SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tootell; ex parte A-G (Qld)* [2012] QCA 273
PARTIES:	**R** **v** **TOOTELL, Trent John** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 161 of 2012 DC No 30 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	9 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2012
JUDGES:	Holmes and Fraser JJA and Henry J Judgment of the Court
ORDERS:	**1. The appeal is allowed.** **2. The sentences are set aside.** **3. On Count 1 the respondent is sentenced to two months imprisonment to be followed by 12 months probation with the requirements set out in s 93 of the *Penalties and Sentences Act* 1992.** **4. On each of Counts 2 and 3 the respondent is sentenced to 14 months imprisonment to be suspended after he has served two months with an operational period of 20 months.** **5. A warrant is to issue for the respondent's arrest, to lie in the Registry for seven days before execution.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – EXERCISE OF DISCRETION – GENERALLY – where the respondent pleaded guilty to three counts of unlawfully and indecently dealing with a child under the age of 16, with the aggravating circumstance that each child was under the age of 12 and in his care – where the respondent was employed at a child-care centre – where the respondent was sentenced to 14 months imprisonment on two counts, wholly

suspended with an operational period for two years, and was placed on probation for 18 months on the third count – where the sentencing judge found that a combination of mitigating circumstances amounted to "exceptional circumstances" so as to take the matter outside the requirement in s 9(5) of the *Penalties and Sentences Act* that the respondent serve an actual term of imprisonment – where the Attorney-General appeals against that sentence on the grounds that the sentencing judge erred in finding there were exceptional circumstances and that the sentence was manifestly inadequate for offences committed while the respondent was in a position of trust and responsibility – whether the sentencing judge erred in his assessment of exceptional circumstances

Crimes (Sentencing Procedure) Act 1999 (NSW), s 44
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)
Penalties and Sentences Act 1992 (Qld), s 9(5), s 9(5A), s 9(6)
Probation and Parole Act 1983 (NSW), s 21(3)

AB v The Queen (1999) 198 CLR 111, [1999] HCA 46, considered
A-G (Qld) v Francis (2008) 250 ALR 555, [2008] QCA 243, considered
A-G (Qld) v Friend [2011] QCA 357, cited
Baker v The Queen (2004) 223 CLR 513; [2004] HCA 45, cited
Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, cited
R v Astill (No 2) (1992) 64 A Crim R 289, cited
R v Craig; ex parte A-G (Qld) [2002] QCA 414, considered
R v Kelly (Edward) [2000] 1 QB 198; [1998] EWCA Crim 3517, cited
R v LA; ex parte A-G (Qld) [2000] QCA 123, cited
R v Quick; ex parte A-G (Qld) (2006) 166 A Crim R 568; [2006] QCA 477, considered
R v Simpson [2001] 53 NSWLR 704; [2001] NSWCCA 534, cited

COUNSEL: A W Moynihan SC for the appellant
P E Smith, with K M Hillard, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Suthers Lawyers for the respondent

[1] **THE COURT:** The respondent pleaded guilty to three counts of unlawfully and indecently dealing with a child under the age of 16, with the aggravating circumstance in each case that the child was under the age of 12 and in his care. On two of those counts he was sentenced to 14 months imprisonment, wholly suspended, with an operational period of two years; on the third he was placed on

probation for 18 months. The Attorney-General appeals against that sentence on two grounds: that the learned sentencing judge erred in finding that there were "exceptional circumstances" so as to take the case outside the requirement in s 9(5) of the *Penalties and Sentences Act* 1992 that the respondent serve an actual term of imprisonment; and that the sentence was manifestly inadequate. It is conceded, however, that the head sentence of 14 months imprisonment, while lenient, was within a proper range.

[2] The provisions of the *Penalties and Sentences Act* of particular relevance here are s 9(5), (5A), and (6). They are as follows:

> "(5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—
>
> (a) the principles mentioned in subsection (2)(a) do not apply; and
>
> (b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.
>
> (5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.
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> (6) In sentencing an offender to whom subsection (5) applies, the court must have regard primarily to —
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> (a) the effect of the offence on the child; and
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> (b) the age of the child; and
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> (c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and
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> (d) the need to protect the child, or other children, from the risk of the offender reoffending; and
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> (e) the need to deter similar behaviour by other offenders to protect children; and
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> (f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
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> (g) the offender's antecedents, age and character; and
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> (h) any remorse or lack of remorse of the offender; and
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> (i) any medical, psychiatric, prison or other relevant report relating to the offender; and
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> (j) anything else about the safety of children under 16 the sentencing court considers relevant."

The offences

[3] The respondent was a 24 year old child care worker in charge of a group of young children at a child care centre. The offences were committed against two three year

old girls in the group, to whom we will refer as A and B. On two separate occasions when he was reading a book to A, who was seated on his lap, the respondent rubbed her upper thigh and groin area; on the second occasion he also rubbed her vaginal area outside her underpants, ejaculating shortly after. The remaining offence occurred when, sitting on the floor with B, helping her to complete a puzzle, the respondent rubbed her upper thigh, groin and vaginal area outside her underpants, again ejaculating.

[4] It seems that one of the children said something about the respondent which raised concern; the court was not told what it was. The supervisor of the child care centre confronted him and he made admissions as to what he had done. On the same day the respondent contacted his father, extremely distressed, and the two went of their own volition to the police, where he confessed to the conduct described above. The children were interviewed, but neither child disclosed any wrongdoing by the respondent. The charges were based entirely on the respondent's admissions.

[5] Victim impact statements were provided by the mother of one child and the grandmother of the other. A was described as outgoing and progressing well. B had been moved from the centre, was missing some of the staff members and was receiving counselling.

The respondent's background and medical history

[6] The respondent had no criminal history. He had completed grade 12 in a vocational stream through which he obtained a child care certificate, passing all his subjects except for mathematics, but he did not qualify for an OP score. He lived with his parents and had been employed at the child care centre for about six years. When he was 11 years old, the respondent had undergone surgery to remove a brain tumour. Before and after the surgery he suffered from epileptic seizures. A neuropsychological report prepared in late 2006, when he was 20, identified a number of deficiencies said to be consistent with that medical history. His intellectual functioning was in the borderline impaired range, with a full scale IQ reading of 77. The assessing neuropsychologist recorded that he exhibited difficulties with verbal and language skills, auditory attention and mental arithmetic, consistent with the surgery he had undergone, and with executive functions such as planning, mental flexibility and abstract reasoning, possibly because his frontal lobe functioning had been affected by regular seizure activity. It was noted that he lived with his parents and had little interaction with peers or friends outside work or sport (he played soccer).

[7] That picture as to the respondent's level of social interaction seems to have remained accurate; his father told police that he had no friends of his own age, was very shy and had never had a girlfriend. After admitting the offences, he of course ceased to work at the child care centre, and had not been able to obtain a job since. Because of his epilepsy he was unable to obtain a driver's licence, making it more difficult for him to find employment.

Evidence of remorse and prospects of rehabilitation

[8] The respondent pleaded guilty at the committal stage. He had attended a number of counselling sessions which, according to a report from the social worker who had undertaken the counselling, involved managing his anxiety and helping him to cope with conflict, to develop skills to ensure he did not re-offend, and to focus on

activities by way of work and volunteering which were compatible with his expected conviction. A psychiatrist's report was also tendered. In the psychiatrist's opinion, the respondent suffered from no psychiatric illness other than an adjustment disorder reflective of his grief and regret for his behaviour. The respondent was motivated, compliant with advice and unlikely to be a risk to the community in the future.

The sentencing judge's remarks

[9] The learned sentencing judge noted that the offences were serious, particularly because of the betrayal of trust involved in them; but in terms of what was actually done to the children, they were at the lower end of the scale of such offences. The respondent's actions appeared to have been opportunistic rather than planned. His Honour noted the content of the victim impact statements. By way of mitigation, he regarded it as significant that the respondent when confronted by his employer immediately made admissions and promptly went to the police and again made full admissions. It was also significant that the evidence came from those admissions and no other source. By that conduct and by his plea of guilty at the committal proceedings, the respondent had demonstrated remorse and ensured that the children involved would not have to participate in court proceedings. His Honour noted the respondent's medical history and the neuropsychological assessment of him. He regarded it as to the respondent's credit that he had sought counselling to help him deal with his behaviour.

[10] The learned judge undertook a consideration of the factors listed in s 9(6) of the *Penalties and Sentences Act*, which he described as:

> "a checklist … of matters which are said to be of primary importance when considering whether or not exceptional circumstances exist."

In fact, the matters listed in s 9(6) do not refer specifically to exceptional circumstances, but are to be taken into account generally "in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years"; indeed, the sub-section existed before s 9(5) was amended to require imprisonment absent exceptional circumstances. The only guidance the legislation gives in the decision as to whether there are exceptional circumstances is to be found in s 9(5A), which refers to closeness in age between offender and child.

[11] Nonetheless, that misdescription of s 9(6) is of no consequence. The matters contained in s 9(6) were all relevant to the sentencing exercise and his Honour, having reviewed them, identified what he regarded as the relevant exceptional circumstances:

> "It's … the combination of factors, the full and frank disclosure very early in the piece; the relatively minor level of offending; the problems that you had with your health and particularly the seizures; the view that I've taken that you have strong prospects of full rehabilitation; the fact that I'm persuaded that you've demonstrated real remorse and another factor, which I haven't mentioned hitherto, but which Mr Smith has urged upon me and which I think is demonstrated in the evidence, namely that you have perhaps in the past demonstrated some emotional immaturity and it seems to me that one might expect that that can be addressed by those professional people who are assisting you."

The appellant's contentions

[12] The appellant submitted that the requirements in s 9(5) could not be avoided by treating common matters of mitigation as exceptional. Counsel referred in particular to the judgments of de Jersey CJ and Chesterman J in *R v Quick; ex parte A-G (Qld)*,[1] in which it was noted that the combination of circumstances relied on there – that the respondent had pleaded guilty to an *ex officio* indictment, had no previous criminal history, had sought counselling, had been treated for depression, was remorseful and unlikely to re-offend, had suffered public embarrassment as a result of the charges, had suffered anxiety awaiting conviction and would find imprisonment difficult, and had committed offences which were not the most serious examples of their kind – reflected usual consequences commonly flowing from the discovery and prosecution of sexual offences.[2]

[13] Here, the appellant submitted, the facts that the respondent had no criminal history, had cooperated with the authorities, pleaded guilty, demonstrated remorse, sought counselling and was unlikely to re-offend, similarly went to mitigation but could not, alone or together, constitute exceptional circumstances. Nor could the respondent's cognitive deficits amount to exceptional circumstances: they did not prevent him from performing his duties, or from knowing that his conduct was wrong. The respondent had molested two children on three separate occasions in circumstances where his offending was aggravated by their youth and vulnerability, the age disparity and the breach of trust he committed as their carer. The fact that the actual circumstances of the offending were at the lower end of the scale was relevant to the head sentence rather than the decision as to whether exceptional circumstances existed.

[14] Contrary to what had been submitted for the respondent at first instance, and reiterated here, the appellant said, his confessions did not fit within the circumstances discussed by Hayne J in this passage from *AB v The Queen*,[3]

> "An offender who confesses to crime is generally to be treated more leniently than the offender who does not. And an offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known. Leniency is extended to both offenders for various reasons. By confessing, an offender may exhibit remorse or contrition. An offender who pleads guilty saves the community the cost of a trial. In some kinds of case, particularly offences involving young persons, the offender's plea of guilty avoids the serious harm that may be done by requiring the victim to describe yet again, and thus relive, their part in the conduct that is to be punished. And the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition."[4]

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1 (2006) 166 A Crim R 568; [2006] QCA 477.
2 Per de Jersey CJ at [6]-[7]; per Chesterman J at [36]–[37].
3 (1999) 198 CLR 111.
4 At 155.

The respondent had not volunteered hitherto unsuspected wrongdoing, and the fact that he had confessed to his conduct was not unusual. The fact that his confession formed the entire foundation for the charges because the complainants were too young to remember the incidents was a matter of mitigation, but not one so exceptional as to justify a sentence involving no actual imprisonment. The appellant cited *R v Craig; ex parte A-G (Qld)*[5] for the last proposition.

[15] We consider, however, that the respondent's reference to *AB v The Queen* was properly made. On any view, the respondent brought to the attention of the authorities offences formerly not known to them. If one assumes, at the highest, that in the first child's complaint to the supervisor, there was some indication of sexual misbehaviour by the respondent, it was nonetheless the case that the offending against the other child would have remained undiscovered had the respondent not disclosed it.

[16] *Craig* was an Attorney-General's appeal against sentence involving a school principal who had, among other offences, procured a grade 7 child to masturbate him. Had it not been for the confessions of the respondent, who was otherwise of impeccable background and character, none of the charges was likely to have been before the court. That constituted, this court said in dismissing the appeal, extraordinary circumstances justifying suspension of a sentence of imprisonment after the relatively short period of four months. It is, with respect, a long - and impermissible - stretch to try to elevate the conclusion there into a general proposition that the fact of an offender's confession providing the sole basis for a charge cannot amount to an exceptional circumstance warranting a non-custodial sentence.

The respondent's contentions

[17] The respondent pointed out that no specific error could be identified in the learned judge's approach to the assessment of whether there were exceptional circumstances, or in his performance of the sentencing exercise more generally. His Honour had identified the combination of factors constituting the exceptional circumstances, all of which were supported by evidence. Of particular importance was the fact of the confessions to offences not otherwise known and in respect of which there was no evidence from the children concerned. The physical acts involved in the offences themselves were, as the learned sentencing judge said, relatively limited when considered against the larger background of indecent treatment offences commonly seen by the courts. The imposition of a non-custodial sentence notwithstanding the fact that there was more than one complainant was not beyond a proper exercise of discretion; *R v LA; ex parte A-G (Qld)*[6] was a case where that had occurred.

Exceptional circumstances

[18] The *Penalties and Sentences Act* does not attempt to define or confine what amounts to "exceptional circumstances". This statement of what the adjective means, taken from *R v Kelly (Edward),*[7] (which has been applied in decisions of this

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5 [2002] QCA 414.
6 [2000] QCA 123.
7 [2000] 1 QB 198.

Court dealing with the expression as it appears in the *Dangerous Prisoners (Sexual Offenders) Act* 2003[8]) is helpful:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."[9]

[19] The expression must, of course, be read in its statutory context. The intent of s 9(5)(b) is to make it the usual case that those who commit sexual offences against children will serve actual imprisonment. That intent should not be subverted by, for example, an over-readiness to regard as exceptional any circumstance peculiar to a prisoner's case.[10] But the statements in *R v Quick* on which the appellant relies should not be taken as indicating that a combination of circumstances which would not individually be unusual can never be judged extraordinary. To the contrary, de Jersey CJ emphasised in that case the need for "careful assessment" of whether "the aggregation of such features warrants the conclusion the offender should be spared imprisonment…".[11]

[20] In *Griffiths v The Queen*[12], the High Court's view was that it was not essential that a defendant be able to point to one or more individually extraordinary factors in order to demonstrate that the circumstances of his case as a whole were exceptional. The issue in *Griffiths* was when a number of factors might make a case exceptional for the purposes of s 21(3) of the *Probation and Parole Act* 1983 (NSW) so as to permit the imposition of a shorter parole period than that otherwise provided for. Brennan and Dawson JJ listed the factors relevant there – the offender's youth, lack of serious criminal history, the effect of his drug addiction, his co-operation with police and better than usual prospects of rehabilitation – before going on to observe

> "Although no one of these factors was exceptional, in combination they may reasonably be regarded as amounting to exceptional circumstances."[13]

The Court of Criminal Appeal had erred in failing to evaluate those factors in combination.

[21] Deane J, in his judgment in *Griffiths,* did not consider that the court below had made the error of not looking at the offender's overall situation. For other reasons, however, it was necessary that it reconsider the matter, and in that exercise it should have regard to the factors identified by Brennan and Dawson JJ.[14] Gaudron and McHugh JJ took the view that while the better than average prospect of rehabilitation was not of itself sufficient to justify the exercise of the power to

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8 See *A-G (Qld) v Francis* (2008) 250 ALR 555, 566; [2008] QCA 243, [92]; *A-G (Qld) v Friend* [2011] QCA 357.

9 per Lord Bingham of Cornhill, 208.

10 See Kirby P's discussion of the effect a statutory requirement of "special circumstances" in *R v Astill (No 2)* (1992) 64 A Crim R 289 at 293.

11 (2006) 166 A Crim R 568; [2006] QCA 477 at [8].

12 (1989) 167 CLR 372.

13 At 379.

14 At 388.

confer a shorter non-parole period (because it was the totality of the circumstances which was to be considered) that fact in combination with other circumstances which were relatively neutral or of little weight might suffice.[15] They considered that the Court of Criminal Appeal had erred in a different respect, but agreed that in reconsidering the matter it should take account of the circumstances to which Brennan and Dawson JJ referred.

[22] In *R v Simpson*,[16] Spigelman CJ said of the expression "special circumstances" used in s 44 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) (again in connection with whether a lower than the otherwise prescribed non-parole period could be imposed),

> "Statutory words of such generality usually lead courts to refuse to identify in advance a list of matters capable of satisfying the statutory formulation. While certain considerations might not often be sufficiently 'special', so that an exceptional justification is required for them to attain the requisite statutory quality, nevertheless there may always be circumstances in which such a factor is of sufficient strength, either alone or in combination with other factors, to justify a conclusion that 'special circumstances' are made out on the facts of a particular case. It will be comparatively rare for an issue to arise in terms of a proposition that a particular circumstance is incapable, as a matter of law, of ever constituting a 'special circumstance'."[17]

Those observations are equally apposite here.

[23] Considering similar expressions used in *Baker v The Queen*,[18] Gleeson CJ said,

> "There is nothing unusual about legislation that requires courts to find "special reasons" or "special circumstances" as a condition of the exercise of a power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors."[19]

Callinan J, in the same case, endorsed Lord Bingham of Cornhill's description of the characteristics applicable to "extraordinary circumstances" as equally applicable where "special reasons" was the term under consideration.[20] He went on to observe,

> "It may be that it is only in combination, or in increasing degrees of relevance and importance that circumstances may come to be, or provide special reasons."[21]

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15 At 393.
16 (2001) 53 NSWLR 704.
17 At 717.
18 (2004) 223 CLR 513.
19 At 523.
20 At 573.
21 At 574.

[24] What emerges, then, is there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case.

[25] It was implicit in this appeal, posited as it was on the two grounds of error (mistaken assessment of exceptional circumstances and manifest inadequacy in the sentence imposed), that sentencing by reference to s 9(5) of the *Penalties and Sentences Act* was a two-stage process. The better construction of s 9(5), in our view, is that the court, in the sentencing process, must consider whether there are exceptional circumstances which, in the light of all the other aspects of the case including those described in s 9(6), warrant the imposition of a sentence which does not involve actual custody. The mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances of that kind. Adopting that approach, if in the present case the circumstances the learned sentencing judge identified were, taken in context with the offending and associated sentencing considerations, so exceptional as to warrant a non-custodial sentence, the sentence actually imposed will not have been inadequate.

Conclusions

[26] The combination of factors identified, including the difficulties the respondent experienced in intellectual and social functioning and the fact that the case against him was founded on his confession, were powerful mitigating circumstances. They were circumstances which might, in other contexts of offending, properly have been regarded as so exceptional as to warrant a non-custodial sentence. Had this case involved, perhaps, a single offence, or occurred in a setting other than a child care centre, the result reached here might well have been available.

[27] But we have concluded differently in the circumstances of this particular case, where there were three distinct offences on three separate occasions against two children, and where the respondent was in a special position of responsibility for children all the more vulnerable because they were not of an age to make effective complaint. Against that background, it was not open to his Honour to regard the mitigating circumstances as so exceptional as not to require custodial imprisonment. The appeal must be allowed.

[28] It falls to this court, then, to re-sentence the respondent. By consent, an affidavit annexing a report on the respondent's performance of probation was tendered. It noted his complete compliance with the requirements of the probation order over the four months since its imposition. The maker of the affidavit also deposed to the fact that the respondent had been assessed as a low to low-moderate risk of re-offending, with his probation focussed on reducing his risk factors; that he attended fortnightly appointments with a psychologist; and that he had continued fortnightly counselling with his psychiatrist.

[29] The degree to which the respondent has already served part of his sentence, particularly through compliance with the probation order, should be taken into account in this court's imposition of a different sentence. For that reason, we have exercised our discretion to make the period of actual imprisonment somewhat

shorter than it might otherwise have been. Another consideration is the desirability of the respondent resuming his rehabilitation as soon as possible through the mechanism of probation.

Orders

[30] The following orders are made:

1. The appeal is allowed.
2. The sentences are set aside.
3. On Count 1 the respondent is sentenced to two months imprisonment to be followed by 12 months probation with the requirements set out in s 93 of the *Penalties and Sentences Act* 1992.
4. On each of Counts 2 and 3 the respondent is sentenced to 14 months imprisonment to be suspended after he has served two months with an operational period of 20 months.
5. A warrant is to issue for the respondent's arrest, to lie in the Registry for seven days before execution.