SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morehu-Barlow* [2014] QCA 4
PARTIES:	**R** **v** **MOREHU-BARLOW, Hohepa Hikairo** (applicant)
FILE NO/S:	CA No 71 of 2013 DC No 404 of 2013 DC No 374 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2013
JUDGES:	Fraser and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of aggravated fraud (counts 1 and 3), two counts of falsifying a record (counts 2 and 5), one count of uttering (count 4), one count of possessing a dangerous drug (count 6), one count of possessing a relevant substance (count 7) and a summary drug offence – where the applicant was given concurrent sentences of imprisonment of two years for counts 1, 2, 4, 5 and a sentence 12 years imprisonment to be served cumulatively for count 3, resulting in an effective term of 14 years imprisonment – where the sentencing judge fixed a parole eligibility date of 12 December 2016 – where the applicant contends that the sentence was manifestly excessive – where the applicant argued the sentencing judge had insufficient regard to the applicant's mitigating factors and that the imposition of a cumulative term was not warranted because the only basis for accumulation was the total sum of money involved – whether the sentencing judge erred – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 9(2)(b), s 9(2)(e), s 9(2)(r), s 155, 156

Markarian v The Queen (2006) 228 CLR 357; [2005] HCA 25, cited
R v Daswani (2005) 53 ACSR 675; [2005] QCA 167, considered
R v Gadaloff [1998] QCA 458, considered
R v Heiser & Cook; ex parte A-G (Qld) [1997] QCA 14, applied
R v Hinterdorfer [1997] QCA 199, considered
R v Kawada [2004] QCA 274, considered
R v Lovell [2012] QCA 43, considered
R v O'Carrigan [2013] QCA 327, considered

COUNSEL: D Shepherd for the applicant
M R Byrne QC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant was given an effective sentence of 14 years imprisonment for a very substantial fraud upon the State. The offences to which the applicant pleaded guilty and of which he was convicted on 19 March 2013, the maximum penalties for those offences, and the sentences imposed for them, are set out in the following table.

Date of Offence	Offence/Maximum Penalty	Sentence
Ct 1: btwn 6 October 2007 – 8 August 2008.	Aggravated fraud (s 408C(1)(c), (2)(b) & (d) (max – 10 years).	2 years imprisonment
Ct 2: on or about 26 September 2008.	Falsifying a record (s 430(e)) (max – 10 years).	2 years imprisonment
Ct 3: btwn 28 September 2008 – 18 December 2011.	Aggravated fraud (s 408C(1)(b), (2)(b) & (d)) (max – 12 years).[1]	12 years imprisonment (cumulative)
Ct: 4 btwn 22 July 2010 – 8 December 2011.	Uttering (s 488(1)(b)) (max – 3 years).	2 years imprisonment
Ct 5: on or about 14 November 2011.	Falsifying a record (s 430(e)) (max – 10 years)	2 years imprisonment
Ct 6: 9 December 2011.	Possess dangerous drug (s 9(d) *Drugs Misuse Act* 1986) (max – 15 years).	6 months
Ct 7: 9 December 2011.	Possess relevant substance (s 9A *Drugs Misuse Act* 1986) (max – 15 years).	6 months
Summary offence: 9 December 2011.	Possess utensils (s 10(2) *Drugs Misuse Act* 1986) (max – 2 years).	Not further punished

[1] The circumstance of aggravation which resulted in the maximum penalty for count 3 being 12 years imprisonment was that the yield to the applicant was $30,000 or more. The yield on count 3 exceeded $16 million.

[2] Each of the sentences imposed for counts 1, 2, 4, 5 and 7 was to be served concurrently with each other. The sentence of 12 years imprisonment imposed for count 3 was ordered to be served cumulatively upon the sentences of two years imprisonment imposed for counts 1, 2, 4 and 5. The sentencing judge fixed a parole eligibility date of 12 December 2016 when the applicant will have served five years imprisonment. It was declared that 464 days which the applicant had served in pre-sentence custody between 12 December 2011 and 19 March 2013 was time already served under the sentences.

[3] The applicant has applied for leave to appeal against sentence on the ground which is stated as follows:

> "The sentence is manifestly excessive because:
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> 1. the learned sentencing judge erred in giving too much weight to the amount of money taken and insufficient weight to the actual loss suffered,
> 2. the learned sentencing judge erred by accumulating the sentence on count 3 (12 years imprisonment) on the sentences imposed for counts 1, 2, 4 & 5 (2 years imprisonment),
> 3. the learned sentencing judge erred by imposing the maximum penalty for count 3 (12 years imprisonment),
> 4. the learned sentencing judge erred by not giving sufficient weight to mitigating factors including the personal circumstances of the offender, the extent of his co-operation with the administration of justice and his remorse."

[4] The explanations suggested in paragraphs 1-4 of the claimed manifest excess in the sentence are inconsistent with the ground of appeal that the sentence is manifestly excessive. That ground of appeal pre-supposes that no specific error can be discerned in the exercise of the sentencing discretion but that the sentence is manifestly excessive on its face.[2]

[5] Ultimately, in addition to a contention that the sentence was manifestly excessive, the applicant focussed upon the proposition that the error was revealed by the asserted fact that the amount of money taken by the applicant was the primary and determinative factor in the sentencing judge's assessment of the overall criminality involved in the applicant's offending; too much weight was given to that one factor for the purposes of deciding that the maximum penalty of 12 years imprisonment for count 3 should be imposed cumulatively upon the sentences imposed for counts 1, 2, 4 and 5. It is difficult to see that the relative weight attributed by the sentencing judge to relevant considerations properly taken into account can afford a ground for finding that the sentencing discretion has miscarried. In any event, for the following reasons I would conclude that there was no such error.

Circumstances of the offences and the personal circumstances of the offender

[6] The applicant was aged between 32 and 36 when he committed the offences and he was 38 years old when he was sentenced. He was a single man employed in the finance division of the Department of Queensland Health. The applicant had a criminal history in New Zealand consisting of an offence of theft as a servant and

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[2] *Markarian v The Queen* (2006) 228 CLR 357 at [25] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

one offence of using a document for pecuniary advantage in December 1998. He was sentenced to eight months imprisonment suspended after six months for those offences. A reparation order was also imposed for the latter offence requiring the payment of $31,764.60. In the following year the applicant changed his first name from Joseph to its Maori equivalent and he later included his father's name within his surname.

[7] The applicant commenced his employment with the Department of Queensland Health in about September 2005. In January 2007 he was appointed as assistant finance officer in the business support unit of the Health and Community Services division. In March 2007 he was promoted to senior business and finance officer. In May 2009 he was appointed as principal project officer in the Health Services and Logistics branch. The applicant's rise through the ranks of the Health Department was due in part to qualifications and experience claimed in the CV attached to his applications. He claimed to have a Bachelor of Laws from the University of Victoria, Wellington, New Zealand, but in truth he had no such qualification. The applicant's roles during the period of the offending entitled him to certify claims of payment and to approve such claims, but not to do both at once. The limit of his delegations permitted him to approve payments up to only $10,000.

[8] Count 1 related to payments made by the Health Department to a bank account maintained by acquaintances of the applicant who operated a part-time business called The Muse. Those acquaintances lived in the same apartment complex in which the applicant lived. The applicant and his partner moved into their unit to look after their two children whilst they were away for two weeks. This apparently gave the applicant access to their computers and the business records of their business. They had leased an expensive motor vehicle and subsequently agreed to sub-lease it to the applicant, who was to keep up the lease payments to the lessor. The applicant set-up an internal Health Department document which identified vendors to whom money could be paid (a "Vendor Set-up Form") and then submitted false invoices in the name of his acquaintances' business.

[9] Seven payments in all were made to the account of the applicant's acquaintances. The seventh payment differed from the earlier payments in that it involved a ministerial grant of funds to a charity called "Filling the Gap". The charity was an indigenous dental scheme operating from a health centre in Cairns. It enlisted the assistance of volunteer dentists to provide their services to the centre. Dr Rosenwax, who established the charity, wrote to the then Minister for Health in early 2008 seeking assistance to cover the travel costs of volunteers. The Minister agreed to provide $25,000 for the charity to be drawn against the "Minister's Grant in Aid Fund". At that time the applicant's duties included oversight of that fund. A letter was sent to the charity advising it of the $25,000 grant and requesting it to liaise with the applicant to arrange the payment. The charity supplied an invoice dated 9 June 2008 and the applicant completed the appropriate set-up form for the charity on 10 June 2008 and arranged for the payment to be made to the bank account of the charity.

[10] Subsequently, an invoice dated 14 August 2008 in the name of The Muse requested payment of $27,500, being $25,000 plus $2,500 GST for the charity. The applicant approved a General Purpose Voucher for the payment and attached to it copies of the correspondence from the Minister which related to the funds paid in June 2008. The payment was processed and the $27,500 was paid to the applicant's acquaintances' bank account. The total of the seven payments made to the

applicant's acquaintances in this way over 12 months was about $77,000. $47,600 was transferred from their bank account to a debit card account in the applicant's name and in addition payments totalling about $11,000 were made to the lessor of the motor vehicle sub-leased by the applicant.

[11] Counts 2, 3, 4 and 5 concern the applicant's taking of about $16,600,000 from the Health Department.

[12] In relation to count 2, the applicant prepared a Vendor Set-up Form which requested that a vendor account be established for a business called "Healthy Initiatives & Choices", which purportedly supplied services to the Health Department. In fact the trading name had been established by the applicant and he resided at the address given for the business. The Vendor Set-up Form was prepared merely to facilitate frauds by the applicant. Attached to the form was an invoice from Healthy Initiatives & Choices claiming "Minister's Grant in Aid" funding of $33,000 was for "Filling the Gap" and a copy of the ministerial correspondence mentioned earlier.

[13] Count 3 related to 55 payments made by the Health Department to the applicant's bank account pursuant to invoices in the name of Healthy Initiatives & Choices. The payments totalled $16,613,033.80. The first 54 payments were of a similar nature. The last payment, $11,000,000, was somewhat different. The first 54 payments perpetuated the applicant's fraud relating to the Filling the Gap program the subject of the seventh payment in count 1, but in this case Healthy Initiatives & Choices was substituted as the recipient of the money. The applicant continued to use the ministerial correspondence mentioned earlier. A Health Department employee became concerned that the ministerial correspondence being supplied to her to support the payments was not current and that a more up to date letter should be obtained from the Minister. The applicant assured her that this was in train and she continued to process the payments. In mid-2010 the ministerial letter used in support of the payments changed to what purported to be a letter from the then current Minister for Health: this is subject matter of count 4.

[14] In December 2010 the applicant took leave and was replaced in his then position of principal finance officer by Ms Lutz. When the applicant returned to work a month or so later he commenced in the position of manager of governance. He then informed Ms Lutz that she no longer looked after the cost centre relating to the Ministerial Grant in Aid and that if fell under his role. Because he was senior to her, she reluctantly accepted this advice. Between September 2008 and September 2011, a total of $5,613,033.80 was deposited to the Commonwealth Bank account of Healthy Initiatives & Choices, a bank account controlled by the applicant. None of the funds were transferred to the relevant program.

[15] In December 2010 the applicant entered into a contract to purchase a unit at New Farm off the plan. He paid a deposit of $50,000 on 23 December 2010 and the balance deposit of $515,000 on 16 February 2011. He was required to pay a further $5,164,028.50 at settlement. In order to obtain sufficient funds to settle the contract, the applicant prepared documents designed to defraud $11,000,000 from the Health Department. For this purpose he took advantage of an arrangement the Department had made with the James Cook University for the provision of dental facilities on the latter's Cairns and Townsville campuses. That arrangement had been approved in the 2010/11 financial year to cover funding over the next four years. The payment in 2011/12 financial year was set at $10,000,000 exclusive of

GST, and had not been paid by November 2011 because negotiations were being undertaken in relation to the contract.

[16] The applicant submitted a Healthy Initiatives & Choices invoice for $11,000,000 dated 14 November 2011. Attached to the invoice was a copy of the Governor-in-Council memorandum recommending the funding, including the 2011/12 financial year funding. The applicant also attached a capital funding agreement between the Department and the University which purported to be signed by representatives of those parties in relation to the $10,000,000 for the 2011/12 financial year. In fact no such contract had been finalised and the contract for the previous year's funding had been altered to produce this document. The applicant prepared and certified as being in order to pay a General Purpose Voucher for $11,000,000. (That document relates to count 5.) Because of the amount involved and the lateness of the preparation of the document, the applicant was required to have discussions with members of the Treasury to organise the release of the money. The money was transferred into the Commonwealth Bank account of Healthy Initiatives & Choices and funds were thereafter transferred to the applicant's bank account. The applicant drew a bank cheque for $5,600,000 to settle his purchase of the New Farm unit and to cover stamp duty and legal costs.

[17] The applicant's frauds came to light on 8 December 2011 when enquiries commenced and the matter was referred to police. At that date, there was a balance in the applicant's bank accounts of $4,475,274.59, including $2,919,610 in the Commonwealth Bank account of Healthy Initiatives & Choices. The applicant's expenditure in the period 29 September 2008 to 8 December 2011 was categorised as follows:

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Expenditure	**Amount**
Moray Street Property Purchase	$6,165,915.40
Cash Withdrawals	$592,946.43
Travel and Accommodation	$1,129,396.92
Louis Vuitton purchases	$636.740.14
Motor Vehicles	$319,272.41
Libertine Parfumerie Costs	$212,823.09
Artwork	$199,937.29
Space Furniture	$189,893.80
Clothing	$143,461.38
Bang & Olfuson	$103,975.00
David Jones	$85,013.45
Flowers (The Flower Trap)	$74,338.20
Brisbane Jetskis	$43,900.00
Restaurants & Food	$54,540.71
Rent	$73,265.00
Watches of Switzerland	$30,605.00
Mount Blanc & The Pen Shop	$16,707.16
Fusion Cycles	$14,574.95
Unvouched Transfers And Withdrawals	$646,013.43
Transfers to Barlow ANZ Debit Card	$410,290.00
Balance of Expenditure	$1,298,395.82
Total Expenditure	**$12,442,005.58**".

[18] Members of the applicant's family were given goods, travel and money from the proceeds of the applicant's frauds. Members of the staff of the Department of Health were also given various gifts, entertainment and flowers. The applicant acquired two Mercedes motor vehicles. He told friends, acquaintances and work colleagues that his extravagant lifestyle resulted in him being a member of a Tahitian Royal family which gave him access to a trust fund. In some documents he gave his title as "HRH".

[19] Count 4 charged that the applicant uttered a forged ministerial letter which purported to come from the then current Minister for Health. Accompanying the letter was a document which purported to be a tracking document for ministerial correspondence, showing the names of the author, the persons who cleared the letter, the endorsement of the Director-General of Health, and various dates each signed off on the document. The letter was false and was never sent as it purported to have been. It was used merely to support the false invoices and to placate the employee who raised concerns about the authorisations for the payments to Health Initiatives & Choices. A copy of the false letter was attached to a General Purpose Voucher for payment of funds to Health Initiatives & Choices on 16 occasions between July 2010 and September 2011.

[20] Count 5 related to the applicant's preparation of the General Purpose Voucher for the $11,000,000 payment to Healthy Initiatives & Choices. Counts 6 and 7, and the summary charge, concerned drugs and drug paraphernalia found at the applicant's unit when a search warrant was executed on 9 December 2011.

[21] On 12 December 2011 police found the applicant unconscious in the unit with Queensland Ambulance Service paramedics attending to him. After being treated in a hospital the applicant was transferred to the watch house where he was charged. He was in custody from that time. Upon the applicant's arrest for the present offences, his legal representatives indicated that he would be pleading guilty. The applicant declined to be interviewed or to assist police with respect to their investigation of his offences; that was at a time when police were unaware of the full extent of the applicant's fraudulent activity and were investigating the last and most substantial of his fraudulent activities, which involved the taking of $11,000,000. Following a full hand up committal on 1 March 2012, the applicant was committed for trial. It was understood that, subject to finalisation of the charges, the matter would be a sentence only.

[22] The applicant's bank accounts were frozen and his real and personal property, and that of members of his family, were subject to restraining orders. By the date of sentence, a gross amount of $12,000,000 had been realised from asset sales. The gross figure did not allow for deduction of costs associated with sales by the Public Trustee, including legal fees, commissions and duties.

[23] A psychiatrist's report tendered by the defence indicated that the applicant did not have any mental illness but he had expressed remorse for his conduct. A confidential exhibit was tendered and taken into account by the sentencing judge. It was submitted for the applicant in this application that this document was relevant, but not overly significant; I accept that submission. It is not necessary further to refer to this document, which should remain confidential.

Sentencing remarks

[24] The sentencing judge referred to a submission on behalf of the applicant that his fraudulent scheme was not complex and inevitably would have been detected, and

observed that the applicant's knowledge of the workings of the Health Department and the position he occupied in that Department enabled him to carry out the scheme, and the position of trust he occupied was a relevant factor. The sentencing judge considered that the applicant's conduct involved a most serious breach of trust that was placed in him by his employer and by the community in his position as a public servant. The applicant had been emboldened by his initial success and the transactions became more frequent and the amounts involved increased significantly over time. The sentencing judge observed that this was an audacious program employed by the applicant to maintain his opulent and extravagant lifestyle. The applicant's dishonesty ceased only when the police became involved. The sentencing judge remarked that it was fortunate that a good deal of the money had been recovered.

[25] The sentencing judge discussed cases which had been submitted to provide guidance in sentencing: *R v Heiser & Cook; ex parte A-G (Qld)*,[3] *R v Hinterdorfer*,[4] *R v Kawada*,[5] *R v Daswani*,[6] *R v Lovell*[7] and *R v Gadaloff*,[8] and observed that the primary consideration must be that the punishment imposed upon the applicant adequately reflected the seriousness of his overall criminal conduct. The sentencing judge referred to the following passage in *R v Heiser & Cook; ex parte A-G (Qld)*:[9]

> "… there is no principle that no matter how many offences are committed, how long the period over which they are committed, or how much is involved cumulative sentences exceeding the maximum permissible for a single offence should never be imposed. It is necessary to ensure that the punishment imposed is proportionate to the total criminality, and it is permissible to achieve this by requiring some sentences to be cumulative upon others."

[26] The sentencing judge expressly took into account the applicant's pleas of guilty, that the Crown case against the applicant was very strong, the applicant's "troubled and difficult background", and that the applicant was remorseful for his behaviour. The sentencing judge then made the following observations:

> "Ultimately, though, I cannot ignore the amount of money that is involved here. I cannot ignore the fact that those were public moneys. I cannot ignore the fact that you occupied a position of significant trust and I cannot ignore the fact that the money was spent on little more, it seems, than the enjoyment of an extravagant lifestyle. The punishment must be one which reflects those matters. It must punish you, but it must also serve as a deterrent to others who might be minded to commit similar offences."

Consideration

[27] Subsection 9(2) of the *Penalties and Sentences Act* 1992 sets out a series of matters to which a court must have regard when sentencing an offender. One of those matters, described in paragraph (e), is "any damage, injury or loss caused by the

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3 [1997] QCA 14.
4 [1997] QCA 199.
5 [2004] QCA 274.
6 [2005] QCA 167.
7 [2012] QCA 43.
8 [1998] QCA 458.
9 [1997] QCA 14 at p 5.

offender". The applicant submitted that this paragraph referred to the "impact of the ultimate loss".[10] The authority cited for that proposition[11] did not support it. It is hardly open to doubt that the quantum of the amount taken by a fraudster is a relevant consideration in the sentence imposed upon the fraudster. At the very least it is a "relevant circumstance" which the sentencing court is obliged to take into account by s 9(2)(r) of the *Penalties and Sentences Act* 1992.

[28] The applicant's related proposition, that the only observation by the sentencing judge about the recovery of money (that it was fortunate that a large portion of the money had been recovered) revealed that the sentencing judge gave insufficient weight to the amount of money recovered, is self-evidently unsustainable. A further proposition on behalf of the applicant, that whilst the amount taken was enormous that amount represented only a small part of the Queensland Health Department budget, raised a false issue. Nor can it be accepted, as was submitted for the applicant, that "in the scheme of things, the loss to the department in the order of $5 million was never going to have any significant impact on the people of Queensland."[12] The temporary loss of nearly $16.7 million and the permanent loss of about $5 million must necessarily have had a significant impact. The sentencing judge was right to take both features of the offending into account. There is no basis for thinking that insufficient weight was attributed to the net amount of the loss as opposed to the gross amount.

[29] The applicant accepted that, despite the statutory preference for concurrency of sentences,[13] the court has power to order sentences to be served cumulatively,[14] and that sentences might be ordered to be served cumulatively even though the effect of the order is that the aggregate sentence will exceed the statutory maximum for any one of the individual sentences. The applicant also accepted that there may be many and varied factors which influence a decision to accumulate sentences, such as different offences occurring at different times and to reflect the overall criminality in the offending. The applicant submitted that should not be understood as authorising a sentencing court to accumulate sentences only on the basis that a sentencing court considers that the statutory maximum is too low; a sentencing court is obliged to have regard to the maximum penalty in determining the sentence[15] but should not circumvent the maximum penalty by imposing cumulative sentences in the absence of proper reason for doing so.

[30] So much may be accepted, but it was in this case open to the sentencing judge to impose a cumulative sentence. It was open to the sentencing judge to conclude that the overall criminality of the applicant in all the offending was not sufficiently reflected by a sentence of 12 years imposed on count 3. As was submitted by the prosecutor, count 3, in the context of counts 2, 4 and 5, could be regarded as falling in to the most serious category of the offence charged in count 3 such as to attract the maximum penalty of 12 years imprisonment. The sentence for count 1 could be made cumulative upon the sentence for count 3 in light of the differences in the timing and character of that separate offending and the inadequacy of the sentence on count 3 or the totality of the offending. The sentencing judge instead adopted the

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10 Outline of submissions on behalf of the applicant, para 14.3.
11 [2012] QCA 43 at [68] (Chesterman JA).
12 Transcript of argument, 5/10/2013, at 1-4.
13 *Penalties and Sentences Act* 1992, s 155.
14 *Penalties and Sentences Act* 1992, s 156.
15 *Penalties and Sentences Act* 1992, s 9(2)(b).

structure of making the sentence imposed on count 3 cumulative upon each of the two year sentences imposed on counts 1, 2, 4 and 5. The effect was the same as that for which the prosecutor contended and the sentencing judge's approach was open. The applicant did not criticise the particular structure adopted by the sentencing judge, but rather contended that no accumulation of sentences was appropriate. That contention should not be accepted.

[31] The applicant also argued that accumulation of sentences was not warranted because the only real basis for the accumulation was the total sum of money involved. The extraordinarily large amount taken by the applicant, and the very substantial amount of the net loss resulting from his fraud, were necessarily very important factors in the sentence. It is wrong, however, to regard those as the only factors taken into account in the sentence. The sentencing remarks summarised earlier in these reasons demonstrate that the sentencing judge took into account other factors, most notably the seriousness of the applicant's breach of trust in his abuse of his position as a public servant and the applicant's motivation in taking the money to maintain his extravagant lifestyle. The applicant's fraudulent use of the ministerial correspondence was especially serious, as was his conduct in relieving a more junior employee of responsibility for a particular cost centre which the applicant then manipulated as part of his fraudulent activities. Those were all relevant considerations as were the matters in mitigation which were advanced for the applicant. It was also relevant that the applicant had prior convictions for dishonesty, that the money he took was public money, and that there were committal proceedings (albeit that there was a full hand up committal without cross-examination).

[32] The applicant argued that the process used to take the money was unsophisticated and bound to be discovered. It is probably right to say that the frauds were not very complex and inevitably would have been detected but, as the sentencing judge observed, the applicant's knowledge of the workings of the Department and his position of trust in it enabled him to effect those frauds. The fact is that the earlier fraud was not uncovered for some years.

[33] The applicant submitted that the sentencing judge had insufficient regard to the mitigating factors and noted that an effective head sentence beyond 12 years imprisonment was not imposed in *Hinterdorfer*, *Daswani* or *Kawada*.

[34] In *Daswani*, the effective head sentence was 12 years imprisonment with parole eligibility after four years and three months. That offender pleaded guilty to an ex officio indictment containing 15 counts of dishonestly using his position as a director, 11 counts of dishonestly inducing a person to delivery property valued at more than $5,000, and one count of dishonestly obtaining a benefit of more than $5,000, namely, $8,650,000. The total amount misappropriated which was unrecovered, $6,000,000, was similar to that in the applicant's case. However, the gross amount misappropriated in Daswani's offending, $11,000,000, was very substantially less than the gross amount of just under $16.7 million taken by the applicant. Furthermore, Daswani took some of the money in an attempt to keep his businesses afloat despite the financial difficulties which they had encountered; it was open to the sentencing judge in this case to regard the applicant's motive as deserving of even greater condemnation. The Court concluded that the effect of a 12 year sentence of imprisonment with parole eligibility after four years and three months was not manifestly excessive. (Although the Court made a declaration as to

the lawful effect of the sentence imposed at first instance which had the result that Daswani was left with an effective 10 year sentence of imprisonment, that followed an indication by the Court that, unless Daswani abandoned his application as he subsequently did, the Court would be disposed to grant the application, allow the appeal and re-structure the sentences so that they lawfully reflected the intention of the sentencing judge.)

[35] *Kawada* pleaded guilty to one offence of false pretences, two offences of improper use of position as an officer of a company, two offences of acting dishonestly in the exercise of powers as an officer of the company, one offence of making a false statement as an officer of the company, five counts of misappropriation, and five counts of forgery. He was given an effective sentence of 10 years imprisonment with a recommendation that he be eligible for post-prison community-based release after serving three years and four months of his sentence. The case is not comparable for a number of reasons: the amount dissipated by the criminal conduct was in the vicinity of $10.3 million, but only $33,000 of that was personal gain to the offender; the offender committed the offences in an attempt to recoup losses in the hope that the profits would then go to his employer; and the maximum penalty on the most serious offences, the misappropriation offences, was 10 years imprisonment compared to 12 years imprisonment as the maximum penalty for the aggravated fraud committed by the applicant in count 3. The Court's decision in *Kawada* was merely to refuse an extension of time within which to apply for leave to appeal against sentence. As to the appropriateness of the sentence, McMurdo P observed only that the offender's prospects of success in any appeal against the sentence were not promising. The decision is therefore of no real assistance in ascertaining any applicable range of sentences for the applicant's offences.

[36] *Hinterdorfer* does not advance the applicant's argument. That offender pleaded guilty on an ex officio indictment to misappropriating $4.5 million which was the property of the Port of Brisbane Corporation at a time when he was employed by that Corporation. He was sentenced to the maximum penalty, 10 years imprisonment, with a recommendation for parole after four years and three months. His application for leave to appeal against that sentence was refused. Relevant distinguishing features include these: the gross amount misappropriated was $4.5 million but $2 million could be recovered, with the result that the net loss was $2.5 million; although that offender was initially less than co-operative when spoken to by police, he subsequently pleaded guilty by way of an ex officio indictment and signed authorities to enable the Corporation to recover the $2 million which was then held by banks in Hong Kong; that offender had no criminal history; there was psychiatric evidence that he was a pathological gambler; and he committed his offences in the context of having accumulated substantial gambling debts.

[37] The applicant referred also to *Lovell*, in which the Court allowed an application for leave to appeal against sentence and made orders which had the effect of reducing an effective sentence of 13 years imprisonment with parole eligibility after four and a half years to an effective sentence of 11 years imprisonment with parole eligibility after four years. That offender pleaded guilty to three counts of aggravated fraud, two counts of forgery, and two counts of uttering. He had a prior criminal history; he had been sentenced to probation and ordered to perform community service for offences of dishonesty in 1999 and he had been fined for drug offences. He had not previously been imprisoned or sentenced to a term of imprisonment. He entered an early plea of guilty and co-operated to some extent with the authorities. His frauds

caused losses which totalled almost $11.5 million. That permanent loss may be seen to be more serious than in the applicant's case, and Lovell also used the monies he obtained to maintain a comfortable, though not overly lavish lifestyle, and to provide the trappings of wealth required to persuade others to invest his dishonest scheme. On the other hand, McMurdo P, with whose reasons Atkinson J agreed, concluded that the company which was the vehicle for the relevant financial dealings was initially incorporated in a genuine, albeit unreasonable, hope that the offender would build a genuinely profitable business, although the offender's frauds continued for many years after he knew that he was defrauding his investors. Another point of distinction is that Lovell was in his early twenties when he began his fraudulent behaviour and was only 30 when it was discovered. That was mentioned by McMurdo P in the course of distinguishing other cases, including *Daswani*. McMurdo P observed of those other offenders that they "were all mature offenders, whereas the applicant's offending commenced whilst he was still a comparatively young man so that rehabilitation remains a prospect".[16] McMurdo P also took into account that, in addition to pleading guilty, that offender co-operated with the authorities.

[38] Since the application for leave was argued, judgment in *R v O'Carrigan*[17] has been delivered. In that case the offender was the manager of finance and administration for an area in which a construction company operated. Over 12 years the offender defrauded the company of more than $20.7 million, most of which had not been recovered. The offender pleaded guilty to fraudulently falsifying a record, fraud as an employee to the value of $30,000 or more (during a period which exceeded eight years), and fraud as an employee to the value of $30,000 or more (during a period of nearly four years). He was given an effective sentence of imprisonment of 15 years with a parole eligibility date set after six years. His application for leave to appeal was granted and the appeal was allowed to the limited extent of fixing an earlier parole eligibility date, after the offender will have served five years imprisonment. McMurdo P, with whose reasons Mullins and Henry JJ agreed, distinguished *Daswani* and *Lovell* on grounds which included that O'Carrigan's fraud was for a larger amount, it was over a more extended period, and it did not commence in an attempt to keep a legitimate business operating but the proceeds were solely used to support the offender's "grand lifestyle".[18] McMurdo P referred to the present applicant's offending as involving "a comparable fraud in scale and circumstances"; "whilst Morehu-Barlow had a criminal history, he had an unfortunate background, was able to repay most of the misappropriated funds and his offending occurred over a shorter period. On the other hand, his cooperation was not as extensive and his guilty plea was not as timely and nor was it to an *ex officio* indictment".[19] O'Carrigan made immediate admissions once he was confronted, he assisted the company to recover its funds, although ultimately with limited success. He communicated his intention to plead guilty within days of being charged, and he pleaded guilty to an ex officio indictment. The sentence as it was adjusted on appeal in *O'Carrigan* is consistent with the sentence imposed upon the applicant.

[39] The applicant's sentence was not manifestly excessive and the sentencing judge did not make any of the errors contended for in the applicant's ground of appeal.

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16 [2012] QCA 43 at [11].
17 [2013] QCA 327.
18 [2013] QCA 327 at [27].
19 [2013] QCA 327 at [27].

Proposed order

[40] I would refuse the application.

[41] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[42] **McMEEKIN J:** I have read the draft reasons of Fraser JA. I agree that the application should be refused for the reasons that his Honour has given.