SUPREME COURT OF QUEENSLAND

CITATION:	*R v Civcija* [2018] QCA 83
PARTIES:	**R** **v** **CIVCIJA, Mato** (applicant)
FILE NO/S:	CA No 108 of 2017 SC No 987 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 28 April 2017 (Burns J)
DELIVERED ON:	Date of Order: 9 February 2018 Date of Publication of Reasons: 4 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2018
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDER:	**Date of Order: 9 February 2018** **The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant pleaded guilty to one count of trafficking cannabis – where the applicant was sentenced to eight years imprisonment with parole eligibility after two years and nine months – where the applicant's trafficking had been associated with the major trafficking business of Terrence and Joshua Thornbury – where a sentence of 10 years imprisonment was imposed on both Terrence and Joshua Thornbury for trafficking cannabis – where five couriers who were employed by the Thornbury brothers were sentenced for their involvement in the trafficking operation – where the sentences imposed on the couriers ranged from four years imprisonment fully suspended to six years imprisonment – where the couriers were sentenced for different crimes that arose in different ways from the applicant's offending, albeit as part of the same trafficking enterprise – whether the sentence imposed on the applicant was not in parity with the sentences imposed on the couriers CRIMINAL LAW – APPEAL AND NEW TRIAL –

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where at first instance it was submitted on behalf of the applicant that he should serve a term of imprisonment of between seven and eight years – where on appeal it was submitted that the Court should substitute a term of seven years imprisonment for the eight years imprisonment imposed at first instance – where the applicant cited no comparable cases on appeal to demonstrate that the sentence imposed was excessive in the circumstances of his case – whether the sentence imposed on the applicant was manifestly excessive

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, applied
R v Thornbury [2017] QCA 283, considered
R v Thornbury [2017] QCA 284, considered
R v Walsh [2008] QCA 391, applied

COUNSEL: S G Bain for the applicant
J A Wooldridge for the respondent

SOLICITORS: A W Bale & Son for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** This is an application for leave to appeal against sentence.

[2] The applicant pleaded guilty to one count of trafficking cannabis between 2 April 2013 and 16 April 2014. His acts of trafficking had been associated with the trafficking business in Queensland of two brothers, Terrence Thornbury and Joshua Thornbury. These two men had been operating in Queensland as cannabis traffickers in a big way. They had bought and sold over $15M worth of cannabis that weighed almost 3,000 kilograms. Terrence Thornbury had been the real principal of the operation. He had a limited criminal history which included some relatively minor drug offences. He had never before served a term of imprisonment. On his plea of guilty he was sentenced to a term of 10 years imprisonment, which was not disturbed on appeal.[1] Joshua Thornbury was convicted and sentenced for the same offence. His circumstances were different. He was secondary to his brother in the operation. He also pleaded guilty and was sentenced for trafficking in methamphetamine, a business in which his brother was not involved. When arrested he was found in possession of 25 kilograms of methamphetamine. On the same occasion he was also sentenced for numerous property and official corruption offences. Like his brother he was sentenced to 10 years imprisonment for the drug offences but he was also given a cumulative sentence of two years and six months on these other counts.[2]

[3] The Thornburys sourced their drugs from a supplier in Melbourne. Their contact for that supply was the applicant who obtained the drug from the actual supplier.

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1 *R v Thornbury* [2017] QCA 283.
2 *R v Thornbury* [2017] QCA 284.

The Thornburys employed a number of couriers to transport the cannabis from Melbourne to the Gold Coast. These couriers travelled on commercial flights to and from Melbourne, carrying money to Melbourne and cannabis to the Gold Coast in their check-in luggage.

[4] As I have said, the applicant was not himself the actual supplier of the cannabis. Instead, he would arrange the purchase of cannabis from a third party in Melbourne and then pass it on to the Thornburys. During the sentencing process he was described as an "intermediary" but his role must be understood according to the actual facts that I have related. He played an essential role in aiding and arranging the supply and, by his assistance to the couriers, aiding the transport itself of massive quantities of the drug in the course of the trafficking business of which he was a part.

[5] Five couriers pleaded guilty and were convicted. Various terms of imprisonment were imposed upon them. It is not necessary to consider all of them for the purposes of these reasons for judgment. One Kerslake pleaded guilty to one count of trafficking. He had taken 42 flights between Melbourne and the Gold Coast and 12 flights between Brisbane and Townsville. On the Townsville flights he had carried between 10 and 20 pounds of cannabis on each occasion. On each of his flights from Melbourne he carried between 50 pounds and 100 pounds of cannabis. Kerslake had a previous conviction for supplying dangerous drugs and a lengthy criminal history otherwise. He was sentenced to imprisonment for six years. He had already served three years in custody and the sentencing Judge ordered his immediate release on parole.

[6] Another courier, Hidalgo, made 36 flights from Melbourne carrying a total of almost 1,000 kilograms of cannabis. The sentencing Judge accepted that he had previously conducted a tiling business with his brother and father but because of a significant back injury he became unable to work. He turned to drug trafficking as an alternative way to support himself and his family. He had the benefit of good references and after his arrest had been working at a hardware store, which also gave him a good reference. The sentencing judge accepted that he was a good worker. He was sentenced to a term of imprisonment of five years to be suspended after serving two years and 11 months.

[7] The remaining couriers all had different circumstances associated with their offending.

[8] At first instance and on appeal the applicant submitted that his offending was less serious than that of the Thornburys but accepted that it was more serious than the couriers. That submission was accepted by the learned sentencing judge, Burns J, and it should be accepted now.

[9] Before Burns J the applicant also submitted that "a sentence in the range of seven to eight years would be appropriate, in the circumstances". The Crown submitted a sentence of nine years was appropriate.

[10] After describing the applicant's offending, and after remarking that the most significant mitigating feature was the applicant's plea of guilty, Burns J sentenced the applicant in accordance with his own submissions, that is to say he was sentenced to imprisonment for eight years to be eligible for release on parole after serving two years and nine months.

[11] The applicant now submits that the difference in the sentence imposed upon him, when compared with the sentences imposed on the couriers (which ranged from a term of imprisonment of four years fully suspended to a term of imprisonment of six years), offends the parity principle.

[12] In the field of sentencing the application of what has come to be called the "parity principle" arises for consideration when co-offenders are sentenced. Thus, in the leading High Court authority *Lowe v The Queen*[3] the appellant was one of two armed robbers, each of whom had been convicted at separate hearings by two different judges of committing the same robbery. *Postiglione v The Queen*,[4] another authority on point, concerned two co-conspirators. The parity principle also applies in cases where two offenders are not strictly "co-offenders". This is because the principle addresses the substance of the matter, which is that offenders guilty of offences raising similar issues of fact and law should be treated equally by way of punishment.[5]

[13] The starting point when sentencing such co-offenders is that like should be treated alike. Allowances must be made for any differences in the circumstances pertaining to co –offenders[6] but any difference between the sentences imposed upon co-offenders for the same or similar offence ought not be such as to give rise to a "justifiable sense of grievance on the part of offender with the heavier sentence or to give the appearance that justice has not been done".[7]

[14] The circumstances in which an appellate court will interfere on the ground of lack of parity are limited. As Dawson J put it in *Lowe v The Queen*:

> "… the interference of a court of appeal is not warranted unless the disparity is such that the sentence under appeal cannot be allowed to stand without it appearing that justice has not been done. The difference between the sentences must be *manifestly excessive* and called for the intervention of an appellate court in the interests of justice."[8] (emphasis added)

[15] In the same case Mason J said that appellate intervention was justified:

> "… when there is a *manifest discrepancy* such as to engender a justifiable sense of grievance."[9] (emphasis added)

[16] In *Postiglione v The Queen*, Gummow J said:

> "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."[10] (emphasis added)

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3 (1984) 154 CLR 606.
4 (1997) 189 CLR 295.
5 *Green v The Queen* (2011) 244 CLR 462 at [30] per French CJ, Crennan and Kiefel JJ.
6 *Postiglione*, *supra* at 301.
7 *Lowe v The Queen*, *supra*, per Dawson J at 623.
8 *Lowe v The Queen*, *supra*, per Dawson J at 623 to 624.
9 *Lowe v The Queen*, *supra* at 613.
10 *Postiglione v The Queen*, *supra* at 323.

[17] Gummow J approved the following passage from the judgment of Callaway JA in *R v Taudevin*:[11]

> "The important words are 'manifestly', 'justifiable' and 'objective'. There is much to be said for the view that all three requirements are variations on the same theme, ie that only a manifest discrepancy in the sense of a difference that is clearly excessive will satisfy the other two requirements."

[18] That being the applicable principle, the applicant fails *in limine*. He complains that the sentence imposed upon him was not in parity with those imposed upon the couriers but they were offenders convicted of different crimes that had been committed by them independently and in different ways, albeit as part of the same criminal enterprise for profit.

[19] The applicant's argument based on lack of parity should be rejected.

[20] The applicant has also submitted that the sentence imposed upon him was manifestly excessive. This argument should also be rejected.

[21] It had been submitted to the sentencing Judge that the applicant should be treated as a lesser offender than the Thornbury brothers. And so he should. And so he was. It was submitted on his behalf that the appropriate sentence that he should serve should be one of between seven and eight years imprisonment. Burns J sentenced him accordingly to a term of imprisonment of eight years. It was submitted on his behalf that he should have had the benefit of the "usual" order that he be eligible for parole after serving one third of his sentence – evidently on account of his plea of guilty and Burns J ordered in these terms.

[22] The applicant's submissions on this application deviated, therefore, from the position he took before Burns J but that is not fatal to this application. In *R v Walsh*[12] Keane JA said:

> "The imposition of a just sentence is, of course, the responsibility of the sentencing judge; but where the sentence which is imposed accords with the position taken by the offender before the sentencing judge, the contention that leave to appeal should be granted because the sentence is **manifestly** excessive is difficult to sustain. If the sentence were indeed **manifestly** excessive then the applicant would not have agreed, by his Counsel, that it might properly be imposed. The applicant's submission is one to which effect could be given only in special circumstances sufficient to warrant the conclusion that the applicant should not be regarded as bound by the conduct of his case in the court below." (emphasis in original)

[23] I respectfully agree. However, if on the facts of a particular case an applicant's submissions on sentence were wrong when made then, despite an applicant's instructions to make those submissions and however forensically powerful it might be to contend that an applicant only got what he or she asked for, this Court would remain obliged to impose the sentence that ought to have been imposed as a matter of law.

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11 [1996] 2 VR 402 at 404.

12 [2008] QCA 391 at [23].

[24] On this application the applicant cited no comparable cases to show that the sentence was excessive in the circumstances of his case and, in my view, it was not excessive.

[25] For these reasons the application should be refused.

[26] **MORRISON JA:** I agree with the reasons of Sofronoff P and the order his Honour proposes.

[27] **McMURDO JA:** The applicant was involved in the same criminal enterprise as the couriers whose sentences are relied upon to argue that there was a disparity between his sentence and theirs. However, on any view he was a more senior participant and his level of criminality was significantly higher. He could have no justifiable sense of grievance that his sentence was higher than theirs.

[28] Nor was the sentence manifestly excessive, as the President has explained.

[29] The application should be refused.