SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moxon* [2015] QCA 65
PARTIES:	**R** **v** **MOXON, Anthony Thomas** (applicant)
FILE NO/S:	CA No 293 of 2014 DC No 1859 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Order delivered ex tempore 7 April 2015 Reasons delivered 24 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2015
JUDGES:	Margaret McMurdo P and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Delivered ex tempore on 7 April 2015:** **The application for leave to appeal against sentence is 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 29 forgery counts relating to phytosanitary certificates and one count of contravening regulations relating to official marks – where the applicant was the CEO, director and secretary of a timber export company – where the Commonwealth statutory regime required that phytosanitary certificates be sent with exports of wood to foreign countries – where these certificates can only be issued by the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF) – where the applicant organised a false DAFF stamp for use by the company in which employees used the stamp to produce false phytosanitary certificates – where the applicant was sentenced to two years imprisonment with release after eight months upon entering a recognizance of $1,000 and on condition of good behaviour for two years – where the applicant contended that the primary judge erred in

not taking into account the nature of the offences – where the applicant contended that the primary judge erred in not taking the guilty plea into account – where the applicant contended that the primary judge erred in failing to acknowledge the significant delay of more than five years between when the authorities began their investigation and the date of sentence – whether the sentence was manifestly excessive

Crimes Act 1914 (Cth), s 4AA, s 4B, s 16A, s 17A, s 19B(1)(d), s 20(1)(b)
Criminal Code 1995 (Cth), s 143.3, s 144.1(5)
Export Control Act 1982 (Cth), s 14

Cameron v The Queen (2002) 209 CLR 339; [2002] HCA 6, cited
R v L; ex parte Attorney-General [1996] 2 Qd R 63; (1995) 84 A Crim R 142; [1995] QCA 444, cited
R v Morex Meat Australia Pty Ltd and Doube [1996] 1 Qd R 418; (1995) 129 ALR 546; [1995] QCA 154, cited
R v Sadeed [2004] QCA 32, cited
Scook v The Queen (2008) 185 A Crim R 164; [2008] WASCA 114, cited

COUNSEL: P J Callaghan SC, with M J McCarthy, for the applicant
W Abraham QC, with M Woodford, for the respondent

SOLICITORS: Russo Lawyers for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MARGARET McMURDO P:** The applicant, Anthony Moxon, pleaded not guilty on 8 September 2014 in the Brisbane District Court to 133 forgery counts relating to phytosanitary certificates, with the intention that they would be used to dishonestly induce a third person to accept the certificate as genuine, and if so accepted, to dishonestly obtain a gain. He also pleaded not guilty to one count of contravening regulations relating to official marks. The following day he pleaded guilty to 29 of the forgery counts and to contravening regulations relating to official marks. The prosecution accepted the guilty pleas in satisfaction of the indictment. On 3 October 2014 he was sentenced to two years imprisonment with release under s 20(1)(b) *Crimes Act* 1914 (Cth) upon entering into a recognizance of $1,000 after serving eight months and on condition of good behaviour for two years.

[2] There were four co-offenders. Moxon and Company Pty Ltd, pleaded guilty to like offences and was convicted and fined $25,000 on each count with 12 months to pay. Andrew Wilson pleaded guilty to and was convicted and sentenced on six counts of forgery and one count of contravention of regulations relating to official marks to an effective term of 12 months imprisonment but with immediate release on a $1,000 good behaviour bond for 12 months under s 20(1)(b) and fined $12,000. Mark Affleck pleaded guilty to and was convicted and sentenced on six counts of forgery and one count of contravention of regulations relating to official marks to 12 months imprisonment with immediate release on a $1,000 good behaviour bond for 12 months under s 20(1)(b) and fined $6,000. Joanne Mason pleaded guilty to and was convicted and sentenced on seven counts of forgery to six months imprisonment

with immediate release on a $1,000 good behaviour bond for six months under s 20(1)(b).

[3] The applicant sought leave to appeal against his sentence on the following grounds:

1. The judge erred when he failed accurately to characterise the nature of the offence;
2. The judge erred when he failed to apply principles relevant to the significance of the applicant's guilty plea;
3. The judge erred when he failed to acknowledge the significance of the delay between detection and conviction; and
4. The sentence is manifestly excessive.

The order in this application and a correction to the record

[4] This application for leave to appeal against sentence was heard on 16 February 2015 and the Court reserved its decision. At 3.20 pm on 2 April 2015 (the Thursday before Easter) I received a memorandum from Carmody CJ headed "Letter forwarded by President of Qld Law Society" and stating "Please find a letter forwarded to me by the President of the Queensland Law Society for your information and any appropriate action." The photocopied letter attached to the memorandum was from the applicant's wife, Mrs Angela Moxon, to Mr Michael Fitzgerald, President, Queensland Law Society, and was dated 27 March 2015. It canvassed a number of issues including that the applicant apprehended that, "solely by reason of his pending appeal he has been assessed as a 'high risk' prisoner, necessitating his continued incarceration in the maximum security Brisbane Correctional Centre [and]… can therefore only be moved to what would otherwise be an appropriate facility once the Court resolves the application." Mrs Moxon asked Mr Fitzgerald to convey the applicant's concerns to the Chief Justice so that the Chief Justice could appraise me of them and the Court could pronounce its orders as soon as possible, allowing administrative steps to be taken to move the applicant out of maximum security. At 2.15 pm on Tuesday, 7 April 2015 (the Tuesday after Easter) the Court acceded to that request and after setting out the history canvassed above, I made an order refusing the application for leave to appeal against sentence, stating the Court would publish its reasons later.

[5] After pronouncing the order, I responded to the Chief Justice's memorandum attaching a copy of my statement in court when making the order. My chambers sent copies of that material to Mr Fitzgerald, the counsel in this application, and Mrs Moxon.

[6] The following day Mr Fitzgerald emailed my chambers stating that he had not corresponded with the Chief Justice about this matter, although he had corresponded with Mrs Moxon. He explained to her that as three months had not elapsed since the hearing, the established protocol in relation to delays in the delivery of judgments did not contemplate any contact with the Chief Justice at this time. Mr Fitzgerald added that she could write directly to the Chief Justice outlining her concerns. I then sent Mr Fitzgerald a copy of the Chief Justice's memorandum to me dated 2 April 2015. Mr Fitzgerald later informed me that he had contacted the Chief Justice's chambers and was advised that the Chief Justice's memorandum incorrectly stating that Mrs Moxon's letter was forwarded to him by the President of the Queensland Law Society was an administrative error. I have had no contact in

respect of this matter from the Chief Justice or his chambers since his memorandum of 2 April 2015.

[7] What follows are my reasons for refusing this application for leave to appeal against sentence.

The Background

[8] The maximum penalty for each forgery offence was 10 years imprisonment and/or a fine of $66,000.[1] The maximum penalty for contravention of the regulations was five years imprisonment and/or a fine of $33,000.[2]

[9] The applicant was aged between 51 and 54 at the time of the offending and 59 at sentence. He had no prior convictions.

[10] He was the majority shareholder and CEO of Moxon and Company Pty Ltd, an importing and exporting timber company. The Commonwealth statutory regime required that phytosanitary certificates must be sent with exports of wood to foreign countries. These certificates can be issued only by the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF). The applicant organised a false DAFF stamp for use in a scheme operated under his management in which the company employees used the stamp to produce false phytosanitary certificates. He pleaded guilty as a party to the company's offending. His forgery offences occurred between August 2006 and May 2009 and the breach of regulations between May 2005 and June 2009. The offences were detected when a disgruntled former employee acted as a whistle-blower and gave information to the Australian Quarantine and Inspection Service (AQIS) in March 2009.

The judge's reasons for sentence

[11] The judge published written reasons relevant to the sentencing of all five offenders[3] on 3 October 2014 before giving oral reasons for individually sentencing each offender. His Honour noted in his written reasons that the whistle-blower had given information to police on 30 March 2009; a search warrant was executed on 1 July 2009 and after a long investigation the offenders were charged on 9 November 2012.[4] The committal hearing took place over three days in July 2013.[5] The indictment was presented on 6 December 2013. Ms Mason pleaded guilty on 6 June 2014 having foreshadowed her guilty pleas at the committal hearing. The trial commenced on 8 September 2014 when Mr Wilson and Mr Affleck pleaded guilty before the jury was empanelled. The company and the applicant pleaded not guilty. A jury was empanelled but sent away during legal argument. After the judge ruled that a New Zealand Ministry of Forestry certificate did not fit the description of a false Commonwealth document under s 143.3 *Criminal Code* 1995 (Cth), the prosecution indicated it would not proceed with those counts which relied on that document. The company and the applicant then pleaded guilty to the present charges and the jury was discharged.[6]

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1 *Criminal Code* 1995 (Cth) s 144.1(5); *Crimes Act* 1914 (Cth), s 4AA and 4B.
2 *Export Control Act* 1982 (Cth), s 14; *Crimes Act* 1914 (Cth), s 4AA and 4B.
3 SRB, 121-129.
4 SRB, 122, [6].
5 SRB, 122, [7].
6 SRB, 123, [10].

[12] His Honour noted that AQIS undertook import and export inspection and certification aimed at maintaining "Australia's highly favourable animal, plant and human health status and wide access to overseas markets." Exporters must meet the requirements of the *Export Control Act* 1982 (Cth) and subordinate legislation, as well as any requirements of the importing country, before AQIS will provide a certificate. Australia is one of 180 signatory countries to the International Plant Protection Convention (IPPC), established in 1952 to protect cultivated and wild plants by preventing the introduction and spread of pests.[7] Adherence to the IPPC was in the national interest. It did not matter if an exporter perceived that the certificates were inconvenient because the exporter believed it had adequately treated the export material. The regime was designed to ensure that Australia met its obligations under the IPPC and to the importing country.[8]

[13] The offenders' actions risked compromising the integrity of Australia's export inspection and certification system. They exposed Australia to criticism for non-compliance with the IPPC and to direct action from importing countries such as closing market access to not only the fraudulent exporter but to all Australian exporters. This could result in the imposition of tougher requirements on all exporters with resulting higher costs. It undermined Australia's international standing and the role it played in assisting and encouraging other nations to comply with the IPPC. It exposed Australia to criticism from foreign competitors. Australia's timber export industry was worth $2 billion annually. The offenders' conduct had the potential to damage Australia's reputation and to cause serious economic harm to its timber industry, including to the company's competitors and to those employed in the industry.[9]

[14] The applicant held 51 per cent of the shares in the company and was its CEO, director and secretary. Mr Wilson was also a director with a 32.25 per cent shareholding. Mr Affleck was a senior manager and since July 2009 a director but he was not a shareholder. Ms Mason was employed as a shipping clerk.

[15] The company's Yeronga premises were not approved for the inspection of export timber, which needed to be transported to an approved place and inspected by AQIS before certification. On three occasions AQIS came to the Yeronga premises and certified export timber as a favour but the company was always told the proper procedure would have to be followed in future.[10]

[16] There was nothing to indicate the company would have stopped its entrenched fraudulent practice but for the whistle-blower's complaint. The company's shipping clerk was trained to retrieve a phytosanitary certificate template from the computer, complete details relevant to the particular shipment, renumber it, apply a false signature and the company's false DAFF stamp kept in the shipping clerk's top drawer. This false document was then sent to the importer.[11]

[17] In late 2005, a timber consignment to France accompanied by a stamped phytosanitary certificate in the style of the New Zealand Ministry of Forestry was rejected so the company had the AQIS replica stamp made. The first manufacturer approached to

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7 SRB, 123, [11].
8 SRB, 123 – 124, [12].
9 SRB, 124, [13] – [14].
10 SRB, 125, [20].
11 SRB, 125-126, [21].

make the stamp queried the company's authority and the company approached another manufacturer who agreed to make the false stamp.[12]

[18] The gain made by the company and the applicant by way of the intended dishonest inducement was the price of the exported material, mostly sent to New Caledonia, set out in a table tendered by the prosecution. In the case of Mr Wilson and Mr Affleck the gain was merely the cost of the inspection and certification process, about $60 for each occasion.[13]

[19] His Honour accepted the applicant's submission that he had not been charged with uttering the false certificates and could not be sentenced for offences of uttering. His Honour noted, however, that the creation of the false documents carried the risk they would be used and the applicant had admitted that was the purpose of their creation. The fact that the certificates were used demonstrated the real risk inherent in the offending, especially the reputational risk for Australia.[14]

[20] The judge accepted that there was no evidence the timber exported as a result of the false certificates did not meet all necessary requirements. Nevertheless, the offending conduct was outside the purview of AQIS, the body responsible for giving effect to the IPPC.[15]

[21] His Honour listed the relevant sentencing principles under s 17A and s 16A *Crimes Act*[16] and determined:

> "that the offences are serious, involving an 'arrogant disregard' for Australia's obligations pursuant to an international treaty to which almost every country in the world is a signatory. The making of the false documents carried the risk they would be used. That may lead to serious consequences for this country and the receiving country. Whether or not the false document is used its creation creates the risk to Australia's reputation. The offences were part of an entrenched system of dishonesty. The offences, as committed by Moxon, Wilson and Affleck, are more serious for the involvement by them of other, more junior, employees. The need to deter others who might be minded to act as the defendants have is strong. Each defendant has now pleaded guilty, although at different times. Each has expressed regret and remorse. None has criminal convictions and all have fine prospects of rehabilitation. I take into account, without giving it much weight, that each defendant has demonstrated progress towards rehabilitation during the period of delay between the commencement of the investigation and the charges being laid."[17]

[22] In his oral sentencing remarks the judge noted[18] that the applicant was "a very hands-on manager." He was involved in acquiring the stamp which was used by successive shipping clerks. It was not said that he initiated the practice. His Honour referred to material tendered by the applicant's counsel which demonstrated that the applicant was a hard worker, perhaps a workaholic, regularly travelling

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12 SRB, 126, [23].
13 SRB, 126, [24] - [25].
14 SRB, 126-127, [26] - [27].
15 SRB, 127, [29].
16 SRB, 128, [30] - [31].
17 SRB, 128-129, [32].
18 ARB, 144.

nationally and internationally for work. He was a devoted father and husband and a generous and supportive friend and employer, as well as an innovative and creative businessman. He was at the helm of an international business. His convictions mean he will be unable to take part in the management of a corporation for some time. Although the reason given for creating the false documents was to save the time involved in the inspection and certification process, the company now conducted its export operation within the regulatory regime efficiently and profitably.[19]

[23] His Honour noted that the company was incorporated in 1903 and had been in the Moxon and Wilson families for generations. Under the applicant's leadership, it employed about 200 people and generated significant tax revenue for Australia.

[24] Mr Wilson, the judge found, was not involved in establishing the fraudulent practice. He successfully opened and operated a Melbourne branch for nine years before returning to Brisbane in a managerial role at the end of 2006. He was a director of the company and held a substantial shareholding. His offending commenced in October 2008. The whistle-blower discussed his concerns with Mr Wilson over an eight month period on six to 10 occasions. Like the applicant, he was highly regarded by others. After this offending was discovered, he resigned as director of the company and sold his shares. He has committed some of his time to charity. Psychologist, Dr Frey, suggested that he had an uneasy relationship with his cousin, the applicant, whom he may have found overbearing. Mr Wilson did not have the personal skills to stop employees from participating in a fraudulent system under the applicant's management. He was extremely remorseful for this inaction.[20]

[25] Mr Affleck was 37 at the time of his offending and a senior manager in the company. He was promoted to general manager in 2008, a position he still occupied, and became a director in July 2009. The whistle-blower discussed his concerns with Mr Affleck over an eight month period on six occasions but Mr Affleck nevertheless encouraged employees to act dishonestly. Mr Affleck had a solid employment history in the timber industry and had worked for Moxon and Company since coming to Australia in 2004. He was highly regarded by referees and was a good husband and father. His convictions on these offences will disqualify him from managing corporations and this will have a detrimental effect on his family. Despite the mitigating features, his Honour was not satisfied that the offences were either trivial or that there were sufficient extenuating circumstances to sentence him under s 19B(1)(d) *Crimes Act* by discharging him without conviction; the offences were too serious. As a senior manager he had encouraged other staff to commit the acts which constitute the company's offence.

[26] Ms Mason was 53 years old at sentence. She and her husband, from whom she was now separated, had raised four children. She still cared for two children, one of whom was an adult suffering from a mental illness. She had worked hard all her life. Her former husband was one of several referees who spoke highly of her integrity and honesty. She would not have committed the offences but for the dishonest system into which she was trained.[21]

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19 ARB, 145.
20 Above.
21 ARB, 146.

[27] His Honour considered that the cases to which he had been referred by counsel offered only limited guidance. The offences were so serious that only a sentence of imprisonment was adequate punishment.

Ground 1 – the judge's assessment of the nature of the offence

[28] The applicant's first ground of appeal is that the primary judge erred in not taking into account the nature of the offences as required by s 16A *Crimes Act*. There was no quantifiable injury, loss or damage caused by these offences, rather the offending created a risk of damage to Australia's reputation as a trading partner. Whilst some offences of this kind caused actual damage, this offending did not. The prosecution did not assert that the relevant consignments of the timber were not properly treated, only that they were not validly certified. The primary judge accepted that the timber had been properly treated. There was therefore no actual damage resulting from the exported timber, or as the applicant's counsel put it, "no functional risk." This was a distinguishing factor from cases such as *R v Morex Meat Australia Pty Ltd & Doube*[22] and *R v Sadeed*.[23] The applicant's offending was much less serious than had he exported diseased timber which had not been fumigated in accordance with Australian and international requirements. His Honour did not fully and properly characterise the nature of the offence so that s 16A was not complied with and the sentencing process miscarried.

Conclusion on this ground of appeal

[29] The applicant's contentions are not supported by the judge's reasons for sentence. His Honour in his written sentencing reasons expressly referred to the following matters. There was no evidence the timber exported by the applicant's company as a result of the false certificates did not meet all the necessary statutory requirements other than the certification.[24] The Commonwealth legislative regime as to export inspection and certification was aimed at maintaining Australia's highly favourable plant health status and wide access to overseas markets. Australia was a signatory to the IPPC with the purpose of protecting plants internationally by preventing the introduction and spread of pests.[25] Adherence to the IPPC was in the national interest, irrespective of whether an exporter like the applicant's company perceived the certificates were inconvenient because the export timber was adequately treated.[26] The applicant's actions risked compromising the integrity of Australia's export inspection and certification system and exposed Australia to criticism for non-compliance with the IPPC. It could result in importing countries closing market access to not only the applicant's company but to all Australian exporters and in the imposition of tougher requirements on all Australian exporters with higher costs and fewer competitors in the international market. The applicant's offending undermined Australia's international standing and the role it played in assisting other nations to comply with the IPPC. It exposed Australia to criticism from foreign competitors. It put at risk Australia's $2 billion annual timber export industry. It had the potential to damage Australia's reputation and to cause economic harm to the timber industry including to the competitors of the applicant's company and to all those employed in the Australian timber industry.[27]

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22 (1995) 129 ALR 546; [1995] QCA 154.
23 [2004] QCA 32.
24 At [29].
25 At [11].
26 At [12].
27 At [13] - [14].

[30] It is clear from the sentencing judge's written reasons that his Honour had a thorough appreciation of the nature of the applicant's offending so that his Honour met the requirements of s 16A. This ground of appeal was not made out.

Ground 2 - the judge's treatment of the guilty plea

[31] The applicant emphasised that his pleas of guilty were entered as soon as the prosecution discontinued more than 100 other charges which the applicant had always disputed. In overcharging the applicant, the prosecution had created a powerful disincentive for him to plead guilty at an earlier time. His guilty pleas had real utility in facilitating the administration of justice. The judge did not give proper credit to the applicant for his guilty pleas which were as early as they reasonably could be.

Conclusion on this ground of appeal

[32] In his written sentencing reasons, the judge correctly outlined the lengthy history of this matter, culminating in the applicant's guilty plea on 9 September 2014.[28] His Honour specifically referred to the relevant sentencing principles under s 16A *Crimes Act* including s 16(A)(g) which required him to take into account the applicant's guilty plea.[29] His Honour then correctly noted that each offender had pleaded guilty, although at different times. As the High Court identified in *Cameron v The Queen*[30] an offender cannot be expected to plead guilty to charges that are incorrectly formulated. A plea of guilty soon after charges have been correctly formulated should be treated as timely as it has been entered at the first reasonable opportunity. The judge's sentencing remarks in the present case, do not suggest that his Honour erred in not treating the applicant's guilty plea as timely and in recognising that it showed remorse, acceptance of responsibility and a willingness to facilitate the course of justice. This ground of appeal was not made out.

Ground 3 – the significance of the delay between the detection of the offending and the applicant's conviction

[33] The applicant's oral submissions focussed on this ground of appeal. His counsel emphasised the more than five year delay between when the authorities began investigating this matter in mid-2009 until the applicant's sentence in October 2014. During that period he rehabilitated. And for much of that time he had in excess of 100 other charges, which were ultimately dropped, hanging over his head like the Sword of Damocles. Mrs Moxon provided a letter to the sentencing judge[31] stating that she could not adequately describe the pain the family had suffered over the past five years as a result of these charges. The applicant was devastated by his foolish actions. She stated he was "very down on himself and the self-castigation over his stupidity has lasted 5 years." She was unsure if the family could endure too much more. A letter from solicitor, Paul Hopgood, referred to the enormous pressure the applicant had been under as a result of the charges. The applicant's counsel emphasised that in mid-2009 the authorities had a statement from the whistle-blower as to how the offending occurred. Any complexity in prosecuting the case was bound up in the formation of the unnecessary 100 plus charges which the Crown ultimately withdrew. The prosecution persisted with those unsuccessful charges

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28 At [10].
29 At [31].
30 (2002) 209 CLR 339, Gaudron, Gummow and Callinan JJ [20] – [25], Kirby J [75].
31 Part of Exhibit 2.

until the trial. The judge gave little weight to the effect of this lengthy delay on the applicant or the fact that he had been of good behaviour during the five years post-offending. The judge's failure to refer to this gross delay by first world standards was an error of law.

Conclusion on this ground of appeal

[34] The applicant's counsel at sentence in his written submissions referred to a period of more than two and a half years between the whistle-blower's complaint to AQIS and the bringing of charges against the applicant, adding that it was, by the date of sentence, five years since AQIS searched the company's premises. During this time, he contended that the applicant had rehabilitated and this was a mitigating feature.[32] In oral submissions at sentence, counsel again emphasised that although the prosecution material was bulky and complex, it did not justify such a long delay.[33] The applicant's present counsel correctly pointed out that counsel at sentence mistakenly stated that the delay between the initial search of the company's premises and the bringing of the complaint was two and a half years when it was three and a half years.

[35] This error is of little moment, however, as counsel at sentence correctly emphasised that there had been a five and a half year delay between the searching of the company's premises and the sentencing of the applicant. In any case, his Honour in his written reasons correctly stated the dates when the search warrant was executed in July 2009 and referred to the long investigation, the resulting charges in November 2012, the committal hearing in July 2013, the presentation of the indictment in December 2013, and the applicant's guilty plea in September 2014.[34] His Honour was plainly cognisant of the precise details of the lengthy delay and the resulting general unfairness.

[36] Counsel at sentence also emphasised that delay was a mitigating feature as during that time the applicant was rehabilitated: *R v L; ex parte Attorney-General*.[35] The sentencing judge was not asked to make any findings as to the reasons for the delay and that issue was not canvassed by the respondent below.

[37] His Honour took into account, although without giving it much weight, that the applicant had demonstrated progress towards rehabilitation during the period of the delay.[36] It is not surprising his Honour gave this limited weight. The applicant had been a successful businessman, a responsible member of the community and a devoted husband and father prior to this offending. It would not have been in his interests to continue to offend once AQIS had discovered this fraud and he was unlikely to offend again. His prospects of rehabilitation were therefore always excellent, irrespective of the delay. Rehabilitation during the period of the delay was not as powerful a feature as, for example, for a reformed drug addict or a youthful property offender.

[38] The applicant has not demonstrated that the sentencing judge erred in failing to consider the mitigating features flowing from the very significant delay in this case

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32 Exhibit 2 [16]; AB 684.
33 ARB 94, T1-38 line 6-20.
34 [6], [7] and [10].
35 [1996] 2 Qd R 63.
36 *L*, [32].

between the whistle-blower's complaint to AQIS and the applicant's guilty plea. The judge's approach and that of counsel at sentence was consistent with settled principle as to the relevance of delay as a mitigating feature: See *L* and *Scook v The Queen*.[37] This ground of appeal was not made out.

Ground 4 – manifest excess in sentence

[39] The applicant relies on the matters raised in grounds 1 to 3 (the nature of the offence, the timely guilty plea and the lengthy delay in finalising the investigation) as well as the applicant's previous good character in contending that the sentence of two years imprisonment with release on recognizance after eight months on a two year good behaviour bond was manifestly excessive. He submits that a sentence of eighteen months imprisonment with release after six months should be substituted when all the many mitigating features are taken into account in the process of instinctive synthesis undertaken when sentencing.

Conclusion on this ground of appeal

[40] As the applicant's counsel has rightly emphasised, there were many mitigating features. In all other aspects of his life it appears the applicant was a solid citizen, a hard worker, an innovative businessman and a loving husband and father, operating a highly successful company employing many people and making a strong contribution to the Australian economy. He was a generous employer and friend and contributed to worthy charities. He was extremely unlikely to re-offend. He has had the worry and stress of these charges, and another 100 plus other charges which were ultimately dropped, hanging over him for many years. This has taken a heavy emotional toll on him and his family and has no doubt also caused him significant financial disadvantage. The timber exported without the required certification would have met the requirements necessary for AQIS certification. The primary judge made clear in his sentencing remarks that he was cognisant of these many mitigating features.

[41] But as his Honour also recognised, this was serious offending. The company's non-compliance with the IPPC put at risk Australia's export reputation, not only in respect of the timber industry, but also more generally. It exposed Australia to criticism from foreign competitors. It not only put at risk the reputation of the applicant's company but it put at risk the whole of Australia's lucrative timber export industry. It had the potential to cause serious harm to the Australian economy and to jeopardise the jobs of innocent people employed in the timber industry. The applicant was the majority shareholder in the company and its CEO, director and secretary. He therefore had a more responsible role than his co-offenders and had to take ultimate responsibility. He was a party to the company putting in place a fraudulent practice of certification involving a false DAFF stamp especially commissioned for this purpose after one manufacturer refused the company's request to make a false stamp. The motivation was to save the cost and inconvenience of the inspection and certification process. His Honour rightly identified that the offending showed an arrogant disregard for Australia's obligations under the IPPC to which almost every country in the world was a signatory. His Honour also rightly identified that there were no closely comparable cases.

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37 *Scook v The Queen* (2008) 185 A Crim R 164 [31] – [33] and [66].

[42] The maximum penalty for each forgery offence was 10 years imprisonment and for the contravention of the regulations relating to official marks, five years imprisonment. Even though the exported timber to which the forged certificates related met AQIS requirements, this was a serious example of the offences of forgery and contravention of regulations relating to official marks. At the crux of the applicant's offending was that he and the co-offenders he led committed criminal acts sacrificing the interests of Australia and its timber industry for their own short term convenience and profit motives. The applicant's fraudulent conduct warranted a stern deterrent penalty so that those involved in the export industry fully comprehend the importance of complying with statutory certification requirements. Despite the many mitigating matters and the applicant's otherwise impressive contribution to society, a period of actual detention was required. The applicant has not demonstrated that a two year sentence, with release on a $1,000 good behaviour bond after one third of that sentence (eight months), is manifestly excessive. It follows that this ground of appeal was not made out.

Conclusion

[43] As the applicant had not made out any of its four proposed grounds of appeal, I joined in this Court's order on 7 April 2015 refusing this application for leave to appeal against sentence.

[44] **MORRISON JA:** I have had the advantage of reading the draft reasons of the President. I agree with those reasons but with some qualifications which do not affect the outcome.

[45] Mr Moxon's company was a timber exporter. Under a statutory regime involving the *Export Control Act* 1982 (Cth), and to assist Australia's obligations and aims as a signatory to the *International Plant Protection Convention* (**IPPC**), timber for export had to be first inspected and certified by officers of the Australian Quarantine and Inspection Service (**AQIS**). The certification was that the timber was disease and pest free.[38]

[46] Before Mr Moxon assumed control of the company, it engaged in the fraudulent practice of using a stamp to by-pass the AQIS inspections. When he assumed control Mr Moxon perpetuated that scheme, arranging for the manufacture of another false stamp, and directing employees to use it, notwithstanding their reservations. The practice was entrenched, carried out over several years, and only revealed by a whistle-blower.

[47] However, there are three important matters that are relevant to characterising the risk posed by the admitted fraud.

[48] First, there was no evidence that the timber had not been properly treated, or that any of the exported timber was unsuitable for export, or that any recipient of the exported timber received timber of a quality other than that for which they had contracted.[39] In fact there was evidence that on three occasions AQIS officers had inspected timber at the Moxon yard, and it was certified as compliant.[40]

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38 AB 61.

39 AB 63, 64.

40 Supplementary Appeal Book (**SAB**) 125 at [20].

[49] Secondly, the prosecution case was not put on the basis that any of the forged certificates was actually uttered.[41] Therefore the case had to be approached on the basis that no overseas recipient actually received a false certificate.[42] There was no suggestion that any customer was defrauded, nor that they were aware of the deceit.[43] The risk here was that the false certificate **might** be used, not that it was.[44]

[50] Thirdly, the gain by Mr Moxon and his company from the fraudulent practice was not put as the price of the exported timer, but "the avoidance of the costs associated with the treatment and inspection of the timber".[45] The timber could not be inspected by AQIS at the Moxon yard, because it was not an authorised place for that purpose.[46] So, the timber had to be moved to another yard for inspection. The costs avoided were minimal in the scheme of things, amounting to about $57.50 per inspection.[47]

[51] In those circumstances care needs to be taken in describing the true extent of the risk that Mr Moxon's fraud posed.

[52] It is true to say that the AQIS inspection and certification regime was part of the process to ensure compliance with Australian statutory requirements under the *Export Control Act* 1982 (Cth). It is also true to say that, having become a signatory to the *International Plant Protection Convention* (IPPC), Australia assumed obligations which it is keen to meet, so as to preserve its favourable status in terms of animal, plant and human health, and its access to international markets.

[53] However, in my respectful opinion the learned primary judge's description of the risk that Mr Moxon's fraud posed is too wide .[48] It certainly risked compromising the integrity of the inspection and export system, but no timber was exported that did not meet the necessary standards. In those circumstances it is, in my view, difficult to see how it would likely lead to closure of market access, and certainly not beyond Mr Moxon's company. Nor was it likely to lead to the imposition of tougher requirements on all exporters; here the system was adequate but bypassed by a determined rogue exporter.

[54] One can accept that it risked undermining Australia's position as a complying signatory to the IPPC, and might expose it to criticism. However it is difficult to see how the conduct risked serious economic harm to the timber industry as a whole, or to all those employed in it, much less put at risk the entire timber export industry, where:

- the offences were carried out by a single determined fraudulent exporter;
- there was no suggestion that any other exporter was engaged in the same or similar conduct;
- no customer was given a fraudulent certificate;
- the exported timber complied with all the necessary requirements;

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41 AB 63.
42 Even if they had, it would not have been false as to the quality of the timber.
43 AB 99.
44 SAB 127 at [27].
45 AB 62, 70; sentencing judge's reasons at AB 145.
46 AB 63, 64, 137; SAB 125 at [16], [20].
47 AB 70, 137.
48 See paragraph [13] above. SAB 124 at [13]-[14].

- there was no actual damage caused by the export of the improperly certified timber.

[55] That said, no error can be demonstrated in the learned sentencing judge's approach to the task of sentencing Mr Moxon for these offences.

[56] For these reasons I agreed with the order made on 7 April 2015.

[57] **PHILIPPIDES JA:** In relation to this matter, in which an order was made on 7 April 2015 refusing the application for leave to appeal against sentence, I agree with the reasons of the President for refusing leave.