SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2022] QCA 89
PARTIES:	**R** **v** **SMITH, Rachel Antoinette** (applicant)
FILE NO/S:	CA No 174 of 2021 SC No 23 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 13 July 2021 (Wilson J)
DELIVERED ON:	24 May 2022
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2022
JUDGES:	Morrison and Bond JJA and Applegarth J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant and co-accused were jointly charged with trafficking – where the applicant was described by the sentencing judge as "the architect" and "the brains" of the trafficking – whether the sentencing judge sentenced the applicant on the basis of factual findings not properly established by the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant and co-accused were jointly charged with trafficking – where the applicant was sentenced to 10 years' imprisonment with an automatic Serious Violent Offender declaration requiring the applicant to serve eight years before being eligible for parole – where the co-accused was sentenced to nine years' imprisonment to be eligible for parole after three years – whether application of the parity principle requires the Court to reduce the applicant's sentence to less than 10 years *Corrective Services Act 2006* (Qld), s 182 *Evidence Act 1977* (Qld), s 132C(2) *Penalties and Sentences Act 1992* (Qld), s 9, s 160B, s 160C,

s 160D, s 161A, s 161B, Schedule 1

Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym) (2017) 262 CLR 428; [2017] HCA 41, cited
Elias v The Queen (2013) 248 CLR 483; [2013] HCA 31, cited
Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v Carlisle [2017] QCA 258, cited
R v Crossley (1999) 106 A Crim R 80; [1999] QCA 223, cited
R v Dang [2018] QCA 331, applied
R v Davenport [2018] QCA 330, cited
R v Eveleigh [2003] 1 Qd R 398; [2002] QCA 219, cited
R v Feakes [2009] QCA 376, cited
R v KAQ (2015) 253 A Crim R 201; [2015] QCA 98, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Mikaele [2008] QCA 261, cited
R v Owen [2015] QCA 46, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: S C Holt QC, with Z G Brereton, for the applicant
B M White for the respondent

SOLICITORS: McGinness & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the reasons of Bond JA.

[2] With one caveat, I also agree with the reasons of Applegarth J. The caveat relates to paragraphs [76]-[98]. In my view, it is unnecessary to the resolution of the issues in this application to reach a conclusion as to those matters. It should not be assumed that I have concluded that Applegarth J's comments on any of those issues are wrong, but I would respectfully leave such issues for a case in which it is necessary to answer them.

[3] **BOND JA:**

Introduction

[4] I have had the advantage of reading the reasons for judgment of Applegarth J. I respectfully adopt his Honour's identification of the facts relevant to the present application. I agree with his Honour that the application should be dismissed. His Honour's judgment enables me to express my reasons for reaching that conclusion in a relatively summary way.

Ground 1 of the application

[5] Ground 1 suggested that the sentencing judge's discretion miscarried because her Honour sentenced on the basis of factual findings not properly established by the evidence.

[6] I agree with the reasons of Applegarth J for concluding that ground 1 lacks merit.

Ground 2 of the application

[7] Ground 2 suggested that the sentencing judge's discretion miscarried because her Honour imposed a sentence which breached the parity principle because the applicant's co-accused, Lawrence Cheers, received a non-parole period that was five years less than that which the applicant received.

[8] The duty of a sentencing judge is to arrive at a single sentence which is just in all the circumstances, but which has due regard to all of the relevant factors, some of which may pull in different directions and some of which may be inconsistent: *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at 494 [27] and *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 per Kiefel CJ, Bell and Keane JJ at [4].

[9] The process undertaken by a sentencing judge has been described as a matter of "instinctive synthesis", a phrase explained in *Wong v The Queen* (2001) 207 CLR 584 at 611 in these terms

> "[T]he task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features."

[10] The nature of the task means that – express legislative provisions apart – there is no particular path that a sentencing judge must follow in order to arrive at the sentence which is just in all the circumstances: *Markarian v The Queen* (2005) 228 CLR 357 per Gleeson CJ, Gummow, Hayne and Callinan JJ at [27]. It follows that there is no single correct sentence and that sentencing judges are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies: *Markarian v The Queen* (2005) 228 CLR 357 per Gleeson CJ, Gummow, Hayne And Callinan JJ at [27].

[11] Where the sentence which is just in all the circumstances involves sentencing an offender to a term of imprisonment, the judge is often also called upon to fix the date on which the offender is eligible for parole: see s 160B(2), (4) or (7), s 160C(2), (3) or (5), and s 160D(2) or (3) of the *Penalties and Sentences Act 1992* (Qld). By doing so, the judge is making a judicial determination that the circumstances of the offending require the offender to serve no less than the minimum term identified by the date so fixed, without opportunity for parole: *Crump v New South Wales* (2012) 247 CLR 1 at 16-17 [28] per French CJ and *R v Watson* [2021] QCA 225 at [22] per Kelly J (with whom McMurdo and Bond JJA agreed).

[12] The duty of a sentencing judge to take account of all the relevant factors to arrive at a result which takes due account of them all applies to all aspects of the formulation of the sentence, not just to the formulation of the head sentence: *R v Eveleigh* [2003] 1 Qd R 398 at [111]. To adopt the language used by Applegarth J, it applies to the sentencing judge's determination of both "the top" and "the bottom" of the sentence which is just in all the circumstances.

[13] As Applegarth J has explained, in some cases the statute law has mandated a minimum non-parole period, with the result that a sentencing judge has no discretion in relation to fixing a parole eligibility date. The identification of the parole eligibility date for "serious violent offenders" is an example of such a case. Pursuant to s 161B(1) of the *Penalties and Sentences Act 1992* (Qld) a sentence of 10 years or more must be declared a serious violent offence and s 182 of the *Corrective Services Act 2006* (Qld) then imposes the consequence that the prisoner must serve 80 per cent of the sentence before being eligible for parole.

[14] The approach to be taken to cases in which these provisions are relevant has been authoritatively stated in *R v McDougall and Collas* [2007] 2 Qd R 87 at 95 [18] in these terms (footnotes and citations omitted):

> "When determining the appropriate level of a head sentence for an offence which is a serious violent offence if a sentence of 10 or more years is imposed, relevant considerations include:
>
> - that sentencing is a practical exercise which has regard to the needs of punishment, rehabilitation, deterrence, community vindication, and community protection;
> - that courts cannot ignore the serious aggravating effect upon a sentence, of an order of 10 years rather than, say, nine years. The inevitable declaration if the sentence is 10 years or more is relevant in the consideration of what sentence is "just in all the circumstances", in order to fulfil the purpose of sentencing which is prescribed s. 9(1) of the Act;
> - but that courts should not attempt to subvert the intention of pt 9A of the Act by reducing what would otherwise be regarded as an appropriate sentence;
> - with the result, as described by Fryberg J. in *R. v. Eveleigh*, that while a court should take into account the consequences of any exercise of the powers conferred by the pt 9A, adjustments may only be made to a head sentence which are otherwise within the "range" of appropriate penalties for that offence; and
> - the court should also take into account the relevant sentencing principles set out in s. 9 of the Act."

[15] Where, as here, the circumstances of the case reveal two offenders involved in the same offending or in offending arising out of the same criminal enterprise, the application of the parity principle becomes an important factor which must be taken

into account by a sentencing judge. I agree with the discussion of the operation and importance of this principle by Applegarth J at [66] to [74] of his Honour's reasons.

[16] It is undoubtedly true that the formulation of a sentence which properly reflects the differing degrees of culpability of two offenders is made more difficult by the mandatory requirements of the serious violent offender sentencing statutory regime: see *R v Bojovic* [2000] 2 Qd R 183 at 191 [34] and *R v Dang* [2018] QCA 331 at [32]. But, nevertheless, the application of the parity principle should not be regarded as having been excluded by statute: *R v Dang* [2018] QCA 331 at [32]–[37]. The approach to be taken is that identified in *R v McDougall and Collas*, quoted above: the parity principle remains a sentencing principle which a sentencing judge must take into account but without attempting to subvert the intention of the statutory regime. Obviously, the reference in the quote from *R v McDougall and Collas* to the "range" of appropriate penalties should now be interpreted in light of the jurisprudence in this state since *Barbaro v The Queen* (2014) 253 CLR 58: see, for example, *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345 at [5] and *R v Volkov* [2022] QCA 57.

[17] In such circumstances, there may well be a tension between all of the factors which a sentencing judge must take into account. They may not all point in the same direction. But the duty of a sentencing judge remains the duty to exercise his or her discretion to determine the single sentence which is just in all the circumstances in the way the High Court has explained in *Wong v The Queen*, *Markarian v The Queen*, *Elias v The Queen* and *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)*, referred to above.

[18] There is no reason to think that the sentencing judge in this case was not aware of and did not seek to apply the parity principle as required by the law. Her Honour plainly identified the differing roles and culpability of the applicant and her co-offender and sought to reflect them in the sentence which she imposed on the applicant. I respectfully adopt the reasons expressed by Applegarth J at [110] to [136] as a sufficient explanation of why the applicant has not established that the sentencing judge breached the parity principle.

Conclusion

[19] Both grounds of the application having failed, I agree with Applegarth J that the application should be dismissed.

[20] **APPLEGARTH J:** The applicant controlled a sophisticated drug trafficking business. It trafficked in large quantities and derived huge profits. For example, in an 11-week period it achieved more than $1 million in sales and made a profit of at least $343,528.

[21] Under an agreement with her junior partner, Lawrence Cheers, the applicant was entitled to 65 per cent of the business' profits.

[22] The applicant and Cheers were charged with trafficking in dangerous drugs and with numerous other drug-related offences. Each pleaded guilty. The applicant was sentenced to 10 years' imprisonment. As a result, she was subject to an automatic

Serious Violent Offence ("SVO") declaration and will be required to serve 80 per cent of her sentence before being eligible for parole.[1]

[23] The applicant does not suggest that the sentence was manifestly excessive. Instead, she seeks leave to appeal on two grounds.

[24] First, the learned sentencing judge is said to have erred in finding that she was "the architect" or "the brains behind" the business. This is said to have overstated her role as a partner in the business. For the reasons that follow, this ground is without merit.

[25] Second, the sentence imposed on the applicant is said to have breached the parity principle because Cheers received a sentence of nine years' imprisonment, with eligibility for parole after three years to reflect his early plea. The fact that the applicant will be required to serve five more years than Cheers before being eligible for parole is said to be a disparity that is not justified by the differences in the culpability or circumstances of the two co-offenders.

[26] The applicant submits that equal justice requires that her sentence be reduced, notwithstanding that a sentence of 10 years' imprisonment would *otherwise* be an appropriate sentence.

[27] This ground requires consideration of the differences and similarities between the circumstances of each accused and their offending. It also requires consideration of how equal justice is accommodated in a case like this in which the sentence of one accused engages the SVO scheme and meaningful recognition of a guilty plea can only be given by reducing the term of imprisonment, whereas a co-accused sentenced to less than 10 years' imprisonment has a timely plea recognised by parole eligibility after one third of the sentence.

[28] For the reasons that follow, despite the significant difference between the non-parole periods, the applicant's sentence did not breach the parity principle.

Differences and similarities – overview

[29] A significant difference between the co-offenders is that the applicant was aged 28 at the time of the offending, whereas Cheers was aged 21, entitling him to the leniency accorded to young offenders. Another difference is that the applicant started the business without Cheers. After they became partners she controlled its finances and many activities. For example, she directed "runners" to deliver drugs. Her dominant position as senior partner is apparent from the fact that she refused Cheers' request for a weekly wage in lieu of 35 per cent of the profits.

[30] The similarities between the co-offenders are that they were engaged in the same criminal enterprise, lived together and took the risks and rewards associated with their profitable business, including a lavish lifestyle.

Facts

[31] The sentencing hearing on 13 July 2021 proceeded on the basis of an agreed statement of facts.

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1 *Penalties and Sentences Act 1992* (Qld) s 161A, s 161B ("the Act").

[32] Count 1 on the indictment charged the applicant and Cheers with trafficking in dangerous drugs between 15 December 2018 and 11 April 2019. During that period the applicant and Cheers were supplied with drugs on credit by a criminal syndicate. They sold the drugs they sourced in large quantities. The drugs included methylamphetamine, MDMA, cocaine, GHB and cannabis.

[33] By the time police commenced investigating the trafficking business in late 2018, it was well-established. At least nine people were employed to deliver the drugs. The applicant directed "runners" by sending them messages through encrypted phone applications. She would routinely request updates on the runners' stock levels and give them directions about returning the cash and not to carry too many drugs with them in their vehicles at one time in case they were intercepted by police. During the trafficking period the applicant used different phones. The business used a number of vehicles to evade detection. At times, the applicant and Cheers enforced debts with threats of violence.

[34] The applicant and Cheers met through the drug scene. Their relationship deepened and they used drugs together. He ended up moving in with her in late 2018. Initially he became involved in occasional deliveries and pick-ups. In early 2019, the applicant sought to formalise the relationship and offered Cheers a third of the profits.

[35] During the trafficking period, the applicant and Cheers lived together in a luxury home at Hamilton. Drugs were kept at that home in concealed places. Cheers installed a safe at a customer's home to store drugs and avoid police detection.

[36] The business conducted by the applicant and Cheers had a high turnover, grossing more than $1 million over an 11-week period and generating a profit of more than $340,000 in that period. Between 21 January and 16 March 2019 the business arranged 750 supplies, including 1.625kg of cocaine, 1.5kg of methylamphetamine, more than half a kilogram of MDMA powder and 720 MDMA pills, along with significant quantities of other drugs.

[37] Although the applicant and Cheers were drug dependent, their trafficking was commercially motivated. To give an air of legitimacy to their drug trafficking income and lifestyle, they registered a business name in late March 2019 and leased premises at Hamilton to operate as a barber shop and a homewares store. They told an associate that the purpose was to "get money running through" the business.

[38] Significant cash payments were made to a shared credit card that was used to buy luxury items. Substantial amounts of cash were deposited into the applicant's debit account. The applicant paid $49,000 in cash to a car dealership associated with a drug associate as a deposit on a Mercedes and used her bank accounts to repay the balance each month.

[39] During the trafficking period, Cheers took on an increasing role in the business. Counsel for Cheers accepted that while Cheers' role started essentially as a runner, it grew into being present when amounts were obtained from suppliers, and Cheers assisted in the drugs being held outside the home by placing them where he was directed. Both the applicant and Cheers conducted sales, collected money, and dealt with suppliers. However, the applicant managed the business' finances and communicated with the runners.

[40] The parties agreed that the applicant demonstrated during the trafficking period that she was extremely distrustful of others, including Cheers on occasions, but the business was so busy that she required assistance. The applicant entrusted at least one employee with her spreadsheets when she asked her to "look after (the business) for a bit".

[41] In January 2019, the applicant complained about Cheers making unilateral decisions when they were "partners". In February 2019, Cheers complained about their partnership agreement, saying that he did not think that the applicant's offer of 35 per cent of the profits was sufficient. She conceded that since the offer of 35 per cent was made he had become more involved in the business. Cheers complained about his lack of access to money and requested a weekly wage from the applicant in lieu of a percentage of the profits. However, she refused his request.

[42] The police operation closed in April 2019. Police executed a search warrant at the Hamilton home. They located on USBs spreadsheets authored by the applicant. She kept a detailed record of the trafficking business between January and March 2019. These records revealed the quantity of sales each day, the profit made on the cost price of each sale, the amount paid to runners per sale or "drop", repayments to suppliers and price lists.

The personal circumstances of the applicant and Cheers

[43] The applicant's parents separated when she was a teenager. She was diagnosed with depression at the age of 14 and treated for it until she was 19. After completing year 12, she started an engineering degree. However, the end of a relationship prompted her to discontinue tertiary study at the age of 19. She moved to Mackay and was successful in technology sales and then in administration in a mining company. At the age of 22, the applicant was introduced to "ice". At 26 she relocated to Brisbane. She had a history of abusive relationships, including with a drug trafficker who was sent to jail in 2018. She instructed her lawyers that she was approached at her home one morning by men who told her that her sometime partner owed them a lot of money, that the debt was now hers and that she had to work it off. She was given a phone and that was the genesis of her drug trafficking.

[44] She subsequently formed a relationship with Cheers.

[45] After the applicant was charged she engaged in drug rehabilitation, established her own retail business and formed a stable relationship. The evidence included 25 negative drug screens on dates between 9 June 2020 and 2 July 2021.

[46] A psychologist diagnosed that between 2015 and her arrest in April 2019, the applicant satisfied the criteria for drug dependence and also satisfied the criteria for Stimulant Use Disorder. The psychologist remarked on the applicant's rehabilitation and the intellectual capacity that she had to succeed in the business that she established as part of that rehabilitation. He described the applicant as "an intelligent person who has sought emotional validation through dysfunctional means".

[47] The applicant was 28 at the time of offending and 31 at the date of sentence.

[48] Cheers was 21 at the time of his offending. His parents separated when he was eight. He was never academically gifted. He began experimenting with drugs from a relatively young age and left school at the first opportunity, aged 15. He moved to

Mackay and worked for two years. He lost his job because of his increasing drug use. His substance abuse problems may have stemmed from the death of a girlfriend. By the time he was 20 or 21, he had nothing left to purchase the drugs he used.

The sentencing remarks

[49] The sentencing remarks gave detailed consideration to the relevant facts and each accused's personal circumstances. The judge analysed comparable cases before returning to the general principles that govern sentencing for drug trafficking. In addressing both accused the judge said that they "prolifically trafficked what could be described as a cocktail of dangerous drugs", that the trafficking was commercially motivated and financially successful, that there were "hallmarks of sophistication" including that a legitimate business was established to launder the trafficking proceeds, and that violence was threatened. The judge observed:

> "Each of you played a role in this business. You both conducted sales, collected money, dealt with suppliers, arranged for the stockpiling of drugs and established a legitimate business."

[50] The judge noted the different roles and culpability of each accused, stating that the applicant "carried the additional responsibility of managing the finances and runners and enjoyed a greater percentage of the profits". The applicant's culpability was higher and she was older, with Cheers being only 21 at the time of the offending.

[51] The judge had regard to each applicant's antecedents. Account was taken of the delay in the matter coming on for sentence and the steps that each accused had taken towards rehabilitation.

[52] But for the matters in the applicant's favour, the judge would have imposed a sentence in excess of 10 years however those matters reduced the sentence to 10 years, the judge noting that such a sentence meant that the applicant had to serve 80 per cent of that sentence before being eligible for parole.

[53] In sentencing Cheers, the judge observed that he met the applicant through drug use, started doing deliveries but then began to do more and, in early 2019, formalised an arrangement whereby he received a third of the profits. The judge noted that the applicant was in charge of the money and that Cheers "only got what was given to [him]". Her Honour continued:

> "She was the architect of the scheme, and you often operated at her direction. I accept that your role and culpability was less than that of Ms Smith. Nevertheless, you were involved, and your involvement cannot be diluted to the status of a runner. You were more than that."

[54] Regard was had to Cheers' serious drug addiction, his attempts at rehabilitation and his decision to revoke his bail. Account also was taken of the additional steps that Cheers had undertaken since going into custody in being rehabilitated from drugs, his letter of apology and genuine remorse. Cheers had indicated at the committal that he intended to plead guilty.

[55] Ultimately, the judge concluded that due to his age and the role that he played, Cheers was of a "lesser culpability" than the applicant, that the appropriate sentence

for him was nine years' imprisonment and that he should receive parole eligibility after serving a third of that sentence to reflect his very early guilty plea and efforts at rehabilitation.

Did the judge err in describing the applicant as "the architect of this business" and "the brains of the business"?

[56] Early in her sentencing remarks and by way of overview the judge stated that the applicant "was the architect of this business and, as the Crown says, the brains of the business". The judge then gave detailed consideration to the role that each accused had in the business.

[57] In this Court, the applicant's counsel submits that the findings that:

(a) the applicant was "the architect of this business and, as the Crown says, the brains of the business"; and

(b) Cheers often worked at the applicant's direction,

overstated the applicant's role compared to his.

[58] I disagree. Shorthand terms like "architect" and "brains of the business" were supported by the evidence. They were not contested by the experienced counsel who appeared for the applicant upon her sentence. This is despite such findings being previewed during submissions when the Crown prosecutor agreed with the judge's characterisation that the applicant "was the brains behind it" and that whilst Cheers contributed to the business, he was not "the architect".

[59] The inference or conclusion that the applicant was "the architect" of and "the brains" behind the business was supported by the uncontested fact that she established the business. Cheers was brought into the business and, as his counsel submitted, "started and continued essentially as a runner like the other people doing deliveries and collections". Counsel for Cheers acknowledged that Cheers' role grew to being present when amounts were obtained from suppliers and he assisted in drugs being held outside of their home at places where he was directed.

[60] The agreed statement of facts stated that the applicant managed the financial side of the business and "would often direct Cheers". This contention was not contested by the applicant's then counsel during the sentencing hearing. When the judge stated that "[t]his is a very sophisticated operation, which your client can take credit for", the applicant's counsel replied, "I can't submit to the contrary". In the light of the evidence, counsel's response was appropriate. The evidence and the response supported findings that the applicant was "the architect" of the business, and that she was "the brains" behind it. Those shorthand, conclusionary terms were open on the evidence. The judge was entitled to make the relevant findings pursuant to s 132C(2) of the *Evidence Act 1977* (Qld) on the basis of the written statement of facts and submissions at the hearing.[2] The uncontested facts were that the applicant founded the business, controlled its financial affairs and controlled its day-to-day operations, including often by directing Cheers. These matters were not questioned, contradicted or qualified by the applicant's counsel at the sentencing hearing.

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2 *R v Bassi* [2021] QCA 250 at [70]-[71].

[61] The challenged findings that the applicant was "the architect" of and "the brains" behind the business did not overstate her role and thereby understate Cheers' role. Cheers was a partner in the enterprise, but a junior one. Cheers was subordinate to her, as reflected in his share of the profits and inability to negotiate a different arrangement for his services. He was subordinate to her because she directed him.

[62] The judge did not err in fact-finding. Ground 1 of the application lacks merit.

Ground 2 – application of the parity principle

[63] Did the principle of equal justice (as reflected in the parity principle) require the judge to reduce the applicant's sentence to less than 10 years, notwithstanding that a sentence of 10 years' imprisonment would otherwise be an appropriate sentence?

[64] This general issue requires consideration of:

- the parity principle;
- problems associated with applying the parity principle in the context of mandatory, minimum non-parole periods;
- the need to take into account each offender's guilty plea; and
- the need to compare all components of the sentences.

[65] This last point[3] entails consideration of the substantial disparity in non-parole periods. It also requires consideration of the absence of a substantial disparity in each offender's head sentence, namely a one-year difference, despite significant differences in their ages and the role that each played in the criminal enterprise.

The parity principle

[66] The parity principle is an aspect of the principles of equal justice.[4]

[67] Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them.[5]

[68] If other things are equal, persons who have been parties to the same offence or have committed offences arising out of the same criminal enterprise should receive the same sentence.[6] Other things, however, are rarely equal. Matters such as age, background, criminal history, general character and the part that each offender played in the relevant criminal conduct or enterprise have to be taken into account.[7]

[69] In the case of co-offenders, different sentences may reflect their different circumstances or their different roles in the relevant criminal activity. An appeal

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3 Which is derived from *Postiglione v The Queen* (1997) 189 CLR 295 at 302 ("*Postiglione*").
4 *Green v The Queen* (2011) 244 CLR 462 at 473 [28] ("*Green*").
5 *Lowe v The Queen* (1984) 154 CLR 606 at 610-611.
6 *Postiglione* at 325-326, following *Lowe v The Queen* (1984) 154 CLR 606 at 609. *R v Phan* [2021] QCA 86 at [12] confirms the parity principle applies not only to offenders charged with the same offence but with offences arising out of the same criminal enterprise.
7 *Green* at 474-475 [31].

court will not intervene when the disparity in sentence is justified by relevant differences.[8]

[70] The parity principle is not applied to increase what would otherwise be an appropriate sentence so as to avoid a previously-sentenced offender feeling a justified sense of grievance.[9] The parity principle is only relevant where a sentence might be such as to engender a justifiable sense of grievance in the offender being sentenced.[10]

[71] The sense of grievance necessary to attract appellate intervention is to be assessed by objective criteria.[11]

[72] The parity principle will be engaged if the challenged sentence is disproportionately higher than a sentence that has already been imposed on a co-offender.[12]

[73] A proper comparison of sentences in order to determine if the principles of equal justice (including the parity principle) have been applied involves a consideration of all components of the sentences, not simply the head sentences. Consideration should include the non-parole periods.[13]

[74] If, after having regard to all components of the sentences, the circumstances of the offenders and the part each played in the relevant criminal conduct or enterprise, there is an unjustified disparity between sentences, then the relevant sentence should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.[14]

[75] An earlier sentence that is viewed as excessively lenient cannot justify the reduction of a co-offender's sentence to one that is "inappropriately low".[15] It has been said that a sentence that is manifestly inadequate will require the co-offender's sentence be placed to a level that might otherwise be regarded as "the bottom end of the range, but not to the point where the offender's sentence is wholly inappropriate or outside the range".[16]

Mandatory minimum non-parole periods

[76] In some cases the parity principle falls to be applied in the context of a statute that mandates a minimum non-parole period. The minimum period, expressed either in a term of years or a percentage of the relevant sentence, must be served before the offender may be released on parole. One such statutory context is the SVO regime established by Part 9A of the Act.

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8 *Green* at 474-475 [31].
9 *R v Dang* [2018] QCA 331 at [30]-[31] ("*Dang*").
10 Ibid; *R v Anthony* [2020] QCA 79 at page 6.
11 *Green* at 474-475 [31].
12 Ibid.
13 *Postiglione* at 302; *Dang* at [33].
14 *Postiglione* at 301.
15 *R v Owen* [2015] QCA 46 at [30] citing *Director of Public Prosecutions (Cth) v Peng* [2014] VSCA 128 at [36]-[37] which cited *Taleb v The Queen* [2014] VSCA 96 at [48] and [52]; and see *Green* at 475-476 [33].
16 Ibid.

[77] In some instances, differences in the offending or circumstances of co-offenders leads to:

(a) one offender's criminal conduct and circumstances warranting a head sentence of less than 10 years, with an early guilty plea being reflected in parole eligibility after one third of the sentence because there is no proper basis to make a discretionary SVO declaration under s 161B(3) or (4) of the Act or to impose a later parole eligibility date; and

(b) the other offender's criminal conduct and circumstances warranting a head sentence of at least 10 years after account is taken of an early or timely plea of guilt, thereby automatically attracting an SVO declaration.

[78] This is one of many complexities that are the product of mandatory minimum non-parole periods.

[79] One complexity is in dealing with a sole offender who pleads guilty to an SVO offence,[17] such as drug trafficking, that warrants in the circumstances a sentence in the vicinity of 10 years.

[80] If the offender's conduct and circumstances warrant a sentence of less than 10 years, then a guilty plea ordinarily will be reflected in parole eligibility after a third. However, in a more serious case in which the circumstances would warrant a sentence of more than 10 years in the absence of a guilty plea, the usual course is to take account of the guilty plea "at the top". In other words, the guilty plea is accounted for in a reduction of the head sentence. This sometimes has the effect of reducing the sentence to less than 10 years, thereby avoiding an automatic SVO.[18] The plea having been taken into account in arriving at a head sentence, the applicant is not ordinarily entitled to the usual benefit of a guilty plea in being eligible for parole at the one-third point. To confer such a double benefit probably would constitute an appellable error.[19] Avoiding the compulsory 80 per cent non-parole period is a significant advantage.[20]

[81] Authorities about the SVO statutory regime have emphasised that in arriving at a sentence that is "just in all the circumstances", courts cannot ignore the serious aggravating effect upon a sentence of an order of 10 years rather than, say, nine years.[21] In considering what head sentence to impose, a judge must take into account the operation of Part 9A of the Act. However, courts should not attempt to subvert the intention of Part 9A by reducing what would otherwise be regarded as an appropriate sentence.[22]

[82] Sentencing in a case in which a sentence that carries an automatic SVO declaration is open, but not inevitable, remains an integrated process. The process requires consideration of all of the circumstances of the case and relevant sentencing principles, including those set out in s 9 of the Act. In its simplest formulation, the sentence arrived at must be "just in all the circumstances" and, subject to mandatory

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17 See s 161A(b), s 161B(3)(b) and the provisions mentioned in Schedule 1 to the Act.
18 See, for example, *R v Carlisle* [2017] QCA 258.
19 *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22 at [46].
20 *R v Davenport* [2018] QCA 330 at [26].
21 *R v McDougall and Collas* [2007] 2 Qd R 87 at 95 [18]; [2006] QCA 365 at [18].
22 Ibid.

minimum non-parole periods, the sentence as a whole must be a just one, not solely in relation to the head sentence.[23]

[83] Sentencing principles, including having regard to the period that the defendant must spend in custody before being eligible for parole, may lead to the imposition of a sentence of less than 10 years in circumstances in which it would not be just to require the defendant to serve eight years before being eligible for parole. If the overall sentence is just in all the circumstances, then such an outcome does not subvert the purpose of Part 9A by reducing what would otherwise be regarded as an appropriate sentence. Instead, it leads to the most appropriate and just sentence in all the circumstances. Such a sentence may have the benefit of subjecting an offender to a longer period of supervision in the community on parole than would be achieved by an automatic SVO, assuming in both cases that parole will be granted shortly after the eligibility date.

[84] The SVO regime may appear to distort sentences compared to the sentences that probably would have been imposed in the absence of that regime. For example, absent such a regime, the most appropriate sentence in a certain case may be 12 years' imprisonment with parole eligibility after five years. Such a sentence simply is not available under the SVO regime. Rather than head sentences for manslaughter reflecting the broad range of circumstances that apply to that offence, with sentences tending to be fairly evenly spread over a range of between nine and 12 years following a plea, many cluster at around nine years. These matters have been considered by the Sentencing Advisory Council in respect of sentences arising from the deaths of children.[24] The operation of the SVO regime is the subject of a current inquiry by the Council.[25]

[85] Under the SVO regime, for every year above 10 years, as well as for every year below it, the offender must serve 80 per cent before being eligible for parole. In imposing a sentence of more than 10 years for an SVO offence, the Court has to have regard to both the head sentence and the mandatory non-parole period that flows from it. To ensure that the non-parole period in such a case is not unjustly excessive, the Court may be inclined to reduce the head sentence below a figure that would be have been appropriate had the Court possessed a discretion to fix a non-parole period at say 50 per cent or 60 per cent. This downward pressure on head sentences arises from the application of general sentencing principles in the context of a mandatory, minimum non-parole period. The effect is to distort what otherwise would be sentencing patterns.

[86] For SVO offences in which a head sentence of at least 10 years is imposed, the downward pressure that I have described leads to a cluster of sentences at around

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23 See *R v Eveleigh* [2003] 1 Qd R 398 at 431 [111]; [2002] QCA 219.

24 Queensland Sentencing Advisory Council, *Sentencing for criminal offences arising from the death of a child* (Final Report, October 2018) at 146, 244-245.

25 See Queensland Sentencing Advisory Council, 'Serious violent offences scheme review', Queensland Sentencing Advisory Council (Website) <https://www.sentencingcouncil.qld.gov.au/terms-of-reference/serious-violent-offences-scheme-review>. See the study commissioned by the Council by Day, Ross & McLachlan, 'The effectiveness of minimum non-parole period schemes for serious violent, sexual and drug offenders and evidence-based approaches to community protection, deterrence, and rehabilitation' <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0005/698621/svo-scheme-review-literature-review.pdf>.

10, 11 or 12 years because every additional year results in an additional, fixed custodial component of at least 80 per cent.

A bifurcated approach to guilty pleas

[87] Another distorting effect of the SVO regime relates to the respects in which an early or timely guilty plea is taken into account. As noted, where the appropriate head sentence is one of less than 10 years in the absence of a guilty plea, an early or timely guilty plea is typically taken into account by granting parole eligibility after one third. Where the head sentence would be 10 years or substantially more than 10 years in the absence of a guilty plea, the plea is taken into account "at the top". This is because any sentence of 10 years or more will carry with it an SVO declaration requiring the offender to serve at least 80 per cent of that sentence before being eligible for parole. As Burns J observed in *R v Ali*:[26]

> "For that reason, the sentence will often be reduced to take into account factors in mitigation because that is the only way of reflecting those factors so as to arrive at a sentence that is just in all of the circumstances."

[88] This bifurcation of the way in which guilty pleas are accounted for is a feature of the statutory regime.

[89] An early or timely guilty plea in respect of a case that may warrant a sentence in the broad range of nine to 12 years may be taken into account "at the bottom" or "at the top", or even sometimes in both ways provided this does not confer an unwarranted double benefit.

[90] This flexibility in how and the extent to which a guilty plea is accounted for may facilitate an integrated process and avoid the pitfalls of strict guidelines. This flexibility has its virtues. If guidelines required an early or timely guilty plea to be accounted for in only one way and with the precision associated with fixed percentages, then it would complicate an already complicated process and undermine the goal of sentencing as an integrated process. However, having an early or timely guilty plea typically reflected in a consistent way, for example "at the bottom" (namely, a parole release or eligibility date, or a date after which the sentence is suspended), coupled with practices or rules of thumb to fix that date,[27] aids predictability and consistency in sentencing. By these means, disparities between similar cases are reduced.[28]

[91] The SVO regime and the bifurcated approach to accounting for a guilty plea that it creates may give at least the appearance of unjustifiable disparities between comparable cases.

[92] An example may illustrate the point. X carries on a sophisticated drug trafficking business over a relatively short period. His offending and personal circumstances make a sentence of nine years' imprisonment the most appropriate sentence. His early guilty plea is reflected in parole eligibility after serving one third. If, however, X had carried on the business for a much longer period then an appropriate sentence might have substantially exceeded 10 years in the absence of a guilty plea, with a guilty plea being reflected in a sentence of 10 years. In such a case, the difference

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26 [2018] QCA 212 at [28], Fraser and Gotterson JJA agreeing.

27 Such as a starting point for the date being after one third of the term has been served.

28 *R v Hawke* [2021] QCA 179 at [96].

between parole eligibility after one third, namely three years, and after 80 per cent, namely eight years, is marked. However, this is largely a function of the SVO regime and one that could not properly be avoided in the second scenario because, in all the circumstances, X warranted a head sentence of at least 10 years after account was taken of his plea.

[93] Incidentally, the difference "at the top" of one year between a head sentence of nine and ten years, when viewed in isolation, seems inadequate to reflect the much longer trafficking period with its far greater consequential damage to drug users, their families, innocent victims of their excesses, and society in general.

[94] If, instead of the scenario just suggested, one had identical twins, X and Y, who became equal partners and were equally involved in the trafficking business after Y was recruited into the business by X, then one might find a similar disparity. X would receive a sentence of 10 years and be required to serve 80 per cent of it before being eligible for parole, and Y, who trafficked for a much shorter period, would be sentenced to nine years' imprisonment with parole eligibility after one third of that term. The main difference in their circumstances would be the duration of their offending. This difference is important, and would require a sentence of substantially more than 10 years for X (before accounting for his guilty plea), and also call for a different approach to their respective guilty pleas.

[95] In this scenario there is a marked difference in the non-parole periods, but a small (one-year) difference in the head sentences. Viewed in isolation, the one-year difference would seem to be inadequate to reflect the much longer period over which X carried on the enterprise, the much greater profit that he derived compared to Y and the much greater damage that his criminality caused.

[96] The difference in their respective non-parole periods is clearly substantial: five years. Viewed in isolation, it seems hard to justify.

[97] The task, however, is to look at all components of the sentences. In determining whether principles of equal justice, along with other sentencing principles, have been applied, the issue is whether due allowance has been made for relevant differences. In the case of X and Y, are the differences in the components of their respective sentences justified by relevant differences?

[98] This question is not easily answered in circumstances in which a statutory regime bifurcates the way in which guilty pleas are accounted for and makes what may be the most appropriate sentence unavailable. For instance, in the hypothetical examples given above X simply could not be sentenced to 12 years with parole eligibility after, say, five years. Instead, he is sentenced to 10 years with parole eligibility after eight years.

Authorities about the parity principle and the SVO regime

[99] In *R v Bojovic*,[29] the Court said that the mandatory requirements of s 161B(1) will "inevitably interfere with the courts' capacity to maintain parity and consistency…".

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[29] [2000] 2 Qd R 183 at 191 [34]; [1999] QCA 206 at [34].

[100] In *R v Mikaele*,[30] Mackenzie AJA (with whom Keane JA and Douglas J agreed) cited *R v Crossley*[31] as authority for the conclusion that "once a serious violent offence declaration is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation".

[101] These and other authorities were considered by McMurdo JA (with whom Gotterson and Morrison JJA agreed) in *R v Dang*.[32] It was unnecessary in *Dang* to decide whether the observations of Pincus JA (with whom McPherson JA agreed) in *Crossley* should be followed, or whether, as White JA suggested in *R v Meerdink*,[33] that the observation in *Mikaele* that I have quoted was to be treated "with some caution". It is also unnecessary to decide those points in this matter because there was no submission that *Crossley* and *Mikaele* should be departed from and because I have reached the conclusion that the parity principle was not breached in this case.

[102] I wish, however, to associate myself with the additional observations of McMurdo JA in *Dang*.[34] If the Parliament had intended to exclude the parity principle in a case to which the SVO regime applies, then one would expect such a consequence to be clearly expressed.

The interaction between the parity principle and the SVO regime

[103] The parity principle must accommodate other sentencing principles and statutory commands contained in the SVO regime. The SVO regime does not expressly displace the parity principle. It does, however, affect its operation.

[104] The parity principle may compete in some cases with other sentencing principles. These other principles may limit the extent to which a head sentence for a co-offender may be reduced.

[105] One constraint is the general principle of equal justice itself from which the parity principle is derived. Too small a difference between the head sentence of the offender being sentenced and the head sentence of a co-offender may be insufficient to mark the differences between their respective offending and circumstances. While regard must be had to the other components of the co-offender's sentences, a reduction that produces only a small difference between head sentences may offend the equal justice principle that due allowance should be made for relevant differences.[35]

[106] Another constraint in adjusting a head sentence on account of the parity principle to less than would otherwise have been an appropriate sentence is that, at a certain point, the head sentence is so inadequate that it is not a just punishment in all the circumstances and conflicts with the principles of the sentencing legislation.[36] If, in all the circumstances after applying sentencing principles, including the parity principle, the offender should be sentenced to at least 10 years' imprisonment for an SVO offence, the parity principle cannot be used to avoid having to make

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30 [2008] QCA 261 at [36].
31 (1999) 106 A Crim R 80; [1999] QCA 223.
32 [2018] QCA 331 at [32]-[37].
33 [2010] QCA 273 at [38].
34 [2018] QCA 331, particularly at [38].
35 See *Lowe* at 610-611 for a statement of what equal justice requires (quoted at [48]).
36 Section 9(1)(a) of the Act relates to a just punishment, while general principles of deterrence and denunciation are stated in s 9(1)(c) and (d).

a declaration.[37] To impose such a sentence may "subvert the intention of pt 9A of the Act by reducing what would otherwise be regarded as an appropriate sentence".[38]

[107] French CJ, Crennan and Kiefel JJ stated in *Green*[39] that if the relevant sentencing legislation, on its proper construction, does not permit an inadequate sentence to be imposed, there can be no discretion to impose one. A marked and unjustified disparity may be mitigated by reduction of the sentence to a lower level, provided it is "still within the range of appropriate sentences".[40]

[108] In short, the parity principle does not allow for "a wholly inappropriate" sentence or one that is outside the range of appropriate sentences.[41] Nor does it allow for a sentence that is not permitted by the relevant sentencing legislation.

[109] Distortions created by the SVO regime produce sentences that may give a co-offender a sense of grievance and lead some to perceive an injustice. In the eyes of others, justice is served in such a case because the parity principle is accommodated by a comparison between all components of the sentence and proper effect being given to the intent of the statutory SVO regime. The offender's real grievance might be said to be with the statutory scheme, including the way it effects the parity principle's application and precludes the imposition of what otherwise would be the most appropriate sentence. The disparity "at the bottom" may be remarkable, yet one that the legislative scheme intended if in all the circumstances (including considerations of parity) a head sentence of 10 years or more is appropriate and just.

Was the parity principle breached by imposing a head sentence of 10 years on the applicant?

[110] Abundant authority exists for the proposition that the applicant's drug trafficking warranted a sentence of at least 10 years' imprisonment even after account was taken of her timely guilty plea and other matters in mitigation. The authorities need not be reviewed in detail.

[111] In *R v Feakes*,[42] McMurdo P analysed the comparable cases relied on in that application which were said to demonstrate that:

> "… absent extraordinary circumstances, in cases of trafficking in sch 1 drugs on a scale like the present offence, the sentence imposed on mature offenders who have pleaded guilty is ordinarily in the range of 10 to 12 years imprisonment. Younger offenders without a significant criminal history and with excellent rehabilitative prospects may be sentenced to a slightly lesser term of imprisonment in the range of eight to nine years[.]"

The scale and profitability of Feakes' trafficking operation were far less than that achieved by the applicant. It consisted of supplying covert operatives on 11 occasions over a seven-month period. Feakes' turnover was slightly in excess of $115,000 and his minimum net benefit was in the order of $56,000.

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37 *Dang* at [39].
38 *R v McDougall and Collas* [2007] 2 Qd R 87 at 95 [18]; [2006] QCA 365 at [18].
39 (2011) 244 CLR 462 at 476 [33].
40 Ibid.
41 See *R v Owen* [2015] QCA 46 at [30] (quoted at [56]).
42 [2009] QCA 376 at [33].

[112] In *R v Carlisle*,[43] the applicant played a subordinate role in a drug trafficking operation, principally by being persuaded to sign a lease over two storage sheds at which drugs were stored and by regularly taking drugs and money there at the direction of his principal. He was drug dependant, poorly remunerated and had little to show by way of wealth for his endeavour. Carlisle was re-sentenced to nine years' imprisonment, but that was an effective sentence of just over 10 years because of undeclarable pre-sentence custody. He had taken substantial steps towards his own rehabilitation whilst on remand. He was ordered to serve four years in custody under the sentence (or in effect just over five years when account was taken of undeclarable pre-sentence custody) before being eligible for parole.

[113] Like *R v Carlisle*, *R v KAQ*[44] contains an extensive review of the authorities and illustrates the significant difference in head sentences between an offender who plays a subsidiary role in a drug trafficking business and its principal. As Holmes JA (as the former Chief Justice then was) observed:[45]

> "KAQ's involvement might have attracted a sentence around the ten year mark, notwithstanding his low-level role, given the quantities of money and drugs which he collected and delivered, together with the fact that for a period he was directly engaged in a limited dealing in drugs for his own reward."

KAQ cooperated extensively with the authorities and his significant cooperation justified a sentence of less than 10 years in those exceptional circumstances.

[114] The authorities were further analysed by McMurdo JA in *Dang*[46] and establish that effective sentences of 11 years are imposed on substantial drug trafficking even by a person who has a substantial drug habit or even a drug dependence. *Dang* is related to *R v Davenport*.[47] Davenport played a subsidiary, but important role in Dang's drug trafficking operation over a five month period. He had some "autonomy and managerial prerogatives", but was subordinate to Dang. Dang was sentenced to a term of 10 years and six months for the trafficking offence. Davenport was sentenced to nine years and nine months for drug trafficking and a total period of imprisonment of 11 years and nine months.

[115] It is unnecessary to analyse the authorities in detail or to consider whether the sentence imposed by the judge in this case on Cheers was lenient. It is sufficient to observe that Cheers' sentence of less than 10 years took into account two important features. The first was his age. The second was his subordinate role to the applicant.

[116] Cheers was aged 21. That age may not have entitled him to the same special leniency that is accorded to offenders aged 17. However, it was a significant mitigating factor.

[117] Absent his young age, Cheers might have been sentenced to a term of imprisonment of at least 10 years after account was taken of his early plea, or substantially in

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43 [2017] QCA 258 at [5]-[28], [101], [112]-[113].
44 (2015) 253 A Crim R 201; [2015] QCA 98.
45 Ibid at 207 [15].
46 [2018] QCA 331 at [10]-[26].
47 [2018] QCA 330.

excess of 10 years in the absence of a plea. His personal circumstances, particularly his age, resulted in a sentence of nine years.

[118] Turning to the applicant's circumstances and applying the parity principle, she played a much more significant role in the business than Cheers. She had an entitlement to approximately twice his share of the profits, she established the business to which Cheers was recruited, and she controlled its day-to-day operations and finances. These differences between her offending and Cheers' offending, together with the scale of the business, necessitated a very substantial sentence by way of deterrence and denunciation. She was motivated by greed, controlled the business and derived an extraordinary profit from it. My focus on the enterprise's finances and the applicant's business acumen should not obscure the fact that the end-users of the enterprise's products spread misery and social decay.

[119] The applicant's mitigating circumstances are helpfully summarised in her counsel's written submissions. They included:

- her early plea;
- her minor and irrelevant criminal history, and that she had never spent time in custody;
- she was still only aged 28 at the time of the offending;
- the circumstances in which she came to traffic; and
- the two-year delay between being charged and her sentence, during which she achieved significant progress towards rehabilitation (returning 25 clean urine screens).

[120] These mitigating circumstances distinguish the applicant's personal circumstances from those of drug traffickers in some comparable cases, who may be older or have a more extensive criminal history.

[121] The circumstances in which the applicant came to traffic are interesting but largely unremarkable. Most offenders who are sentenced for drug trafficking can point to circumstances in which they felt compelled to start selling drugs. Often it is to support their own drug habit and to pay debts. Some people resort to drug use and to street-level drug trafficking to support their habit as a misguided form of self-medication to deal with psychological problems arising from childhood sexual abuse or domestic violence. The circumstances in which the applicant came to traffic did not warrant special mitigation. They were relevant because she was practically forced to start selling drugs in order to pay her former partner's drug debt. That said, she developed the business with enthusiasm, presumably paid off the debt, and made a great commercial success of the criminal enterprise that she controlled.

[122] Apart from an alleged breach of the parity principle, the judge is not said to have erred in principle. The applicant submits that, even if a sentence of 10 years or more might otherwise have been appropriate, the parity principle required a just relationship to be maintained between the applicant's sentence and that imposed on Cheers.

[123] This submission requires consideration of relevant differences and the extent to which differences in all components of the sentences might be justified. The focus of the applicant's submissions is on the difference between parole eligibility dates.

This is an important aspect. However, consideration also must be given to the small, one-year difference between the head sentences imposed on the applicant and Cheers.

[124] Where sentencing is an integrated process and the product of an instinctive synthesis, it may be heretical to talk of starting points and discounts for matters in mitigation. However, in some cases a notional starting point may aid in considering the extent to which a sentencing principle or a matter in mitigation might be said to have been taken into account at arriving at a sentence.

[125] In a case in which the parity principle is engaged, consideration is required of the appropriate account taken of relevant differences. In this case, the significant differences between the co-offenders were their age and the role that each played in the criminal enterprise.

[126] Simply put, the differences in the ages and roles of the co-offenders warranted a head sentence for the applicant substantially in excess of nine years. Consideration of comparable cases was required by the judge and is required by this Court in order to serve a different aspect of the principle of equal justice. Those comparable cases indicate that the applicant warranted a sentence of at least 10 years' imprisonment, even with the benefit of an early guilty plea. The benefit of the guilty plea was to reduce the applicant's head sentence. For every year the head sentence was reduced on account of her guilty plea from what it would have been absent such a plea, the applicant had the benefit of a reduction of 80 per cent of a year to her parole eligibility date.

[127] The circumstances of the applicant's offending and her personal circumstances did not suggest that this was a case in which she should be sentenced to less than 10 years. The head sentence that the applicant's counsel urges on this appeal, namely a head sentence of nine years, with parole eligibility set at one half involves, in my view, a head sentence that is inappropriately low in all the circumstances, including her mitigating circumstances and early plea.

[128] Absent the operation of the parity principle, it was open to the judge to impose upon the applicant a head sentence of 12 years, or perhaps more, to reflect all the circumstances, including the fact that any sentence of 10 years or more automatically engaged the SVO regime. In my view, the sentence of 10 years that was imposed appropriately reflected all the circumstances and gave proper consideration to sentencing principles, including the parity principle.

[129] As discussed, the SVO regime does not completely displace the parity principle. That principle had to be accommodated, along with other principles, in arriving at a just sentence. The parity principle requires one to look at all components of the sentences, not simply the non-parole periods. This is necessary to determine whether principles of equal justice, along with other sentencing principles, have been applied and due allowance made for relevant differences.

[130] One aspect, therefore, is to compare the head sentences that were imposed on the applicant and on Cheers. The one-year difference, viewed in isolation, is inadequate to reflect the substantial differences in their ages and the roles that they played in the criminal enterprise. Viewed in isolation, the five-year difference in their non-parole periods seem excessive. However, that difference cannot be viewed in isolation, the sentences must be looked at as a whole, and also as the products of principles and statutory provisions that govern parole eligibility dates

and which necessitated their guilty pleas being taken into account "at the bottom" (in the case of Cheers) and "at the top" (in the case of the applicant).

[131] In *Dang*, this Court was concerned with a similar issue in which Dang's sentence for trafficking was heavier than the one imposed upon Davenport, but their different roles, by which one acted under the direction of and was remunerated by the other, warranted a substantial difference between the sentences. By reason of the operation of the SVO regime there was a significant difference in their parole eligibility dates. There was a relatively small difference in their head sentences. Even considering the disparity in their non-parole periods, the disparity between Dang's sentence and that imposed on Davenport was not such as to warrant a reduction in Dang's sentence on appeal by force of the parity principle. The facts of this matter lead, in my view, to a similar conclusion. Also, in this case one has both a difference in roles and a difference in the ages of the co-offenders.

Conclusion – Ground 2

[132] The applicant has not established that the judge breached the parity principle. Appropriate account was taken of differences and similarities. The differences in the ages of the offenders and the role that each played in the business were significant. Cheers' age entitled him to significant leniency. The applicant controlled the business. The more important role that she played in it compared to Cheers meant that a sentence of at least 10 years was appropriate in her case after applying the parity principle and other principles of sentencing.

[133] Differences in their offending and in their circumstances meant that one offender's sentence engaged the SVO regime and the other's sentence did not.

[134] The relevant differences result in a significant disparity in non-parole periods but a minor and, when viewed in isolation, inadequate difference in their head sentences. Having regard to all components of the sentences there is not, in my view, an unjustified disparity between the sentences.

[135] The applicant may have a sense of grievance that the SVO regime led to such a significant difference between the periods that she and Cheers each must serve before being eligible for parole. In my view, however, the sentence that she received is not such as to engender a justifiable sense of grievance on her part. The similarities between the applicant and Cheers in carrying on the same criminal enterprise led to Cheers receiving a head sentence of nine years. Material differences between their offending and their circumstances led to her receiving a head sentence of 10 years. She probably would have received a higher head sentence in the absence of the SVO regime. Therefore, I do not consider that, assessed objectively, the applicant has a justifiable sense of grievance by the differences in the sentences that were imposed.

[136] Principles of equal justice, including the parity principle, were served by sentences that reflected important differences in the personal circumstances of each offender, particularly Cheers' young age, and in the different roles each played in the criminal enterprise.

[137] I would order that the application be dismissed.