SUPREME COURT OF QUEENSLAND

CITATION:	*R v Officen* [2014] QCA 84
PARTIES:	**R** **v** **OFFICEN, Mary Catherine** (applicant)
FILE NOS:	CA No 263 of 2013 DC No 956 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2014
JUDGES:	Margaret McMurdo P and Gotterson JA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal allowed to the extent of substituting a parole eligibility date of 14 July 2014 for the parole eligibility date of 2 October 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted in 2013 of one count of fraud which occurred in 2008 whilst the applicant was on bail pending conviction for other fraud charges – where the applicant was given a cumulative sentence upon the 2008 sentence – where the cumulative sentence was eight years with time to be served being at least three years – where the applicant submitted that the sentence imposed was excessive due to its cumulative nature – where the applicant submitted that the time spent in pre-sentence custody had not been taken into account when setting the date that the applicant would be eligible for parole – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 160E(d), s 160F(2) *R v Alexander* [2004] QCA 11, considered *R v Goodger* [2009] QCA 377, considered

R v La Rosa; ex parte A-G (Qld) [2006] QCA 19, considered
R v Roberts-O'Keefe [2012] QCA 260, considered
R v Robinson; ex parte A-G (Qld) [2004] QCA 169, considered
R v Sommerfeld [2009] QCA 333, considered

COUNSEL: The applicant appeared on her own behalf
V A Loury for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Ann Lyons J's reasons for granting the application for leave to appeal against sentence and allowing the appeal to the limited extent of substituting a parole eligibility date of 14 July 2014 for the parole eligibility date of 2 October 2014.

[2] **GOTTERSON JA:** I agree with the orders proposed by Ann Lyons J and with the reasons given by her Honour.

ANN LYONS J: The sentence imposed

[3] On 1 July 2013 the applicant pleaded guilty to one count of fraud as an employee to the value of $5,000 or more in a 17 month period between 19 June 2007 and 6 November 2008. On 20 September 2013 a sentence of three years imprisonment was imposed which was to be cumulative upon the sentence of five years imprisonment she was currently serving which had been imposed on 17 November 2008. A parole eligibility date was fixed at 2 October 2014 and 80 days of pre-sentence custody was declared.

[4] The applicant seeks leave to appeal against that sentence on the basis that it is manifestly excessive in all of the circumstances.

Background

[5] The applicant's offending came to light when her employers were informed in November 2008 that she would not be returning to work as she was in jail for fraud.[1] On 17 November 2008 she had been sentenced on four indictments by Newton DCJ in relation to five counts of fraud in a period between 2004 and 2006. Whilst an amount of $502,725.02 was involved, one of the charges related to an attempt to cash a cheque which she had stolen and then made out to an amount of $350,000. An amount of $107,169.26 was the figure which was outstanding at the time of sentence. The applicant was sentenced to a period of five years imprisonment in relation to each count on Indictment Nos 1319/2006, 1320/2006, 1321/2006 and 12 months imprisonment on an ex-officio indictment. All sentences were to be served concurrently. Her full time release date was 16 November 2013. A parole eligibility date was fixed after a period of 18 months at 16 May 2010.

[6] The applicant was ultimately released on parole on 25 August 2010 having served 21 months in custody.

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1 ARB 100.

[7] She was not charged with the current offence until 15 months later on 24 November 2011. As the offending had occurred prior to her imprisonment the new charges did not breach her parole and she was granted bail for the current offence. She remained on bail for 20 months until the current indictment was presented on 1 July 2013. The applicant pleaded guilty on that day to the charge and bail was enlarged until 2 July 2013 for a contested sentence. The delay in prosecuting the charge was due, in part, to the complexity of tracing the exact amount which had been misappropriated because of the poor record keeping in the complainant's business. At the contested sentence the issue in dispute was the exact amount which was alleged to have been misappropriated.

[8] The applicant was remanded in custody on 2 July 2013 at the end of the first day of the contested hearing. The sentence was adjourned to 20 September 2013. The applicant therefore served 80 days in custody awaiting sentence solely in relation to the current charges.

The sentence hearing

[9] On 20 September 2013 the learned sentencing judge imposed a sentence of three years imprisonment which was to be cumulative upon the sentence of five years imprisonment and fixed a parole eligibility date of 2 October 2014 after declaring 80 days as time served in pre-sentence custody (from 2 July 2013 to 20 September 2013). Accordingly, whilst her full time release date has been shortened by 80 days and is now 28 August 2016 rather than 16 November 2016 the applicant is required to serve an actual period of 15 months imprisonment before she has any eligibility for parole.

[10] The applicant was self represented on the day of the hearing of the application for leave to appeal against the sentence and acknowledged at the outset that her outline raised matters which had not been put before the sentencing judge. She abandoned those grounds and now argues that the sentence imposed was excessive as it was a cumulative sentence and that the 80 days she served in pre-sentence custody has not been taken into account in calculating her parole eligibility date. She also argues that the sentence imposed should have been concurrent rather than cumulative.

The circumstances of the offending

[11] The applicant had been employed as a bookkeeper and office manager for a small family business. She had access to the business cheque book and was authorised to use the cheque book. The evidence indicated that the applicant would make out cheques for cash payment and then falsify the cheque stub by inserting the name of a creditor of the business as the payee. Two cheques had been presented at a bank and deposited directly into the applicant's bank account. She also accepted that a further five cheques were fraudulent.[2] The applicant admitted that she took $12,527.[3] However, the Crown alleged that a total of 46 cheques amounting to at least $82,000 had been fraudulently presented by the applicant.[4] The applicant accepted that she had inserted false details on 39 other cheque stubs but argued that some of those false details were entered at the direction of the owner of the business.[5]

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2 ARB 98.
3 ARB 99.
4 ARB 98.
5 ARB 99.

[12] At the contested sentence the Crown called three witnesses, including the owner of the business, his wife and a friend who had lent the complainant money. The applicant did not give or call evidence. The sentencing judge accepted the evidence of the three Crown witnesses. It was not in dispute that the applicant did not keep accurate records of the transactions and the learned sentencing judge made a finding of fact that the applicant was involved in a system of dishonesty which was much greater than the $12,500 admitted.[6] She also found that the system of dishonesty had continued over a period of years. Her Honour indicated that it was clear that such a system of dishonesty had been allowed to flourish given the complainant's disorganisation, his heavy reliance on cash, a number of overseas transfers and the failure to keep business records.[7] Her Honour concluded that the amount of money involved "must be at least in the vicinity of $50,000 and it is on that basis that I will proceed to sentence."[8]

The sentencing remarks

[13] In imposing the sentence that she did, the learned sentencing judge took into account the fact that the applicant's history of dishonesty spanned 38 years and had commenced when she was 17 years of age.[9] She noted that the applicant was first sentenced to prison for dishonesty at the age of 33 in 1986 and that the five year term that was then imposed had not expired before she was sentenced to another term of three and a half years.[10] Her Honour also noted that the applicant was on parole for that sentence when she committed further offences that resulted in seven years imprisonment.[11]

[14] A 10 year gap in offending was appropriately acknowledged with the judge indicating that it was after this gap that the applicant had been sentenced to the further five year period of imprisonment in 2008. Her Honour noted that the offences for which she was sentenced in 2008 involved an actual loss of over $100,000 and a significant breach of a position of high trust.[12]

[15] Against that background her Honour noted that in relation to the current offences the applicant had kept her past from her employer who entrusted her with the bank accounts for the business. It was clear from her Honour's remarks that the complainant trusted the applicant without question and allowed her to run the office while he was overseas. The owner's wife also regarded the applicant as a friend. Her Honour considered that there was a lengthy period of offending and that the funds were diverted by the applicant to herself when they should have gone to creditors. Her Honour referred to the fact that bills were left unpaid for the business's day-to-day operations and for equipment and supplies as well as advertising, phone services and superannuation obligations.

[16] Her Honour also considered that it was significant that the applicant continued to steal and the offending only stopped when she was jailed in November 2008 for the 2004 to 2006 offences. She stated that:[13]

> "Even after you were charged with the preceding fraud you continued to steal from Mr Bruer. The offending only stopped when

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6 ARB 100.
7 ARB 101.
8 ARB 101 at ll 5 – 6.
9 ARB 110.
10 Ibid.
11 Ibid.
12 Ibid.
13 ARB 110 at ll 33 – 42.

> you were jailed in November 2008. As the date of the sentence approached you told Mr Bruer that you would need time off for cancer treatment. Later, he learned that you would not return to work because you had been [sentenced] to five years imprisonment. It was only then that the business's true financial position became apparent. Because you had not paid the bills, suppliers were about to suspend the operational accounts. The phone service was about to be cut. Taxes of more than $100,000 had not been paid, accumulating penalties of nearly $7000."

[17] Her Honour considered that that there was no prospect of repayment to the complainant and that his business had been damaged as a result of the applicant's behaviour.[14] Her Honour also indicated that she also took into account the fact that the complainant had to borrow from his elderly parents to meet his creditors and that had been burdened by a sense of shame to his family. The business reputation had also been tarnished.[15]

[18] Her Honour recognised that the applicant had pleaded guilty and that she was also was entitled to some recognition for her level of cooperation. However, she considered that the plea of guilty was due to a recognition of the weight of evidence against her rather than any true sense of remorse.[16]

[19] Her Honour considered that a cumulative order was appropriate in the circumstances given that the applicant continued to steal from the complainant whilst charges for the preceding fraud were outstanding. Her Honour also stated that such a cumulative sentence needed to be moderated to avoid oppression. Her Honour continued indicating:[17]

> "it is necessary to weigh the cumulative [effect] of this sentence upon the [pre-existing] sentence, in proportion to the level of total criminality. An additional $50,000 worth of loss may be added to [the] seriousness of the preceding offence. Considering the 2 lots of offences as a continuum, your offending persisted over years, with different complainants and successive positions of trust. The present offending extending to a breach of bail for the earlier matter. I also take into account that there has been a three year break between your first release on parole and, then. the return to custody in July. You have already served 20 months under the previous sentence."

[20] In recording a conviction and sentencing the applicant to three years imprisonment to be served cumulatively on the pre-existing sentence which was to finish on 16 November 2013, her Honour fixed the parole eligibility date as 2 October 2014. Her Honour referred to a period of 80 days from 2 July 2013 until 20 September 2013 and declared that it was time served under the sentence.[18] Her Honour also specifically indicated that she took that period of time in custody into account when fixing the parole eligibility date.[19] Accordingly, her Honour imposed a three year cumulative sentence and she required that the applicant serve at least an additional 15 months in custody.

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14 ARB 110.
15 ARB 111.
16 Ibid.
17 ARB 111 at ll 18 -26.
18 ARB 111.
19 ARB 112.

Was the head sentence appropriate?

[21] The applicant essentially concedes that there is no real argument that a sentence of three years was not the appropriate sentence in the circumstances. Indeed the only case referred to by both the Crown prosecutor and defence counsel was a case which indicated that a sentence of between three or four years could have been imposed in the circumstances before her Honour. The sole decision referred to was the 2006 Queensland Court of Appeal decision of *R v La Rosa; ex parte A-G (Qld),*[20] where a sentence of three years fully suspended for an operational period of three years had been initially imposed. On appeal by the Attorney General the original sentence was set aside and the respondent was sentenced to three years imprisonment with a recommendation for post prison community based release after nine months. In that case an amount of $51, 214.10 had been stolen by a young 23 year old woman with bulimia. She had no criminal history, had been making regular partial restitution payments at the time and had pleaded guilty to an ex-officio indictment.

[22] In *La Rosa* reference had been made to an earlier decision of *R v Robinson; ex parte A-G (Qld),*[21] where McMurdo P referred to the fact that the concerning aspect of offences of this kind "is the breach of trust" and that in circumstances where the amount involved a considerable sum of money obtained over a lengthy period where the offending was planned then an offender will be required to serve a period of actual detention.[22] The earlier Court of Appeal decision of *R v Alexander*[23] was also referred to where Williams JA had set out the relevant principles in cases of this kind:[24]

> "A review of the decisions to which the court was referred indicates that there are a number of factors which have been regarded as relevant in determining the appropriate sentence where dishonesty is involved. On some occasions the critical factor has been the amount of money lost by victims of the fraud, on other occasions the decisive factor has been the persistent and systematic offending. One cannot say that either one of those factors is generally more significant than the other. Each case has to be considered in the light of its own peculiar facts; all one can say is that the amount of money lost and the regularity of offending will always be relevant considerations."

[23] In this case the applicant's appalling history of continued offending together with the other factors specifically referred to by her Honour indeed justified a sentence in the order of three to four years. There is no doubt that the Court of Appeal decisions referred to on this appeal similarly indicate that a sentence in the order of three to four years was in order. Those decisions were *R v Sommerfeld,*[25] *R v Goodger,*[26] *R v Grant-Watson,*[27] *R v Scott,*[28] *R v Matauaina*[29] and *R v Roberts-O'Keefe*.[30]

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20 [2006] QCA 19.
21 [2004] QCA 169.
22 [2004] QCA 169 at [11].
23 [2004] QCA 11.
24 [2004] QCA 11 at [24].
25 [2009] QCA 333.
26 [2009] QCA 377.
27 [2004] QCA 77.
28 [1997] QCA 300.
29 [2011] QCA 344.
30 [2012] QCA 260.

[24] In *Sommerfeld*, a sentence of four years was to be served cumulatively upon an activated two and a half year suspended sentence. An effective sentence of six and a half years with parole eligibility after two years and one month (almost one third of the sentence) was not disturbed on appeal. The offence involved stealing $126,000 over a 14 month period whilst subject to a suspended sentence for stealing $57,000.

[25] In *Goodger*, a sentence of four and a half years with parole eligibility after serving 18 months (a third) was not disturbed on appeal. The applicant was in her mid fifties and had a history of stealing as a servant. The misappropriation in that case had continued over a two year period and involved $94,000.

[26] Similarly in *Grant-Watson* a sentence of four years suspended after 18 months was not disturbed in circumstances where there was a long history of dishonesty, $37,000 was said to be involved and $18,000 had been repaid. The sentence was said to be lenient, and as it involved an applicant with mental instability it is not an entirely appropriate comparison. The decisions in *Scott* and *Matauania* both involved sentences imposed after a trial and where the amounts were less.

[27] The most recent Court of Appeal decision is the decision of *R v Roberts-O'Keefe* which was decided in 2012. In that case the applicant stole $42,006 and there was no prospect of repayment. There were 52 dishonest transactions in a four month period most of which involved failing to bank cash payments from customers or by making refunds into her bank account. She was 64 years old and had a head injury which would make her time in jail more difficult. A sentence of three years was imposed in those circumstances and a parole release date was set at the one third mark of 12 months. McMeekin J in analysing the decisions of *Goodger* and *Scott* considered that the applicant had in fact been "dealt with leniently". His Honour considered in fact that the range extended to at least four years. He stated:[31]

> "[39] There are cases in which a sentence of less than three years imprisonment has been imposed in respect of offenders who abuse positions of trust to steal significant sums. Fraser JA's analysis of such cases in *R v Matauaina* demonstrates that there is usually a coincidence of an absence of a relevant criminal history, a plea of guilty, cooperation with the administration of justice and compelling personal circumstances. The applicant's long criminal history alone is sufficient to distinguish such cases, a point defence counsel recognised below. Fraser JA explained the significance of such a history to the sentencing process in *R v Matauaina*:
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> > "An offender's criminal history cannot justify a sentence which is out of proportion to the gravity of the offence, but the criminal history may be taken into account both in assessing any claim for leniency and in deciding whether considerations such as retribution, deterrence, and protection of society indicate that a more severe penalty should be imposed."
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> [40] Each of those factors was relevant here."

[28] It would seem clear, therefore, that all of those decisions established that a period of imprisonment of between three to four years was called for.

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31 [2009] QCA 377 at [39] – [40].

The interaction of the sentence imposed and the sentence still being served at the time of sentence

[29] Counsel for the applicant had submitted at the sentence hearing that had the applicant been dealt with whilst she was still in custody for the earlier offences she would have only received a cumulative head sentence of two years and have been required to serve an additional eight to 10 months in custody as follows:[32]

> "A fraud, in the usual sense of about $150,000 of which about 47 or 45 was repaid, and an attempted fraud of $350,000 which fell apart on the presentation of the cheque to the bank. So the loss was about 150 and nearly $50,000 was repaid. Had there been, whilst my client was in custody, this finding and it had reached its conclusion while she was in custody, my submission is for the 45 extra $50,000 of fraud, even taking into account that it was committed on bail, she would have received perhaps a further two years cumulative. And her bottom – given there's been a contest, it may have been extended between eight and 10 months…."

[30] When the applicant was sentenced on 20 September 2013 her full time release date on her 2008 sentence was 16 November 2013. Accordingly, with respect to the sentence her Honour was going to impose her Honour considered that a cumulative sentence was appropriate. There is no doubt that such an approach was correct in the circumstances given the applicant had continued to steal whilst on bail for charges for which she was sentenced in 2008.

[31] I can see no basis for the applicant's argument that the sentence imposed should have been concurrent rather than cumulative.

[32] Her Honour correctly stated that any cumulative sentence imposed needed to be ameliorated to avoid it being crushing. It was in those circumstances that a period of imprisonment of three years was imposed rather than a period of four years which was clearly open on the facts.

[33] The real issue is whether a reduction of the head sentence to three years was a sufficient amelioration in the circumstances. In my view such a reduction was appropriate given the applicant's appalling history of offending over an almost forty year period. Her offending was persistent and a gross abuse of trust. I do not consider there is any basis for an argument that the head sentence should have been reduced beyond three years.

[34] My real concern is whether the 80 days in pre-sentence custody was in fact appropriately recognised in the sentence imposed. I consider that there is some force in the applicant's argument in this regard.

The applicant's submission

[35] The applicant argues that given the three year term was imposed cumulatively the period of 80 days pre-sentence custody should have been factored into her parole eligibility date and she argues that it has not been. I consider that the real issue in this appeal is the impact of the cumulative sentence and whether the 80 days served in custody on remand for this offence was appropriately recognised in the actual sentence imposed.

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32 ARB 103 at ll 40 – 47.

[36] In pronouncing sentence her Honour stated:[33]

> "The circumstances of the present offending make it appropriate for a cumulative order. The sentence, however, must be moderated to avoid oppression. And the parties jointly submit that it is necessary to weigh the cumulative affect of this sentence upon the the preexisting sentence, in proportion to the level of total criminality. An additional $50,000 worth of loss may be added to seriousness of the preceding offence. Considering the 2 lots of offences as a continuum, your offending persisted over years, with different complainants and successive positions of trust. The present offending extended to a breach of bail for the earlier matter. I also take into account that there has been a three year break between your first release on parole and, then, the return to custody in July. You have already served 20 months under the previous sentence.
>
> A conviction is recorded. You are sentenced to three years imprisonment. That term of imprisonment is to be served cumulatively on the pre-existing sentence. I fix the date for your release on parole as the 2nd of October 2014.
>
> MR HARRISON: Is your Honour making a declaration at all?
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> HER HONOUR: There can't be a declaration, can there, because she was on remand serving the sentence. Sorry. She was – her parole was cancelled – or suspended.
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> MR HARRISON: No. It wasn't
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> HER HONOUR: It wasn't?
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> MR HARRISON: No. Because it didn't – the offending didn't occur whilst on parole.
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> HER HONOUR: *So that is only – but isn't that time taken off – isn't that – that must be time deducted from the original sentence*.
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> MR HARRISON: No. It says the prisoner is currently serving five years imprisonment, which commenced on – and it says two-seven, 2013. That should be 17-11-08. She was released [indistinct] ordered parole on 25-8-2010. The parole order has not been suspended.
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> HER HONOUR: But the sentence of five years continues to run. I don't understand how that could not - - -
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> MR HARRISON: It hasn't. Well, it wasn't suspended. And - - -
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> HER HONOUR: Well, in light of the certificate, I will declare the period from the 2nd of July 2013 until the 20th of September 2013 – a period of 80 days – as time served under this sentence. I suppose she has been in custody for no other reason.

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33 ARB 111 -112 at ll 16 – 28.

> MR HARRISON: Under section 209, prisoners – of the Corrective Services Act, a prisoner parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed in Queensland or elsewhere during the period of the order. So it's not – it's not cancelled.
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> HER HONOUR: No. That period, from the 2nd of July 2013, until the 20th of September 2013 – a period of 80 days – is time spent on remand in relation to this offence and for no other reason. That period is to be treated as time served under the sentence. I took that period of time in custody into account in fixing the parole date. It is to be a parole eligibility date. Did I fix it as a – an eligibility for parole, Sally?
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> MS HURLEY: I understand you may have said release rather than eligibility.
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> HER HONOUR: All right. I need to correct myself. The 2nd of October 2014 is the date on which Ms Officen will be eligible for parole. Adjourn the Court, please. Thank you, counsel." (my emphasis)

[37] It would seem therefore that before her Honour was aware that the 80 days on remand could be declared as time served she had imposed a three year sentence with a parole eligibility date fixed for a date of 2 October 2014 which was one year and 10 days later. It would seem from the transcript extracted above that once her Honour became aware that it could in fact be considered as time served she inadvertently failed to take it into account in fixing the parole eligibility date. If her Honour had in fact taken 80 days into account, she would have been setting a parole eligibility date which required some 15 months to be served. That would mean that for an effective sentence of eight years the applicant would have been required to serve a period of three years in custody before being eligible for parole given that she served 21 months under her original sentence and was then required to serve 15 months under the new sentence.

[38] It would seem to me that the 80 days was not factored into the parole eligibility date through inadvertence but in any event I consider that even though this was a contested sentence, given the applicant's guilty plea, a sentence which required that she serve an additional 15 months in custody on a three year sentence was excessive in the circumstances. It would seem to me that when it became known that the 80 days could in fact be declared as time served the parole eligibility date should have been adjusted so that 80 days was deducted from that date as well as from the full time release date. In my view the sentencing discretion miscarried in this respect. Accordingly, I consider 80 days should be deducted from the eligibility date of 2 October 2014 which on my calculations is 14 July 2014.

[39] There is no doubt that it is a parole eligibility date rather than a parole release date as s 160E(d) of the *Penalties and Sentences Act* 1992 (Qld) provides that where there is a sentence of more than three years and the offence is not a serious violent offence, the Court may fix the date the offender is eligible for parole. Section 160F(2) further provides:[34]

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[34] *Penalties and Sentences Act* 1992 (Qld) s 160F(2).

> "When fixing a date under this division as the date the offender is to be released on parole or is to be eligible for release on parole, the date fixed by the court must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment."

[40] Accordingly, I would grant the application for leave to appeal against sentence and allow the appeal to the extent of substituting a parole eligibility date of 14 July 2014 for the parole eligibility date of 2 October 2014.