercise jurisdiction in the co-offender's case.[23]

[34] Where the sentence imposed on the co-offender is affected by such a mistake its utility for the exercise of the parity principle is quite limited. The learned sentencing judge in this case acknowledged that he had to give some allowance to the co-offender's sentence. There were other relevant factual comparisons that could be made between the two co-offenders which justified that approach. In the circumstances of this case, however, it has not been shown to my satisfaction that his Honour should have imposed a lower sentence than he actually did because of

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[23] Presumably pursuant to the power under s 552D of the *Criminal Code*.

the parity principle. It was proper for his Honour to sentence on the accurate view of the facts rather than those provided to the magistrate.

Was the sentence manifestly excessive?

[35] The comparable decisions referred to the learned sentencing judge demonstrated that, where there is a large number of offences causing substantial loss committed by a mature man with a substantial criminal history, sentences of five to six years imprisonment can be imposed.[24] His Honour was also entitled, as he appears to have concluded, to take the applicant's overall criminality into account in fixing the sentence on this count, the most serious of the many offences dealt with by him at the same time.[25]

[36] Accordingly, in my view, it has not been shown that the sentence imposed on the applicant was manifestly excessive.

Pre-sentence custody

[37] A period of 292 days between 31 October 2013 and 19 August 2014 was declared as time served under the sentence. A pre-sentence custody certificate tendered at the hearing recorded that the applicant had been in custody for a variety of offences since 11 October 2013. The charges set out in the pre-sentence custody certificate do not neatly match those of which the applicant was convicted on 20 August 2014, although there is clearly some overlap. It was difficult, on the material in the record, to conclude that the 21 additional days spent in custody by the applicant from 11 October 2013 to 31 October 2013 should have been declared as time served by his Honour. Mr Cash for the respondent conceded, however, that it would have been appropriate for his Honour to have taken that period into account in arriving at an appropriate sentence and that he did not appear to have done so. He submitted however, that it was not such an issue as would require this Court to intervene.

[38] In the end, the parties were content that that period should be taken into account by fixing an earlier parole eligibility date than his Honour had imposed. That seems to me to be an appropriate course and I would fix a parole eligibility date 21 days earlier than that fixed by his Honour.

Conclusion and Orders

[39] Since circulating these reasons for judgment in draft form I have had the advantage of reading the draft reasons of Morrison JA with which I agree. The result is that the application for leave to appeal against sentence should be granted and the order below varied to fix the date on which the applicant is eligible for parole as 10 October 2015.

[40] Otherwise the appeal against sentence should be dismissed.

[41] **PETER LYONS J:** I have had the advantage of reading in draft the reasons for judgment of Douglas J, with which I agree. I also agree with the orders proposed by his Honour.

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[24] See, eg, *R v Bryant* (2007) 173 A Crim R 88; *R v McKinless* [2004] QCA 280.

[25] See *R v Nagy* [2004] 1 Qd R 63, 72-73 at [39].