PARTIES:	DROULLOS, METCALFE & LAVER v THE QUEEN
TITLE OF COURT:	In the Court of Criminal Appeal of the Northern Territory of Australia
JURISDICTION:	Court of Criminal Appeal of the Northern Territory of Australia exercising Territory jurisdiction
FILE No:	CA 1, 2 and 3 of 1993
DELIVERED:	Delivered at Darwin 11 February 1994
HEARING DATES:	Heard at Darwin 29 November 1993
JUDGMENT OF:	Kearney, Angel and Mildren JJ

REPRESENTATION:

Counsel

Appellants:	R.J. Coates
Respondent:	T.M. Gardner

Solicitors

Appellants:	NT Legal Aid Commission
Respondent:	Australian Government Solicitor

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN

Nos. CA 1 of 1993
CA 2 of 1993
CA 3 of 1993

BETWEEN:

NICHOLAS DROULLOS, ROBYNE JODY METCALFE and GARRY ALBERT LAVER
Appellants

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, ANGEL and MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 11th day of February 1994)

KEARNEY J:

The appellants appeal against the severity of sentences imposed on them on 17 June 1991. In February 1993, some 20 months after being sentenced, they filed applications to extend the time within which to apply for leave to appeal; this was some 14 weeks after one Miles, the organizer of the criminal enterprise in which they had all participated, had had his sentence reduced on appeal. In May the appellants were granted the necessary extensions of time, and leave to appeal, by a single judge of this Court. This may indicate that his Honour considered the circumstances were very exceptional, or that there would be a real possibility of

a miscarriage of injustice if time were not extended and leave refused, or that there was some prospect of the appeals succeeding - see *Green v The Queen* (1989) 95 FLR 301 at 310-313, per Rice J; *Cookson v The Queen* (1989) 45 A Crim R 121 at 123-4, per Malcolm CJ; *McDonald v The Queen* (1992) 85 NTR 1 at 3-5, per Asche CJ; and *Jeffers v The Queen* (1993) 112 ALR 85. The appeals were heard together on 29 November, and stand for judgment today.

The factual background

All three appellants were recruited by Miles to travel to Thailand for the purpose of importing a quantity of heroin into Australia, as couriers. Miles went there himself, purchased a quantity of heroin and delivered it in Bangkok to the appellants who each carried part of it back to Australia. En route, they passed through Customs in several countries where the penalty for heroin trafficking is death. Having passed these Scyllas safely they were engulfed in Darwin by Charybdis in the form of Darwin Customs officers. Droullos was arrested on arrival in Australia at Darwin Airport on 7 December 1990 with 148.9 grams of impure heroin (101.2 gms pure). Laver and Metcalfe were arrested at Darwin Airport on 9 December 1990 with 341.51 and 156.82 grams of impure heroin respectively (239 and 109 gms pure). Miles was also arrested at Darwin Airport on 9 December 1990; he was not carrying any heroin. The market value of all the heroin was between $500,000 and $2,000,000; the total quantity, some 647.23 gms (449.2 gms pure), was the second largest quantity of heroin ever detected on importation in the Territory.

The sentencing by the trial judge

On 2 May 1991 Laver and Metcalfe each pleaded guilty before Gray A/J to a charge of importing heroin into Australia, contrary to par233B(1)(b) of the Customs Act 1901 (C'th). On 7 June Droullos pleaded guilty to an identical charge. The quantities of heroin each of these couriers imported far exceeded the statutory trafficable quantity of 2gms; the maximum penalty they faced, in force since 1979, some 11 years before they embarked upon their criminal enterprise, was a fine not exceeding $100,000 or imprisonment for up to 25 years, or both. On 17 June 1991 Laver and Metcalfe were each sentenced to 7 years imprisonment for their offences, a nonparole period of 3 years and 9 months being fixed in each case. On the same day his Honour sentenced Droullos to 8 years imprisonment, fixing a nonparole period of 4 years and 3 months.

Miles had pleaded guilty before Gray A/J on 2 May 1991 to 3 charges that he was "knowingly concerned" in each of the appellants' importation of heroin, contrary to par 233B(1)(d) of the Customs Act; he was sentenced on 17 June 1991 to an effective sentence of 11 years imprisonment, the nonparole period being 6 years.

In sentencing the appellants and Miles, Gray A/J treated Miles as the "undoubted organizer" of this "very large heroin importation" in which he played "a central executive role". His culpability was therefore "considerably more serious" than any of the three appellants. His Honour treated Droullos as having had a "rather greater" degree of involvement with Miles than had Metcalfe and Laver. Since Droullos was "much more closely involved" - he had shared a room in the Bangkok hotel with Miles,

and travelled with him to Chiang Mai to collect the heroin - and had displayed no remorse or contrition, his Honour considered there were sufficient grounds to distinguish him from Metcalfe and Laver, when it came to sentencing. His Honour treated Metcalfe and Laver as being equally (and least) culpable. It can be seen that these views were reflected in the carefully-structured sentences which his Honour imposed; none have been effectively challenged on these appeals.

Mr Gaffy QC, senior counsel for Miles, had submitted that sentences in the Territory for heroin importation were somewhat lower than those imposed elsewhere in Australia. The Crown's response was that "any such tendency should be arrested and reversed." His Honour was referred by counsel to sentences imposed in a number of Territory cases involving the importing of heroin and to some cases in Carter's 'Australian Sentencing Digest' (1985). After submissions were completed his Honour collated some further sentencing information about Territory, Victorian and New South Wales sentences.

His Honour noted when sentencing all four on 17 June 1991, that the alleged lower sentencing structure in the Territory was said to be attributable to an (undescribed) "Territory factor", observing that it was a "general consideration which the court was invited to take into account during the course of counsels' pleas". He stated that he had collated certain sentencing information which, despite its "limits", reinforced his "impression that the range of sentences in the Territory is somewhat lower than might be expected". Earlier in sentencing, he had said that whether or not it was attributable to a "Territory factor" -

> "- - - it is, I think, apparent that sentences in the Territory for heroin importation tend to be significantly shorter than those imposed elsewhere in Australia."

His Honour said that he -

> "should attach some weight to this consideration [that is, that Territory sentences for this offence were 'somewhat lower than might be expected'] because the Court should always seek to achieve consistency in sentencing". (emphasis mine)

This latter observation gave rise to an important general issue in Miles' subsequent appeal; see p9. It is desirable to consider how it was there dealt with; I turn to Miles' appeal, the outcome of which clearly prompted the present appeals.

Miles' appeal against sentence

Eleven days after being sentenced, on 28 June 1991, Miles filed an application for leave to appeal against the severity of his effective sentence. On 18 November 1992 he succeeded before the Court of Criminal Appeal. He was granted leave to appeal and his appeal was allowed: his effective sentence was reduced from 11 years to 9 years imprisonment, and the nonparole period from 6 years to 4 years and 6 months.

The Court noted that Miles had "made a statement to the police furnishing them with certain information". As is often the case the contents of the statement were not publicly disclosed and this Court is not aware of them. The Court observed:-

> "It is plain from [the statement's] contents that [Miles] displayed a high degree of co-operation with the police"

The observation was significant as s16A(2)(h) of the Crimes Act 1914 (C'th) provides that a sentencing Court must take into account, inter alia, "the degree to which the person has

co-operated with law enforcement agencies in the investigation of the offence or of other offences." The Court of Criminal Appeal treated Miles' making of this statement as "a most material factor to be taken into account when determining the appropriate sentence to be passed" on him. It is clear, I think, that Gray A/J had not given as much weight to that sentencing factor as the Court considered it merited; his Honour said, in sentencing Miles:-

> "[Your counsel] placed reliance upon the fact that you had made admissions, and the help you are said to have given to the Federal Police. It is true that you sought an interview with Sergeant Taylor some time after your arrest. You gave certain information to Sergeant Taylor, concerning the Darwin drug scene.
>
> It is said on your behalf that you imperilled your life in so doing. It is clear that the information, most of which was already known, did not materially assist the police. It is also an inescapable conclusion that you were primarily motivated by a desire to improve your own position. Nevertheless some credit should be given you and I take the fact that you provided information into account as a mitigating circumstance." (emphasis mine)

The Court, I think, placed greater weight than Gray A/J on the aspect that Miles had volunteered the statement, and on his claim to have thereby endangered his life.

The Court nevertheless considered that Miles' effective sentence of 11 years imprisonment was "within the range within which a sentence could appropriately have been imposed" and observed that -

> "Under ordinary circumstances it would not be appropriate for this Court to vary the sentence imposed by the trial judge if the sentence fell within the range of sentences which could properly be imposed in respect of the relevant offence". (emphasis mine)

However, there were two matters raised by Miles which, taken together, persuaded the Court that it should "take a somewhat

different approach on the hearing of the appeal from that which it would ordinarily take". I turn to these matters.

(i) The fact that Gray A/J's sentencing research was not drawn to counsels' attention

The first of these matters was that the result of his Honour's researches into sentences imposed for this offence in the Territory and in Victoria and New South Wales had not been drawn to the attention of counsel, before he imposed sentence. Miles argued that he was thereby "denied natural justice because his counsel was deprived of the opportunity of addressing" on the significance of that information for sentencing. Taken by itself, this is somewhat surprising since his Honour treated the information as supporting Mr Gaffy's thesis that Territory sentences for heroin importation were somewhat lower than elsewhere.

The Court rejected this submission, stating:-

> "We do not think the applicant was denied natural justice by the trial judge. A sentencing judge is not obliged to relist a matter for further hearing and submissions merely because he proposes to give consideration to standards of sentencing in other jurisdictions."

I respectfully agree. It is entirely proper to do so; see, for example, the 33 additional cases examined by the Court and set out as a schedule to *R v Bird* (1988) 56 NTR 17. I venture to repeat certain remarks I made in *Tarry v Pryce* (1987) 24 A Crim R 394 at 400:-

> "- - - at no time prior to delivering judgment - - - did the learned magistrate mention to the parties the existence of the statistical material to which he referred in his judgment; - - - . It was submitted that his Worship erred in failing to do so and thus denying counsel the opportunity of dealing with those matters.

> No doubt it would have been preferable for the learned magistrate to have done so, but reasons for sentence are to be treated on a quite different plane to reasons for conviction. However, the approach adopted meant that it was necessary for counsel to be afforded the opportunity of dealing with those materials before me - - -"

The Court considered that "it may be wise" for a sentencing judge to relist for further hearing and submissions in such circumstances, and concluded that -

> "having regard to the extensive nature of the material considered by the trial judge in this case we think counsel should have been afforded the opportunity of addressing upon it before sentence was passed".

It appears that the Court considered that the requirements of procedural fairness meant that it was desirable in the particular circumstances of the case that counsel be permitted to address on the additional information before sentence was passed, but the fact that his Honour had not taken this course did not amount to a breach of the requirements of natural justice so as to vitiate his sentencing. That is to say, it did not by itself constitute appealable error.

(ii) The meaning of the sentencing judge's remarks as to the desirability of consistency in sentencing

The second matter which, taken with (i) above, resulted in the Court taking a "somewhat different approach" arose from his Honour's remark that he would give

> "- - - some weight to this consideration [that is, that Territory sentences for this offence were 'somewhat lower than might be expected'] because the Court should always seek to achieve consistency in sentencing." (emphasis mine)

Miles submitted that by this his Honour meant that in sentencing he was seeking to achieve consistency with what he believed were

the somewhat higher sentences imposed interstate for this type of offence, with the result that the sentence he imposed on Miles could be a sentence higher than - and inconsistent with - other Territory sentences for comparable offences.

The Court said:-

> "Counsel for [Miles] took his Honour's words as conveying that he was intending to impose a sentence somewhat higher than would normally be imposed in the Territory for this class of offence. We doubt whether that is a proper interpretation of what his Honour said. Nevertheless, the matter is not free from doubt." (emphasis mine)

The same point was raised before this Court; see Ground 2 at p17. I may say immediately that, reading his Honour's remarks in the light of the way the matter had been raised before him, I consider the submission has no merit; to the contrary, I consider that his Honour was clearly indicating that he aimed to achieve consistency in sentencing with what he perceived to be the somewhat lower level of Territory sentencing, which had been the thrust of Mr Gaffy's submission. It was a consistency which he achieved since, as the Court recognized, the sentence he imposed lay within the proper range in the Territory.

The Court, incidentally, did not share Gray A/J's view that sentences in the Territory for importing heroin were somewhat lower than elsewhere. It said:-

> "Our impression from the sentences imposed in Lowther, Braam and Druett is that sentences for this class of offence in the Territory are no less severe than in other jurisdictions in Australia. However, there would need to be more material before the Court before a firm conclusion could be reached on the matter."

I respectfully agree with this observation. It is obviously desirable that breaches of Commonwealth laws, the national laws of Australia, be attended by generally similar consequences throughout Australia. Sentencing judges bear this general objective in mind, though bound by the sentencing structure for those offences in their own jurisdiction; see the approach indicated in *R v Jackson* (1972) 4 SASR 81 at pp91-2, the cautionary observations by Roden J in *R v Watene* (1988) 38 A Crim R 353 at p355, and the observations of members of the High Court in *Leeth v The Commonwealth* (1991-2) 174 CLR 455, especially at p476 per Brennan J. My own general impression is that sentencing in the Territory tended to be somewhat lower than elsewhere in the past, but not now; cf Potas and Walker 'Sentencing the Federal Drug Offender' (1983).

(iii) The conclusion of the Court in *Miles*

As noted at p6, the Court recognized that since Miles' sentence of 11 years imprisonment was "within the range of sentences which could properly be imposed in respect of the relevant offence", the Court would not ordinarily reconsider it. It continued:-

> "Nevertheless we think the observations made by his Honour with reference to the alleged 'Territory factor' justify this Court taking a somewhat different approach on the hearing of the appeal from that which it would ordinarily take".

It seems from this observation that it was the fact that the Court was "not free from doubt" as to whether his Honour intended "to impose a sentence somewhat higher than would normally be imposed in the Territory" which was regarded as the justification for the Court "taking a somewhat different approach from that which it

would normally take." However, the Court then proceeded to rely on both matters (i) and (ii) above, viz:-

> "This circumstance [that is, the doubt as to his Honour's intention in sentencing, in (ii) above] together with the fact that counsel did not have an opportunity of addressing his Honour on the additional material unearthed by him leads us to the view that, on the special facts of this case, the appropriate course for the Court to adopt is to grant leave to appeal and to determine what the Court considers to be an appropriate sentence to be passed on the applicant. If that sentence is somewhat lower than [the sentence] imposed by his Honour, then we think it should be imposed notwithstanding that the sentence of eleven years is within the range within which a sentence could appropriately have been imposed."

The Court then turned to consider what would be "an appropriate sentence" for Miles. It said:-

> "We do not dissent from his Honour's opinion that the Court has a clear duty to impose a stern penalty on the applicant. But that having been said, there are other circumstances which, to our minds, justify the imposition of a sentence somewhat shorter than that imposed by his Honour."

It then proceeded to itemize these "other circumstances" favourable to Miles:-

> " There is no suggestion that the applicant had any involvement in the drug trade otherwise than his involvement in the importations which form the basis of the charges to which he pleaded guilty. He is a man of twenty-eight years with no previous convictions. He is also entitled to have taken into account in his favour the plea of guilty and his ready co-operation with the authorities: *R v Winchester* (1992) 58 A Crim.R 345 at 350; see also, s.16A(2)(g) and (h) of the Crimes Act 1914 (Cth). In *Winchester* it was said (at p350) that the reduction in sentence by reason of an early guilty plea "should be substantial and it should be seen to be such". (emphasis mine)

As to this passage three observations may be made.

First, the "circumstances" referred to are amongst those considered by Gray A/J when sentencing. It appears that the Court considered that together they carried greater mitigating weight

than had his Honour; but see its clarificatory remarks at p14 when re-sentencing.

Second, the plea of guilty was, per se, a mitigating factor by virtue of s16A(2)(g) of the Crimes Act. The general approach to such a plea as outlined in *Winchester* (supra) applies to Commonwealth offences in this jurisdiction (as opposed to the plea to Territory offences where its different nature is set out in *R v Jabaltjari* (1989) 64 NTR 1 at pp6-16, per Asche CJ.) Miles' "ready co-operation with the authorities" is a clear reference to the statutory factor referred to in s16A(2)(h) of the Crimes Act (p5); it refers to Miles' statement from which the Court concluded he had "displayed a high degree of co-operation with the police" (p6).

Third, although the Court here set out 4 mitigating factors which justified a "somewhat shorter" sentence - Miles having no prior involvement in the drug trade, and no prior convictions, his plea of guilty and "ready co-operation with the authorities" - without seeking to distinguish between them as to their respective weight, it is clear from the authorities that in sentencing for this offence not very much weight is to be given to the first two factors. The Court stressed the specific factors to which it in fact gave weight, when proceeding to re-sentence; see p14.

The Court then referred to the sentences imposed in the "only three cases in the Territory in recent years which have had any comparability with the present case"; these were *Lowther* (1990), *Braam* (1990) and *Druett* (1989). It discussed these cases at some length and clearly sought to adjust the sentencing of Miles

so that it fitted in some appropriate way with the sentences imposed in those cases, viz:-

(a) It considered "that a sentence somewhat shorter than that which was imposed on Lowther [10 years imprisonment, non-parole period of 5 years] would be appropriate in the present case".

(b) It considered that Miles' sentence [11 years imprisonment, non-parole period of 6 years] "was high when compared with the sentence [13 years and 6 months] and non-parole period [6 years and 9 months] fixed in Braam's case". We were informed that the Court was told that Braam, found guilty after trial of being in possession of 5.46kg of pure heroin, street value about $17 million, a commercial quantity which carried life imprisonment, had his sentence and non-parole period reduced by ¼ because of his co-operation with the law enforcement agencies - that is, from 18 years (non-parole period 9 years) to 13½ years (non-parole period 6¾ years). We do not know by how much Gray A/J had reduced Miles' sentence for his information to the Police "concerning the Darwin drug scene", though it resulted in "some credit" to him.

(c) It considered that various mitigating factors in Miles' case, identified and stated, "are all matters strongly suggesting that the sentence imposed on him would be substantially less than

that [12 years imprisonment, non-parole period of 6 years] imposed on Druett".

The Court, being of opinion that Miles was entitled to "a substantial reduction in his sentences because of his early plea of guilty and his high degree of co-operation with the authorities", proceeded to sentence in the following terms:-

> "Taking into account all the matters which are referred to in s.16A of the Crimes Act and to the other matters to which regard should be had, and bearing in mind in particular that he is a first offender, we think the appropriate sentence which should be imposed on Miles is a term of imprisonment of nine years. We fix a non-parole period of four years and six months. Had there been no reduction on account of the co-operation with the authorities, the sentence would have been eleven years with a non-parole period of six years." (emphasis mine)

It is the last sentence emphasized above which to my mind is of major importance in the present appeals. It is clear from that sentence that in the end the only consideration which persuaded the Court of Criminal Appeal when re-sentencing to impose a lower sentence on Miles than that imposed by Gray A/J was Miles' "co-operation with the authorities" about the mitigating effect of which it had taken a different view to Gray A/J; see p6. The determining factor for the Court could not be more explicitly stated. It seems inescapable to me from the Court's consistent use of language throughout its judgment that its words "co-operation with the authorities," were a re-iteration of what it had earlier described (p6) as Miles' "high degree of co-operation with the police" in giving them a statement which the Court considered "a most material factor to be taken into account when determining the appropriate sentence to be passed on him."

The Court added the following observation:-

> "We are conscious of the fact that the sentences imposed upon the applicant's co-offenders are not subject to review by us. The fact that they have not appealed does not, however, mean that the appropriate sentence should not be passed in the present case. It is open to the other offenders to seek leave to appeal out of time against the sentences imposed upon them."

I note in passing that the Crimes Act (C'th), although referring in s16A(2)(h) to an offender's degree of co-operation with law enforcement agencies as a factor going to mitigation of sentence, has nothing corresponding to the detailed provisions in s442B of the Crimes Act (NSW), introduced last year. The utility of such a provision spelling out in detail the considerations relevant to assessing the extent of leniency to be afforded for co-operation, is obvious. Meanwhile, the case law spells out some relevant considerations; see, for example, *R v Cartwright* (1989) 17 NSWLR 243.

The present appeal

I turn to the present appeal. The appellants each rely on the same 3 grounds of appeal.

Ground 1

The first is that Gray A/J in sentencing relied on his own researches as to sentences imposed in the Territory and elsewhere in Australia, without first offering counsel an opportunity to make submissions on those matters. That ground was also relied on by Miles in his appeal; see pp7-9. Like the Court in Miles' appeal, I consider there is no substance in it. As noted above this was one of the two linked circumstances - the other being the doubt as to whether it was Territory sentences or sentences imposed elsewhere in Australia which his Honour had

in mind when seeking to achieve consistency in sentencing - which together persuaded the Court of Criminal Appeal to uphold Miles' appeal, and to re-sentence him.

Both of these matters must be considered in relation to all 3 appellants. I have already indicated the view which I take; see pp9-10. Although I do not share the doubt of Court of Criminal Appeal in *Miles* as to the particular sentences with which Gray A/J sought to achieve consistency, in my opinion justice to the 3 appellants, in light of the approach taken by that Court in Miles' appeal, requires that this Court, in exercising power under Code s411(4), now adopt the course taken by that Court, and decide whether in light of the sentence ultimately imposed on Miles, sentences other than those imposed on the appellants are "warranted in law and should have been passed" on them. That approach may not sit well with the principles upon which an exercise of a sentencing discretion should be reviewed by an appellate Court pursuant to s411(4), as set out in *Cranssen v The King* (1936) 55 CLR 509 at pp519-520, but the fact that Miles' sentence has now been reduced makes it necessary. Ultimately, there are no scales other than the scales of justice. In terms of *R v Radich* [1954] NZLR 86 at p87, Miles' re-sentencing gives rise to "exceptional circumstances" for present purposes. The re-sentencing of Miles may be treated as akin to "new evidence" in this Court; see the commentary on *Russo* in (1979) 3 Crim. L.J. 220. Whether different sentences should be passed on the appellants in the light of Miles' re-sentencing, may be discussed in the context of the other 2 grounds of appeal.

Ground 2

Ground 2 is as follows:-

> "The learned sentencing Judge erred in sentencing the co-accused Brett Vernon Leslie Miles by failing to give counsel for Miles an opportunity to make submissions on the statistical material gathered by His Honour. This error resulted in an excessive sentencing being imposed on the co-accused Brett Vernon Leslie Miles which error lead (sic, led) to an excessive sentence being imposed on the applicant." (emphasis mine)

I consider there is no substance in this ground. The Court of Criminal Appeal in *Miles* did not consider that the failure to give Miles' counsel the opportunity to make submissions was a denial of natural justice, or an error in law which such a denial would entail; see pp7-8. In re-sentencing Miles the Court stated explicitly that :-

> "Had there been no reduction on account of the co-operation with the authorities, the sentence would have been 11 years with a nonparole period of 6 years [that is, a sentence identical with the sentence imposed by Gray A/J]."

It is clear from this that the sentence of 11 years imprisonment imposed by Gray A/J on Miles was higher than appropriate only because Miles' "co-operation with the authorities" called for a greater reduction than his Honour had given. That is, Miles' plea of guilty and the other mitigating factors the Court mentioned (at pp11,12 and 14) would not, in its opinion, have led to a sentence less than 11 years imprisonment. In other words, setting aside the factor of Miles' "co-operation with the authorities", the Court's view of the appropriate sentence for Miles was identical with that of Gray A/J. The error by Gray A/J lay in giving insufficient weight to Miles' "co-operation with the authorities"; that was a mitigating factor personal to Miles, arising from what he did following his arrest, and did not bear upon his culpability

for his crimes, or upon the relative culpability of the appellants. Are the appellants able to point to any similar factor on their part, post-arrest "co-operation with the authorities" or some other mitigating factor, to which sufficient weight was not given when sentencing? I do not think so.

On that basis I consider that it could not be said that the difference between the sentences imposed on any of the appellants and Miles is such as to show that the appellants' sentences are manifestly excessive. With respect, Gray A/J sentenced the appellants with meticulous care. His Honour rightly noted that -

> "- - - when a court is dealing with those who have chosen to take part in the movement of heroin for commercial purposes, very little weight can be given to mitigating factors which are personal to the offender. This is so because the court's obligations to impose deterrent punishment far transcends all other sentencing considerations."

I respectfully agree with his Honour that a person contemplating engaging in this "malicious trade with all its attendant misery, horror and death" -

> "- - - must be made to realise that the consequences of detection will be catastrophic regardless of arguments about good character and the like."

His Honour took into account, inter alia, that Ms Metcalfe had provided "eventual full co-operation with the Police". He also took into account that Mr Laver had been frank with the Police and "offered to give evidence against Miles if that would prove necessary." It appears from what we were told by Mr Gardner that it was only after the Police had put to Mr Laver that Miles had been on the same flight - the Police having prior knowledge of an association between Metcalfe, Laver and Miles -

that Laver and then Metcalfe admitted to Miles involvement in the criminal enterprise.

His Honour noted that Mr Droullos "told the Police a completely false story after his interception at Darwin," and maintained it "until about 3 weeks later when the overwhelming evidence persuaded him to tell a story which is probably closer to the truth." That is to say, that Miles had been the organiser.

> His Honour also stated that
> "- - -in each case I have taken into account the matters specified in s16A - - of the Commonwealth Crimes Act insofar as they are relevant."

I consider that the sentences imposed upon the appellants are well within the proper sentencing range for their offences; apart from any argument based upon disparity with Miles' sentence, they are not demonstrably wrong or vitiated by error. I bear in mind the seriousness of the criminality of drug couriers, repeatedly stressed by the courts. The approach to sentencing "mere couriers" outlined by Street CJ in *Farrugia* (unreported, NSW, 31 March 1983), set out in Rinaldi: Drug Offences in Australia (1986), Vol 1 at p83, has been stiffened in recent years; see, for example, *R v Poyner* (1986) 17 A Crim R 162 and the observations of Kirby P in *Laurentiu and Becheru* (1992) 63 A Crim R 402 at pp405-6.

> Ground 3
>
> Ground 3 is as follows:-
> "The sentence imposed on the applicant is disproportionate to the [ultimate] sentence [of 9 years imprisonment, nonparole period of 4½ years] imposed on the co-accused Brett Vernon Leslie Miles."

This ground raises the question of whether there is now an unjustified disparity of sentencing as between Miles and the

appellants, in the sense that the sentencing now shows a manifest failure to differentiate properly between them.

Although the appellants' sentences are unexceptionable, should this Court nevertheless interfere on the basis that the proportion between the 4 sentences imposed by Gray A/J has now been changed, and there is now a marked disparity between them in the sense mentioned above? I bear in mind the personal basis on which the Court reduced Miles' sentence and nonparole period, and the force of the argument that therefore, in considering disparity, Miles' original sentence of 11 years (6 years nonparole) remains the point of reference. Miles' new sentence and nonparole period must be regarded as his appropriate sentencing. I have finally concluded that while there is no marked disparity in the structure of the head sentences there is now a manifestly inadequate differentiation in the appellants' respective nonparole periods compared with Miles such that in accordance with the principles set out in *Lowe v The Queen* (1984) 154 CLR 606 an understandable and justifiable sense of grievance on the part of the appellants arises, an appearance that justice has not been done to them, which this Court must now correct. That is to say, bearing all relevant matters in mind, at the end of the day the re-sentencing of Miles has resulted in a disproportion as regards the nonparole periods which is manifestly excessive both when viewed subjectively by the appellants and objectively by the community. To correct it I consider that the nonparole periods of the appellants, not in themselves manifestly too long, must be reduced, even to a point where they might otherwise be regarded as inadequate.

Accordingly I concur in the orders proposed by my brethren.

Angel and Mildren JJ

The facts are set out in the judgment of Kearney J a draft of which we have had the advantage of reading.

The Court of Criminal Appeal having resentenced in the case of *Miles*, Mr Gardner, who appeared for the Crown, conceded that there was a basis to re-examine afresh the sentences imposed upon the appellants. Bearing in mind that the Court of Criminal Appeal considered that, had there been no reduction to Miles' sentence on account of his co-operation with the authorities, an appropriate sentence would have been eleven years with a non-parole period of six years, Mr Gardner submitted that there is no substance to the argument put on behalf of the appellants that the head sentences originally imposed by Gray AJ now lacked proportionality to the head sentence of nine years imposed by the Court of Criminal Appeal. We agree. We also accept Mr Gardner's submission that the head sentences imposed by Gray AJ upon the appellants are unremarkable. In our opinion the head sentences imposed by Gray AJ were appropriate in all of the circumstances, and so far as they are concerned no substantial miscarriage of justice has occurred.

As to the non-parole periods fixed by Gray AJ, Mr Gardner conceded that there may be a basis for adjustment in that, compared to the non-parole period of four years and six months fixed for Miles, this was too close to the non-parole period of four years and three months fixed for Droullos, and three years nine months fixed for each of Laver and Metcalfe, bearing in mind the respective culpability of each of the appellants and of Miles and the factors personal to each of them. We agree with Kearney J, for the reasons that he gives, that there is now a disparity in the respective non-parole periods such as to engender a justifiable sense of grievance on the part of the appellants. We would add that the disparity is such that justice has not been done: *Lowe v The Queen* [1981] 154 CLR 606. In our opinion the non-parole period in the case of Droullos should be reduced to three years six months

(effective from 7 June 1991) and in the case of Laver and Metcalfe to three years (effective from 2 May 1991).

Accordingly, we would propose the following orders:

1. That the appeals against the appellants' respective head sentences be dismissed, and those sentences affirmed.

2. That the appeals against their respective non-parole periods be allowed, the non-parole periods previously fixed be set aside, and lieu thereof new non-parole periods be fixed as follows:

   (a) Nicholas Droullos: a non-parole period of three years six months, to take effect from 7 June 1991.

   (b) Gary Albert Laver and Robyne Jody Metcalfe: non-parole periods of three years, to take effect from 2 May 1991.

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