

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Briones* [2017] QCA 265

PARTIES: **R**  
**v**  
**BRIONES, Eunice**  
(appellant/applicant)

FILE NO/S: CA No 220 of 2016  
DC No 6 of 2015

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Roma – Date of Conviction: 14 April 2016;  
Date of Sentence: 15 April 2016 (Moynihan QC DCJ)

DELIVERED ON: 7 November 2017

DELIVERED AT: Brisbane

HEARING DATE: 26 July 2017

JUDGES: Sofronoff P and McMurdo JA and Douglas J

ORDERS: **1. The appeal against convictions be dismissed.**  
**2. The application for leave to appeal against sentence be refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of setting fire to her house and attempting to dishonestly obtain money from her insurer – where the appellant’s house near Roma was substantially damaged by a fire and, on the following day, made a claim under her fire insurance policy for the loss –where, six weeks prior to the fire, the appellant caused the value of her home insurance policy to increase from \$280,000 to \$400,000 – where there was evidence that the appellant intended to sell her house and move to the Philippines and had already begun making payments for that purpose – where three lay witnesses and an expert witness described the fire in ways consistent with it being deliberately lit – where the Crown alleged that the appellant had procured a Mr Hameed to set the fire – where there was extensive evidence linking the appellant to Mr Hameed, such as phone records and money transfers to him totalling nearly \$30,000 – where there was extensive evidence linking Mr Hameed to the fire, such as a booking on a bus into Roma the day before the fire, a one night stay in a Roma hotel on the day of the fire, a bus booking out of Roma on the day after the fire, and hire car

documentation – where the appellant had been stockpiling about five “doona bags” full of clothing at a friend’s house – where the appellant had stored items of apparent sentimental value, such as 300 family photographs and her citizenship papers, in her car – where the appellant’s explanations for the suspicious circumstances were unconvincing – whether it was open to the jury to conclude, beyond reasonable doubt, that there was arson or that she was a party to such an offence – where the applicant also argued that her sentence of three and a half years’ imprisonment was manifestly excessive – where the offending was premeditated and presented a danger to neighbours, their property, and fire-fighters – where the sentence was consistent with other authorities from this Court – whether the sentence was manifestly excessive

*R v Leigh* [1996] QCA 561, cited  
*R v Sparks* [2004] QCA 454, cited

COUNSEL: The appellant/applicant appeared on her own behalf  
M T Whitbread for the respondent

SOLICITORS: The appellant/applicant appeared on her own behalf  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.
- [2] **McMURDO JA:** The appellant owned a house in Yuleba, near Roma, which was substantially damaged by a fire on 26 March 2014. On the following day, through a friend, she made a claim under her fire insurance policy for the loss.
- [3] She was charged with setting fire to the house and attempting to dishonestly obtain money from her insurer. After a four day trial before a jury in the District Court, she was found guilty on each charge. She was sentenced to a term of three and half years’ imprisonment for the arson offence and a two year concurrent term for the attempted fraud offence. She appeals against her convictions and seeks leave to appeal against her sentences.
- [4] The appellant was represented by counsel at her trial but is unrepresented in this Court. She makes many arguments, some of which are not obviously related to one or more of the grounds set out in her notice of appeal. Before going to those arguments, I will discuss the prosecution case at the trial.

### **The prosecution case**

- [5] The appellant purchased the house in 2011 for a price of \$65,000. She insured it for a value of \$350,000, which was increased (by the insurer) in early 2012 to a value of \$371,000. On her instructions to the insurer, the insured amount was decreased to \$265,000 for the year commencing February 2013. The contents were then insured for about \$22,000. In January 2014, by the terms of the policy, the insured amounts for the house and contents increased to about \$280,000 and \$23,000 respectively.

- [6] However, on 16 February 2014, the appellant caused the insured amounts to be increased, from about \$280,000 to \$400,000 for the house and from about \$23,000 to \$50,000 for the contents.
- [7] The appellant's circumstances at the time of the fire were as follows. The appellant was then aged 50 years. She had been born in the Philippines where she worked and studied before marrying an Australian man and coming to this country, where she had worked in hospitality, teaching and as a nurse's assistant in aged care. She told an investigator appointed by the insurer that she had no money or property in the Philippines, this house was her only property, she earned about \$45,000 a year and she was divorced. She owed about \$56,000 to her bank.
- [8] A friend of the appellant, Evelyn Pagtalunan, testified that the appellant had told her that she planned to purchase a property in the Philippines with her adult children. When interviewed by police, the appellant said that she was in the process of buying a house in the Philippines and that amounts totalling \$9,500 paid in a period from October to December 2013, were for such a purchase. The prosecution case was that the appellant had no means of completing that purchase and that this was a likely motive for the offences.
- [9] The evidence that the house was deliberately set on fire came from four witnesses. One witness, who lived in the same street, said that she was outside of her house, near the family car, when she smelt fuel and noticed the light of the fire, coming through a window in the house. She saw a man running fast to a car which was then driven to the corner of the street where it stopped. The witness said there was then a "big bang" from the house, before the car drove away and a second bang occurred.
- [10] Another witness, who also lived in the street, said that at about 8.30 or 9.00 pm on that evening, he heard "quite a loud bang." He then saw a car "flash past" before he went outside and saw that the house was on fire.
- [11] A third witness, another resident of the street, said that on this night he was in bed when he heard a noise, which was so loud that it made him think that a tree had fallen down. His own house shook with the noise. He went outside and saw that the appellant's house was on fire.
- [12] The fourth witness was a forensic scientist, who excluded the possibility that the fire had been caused by an electrical malfunction, upon the basis of the extent of the fire and what those other witnesses had said about hearing an explosion. He said that such a quickly spreading fire, as described by the witnesses, was consistent with the use of an ignitable liquid, as was the fact of the loud explosion. He observed that photographs of the scene showed that louvre windows had been open, which could have assisted significantly in the development of a fire by providing fresh oxygen.
- [13] No one was in the house that night: the appellant was away. A friend of the appellant, Ms Khan, testified that the appellant stayed with her at Ms Khan's mother's house in Sydney from 25 to 28 March 2014.
- [14] The case was that the appellant procured a person called Ali Mahdi Hameed to set fire to the house. The evidence linking the appellant to this person was extensive. In a period from 19 February to 18 March 2014, the appellant made a number of payments to this man's bank account. The first of those payments was a transfer of \$500, described in the appellant's bank account as being "for mom". On 12 March

2014, an amount of \$2,000 in cash was withdrawn from the appellant's account with the Commonwealth Bank in Roma and deposited, at an ATM machine in Roma, to the credit of an account in the name of Ali Mahdi Hameed. The address of Mr Hameed, on his bank statement, was in Western Australia. On 16 March, the appellant electronically transferred \$10,000 to that account, labelling that transaction as "truck". On the following day, she transferred a further \$10,000 to the same account, labelling the transaction as "truck repair." And on 18 March 2014, she transferred \$3,200 and a further \$1,000 to the same account, labelling those transactions as "truck repair" and "truck transfer" respectively.

- [15] On the appellant's mobile phone there were photographs of a person similar in appearance to a photograph, on a Queensland driver's licence, of a person there named as Mahdi Hameed Ali.
- [16] Ms Pagtalunan identified, from a police photo board that included that driver's licence photograph, the man to whom she had been introduced as "Ali" by the appellant in the period of January to March 2014.
- [17] It was formally admitted that from 16 to 21 March 2014, the appellant contacted a person on a total of 18 occasions by calling the telephone number which was registered to a Mr "Ali Elhousseini".
- [18] There was extensive evidence linking this man to the fire. A passenger under the name "Mahdi Ali" was booked to travel on a Greyhound bus from Brisbane to Roma on 25 March 2014, to arrive in Roma at 3.30 pm. On that date, that same bank account of Ali Mahdi Hameed was accessed for a transaction at a shop in Roma. On that day, it was also the subject of a withdrawal from an ATM in Roma, in an amount of \$500. And again on that day, a person named Ali Mahdi Hameed paid for one night's stay at a Roma hotel, by a credit card which was charged against that bank account. The guest provided a mobile telephone number which was (incompletely) recorded as 0401 669 77.
- [19] At about 9.00 am on 26 March 2014, a white car was hired from Avis Car Rentals at the Roma Airport. The booking was in the name of Ali Mahdi. A telephone number was provided by the hirer: it was 0405 166 977, which was different from, but very close to, the number which had been provided to the hotel. The car was returned to Avis at 7.30 am on 27 March 2014. It had travelled 149 kilometres. The round trip from Roma to the appellant's house and back was roughly 120 kilometres. The hire car cost was drawn from the bank account of Ali Mahdi Hameed. The return trip by Greyhound bus from Roma to Brisbane, booked in the name of Ali Mahdi, departed at 10.55 am on that morning.
- [20] The appellant was interviewed by police on 29 March 2014 and by the insurer's investigator on 3 April 2014. On 9 April 2014, a person known to the Department of Immigrations as Ali Mahdi Hameed departed Australia from Perth and returned on 23 April 2014. During that time there were transactions, effected from overseas, upon that bank account of Ali Mahdi Hameed.
- [21] There was evidence from Ms Pagtalunan that from the period from January to March 2014, the appellant would stay with her about once a week, staying two days at a time, when the appellant brought many of her clothes with her which she left at Ms Pagtalunan's house. She said that there were about five "doona bags" full of clothing which were left by the appellant.

- [22] A police officer found a large amount of personal property in the appellant's car. Many of the items had an apparent sentimental value. They included more than 300 photographs and her citizenship papers.
- [23] When first interviewed by police, the appellant said she had these items because she was a "hoarder". She denied any knowledge of any arson. She explained that she had increased the insured value of her property when, as she was renewing the policy, she was told she could insure the property for as much as she wanted.
- [24] When she was interviewed by the insurer's investigator a few days later, she was asked to explain the presence of important documents, including her citizenship papers, in her vehicle. The appellant said that she had forgotten that they were there.
- [25] She was interviewed by police again on 19 August 2014. She then said that she had increased the insured value of the house because the house was her "pride and joy". She was asked about a number of transactions on her bank account. When first asked about one of the transfers of \$10,000 (to which I have referred above), which was described as a transaction for a "truck repair", she said that:

"It's a mechanic that I've known, and ... they wanted to ... me to put some money on that so that I can ... it's my, it's mine, it's mine, I will have to ... buy that and have it repaired and sell it."

She was asked to describe this truck, but could not give its model or registration number. She was unable to say whether it was a registered vehicle or how large it was. She said that:

"I was just told that ... I'm going to buy this truck and repair it, and then we'll get money from it. And I said, that's ok, because I've been wanting to do that."

When asked to identify the person who had told her that, she said that he was a "mechanic", whom she could not identify. It was somebody that she "just met but lost contact". She was asked whether she had ever known the name of this mechanic and said that she had not. She claimed that she had been "conned" and that she preferred to "just forget it".

- [26] The police officers then asked her about another of the transfers, which had been described by reference to a truck. She said that she made this payment in response to a request by someone who had telephoned her. When asked whether she could identify that person, she said "I met them on internet." At that point in the interview she was asked whether she knew the name "Ali Mahdi Hameed", and she answered:

"Oh yeah I think that's the, I think I sent some money ... yeah do you know that person?"

The appellant then asked the police officers:

"Can you trace my money to that person?"

When told that the police could do so, the appellant said that she had met him on "Tango", an internet site, and that she now remembered his name as the person to whom she transferred the money. She admitted that she had telephoned him about

the payments. She claimed that it had always been a dream of hers to repair and sell trucks.

[27] She said that she had subsequently met this man in Queensland, in a hotel or motel in a Brisbane suburb. She said that he had telephoned her “out of the blue”, saying that he was travelling through Brisbane on his way to the Gold Coast, and suggesting that they meet in Brisbane. She said that it “so happened” that she was travelling and so she agreed to meet him. She agreed with police that she had paid for his flight from Perth. She said that this was “part of my deal to him about the truck”. She denied that she had arranged for this man to burn down her house. When asked why she believed that he had gone to Roma, she said that he had wanted “to see some buses [and] trucks in Roma.”

[28] The appellant neither gave nor called evidence at the trial.

### **The grounds of appeal**

[29] In the notice of appeal, which was not signed by a lawyer, the appellant’s convictions are challenged upon grounds expressed as follows:

- “\* No evidence of an arsonist, I didn’t procure an arsonist.
- \* Phone conversation between Phyllis Khan and CIB detective James.
- \* So called phone conversation between Phyllis Khan and bank representative wasn’t presented in Court.
- \* The [insurer] has given me goodwill money \$5,000 and alternative accommodation.”

[30] That first ground of appeal appears to suggest that it was not open to the jury to conclude, beyond reasonable doubt, either that there was any arson, or that she was a party to any such offence. Her written submissions repeat what she said in her second police interview, namely that she had paid Mr Hameed for a transaction or transactions involving trucks. She also says that they had a sexual relationship. She claims that she was deceived by him about the trucks.

[31] In her written submissions, she disputes that she was under any financial difficulty. She denies that she telephoned her insurer intending to increase the insured value of her house: instead, she says, the increase was suggested to her by the insurer when she rang to renew her insurance. Those points were before the jury, from the evidence of her police interviews.

[32] The appellant says that there were inconsistencies in the evidence of one of the neighbours. This was the evidence of the first of those witnesses which I have described above. The appellant says that at one point in this evidence, the witness said “I didn’t see the car” although at other points, she said that she had seen a white car driven from the house. The appellant’s argument misrepresents the evidence. Relevantly, it was as follows:<sup>1</sup>

“He was running fast. Okay. And you said it’s a he. So it was a male person. Do you recall how old, roughly, that person was? No.

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<sup>1</sup> In cross-examination.

Any other details you can tell us about that person? --- He was driving a white hatchback car.

Ok. So you said he was driving a white hatchback car. Is that correct? --- Yeah.

Where did you see the car? --- I didn't see the car. I seen it when it was driving off."

In context, the statement that "I didn't see the car", whilst curious, did not detract from her evidence that she had seen a car being driven away from the scene. And another witness also saw a car leaving the scene.

- [33] The appellant submits that there was no evidence that it was the rented car which was seen. But the jury was asked to infer, and could have inferred, that it was the rented car from all of the circumstances which I have outlined.
- [34] As to the evidence of the forensic scientist of the likely cause of the fire, the appellant was critical of what he said about louvre windows being open. She says that they could not have been open because they were nailed shut. She further suggests that a photographic exhibit showed "buckled" windows, which was inconsistent with windows having been open. However, this witness was not cross-examined. His evidence that some of the windows had been open came from his examination of evidence of the fire debris, in which he saw some windows which were in the opened position, some in the closed position and some which he could not say had been opened or closed. The appellant's argument does not demonstrate an incorrectness of his evidence that some of these windows were open.
- [35] The appellant is critical of the evidence of Ms Pagtalunan, that the appellant would visit her about once a week in the period preceding the fire. She says that this was impossible because of the appellant's work roster, photographs of which were in evidence. That is a tenable assertion, but it was not put to the witness. What the appellant does not challenge, even now, is that she frequently stayed at Ms Pagtalunan's house and left a large quantity of clothes there, suggesting that she was wanting to save them from an imminent fire.
- [36] The appellant now says that she did not leave a large amount of clothing at Ms Pagtalunan's house. She says that she had two doona bags of clothing in her car, one of which was to be given to the Salvation Army. But as I have said, Ms Pagtalunan was not challenged on that evidence. Instead, it was suggested only that the appellant left some clothes at Ms Pagtalunan's house at her invitation, which was not accepted by the witness.
- [37] The appellant argues, as her counsel did at the trial,<sup>2</sup> that the jury could not be satisfied that the man who travelled by bus to Roma and hired the car, was the man with whom the appellant had been dealing and to whom she had sent money. It was argued at the trial that no person from Avis or the hotel had said that the photograph on the driver's licence matched the appearance of the person who had presented it. It was argued that there was no evidence of the identity of the person who travelled on the bus. But again, this was a circumstantial case. The jury had other evidence linking the man who had received the money with the man who went to Roma. Most importantly, the bank account, to which the appellant had sent money, was operated in Roma on the afternoon preceding the day of the fire and on the

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<sup>2</sup> The argument being summarised by the judge in the summing up at AB206.

following morning. And the name on the driver's licence was that of the holder of the bank account.

- [38] The appellant says that she was not in difficult financial circumstances. She says that she owed money only to the bank. She was intending to buy property overseas, but with a personal loan and money from her son and her brother. Arguments to that effect were made to the jury. On the evidence at the trial, the jury could have concluded that there was a financial explanation for the commission of these offences by her.
- [39] None of the appellant's arguments, either considered alone or together, shows that it was not open to the jury to find, beyond reasonable doubt, that she had procured Mr Hameed to burn down her house. The evidence presented a strong case that the fire had been deliberately lit, and that it was lit by the person who travelled to Roma using Mr Hameed's name. It was open to the jury to be satisfied that this was the person with whom the appellant had been communicating in the weeks leading up to the fire and to whom she had sent large sums of money. Her explanation for sending those sums was very unlikely to have been true. Her initial denial that she even knew the identity of this person made those explanations even less persuasive. She had significantly increased the insurable value of the house. She had an apparent motive for burning the house, in that she had no apparent funds with which to pursue the purchase of a property in the Philippines. She had been clearing out the house, removing what must have been most of her wardrobe, as well as hundreds of items of personal effects, in the period shortly before the fire. She inexplicably left the house partly open when she went to Sydney, just before the fire. Overall, this was a strong circumstantial case.
- [40] Her second ground of appeal relates to a conversation between Phyllis Khan and Detective James. She complains that a recording of this conversation was not tendered at the trial.
- [41] As I have already discussed, on the eve of the day of the fire, the appellant travelled to Sydney to stay with Ms Khan at Ms Khan's mother's house. She stayed there until 28 March. Ms Khan recalled that on 27 March, a detective telephoned to speak to the appellant. She said that the appellant was crying and gave the phone to her so that she then spoke to the detective. He said that the appellant's house had been burnt down and that there was nothing remaining. It was after that call that the appellant rang the insurer and then asked Ms Khan to speak to someone there about the fire. In cross-examination, there was this evidence by Ms Khan:

“And did the detective tell you to tell [the appellant] to contact her insurance company?---No, I don't think he said that, no.

Are you sure?---No, I'm – I can't remember that he said it.”

There was no request that the prosecution produce a recording of this conversation. The appellant's argument appears to be that her conduct, in calling the insurer that day, would have been less suspicious if the jury had heard that the police had suggested that the insurer be called. It was confirmed in the cross-examination of an investigating police officer that this conversation had been recorded. But there was no request of this witness or of the prosecutor that the recording be produced. That indicates the insignificance of the issue of whether the officer had suggested that the insurer be called. The cross-examiner's only interest appears to have been

to establish that the insurer was called only after the police had told the appellant of the fire.

- [42] The third ground of appeal complains that evidence of that telephone conversation between Ms Khan and a representative of the insurer was not tendered in the prosecution case. As I have just noted, the appellant called the insurer and then handed the phone to Ms Khan. The conversation proceeded with Ms Khan acting as an intermediary between the appellant and the person on the other end of the phone line. That person gave evidence, and confirmed that there was a record of this call and of the claim which was then made on the insurer. He said that he believed that this call was recorded and that it may have been provided to police. At that point, in the cross-examination of this witness, the appellant's counsel said to the judge that he did not have a copy of that recording. But he then discontinued his cross-examination. The prosecutor was not asked to produce the recording. There was no issue about what was said in this conversation and the appellant's argument does not suggest how the recording may have assisted her case at the trial.
- [43] The remaining ground of appeal is that the insurer provided the appellant with the sum of \$5,000 and alternative accommodation, which the appellant now argues was inconsistent with the notion that she had defrauded the insurer. But this was at a very early stage in the police investigation. Whatever view was then held within the insurer, about the appellant's guilt or innocence, was and is irrelevant.

#### **Other complaints about the conviction**

- [44] The appellant argues that the audio visual recording of her second police interview was unfairly edited. She claims that there are three gaps, one of seven seconds, one of nine seconds and one of 15 seconds, in the recording. The original transcript of the interview is exhibited to an affidavit, filed in this Court, which was affirmed by an employee of the Office of the Director of Public Prosecutions. The transcript confirms that there were, in fact, two gaps, neither of which is of any consequence. In each case what was omitted was something which was said by the police officer.<sup>3</sup>
- [45] The appellant complains that the judge spoke "with the juror speaker" during the trial. Although that is the subject of an apparent complaint in the appellant's outline, the point has not been developed. In particular it is not suggested that there was any improper exchange between the judge and a juror.
- [46] The appellant complains that two jurors were allowed to be empanelled, against her instructions. This Court has an affidavit from the appellant's trial solicitor. Referring to a file note, the solicitor recalls that she asked the appellant to read the jury list and identify any jurors whose names she recognised. The appellant identified six potential jurors, who were then the subject of a discussion between the solicitor and the appellant. The solicitor recalls that the appellant confirmed that there was no reason why any of those jurors might be biased against her. Five of those six potential jurors were empanelled. The appellant's argument does not identify the two jurors who, she says, should not have been empanelled. More generally, there is no evidence to contradict that of the solicitor.

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<sup>3</sup> At page 17, line 54 to 56 and page 35 line 49 to 54 of the transcript exhibited to the affidavit of Ms McGregor filed on 18 July 2017.

- [47] Lastly, there is a complaint that the police did not “listen to” the appellant’s mobile phone. That was not an issue which was explored by her counsel. The appellant does not suggest how an examination of her phone, beyond the evidence of the calls which she made to the phone of Mr Hameed, would have been relevant and exculpatory.

### **Conclusion on the appeals against conviction**

- [48] None of the appellant’s arguments reveals any basis for setting aside her convictions. This was a strong circumstantial case that the appellant procured the man called Hameed to set fire to her house. If the arson charge was proved, the attempted fraud was also proved. The appeals against conviction should be dismissed.

### **The appeal against sentence**

- [49] No ground for an appeal against sentence is set out in the notice of appeal, but the appellant’s outline argues that her sentence of three and a half years’ imprisonment was excessive. And she complains that it was imposed without reference by the judge to any comparable sentences.

- [50] The sentencing judge described this offending as premeditated and planned. His Honour said that burning a house in a residential area presented a danger to neighbours, their property and fire fighters. He also remarked that the appellant had not assisted police to locate her accomplice. That last comment is criticised by the appellant. In her outline, she claims that she did not know “that police wanted him to be located”. She claims that she did not know that he was a suspect until the second interview. She now says that she had telephone conversations with Mr Hameed in the end of June, during July and in early August 2014, when she says that he was in Syria. Yet in her police interview conducted on 19 August 2014, she made no reference to these conversations. Importantly, she then told police that she did not know where Hameed was or how to contact him.<sup>4</sup> The complaint about the judge’s remark about her lack of assistance is baseless.

- [51] At the sentencing hearing, the prosecutor relied upon two decisions of this Court: *R v Leigh*<sup>5</sup> and *R v Sparks*.<sup>6</sup> In *Leigh*, the offender pleaded guilty to attempting to procure another person to burn down a house. The applicant was aged 67 at the time of the offence and had what was described as “a not insignificant criminal history”. He was sentenced to a term of four years’ imprisonment. Dowsett J, with the agreement of the other members of the Court, said that a period of in excess of four years could well have been supported. In *Sparks*, after a trial, the applicant was convicted of offences of arson and fraud. She was sentenced to a term of four years for the arson offence and two years for the fraud offence, to be served concurrently. She was aged 41 at the time of the offences. She successfully appealed against those sentences, but only to the extent of a declaration being added about a period of 73 days of pre-sentence custody.

- [52] It cannot be said that the present sentence was manifestly excessive, so as to indicate some error by the sentencing judge. Nor does any error appear from his

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<sup>4</sup> Transcript of interview, 19 August 2014, page 39.

<sup>5</sup> [1996] QCA 561.

<sup>6</sup> [2004] QCA 454.

Honour's reasons. The appellant's counsel submitted to the judge that the head sentence should be in the range of three to four years. Her parole eligibility date was fixed at a point where, having regard to her pre-sentence custody she would have to spend at least 20 months of her sentence in jail. There was no basis for ordering an earlier eligibility date, when she had gone to trial and offered no assistance in respect of her co-offender.

### **Orders**

[53] I would order as follows:

1. The appeal against convictions be dismissed.
2. The application for leave to appeal against sentence be refused.

[54] **DOUGLAS J:** I agree with McMurdo JA.