SUPREME COURT OF QUEENSLAND

CITATION:	*R v West* [2012] QCA 365
PARTIES:	**R** **v** **WEST, Gerald Ernest** (applicant)
FILE NO/S:	CA No 340 of 2011 DC No 397 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	Orders delivered ex tempore on 23 May 2012 Reasons delivered on 21 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 May 2012
JUDGE:	Margaret McMurdo P and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 23 May 2012:** **1. The application for leave to appeal is granted and the appeal is allowed.** **2. The sentence imposed at first instance is set aside.** **3. Instead, the Court substitutes a sentence of 12 months imprisonment suspended forthwith, with an operational period of 12 months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where applicant pleaded guilty to one count of attempting by verbal instructions to induce a witness to give false testimony – where applicant jointly charged with a co-offender who also pleaded guilty to the same offence – where applicant sentenced to an intensive correction order for 12 months and fined $10,000 – where co-offender sentenced to an intensive correction order for six months and to 18 months imprisonment with immediate suspension and operational period of 18 months – where co-offender and applicant sentenced by different Judges – where applicant's sentence endorsed on court order sheet but not otherwise drawn to other Judge's attention – where applicant contends

sentence is manifestly excessive and disparate to that imposed on co-offender – whether sentence manifestly excessive in all the circumstances – whether disparity of sentences unjustifiable and infringes principle of equal justice

Penalties and Sentences Act 1992 (Qld), s 13A, s 112

Green v The Queen; Quinn v The Queen (2011) 244 CLR 462; (2011) 86 ALJR 36; [2011] HCA 49, followed
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, followed
R v Ensbey; ex parte Attorney-General (Qld) [2005] 1 Qd R 159; [2004] QCA 335, cited
R v Harnden [2003] QCA 340, cited
R v Kucharski[1997] VicSC 249, cited
R v Wager, unreported, Court of Criminal Appeal, Queensland, Macrossan CJ, and Kelly and Connolly JJ, No 79 of 1990, cited

COUNSEL: J R Hunter SC for the applicant
D Balic for the respondent

SOLICITORS: Jacobson Mahony Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with White JA's reasons for the orders pronounced by this Court in this matter on 23 May 2012.

[2] **FRASER JA:** I agree with the reasons for judgment of White JA for the orders made by the Court on 23 May 2012.

[3] **WHITE JA:** On 23 May 2012 the court ordered:

- The application for leave to appeal be granted.
- The appeal be allowed.
- The sentence imposed at first instance be set aside.
- Instead, substitute a sentence of 12 months imprisonment suspended forthwith, with an operational period of 12 months.

[4] The court indicated that it would deliver its reasons for making those orders at a later date. The following are my reasons for joining in those orders.

[5] On 10 November 2011 the applicant pleaded guilty in the District Court at Southport to one count of attempting by verbal instructions to induce one Belinda Lee Harris, who was to be called as a witness in a judicial proceeding, namely for a hearing for a crime investigation pursuant to the *Crime and Misconduct Act* 2001 (Qld), to give false testimony. The Crime and Misconduct Commission ("the CMC") was investigating unlawful prostitution. The

applicant was jointly charged with Graeme Charles Neilson. The maximum penalty for the offence was seven years imprisonment.

[6] The applicant was sentenced to an intensive correction order pursuant to s 112 of the *Penalties and Sentences Act* 1992 (Qld) for a period of 12 months. He was also fined the sum of $10,000 to be paid within 12 months.

[7] The applicant had carried out eight hours per week of the intensive correction order since its imposition on 10 November 2011 to the date of hearing.

[8] A week after the applicant was sentenced, on 16 November 2011, Neilson pleaded guilty[1] to the same charge before a different District Court judge at Southport. He also pleaded guilty to a separate but related offence of attempting to procure the destruction of evidence, the maximum penalty for which was 18 months imprisonment.

[9] Neilson was sentenced to a six month intensive correction order for the latter offence and 18 months imprisonment with immediate suspension with an operational period for 18 months in respect of the corruption of a witness offence – the same offence as the applicant.

[10] The sentence imposed on the applicant was not drawn to the other District Court judge's attention although it was endorsed on the court order sheet.[2]

[11] The applicant challenges the sentence imposed upon him on the grounds of manifest excess and disparity with that imposed on Neilson. At the hearing, the focus of the applicant's submissions was the disparity with the sentence imposed upon Neilson. His submission was that the disparity was such that this court ought to intervene.

Circumstances of offending

[12] The sentence proceeded on a Schedule of Facts.[3] Debbie Kay Neilson owned and operated a licensed brothel in Brisbane. Her husband, Graeme Neilson, was acquainted with the applicant through their sons' sporting association. It is unnecessary to set out how they came to purchase a prostitution business together but in 2008 the Neilsons and the applicant acquired an interest in an unlawful outcall prostitution enterprise. In late 2007 or early 2008 the applicant arranged for Belinda Harris (the CMC witness the subject of the charge) to work as a "receptionist" in the business. Ms Harris received extensive training in the conduct of the business, particularly so as to avoid the risk of detection by the police. She was to use the name "Bella".

[13] Between March and May 2008 police conducted a covert operation that produced evidence of the commission of prostitution offences by, amongst others, the applicant and the Neilsons. A search of an associate's apartment located numerous documents relating to the enterprise as well as the telephone numbers of the applicant and the Neilsons.

[14] On 8 May 2008, the applicant telephoned Ms Harris and advised her that the business had been unlawful and that they were in trouble. Later that day he went to her home and collected a number of incriminating documents relating to the business.

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1 The applicant had agreed to give evidence at Neilson's trial which was about to commence.
2 AR 3.
3 AR 50-54.

[15] On 9 November 2008 the CMC served Ms Harris (and the applicant) with an attendance notice requiring her to give evidence before an investigative hearing. Ms Harris sought to contact the applicant to find out what it was about. He later contacted her and arranged to meet her at her home to discuss the investigation and told her that he would arrange for legal representation for her.

[16] He later attended at her home and was described as "apologetic, appeared nervous, panicked and stressed about the upcoming CMC Hearing".[4] Over a period of about 10 minutes the applicant gave Ms Harris instructions about what evidence she should give at the CMC hearing.

[17] On 15 November 2008 Ms Harris was met by the applicant and Neilson outside her workplace. They spoke to her for about 25 minutes and reiterated the instructions that the applicant had given her a few days earlier. Neilson gave Ms Harris specific instructions as to what she should say about her knowledge of his wife. The following summary of that conversation is in the Schedule of Facts:

> "● '*You didn't do reception work for us*'; '*Please make sure that you say you didn't do reception and your name is not Bella*' …
>
> ● Emphasised to HARRIS that her stage name was Jade and her real name Belinda and she was never known as or had used the name Bella …
>
> ● "*You only know me (WEST) because you did promo work for me*" and that HARRIS had met the defendant at the Toy Box just before the Sanctuary Cove Boat Show in May, not at the end of 2007, and the meetings were only in relation to promotional work for the boat show;
>
> ● "*You don't know Sandy*" (i.e MacDONALD …);
>
> ● The only association HARRIS has with NEILSON was conversations about the proposed DMB web site;
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> ● HARRIS knew Debbie (Debbie Kay NEILSON) as Debbie wanted some strippers in her lounge at the brothel in Brisbane;
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> ● HARRIS knew Eve (Debbie Kay NEILSON's alias) as a result of Eve organizing outfits for some girls;
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> ● Eve was not Debbie Kay NEILSON;
>
> ● "*There were never any meetings at the Isle of Capri*" …
>
> ● Nothing with Universal Models ever happened ..."[5]

[18] On 16 November 2008 the applicant attended Ms Harris' residence. He refused an invitation to come inside and took her to the rear of the residential complex where Neilson was waiting. The applicant advised her that they thought, correctly, that they were under surveillance. There was a 10 to 15 minute conversation in which it was emphasised that her evidence should be as they instructed and that a failure to

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[4] AR 52.
[5] AR 53.

comply could have the result that she would be charged with prostitution offences herself. At the conclusion of their conversation the applicant gave Ms Harris a telephone number so that she could contact him after she had given evidence at the hearing.

[19] On 17 November 2008 Ms Harris gave truthful evidence at the CMC meeting and did not comply with the applicant's and Neilson's suggestions as to what she should say.

[20] On 8 April 2009 the applicant and the Neilsons were arrested and charged with prostitution offences. On 26 March 2010 the applicant pleaded guilty to three prostitution offences, namely, knowingly participating in the provision of prostitution between 28 February and 8 May 2008; procuring prostitution; and using a telecommunications network to facilitate the commission of a serious offence. A fine of $2,000 was imposed without the recording of a conviction.

[21] The Neilsons entered pleas of guilty to similar offences in the Southport Magistrates Court on 2 December 2010 and a similar penalty to that imposed on the applicant was imposed on each of them.

The applicant's antecedents and submissions below

[22] The applicant was a qualified carpenter and builder with a strong work history until 2000 when he became a sole parent to three boys aged three, five and seven years after the death of his wife from cancer. During the following five years he sold assets so as to enable him to care for his sons. He also undertook small building projects. He was never dependent upon social security.

[23] In 2005 he returned to building work, however, at the date of sentence his principal occupation was the distribution of a pontoon docking system which required regular travel to the United States of America. Shortly after his conviction for the prostitution offences the applicant wrote a letter to his United States principals, his children and his Australian work colleagues acknowledging and apologising for the embarrassment he had caused them and expressing remorse. The letter was tendered to the sentencing judge.

[24] The applicant had assumed that Neilson was wealthy and successful and lawfully engaged in the prostitution business. Neilson had offered to buy into the applicant's pontoon docking business and, when he refused, Neilson offered him a business opportunity which led to his involvement in the prostitution offences.

[25] When the applicant was called before the CMC he initially was untruthful but quite quickly recanted that evidence and told the truth.

[26] The primary judge indicated in the course of defence counsel's submissions that she was considering imposing an intensive correction order and a fine with which counsel agreed. This was in light of the prosecution seeking a term of actual imprisonment.

Co-operation

[27] The applicant had provided police with a statement concerning his involvement in the offences and had undertaken to give evidence against Neilson whose trial was to commence shortly. The primary judge reduced the sentence which she would have imposed of 18 months imprisonment with parole after six months had he not co-operated in the manner recognised by s 13A of the *Penalties and Sentences Act* 1992.

Manifestly excessive?

[28] It is unnecessary to say anything much about the contention by the applicant that the sentence imposed was, without reference to the sentence imposed on Neilson, manifestly excessive.

[29] Rightly recognised by the primary judge, attempting to cause a witness to give false evidence is fundamentally inimical to any system of criminal justice and requires serious punishment to mark that condemnation and to act as a deterrent, both personal and general. The sentence imposed was not manifestly excessive by reference to the few comparable cases: *R v Wager*[6]; *R v Harnden*[7]*;* and *R v Ensbey; ex parte Attorney-General (Qld).*[8]

Parity

[30] The parity principle is conveniently summarised in the following passages from *Postiglione v The Queen*:[9]

> "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.[10] 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.[11] Ordinarily, correction of 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*[12], 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'.[13] If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options."[14]

[31] More recently in *Green v The Queen*; *Quinn v The Queen*[15] French CJ, Crennan and Kiefel JJ said:[16]

> "[31] … The sense of grievance necessary to attract appellate intervention with respect to disparate sentences is to be assessed by objective criteria. The application of the parity principle does not involve a judgment about the feelings of

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6 Unreported, Court of Criminal Appeal, Queensland, Macrossan CJ, and Kelly and Connolly JJ, No 79 of 1990.
7 [2003] QCA 340.
8 [2005] 1 Qd R 159.
9 (1997) 189 CLR 295 at 301, per Dawson and Gaudron JJ.
10 See *Lowe v The Queen* (1984) 154 CLR 606 at 610-611, per Mason J.
11 *Lowe v The Queen* (1984) 154 CLR 606 at 617-618, per Brennan J.
12 (1984) 154 CLR 606.
13 *Lowe v The Queen* (1984) 154 CLR 606, esp at 610, per Gibbs CJ; at 613 per Mason J; and at 623, per Dawson J.
14 (1997) 189 CLR 295 at 301, per Dawson and Gaudron JJ.
15 (2011) 86 ALJR 36; [2011] HCA 49.
16 At [31]; 45.

> the person complaining of disparity.[17] 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.[18]
>
> [32] A court of criminal appeal deciding an appeal against the severity of a sentence on the ground of unjustified disparity will have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders. Where there is a marked disparity between sentences giving rise to the appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive. Disparity can be an indicator of appealable error.[19] It is also correct, as Mason J said in *Lowe*, that logic and reality combine to favour the proposition that discrepancy is a ground for intervention in itself.[20] Unjustifiable disparity is an infringement of the equal justice norm. It is appealable error, although it may not always lead to an appeal being allowed. If an appeal is allowed on the ground of disparity, a court of criminal appeal in re-sentencing is not required to achieve identity of punishment. It must have regard to the sentence imposed on the co-offender and give it appropriate weight.[21] In such a case, an appeal to this Court on the question whether a disparity identified in a court of criminal appeal was unjustifiable and called for intervention by that court would also involve review of a qualitative and discretionary judgment.[22]"

[32] As Mr Hunter SC for the applicant submitted, his client was in a much better position than Neilson on sentence. They both had the same criminal history, that is, the prostitution offences (and only that history), but Neilson entered late pleas of guilty and had not otherwise co-operated with the authorities. There were relative subjective features about their personal circumstances which need not be further elaborated and which did not tend to mark out one more than the other. The disparity in sentence is not thus explicable and justifiable by reference to those factors which often are the explanation for disparity in sentence between co-offenders.

[33] The difference between the two sentences is stark. The applicant was the subject of an intensive correction order for twice the period to which Neilson was subject. In addition, he received a large fine.

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17 *Postiglione v The Queen* (1997) 189 CLR 295 at 323; 71 ALJR 875 per Gummow J; at 338 per Kirby J.

18 *Lowe v The Queen* (1984) 154 CLR 606 at 609; 58 ALJR 414 per Gibbs CJ.

19 *Lowe v The Queen* (1984) 154 CLR 606 at 617-618; 58 ALJR 414 per Brennan J; *Postiglione v The Queen* (1997) 189 CLR 295 at 301; 71 ALJR 875 per Dawson and Gaudron JJ.

20 *Lowe v The Queen* (1984) 154 CLR 606 at 613; 58 ALJR 414.

21 *R v Kucharski* [1997] VicSC 249 at 10 per Hayne JA, Brooking JA and Ashley AJA agreeing at 11.

22 *Lowe v The Queen* (1984) 154 CLR 606 at 610; 58 ALJR 414 per Gibbs CJ, Wilson J agreeing at 616.

[34] It was not submitted by the respondent that Neilson's sentence was so lenient as to be inadequate. There had been no appeal by the Attorney-General. This issue arose because, inexplicably, no regard was had to the sentence imposed on the applicant just a week previously. The disparity is unjustifiable and infringes the fundamental principle of equal justice. It calls for appellate intervention.

[35] It is for the above reasons that I joined in the orders pronounced on 23 May 2012.