IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

No S146 of 2011

BRETT ANDREW GREEN
Appellant

AND

THE QUEEN
Respondent

No S143 of 2011

SHANE DARRIN QUINN
Appellant

AND

THE QUEEN
Respondent

APPELLANTS' JOINT REPLY

1. These submissions are in a form suitable for publication on the internet.

2. No notices have been filed under s78B of the Judiciary Act 1903 (Cth) (cf. Respondent's Submissions (RS) Part III.

3. The appellants maintain that the issues these appeals present are broader than stated at RS [2.1], [6.24], [6.33] and involve consideration of all three matters set out in the appellant's submissions at AS [2].

Factual issues

4. The facts were agreed on sentence and the relevant factual findings of the sentencing judge were not challenged by the respondent on appeal. They are as summarised in the judgments of the Court of Criminal Appeal, by Allsop P and McCallum J (at [14]-[19] **AB284-5**) and by RS Hulme J (at [43]-[60] **AB291-6**).

5. The respondent now contends for the first time that Mr Taylor's *"blasé' attitude*[1] *and lack of insight reflected his youth and immaturity"* which in turn mitigated his *"moral culpability"* for the offence (RS [6.41]). This was not a finding made by the sentencing judge (**AB 219-228**), nor was it a matter advanced by the respondent at the sentencing of Mr Taylor nor on the Crown appeal relating to the appellants. Mr Taylor was found to have close connections with the most senior figures, was trusted by them, worked with them, and was to profit directly (**AB224**). He was held to be *"quite a significant player in the organisation"* and while not the principal was *"nonetheless involved from a very early stage in the enterprise"*, with a *"significant level of participation"* (**AB 222**).

6. Further, there was no *"misapprehension in the CCA"* as to good character and likelihood of re-offending of each offender RS [6.38]-[6.40]); rather, the CCA (per RS Hulme J at [99] **AB 308** and Allsop P and McCallum J at [19] **AB285)** stated

[1] The only reference to Mr Taylor being 'blasé' appears at **AB226** and is in a different context.

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the unchallenged findings of the sentencing judge that Mr Taylor *"cannot be described as previously a person of good character*[2] *or being unlikely to re-offend*[3]*"* (ROS Taylor p.8, **AB227**). He was also found to have *"little insight into the impact of his offending on the wider community"* and to require *"supervision for a significant period of time in order to give him some prospects of rehabilitation"* (ROS Taylor pp.7-8, **AB226-7**). These were findings relevant to the imposition of an appropriate sentence: see ss3A, 21A[4] *Crimes (Sentencing Procedure) Act* 1999 (NSW), unchallenged by the respondent in the CCA. To the extent that the respondent states otherwise, the respondent is seeking to argue for the first time on this appeal issues not raised below.

7. The appellants on the other hand supplied *"a number of testimonials"*, which *provided impressive support for Mr Quinn"*; per Hulme J at [57] **AB295**. These established prospects of employment and past very satisfactory performance in employment. The appellant Quinn was found to have already commenced rehabilitating while in custody, having done the SMART program and having *"improved his education by doing courses in English, Maths and IT and has applied for a tertiary course"* (**AB239**) and Hulme J concluded that he had *"good, perhaps better than good prospects of rehabilitation"* (at [139] **AB326**). Hulme J made further positive findings in relation to the appellant Green (at [136] **AB325**), including that his progress had been such that he had commenced and was continuing day release. The respondent's contention in this respect, contrary to the findings of the sentencing judge, and all five judges in the CCA should not be accepted.

Creation of Disparity on a Crown Appeal

8. The respondent suggests (RS [6.15]) that there was no difference of approach in principle between the majority and minority judgments. Contrary to the respondent's suggestion, all five judges in the CCA understood the argument to turn on a difference of principle. The submission ignores McClellan CJ at CL's statement of what he has held to be *"the relevant principles"* (at [32] **AB289**) and RS Hulme J's affirmation of *"the four principles"* from *R v Harmouch* (2005) 158 A Crim R 357 at [108] (**AB314,** [109] **AB315**, [125] **AB321** and his further conclusions as to *"three principal sentencing principles"* at [131]-[133] **AB323-4**). McClellan CJ at CL also held that *"the decision in R v McIvor* [2002] NSWCCA 490 *should not be followed"* (at [33] **AB289.32**; see also RS Hulme J at [119]-[121] **AB319-320**, Latham J agreed with both at [145] **AB 330**).

9. In contrast, the minority were of the opinion that *"the principles stated by Heydon JA in McIvor and by Howie J in Borkowski are correct and should be followed"*: per Allsop P and McCallum J (at [10] **AB 283**). This was a reference to the principles stated by Heydon JA in *R v McIvor* (2002) 136 A Crim R 366 at 371-2 [10]-[11] and Howie J in *R v Borkowski* (2009) 195 A Crim R 1 at 18-19 [70]-[72].

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[2] This was a finding under s21A (3)(f).

[3] This was a finding under s21A (3)(g).

[4] Subsections 21A (3) (e)-(h) list separate mitigating factors such as: no significant record of criminal convictions history; person of good character; unlikelihood of re-offending; good prospects of rehabilitation.

10. The respondent's submissions (see RS [6.17]), do not address the fundamental considerations applying on a Crown appeal, such an appeal *"being an application by an arm of the State that has the wider public purposes identified by Howie J in Borkowski at [70]"* (**AB 282.36** per Allsop P and McCallum J). Nor do they address the conundrum arising where what is proposed is a move from relative parity to relative disparity: *"the Court itself is being asked to be the instrument for the creation of the appearance of unequal justice"* (**AB 282.30** per Allsop P and McCallum J at [8]).

11. The difference in principle between the majority and the minority is reflected in the application by the minority of the judgment of the CCA in *Borkowski.* The minority recognised, consistently with *Borkowski,* that the purpose of a Crown appeal is not simply to increase an erroneous sentence imposed upon a particular individual; it has a wider purpose, being to achieve consistency in sentencing and the establishment of sentencing principles, as to which, that purpose can be achieved to a very significant extent by a statement by the intermediate appellate court that the sentences imposed were wrong and why they were wrong.

12. Similarly, in the earlier judgment in *McIvor,* followed by the minority, the Court declined to intervene because a move from parity to disparity in a Crown appeal had a different quality to that of a sentence appeal by an offender. Such a move was held to likely excite a justifiable sense of grievance because the increase would not depend on anything in the objective circumstances of the crimes or the subjective circumstances of each offender's background, but rather the Crown's application in relation to only one of two offenders whose sentences at first instance achieved parity. To increase one sentence in these circumstances *"would create inequity of the kind the principles of parity operate to avoid"*: *R v Cvitan* [2009] NSWCCA 156, per Simpson J at [90]-[93].

13. In Queensland, the creation of such unequal injustice has been recognised as a reason for disallowing a Crown appeal: *R v Davidson* (1999) 105 A Crim R 142 at 145. Similarly in Tasmania, Western Australia and Victoria, where the Crown has only appealed one of two sentences that achieve parity, the unappealed sentence acts as a constraint and may lead to the dismissal of the appeal even where there is a manifestly inadequate sentence: *R v Dowie* [1989] Tas R 167; *State of Western Australia v Marchese* (2006) 163 A Crim R 363 at [29]-[32]; *DPP v Karazisis* [2010] VSCA 350 at [109]; *DPP v Gregory* [2011]VSCA 145 at [37]-[39].

14. The majority of cases relied on by the respondent are offender's appeals (RS [6.1]-[6.12], [6.16], [6.17]) and as such do not consider the principles stated by Allsop P and McCallum J (at [5]-[11] **AB280-283**): see also *R v Draper* (unreported NSWCCA 12.12.86); *R v Pecora* [1980] VR 499 at 297; *R v Hildebrandt* 92008) 187 A Crim R 42 at [56]-[65]; *Goddard v R* (1999) 21 WAR 541, *R v Cox* (1996) 66 SASR 152. The approach taken on offenders' appeals is then identified by the respondent as having been taken in the present case (at [6.13]). Similarly the *"long standing course of authority"* referred to by the respondent (at [6.17]) must refer either to offender's appeals, or to the cases referred to by Hulme J in his judgment at [107]-[117] **AB 318** decided contrary to *McIvor* and accepted by him to be reliant on decisions in offender's appeals. So too, the analysis of the respondent of

the judgment of Hulme J (at RS [6.27]-[6.30]), based as it is on offender appeals in *Goddard v R* (1999) 21 WAR 541 and *R v MacGowan* (1986) 42 SASR 580, fails to address the issue at hand.

15. At RS [6.13] the respondent submits that the approach adopted by McClellan CJ at CL (at [28] **AB288.20**), was consistent with earlier decisions. However, it was inconsistent with prior authority on Crown appeals, resulting in his Honour's attempt to distinguish *Borkowski,* and his conclusion that *McIvor* should not be followed. In contrast with McClellan CJ at CL's reasoning, in *R v Farrugia* [2011] VSCA 24 at [31], a case relied on by the respondent (para RS [6.7]), it was held that *"where one co-offender has been given a manifestly inadequate sentence, that sentence cannot be ignored for the purpose of sentencing the other co-offender..."* at [31]. Similarly in *Reardon* (1996) 89 A Crim R 180 at 181 (in part a Crown appeal) it was held that complexity of the application of the parity principle does not deny its application: per Gleeson CJ *(cf.* Hulme J at [131]-[133] **AB 323-4**). Furthermore, the treatment of conduct of the Crown and delay in *Reardon* and *DPP v Gregory* support the appellants' submissions. This is addressed below at paras [22]-[23].

16. The respondent's suggestion that this case was not one of parity (RS [6.34]) is contrary to the findings of the sentencing judge and the CCA: per Allsop P and McCallum J at [2], [13], [18-19] and [23] **AB279, 283, 285-6**; Hulme J at [100] **AB308**, Latham J agreeing at [145] **AB330**. McClellan CJ at CL referred to the issue at [26]-[27] and [34]. This submission was rejected in the CCA as being contrary to authority: *Jimmy v R* (2010) 269 ALR 115 at 148, 170, 172. The Victorian Court of Appeal has applied *Jimmy* and the principle of relative parity in *DPP v Farrugia* [2011] VSCA 24 at [15]. It has always been accepted that the sentences by the primary judge achieved parity with that of Mr Taylor and that the Crown's application was for a move upwards and away from this position. The appeal was adjourned to allow further submissions and a five judge bench convened to address the conflicting authority on this question. In this respect the respondent's submissions at RS [6.33]-[6.35] should not be accepted: see also RS [6.32].

17. *McIvor, Borkowski* and *Cvitan,* and the decision of the minority in this case involve the proper application of principle. The purpose of an intermediate appellate court on a Crown appeal to correct error of principle can be achieved while maintaining justice for the individual and the appearance of justice for the community. It is not a question of one principle having to *"prevail"* over others, nor a lessening of the weight of any principle as held by Hulme J at [131]-[133] **AB323-4.** The Court does not become an instrument of injustice and disparity (cf RS [6.27]).

18. The respondent (RS [6.27]-[6.30]) understates the significance given by Hulme J to what he held were the principal "principles that operate" on Crown appeals where parity is an issue (at [131]-[133] **AB323-4**). It is clear that his Honour did *"intend to convey"* that his stated principles applied (cf.RS [6.27] -[6.30]).

19. The respondent submits that the major difference between the majority and minority judgments was the extent of inadequacy of the sentences imposed: RS

[6.45]-[6.46]. The true position is that the major difference was in the application of the principle of parity on Crown appeals as set out at [8]-[19] above and detailed in the appellants' submissions.

20. The Crown appeals were upheld on the basis that the Court was *"not persuaded that the Court should reject the Crown appeal upon the basis that to allow it will create disparity with the sentence imposed on Mr Taylor"* [5], together with the importance that Hulme J considered that Parliament had given to the maximum penalty and the standard non parole, as "standards": [134] **AB 324.** The appellants were refused special leave to challenge the application of the standard non parole period in their appeals, on 8 April 2011. However, the determination of manifest inadequacy by the CCA, and the extent of it in these Crown appeals, with the emphasis given to the standard non parole period and the application of the "*R v Knight and Bivuana*"[6] approach, may need to be qualified depending on the outcome of the appeal of *Muldrock v The Queen*[7] currently reserved in this Court. The respondent relies on the finding of manifest inadequacy and the sentences themselves, as so calculated by the majority, to establish a range for future sentencing[8]: RS [6.24], [6.47], [6.48].

21. It is not correct to say that the majority regarded disparity as "an important consideration on the exercise of the discretion whether to intervene" (RS [6.44]). Although they considered the discretion at a level of generality, the majority did not consider the discretion as it applied to the appellants (RS [6.31]- [6.44]), but rather moved directly from a finding of manifest inadequacy to re-sentencing: [136]-[144] **AB325-327.** On the other hand, Allsop P and McCallum J considered the discretion and applied it having regard to the disparity that would be created and the failure of the Crown to appeal the sentence of Taylor: **AB286** [24].

22. In *DPP v Gregory,* a case relied upon by the respondent, this Court's decision in *Everett* was applied and the Crown appeal was dismissed despite the inadequacy of the co-offenders' sentence, on the basis of conduct of the Crown, considerations of delay and the fact that upholding the Crown appeal would have returned that respondent to custody, which could have damaged public confidence in the administration of justice, interrupted the process of rehabilitation and the re-

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[5] See the appellant's submissions at [51]-[52] on this approach.

[6] The CCA determined that the failure to make a first step finding as to the objective seriousness of the offence was a failure to observe a basic rule of sentencing (relying on the reasoning in *R v Knight and Bivuana* [2007] NSWCCA 283 (at [72]-[73] **AB 300-301**). The majority used the standard non parole period of ten years as a "starting point" to determine an appropriate sentence (at [86]-[88] **AB 304-305,** and [139]-[140] **AB 326,** cf. RS [6.45]). There was also, at least in the case of Mr Quinn, the use as a starting point for the head sentence, the maximum penalty for the offence of cultivation of a commercial quantity, with his offence said to be at least a "worst case" of that offence: see contra *Markarian v The Queen* (2005) 228 CLR 357 at 372-3 [31]-[33]) ([86], [139] **AB 304, AB 326**).

[7] On 8-9 June 2011 this Court heard the appeal in *Muldrock v The Queen* [2011] HCA Trans 150 (9 July 2011) where the proper application of the Standard non-parole provisions was the subject of the appeal. Judgment is reserved.

[8] The appellants note that Mr Shannon Quinn has already been sentenced.

integration of an offender upon his release (*Gregory* at [74], [78]). These or very similar considerations apply in the present appeals.

23. In *Reardon,* it was held that the conduct of the Crown in encouraging a lenient sentence being imposed upon the co-offender was "*not to be disregarded in considering the dictates of justice in the case of the appellant*" (at p.182). Such conduct by the Crown was the reason for disallowing the Crown appeal (per Gleeson CJ at 182, per Sully J at 183-4, Hulme J dissenting). The Crown's relevant conduct in this case, consisted both in failing to take issue with the sentence imposed on Mr Taylor in the sentence proceedings against Green and Quinn and in failing to appeal Taylor's sentence. The majority effectively put to one side the Crown's conduct.

24. Contrary to the respondent's submission (RS [6.31]- [6.44]), matters including delay were not taken into account in a determination by the majority of whether the discretion should be applied in the particular circumstances of the appellants. As detailed in the appellant's submissions at paras [54] – [56] and the Joint Chronology, the delay in this case was substantial at every stage. The time between the original sentencing and the determination of the Crown appeals was approximately 1 year and 4 months, with a further 4 month delay before the CCA determined that its orders would not be varied. Upholding the Crown appeal involved returning Mr Green from day release to full-time custody and the setting back of Mr Quinn's progression in classification and consequent disruption of rehabilitative courses. The inevitable postponement of eligibility for parole of both appellants was also a relevant consideration given its proximity to the determination of the appeals.

25. Applying *McIvor* and *Borkowski,* and the judgment of Allsop P and McCallum J (at [1]-[11], and the last sentence of [23] **AB279-283, AB286**), taking into account the conduct of the Crown, the length of time this matter has been before the Courts and the continuing rehabilitation of the appellants, it is submitted that the appropriate course is to allow the appeal and order that the Crown's appeals to the CCA in these matters be dismissed.

Dated: 14 June 2011

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