SUPREME COURT OF QUEENSLAND

CITATION:	*R v Melrose* [2016] QCA 202
PARTIES:	**R** **v** **MELROSE, Ronald James** (applicant)
FILE NO/S:	CA No 33 of 2016 DC No 429 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 13 January 2016
DELIVERED ON:	16 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2016
JUDGES:	Morrison and Philippides JJA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce fresh evidence is refused.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted on his plea of guilty of 23 counts of obtaining a financial advantage by deception and two counts of attempting to obtain such an advantage – where the applicant was sentenced to four years imprisonment for the obtaining counts and two years imprisonment to be served concurrently for the attempt counts with parole eligibility after serving two years imprisonment – where a reparation order for the amount of $182,287.23 was made – where the applicant submitted that the sentencing judge erred in not reducing the amount of the reparation order by the quantum of fraud involving a co-offender – where the applicant argued that a reference by the sentencing judge to the fact the applicant had not initially co-operated may have amounted to the sentencing judge impermissibly taking the applicant's lack of initial co-operation into account as an aggravating factor – where the applicant complained that a reference in the prosecution's sentence submissions to the applicant being on bail for other alleged offending amounted to an error – where the applicant contended

that the sentencing judge gave insufficient weight to the delay that occurred between the detection of the offences in late 2005 and when the applicant was charged in 2013 – whether the delay was a relevant factor – whether the weight to be given to the delay went to the issue of manifest excessiveness – whether the exercise of the sentencing discretion miscarried

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his plea of guilty of 23 counts of obtaining a financial advantage by deception and two counts of attempting to obtain such an advantage – where the applicant was sentenced to four years imprisonment for the obtaining counts and two years imprisonment to be served concurrently for the attempt counts with parole eligibility after serving two years imprisonment – where a reparation order for the amount of $182,287.23 was made – where the applicant submitted that the sentence was manifestly excessive – where the applicant contended that the sentencing judge gave insufficient weight to the delay that occurred between the detection of the offences in late 2005 and when the applicant was charged in 2013 –where the respondent argued that the sentencing judge had brought forward the applicant's parole eligibility date to recognise the delay – whether adequate weight was given to the delay – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – TO ADMIT NEW EVIDENCE – where the applicant sought to adduce fresh evidence that went to the finding by the sentencing judge that the applicant was the "architect and instigator" of the scheme – where the respondent submitted that the material merely sought to relitigate the factual basis of the sentence – whether the application to adduce evidence should be granted

Crimes Act 1914 (Cth), s 16A, s 21B

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, cited
Dwayhi v R; Bechara v R (2011) 205 A Crim R 274; [2011] NSWCCA 67, cited
Hanania v R [2012] NSWCCA 220, cited
Hookham v The Queen (1994) 181 CLR 450; [1994] HCA 52, cited
R v Anderson [2012] QCA 215, considered
R v Baker [2000] NSWCCA 85, cited
R v Buckman [2016] QCA 176, considered
R v Cox; R v Cuffe; R v Morrison [2013] QCA 10, considered
R v Fidler (2010) 199 A Crim R 54; [2010] QCA 25, cited
R v Host [2015] WASCA 23, considered
R v Kapitano [2012] QCA 288, cited

R v Kertebani [2010] NSWCCA 221, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Massey [2015] QCA 254, considered
R v Phillips & Woolgrove (2008) 188 A Crim R 133; [2008] QCA 284, cited
R v Suarez [2012] QCA 190, cited
R v Theodossio and Said [2000] 1 Qd R 299; [1998] QCA 421, cited
R v Wall (2002) 71 NSWLR 692; [2002] NSWCCA 42, cited
Scook v The Queen (2008) 185 A Crim R 164; [2008] WASCA 114, approved
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: The applicant appeared on his own behalf
W S Ferguson (*sol*) for the respondent

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

[1] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the orders her Honour proposes.

[2] **PHILIPPIDES JA:** The applicant was convicted on 10 September 2015 on his plea of guilty to 23 counts of obtaining a financial advantage by deception contrary to s 134.2(1) of the *Criminal Code* (Cth) (the Code) and two counts of attempting to obtain a financial advantage by deception contrary to s 134.2(1) and s 11(1) of the Code. He was sentenced on 13 January 2016 to four years imprisonment for the 23 counts of obtaining a financial advantage and two years imprisonment to be served concurrently for the remaining attempt offences. Parole eligibility was fixed after serving two years imprisonment being served. A reparation order was also made for the amount of $182,287.23.

[3] The applicant sought leave to appeal against the sentences imposed on the grounds of specific errors and on the basis that the sentences imposed were manifestly excessive. The sentence that the applicant contends ought to have been imposed is one of between three to three and a half years imprisonment with parole eligibility after serving six to seven months imprisonment has been served. The applicant also sought leave to adduce further evidence.

Circumstances of the offending

[4] The sentences were imposed on the basis of an agreed statement of facts. The applicant was an accountant and tax agent until his deregistration in 1998. He was an undischarged bankrupt between May 2000 and September 2005.

[5] The offending occurred between 7 January 2003 and 22 March 2005. It concerned 25 income tax returns prepared by the applicant for 10 individual taxpayers that contained false information, and having also prepared false supporting documentation that included group certificates, letters from employers and profit and loss statements for five of the taxpayers. Seven of the taxpayers had never worked for the employer nominated in their tax return. In respect of the remainder, their income and tax withheld amounts were falsely inflated. These returns were then lodged through tax agents or by the taxpayers themselves.

[6] The lodgement of the false returns resulted in $204,028.50 in tax refunds accruing to the 10 taxpayers, with $182,287.23 being refunds actually paid by the Australian Taxation Office and $21,741.27 that was withheld (the attempt counts). Of the $182,287.23 in refunds that was paid, $111,582.97 was traced to the applicant's bank account. The balance was retained by the tax agents, with some remaining with the clients.

Sentencing remarks

[7] The sentencing judge referred to the quantum of the fraud, noting the total amount involved and that $182,287.23 was fraudulently obtained through payments by the ATO, of which the applicant received $111,582.97.

[8] His Honour had regard to the considerations in s 16A of the *Crimes Act* 1914 (Cth) (the Act) which are summarised in the respondent's written sentencing submissions. His Honour observed that the offending concerned offences of a serious nature, namely frauds on the ATO, and occurred over a period of two years and nine months. The offending concerned a "relatively sophisticated fraud motivated solely by greed" and required the involvement of other people as the applicant was bankrupt and a deregistered tax agent at the time. The conduct was "deliberate and persistent". The applicant created false group certificates, claimed that taxpayers had incurred allowable deductions and business losses, and created false profit and loss statements for false businesses. The applicant was the "architect and instigator of the scheme", which involved "considerable and considered planning".

[9] The sentencing judge took into account the applicant's plea of guilty and, while noting that the applicant did not initially cooperate, had regard to his cooperation as indicative of remorse and as assisting in the administration of justice.

[10] His Honour referred to the need to impose a sentence which reflected considerations of general and personal deterrence. In that regard, his Honour took into account the applicant's criminal history. The sentencing judge noted, however, that it did not include offending of a similar nature. His Honour also remarked that the offending was aggravated because the applicant offended while subject to a suspended term of imprisonment.

[11] The applicant's antecedents, age and personal circumstances were taken into account. His Honour noted that the applicant was 63 years of age and had been on a disability support pension because of depression with suicidal tendencies. His Honour also observed that the applicant's depression was said to have been exacerbated because of the delay of almost 10 years from the time investigations into the frauds commenced until the pleas.

[12] In this respect, his Honour observed that some delay was inevitable given that the investigation was "extremely complicated" and that "multiple other offenders" were involved. Additionally, his Honour observed that no onerous bail conditions were imposed as a result of the charges brought on 13 May 2013. The applicant's counsel pointed to the exacerbation of the applicant's depression that the delay had caused. The sentencing judge stated that the fact that there was some delay was a factor he would take into account in reducing the parole eligibility date.

Application to adduce evidence

[13] This Court has power to receive evidence that was not before the sentencing judge if its admission would mean that some other sentence other than that imposed was

warranted in law.[1] The material that was the subject of the application went to the matter of the finding by the sentencing judge that the applicant was the "architect and instigator" of the scheme. The respondent contended that the material sought to be admitted as further evidence did not reveal anything that would not have been known about, or that could not have been reasonably obtained, at the time of sentence. Rather it sought to re-litigate the factual basis of the sentence, which was the subject of an agreed statement of facts, and the findings of the sentencing judge that were based on those facts. The respondent's submissions should, in my view, be accepted.

[14] There is no basis to consider that the evidence sought to be put before the Court was unavailable or unknown at the time of sentence. Moreover, the sentencing judge's conclusion (not challenged at sentence) that the applicant was the "architect and instigator" was an objectively reasonable finding in all the circumstances and within his Honour's discretion at sentence. The applicant was sentenced on the basis that he falsely completed returns for all 25 claims relevant to the indictment and that he forged supporting documentation in relation to a number of those returns. He received a lower proportion of proceeds from his offending with a co-offender but he obtained or retained the majority of the funds from the remainder of the fraud, being $111,582.97. He was the contact point for all of the taxpayers and provided some with excuses when they received unexpected returns. The application to adduce evidence should be refused.

Grounds of appeal

[15] The applicant's grounds of complaint are as follows:

Error as to the quantum and making of the reparation order

[16] Section 21B of the Act confers a discretionary power to make a reparation order representing the loss suffered or expense incurred by reason of the offence.[2] As this Court noted in *R v Theodossio & Said*:[3]

> "Liability to make reparation, in the case of co-offenders, is joint and several. It is up to the court whether, in a case like this, it apportions the loss between the co-offenders. But that does not exclude a court from ordering each to pay the total sum. We note the passage in *Archbold* (1997) paragraph 5-399:
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> > '[a]n offender may not complain on the ground that the order is for a greater sum than he received as his share of the proceeds of the crime, so long as it is not larger than the total amount stolen (see *R v Lewis*, unreported, January 31, 1975) or on the ground that there is an objectionable disparity in making such an order against him but not against his accomplices: ibid.'
>
> Of course, the Commonwealth cannot in fact recover more than the total of [the loss suffered by the victim]. But it should reasonably have the right to recover the loss from either. Each caused the loss, by respective acts of participation in the fraud."

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1 *R v Maniadis* [1997] 1 Qd R 593; [1996] QCA 242 at 597 per Davies and Helman JJ.

2 *Hookham v The Queen* (1994) 181 CLR 450; [1994] HCA 52; the making of an order constitutes proof of final judgment should the beneficiary of the order choose to pursue the matter in a court of competent civil jurisdiction: see *Crimes Act* 1914 (Cth), s 21B(3).

3 [2000] 1 Qd R 299; [1998] QCA 421 at [24].

[17] The applicant submitted the "actual" fraud amount that was the basis of sentence should be reduced by the quantum of fraud involving a co-offender. The obvious difficulty with that submission is that the quantum was an agreed fact at sentence. There is no merit in the submission as to the making of the order, which was not opposed. In any event, it was within his Honour's discretion to make the reparation order for the full amount. Section 16A(2)(e) of the Act stipulates that the Court must take into account the "injury, loss or damage resulting from the offence". It was correct to attribute $182,287.23 as the amount fraudulently obtained and open to the sentencing judge to make the order on this basis.

Lack of cooperation

[18] The applicant argued that a reference by his Honour to a lack of cooperation may have resulted in additional punishment. The sentencing judge stated the applicant had not initially cooperated, which was accurate. As the respondent submitted, if the applicant had cooperated at the earliest possible opportunity, this would have been a relevant factor to take into account in mitigation. There was no evidence to suggest his Honour made an error in the form of impermissibly taking the applicant's lack of initial cooperation into account as an aggravating factor.

The applicant being on bail for other offending

[19] The applicant also complained of a reference in the Crown's written submissions at sentence to his being on bail for other alleged offending. However, as the respondent contended, the submission as to the applicant being on bail for other matters pending the finalisation of this matter was made in the context of the issue of delay. The prosecution did not contend that being on bail for other offending was relevant to the applicant's antecedents. Nor is there any reason to consider that the sentencing judge took the matter into account in imposing sentence.

Delay

[20] The applicant submitted that the sentencing judge gave insufficient weight to the issue of delay as a mitigating factor in imposing sentence. Although delay is not a consideration listed in s 16A of the Act, the respondent accepted that it could be a relevant sentencing consideration depending on the circumstances of the case.

[21] The applicant contended that the delay in commencing and finalising the prosecution was "unfair, resulting in anxiety, depression and alcoholism". The offences related to conduct that occurred between 2003 and 2005. The applicant submitted that he had already been punished at the date of sentence for "eleven years" and that he had done "nothing whatsoever to impede the investigation". The applicant distinguished his case from that of *R v Suarez*,[4] which was referred to by counsel at sentence, on the basis that the sentencing judge in *Suarez* was justified in not mitigating the sentence to reflect delay which had largely been caused by the offender. The applicant placed reliance on *R v Cox; R v Cuffe; R v Morrison*,[5] which was also put before the sentencing judge. In that case, the applicants (Cuffe and Morrison) were resentenced to take account of the strain they had experienced during the delay of seven years between investigation and proceedings being commenced, during which time they had not

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4 [2012] QCA 190 at [27]-[32].
5 [2013] QCA 10 at [98]-[103].

reoffended, which had not been taken into account. The applicant relied in particular on the following statements of Holmes JA:[6]

> "The focus must be on whether there is either a significant element of punishment in the delay because of the uncertainty and anxiety involved or the interval of delay is of sufficient length to make a law-abiding life in the interim a promising indication of rehabilitation.
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> The fact that an offender has expressed remorse for a plea of guilty may be an important indicium of rehabilitation, but the failure to do so does not exclude it. Nor is it imperative, in my view, that there be direct evidence that delay has had an impact through the protracted anxiety of the threat of prosecution; in a sufficiently obvious case an inference to that effect may be drawn."

[22] The respondent submitted that in dealing with the issue of delay in the context of white collar crime, the sentencing judge appeared to have applied the principle referred to in *R v Wall*, where Wood CJ stated:[7]

> "Delay in the prosecution of white-collar crimes is not unusual and the fact that they are so difficult to discover and successfully prosecute is one of the reasons why general deterrence is so important."

[23] The respondent also referred to the principles outlined by Buss JA in *Scook v The Queen*,[8] who observed the relevance and significance of delay will depend on all the circumstances of the particular case and require a flexibility of approach. His Honour identified the following non-exhaustive "guiding principles":[9]

> "First, delay is not, of itself, a mitigating factor.
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> Secondly, delay will not ordinarily be a mitigating factor if it has been caused by difficulties in detecting, investigating or proving the offences committed by the offender, and the period of the delay is reasonable in the circumstances.
>
> Thirdly, delay will not ordinarily be a mitigating factor if it is caused by the offender's obstruction or lack of co-operation with the State, prosecuting authorities or investigatory bodies, but the offender's reliance on his or her legal rights is not obstruction or lack of co-operation for this purpose.
>
> Fourthly, delay will not ordinarily be a mitigating factor if it results from the normal operation of the criminal justice system, including delay as a result of the offender or a co-offender exercising his or her rights; for example, interlocutory appeals and other interlocutory processes.
>
> Fifthly, delay may be conducive to the emergence of mitigating factors; for example, if, during the period of delay, the offender has made progress towards rehabilitation or other circumstances favourable to him or her have emerged.

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6 [2013] QCA 10 at [101]-[102].
7 (2002) 71 NSWLR 692; [2002] NSWCCA 42 at [89].
8 (2008) 185 A Crim R 164; [2008] WASCA 114.
9 (2008) 185 A Crim R 164; [2008] WASCA 114 at [57]-[65].

> Sixthly, delay (not being delay of the kind described in the second, third and fourth guiding principles) will ordinarily be a mitigating factor if:
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> (a) the delay has resulted in significant stress for the offender or left him or her, to a significant degree, in 'uncertain suspense'; or
>
> (b) during the period of delay the offender has adopted a reasonable expectation that he or she would not be charged, or a pending prosecution would not proceed, and the offender has ordered his or her affairs on the faith of that expectation.
>
> Seventhly, delay caused by dilatory or neglectful conduct by the State, prosecuting authorities or investigatory bodies may result in a discount of the sentence that would otherwise be imposed on the offender, if the court thinks it an appropriate means of marking its disapproval of the conduct in question."

[24] In considering the matter of delay, it is to be observed that the delay prior to proceedings being commenced occurred between the detection of possible offences in late 2005 until the applicant was charged in May 2013. That was undoubtedly a substantial period.

[25] However, the delay must be considered in the light of the undisputed facts in respect of the investigation and prosecution phases of the proceedings as set out in the statement of facts. They reveal that the investigation involved examination of 248 suspect tax returns and the execution of 50 warrants between 2005 and 2010. One co-offender was charged in October 2009 and sentenced in October 2010. He formed part of the case against the applicant. On 6 September 2011, Katherine Forrester, the former girlfriend of the offender and former employee of McNeill, one of the tax agents involved in the frauds, was charged with three money laundering offences. She pleaded guilty on 29 May 2013. On 13 May 2013, a warrant was issued against Nerissa McNeill, the registered tax agent who lodged 16 tax returns in the names of eight persons whose refunds were subsequently paid to the applicant. Also on 13 May 2013, a complaint and summons was issued against the applicant in relation to 79 income tax returns. Between the first return date on 20 August 2013 and the committal hearing on 6 May 2014, there were seven adjournments of the matter before the Magistrates Court at Southport to facilitate the brief being read and instructions being taken. Following the committal hearing, the applicant was granted bail on his own undertaking, having been at large on the Commonwealth offences until that date.[10] On 20 October 2014, an indictment containing 57 counts relating to 57 income tax returns was presented. On 26 November 2014, a four week trial was set down to commence on 28 September 2015. On 8 September 2015, the applicant offered to plead guilty to 25 counts on the indictment. The respondent accepted that offer. On 10 September 2015, the applicant was arraigned on 25 counts on the indictment and a *nolle prosequi* was presented in relation to the remaining 32 counts on the indictment.

[26] The sentencing judge considered the delay but was of the view that it was not excessive based on the material. His Honour remarked that the investigation was extremely complicated and involved multiple offenders such that some delay was inevitable.

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[10] The applicant was granted bail on his own undertaking in relation to other state fraud charges, for which he was arrested on 4 May 2012 and 12 December 2012 respectively.

His Honour, nevertheless, accepted the submission made by the applicant's counsel that the delay had exacerbated the applicant's depression and indicated the applicant's parole eligibility date would be reduced in recognition of the delay. As the respondent submitted, the approach taken by the sentencing judge in recognising stress caused by "uncertain suspense" prior to charge was open and consistent with the principles outlined in *Scook*. The same approach was taken in *R v Phillips & Woolgrove*,[11] where it was held that the sentencing judge appropriately took into account "the particular effect of the lengthy delay in the prosecution" of the offender by reference to the psychological impact caused by it.[12]

[27] There was no demonstrated error in the approach taken by the sentencing judge to the issue of delay. Further, the weight to be given to such delay is a matter for the discretion of the sentencing judge. Appellate intervention is only be justified if the sentence as a whole can be said to be manifestly excessive.[13]

Was the sentence manifestly excessive?

[28] At sentence, both counsel relied on the cases of *R v Massey*.[14] The prosecution also made reference to the decision in *R v Cox; R v Cuffe; R v Morrison.*[15] On appeal, the applicant relied additionally on the cases of *R v Host*,[16] *Dwayhi v R; Bechara v R*,[17] *R v Kertebani*,[18] *R v Fidler*[19] and *R v Buckman.*[20] The respondent, while primarily relying on *Massey*, also put forward *R v Host*[21] and *R v Anderson*[22] as appropriate comparatives.

[29] In *Massey*, a sentence of three and a half years imprisonment with release on a good behaviour bond after 14 months was imposed. Massey was an undischarged bankrupt, who conducted a relatively sophisticated operation over a period of six months using several companies, false invoices and receipts. He lodged 25 business activity (BAS) statements, claiming total refunds of $257,655.45 of which $141,048.22 was refunded by the ATO. The sentencing judge considered Massey's criminal history, which included convictions for assault, wilful destruction and stealing, to be minor. His age, extreme ill health and pain, psychiatric problems at the time of offending and his, albeit late, guilty plea were considered to be mitigating factors in imposing sentence. It was held that the sentencing judge had not overlooked relevant mitigating factors, particularly the applicant's health, in imposing sentence and that the sentence was not otherwise manifestly excessive.

[30] Both *Massey* and the applicant were sentenced as principal offenders. The sentence imposed upon the applicant was greater than that in *Massey*, despite *Massey* involving a greater, though not substantially greater, quantum of fraud. Quantum, however, while highly relevant to assessing the seriousness of fraud offences, is not the sole

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11 (2008) 188 A Crim R 133; [2008] QCA 284.
12 [2008] QCA 284 at [59]-[60] per Fraser JA.
13 *R v Buckman* [2016] QCA 176 at [8] per Fraser JA, citing *R v Baker* [2000] NSWCCA 85 at [11] per Spigelman CJ and *Hanania v R* [2012] NSWCCA 220 at [33] per Button J.
14 [2015] QCA 254.
15 [2013] QCA 10.
16 [2015] WASCA 23.
17 (2011) 205 A Crim R 274; [2011] NSWCCA 67.
18 [2010] NSWCCA 221.
19 [2010] QCA 25.
20 [2016] QCA 176.
21 [2015] WASCA 23.
22 [2012] QCA 215.

determinant in a particular case. The respondent submitted three factors warranted the greater penalty imposed in the applicant's case. The first was the use of others' identities in this case and the breach of trust that involved. Nine taxpayers (other than the taxpayer who was a co-offender) had their identities improperly used to enable the applicant to obtain a financial advantage by deception. Secondly, 10 counts of the offending occurred whilst the applicant was subject to a suspended sentence. Thirdly, that the extreme ill health of the applicant in *Massey* meant that his time in custody would be more difficult was a relevant, albeit not overwhelming, mitigating feature. In the present case, there was no material before the sentencing judge regarding the applicant's health, apart from reference to his depression, which was referred to by the sentencing judge in the context of delay.

[31] In *Buckman*, the applicant was sentenced to concurrent terms of three years imprisonment on counts 1 and 2 and 15 months on count 3, with release on a recognizance after serving 14 months imprisonment in respect of pleas to three counts of obtaining a financial advantage by deception relating to a fraud on Medicare. The offending occurred over a period of 16 months and involved the applicant using the Medicare numbers of 518 patients at a medical practice where she worked to obtain a total amount of $189,000 from Medicare. Buckman had a relevant criminal history, including a previous conviction for Medicare fraud and, when sentenced for the relevant offending, was already serving a sentence for state offences of dishonesty. Her motivation was to obtain money to fund her gambling addiction. Significantly, she had taken steps to overcome her addiction and had made significant attempts at rehabilitation whilst imprisoned.

[32] *Host* concerned offending involving the submission of 30 false BAS statements over approximately four years in respect of a company of which he was a director. From this conduct, he fraudulently obtained $313,677. The offender also provided false information in respect of his individual tax returns over a period of three years encompassed within the period of the other offending and, as a result, fraudulently obtained $18,969.15 from the ATO. In addition, he provided forged documents to the ATO in response to ATO compliance checks. However, Host made full restitution of the amounts obtained prior to sentence. He was between 30 and 34 years of age at the time of offending and 39 at sentence. Soon after presentation of the indictment, plea negotiations had commenced. He had no criminal history, was married with two children, had a supportive family, a good work record, ran his own business and had engaged in volunteer work. He was assessed as being unlikely to reoffend by the sentencing judge, having excellent rehabilitation prospects and as having undertaken counselling as a result of his overwhelming shame, stress, anxiety and depression arising from the offending. Significantly, the fraud was not motivated by greed but by a desire to cover debts, avoid losing the family home and avoid having to declare bankruptcy. A sentence of three and a half years imprisonment, with release on a recognizance after serving one year and nine months imprisonment, was imposed on appeal.

[33] *Anderson* concerned the lodgement of six false BAS statements with the ATO in respect of four different entities, three of which did not trade. The offending occurred over four and a half months, during which time Anderson obtained nearly $32,000 and attempted to obtain a further $65,000. Anderson was 49 at the time of the offending, 60 at the time of sentence and had a criminal history that included dishonesty offences. The offences were committed while subject to a good behaviour bond given to obtain his release in respect of a 12 month term of imprisonment

imposed for social security fraud. The Court of Appeal dismissed the application for leave to appeal against the sentence imposed, on his guilty plea, of three years imprisonment with release on a recognizance after serving 15 months.

Conclusion

[34] While the sentence imposed upon the applicant was greater than that in *Massey*, there were a number of distinguishing factors and, in some respects, the offending could be considered more serious. Nor do any of the other comparatives outlined above demonstrate that the sentence imposed was manifestly excessive, even when regard is had to the matter of delay. In *Massey*, McMurdo P observed that, unlike the position when sentencing for state offences, more commonly when sentencing federal offenders release dates are set to recognise mitigating factors at between the half to two thirds point of the sentence.[23] As to the recognition of the effect of delay, Holmes JA in *R v Cox; R v Cuffe; R v Morrison*[24] reduced the sentence imposed on two of the offenders by one sixth. Both of these authorities were referred to before the sentencing judge.

[35] The sentencing judge had regard to the observation of McMurdo P in *Massey* and also noted that the delay was "a factor which [the sentencing judge would] take into account in reducing the parole eligibility date". In my view, the non-parole period imposed in this case of two years was within the range regarded as an appropriate exercise of the sentencing discretion, having regard to all the circumstances of the case including the factor of delay. It cannot be said that the overall sentence was manifestly excessive so as to indicate that delay was not adequately taken into account.

[36] There being no demonstrated error in principle by the sentencing judge and the sentences imposed being within the appropriate sentencing discretion, and not being manifestly excessive, the application should be refused.

Orders

[37] I would make the following orders:

1. The application to adduce evidence is refused.

2. The application for leave to appeal against sentence is refused.

[38] **BURNS J:** For the reasons expressed by Philippides JA, I agree that the application to adduce evidence and the application for leave to appeal against sentence should both be refused.

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23 *R v Massey* [2015] QCA 254 at [28].

24 [2013] QCA 10 at [102]-[103].