# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Nuttall; ex parte A-G (Qld)* [2011] QCA 120 |
| PARTIES: | **R**<br>**v**<br>**NUTTALL, Gordon Richard**<br>(respondent)<br>**EX PARTE ATTORNEY-GENERAL OF QUEENSLAND**<br>(appellant) |
| FILE NO/S: | CA No 8 of 2011<br>DC No 187 of 2010 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Appeal by A-G (Qld) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 7 June 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 May 2011 |
| JUDGES: | Muir, Fraser and Chesterman JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The appeal be allowed.**<br>**2. The sentences imposed, except for the perjury offences the subject of counts 11 to 15 on the indictment, be set aside.**<br>**3. The respondent be sentenced to seven year terms of imprisonment for each of the offences of official corruption.**<br>**4. Such sentences for corruption and perjury to be served concurrently with each other and cumulatively upon the sentences imposed on 17 July 2009.**<br>**5. A new parole eligibility date of 17 July 2015 is fixed, being a date twelve months earlier than the mid point of fourteen years from the commencement of the sentences imposed on 17 July 2009.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was sentenced to five years imprisonment for each of five counts of official corruption and two years imprisonment for each of five counts of perjury to be served cumulatively upon sentences of seven years imprisonment being imposed for |

each of 36 counts of corruption – where the respondent was a member of the Queensland Legislative Assembly – where the Attorney-General submitted that the sentence failed to adequately reflect the gravity of the offending and failed to sufficiently take into account general deterrence – where the Attorney-General submitted that the sentencing judge gave too much weight to mitigating factors and erred in applying the totality principle – where the respondent argued that the offences were not "within the worst category of cases" – where no sentencing guide was made available to the sentencing judge – whether the sentence was manifestly inadequate

*Criminal Code* 1899 (Qld), s 87, s 121(1), s 124, s 442B, s 669A(1)
*Penalties and Sentences Act* 1992 (Qld), s 9(2)(f)

*Einfeld v R* (2010) 266 ALR 598; [2010] NSWCCA 87, considered
*Everett v The Queen* (1994) 181 CLR 295; [1994] HCA 49, considered
*Hili v R* (2010) 272 ALR 465; [2010] HCA 45, considered
*Kenny v R* [2010] NSWCCA 6, considered
*Lacey v Attorney-General of Queensland* (2011) 275 ALR 646; [2011] HCA 10, cited
*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited
*Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, considered
*R v Chong; ex parte A-G (Qld)* (2008) 181 A Crim R 200; [2008] QCA 22, cited
*R v Clements* (1993) 68 A Crim R 167; [1993] QCA 245, cited
*R v Coombes* [2003] QCA 388, cited
*R v D'Arrigo; ex parte A-G (Qld)* (2004) 42 MVR 54; [2004] QCA 399, considered
*R v Daswani* (2005) 53 ACSR 675; [2005] QCA 167, considered
*R v Dwyer* [2008] QCA 117, considered
*R v Evans* [1996] QCA 553, cited
*R v Hunter; ex-parte A-G (Qld)* [2000] QCA 97, cited
*R v Jackson & Hakim* (1988) 33 A Crim R 413, considered
*R v Larsen* (1989) 44 A Crim R 121, cited
*R v Le* [1996] 2 Qd R 516; [1995] QCA 479, cited
*R v Lewis* [1994] 1 Qd R 613; [1992] QCA 223, considered
*R v MAK* (2006) 167 A Crim R 159; [2006] NSWCCA 381, considered
*R v Poynder* (2007) 171 A Crim R 544; [2007] NSWCCA 157, cited
*R v Todd* (1982) 2 NSWLR 517, cited
*Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21, considered

*Veen v The Queen [No 2]* (1988) 164 CLR 465; [1988] HCA 14, considered
*Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: W Sofronoff QC SG, with M B Lehane, for the appellant
J Rivett for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
No appearance for the respondent

[1] **MUIR JA**: **Introduction**
The appellant Attorney-General appeals against sentences of five years imprisonment for each of five counts of official corruption and sentences of two years imprisonment for each of five counts of perjury imposed on the respondent after a two and a half week trial in the District Court. The sentences were ordered to be served concurrently with each other but cumulatively upon sentences of seven years imprisonment imposed in the District Court on 17 July 2009 for each of 36 counts of corruption. The parole eligibility date of 2 January 2014 was substituted for the 2 January 2012 date fixed on 17 July 2009.

**The respondent's antecedents**

[2] The respondent was a member of the Queensland Legislative Assembly, representing the electorate of Sandgate from 19 September 1992 to 9 September 2006. From 1996 to 1998, he was Deputy Chairman of the Parliamentary Criminal Justice Committee which had the function of monitoring and reviewing the operations of the Criminal Justice Commission ("CJC"). He became Minister for Industrial Relations in 2001 and was made Health Minister in 2004. In 2005, he ceased to be Minister for Health and held the Primary Industries portfolio until December 2005. He resigned as a Member of the Legislative Assembly in September 2006. When sentenced, the respondent was 57 years old.

[3] Soon after the respondent became a Minister, he promoted to his Department a project introduced to him by a Mr McKennariey for the training of indigenous workers in Workplace Health and Safety. The scheme, which a Mr Doyle also promoted, involved using a front man, Mr McNeillage, as the notional contractor. McKennariey and Doyle were to be paid to provide the training. McNeillage, an innocent party, was used because, to the knowledge of those concerned, McKennariey and Doyle were out of political favour. The initial understanding of McKennariey, Doyle and the respondent was that the respondent would be paid money if McKennariey and Doyle made a profit from the scheme. Payment was eventually made to the respondent in respect of the scheme after he pressed McKennariey for payment.

[4] The project was adopted by the Department over the resistance of Senior departmental officers. The sentencing judge found that: the respondent was actively involved in ensuring that finance was provided for the project; the respondent was involved in ensuring that "the appropriate people were in place to drive [it]"; and the respondent received some $17,000 in respect of the project.

[5] When McKennariey and a colleague of his ceased to have an interest in the project, the respondent lost interest in it himself.

[6] The respondent had had a lengthy relationship with McKennariey. In 1998, he had accepted approximately $29,000 from McKennariey to cover his debts. At the time, he said to McKennariey words to the effect, "I'll make it up for you. Wait until I'm Minister. I'll make it up for you." Around this time, a consortium of companies, the controllers of which had interests in a coal mining project, alleviated the respondent's financial difficulties by purchasing a unit owned by him at Marcoola for a price well in excess of market value. The unit was subsequently sold at a loss by the consortium. After the unit had been purchased by the consortium, the respondent had a conversation relating to business matters with a director of one of the consortium members in which he said words to the effect, "You know, I can help. I can talk to the Boss, brother." It was reasonably plain that "Boss" was a reference to the Premier. There was no suggestion that the respondent actually sought to involve the Premier in any improper activities.

[7] Soon after the respondent's appointment as Minister for Health, McKennariey introduced the respondent to a project for the treatment of waste water generated by hospitals. This project, which the respondent promoted to his Department, was also undertaken by the Department over the resistance of departmental officers, who doubted whether there was any justification for its implementation. The project was abandoned after the respondent ceased to be Minister for Health.

[8] However, while it lasted, the project was very profitable for its promoters and significant sums became available for distribution to the respondent. The arrangement between McKennariey, Doyle and the respondent was that any profit made by McKennariey should be split between them. McKennariey was to keep the respondent's share for "life after politics" but, in October 2005, the respondent started pressing McKennariey for payment and McKennariey eventually succumbed. About $130,000 was paid to the respondent by a series of payments between October 2005 and April 2006.

[9] The sentencing judge found that the ideas for the projects came from McKennariey and that the respondent "did see those projects as beneficial to the community".

**The subject offences**

[10] The offences which were the subject of counts 1, 3, 5, 7 and 9 on the indictment were offences of official corruption created by s 87 of the *Criminal Code* which relevantly provides:

> "**87 Official corruption**
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> (1) Any person who—
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> (a) being employed in the public service, or being the holder of any public office, and being charged with the performance of any duty by virtue of such employment or office, not being a duty touching the administration of justice, corruptly asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by the person in the discharge of the duties of the person's office; or
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> …

> is guilty of a crime, and is liable to imprisonment for 7 years, and to be fined at the discretion of the court.
>
> (1A) If the offence is committed by or in relation to a Minister of the Crown, as the holder of public office mentioned in subsection (1), the offender is liable to imprisonment for 14 years, and to be fined at the discretion of the court."

[11] Counts 1 and 3 alleged that, at the time specified, the respondent:

> "…being a Minster of the Crown and being charged by virtue of such office with the duty of supervising generally the activities of a government Department, namely the Department of Industrial Relations, corruptly received a sum of money on account of his having in the discharge of his duties of his office influenced business dealings undertaken by the Department of Industrial Relations."

[12] Counts 5, 7 and 9 were in similar terms, save that the dates of the offences were different and the government department concerned was the Department of Health.

[13] The five perjury offences each concerned evidence given by the respondent in a closed hearing of the Crime and Misconduct Commission on 28 September 2006. Counts 11 to 14 on the indictment concerned false testimony in respect of the Workplace Health and Safety training scheme and hospital waste water project. Count 15 concerned a denial by the respondent that he had received payments of funds by benefactors other than Talbot.

[14] The maximum penalty for perjury is fourteen years imprisonment.[1]

**The July 2009 convictions**

[15] The respondent's earlier convictions were for the offence of receiving a secret commission created by s 442B of the *Criminal Code*. The maximum penalty for that offence is seven years imprisonment. Count 1 on the indictment concerned the payment of $60,000 into the respondent's account with a Credit Union by a Brisbane solicitor and businessman, Mr Shand. The payment was recorded in the books of Capregin Pty Ltd, the company which Mr Shand procured to make the payment, as a loan to Mozic Pty Ltd. There was no such loan.

[16] Counts 2 to 36 concerned payments to the respondent made by the late Mr Kenneth Talbot through one of his companies. Mr Talbot was a director of Macarthur Coal Ltd, a company engaged in a coal mining joint venture. Throughout 2002, there were dealings between the joint venturers and the Queensland Government concerning a project being undertaken by the joint venturers ("the TIC Project"). Some of the dealings were explained as follows in the reasons given by this Court in dismissing the respondent's appeal against his convictions:

> "…On 9 April 2002, there was a meeting between the appellant and Mr Talbot. Six days later, the appellant attended a cabinet meeting at which the grant of a mining lease to a company owned by Macarthur Coal Ltd was approved. He did not disclose any conflict of interest; nor did he do so at any subsequent meeting at which matters were dealt with concerning Macarthur Coal. On 9 May 2002, there was another meeting between Mr Talbot and the appellant, subsequent to which the appellant attended a cabinet meeting approving an assistance package for the TIC Project."

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1 *Criminal Code* (Qld), s 124.

[17] The payments to the respondent were made pursuant to arrangements negotiated between Mr Talbot and the respondent's solicitor. The initial arrangement was that Mr Talbot would advance to the respondent $100,000 over a 12 month period in equal monthly payments of $8,333.33. During these negotiations, the respondent attended a Cabinet meeting at which further expenditure was authorised relating to the TIC Project.

[18] In October 2003, Mr Talbot confirmed to the respondent's solicitor that the arrangement would be extended for a further two years and it was duly continued until 28 September 2005, by which time payments totalling $300,000 had been made. In the last year of the arrangement, the respondent attended a Cabinet meeting at which three mining leases were granted for a Macarthur Coal project.

**The sentencing remarks**

[19] After observing that the respondent saw the "projects as beneficial to the community" and that the projects "were not mere sham schemes", the sentencing judge said that the "true criminality lay in [the respondent's] determination to use [his] position of ministerial authority to achieve personal financial gain from those projects." The primary judge then identified reasons why offences of corruption "in high places" were serious and required sentences which would provide general deterrence as well as reflecting "public denunciation of the breach of trust necessarily involved in such conduct."

[20] Reference was made to *R v Jackson and Hakim*[2] and *R v Lewis*.[3] In respect of *Jackson*, the sentencing judge noted that the court considered that a head sentence of 10 years was appropriate for Jackson's offence of conspiring with others to pay bribes to him as an inducement to corruptly favour certain persons in violation of his official duty.

[21] His Honour considered that *Lewis* provided "useful guidance". He regarded Lewis' offending as more serious than that of the respondent's as Lewis, although not a Minister of the Crown, was the Commissioner of Police, the head of the body charged with enforcing the law and his conduct, as well as being more protracted than the respondent's offending, encouraged corruption in the police force.

[22] The sentencing judge referred to the 14 year maximum penalty for the subject offences and to the respondent's convictions in 2009. He concluded that it was appropriate "to consider the effect of [the] head sentence that might have been imposed had [the respondent] been sentenced for all of these offences [the subject and the earlier offences] on the one occasion … [so as] to impose a head sentence that reflects the total criminality of [the respondent's] conduct." His Honour found that, apart from the respondent's "somewhat belated comments" at the sentencing hearing, he had shown no remorse and was not entitled to any leniency which otherwise may have been extended in that regard.

[23] The sentencing judge was of the view that, although the relevance of "past good character" was diminished by the nature of the respondent's offending, it should be given "some weight". He accepted as relevant, and as providing "a strong measure of punishment", the "adverse publicity, and public humiliation" that the respondent had undergone. He took into account also the considerable stress on the respondent

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2 (1988) 33 A Crim R 413.

3 (1992) 63 A Crim R 18.

and members of his family, as well as the evidence that the conditions of the respondent's incarceration were "more severe than they would ordinarily [have been]."

[24] In fixing the new parole eligibility date of 2 January 2014, the sentencing judge expressly had regard to the respondent's co-operation in the "streamlining of [his] trial by making a series of extensive admissions", many of which "were probably formal in nature, but … nevertheless eliminated the need to call a significant number of additional witnesses."

**The appellant's contentions**

[25] Counsel for the appellant contended that the subject sentences were manifestly inadequate and that any mitigating circumstances, including application of the totality principle, would have been addressed adequately by the imposition of sentences of 14 years to be served concurrently with the perjury offences and the 2009 convictions, with a parole eligibility date set at around the mid point of the total sentence to be served. Reference was made to the two cases discussed by the sentencing judge, *Jackson* and *Lewis*.

[26] It was submitted that Jackson's offending was less serious than the respondent's as Jackson's offending was shorter in duration than that of the respondent and he was not the entrepreneurial mind behind the scheme. It was submitted that the limited scope of the scheme also moderated the seriousness of Jackson's conduct. Jackson, when Minister for Corrective Services in New South Wales, accepted money to "make more certain the release into the community of particular offenders … who in any event satisfied the criteria for legitimate release under the relevant scheme." Jackson was re-sentenced after a successful Attorney-General's appeal to 10 years, with parole eligibility set at five years.

[27] It was submitted that the sentencing judge overestimated the significance of *Lewis* in deciding to sentence the respondent below the statutory maximum as, on appeal, Lewis' 14 year term of imprisonment was not disturbed or even "seriously argued". Reference was made to the observation of Pincus JA (at 57) that:

> "The submission that the sentence should be interfered with was not, I think, pressed, but appears in any event not to be sustainable."

[28] Reliance was placed on the following observations of Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen (No 2)*:[4]

> "[T]he maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed…That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

[29] In *R v Dwyer*,[5] Keane JA observed:

> "An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process."

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4 (1988) 164 CLR 465, 478.

5 [2008] QCA 117, [37].

[30] The fact that the maximum penalty for official corruption was doubled where the offence was committed by a Minister of the Crown was a clear signal of Parliament's intention that offending of this type should be regarded as particularly grave. This was extremely high-level corruption on a grand scale, where the very institution of democracy itself was "assailed and at the very height of the apex".[6] The corruption spanned virtually the whole of the respondent's ministerial career. The corrupt arrangements were put in place at the insistence of the respondent over the reasoned objection of senior public servants and placed innocent people in positions of serious embarrassment. The corrupt schemes were sophisticated ventures and involved much more expense than the sums obtained from them by the respondent. Although the details of the schemes were put up by Doyle and McKennariery, the respondent had substantial responsibility for the entrepreneurial spirit behind the corruption.

[31] There were no powerful mitigating factors. The respondent was convicted after a reasonably lengthy trial and there was no real evidence of remorse. The admissions made during the trial warranted some weight but were more than counter-balanced by the matters mentioned earlier. Those and other mitigating factors "paled into insignificance in light of the calibre of [the respondent's] offending".

[32] The sentencing judge's determination of a penalty on the basis of the totality of the respondent's criminal conduct throughout his entire ministerial term does not detract from the force of the submission as to the appropriate sentence. Applying the sentencing judge's methodology, the respondent would be required to serve a maximum of 15 years and five months in respect of an extensive high level political career riddled with corruption involving pecuniary gains to him in excess of $500,000.

[33] While the maximum penalty for a single offence did not exceed 14 years, no reason in principle prevented the imposition of a cumulative term.[7] A cumulative sentence of at least three years imprisonment for the perjury offences would have been justified on the authorities.[8] Perjury "strikes at the essence of the criminal justice system and the public's confidence in it."[9] Denunciation and general deterrence are important considerations in sentencing for perjury and the respondent's culpability was significantly aggravated by his position as Minister of the Crown. His perjury was motivated by self interest. The "very little focus on the perjury offences in [the] sentencing remarks" indicates that the offences did not receive the prominence they deserved when consideration was given to the respondent's overall criminality.

[34] The submissions as to the appropriate sentences were summarised as follows:

> "The sentence imposed upon the respondent was inadequate. The maximum penalty of 14 years imprisonment should properly have been imposed in respect to the official corruption offences. Factors in the respondent's favour, including principles of totality, would have been adequately addressed by ordering the 14 year sentence to be served concurrently with the perjury offences and the 2009 convictions. A parole eligibility date should have been set at around the half-way mark of the total sentence to be served (*i.e. April 2017).*"

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6 *R v Jackson and Hakim* (1998) 33 A Crim R 413, 435 per Lee J.

7 *R v Daswani* [2005] QCA 167 at [12].

8 *R v Evans* [1996] QCA 553 and *R v Hunter; ex-parte A-G* [2000] QCA 97.

9 *R v Coombes* [2003] QCA 388.

**The respondent's submissions**

[35] Counsel for the respondent's submissions may be summarised as follows. The offences were not "within the worst category of cases" which would include, for example, stealing from the public purse. The two projects were found by the sentencing judge to have been seen as beneficial by the respondent. They served a community purpose. The health contract was won at public tender and it follows that the government received the cheapest possible price. The respondent's crime was to corrupt by securing enrichment out of McKennariey's profits, not to defraud the government.

Although the respondent may have exposed the unwitting Mr McNeillage, he did not actually corrupt anyone; he permitted himself to be used by the corrupt and desperate McKennariey who made much more out of the crimes than the respondent, who was not the entrepreneurial mind behind the two schemes.

[36] The totality principle was applicable to avoid a "crushing" sentence and the respondent's age was a significant factor in that regard. The principle was stated in the following terms in *Mill v The Queen*:[10]

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'."

[37] It was explained in *R v MAK*:[11]

> "[A]n extremely long total sentence may be 'crushing' upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint."

[38] Other factors which increased the risk that a sentence may prove "crushing" were the likelihood of a lack of employment on release, the impact on the respondent of his fall from grace, the excessive media attention and the effect of the whole five year pre-trial process on him and his family.

[39] The perjury should be regarded as demonstrating a lack of remorse. Although the charges are very serious they do not warrant a cumulative sentence beyond 12 years. The respondent did show genuine remorse in issuing a public apology at the sentencing hearing. His admissions were also important. They saved time and cost and the sentencing judge reduced the non-parole period by a further six months in recognition of them. This was consistent with the approach taken in his earlier sentencing.

[40] The sentence is supported by *Lewis* in which the offending was more serious as it involved more money and Lewis corrupted a host of other police officers "in the

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10 (1988) 166 CLR 59, 63, quoting Thomas, *Principles of Sentencing* (2nd ed, 1979), pp. 56-57.

11 [2006] NSWCCA 381 at [17].

very institution that the community relies on". *Jackson* was also more serious in some ways. There were no maximum penalties so that a life sentence was open. Corruptly releasing prisoners into the community before their allotted time corrupted both the prison system and participants in the conspiracy.

**Consideration**

[41] The appeal is brought under s 669A(1) of the *Criminal Code* (Qld) which gives the appellate court an "unfettered discretion [to] vary the sentence and impose such sentence as to the Court seems proper". Before the Court's "unfettered discretion" to vary a sentence appealed against is enlivened, error on the part of the sentencing judge must be demonstrated.[12]

[42] The error relied on by the appellant was that the sentences imposed were manifestly inadequate and not the proper sentences as:

> "(a) they failed to reflect adequately the gravity of the offences generally and in this case in particular;
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> (b) they failed to take sufficiently into account the aspect of general deterrence; and
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> (c) the sentencing judge gave too much weight to factors going to mitigation."

[43] Where an appeal against sentence is not based on a specific error of principle, but on grounds that the sentence is manifestly inadequate or excessive: [13]

> "…appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons."

[44] After referring to the above passage with approval, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen*[14] said:

> "But, by its very nature, that is a conclusion that does not admit of lengthy exposition."

[45] Their Honours[15] rejected the view that "manifest error is fundamentally intuitive" but accepted the Court of Criminal Appeal's statement that manifest error "arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it." Their Honours then observed:

> "But what reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence."

[46] The only comparable sentences relied on by either party in respect of the corruption offences were *Lewis* and *Jackson.* Jackson, when Minister for Corrective Services in New South Wales, engaged in a conspiracy under which he would corruptly accept money as an inducement to show favour to applicants applying for release on

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12 *Lacey v Attorney-General(Qld)* [2011] HCA 10 at [62].

13 *Wong v The Queen* (2001) 207 CLR 584, [58].

14 (2010) 272 ALR 465, [59].

15 At 208, [60].

licence "within certain prescribed guidelines on dates earlier than the expiration of their sentences or non-parole periods."[16] Normally, such applications would be processed within the Department of Corrective Services and, if approved, submitted to Jackson for a recommendation for Ministerial approval. Applications were often made directly to Jackson, in which case they would be sent to the Chairman of the Corrective Services Commission for processing. Street CJ summarised the prosecution case as follows: [17]

> "It was the Crown case that the only prisoners who were intended to benefit from the conspiracy were those who fell within the formal guidelines of the release on licence programme. The role of Rex Jackson was to be facilitating, expediting and rendering more certain the ultimate formal grant of the licence."

[47] The amount obtained by Jackson from the scheme, which was implemented between 1 October 1982 and 1 August 1983, did not exceed $20,000.[18] Lee J, with whose reasons Finlay J agreed, observed that:[19]

> "The conduct of the respondent was not a mere short-lived lapse but a consistent course of gross abuse of high office involving the receipt of bribes for favours. To the extent that the respondent can claim that favours given in respect of early release of prisoners were only awarded to those who, in any event, might have expected to be released, the conspiracy still stands as one in which the respondent's position as the Minister for Corrective Services was the key to any success which the conspirators might have expected to have achieved. It is true that he was not shown to be the instigator of this scheme – the finding that Harris was most likely the instigator seems to me to be sound – but that can count for little in his favour."

[48] Counsel for the respondent contended that Jackson's offending was more serious than the respondent's as it involved corruption of the prison system, corruption of others and corruptly releasing prisoners into the community before their allotted time which could lead to loss of life and further crime. Some of these points have validity but it does not appear from the reasons that Jackson corrupted others. He was not the instigator of the conspiracy and appeared to have had contact only with one of his co-conspirators.

[49] Like the respondent's offending, Jackson's offending was made possible by the high office he held and was carried out in abuse of that office. Jackson's conduct had the potential to damage public confidence in executive government and also in the administration of justice, at least insofar as the integrity of the prison system was concerned. In as much as it also had potential to weaken public confidence in the administration of justice, it was inherently more serious than the respondent's offending. The respondent's offending, however, was more protracted, much more money was corruptly taken and substantial amounts of public moneys were involved. When regard is had to the totality of the respondent's conduct, I doubt that there is much to choose between the two sets of offences in terms of overall criminality and, for the purposes of sentencing, there is nothing to be gained from a minute analysis of the offending conduct in cases referred to for guidance in determining an appropriate sentencing range.

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16 (1998) 33 A Crim 413, 415.

17 At 415.

18 *Jackson and Hakim* (supra), 436.

19 At 435-436.

[50] Counsel for the respondent submitted that the offending in *Lewis* was more serious than the respondent's as more money was involved and the offending caused the corruption of "a host of other police officers in the very institution that the community relies on." Lewis was convicted by a jury on 15 counts of official corruption. Count 2 alleged an offence under s 87(1) of the *Criminal Code* committed between May and December 1980, under which Lewis corruptly agreed to receive $25,000 for submitting a report adverse to the introduction of poker machines into Queensland.

[51] All the other counts, which concerned offences under s 121(1) of the *Criminal Code*, alleged that Lewis, being Commissioner of Police, corruptly agreed to receive from one Jack Herbert a specified sum of money monthly for ensuring that police action would not be taken against intending offenders under laws relating to a specified matter. The sum specified in count 1 was $1,500 each month. The period of the offending alleged for count 1 was between January and December 1978. The other counts involved various periods commencing in 1978 and concluding in 1987. It is not possible to determine the extent of Lewis' unlawful gains from the report, but it is apparent that the sums involved were substantial.

[52] There was one aspect of the respondent's offending which was more serious than Lewis' offending. Grave though it is, corrupt behaviour on the part of a servant of the Crown does not have as great a potential to erode public respect for, and confidence in, institutions critical to the good order of government and society as does the conduct of a corrupt Minister of the Crown. If corruption takes hold at the centre of government, its permeation of lower echelons is assured and the ability to eradicate it gravely compromised. The respondent abused his position as Minister of the Crown, an office at the pinnacle of the structure of government in this state. Ministers have responsibility for the affairs of the departments over which they preside. Lewis, as Commissioner of Police, was, in practical terms, the head of one such department and answerable to his Minister.

[53] The features which elevated the seriousness of Lewis' conduct were his complicity in the corruption of police officers, the effect his conduct was likely to have had and, no doubt had, on the probity of other police officers and the duration over which his offending occurred.

[54] The legislature, not unremarkably, recognised the particular gravity and potential for harm to the body politic which could be caused by Ministerial corruption by providing for it a maximum penalty double that of corruption by the holder of any public office or any person employed in the public service.[20] This, and the other matters I have just mentioned, persuade me that the respondent's offending did not differ greatly in its seriousness from that of Lewis'.

[55] It was argued on the respondent's behalf that the gravity of his offending was reduced as: the Health Department contract was won at public tender ensuring the cheapest price for the project, the tender process was not interfered with corruptly; the respondent did not corrupt anyone; and the respondent was not the entrepreneurial brain behind the schemes. Both schemes were promoted by the respondent against departmental advice in circumstances in which the respondent was not merely acting unlawfully, but in a position in which his own personal interests were in stark conflict with his duty as a Minister. He may not have

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20 *Criminal Code* (Qld), s 87(1A).

initiated the schemes, but he was a willing participant, promoter and beneficiary. The fact that he could have behaved even worse than he did is relevant only to whether the respondent's offending fell within the worst category of cases, otherwise the gravity of his offending must be assessed by reference to the facts and circumstances of his actual offending.

[56] The respondent's offending commenced almost as soon as he took office as a Minister and was taking place when he ceased to be a Minister. The offending was thus protracted. In the gap between the subject offences, he committed the Shand and Talbot series of offences.

[57] Not much can be said by way of mitigation. The respondent showed no remorse. The statement he made at his sentencing hearing demonstrated an absence of insight into the criminality of his conduct and its potential for harm. Reliance was placed on the respondent's previous good character as witnessed by a lack of prior convictions. That an offender is of otherwise good character is a mitigating factor,[21] but it may sometimes be overridden by the objective seriousness of the offences, by countervailing evidence or by other considerations.[22]

[58] In the circumstances of this case, the gravity of the offending conduct, its duration and frequency and the intervening Talbot and Shand offending make the respondent's previous good character a matter of little weight. Abuse of a position of authority or trust is normally considered a circumstance of aggravation and it plainly is in this case.[23]

[59] The respondent's loss of employment and lack of job prospects on his release are relevant considerations. There is some controversy, however, over whether the loss of reputation and public opprobrium suffered by an offender as a result of his conviction may be taken into account in reduction of penalty. In *Ryan v The Queen*,[24] McHugh J doubted that public opprobrium was a relevant consideration "to be treated as equivalent to the loss of a job or similar personal or financial loss." Kirby and Callinan JJ were of a contrary opinion. The other members of the court, Gummow and Hayne JJ, did not discuss the matter. In this regard, Callinan J said:[25]

> "The rule that good character is a mitigating factor in sentencing may also be qualified in the case of persons who abuse high public office to commit offences, or use their good character to increase the prospects of successfully completing the crime. In *R v Jackson and Hakim*, an appeal against a sentence for the crime of conspiring to accept bribes for the early release of prisoners committed by a Minister for Corrective Services, Lee J said:
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> > 'But as was pointed out in [*R v*] *Farquhar* the good character of a person holding high office who commits a crime relating to the performance of his office cannot form a basis for the same mitigation of sentence as in the case of an ordinary

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21 *Ryan v The Queen* (2001) 206 CLR 267, 275 per McHugh J, at 288 per Gummow J, 297 per Kirby J, 311 per Hayne J and 317 per Callinan J. Also s 9(2)(f) of the *Penalties and Sentences* Act 1992 (Qld) requires the offender's character and age to be taken into account in sentencing.

22 *Ryan v The Queen* (supra), 297 per Kirby J. See also per McHugh J, 278, Gummow J, 288, per Hayne J, 309, 310, 311.

23 *Ryan v The Queen* (supra), 287.

24 At 285.

25 *Ryan v The Queen* (supra), 318-319.

> citizen committing crime, for the public is entitled to expect that those who are placed in high office will necessarily be persons whose character makes them fit to hold that office … The holding of such office may indeed bring distinction to him personally but, from the point of view of sentence, it is not a matter which can advance the respondent any more than if he had been some hardworking person carrying on a menial occupation.'
>
> In my opinion the statement in this form is too strict and too unqualified but I will deal with that aspect a little later. Statements that I have quoted provide very helpful guidelines and principles, but few of them can be applied categorically. Of course the abuse of an office to commit a crime is greatly to be deplored but the crime of a person occupying an office of some prominence will often attract much greater vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced. When these consequences are attracted they should not be ignored by the sentencing court. So much was conceded, and in my view, properly so by the respondent. To ignore such matters would be as unjust to a prominent person as it would be, in the case of a person in a menial position, to ignore disadvantages to him peculiar to his position, such as a likely greatly reduced, if not utterly destroyed capacity on release from prison, to find any remunerative employment at all." (citations omitted)

[60] The following competing considerations were raised by McHugh J:[26]

> "It may be, as Kirby and Callinan JJ suggest, that factors such as public opprobrium and a permanent and public stigma entitle a convicted person to a lesser sentence than otherwise would be the case. But, at the moment, I am not convinced that that is so.
>
> First, it would seem to place a burden on the sentencing judge which would be nearly impossible to discharge. The opprobrium attaching to offences varies greatly from one offender and one offence to another. How a judge could realistically take such a matter into account is not easy to see. Whether or not public opprobrium will attach to an offence and, if so, to what extent, will depend on the individual, his or her position and reputation in society, whether and when the offender will return to the community where the offence occurred and the nature of the publicity, if any, that the conviction receives. In the case of long sentences, taking into account the impact of public opprobrium or stigma would seem an impossible exercise and almost meaningless. In addition, taking public opprobrium or stigma into account would seem to favour the powerful and well known over those who were lesser known. I see no reason why the well known individual should get a lesser sentence than the person who is hardly known in his or her community.
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> …

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[26] *Ryan v The Queen* (supra), 284-285.

> Secondly, the worse the crime, the greater will be the public stigma and opprobrium. The prisoner who rapes a child will undoubtedly be subject to greater public opprobrium and stigma than the prisoner who rapes an adult person." (citations omitted)

[61] Whether it was permissible to take into account public humiliation and vilification as a mitigating factor was considered in *Kenny v The Queen*[27]and *Einfeld v The Queen*.[28] In the former case Howie J, Johnson J agreeing, after referring to *R v Poynder*[29] in which "allowance, albeit only limited" for public humiliation was considered appropriate, concluded that public humiliation of "such proportion that it has had some physical or psychological effect on the person" could be taken into account as additional punishment. His Honour otherwise found it unnecessary to determine the question. The other member of the court, Basten JA, after noting the differences of opinion in *Ryan v The Queen* between McHugh J on the one hand and Kirby and Callinan JJ on the other, and referring to factors which McHugh J considered could be taken into account, observed:[30]

> "None of these factors and considerations operate in a clear and constant way. Each must be assessed according to underlying principles of retribution, deterrence and the need to ensure that the penalty fits the crime."

[62] His Honour implicitly found no error in the sentencing judge's remark that he did not believe that "…such public humiliation is more than would naturally be expected given these offences and his public figure, such that the offender should be entitled to a finding that he has suffered extra curial punishment as a result."

[63] In *Einfeld v The Queen*,[31] Basten JA, Hulme and Latham JJ agreeing, referred without criticism to Howie J's observations in *Kenny v The Queen*:[32]

> "My initial reaction was that public humiliation that arises from the commission of the offence should not alone give rise to a mitigation of sentence without more. However … the issue appears to be unresolved in the High Court … Clearly there may be an exceptional case where it reaches such proportion that it has had some physical or psychological effect on the person so that it could be taken into account as additional punishment."

[64] Basten JA then identified two factors "which affected the way in which public opprobrium could be taken into account." One was that it was the applicant's status and former office holding which "gave rise to the heightened seriousness of the offence" as well as to "a greater level of public opprobrium". The other factor was that "the offence was one in the course of which the applicant appeared to use his former public office to further his unlawful purposes."

[65] As it was not contended by the appellant that the sentencing judge erred in taking public opprobrium into account, it is appropriate to proceed on the assumption that it was a relevant consideration, albeit one the application of which gives rise to considerable difficulties. In this case, the factors which militated against the giving

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27 [2010] NSWCCA 6.
28 [2010] NSWCCA 87.
29 [2007] NSWCCA 157.
30 At [23].
31 (2010) 266 ALR 598; [2010] NSWCCA 87.
32 At [49].

of significant weight to the respondent's "otherwise previous good character", which encompass matters of the kind identified by Basten JA in *Einfeld,*[33] render the respondent's public humiliation and vilification of little weight. The attainment of high public office brings with it public exposure and media scrutiny as well as power, fame and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention and result in shame and distress to the offender and his family.

[66] The sentencing judge took into account the stress suffered by members of the respondent's family including "severe health problems as a result of these events" experienced by one family member. Where appropriate, consideration is given in sentencing to the needs of young children of the offender.[34] But even such consideration ought not be allowed to overwhelm the punishment which would otherwise be appropriate. The Chief Justice observed in *R v D'Arrigo; ex parte A-G (Qld)*:[35]

> "The balance of authority supports the view that while hardship to third parties because of the imprisonment of a family member may, if rarely, be a relevant consideration, it must not overwhelm others such as the need for deterrence, denunciation and punishment."

[67] The foregoing discussion suggests that, in exercising the sentencing discretion, the sentencing judge may well have given undue weight to some mitigating factors, as counsel for the appellant submitted. Even so, the appeal can succeed only if the sentences are shown to be manifestly inadequate.

[68] In *Markarian v The Queen*[36] Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> "As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies." (citations omitted)

[69] In determining an appropriate sentence, the sentencing judge had no sentencing guide available to him on which he could base his judgment. As Street CJ remarked in *Jackson*:[37]

> "There is accordingly no perceivable sentencing pattern reflecting the accumulation of judicial wisdom deriving from multiple instances of sentencing decisions. Inevitably this imports a wide discretionary field open to a sentencing judge."

[70] It may be said also that the absence of guidance as to an appropriate sentence afforded by comparable sentences makes it more difficult for an appellate court to conclude that the sentence imposed fell outside permissible bounds.

[71] The following discussion by McHugh J in *Everett v The Queen* identifies the breadth of the sentencing discretion and the limited circumstances in which interference with it is justifiable on Crown appeals:[38]

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33 At [101].
34 *R v LE* [1996] 2 Qd R 516.
35 [2004] QCA 399. See also *R v Chong; ex parte A-G (Qld)* [2008] QCA 22.
36 (2005) 228 CLR 357, 371.
37 At 434.
38 (1994) 181 CLR 295, 306, 307.

> "If a sentencing judge imposes a sentence that is definitely below the range of sentences appropriate for the particular offence, the case can be regarded as falling within the rationale for conferring jurisdiction in respect of Crown appeals. It can be regarded as sufficiently exceptional to warrant a grant of leave to appeal to the Crown even if no question of general principle is involved. Such cases, however, are likely to be rare. Defining the limits of the range of appropriate sentences with respect to a particular offence is a difficult task. What is the range in a particular case is a question on which reasonable minds may differ. It is only when a court of criminal appeal is convinced that the sentence is definitely outside the appropriate range that it is ever justified in granting leave to the Crown to appeal against the inadequacy of a sentence. Disagreement about the adequacy of the sentence is not enough to warrant the grant of leave. Sentencing is too inexact a science to make mere disagreement the criterion for the grant of leave to appeal against the inadequacy of a sentence. The requirement of leave gives rise to the inference that Parliament intended that something more than mere error was to be the criterion of the grant of leave."

[72] After taking into account the principles discussed above, I have concluded that there is an inadequacy in the subject sentences such that error has been demonstrated. The July 2009 sentences were for seven years. The subject sentences for the corruption charges were for five years. The perjury sentences were for two years and the new parole eligibility date of 2 January 2014, a date four and a half years after the date on which the subject sentences were passed, was fixed. For practical purposes, the total term of imprisonment imposed was twelve years.

[73] The sentences imposed in *Jackson* and *Lewis* both support sentences well in excess of five years imprisonment, even without taking into account the perjury offences. So too does the gravity of the offending conduct and its duration. Those matters have been addressed above. The offending conduct calls for severe punishment to mark its public denunciation in no ambiguous way and to serve as a deterrent to others who may be tempted to abuse high office. In my respectful opinion, the subject sentences do not satisfy these requirements.

[74] The earlier offences and the subject offences (other than the perjury offences) all involved corruption by a Minister of the Crown, but beyond that there is little to connect the two sets of offences beyond the respondent's venality. The two sets of corruption offences concerned different payments at different times by different payers for quite different reasons. It was thus plainly open to the sentencing judge to make the subject sentences cumulative upon the earlier sentences and it was conceded by counsel for the appellant that there was no error in that regard.[39]

[75] The making of the subject offences cumulative on the earlier offences attracted the application of the totality principle and it is apparent that, in arriving at the five year terms of imprisonment, the sentencing judge applied it. The application of the totality principle does not always require: [40]

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[39] See also *R v Todd* [1982] 2 NSWLR 517 at 126 and *R v Clements* (1993) 68 A Crim R 167, 172, 173, 174, 175.

[40] *Clements* (supra), 175.

> "[T]hat the prisoner be given a lesser sentence for the second offence or group of offences than would otherwise have been appropriate; the question must always be whether the total is proper."

In determining the proper sentence: [41]

> "The totality of the sentence imposed on the offender must bear a proper relationship to the overall criminality involved in the various offences being dealt with…."

[76] Counsel for the appellant pointed to the observation of McMurdo P in *R v Daswani*,[42] that:

> "Whether sentences are imposed concurrently or cumulatively, the primary consideration is that the effective punishment imposed adequately reflects the seriousness of the criminal conduct. It is not the law that if one crime is committed another crime of the same sort can be committed with little or no increase in punishment: see the observations of King CJ in *R v Dube & Knowles*, cited with approval in *R v Gage*." (citations omitted)

[77] The totality of sentences imposed, for the reasons expressed above, do not properly reflect the overall criminality of the respondent's conduct.

[78] I do not consider that the respondent's offending fell within the worst category of cases for which the fourteen year penalty was provided. For example, neither of the subject schemes corrupted or involved a conspiracy with public servants or other politicians. For that reason, I do not regard it appropriate to impose concurrent fourteen year sentences and make them concurrent with the earlier five year sentences, as contended for by the appellant.

[79] Having regard to the appellant's submissions as to the appropriate level of sentence and to the considerations discussed above, I regard an overall term of imprisonment of fourteen years appropriate. The fixing of a parole eligibility date one year before the mid point of the sentence recognises sufficiently all mitigating circumstances, such as they are, including co-operation during the trial. Counsel for the respondent's submission that his client's concessions may have shortened the duration of the trial by as much as four or five weeks was not challenged. Such co-operation reduces the strain on the Court's resources, lessens the burden on jurors, obviates unnecessary disruption of the personal and business affairs of persons who would otherwise be called as witnesses and saves public moneys. It is to be encouraged. And, as the sentencing judge recognised, the conditions of the respondent's confinement, because of the need to afford him protection, are also "more severe than they would ordinarily be". Consequently, I would order that:

(a) The appeal be allowed.

(b) The sentences imposed, except for the perjury offences the subject of counts 11 to 15 on the indictment, be set aside.

(c) The respondent be sentenced to seven year terms of imprisonment for each of the offences of official corruption.

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41 *R v Larsen* (1989) 44 A Crim R 121, 126.

42 [2005] QCA 167, [12].

(d) Such sentences for corruption and perjury to be served concurrently with each other and cumulatively upon the sentences imposed on 17 July 2009.

I would fix a new parole eligibility date of 17 July 2015, being a date twelve months earlier than the mid point of fourteen years from the commencement of the sentences imposed on 17 July 2009.

[80] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.

[81] **CHESTERMAN JA:** I agree with the orders proposed by Muir JA for the reasons given by his Honour.