SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cunha; R v Rosso Bernardo* [2017] QCA 6
PARTIES:	**In CA No 88 of 2016:** **R** **v** **CUNHA, Edmo** (first applicant) **In CA No 107 of 2016:** **R** **v** **ROSSO BERNARDO, Gean Carlos** (second applicant)
FILE NO/S:	CA No 88 of 2016 CA No 107 of 2016 SC No 950 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 23 March 2016
DELIVERED ON:	7 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2016
JUDGES:	Gotterson and Morrison JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 88 of 2016 (Cunha)** **The application is refused.** **In CA No 107 of 2016 (Rosso Bernardo)** **The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the first applicant Cunha pleaded guilty to importing a marketable quantity of a border controlled drug and was sentenced to eight years imprisonment with a non-parole period of five years – where the applicant contended that the sentence imposed did not take into account his guilty plea, lack of a criminal history, remorse, prospects for rehabilitation, voluntary work, and

personal circumstances – where the respondent contended all factors were taken into account – where the personal circumstances submitted as relevant by the applicant arose after the sentence was imposed – whether the sentencing judge took into account all relevant factors at the time of sentencing – whether the sentence was within the range suggested by comparable cases – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – JUDGE ACTED ON WRONG PRINCIPLE – SENTENCE MANIFESTLY EXCESSIVE – where the second applicant Bernardo pleaded guilty to importing a commercial quantity of a border controlled drug and was sentenced to nine years imprisonment with a non-parole period of five years and six months – where the second applicant pleaded guilty to an offence with a higher maximum penalty than the first applicant– where the second applicant contended that the parity principle should have been applied so that the second applicant received the same sentence as the first applicant – where the respondent contended that the second applicant's offending was objectively more serious than the first applicant's – whether the principle of parity was applied to the extent possible under the statutory regime – whether the sentencing judge addressed the differences between the two offenders – whether, all other factors being equal, the second applicant should receive a more serious sentence than the first applicant because he plead guilty a similar offence with a higher maximum sentence – whether the sentence was manifestly excessive

Criminal Code 1995 (Cth), s 307.1(1), s 307.2(1)

Director of Public Prosecutions (Cth) v De La Rosa (2010) 79 NSWLR 1; [2010] NSWCCA 194, distinguished
Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, considered
R v AAH & AAG (2009) 198 A Crim R 1; [2009] QCA 321, considered
R v Agboti (2014) 246 A Crim R 72; [2014] QCA 280, distinguished
R v Alvarez [2000] QCA 290, distinguished
R v Jimson [2009] QCA 183, distinguished
R v Maygar; *ex parte Attorney-General (Qld)*; *R v WT; ex parte Attorney-General (Qld)* [2007] QCA 310, followed
R v Onyebuchi; Ex parte Commonwealth Director of Public Prosecutions [2016] QCA 143, distinguished

COUNSEL: The first applicant appeared on his own behalf
B J Power for the second applicant
L K Crowley for the respondent

SOLICITORS: The first applicant appeared on his own behalf
Legal Aid Queensland for the second applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** On 23 March 2016, Mr Cunha and Mr Rosso Bernardo were convicted, on their pleas of guilty, of the following offences, and the following sentences were imposed:

(a) Mr Cunha – importing a marketable quantity of a border controlled drug (cocaine) – eight years imprisonment with a non-parole period of five years; and

(b) Mr Rosso Bernardo – importing a commercial quantity of a border controlled drug (cocaine) – nine years imprisonment with a non-parole period of five years and six months;

[3] Each of Mr Cunha and Mr Rosso Bernardo seek leave to appeal against the sentences imposed upon them. Mr Cunha contends that the sentence imposed is manifestly excessive. Mr Rosso Bernardo relies on two grounds:

(i) that there was an error in the sentencing process as, in the circumstances of the case, the parity principle (or its equivalent) should have been applied; or alternatively

(ii) the learned sentencing judge erred in concluding that due to the higher maximum penalty Mr Rosso Bernardo faced, he "must" receive a higher sentence than Mr Cunha.[1]

Circumstances of the offending

[4] An agreed Statement of Facts was tendered, covering both cases. Additional facts were mentioned, without objection, at the sentencing hearing, and others were mentioned on the hearing of the applications before this Court. What follows draws on all sources, with the exception of any to which objection was taken.

[5] On 4 February 2015, Mr Rosso Bernardo and Mr Cunha, who were both Brazilian nationals, arrived at the Brisbane International Airport, from Santiago in Chile. Each collected their belongings from the baggage carousel and proceeded through to the arrivals hall.

[6] A short time later, both were selected by members of the Australian Customs and Border Protection Service (Customs) to undergo a baggage examination. During the examinations, Customs officers formed the view that Mr Rosso Bernardo and Mr Cunha were concealing something in their pants.

[7] Customs officers asked Mr Cunha to lift his shirt. He was wearing a pair of bike pants which appeared unusually thick at the top. When asked what he had down his pants, he responded "nothing".

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1 These grounds were added by amendment, for which leave was granted at the hearing of the application.

[8] Officers from the Narcotics Detector Dog Unit attended at the baggage examination area and the dogs reacted positively to both Mr Rosso Bernardo and Mr Cunha. A Customs officer conducted a frisk search on Mr Cunha and felt abnormalities at the top of his shorts and in the area of his thighs.

[9] Customs officers asked Mr Cunha and Mr Rosso Bernardo whether they had anything in their pants. When asked if Mr Cunha was concealing anything in his pants, Mr Rosso Bernardo replied "I can't say". When asked if he, himself, had anything in his underpants, Mr Rosso Bernardo replied "I can't say".

[10] A Customs officer fluent in Spanish, and with some knowledge of Portuguese, attended and asked Mr Cunha whether he was carrying anything. He answered "Yes, I think". When asked if it was drugs, Mr Cunha said "I think it is cocaine, but it is not for me, it is for a friend".

[11] The same Customs officer then spoke to Mr Rosso Bernardo, and advised Mr Cunha had just admitted that he was carrying drugs. She asked Mr Rosso Bernardo "Are you carrying drugs too?" and he replied "Yes, I think".

[12] Members of the Australian Federal Police spoke with Mr Rosso Bernardo and Mr Cunha, utilising an interpreter. When asked by the AFP officers if he was concealing anything on his body, Mr Rosso Bernardo replied "Yes". He told officers that he did not know what it was, how much it weighed, or if it was a solid or a liquid.

[13] Mr Cunha also advised the AFP officers that he did not know what the substance was, saying "I picked it up but I don't know what it is".

[14] Mr Rosso Bernardo and Mr Cunha were subsequently arrested. Each consented to participating in a non-intimate forensic procedure, pursuant to Pt 1D of the *Crimes Act* 1914 (Cth). That procedure identified that each of the men had packages strapped to each of their upper thighs, as well as a package secreted within the front of their underwear.

[15] Each of Mr Rosso Bernardo and Mr Cunha were offered the opportunity to participate in a formal interview with police, but both declined.

[16] Analysis of the three packages found on Mr Rosso Bernardo revealed that they contained 2,509.9 grams of a white powdered substance, containing 2,069 grams of pure cocaine (at an average purity of 82.43 per cent).

[17] The three packages found in the possession of Mr Cunha contained 2,346.3 grams of a white powdered substance, being 1,338.8 grams of pure cocaine. The purity of the three packages ranged from 14.7 per cent to 81.6 per cent.

[18] The Australian Crime Commission's Illicit Drug Data Report for 2013/2014 indicates that (in Queensland):

(a) the median purity for street level seizures of cocaine of 2 grams or less is 27 per cent; and

(b) the price for 1 gram of cocaine is $350 to $400.

[19] On the basis of that data, it was estimated that the cocaine carried by Mr Cunha and Mr Rosso Bernardo, when sold in street deals of 1 gram, at 27 per cent purity, would yield:

(a) in the case of Mr Rosso Bernardo, in excess of $3 million; and

(b) in the case of Mr Cunha, in excess of $1.98 million.

[20] A letter from Mr Cunha to the learned sentencing Judge, set out in his own words how he came to be involved in the offending:

> "At the beginning of 2014 I had a car accident, colliding with the car of one of [the] members of my soccer team. The respective repair cost for both cars was too high and I didn't have that amount of money at the time. Facing the pressure I was going under to get his car repaired, he proposed that I could take an unknown parcel to Australia in exchange of having the whole debt settled. Out of despair and fear I accepted to go ahead with what no doubt was the biggest mistake of my life, hoping to solve the problems I was facing. Unfortunately today I know that nothing could justify my mistake, as I accepted to come to your country, I was immature and I did not understand that the consequences would be so devastating for my life. In particular my family, who were suffering with my remand in this place. All this makes me feel with even more guilt".[2]

Personal circumstances of Mr Rosso Bernardo and Mr Cunha

[21] Mr Rosso Bernardo was born in Portugal and moved to Brazil as a teenager, and Mr Cunha was born in Brazil. Mr Rosso Bernardo was born on 9 July 1991, and was thus aged 23 at the time of the offence, and 24 at sentencing. Mr Cunha was born on 19 April 1988, and thus aged 26 at the time of the offence and 27 at sentencing. Both being Brazilian nationals, they arrived in Australia on tourist visas, and at the time of sentencing were unlawful non-citizens. Neither Mr Rosso Bernardo nor Mr Cunha had a criminal history.

Personal circumstances – Mr Rosso Bernardo

[22] During the course of the sentencing hearing, counsel for Mr Rosso Bernardo proffered further information about his client. He was born in Portugal and later moved to Brazil. A folder of material was tendered concerning him, including reference letters from his family, hospital statements and medical certificates, a service report of his time in custody, and material concerning courses he had done whilst in custody.[3] It was contended this revealed a disadvantaged background, with Mr Rosso Bernardo's family dispersed between Portugal and Brazil, and life-affecting illnesses within the family, particularly with his mother.[4] It was said that because his mother was ill, "he made the incorrect choice of participating in this criminal enterprise to try and satisfy some financial requirements to address his family situation".[5] The learned sentencing judge questioned the evidentiary basis for that submission which, it transpires, was absent. As counsel put it, attempting to obtain funds to provide for his mother was only part of the story, and Mr Rosso Bernardo "went into this criminal enterprise to obtain funds for himself" as well.[6]

[23] Mr Rosso Bernardo was a university student studying civil engineering. He was a user of cannabis and alcohol, but Exhibit 5 contained material suggesting he wanted to move away from that in the future.

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2 AB 168.
3 These became Exhibit 5; AB 59-148.
4 AB 26.
5 AB 26 line 10.
6 AB 26 line 31.

[24] Mr Rosso Bernardo wrote a personal letter to the learned sentencing judge, attempting to express his remorse, and to inform of the events leading up to his arrest. This referred to his moving, when aged 12, to Brazil to live with his grandparents, one of whom died a few years later. He completed high school and a technical course in electro-mechanics, which enabled him to get a job as an electrician. In 2013, he commenced a course in civil engineering at a university. He was forced to quit his studies and focus on work, because of financial reasons. In August 2014, he was involved in a car accident and unable to work for a period of time. His mother was diagnosed with cancer the same year. Mr Rosso Bernardo said he "started to feel scared that I was going to lose my mother", and during that feeling of desperation, he became involved with the wrong people, making the wrong choices, believing that he could gather funds to support his mother. His letter also referred to the many courses he had done whilst in custody.

[25] Exhibit 5 contained letters of reference from Mr Rosso Bernardo's mother,[7] his brother,[8] his father,[9] his grandmother,[10] his aunt,[11] and a family friend.[12] All of them spoke of Mr Rosso Bernardo's shame and remorse, his background and their confidence in his future.

[26] The medical reports were largely to do with the physical condition of his mother. They attest to the mother having suffered from a malignant cancer in the ovary, which had been surgically removed in 2015. Some of the material also dealt with a dislocation injury in Mr Rosso Bernardo's hand, in 2014.

[27] The material from his period in custody showed that Mr Rosso Bernardo had, indeed, completed quite a number of courses, including those in which he was learning English. His case file notes reveal him to have been a model prisoner. These were matters which, counsel submitted, showed a positive trend towards rehabilitation, and the fact that he had shown great remorse and contrition. It was also suggested (without supporting evidence) that he would have a harsher time serving his sentence because he is a Brazilian national.[13]

Personal circumstances – Mr Cunha

[28] The following matters were added by counsel for Mr Cunha during the course of the sentencing hearing. He came from a family of five children, being raised in a small town. He completed high school and did two years of a four year degree in graphic design. While undertaking high school, at the age of 14, he took a job as an apprentice fitter and turner. Having finished high school, he worked as a fitter and turner, combining that with his studies in graphic design. Between 2010 and 2014, he worked most Saturdays as a volunteer art teacher at a local school.

[29] An explanation (without supporting evidence) was proffered for how Mr Cunha found himself in the circumstances of offending.[14] The explanation was that he damaged the car of another man, who was a team mate in his soccer team. The damage amounted to about $8,000 and he was being pressed by his team-mate for payment.

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7 AB 64.
8 AB 70.
9 AB 73.
10 AB 74.
11 AB 76.
12 AB 78.
13 AB 32.
14 See above at [20].

Mr Cunha's father had heart problems and medical costs were incurred in respect of it. Mr Cunha's friends told him that his team-mate was "not a good person". The team-mate proposed to him that he transport a package and in return, the debt would be discharged. There was, therefore, an element of financial reward in what he was doing.

[30] Two documents were tendered on behalf of Mr Cunha. One was a letter from Mr Cunha to the learned sentencing judge, and the other was one from Mr Cunha's father.[15] Mr Cunha's letter expressed his sincere apologies and his shame at his wrongdoing. He referred to his family circumstances, and the illnesses of his mother (cancer) leading to her death, and his father (heart conditions). He also related his community work, volunteering at a school for disadvantaged children, developing works related to graphic design.[16] He proposed after his eventual release to continue his voluntary work and complete his university studies.

[31] On behalf of Mr Cunha, it was submitted that he attempted to facilitate the administration of justice by cooperating, pleading guilty at the committal and having the matter sentenced reasonably early. However, as the learned sentencing judge observed, that cooperation did not extend to identifying the person to whom he was to deliver the cocaine.

[32] He had completed a variety of programs whilst in custody, working as a volunteer and as a cleaner. The management notes suggested that he was a compliant prisoner. During his time in custody, he had very limited contact with his family, because of the costs.

Approach of the learned sentencing judge

[33] The learned sentencing Judge took into account the following matters in his sentencing remarks:

(a) the pleas of guilty;

(b) Mr Rosso Bernardo imported a commercial quantity of cocaine, and the maximum penalty for that offence was life imprisonment;

(c) Mr Cunha had imported a marketable quantity of cocaine, and the maximum penalty for that offence was 25 years imprisonment;

(d) the circumstances of the offending, including the fact that Mr Cunha initially lied about carrying material in his pants;

(e) Mr Rosso Bernardo carried 2.5 kilograms of white powdered substance, that contained 2,069 grams of pure cocaine;

(f) Mr Cunha carried 2.346 kilograms of white powdered substance, which contained 1,338.8 grams of pure cocaine;

(g) the cocaine carried by Mr Rosso Bernardo slightly exceeded the commercial quantity;

(h) in the case of Mr Cunha, the cocaine carried by him was more than 600 times the marketable quantity (2 grams);

(i) in the case of Mr Rosso Bernardo, the street value of the cocaine[17] was in excess of $3 million, and in the case of Mr Cunha, in excess of $1.98 million;

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15 AB 168 – 170.

16 AB 169.

17 In each case, if sold in street deals of 1 gram, cut to a level of purity of 27 per cent.

(j) the personal circumstances of each of Mr Rosso Bernardo and Mr Cunha, including that each was well educated and a tertiary student;

(k) they were motivated by financial gain to commit a particularly serious offence;

(l) the mitigating features, including the relative youth of each of them; neither had a criminal history, there were plain indications of contrition, both had behaved well in custody and participated in programs likely to contribute towards rehabilitation, and both appeared to have reasonable prospects of rehabilitation;

(m) that each would endure hardship, as would their families, because of incarceration; however, that factor would attract not much weight because it was an entirely predictable consequence of the choices made in offending; and

(n) the degree to which each had cooperated with law enforcement agencies.

Contentions on behalf of Mr Rosso Bernardo

[34] Mr Rosso Bernardo was sentenced to nine years imprisonment with a fixed non-parole period of five years and six months. Before this Court, his counsel contended that there was an error in the sentencing process, based upon the fact that the parity principle (or its equivalent) should have been applied so that Mr Rosso Bernardo received the same sentence as Mr Cunha, or at least one that was not greater than that. Secondly, the sentence was attacked because of a conclusion said to have been drawn by the learned sentencing judge that Mr Rosso Bernardo "must" receive a higher sentence than Mr Cunha.

[35] As developed in oral submissions, the contention was that each of Mr Rosso Bernardo and Mr Cunha were supplied with similar sealed packages by the same source, and travelled together at the behest of the same organisation, and further, each had the same level of knowledge and involvement as the other. Reference was made to the submission by the prosecutor at sentencing, that "[t]hey were obviously committing the offences with the full knowledge of the other's involvement and, absent any evidence concerning the organisational chain and each of their knowledge as to that, their conduct is virtually identical".[18] It was contended that the random chance that Mr Rosso Bernardo ended up with a greater weight of cocaine, at a greater purity, with the consequence that it was a commercial quantity and not a marketable quantity, should not stand in the way of the application of the parity principle.

[36] The second part of the submissions focussed on an exchange between the learned sentencing judge and counsel then appearing for Mr Cunha. The full text is as follows:

> "MR MUMFORD: In terms of mitigating circumstances …
>
> HIS HONOUR: Hardship to family. What, if anything, is there in terms of mitigating circumstances to distinguish them?
>
> MR MUMFORD: In terms of mitigating circumstances not very much at all. The significant difference that must follow when your Honour falls to sentence them is that they're being sentenced, in essence, under a quantity-based sentencing regime.

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18 AB 15.

> HIS HONOUR: Yes. That's right. Mr Rosso Bernardo was 69 grams - - -
>
> MR MUMFORD: He was - - -
>
> HIS HONOUR: - - - into the commercial range.
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> MR MUMFORD: But his head sentence is one of life.
>
> HIS HONOUR: Yes.
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> MR MUMFORD: Yes. That's what puts him into that higher category, and, by extension, must mean that Mr Cunha is sentenced to a lesser term.
>
> HIS HONOUR: I think that's right. Yes."[19]

[37] For the respondent, it was contended that those arguments failed to acknowledge the obvious and fundamental factual difference between Mr Rosso Bernardo and Mr Cunha, that is, that Mr Rosso Bernardo imported a much greater quantity of pure cocaine. That had two features, it was contended. The first was that it meant that Mr Rosso Bernardo fell within that part of the statutory sentencing regime which provided for a higher maximum penalty (life imprisonment as opposed to 25 years). Secondly, if the conduct of Mr Rosso Bernardo and Mr Cunha was otherwise identical, and there was little difference in their objective personal circumstances, the difference in the quantity of drug imported became a significant distinguishing feature. Therefore, it was contended, Mr Rosso Bernardo's offending was objectively more serious. Reference was made to authorities supporting the proposition that, all other things being equal, the greater the quantity of the drug imported, the higher the sentence to be expected.[20]

Discussion – application by Mr Rosso Bernardo

[38] In *Green v The Queen*[21] it was held that the parity principle is designed to ensure equality before the law, and takes into account that equal justice according to law generally requires that "like cases be treated alike" and that there be "differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law".[22]

[39] In *R v AAH & AAG*,[23] Fraser JA referred to the parity principle in this way:

> "I record my respectful agreement with Chesterman JA's remarks about the parity principle, to which White J has also referred. In that respect, in *Lowe v The Queen* (1984) 154 CLR 606 the High Court held that equal justice requires that, as between co-offenders, there should not be a marked disparity between their sentences which gives rise to a justifiable sentence of grievance; if such a disparity arises the more severe sentence should be reduced even if it is otherwise within the permissible range of sentences. In *Postiglione v The Queen* (1997) 189 CLR 295 Dawson and Gaudron JJ pointed out that the parity

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19 AB 36 lines 13-33.

20 *R v Nguyen; R v Pham* (2010) 205 A Crim R 106*; Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584*; Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1.

21 (2011) 244 CLR 462.

22 *Green* at [28].

23 (2009) 198 A Crim R 1; [2009] QCA 321.

> principle raises a question which does not merely concern the imposition of different sentences for the same offence, but rather one which concerns the 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.
>
> In *Postiglione* Kirby J insisted that perfect consistency between the sentences of co-offenders is not necessary and that a sentence is to be reviewed only where the disparity is such as to engender a 'justifiable sense of grievance' on behalf of the prisoner or 'give the appearance that justice has not been done'. (The quoted words were those of Gibbs CJ in *Lowe v The Queen* at 610.) Gummow J put the test in similar, although perhaps even more demanding terms, in the same case (*Postiglione* at 323):
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> > "The principle for which *Lowe* is authority appears to be that the Court of Criminal Appeal intervenes where the difference between the two sentences is manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done".
>
> Put another way, the question is whether an objective comparison of the sentences reveals what Mason J called (in *Lowe v The Queen* at 611) a 'badge of unfairness'."[24]

[40] For a number of reasons, I do not consider that Mr Rosso Bernardo's contention can be accepted.

[41] First, the sentencing regime is one which recognises that differing quantities of the border controlled drug[25] will result in different sentences. That is reflected in the fact that the maximum penalty available where the offence is importation of a commercial quantity is life imprisonment. By comparison, the offence of importing a marketable quantity[26] results in a maximum penalty of 25 years. This Court has recognised, albeit not in the context of these particular offences, that where a difference in sentence is the product of a different sentencing regime, there is little room for a justifiable sense of grievance. In *R v Maygar*; *ex parte Attorney-General (Qld)*; *R v WT; ex parte Attorney-General (Qld)*[27] the Court considered sentences imposed for murder, and the difference in the sentence imposed for one offender under the age of 18, and another over the age of 18. The two offenders had participated in a particularly brutal murder, albeit that their level of involvement was of varying degrees. The sentences on the offenders who were under the age of 18, were affected by considerations applicable under the *Juvenile Justice Act*, which were inapplicable to the offender Maygar. As a consequence, the period of actual custody to be served was different, i.e. longer in the case of Maygar than in the case of the other offenders. Maygar complained that he had a justifiable sense of grievance because his period of mandatory custody should not exceed that of the others. That argument was rejected by the Court[28]:

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24 *AAH & AAG* at [9], [21]-[22].
25 In this case, cocaine.
26 The base limit of which is 2 grams.
27 [2007] QCA 310.
28 Per Keane JA with whom Williams JA and Mullins J agreed.

> "There could be no justifiable sense of grievance on Maygar's part if he were obliged to serve a longer period in custody than Woodman. That he must serve a longer period of imprisonment is simply the consequence of the application of different sentencing regimes to him and to Woodman: Maygar falls to be sentenced under the law relating to adults and Woodman falls to be dealt with under the laws relating to children. In the sentencing of child offenders, the considerations of leniency and child protection which inform the regime established by the *Juvenile Justice Act* must be observed by a sentencing judge. It may be thought that the drawing of a line in this regard between Maygar and Woodman by reason of the small difference in their ages is arbitrary; but a line has to be drawn somewhere for these purposes. More importantly, the drawing of this line is not a matter of judicial discretion; the line has been drawn by the legislature whose function it is to determine when a person should be dealt with as an adult by the criminal justice system. Maygar can have no legitimate grievance about that.
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> As Mackenzie J, with whom Jerrard JA agreed, said in *R v Tuki*:
>
> > '… there is no general principle that the mere fact that co-offenders are dealt with differently because one is dealt with as an adult and one as a child, requires this Court to reduce the sentence from what is otherwise an appropriate level for the adult offender by resort to the principle of parity. The fact that the sentences are imposed under different schemes of sentencing necessarily implies that there will be differential treatment.'
>
> The view expressed in *R v Tuki* is in conformity with a decision of this Court in *R v Crossley* and with the approach of the Full Court of the Supreme Court of South Australia in *The Queen v Harris (No. 2)* and *The Queen v Homer*. McPherson JA said, in *R v Crossley*, a "difference in parole eligibility dates between the two offenders was the direct consequence of the operation of the statutory provisions … it was no part of a sentencing judge's function to nullify by other means.'"[29]

[42] The differences in the maximum penalty applicable to the two present offences are not precisely the same as the different sentencing regime discussed in *Maygar*. However in my view, the same approach should be taken in point of principle. The legislature has plainly stated that if the offence is importation of a commercial quantity, then the maximum penalty is greater than that applicable for importation of a marketable quantity. The point at which those offences are triggered relates in part to the weight of cocaine imported. Thus a commercial quantity commences at 2,000 grams. On the other hand, a marketable quantity can be as small as two grams. In that way, it is right to call it a quantity-based sentencing regime, which signifies the need for differential treatment according to the offence. For example, even if someone imported 1,998 grams of cocaine, they would still be charged with importation of a marketable quantity because the amount had not reached the trigger of two kilograms. Even in that case, the offender would be entitled to point to the lesser maximum penalty as a relevant factor in determining what sentence should be imposed.

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[29] *Maygar* at [57]-[59]. Internal footnotes omitted. *R v Tuki* [2004] QCA 482 at [7]. *R v Crossley* (1999) 106 A Crim R 80 at 87, 88; *The Queen v Harris (No 2)* (1971) 2 SASR 255 at 256-267; *The Queen v Homer* (1976) 13 SASR 377 at 382-383.

[43] Secondly, it is the fact that Mr Rosso Bernardo carried a significantly greater weight of pure cocaine, than did Mr Cunha. Mr Rosso Bernardo's cocaine was at a purity of over 82 per cent, with the consequence that he was carrying 2,069 grams of pure cocaine. Mr Cunha's cocaine had a much reduced average purity, and the amount of pure cocaine was 1,338.8 grams. In percentage terms, Mr Cunha only had 64 per cent of the pure cocaine carried by Mr Rosso Bernardo.

[44] I do not consider that it would, or should be, accepted that it was merely random chance that meant Mr Rosso Bernardo had greater weight and greater purity on his body. Mr Rosso Bernardo said nothing beyond his own personal circumstances to indicate how or from whom the cocaine was obtained, and to whom it was to be delivered. Mr Cunha proffered an explanation that a car crash of a soccer team-mate's car led to his offer being put to him, but other than that, said nothing about the source or the recipient. In a vacuum such as that, one cannot infer that there was an identity of treatment such that it was merely random chance that Mr Rosso Bernardo had the greater quantity and the greater purity.

[45] Thirdly, whilst the sentencing comments of the learned sentencing judge were sparing in this regard, it is, in my view, plain that the difference in the sentences was driven by the different offences and the different quantities. Thus his Honour recited the different offences and the different maximum penalty applicable,[30] and then shortly thereafter the fact that Mr Rosso Bernardo's quantity "slightly exceeded the commercial quantity", whereas Mr Cunha's quantity "was more than 600 times the marketable quantity".[31]

[46] His Honour's recitation of the facts relevant to sentencing otherwise treated each of Mr Rosso Bernardo and Mr Cunha as largely identical. The only other differentiating factor that was mentioned was the three year difference in age (Mr Cunha being older), which led to the fact that Mr Cunha did not have "the same claim to relative youth".[32]

[47] In my view, the sentencing remarks make it plain that the different quantity and the different offences were the real reason for the differential in the penalties imposed.

[48] Fourthly, I do not consider that the exchange between counsel for Mr Cunha and the learned sentencing judge[33] demonstrates error. It is apparent that his Honour was attempting to discern if there were any distinguishing features in relation to mitigating circumstances. He was told by counsel for Mr Cunha that there was not much at all to distinguish the offenders. However, the submission continued that the "significant difference that must follow … is that they're being sentenced … under a quantity-based sentencing regime". It was a reflection of the different sentencing regime that was referred to by counsel when he said "that's what puts him into that higher category, and, by extension, must mean that Mr Cunha is sentenced to a lesser term". I do not consider that the submission meant, or was understood by the learned sentencing judge to mean, that the sentencing discretion was constrained in a way that a higher sentence had to fall on Mr Rosso Bernardo merely because his was the different offence. Read in context, the submission was that in the particular circumstances where the conduct otherwise was the same, the different weight and different offence meant that there logically ought to be a difference in the sentence.

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30 AB 39 lines 9-15.
31 AB 39 lines 40-44.
32 AB 40 line 19.
33 AB 36; see paragraph [36] above.

In context, that is all his Honour's acceptance signified. Further, that is borne out by the way in which the sentencing remarks reveal the determinative factors for the difference in sentence.

[49] Fifthly, the difference in the sentences imposed were, in effect, invited by counsel then acting for Mr Rosso Bernardo. The issue was addressed in this way:

> "The other aspect that I should address, your Honour, and my friend touched on it, and I think my friend touched on it fairly regarding the parity issue concerning the two offenders. Of course, with respect, your Honour has to sentence Mr Rosso Bernardo in a different way to the other offender, purely because of the section that he is to be sentenced under, and that's just the fall of the cards as far as Mr Rosso Bernardo is concerned, but I'd ask your Honour to recognise that and to see that it is an unfortunate circumstance for Mr Rosso Bernardo …".[34]

[50] Contrary to the submission made before this Court, that contention was not advanced in ignorance of the parity principle. Rather, the submission responded to what the prosecutor said,[35] that apart from the greater amount and the more serious penalty for Mr Rosso Bernardo, the conduct of each of the offenders was identical.

[51] In my view, there can be no justifiable sense of grievance on the part of Mr Rosso Bernardo in respect of the sentence imposed on Mr Cunha. That being the only basis upon which the sentence was challenged, the application by Mr Rosso Bernardo should be refused.

Discussion – application by Mr Cunha

[52] Mr Cunha represented himself before this Court. In his commendably succinct oral address, he made several points:

(a) he had agreed to plead guilty at an early point and therefore assisted the administration of justice;

(b) he had no criminal history in Brazil, and had completed courses whilst in custody;

(c) he was extremely remorseful and had high prospects of rehabilitation; that had not been given enough weight in the sentencing;

(d) he had done six years voluntary work in Brazil, and that had not been given proper weight;

(e) Mr Cunha wished to rely on some additional documents; several of those concerned his voluntary work, and one concerned the health of his father and surgery in respect of a "neoplastic bladder"; and

(f) a review of comparable cases showed his sentence to be manifestly excessive.

[53] The respondent contended that all factors had been taken into account by the learned sentencing judge, and that it could not be demonstrated that the sentence was manifestly excessive. The comparable cases reveal a range within which this particular sentence fell. Insofar as Mr Cunha had raised new material concerning the health of his father, that came subsequent to the sentence and did not mean that the sentence imposed was manifestly excessive.

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34 AB 32 lines 23-29.

35 AB 15.

[54] It is evident from the remarks by the learned sentencing judge, that he took into account the guilty plea and the extent to which it assisted the administration of justice. That was the limit of the degree to which there was cooperation with law enforcement agencies, as Mr Cunha had not been willing to reveal either the source of the cocaine he was carrying, or its intended recipient. Further, his Honour took into account the lack of any criminal history, the indications of contrition and the participation in programs whilst in custody. His Honour expressly found that Mr Cunha appeared to have "reasonable prospects of rehabilitation". In terms of the voluntary work in Brazil, whilst his Honour did not mention it specifically, he was referred to it and, in my view, it cannot be said to have been ignored given that his Honour found that Mr Cunha has reasonable prospects of rehabilitation.

[55] As for the additional documents produced by Mr Cunha, they did not take the matter further. Those concerning his voluntary work added nothing to the fact which the learned sentencing judge took into account. The document concerning Mr Cunha's father referred to surgery for a "neoplastic bladder", and matters connected with that. However, the documents post-dated the sentencing hearing by a considerable time. There is nothing in it to warrant its receipt by this Court, on this application.

[56] In terms of comparable cases, Mr Cunha placed reliance upon *R v Jimson*,[36] *R v Agboti*,[37] *R v Alvarez*,[38] *Director of Public Prosecutions (Cth) v De La Rosa*,[39] and *R v Onyebuchi; Ex parte Commonwealth Director of Public Prosecutions*.[40]

[57] *Jimson* involved importation of a marketable quantity of cocaine, in a sealed package concealed in the lining of a suitcase. The total weight of the cocaine was 1,982.2 grams, and the pure cocaine weighed 1,686.8 grams. The street value was estimated at about $760,000, based on the street price in New South Wales (the intended destination). It was acknowledged at the sentencing hearing that it was potentially possible to value the drugs at about $2 million, based on sales at a 30 per cent purity, because the $760,000 figure was based on sales of 100 per cent pure cocaine.

[58] The sentence imposed was eight years with a non-parole period of four years and six months. A period of pre-sentence custody was declared as time served. The offender arrived in Australia having flown from Malaysia to Brazil, and then flying on to Australia via Chile and Auckland. She had instructions to collect the bag at the airport, contact someone and take it to an address in Sydney where it would be collected. The offender indicated her willingness to assist in investigations with a view to identifying the person who was to take delivery of the cocaine. To that end she communicated with a person she had been told to contact, and checked into a hotel room nominated by that person. It became impracticable to extend the investigation, notwithstanding her willingness to fully cooperate. She also expressed remorse for what she had done. There was an early guilty plea and a full hand-up committal with no cross-examination.

[59] By reference to a number of comparable cases, this Court held that the sentence was not manifestly excessive. Though the overall quantity was less than Mr Cunha by some 400 grams, the quantity of pure cocaine was more than 300 grams greater. In *Jimson*, the offender cooperated to a much greater degree than Mr Cunha. Her

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36 [2009] QCA 183.
37 [2014] QCA 280.
38 [2000] QCA 290.
39 [2010] NSWCCA 194.
40 [2016] QCA 143.

personal involvement in the offence itself can be distinguished somewhat, in that she did not carry the cocaine on her person, but it was hidden in the lining of a suitcase she was asked to carry. Given those matters, *Jimson* does not suggest that the eight years and non-parole period of five years in the case of Mr Cunha is manifestly excessive. The contrary is the case.

[60] *Agboti* was an importation of a commercial quantity of methamphetamine. The gross weight was 2,944.6 grams and the pure weight was 2,326.5 grams, with an average purity of 79 per cent. The threshold for a commercial quantity was 750 grams, and therefore the offender was carrying more than three times the threshold limit. The street value was between $3.4 million and $10.2 million, although there was a much reduced wholesale value.

[61] The offender in *Agboti* had particular features concerning her personal circumstances which are greatly at variance from those concerning Mr Cunha. Whilst there were troubles in her family, immediately prior to leaving on the trip she had had an abortion, about which she was unable to tell anybody. She was desperate to leave the country and as a consequence, was prevailed upon to take a circuitous route to Cameroon, Ethiopia, Rwanda, Qatar, Singapore, Port Moresby and then Australia. This Court reduced the sentence imposed (11 years with a non-parole period of five years and six months) to nine years and six months imprisonment, with a non-parole period fixed at four years and six months. The Court reviewed a number of comparable decisions, including *Jimson*. The sentenced was reduced for two essential reasons:

(a) the circumstances were different from cases that were reviewed; none of them involved the unusual series of events which left the offender in a fragile state of mind bordering on desperation; and

(b) there was no suggestion that she had any knowledge of the quantity of the drugs, and there was no suggestion of reward in her undertaking the journey; her culpability was less than someone who received a more substantial reward.

[62] The foregoing is sufficient to demonstrate that *Agboti* is of no utility in terms of assessing whether the sentence imposed on Mr Cunha was manifestly excessive or not. The particular features of that case distinguish it from that of Mr Cunha.

[63] *Alvarez* involved a 28 year old who was sentenced to eight years imprisonment with a fixed non-parole period of three and a half years, for importing a quantity of cocaine. A total of 1,920.8 grams of powder were imported, of which 1,270.8 grams was pure cocaine. The potential street value was $1.5 million. The offender carried the drugs into Australia in a suitcase, doing so out of loyalty to her husband. Her time in custody would be more difficult than for others, because she had given birth to a child since being incarcerated.

[64] This Court held that the sentence was not manifestly excessive. The issue was not the eight year period for the head sentence, but the non-parole period. It was contended that the non-parole period should be substantially less and five reasons were put forward for that. The Court came to the conclusion that none of those reasons warranted any interference in the sentence.

[65] The mere fact that a different non-parole period was found to be not manifestly excessive does not lead to the conclusion that this non-parole period, being longer, must be manifestly excessive. *Alvarez* therefore does not assist.

[66] *Onyebuchi* involved the importation of a commercial quantity of methylamphetamine. The amount imported was 997.4 grams, with a purity of 79.4 per cent. The pure weight of methylamphetamine was 791.9 grams, or some 42 grams over the commercial quantity. The estimated value was between $673,000 and $2.02 million. The sentence imposed was seven years imprisonment with a non-parole period fixed at three and a half years. Five hundred and five days of pre-sentence custody was declared to be time served.

[67] The Attorney-General appealed against that sentence on the basis it was manifestly inadequate. This Court held that to be correct, adjusting the sentence to nine years with a non-parole period fixed at four and a half years.

[68] The offending in *Onyebuchi* consisted of the drugs being mailed into Australia, concealed in another item. One person arranged for the package to be delivered to a particular address, where police arrested the recipient. That person said he was simply taking delivery on behalf of Onyebuchi. The activity was deliberate and planned and Onyebuchi stood to benefit financially from his role, given the value of the drugs. The circumstances were well beyond the mere actions of a courier bringing a package in through Customs. The financial benefit was said to be a loan of $10,000 to assist his business, but the sentencing judge was sceptical that it was limited to that.

[69] Having reviewed a number of comparable cases, including *Agboti*, the Court resentenced on the basis of the seriousness of the offence, the quantity of the methamphetamine involved, the role of the offender, the commercial reward and other matters.

[70] Given that *Onyebuchi* was an Attorney-General's appeal, and involved an importation of a different quality than is the case here, it is of no assistance in determining whether the sentence imposed on Mr Cunha was manifestly excessive or not.

[71] *De La Rosa* involved an importation of cocaine in a marketable quantity (1,870 grams). The sentence imposed was eight years with a non-parole period of five years. The Director of Public Prosecutions appealed on the basis that the sentence was manifestly inadequate. The offending involved acting as a courier, not a principal. The quantity of the drug was near the upper limit for that offence. The cocaine powder was carried in shampoo and hair care bottles in the offender's suitcase. The offender declined to assist.

[72] The offender gave evidence at the sentence hearing. He had a criminal history which included spending time in custody for robbery, and said he had accumulated significant debts. Because he was unable to repay the debts and his friends began threatening him, he succumbed to the offer of €30,000 to import the cocaine into Australia. Of that sum, €15,000 was to extinguish his debt, and the remainder was to support his family. During his time in custody, he had attended classes in English (he was a Spanish national) and had been employed in electrical wiring.

[73] McClellan CJ at CL undertook a somewhat exhaustive analysis of cases, categorising them into relevant groupings. One of those was importation of a commercial quantity, where life imprisonment was the maximum. Another was importation of a marketable quantity, where the maximum penalty was 25 years. In the marketable quantity category, group 1 was those cases involving offences where there was a reward in the thousands of dollars, a discount for assistance, and a subordinate role in the organisation of the importation, including that where the offender was a mere courier, the quantity was high. *De La Rosa* fell into that grouping. For those in that grouping, the range of sentences started at nine years.

[74] Ultimately, the Court concluded that the sentence was not manifestly inadequate even though McClellan CJ at CL might have imposed a greater sentence had he been the sentencing judge. Other judges on appeal (Allsopp P, Basten JA, Simpson J and Barr AJ) did not follow the same reasoning, but all concluded that the sentence was not manifestly inadequate.

[75] The fact that it was an Attorney's appeal, is sufficient to make the decision in *De La Rosa* of little utility on the question of whether this sentence is manifestly excessive. All that *De La Rosa* decides is that that particular sentence was within range, and available to that sentencing judge.

Conclusion

[76] In my view, none of the authorities referred to by Mr Cunha demonstrate that the sentence imposed on him was manifestly excessive. To the contrary, *Jimson* supports the sentence.

[77] I am unpersuaded that the sentence can be shown to be manifestly excessive. The application for leave to appeal against the sentence ought to be refused.

[78] I propose the following orders:

1. In CA no 88 of 2016, the application is refused.

2. In CA no 107 of 2016, the application is refused.

[79] **DOUGLAS J:** I agree with the reasons of Morrison JA and the orders proposed by his Honour.