SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smyth* [2018] QCA 171
PARTIES:	**R** **v** **SMYTH, Matthew Jarrod** (applicant)
FILE NO/S:	CA No 28 of 2017 SC No 448 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 6 February 2017 (Daubney J)
DELIVERED ON:	31 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2017
JUDGES:	Fraser and Morrison and McMurdo JJA
ORDER:	**Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – RELEVANT FACTORS – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – GENERAL PRINCIPLES – where the applicant was convicted on his own pleas of guilty to trafficking in the dangerous drug cannabis for the period of about one year, possession of the dangerous drug cannabis and possession of property (money) obtained from trafficking – where the applicant was sentenced to seven years imprisonment with parole eligibility after serving two years for the trafficking offence and was convicted but not further punished for the other two offences – where the applicant argued that the sentence was manifestly excessive having regard to two of the applicant's co-offenders and that the primary judge erred in finding that the applicant's offending was at the same level as a co-offender – where the applicant's co-offenders were found in possession of MDMA and $416,260 – where the co-offenders pleaded guilty to further offences – where the applicant was not the head of the syndicate – where the applicant couriered more cannabis than his co-offender but did not distribute as much cannabis – where the applicant did not argue there were any distinguishing personal circumstances that might result in greater mitigation – whether there was parity as between the applicant's sentence and that of his two co-offenders

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, applied
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, applied
R v AAH & AAG (2009) 198 A Crim R 1; [2009] QCA 321, cited

COUNSEL: B J Power for the applicant
C M Kelly for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant was convicted on his own pleas of guilty of three offences. For trafficking in the dangerous drug cannabis for a period of about one year (14 March 2013 – 26 March 2014) the applicant was sentenced to seven years imprisonment with parole eligibility on 5 February 2019 (after serving two years). The applicant was convicted and not further punished for possession of the dangerous drug cannabis and possession of property (money) obtained from trafficking.

[2] The applicant applied for leave to appeal against sentence upon three grounds:

> "1. The sentence imposed on the applicant was manifestly excessive when compared to that imposed on the applicant's co-offenders Justin Adam Corke and Matthew James Stirling, such that the applicant has a justifiable sense of grievance;
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> 2. The learned sentencing judge erred in finding that the applicant's offending was at the same level as Matthew James Stirling; and
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> 3. The learned sentencing judge erred in not giving proper regard to the sentence of six years imprisonment with parole eligibility after serving 18 months that was imposed upon Jacob Thomas Koczan as having the status of a sentence of a co-offender, given the basis on which that offender was sentenced, such that the applicant has a justifiable sense of grievance."

[3] At the hearing of the application the applicant abandoned ground three. As counsel for the applicant submitted, the remaining grounds, grounds one and two, rely upon the "parity principle". Counsel quoted this summary of that principle from my reasons in *R v AAH & AAG*:[1]

> "[9] I record my respectful agreement with Chesterman JA's remarks about the parity principle, to which White J has also referred. In that respect, in *Lowe v The* Queen (1984) 154 CLR 606; 12 A Crim R 408 the High Court held that equal justice requires that, as between co-offenders, there should not be a marked disparity between their sentences which gives rise to a justifiable sense of grievance; if such a disparity arises the

[1] (2009) 198 A Crim R 1 at [9] – [10].

> more severe sentence should be reduced even if it is otherwise within the permissible range of sentences. In *Postiglione v The Queen* (1997) 189 CLR 295; 94 A Crim R 397 Dawson and Gaudron JJ pointed out that the parity principle raises a question which does not merely concern the imposition of different sentences for the same offence, but rather one which concerns the due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality.
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> [10] In *Postiglione* Kirby J insisted that perfect consistency between the sentences of co-offenders is not necessary and that a sentence is to be reviewed only where the disparity is such as to engender a "justifiable sense of grievance" on the part of the prisoner or "give the appearance that justice has not been done." (The quoted words were those of Gibbs CJ in *Lowe v The Queen* at 610; 409.) Gummow J put the test in similar, although perhaps even more demanding terms, in the same case (*Postiglione* at 323; 418):
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> > The principle for which *Lowe* is authority appears to be that the Court of Criminal Appeal intervenes where the difference between the two sentences is manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done.
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> Put another way, the question is whether an objective comparison of the sentences reveals what Mason J called (in *Lowe v The Queen* at 611; 410) a "badge of unfairness."

[4] The principle has since been confirmed in *Green v The Queen*.[2] In that case, French CJ, Crennan and Kiefel JJ observed that, "[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."[3]

[5] The applicant, Corke and Stirling are "co-offenders" in relation to whose sentences the parity principle is applicable. In order to decide whether or not the parity principle has been infringed, it is necessary to refer to each co-offender's sentence and to their personal circumstances and the circumstances of their offending.

[6] Corke trafficked in cannabis in two phases. The first phase (count 1) was between November 2011 and March 2014. The applicant and Stirling were not charged with any offence in relation to that period.

[7] In relation to the second phase of Corke's drug trafficking (count 2), between March 2013 and March 2014:

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2 (2011) 244 CLR 462 at 472 – 475 [28] – [32].
3 (2011) 244 CLR 462 at 475 [32].

- Corke was the head of the syndicate which carried on the business of trafficking in cannabis in which the applicant, Stirling and others were engaged. The schedule of facts with reference to which the applicant was sentenced included a statement that the Corke Syndicate "consisted of … Corke, … Stirling, [the applicant]" and two others, "who were all operating a business trafficking in cannabis conjointly".

- The total amount of cannabis supplied by the syndicate was likely to be greater than the amount derived from telephone intercept evidence, which did not cover the full period of the trafficking. That telephone intercept evidence suggested that the total amount of cannabis supplied between October 2013 and March 2014 was 897.44 kg (1,978.5 pounds). The total proceeds of the syndicate from the sale of the 1,978.5 pounds of cannabis was $6,726,900.

- Between December 2013 and March 2014, it was estimated that Corke supplied or directly facilitated the supply of 190.06 kg (419 pounds) of cannabis in total to at least ten different customers, the amounts supplied ranging from 1 to 75 pounds each time and the total proceeds contributed to the syndicate by those supplies being $1,424,600 (at an assumed sale price of $3,400 per pound).

- On 15 March 2013 Stirling moved to an address in Pimpama and entered into a lease under a false name (count six – forgery). The Pimpama address was used as a "safe house" where the Corke syndicate stored and packaged cannabis and money as part of the syndicate business.

- On 24 May 2013 the applicant leased a property at a Melbourne address, which was used by the syndicate as a "safe house" in Melbourne, where members of the syndicate packaged and stored cannabis before transporting it to Queensland.

- The syndicate sourced the cannabis predominantly from one Tran, or "Asian", and occasionally from other Melbourne based suppliers. The Crown had evidence only of flights by Stirling during a four month period and flights by the applicant during a five month period. During those periods:

    - The applicant transported at least approximately 1,045 kg (2,306.035 pounds) of cannabis from Melbourne in 29 flights during the five month period. The estimated purchase price for that quantity of cannabis was approximately $6,918,105 (calculated at $3,000 per pound), with an on-sale value of $7,840,519 (based on $3,400 per pound) and a profit of approximately $922,414.

    - Stirling transported at least approximately 553 kg (1,219.16 pounds) of cannabis from Melbourne in 13 flights during a four month period. The estimated purchase price for that quantity of cannabis was approximately $3,657,480 (calculated at $3,000 per pound), with an on-sale value of $4,145,144 (based on $3,400 per pound) and a profit of approximately $487,664. In addition, Stirling couriered 24 kg (52.911 pounds) of cannabis from Brisbane to Mackay in two flights in February and March 2014. That cannabis had an on-sale value of $179,897.40.

    - The schedule of facts records that a syndicate member, Rohl, said that he knew that the applicant and Stirling were paid $100 per pound for

transporting the cannabis but this dropped to $50 per pound. The schedule then records that the applicant was paid at least $115,301 over the five month period covered by the airline records and Stirling was paid at least $60,958 over the four month period covered by the airline records, calculated at $50 per pound. In the case of the applicant and Stirling, the schedule states that it is likely that the overall pay was more because the evidence did not make it clear how many times the offender met with the supplier, when their pay dropped from $100 per pound to $50 per pound, the amount paid in travel expenses, and in any event the airline records do not cover the overall trafficking period.

- The applicant and Stirling each supplied wholesale quantities to a select group of customers as part of the joint business:
    - The Crown estimated that the applicant had at least six regular customers and between 5 February and 6 March 2014 supplied at least 126.1 kg (278 pounds) of cannabis to these customers, ranging in amounts from 6 pounds to 47 pounds. The applicant was responsible for contributing $945,200 in proceeds to the group (assuming a sale price of $3,400 per pound).
    - The Crown estimated that Stirling had at least 15 regular customers and between December 2013 and March 2014 supplied at least 581.28 kg (1,281.5 pounds) of cannabis to these customers, ranging in amounts from 1 to 104 pounds at a time. Stirling was responsible for contributing $4,357,100 in proceeds to the groups (assuming a sale price of $3,400 per pound).
    - In the case of each defendant, the schedule states that it is unknown how much of the profit the defendant was entitled to keep for his involvement in the sales of cannabis.
- There were "constant" discussions between Corke, Stirling, the applicant and Tran about the price of cannabis. The schedule of facts described the applicant as the "main" courier for the syndicate. The applicant and others used code words to avoid detection in those conversations. The availability of cannabis from Tran determined the frequency of the purchases. On average Tran supplied the syndicate with between 50 to 150 pounds of cannabis per week. When the applicant and Stirling travelled to Melbourne to collect cannabis they attended one of the houses rented in Melbourne, repackaged the purchased cannabis, typically to one pound cryovac parcels, and placed those parcels into separate large space bags to avoid detection and reduce the volume of the cannabis. They also intermittently sprayed the cyrovac bags with disinfectant to remove any smell of cannabis. They would then return to Brisbane within a few days with the cannabis in their checked in luggage. The applicant and Stirling used gloves when handling the cannabis.
- The applicant and Stirling (amongst other members of the syndicate) intermittently flew from Brisbane to Melbourne with large amounts of cash to pay the suppliers. Intercepted telephone calls confirmed that up to $300,000 was placed in a syndicate member's luggage on one occasion and flown to Melbourne to pay Tran. Syndicate members packaged the cash in a way which was similar to the way the cannabis was packaged. The Crown could not determine the number of occasions upon which the applicant and Stirling

travelled to Melbourne to pay the suppliers, but Rohl stated that Corke, Stirling or the applicant would meet with Rohl prior to him travelling to Melbourne to give the supplier the money. The schedule of facts also records that the applicant "left money to pay for the cannabis at his Melbourne property and Tran would exchange the money for cannabis." Rohl rented another property in Melbourne that was used for similar purpose and the applicant and Stirling utilised those properties when they travelled to Melbourne to obtain cannabis.

[8] The drug trafficking ceased as a result of interception by the police. On 25 March 2014 police arrested the applicant as he was leaving Brisbane Airport with two suitcases. 23.4 kg of cannabis was seized (count 66). The police also found $6,000 in a bag the applicant carried at the airport and some cash in a wallet on his person (count 67). Four mobile phones were found on the applicant or in his suitcases. He did not participate in a police interview.

[9] During a search of Stirling's Surfers Paradise unit police found $23,450 in a plastic shopping bag under a couch (count 62). Drug paraphernalia and other items used in the drug trafficking, including five mobile phones and a laptop computer, were also found. In Stirling's cars police found a suitcase containing $34,650 cash (count 63), ten cryovac plastic bags of cannabis (count 65), $670 cash in the glovebox (count 64), and other items relating to the drug trafficking. Stirling gave an exculpatory explanation to police about the money and items that had been found. Police executed a search warrant at the Pimpama address. Amongst the items relating to trafficking found by police were a set of digital scales (count 56) and 52 cryovac bags of cannabis containing a total weight of 22.7 kg (count 55).

[10] Of more significance to the applicant's argument in this application, police also found a bag containing 945 MDMA pills with a gross weight of 234.354 grams and a calculated weight of pure MDMA of 34.215 grams (14.6 per cent purity) (count 54 – unlawful possession of the dangerous drug 3,4-methylenedioxymethamphetamine with the circumstance that the quantity of the dangerous drug exceeded 2 grams) and $416,260 found in various locations throughout the house (count 57 – possession of a sum of money obtained from trafficking in a dangerous drug, knowing it had been obtained from the trafficking). Both Stirling and Corke were charged with the offences in counts 54 and 57. The Crown alleged that both of them had access to and control of the items found at the Pimpama address, they were in joint possession of those items and they possessed them to run their joint business. As to count 54, at the sentence hearing it ultimately became common ground that Stirling's fingerprints appeared on the bag containing MDMA which was found at the Pimpama address.[4] The prosecutor did not seek to contradict the submission made by Stirling's counsel that Stirling did not know with precision what was in the bundle, he knew it was some type of dangerous drug, he knew it was of some value because it was not disposed of, he understood that the MDMA was security for some debt, but that the business of the syndicate was in cannabis and not in something else.[5]

Parity as between the applicant's sentence and Stirling's sentence

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4 T1-56.

5 T1-46.

[11] Stirling was convicted on his own pleas of guilty to ten counts in the indictment and one summary charge: trafficking in a dangerous drug (count 2), forging (count 6), possessing a dangerous drug MDMA in excess of two grams (count 54), possessing a dangerous drug cannabis in excess of 500 grams (count 55), possessing a thing used in connection with trafficking in a dangerous drug (count 56), possessing property obtained from trafficking (count 57), three additional counts of possessing property obtained from trafficking (counts 62-64), possessing a dangerous drug in excess of 500 grams (count 65) and a summary charge of unlawful possession of utensils and pipes used in connection with the smoking of a dangerous drug. Stirling was sentenced to seven years imprisonment with parole after serving two years – the same sentence as was imposed upon the applicant. Stirling was not further punished on each other count and the summary charge.

[12] Stirling was 39 – 40 years old at the time of his offending. He had a criminal history which the sentencing judge described as "minor and irrelevant". He pleaded guilty when the prosecutor advised that the circumstances of aggravation under the *Vicious Lawless Association Disestablishment Act* 2013 (Qld) ("VLAD") were to be dropped. The sentencing judge regarded his plea as a timely plea that counted to his credit. Stirling had been subject to a series of traumatic and troubling incidents during his life. The sentencing judge observed that he had careful regard to a report supplied by a psychologist who treated Stirling. The psychologist opined that Stirling had mental health issues including extremely severe symptoms of depression and anxiety. He had a generalised anxiety disorder, adjustment disorder and dependent personality disorder. The psychologist observed that Stirling's medical history indicated that his problems with depression and anxiety were long standing. He had been manipulated and used by others for their amusement or gain, a pattern of behaviour which had been present from his school days. Stirling had demonstrated his motivation to address his psychological problems by engaging with mental health professionals in the past and that was ongoing. There were supportive references for him from his parents, other family members and friends. The sentencing judge also took into account in both the head sentence and the parole eligibility date a total of 24 days in pre-sentence custody that could not be declared as time served under the sentence.

[13] The applicant was 29 at the time of the offending and he had no criminal history. The sentencing judge also took into account in his sentence 24 days in pre-sentence custody which could not be declared as time served. Like Stirling, the applicant indicated an intention to plead guilty in a timely way after the VLAD circumstances of aggravation were dropped and he was given credit for that. The sentencing judge referred to material recording the applicant's extensive history of substance misuse, including alcohol, chronic cannabis dependency and methylamphetamine misuse. The applicant has a young son who suffered from quite severe autistic disorder. The applicant's separation from his son during his time in jail would be difficult for both of them, but the sentencing judge observed that it was one of the many consequences of criminal conduct of this kind. The sentencing judge also had regard to supportive references from the applicant's family and material demonstrating that the applicant had since undertaken a mature aged apprenticeship, his employer spoke highly of him, he was off drugs, and he had made contributions to his local community. The sentencing judge referred to the applicant having undertaken "positive rehabilitation".

[14] The sentencing judge found that the offending of the applicant was at the same level as that of Stirling. The sentencing judge noted that Stirling had distributed more cannabis than the applicant, but the applicant had couriered more cannabis than Stirling, both were engaged at levels above mere couriers and, for example, Stirling leased the Pimpama address whilst the applicant leased the safe house in Melbourne.

[15] The applicant did not submit that he should have been given materially greater mitigation in his sentence for his personal circumstances than was given to Stirling. Rather, the applicant's argument under ground one was based upon the contention in ground two that the sentencing judge erred in finding that the applicant's offending was at the same level as the offending by Stirling. The applicant argued that Stirling's criminality was more serious because he pleaded guilty to an additional seven offences which were not alleged against the applicant. The applicant's argument focused upon the two most serious charges against Stirling which were not alleged against the applicant, count 54 and count 57 (see [10] of these reasons). The applicant argued that the applicant should not have been given the same effective sentence as was given to Stirling in circumstances in which Stirling had those additional charges. In the applicant's submission, the sentencing judge's conclusion that the applicant's offending was at the same level as the offending of Stirling could not be reconciled with the joint possession by Stirling and Corke of more than $400,000 derived from trafficking and a significant quantity of the dangerous drug MDMA.

[16] It is necessary to refer also to the applicant's submission that the facts in the schedule of facts upon which the Crown relied "were accepted by the applicant subject to submissions making it clear that the applicant was paid only on a 'piece-work' basis for acts done at the direction of the main offender Corke."[6] The applicant's outline of submissions at sentence stated that the schedule of facts used some terms that could be read as inferring that the applicant had some form of partnership in the trafficking enterprise but other parts of the schedule of facts make it clear that it was not the case and "the defendant was paid by Corke for the work that he performed". The outline also contended that the applicant, although a trusted participant in Corke's trafficking enterprising, "was not a partner in that enterprise, instead he was paid for the work he performed on a 'piece-work' basis". That did not adequately describe the applicant's role. The schedule of facts makes it clear, and this was not disputed, that at least for the period for which the Crown had airline records, the applicant and Stirling were paid at $50 per pound of cannabis transported and in an earlier period they had been paid at $100 per pound. But they were not merely paid couriers of the drug. They also participated in discussions about price, they supplied regular customers, their names were on the leases of properties used in the trafficking business, and they were entrusted with money to buy the drug. As was submitted by the applicant's counsel at the sentence hearing, the applicant "was deeply involved in this trafficking enterprise … was trusted in this enterprise … was receiving payment for the work that he did".[7]

[17] The schedule of facts makes it clear that the applicant was entrusted with very large amounts of money to pay for the cannabis which was supplied in Melbourne to the syndicate. The applicant was described as the syndicate's "main" courier. The schedule

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6 Outline of Submissions on Behalf of the Applicant at 7.1.

7 T1-54.

refers to him having transported at least about 1,045 kg of cannabis in 29 flights, the estimated purchase price for which was approximately $6,918,105. Thus the applicant was entrusted both with very large amounts of cash and with very substantial quantities of the dangerous drug on numerous occasions, in the Melbourne house leased to the applicant and in the course of moving money and drugs. Counts 54 and 57, together with the other, less serious counts of which Stirling, but not the applicant, was convicted, did not attract any additional punishment. That is consistent with them being treated as particulars of Stirling's trafficking offence. Stirling's criminality in having possession of the MDMA and money at the Pimpama house must be assessed in the context of the very large amounts of cannabis and money involved in the trafficking offences which the applicant and Stirling committed. With that context in mind, I am not persuaded that there was such a difference in the overall criminality of the applicant when compared to the overall criminality of Stirling as to require the applicant be given a less severe sentence.

Parity as between the applicant's sentence and Corke's sentence

[18] Corke pleaded guilty to 12 counts in the indictment, the most serious of which were two counts of trafficking in the dangerous drug cannabis. He was given an effective sentence of nine and a half years imprisonment with parole eligibility after three and a half years. (The sentence imposed on counts 1 and 2 was six and a half years imprisonment with parole eligibility after three and a half years, but that sentence took into account three years of pre-sentence custody which were not formally declared as time served.)

[19] The Crown was not able to determine the quantity of cannabis trafficked in the first phase of Corke's trafficking (count 1), but his part of the profit in that phase was at least $131,650. Corke was also convicted of money laundering in relation to that amount of the profit. In relation to the first phase of Corke's cannabis trafficking:

- Corke carried on the unlawful trafficking business with other people, including C Lee, Rohl, Monahan, W Lee, and "Jimmy Hannan".
- Corke and others couriered the cannabis on occasions from Melbourne to premises in Queensland which were used by the group to store and repackage the cannabis before distribution.
- Corke and others distributed the cannabis.
- Whilst Corke was serving a term of imprisonment between 24 October 2011 and 24 February 2012, Corke deposited or arranged for the deposit of four cheques totalling $105,000 into the account of one Green, after which Green transferred the money (in four tranches) to Corke's business account ostensibly to facilitate the payment by Corke of the costs associated with Corke's purchase of land at a residential development site (count four).
- Between 1 February 2013 and 14 March 2013, Corke was guilty of money laundering in relation to an amount of $33,650, being part of the total amount of $231,970 the subject of the money laundering charge in count five. In the relevant transactions, Corke funded payments by Green to Corke and Duane Corke ostensibly as wages. (The balance of the total amount of $231,970 the subject of count five was the sum of $198,320 derived from Corke's

trafficking in the second phase of his offending between March 2013 and March 2014).

[20] In addition to Corke's responsibility for the trafficking in the second phase already described, Corke himself supplied cannabis to ten different customers between 21 December 2013 and 23 March 2014. He supplied or directly facilitated the supply of 190.06 kg (419 pounds) of cannabis over 18 transactions. The schedule estimated the profit obtained by the syndicate from those sales as $167,600. Corke facilitated the sale of the further 707.38 kg (1,559.5 pounds) of cannabis by Stirling and the applicant to their customers over 72 transactions between 20 December 2013 and 25 March 2014. The schedule includes a statement that the evidence showed that the group in total transported approximately 1,938.98 kg (4,276.92 pounds) of cannabis but it was likely to be substantially more. The Crown estimated that the purchase price for that quantity of cannabis was approximately $12,830,760 (calculated at $3,000 per pound) and the cannabis had an on-sale value of $14,541,528 (calculated at $3,400 per pound). The profit was calculated to be approximately $1,710,768.

[21] Corke was aged between 31 and 33 at the time of his offending. He had an extensive criminal history consisting mostly of drugs and some weapons offences. He was a long term drug user. He was on parole when he committed some of the offending and the sentencing judge regarded that as an aggravating feature of his criminality. The sentencing judge found that Corke held a significant position of responsibility in the drug trafficking operation and he was involved in its organisation. It was a well organised sophisticated large scale trafficking operation and he was at its head. Corke indicated his intention to plead guilty when the Crown indicated it would not be proceeding with the circumstances of aggravation under the VLAD legislation. The sentencing judge regarded that as a timely plea which assisted in the administration of justice. Corke had been using cannabis since age 13 and amphetamines since age of 16 until about the age of 20. He continued using cannabis and later started using cocaine. The sentencing judge regarded as greatly to Corke's credit that he had undertaken very positive steps of rehabilitation during his period in custody before sentence of nearly three years. He had given up drugs. The sentencing judge accepted that he was remorseful.

[22] The applicant argued that in light of Corke's recidivism, the much longer period of his trafficking, and the control he had for the entirety of the trafficking, the necessity that there be due proportion between Corke's sentence and the applicant's sentence required that the applicant's sentence be more lenient.

[23] The circumstances upon which the applicant relies do indicate that the applicant's sentence should be significantly less severe than the sentence of Corke. That is the case. Bearing in mind the lengthy period of pre-sentence custody which would not be declared in Corke's case, the applicant's sentence is two and a half years shorter than that of Corke and the applicant's minimum custodial period is 18 months shorter than that of Corke. The sentences are not out of due proportion having regard to the different circumstances of these co-offenders and their different degrees of criminality.

Proposed order

[24] I would refuse the application.

[25] **MORRISON JA:** I agree with the reasons of Fraser JA and the order his Honour proposes.

[26] **McMURDO JA:** I agree with Fraser JA.