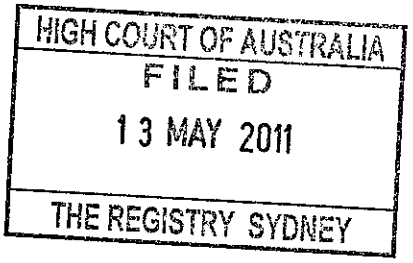
IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S146 of 2011

BETWEEN:

BRETT ANDREW GREEN
Appellant

and



10 **THE QUEEN**
Respondent

No. S 143 of 2011

SHANE DARRIN QUINN
Appellant

and

20 **THE QUEEN**
Respondent

APPELLANTS' JOINT SUBMISSIONS

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF ISSUES

2. This appeal raises the following issues:

(a) If a sentence imposed at first instance achieves parity with a sentence imposed on a co-offender, can that sentence be regarded as erroneous such that it is open
30 to a Court of Criminal Appeal, in an appeal against sentence brought by the Crown, to increase the sentence and thereby create a disparity?

(b) To what extent is a Court of Criminal Appeal, in an appeal against sentence brought by the Crown, entitled to increase a sentence in circumstances where the increase will lead to a disparity with a sentence imposed on a co-offender, and if so, what are the factors relevant to the court's discretion to interfere in such a case?

Filed by: Solicitor for the Appellant
Brian Sandiland, Legal Aid NSW
323 Castlereagh St
SYDNEY NSW 2000

Tel: 9219 5832
Fax: 9219 5059

Ref: 200968975 Karen Psaltis

(c) Was the Court of Criminal Appeal in error in determining that *R v McIvor* (2002)136 A Crim R 366 and *R v Borkowski* (2009) 195 A Crim R 1 should not be followed?

PART III: SECTION 78B NOTICES

3. The appellants consider that section 78B notices are not required in this appeal.

PART IV: REPORTED REASONS FOR JUDGMENT IN THE COURT BELOW

4. The reasons for judgment of the Court below are not reported but have been published electronically as *R v Green and Quinn* [2010] NSWCCA 313. The further reasons of the Court below relating to the revisiting of the orders have been published electronically as *R v Green and Quinn* [2011] NSWCCA 71. The remarks on sentence of the sentencing judge have not been published on the internet but are contained in the Appeal Book.

PART V: RELEVANT FACTS

5. On 20 July 2009 in the District Court of NSW, both appellants pleaded guilty to an offence of cultivation of not less than a commercial quantity of cannabis plants, to wit a large commercial quantity. The offence is contrary to s23(2)(a) of the *Drug Misuse and Trafficking Act* 1985, no 226 (NSW). The maximum penalty is 20 years imprisonment: s33 *Drug Misuse and Trafficking Act.* The offence attracts a standard non-parole period of 10 years: Division 1A, s.54A-D *Crimes (Sentencing Procedure) Act* 1999, No 92 (NSW). Mr Quinn had three matters taken into account on sentence, pursuant to s32 *Crimes (Sentencing Procedure) Act* 1999, (commonly referred to as a "Form One"). These three matters were held by the majority to be *"of little significance in the case"*: CCA [143].

6. The factual background to the appeal is set out in the judgments of Allsop P and McCallum J at [14]-[19] and Hulme J at [43]-[60], [66]-[70], [97], [136]-[137]. The facts were agreed. Briefly stated, the appellants and a number of others were involved in the cultivation of 1,354 cannabis plants over a number of crop sites between October 2007 and 30 April 2008. The cultivation was sophisticated, with

the use of fertiliser, watering, cameras and observers. There were up to 9 sites, with three sheds to be used for drying. Vehicles and phones were purchased and labourers engaged to pick the crop. The crop was valued at $2.7 million and the harvested cannabis worth between $1.33 and $1.47 million. The appellant Quinn was found to be the principal of the enterprise. Three other persons involved at a senior level, Gary Mason, Kodie Taylor and the appellant Green, were described as *"partners in the enterprise"* who were to share in the total proceeds of cannabis leaf finally produced. Mr Green was found to hold a slightly more senior level in the enterprise than Taylor and Mason. Mr Taylor was found to be *"quite a significant player in the organisation and the administration of this enterprise"*: [60].

7. The appellants both had significant relevant subjective features as summarised by Allsop P and McCallum J at [19] and Hulme J at [52]-[58], [97] [136]-[140]. A discount of twenty percent was afforded to each on account of his guilty plea.

8. The appellant Green had a severe learning disability, however his intelligence and cognitive capacity was in the high average range. He had no significant criminal history, a stable family life, support in the community, a good relationship with his wife and children and had a praiseworthy work ethic. He had no problems with drugs or alcohol, was remorseful, had a low risk of re-offending, was of good character and had good prospects of rehabilitation.

9. The appellant Quinn had an upbringing where he was the victim of domestic violence at the hands of his father and a mother who suffered alcoholism. He had taken on responsibility for his siblings from a young age. He was sexually assaulted as a teenager and in this context he developed drug and alcohol addictions. He had accepted responsibility for his offence, was remorseful and had significantly rehabilitated. He was working and studying while in custody, and had pursued drug and alcohol counselling, all found to be serious attempts at reform. He was highly thought of in the community and a good father to his four children. He was assessed as having no significant prior convictions and being unlikely to re-offend, with good *"perhaps better than good"* prospects of rehabilitation.

10. At the time of sentencing the appellants, Acting Judge Boulton had already sentenced eight offenders involved in the criminal enterprise, including Mr Taylor. Mr Taylor's offence involved a commercial quantity of marijuana, he had pleaded guilty earlier than the appellants and was younger. He was lower in the hierarchy than the appellant Quinn and only slightly lower than the appellant Green, however *"contrary to the situation of Messrs Quinn and Green, Mr Taylor was not of good character, could not be said to be unlikely to re-offend and had a need for supervision for a significant period"*: [99]. On 1 June 2009, his Honour had sentenced Mr Taylor on a single offence contrary to s25 (1) *Drug Misuse and Trafficking Act* (maximum penalty 15 years) to 3 years imprisonment with a non parole period of 18 months. The Crown did not appeal against this sentence.

11. On 14 August 2009 Boulton A/DCJ sentenced the appellant Green to 4 years imprisonment with a non-parole period of 2 years commencing from 17 May 2009, that non-parole period to expire on 16 May 2011. His Honour sentenced the appellant Quinn to 6 years imprisonment with a non-parole period of 3 years, to commence from 30 April 2008. The non parole period was to expire on 29 April 2011 and the full term on 29 April 2014. The His Honour found "special circumstances" in relation to both appellants pursuant to s.44 *Crimes (Sentencing Procedure) Act* 1999, and in his discretion adjusted the non parole period from 75% to 50% of the head sentence.

12. On 17 September 2009, the Crown lodged inadequacy appeals against the sentences imposed on the appellants pursuant to s5D of the *Criminal Appeal Act* 1912. There remained no appeal against the sentence of Mr Taylor. At this time, Mr Mason and others in the enterprise had not been sentenced.

13. The Crown appeal was heard on 30 July 2010 before a five judge bench constituted by Allsop P, McClellan CJ at CL, RS Hulme, Latham and McCallum JJ. In the event of consideration of the discretion and any re-sentencing on the Crown appeal, evidence was read on behalf of both appellants demonstrating continued insight into their offending, remorse and further rehabilitation since being sentenced almost a year earlier. The appellant Green's affidavit sworn 18 February 2010 was

evidence that in the time it took for the appeal to be heard, he had progressed to C3 classification, meaning he had day release and would progress to weekend release in the weeks after the appeal was heard.

14. Judgment was not delivered by the CCA until 17 December 2010. The Crown appeal was allowed by majority: McClellan CJ at CL, RS Hulme and Latham JJ; Allsop P and McCallum J dissenting. The majority concurred that an appropriate sentence for the appellant Quinn was 9 years with a non parole period of 6 years and for the appellant Green was 6 years with a non parole period of 4 years: [143]. However, orders were made that the appellant Quinn be re-sentenced to 8 years imprisonment with a non-parole period of 5 years and that the appellant Green be re-sentenced to 5 years imprisonment with a non parole period of 3 years. Allsop P and McCallum J would have dismissed the appeal.

15. The discrepancy between paragraph [143] and the orders in paragraph [144] was considered at a further hearing before the Court on 11 March 2011. After argument on the day but before the delivery of reasons, the Court indicated that it would not be varying the orders made on 17 December 2010. On 15 April 2011, the Court gave reasons for declining to vary or correct the orders made on 17 December 2010: *R v Green and Quinn* [2011] NSWCCA 71. That judgment also contains a summary of the further progress of the rehabilitation of the appellants between 17 December 2010 and 11 March 2011.

16. In the judgment of 17 December 2010, Hulme J gave the principal judgment for the majority. He reviewed earlier decisions of the CCA where the Court had dismissed Crown appeals where otherwise relative disparity would eventuate: *R v Bavin* [2001] NSWCCA167 per Spigelman CJ (Wood CJ at CL and Greg James J agreeing) , *R v McIvor* (2002) 136 A Crim R 366 at 371-2 [10]-[11] per Heydon JA (Levine J and Carruthers AJ agreeing), *R v Borkowski* (2009) 195 A Crim R 1 at 18-19 per Howie J (McClellan CJ at CL and Simpson J agreeing) and *Cvitan v R* [2009] NSWCCA 156 at [93]-[94] per Simpson J (McClellan CJ at CL and James J agreeing). He then examined cases where the Court had taken a contrary approach, allowing Crown appeals where relative disparity was thereby created: *R v Guthrie*

[2002] NSWCCA77, *R v Harmouche* (2005) 158 A Crim R 357, *R v Harris* [2007] NSWCCA 130, *R v Elzakhem* [2008] NSWCCA 31, *R v Najem* [2008] NSWCCA 32, *R v Kumar and Feagaiga* [2008] NSWCCA 328.

17. Hulme J declined to follow *McIvor* and the other cases in that line of authority; while agreeing that the *Harmouche* line of authority was based on applicants' appeals, he held that the *Harmouche* line of cases expressed the correct applicable principles: [126]. He concluded that disparity may be created by allowing a Crown appeal and that the fact of disparity or conduct or inaction by the Crown should not be a bar to the success of a Crown appeal: [126], [133]. McClellan CJ at CL agreed with 'most' of the reasons of Hulme J, distinguished *Borkowski* and held that *McIvor* should not be followed: [28], [33]. Latham J agreed with both McClellan CJ at CL and Hulme J: [145].

18. Allsop P and McCallum J dissented. They held (at [7]-[11]) that the analysis by Hulme J and the previous decisions relied on by him had not addressed the "essential" considerations of the differences between Crown appeals and applicant's appeals, namely that the Court itself was being asked to be the instrument for the creation of the appearance of unequal justice; due regard was to be had to the nature of a Crown appeal as an application of an arm of the State; and the wider public purposes of a Crown appeal as identified in *Borkwoski* at [70]. They held that the principles as stated by Heydon JA in *McIvor* and Howie J in *Borkowski* were correct and should be followed: [10].

PART VI: APPELLANT'S ARGUMENT

19. All five judges accepted that considerations of relative parity should be taken into account in the appellants' cases as per Mr Taylor: per Hulme J at [100], Latham J agreeing at [145]; per Allsop P and McCallum J at [2]. McClellan CJ at CL qualified his agreement by holding that although the sentence of a co-offender is not entirely irrelevant, the fact that different offences were charged confined the significance of a comparison of the sentences: [27]. He held that the significance of the sentence imposed on co-offenders *"will vary from case to case"*: [27]. He further held that if the sentence imposed on one co-offender that is not appealed is considered to be

erroneously lenient, that sentence cannot be used as a comparator in a Crown appeal of another offender: [33].

20. In *Lowe v The Queen* (1984) 154 CLR 606, this Court was concerned with an offender's appeal against severity on the grounds of parity. Mason J said, at 610-611:

> "Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."

21. In relation to the situation where the other sentence is inadequate, his Honour said, at 613-614:

> "... a court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate."[1]

22. Earlier, in *R v Tisalandis* [1982] 2 NSWLR 430 at 431-2 Street CJ, said:

> "An analysis of the many cases where an argument based on disparity has been considered, and either upheld or rejected, in recent years will disclose that, where the interests of justice so require, the Court of Criminal Appeal will not refrain from interfering with a sentence which, in the absence of particular disparity, would not have been the subject of appellate intervention. In the interests of justice it has at times been thought necessary, in eliminating or diminishing disparity, to reduce a sentence to a level which could probably be criticized as inadequate."

23. See also *R v Capper* (1993) 69 A Crim R 64 at 74; *R v Wilson* (2000) 116 A Crim R 90 at 97.9; *O'Loughlan v The Queen* [2010] VSCA 175; *R v Sultan* [2003] NSWCCA 404.

[1] See also Dawson J at p.623.

24. Street CJ considered the approach to be taken by a sentencing judge in circumstances where he or she is of the view that a co-offender had received an inappropriately lenient sentence. His Honour said, at 435:

> ... as the first decision is an established fact, the second judge is bound to take it into consideration and to give it appropriate weight in deciding what sentence to pass. Having given it full and adequate weight he may feel obliged to pass a sentence which in his own unfettered judgment he would regard as erroneously lenient. It is better, however, to strive to avoid disparity when the second offender comes before the court at first instance ... The true rationalisation from the point of view of the second judge in cases such as these is not that he is passing a sentence which appears to him to be too lenient but rather that he is passing the sentence which is shown to be appropriate having regard to the whole of the relevant circumstances including, very particularly, the established circumstance of an unduly lenient sentence already passed by a brother judge upon the co-offender."

25. Where the principles of parity, proportionality and relativity have been properly observed in the court below, it is submitted that an appellate Court should not intervene on a Crown appeal so as to create disparity. Applying the principles to the appellants, given that the appellants were sentenced after Mr Taylor, the latter's sentence was an established fact at the time the appellants were sentenced. It fell within the sentencing judge's discretion to impose a sentence on the appellants that achieved parity with Mr Taylor's sentence, even if it was subsequently concluded that the sentence imposed on Mr Taylor was manifestly inadequate.[2] The sentence of Mr Taylor was an established fact, was not the subject of appeal, was not challenged by the Crown as manifestly inadequate and the appellate court did not have all of the material that was before the sentencing judge when he sentenced Mr Taylor before them for review. For this reason, it is submitted, it cannot have been appropriate for the Court of Criminal Appeal to "correct" the sentences imposed on the appellants simply on the basis that each was manifestly inadequate when each sentence was, on the basis of considerations of relative parity, open to the sentencing judge. Adopting the language used by Gaudron and Gummow JJ in *Dinsdale v The*

[2] It was never asserted by the Crown at first instance that the sentence imposed on Mr Taylor was inadequate.

Queen (2000) 202 CLR 321 at [22] and [26], the appellants' sentences were not *"manifestly wrong"*.

26. The further reasons of McClellan CJ at CL holding that the *"established circumstance"* of the sentence of a co-offender may vary in significance [27]; that although a court should strive to achieve parity when sentencing *"this may not always be a just result"* [32] and that a sentencing judge may do other than seek parity if of the opinion that *"the other sentence is erroneously lenient"* [32] is not a correct approach (see also Hulme J at [122]). This approach, contrary to *Tisalandis*, promotes inconsistency in sentencing and vests in sentencing judges a function reserved for intermediate appellate courts. The correct principle as it applies to sentencing judges is that stated by Street CJ in *Tisalandis*. A sentencing judge should strive to eliminate or reduce disparity, even when a previous sentence on a co-offender by a different judge appears to be erroneously lenient, rather than leave it to an appellate court to take considerations of parity into account: *Tisalandis* at p.434E-435C.

27. In determining an appropriate sentence for each of the appellants, the sentencing judge took into account the established circumstance of the sentence he had imposed two and half months earlier on the co-offender Taylor. There had been no Crown appeal from that sentence and it was not otherwise challenged by the Crown as being erroneous. He imposed sentences on the appellants which achieved relative parity with Taylor, taking into account the differences of charge, standard non parole period, maximum penalty, role, discount for timing of the pleas, age and the favourable subjective aspects of the appellants' cases. He imposed a sentence on the appellant Quinn that was double that of the sentence imposed on Mr Taylor and a sentence on the appellant Green that was a third heavier than that of Mr Taylor. The sentences imposed on the appellants, taken on their own and without considerations of relative parity may have been capable of being regarded as unduly lenient, however, taking into account considerations of relative parity, were not *"manifestly wrong"*: cf. *Dinsdale* at [22], [26].

28. Further, as held by Allsop P and McCallum J at [10], the principles stated by Heydon JA (Levine J and Carruthers AJ agreeing) in *R v McIvor* (2002) 136 A Crim R 366 at 371-372 [10]-[11] and by Howie J (McClellan CJ at CL and Simpson J agreeing) in *R v Borkowski* (2009) 195 A Crim R 1 at 18-19 [70]-[71] are correct and should be followed: [10].

29. In a Crown appeal, where the Crown appeals against the sentence of only one of two co-offenders, there is a legitimate sense of grievance based in the uneven administration of justice where allowance of the Crown appeal would be a move from parity to disparity: *McIvor* per Heydon JA at pp.371-372 [10]-[11]. On a Crown appeal, it cannot be said that a refusal to intervene is itself a wrong decision, because the purpose of a Crown appeal is not simply to increase an erroneous sentence imposed upon a particular individual. It has a wider purpose, to achieve consistency in sentencing and the establishment of sentencing principles, which can be achieved to a *"very significant extent"* by a statement of an intermediate appellate court that the sentences were wrong and why they were wrong: *Borkowski* per Howie J at [70]. See also the statement and application of this principle in the earlier decision of *R v Bavin* [2001] NSWCCA 167 at [60]-[71] (per Spigelman CJ, Wood CJ at CL and Greg James J agreeing) and the decision of *Cvitan v R* [2009] NSWCCA 156 at [93]-[94] (per Simpson J, McClellan CJ at CL and James J agreeing). In Cvitan it was held that a Crown appeal will be dismissed where to intervene *"would create inequity of the kind the principles of parity operate to avoid"*: *R v Cvitan* per Simpson J [2009] NSWCCA 156 at [90]-[93].

30. As Howie J held in *Borkowski* at [70]-[71]:

> "it cannot be said that the refusal to interfere to correct that decision is itself a wrong decision. That is because 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. That purpose can be achieved to a very significant extent by a statement of this Court that the sentences imposed upon the respondent were wrong and why they were wrong...
>
> It may well be that members of the public, either in general or in the case of particular individuals, will retain a sense of grievance that the respondent was not appropriately sentenced for his conduct and its consequences. But that

grievance, if it exists, will be a consequence of the conduct of the Crown both before the sentencing judge and before this Court. It is not a result of the failure of this Court to recognise the seriousness of the offences and require that appropriate punishment be imposed upon such offenders. General deterrence, which is of the utmost importance in this case, will be achieved by the pronouncement of this Court as to the type of penalty that should be imposed upon similar offending in the future."

31. In response to a submission by the respondent Borkowski that even if the Court viewed the sentence of the co-offender McDonald to be manifestly inadequate, that finding could not be used to justify the resulting disparity between his sentence and that of the respondent of the Crown appeal were to be allowed (*Borkowski* at [68]), the Court dismissed the Crown appeal in *Borkowski* having regard to:

"the nature and purpose of a Crown appeal and the consequences that would flow were the Court to allow the Crown appeal against the respondent in circumstances where the Crown has not appealed against the sentence of the co-offender" (cf. McClellan CJ at CL at [28]-[30])

32. In Queensland, in *R v Davidson* (1999) 105 A Crim R 142 at 145 [12], it was conceded by counsel for the Attorney General that where the Crown had not appealed a sentence that achieved parity with sentences under review on a Crown appeal, intervention by the Court *"would or might lead to a sense of justifiable grievance on their part"* and it *"would be difficult for the Court to alter the sentences imposed on these two respondents without creating some form of injustice at another level"*. The Court held that there was *"no good reason now for disturbing the order suspending Davidson's sentence when doing so would simply result in the disparity with Dalton's sentence that her Honour was aiming to avoid"*(at 147 [18]).

33. In Tasmania, in *R v Dowie* [1989] Tas R 167, Underwood J (Nettlefold J agreeing, Wright J dissenting) held that on a Crown appeal, an intermediate court may decline to intervene in circumstances including where *"an unappealed sentence imposed upon a co-offender was seen to create a penalty ceiling"*. He referred, with approval to this circumstance, as set out in the article of Fiori Rinaldi,

'Dismissal of Crown Appeals Despite Inadequacy of Sentence' (1983) 7 Criminal Law Journal 306.

34. The Court of Appeal of Western Australia (per Steyler P, Wheeler JA concurring and Buss JA agreeing as to principles on Crown appeals, but dissenting as to their application to the facts (at [49])) affirmed *Dowie* and again quoted from Rinaldi's article in *State of Western Australia v Marchese* (2006) 163 A Crim R 363 at [29]-[32], when summarising principles to be applied in Crown appeals at [25]-[40].

10 35. A five judge bench of the Victorian Court of Appeal (Warren CJ, Maxwell P, Ashley, Redlich and Weinberg JJA) held unanimously in *DPP v Karazisis; DPP v Bogtstra; DPP v Kontoklotsis* [2010] VSCA 350 at [109]:

> "Parity can also operate as a constraint upon a Crown appeal against sentence. It sometimes happens that the Crown elects to appeal against the sentence imposed upon one offender, but not another. In the same way as want of parity can require a court to moderate a sentence that it would otherwise consider appropriate, it may act as a limiting factor when the Crown challenges the adequacy of just one of a number of sentences. In such circumstances, a sentence which is regarded as inadequate might still be permitted to stand."

20

36. The propositions in these cases are to be contrasted with the statement in the appellants' case by Hulme J that the Court *"cannot give full weight"* to the principles of parity *"without departing from another or others"* (at [131]), that the Court must make a decision as to *"whether to allow parity to prevail"* (at [132]) and finally that *"the fact of disparity or conduct (or inaction) on the part of the Crown should not otherwise be a bar to the success of the appeal"* (at [133]).

37. Hulme J held that the court could create disparity given the *"substantial public interest in sentences being appropriate and that manifestly, sometimes grossly, inadequate sentences be corrected"* [126]. He also held the principles of parity
30 should not be allowed to prevail over principles described as: *"manifestly inadequate sentences should not be allowed to stand"* and *"there should be consistency in punishment of all offenders whose criminality and circumstances are comparable"*: [131].

38. There is no tension between the principles of parity and *"consistency in punishment"*. Hulme J erred in identifying "consistency" in sentencing as being *"consistency in punishment"*. Rather, consistency in sentencing is *"consistency in the application of relevant legal principles, not some numerical or mathematical equivalence"*: *Hili and Jones v R* (2010) 85 ALJR 195 at [18]; [48]-[49]. *"Consistency in punishment"* is an expression that has been used to describe an aspect of equal justice which requires that there be no marked disparity in sentences between co-offenders such as to give rise to *"a justifiable sense of grievance"*: *Postiglione v R* (1997) 189 CLR 295 at 301 per Dawson and Gaudron JJ; *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Gibbs CJ, 610-11, 613 per Mason J, 617-618 per Brennan J, 623 per Dawson J.

39. The proper application of consistency in sentencing and equal justice ensures parity in sentencing and does not permit, in a Crown appeal, the Court to be *"the instrument for the creation of the appearance of unequal justice"* or intervention *"in an individual sentence so as to constitute the Court the instrument of unequal justice"*: per Allsop P and McCallum J (in dissent) at [8] and [11]. The suggested tension between what were said to be the *"three principal sentencing principles"* set out by Hulme J (at [131]) does not exist when the principles of consistency in sentencing and equal justice are properly stated and applied, in the context of the statutory regime. Further, these statements failed to take into account the essential and different considerations arising on a Crown appeal, as summarised in the decision of the minority at [7]-[11].

40. Hulme J also relied on a decision of the Court of Appeal in Victoria, *DPP v Bulfin* (1998) 101 A Crim R 40 (Winneke P, Charles and Callaway JJA), as authority for the proposition that as Crown appeals should be rare, the Crown's ability to appeal against inadequate sentences was much circumscribed and in consequence principles of parity should be given less emphasis or be more cautiously applied on Crown appeals: [116]. He held that despite the rule that Crown appeals should be rare no longer being applicable in NSW following the decision of the Court of

Criminal Appeal in *JW v R* (2010) 199 A Crim R 486 at [99]-[130], *Bulfin* should be applied: [130]. In *Bulfin* the earlier conflicting authority of *R v Nikodjevic* [1998] 2 VR 33 at p.43, was distinguished. In *Nikodjevic,* Winneke P (Ashley AJA and Brooking JA agreeing) held:

> "In my view it is no part of the function of this court, on a Crown appeal, to use its powers to remedy an inadequate sentence if to do so would produce a sentence which would clearly offend the principle of parity in sentencing. The Crown must be assumed to have accepted the adequacy of the sentence which the learned sentencing judge imposed upon (the co-offender).
>
> Consistency of punishment between those deserving of equal punishment is a fundamental element of sentencing. It necessarily follows, as Mason J said in Lowe v R (1984) 154 CLR 606 at 610:
>
> > '...[that] inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion in public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community'.
>
> For the reasons that have been given by Ashley AJA, the learned judge, I think, has striven to achieve parity between the respondent and [the co-offender] which the law seeks to attain. If the powers of the court...were now used to increase the sentence of the respondent, it seems to me that we would be producing the very sort of disparity which the law seeks to eliminate. The fact that, in my view, the court is restrained in this way is, perhaps unfortunate, because the sentence imposed...is too low...
>
> However, where the choice is to increase the punishment to a level which is commensurate with the gravity of the crime producing the inequity of which I have spoken, the proper course is, I think, to dismiss the Crown's appeal."

41. In *DPP v Karazisis,* while accepting that the notion that Crown appeals should be *"rare and exceptional"* no longer applied to restrain the Court, but remained an imperative on the prosecution (at [120]-[123]), it was the approach taken in *Nikodjevic* rather than the approach taken in *Bulfin* which was adopted by the Court of Appeal at [109]. In *Karazisis,* as in *JW v R* (2010) 199 A Crim R 486, considerations of parity, delay, rehabilitation and the conduct of the Crown were held (amongst other matters) to be undiminished in relevance to the exercise of the Court's residual discretion not to intervene on Crown appeals: *Karazisis* at [99]-

[115]; *JW* [92]-[95]. *Karazisis* was delivered on the same day as the judgment in the appellants' matters. The passage in *Nikodjevic* referred to above was also specifically referred to with approval by the Western Australian Court of Appeal in *Marchese* at [30].

42. The decisions relied upon in *Harmouche, R v Harris* [2007] NSWCCA 130, *R v Elzakhem* [2008] NSWCCA 31 at [62], *R v Najem* [2008] NSWCCA 32; *R v Kumar and Feagaiga* [2008] NSWCCA 328 of *R v Diamond* (unreported CCA 18 February 1993), *R v Rexhaj* (unreported NSWCCA 29 February 1996), *R v Doan* (2000) 50 NSWLR 115 at [19], *R v Chen* [2002] NSWCCA 174, *Ismunandar and Siregar* [2002] NSWCCA 477 were all appeals by offenders. As they were not Crown appeals, they did not address the principles enunciated in *McIvor, Borkowski* and the decisions from other State jurisdictions discussed above.

43. In rejecting an argument that the *Harmouche* line of authorities was decided *per incuriam,* his Honour held (at [117]) that the weight of this submission was attenuated by the fact that *McIvor* was decided in ignorance of *R v Guthrie* [2002] NSWCCA 77. In *Guthrie*, however, Grove J held (at [18]) that, in that case, the fact of relative parity was *"cause for some restraint"*. Hulme J also failed to have regard to the earlier decision of *R v Bavin* [2001] NSWCCA 167, where Spigelman CJ had held that *"in the context of Crown appeals quite different considerations arise"*. Spigelman CJ went on to hold that *"....a sense of grievance that may be justifiable would remain if the Crown, in this case, was successful in this appeal, and the Court increased to any substantial degree the sentence imposed upon the appellant (sic) bringing it closer to what, in my opinion, would be regarded as an adequate sentence in all the circumstances of the case"*. The circumstance that the Crown appeal of the sentence of a co-offender had not been heard and was unlikely to be heard within a reasonable time was one informing the exercise of the discretion in that case.

44. His Honour also had regard to what was said to be the *"substantial support"* for the *Harmouche* line of authority that could be found in this Court's refusal to grant special leave in the case of *R v Kumar and Feagaiga* [2008] NSWCCA 328 (per Heydon and Kiefel JJ): [114], [115], [118]. Such an approach fails to recognise the nature and effect of a special leave application and the refusal of such an application in the absence of full argument: *cf* Gibbs CJ, Mason, Wilson and Dawson JJ in *AG (Cth) and The Commonwealth v Finch* (1984) 155 CLR 107 at 115 [13]; McHugh J said in *North Ganalanja Aboriginal Corporation and Waanyi People v Queensland* (1996) 185 CLR 595 at 6; *Collins v The Queen* (1975) 144 CLR 120 at 122; *Muir v The* Queen (2004) 78 ALJR 780; *United Mexican States v Cabal* (2001) 209 CLR 165 per Gleeson CJ, McHugh and Gummow JJ at [30]-[31][3].

45. Whereas Allsop P and McCallum J held that *McIvor* and *Borkowski* were correct and should be followed, Hulme J criticised the reasons of Heydon J in *McIvor* as speculative (at [120]) and then, having accepted that *"one body, Crown or Court, has displayed an absence of even handed treatment"*, held that *"I rather doubt that it will matter to an aggrieved offender that disparity was created by the Court of Criminal Appeal, rather than by a first instance judge"*: [121]. Contrary to *McIvor*, his Honour held that his own earlier decisions should be followed and that there should not be any principle to the effect that the Court of Criminal Appeal *"could not or should not"* intervene on a Crown appeal where to do so would *"create disparity"*: [126].

46. Hulme J went on to hold, without qualification, that the Court of Criminal Appeal was not bound by its earlier decisions: [118]: *cf Gett v Tabet* (2009) 254 ALR 504 at 561-566 [273], [277]-[295], 566-7; *Hili and Jones* (2010) 272 ALR 465 at 480[57]; *Australian Securities Commission v Malborough Gold Mines Ltd* (1993) 177 CLR 485; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Nguyen v Nguyen*

[3] On 13 April 2004, the grant of special leave was limited to the ground set out in the notice of appeal.

(1990) 169 CLR 245; *Queensland v Commonwealth* (1977) 139 CLR 585; *Chamberlain v The Queen* [1983] 72 FLR 1; *Transurban City Link Ltd v Allan* [1999] 95 FCR 553. It is submitted that his Honour thereby inverted the process, when he held (at [126]) that nothing persuaded him that his own reasoning was incorrect rather than considering whether binding, well reasoned authority based on those matters particular and essential to Crown appeals was "plainly wrong" and whether "compelling reasons" existed for departure.

47. McClellan CJ at CL held that *"when the Court considers it appropriate to increase a sentence it may do so notwithstanding that a sense of grievance may result. Only if the sentence would result in a justified sense of grievance being one defined by comparison with the sentence imposed on a co-offender who has been appropriately sentenced could issues of parity cause the court to reject the Crown appeal"*: [32]. Without analysis of the special considerations raised by *McIvor* and *Borkowski,* he held that the decision in *McIvor* should not be followed: [33]. As to his Honour's observations on *Borkowski* and *Cvitan* as turning on the circumstances of each case, see *Borkowski* at [70]-[72]. In *Cvitan* at [93], Simpson J summarised *Borkowski*:

> " ...in *Borkowski* this Court expressly held that the sentence under consideration was "manifestly inadequate to a very significant degree", but since the Crown appealed against one but not the other, declined to intervene. That was because intervention in one case and not the other would disrupt the relativities, and create unacceptable disparity"

Applying this authority, in *Cvitan* she held that to intervene in similar circumstances in that case:

> "would create inequity of the kind the principles of parity operate to avoid".

48. These principles were not applied in the appellant's appeal. As a consequence of the failure to follow *McIvor* and *Borkowski*, in New South Wales the Court of Criminal Appeal may, on a Crown appeal, be the source of the creation of unequal justice: *cf.* Allsop P and McCallum J at [8]. However the source of the principle of parity (whether described as strict or relative parity or proportionality or relativity) in sentencing as "*an aspect of equal justice that inheres the fabric of the law and in*

the exercise of judicial power" is one that elevates its consideration to *"one of importance, not only as part of the operation of the legal system to bring about just punishment to the individual, but also as part of the operation of the administration of justice as a whole as a consideration conformable with the avoidance of bringing about unjust results"*: per Allsop P and McCallum J at [3]-[4].

49. The potential for unjust results has also been extended by the analysis of Hulme J of principles to be applied on Crown appeals in relation to conduct or inaction of the Crown. This Court, five judge benches of the Court of Criminal Appeal of NSW and Victoria and the Court of Appeal in Western Australia have all held that the conduct of the Crown, delay occasioned through no fault of an offender and rehabilitation are matters attended by principles of restraint on Crown appeals: *Everett v The Queen* (1994) 181 CLR 295 per Brennan, Deane, Dawson and Gaudron JJ at 302-303, 305; *Malvaso v The Queen* (1989) 168 CLR 227 per Deane and McHugh J at 240, affirmed in NSW in *JW v R* (2010) 199 A Crim R 486 at [92]-[95]; *Karazisis* at [99]-[115] and *Marchese* at [25]-[40]. In those decisions the emphasis is on the Crown's conduct both on sentence and appeal, given the Crown's role in the fair, just and proper administration of justice and may constitute, in itself a *"bar"* to the success of an appeal: *JW* at [92].

50. However, the majority in the appellant's case held that *"the omission of the Crown to appeal from the sentence imposed on a co-offender...cannot always be regarded as a fault or for which the Crown is to be criticised. Furthermore, there will be occasions when the importance of imposing a proper sentence may well far outweigh any fault on the part of the Crown"*: per Hulme J at [132]. He went on to hold that conduct or inaction on the part of the Crown should be taken into account but *"should not otherwise be a bar to the success of the appeal"*: [133]. The failure to refer to the principles of restraint and the underlying considerations of fairness attending Crown appeals represents a significant *"watering down"* of the statements of principle in this Court and those outlined above. The result is that despite the considerations outlined by Allsop P and McCallum J attendant only in

Crown appeals, a respondent in a Crown appeal is now in no different position to an applicant seeking leave to appeal his sentence to the Court of Criminal Appeal.

51. In this manner, Hulme J held that he was *"not persuaded that the Crown should reject the Crown appeal upon the basis that to allow it will create disparity with the sentence imposed on Mr Taylor"*: [134]. The matters he took into account in so determining was particularised by his Honour as the maximum penalty, the standard non parole period and *"the extent of the inadequacy of the sentences"* imposed on the appellants (at [134]). Considerations of retribution and general deterrence were also taken into account: [134]. Other matters were not taken into account in determining whether or not to intervene: [136]. The resulting creation of disparity was said to have been given "some allowance" in determination of an appropriate sentence in re-sentencing the appellants: [142]. The residual discretion as it applied in the particular circumstances of the appellants was not referred to by Hulme J.

52. There are, it is submitted, several problems with this approach. In addition, the failure to take into account the considerations identified by Allsop P and McCallum J, his Honour cast an onus on the appellants to persuade the Court that it should not intervene on a Crown appeal. This reversed the onus on Crown appeals and inappropriately limited the relevant considerations on the determination of whether to intervene on a Crown appeal, including excluding matters such as conduct of the Crown, parity, delay and rehabilitation. Such matters have been expressly held to be relevant to the residual discretion in *JW* and *Karazisis,* which in turn affirmed the continuing application of this Court's decisions in *Malvaso* and *Everett.*

53. There was no mention of the discretion as it applied to the circumstances of each appellant in the majority judgment, nor were the factors of delay[4] or rehabilitation as considerations to be taken into account as relevant to whether to allow the appeals: [136]. Contrary to his Honour's statement at [136] that *"no other grounds*

[4] The time between the imposition of the original sentence and the judgment was approximately sixteen months. The substantial further rehabilitation was relevant to the exercise of the discretion, not only re-sentencing.

were advanced as to why, if the Court found that the sentences were manifestly inadequate, it should not allow the appeals and re-sentence", both appellants had specifically relied on the discretion on Crown appeals in submissions that the Crown appeal should be dismissed, and read affidavit evidence in support of this submission[5].

54. The appellants were originally sentenced on 14 August 2009. The original Crown notice of appeal was filed and served on 22 September 2009. The case was listed for hearing on 4 March 2010. On that date the matter was adjourned at the request of the then respondents as the decisions in *JW* and *Carroll* were reserved and were relevant to the proceedings, particularly as to the operation of s.68A *Crimes (Appeal and Review) Act* 2001 which had commenced on 24 November 2009 but applied to appeals *"commenced but not finally determined before the insertion of the section"*. That section precluded regard on a Crown appeal to double jeopardy considerations. It was relevant to the exercise and scope of the residual discretion. The decision in *JW* preserving the discretion and indicting the limited effect of s68A, was delivered on 22 March 2010. Approximately four months after this judgment, and consequent upon comments by the Court as to the proper content of notices of appeal on Crown appeals, the Crown filed amended notices of appeal on 12 July 2010 and then a further amended notice of appeal on 29 July 2010.

55. The Crown appeal was heard on 30 July 2010. By that time the appellants Green and Quinn had both progressed through the classification system. Both had further progressed with substantial reform. The appellant Green had commenced day leave. The appellant Quinn had commenced working in a position of responsibility that saw him work outside the gaol and had been attaining *"excellent"* results in his studies thereby improving his opportunities for employment upon release.

---

[5] *"R v Brett Andrew Green, Further Submissions on Behalf of the Respondent"* Paras [56]-[57], Affidavit of Jessica Latimore sworn 16.02.10 and affidavits of Brett Green sworn 18.2.10 and 28.7.10; *"R v Shane Darrin Quinn, Submissions on Behalf of the Respondent"*Paras [85]-[88], *"R v Shane Darren Quinn, Further Submissions on behalf of the Respondent"* at [5], [15], Affidavit of Denise Quinn sworn 26.2.10 and affidavits of Michael Giles, solicitor, sworn 1.3.10 and 29.7.10.

56. The Court of Criminal Appeal gave judgment on 17 December 2010, a delay of almost 5 months from the date of the hearing and 15 months since the service upon the appellants the notices of Crown appeal.

57. The ultimate assessment by Allsop P and McCallum J, in considering the residual discretion, was that they were not of the opinion that *"the degree of departure from the appropriate range is so great that it would be an affront to justice not to intervene..."* when considerations of equal justice and those matters pertinent to Crown appeals were taken into account: per Allsop P and McCallum J at [23].

10 58. It is submitted that the Crown appeal should have been dismissed. This is turn would see both appellants eligible for parole forthwith, Mr Quinn having been eligible to release to parole under the original sentence on 29 April 2011, and Mr Green having been eligible for release to parole under the original sentence on 16 May 2011.

PART VII: APPLICABLE STATUTORY PROVISIONS

Criminal Appeal Act 1912, s5D; *Crimes (Sentencing Procedure) Act* 1999, ss.21A, 44, Division 1A; *Lowe v The Queen* (1984) 154 CLR 606; *Hili and Jones v R* (2010) 85 ALJR 195 at [18]; [48]-[49]; *R v McIvor* (2002) 136 A Crim R 366 at 371-372 [10]-[11]; *R v Borkowski* (2009) 195 A Crim R 1 at 18-19; *Cvitan v R* [2009] NSWCCA 156 at
20 [93]-[94]; *R v Bavin* [2001] NSWCCA 167 at [60]-[71]; *JW v R* (2010) 199 A Crim R 486; *DPP v Karazisis; DPP v Bogtstra; DPP v Kontoklotsis* [2010] VSCA 350; *State of Western Australia v Marchese* (2006) 163 A Crim R 363 at [25]-[40]; *R v Davidson* (1999) 105 A Crim R 142; *R v Dowie* [1989] Tas R 167; *Everett v The Queen* (1994) 181 CLR 295 per Brennan, Deane, Dawson and Gaudron JJ at 302-303, 305; *Malvaso v The Queen* (1989) 168 CLR 227.

PART VIII: ORDERS SOUGHT BY THE APPELLANTS

(1) The appeal is allowed.

(2) The orders of the Court of Criminal Appeal made on 17 December 2010 are set aside.

30 (3) The Crown appeal to the Court of Criminal Appeal is dismissed.

Dated:

Counsel for Mr Green:

Tim Game
Forbes Chambers
Ph: 9390 7777
Fax: 9261 4600

David Barrow
Forbes Chambers
Ph: 9390 7777
Fax: 9261 4600

Email: cdarne@forbeschambers.com.au

Counsel for Mr Quinn:

Gabrielle Bashir
Forbes Chambers
Ph: 9390 7777
Fax: 9261 4600

Anita Betts
Ada Evans Chambers
Ph: 9286 3422
Fax: 9268 3488

Email: cdarne@forbeschambers.com.au