SUPREME COURT OF QUEENSLAND

CITATION:	*R v Allan; Ex parte Commonwealth Director of Public Prosecutions* [2016] QCA 270
PARTIES:	**R** **v** **ALLAN, Alex Escala** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant)
FILE NO/S:	CA No 288 of 2015 DC No 1577 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Director of Public Prosecutions (Cth)
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 3 November 2015
DELIVERED ON:	Orders delivered ex tempore 22 June 2016 Reasons delivered 25 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2016
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 22 June 2016:** **1. Appeal against sentence allowed.** **2. The sentence on count 1 is varied by ordering the offender be imprisoned for a period of 2 years instead of 18 months and that he be released after serving 15 months, instead of 8 months, upon giving security by recognizance in the sum of $1,000.00 conditioned that the offender be of good behaviour for a period of 4 years.** **3. The sentence imposed on count 2 is varied by ordering the offender be imprisoned for a period of 2 and a half years instead of 2 years and that he be released after serving 15 months, instead of 8 months, upon giving security by recognizance in the sum of $1,000.00 conditioned that the offender be of good behaviour for a period of 4 years.** **4. The sentences imposed at first instance are otherwise confirmed.** **5. The respondent's legal representatives are directed to**

explain to the respondent as soon as possible, in language likely to be understood by him, the purpose and consequences of the sentence in accordance with s 16F *Crimes Act* 1914 (Cth).

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was convicted of abuse of public office and receiving a bribe – where the respondent was a Commonwealth Department employee and unlawfully approved visas for 59 people – where the respondent received over $560,000.00 in bribes from a co-offender – where the respondent, once arrested, made full admissions and provided high value information that was likely to be crucial in prosecuting a co-offender – where the respondent pleaded guilty at an early stage, was co-operative with authorities and gave an undertaking to provide future co-operation – where the respondent was sentenced to an effective sentence of two years, with release after eight months – where the judge erred in taking into account co-operation other than future co-operation when discounting the sentence under the *Crimes Act* 1914 (Cth) s 21E – where the respondent's offending was serious and general deterrence was important – whether the sentence was manifestly inadequate

Crimes Act 1914 (Cth), s 16AC, s 16F, s 21E

Commonwealth Director of Public Prosecutions v Afiouny [2014] NSWCCA 176, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Bruce, unreported, District Court of New South Wales, Hosking DCJ, 23 July 2004, cited
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, cited
R v Tae [2005] NSWCCA 29, cited
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, cited

COUNSEL: G R Rice QC for the appellant
A Edwards for the respondent

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
Hannay Lawyers for the respondent

[1] **MARGARET McMURDO P:** The respondent, Alex Escala Allan, pleaded guilty on 3 November 2015 to abuse of public office (count 1) and receiving a bribe (count 2). He was sentenced on count 1 to 18 months imprisonment and on count 2 to two years imprisonment. On each count he was ordered to be released after serving eight months with a recognizance release order in the sum of $1000.00 conditioned that he be of good behaviour for four years. The judge stated in closed court that, but for his assistance and co-operation with authorities, he would have sentenced him to two years imprisonment on count 1 and four years imprisonment on count 2.

When this Court raised whether the appeal hearing should be in closed court, counsel did not contend it should.

[2] The appellant, the Commonwealth Director of Public Prosecutions, appealed against that sentence contending it was manifestly inadequate in all the circumstances and that the sentencing judge erred in giving a disproportionate discount for the respondent's assistance to authorities, especially in giving a discount of 50 per cent for future assistance alone, resulting in a sentence that was not of a severity appropriate in all the circumstances.

[3] On 22 June 2016, this Court ordered:

"1. Appeal against sentence allowed.

2. The sentence on count 1 is varied by ordering the offender be imprisoned for a period of 2 years instead of 18 months and that he be released after serving 15 months, instead of 8 months, upon giving security by recognizance in the sum of $1,000.00 conditioned that the offender be of good behaviour for a period of 4 years.

3. The sentence imposed on count 2 is varied by ordering the offender be imprisoned for a period of 2 and a half years instead of 2 years and that he be released after serving 15 months, instead of 8 months, upon giving security by recognizance in the sum of $1,000.00 conditioned that the offender be of good behaviour for a period of 4 years.

4. The sentences imposed at first instance are otherwise confirmed.

5. The respondent's legal representatives are directed to explain to the respondent as soon as possible, in language likely to be understood by him, the purpose and consequences of the sentence in accordance with s 16F *Crimes Act* 1914 (Cth).

6. The Court will publish its reason for these orders later."

[4] What follows are my reasons for joining in those orders.

The circumstances of the offence

[5] The prosecution at sentence tendered a statement of facts[1] which included the following information. The respondent was employed by the Department of Immigration and Border Protection as a visa processing officer from August 2011 on an annual salary of $61,582.00. Whilst acting on higher duties in April 2013, he had increased access which allowed him to allocate visa applications to himself to process. He retained this access when he returned to his regular position although he was no longer authorised to use it. Between 1 June 2013 and 14 February 2014 he self-allocated and unlawfully approved General-Skilled Migration visas for 17 family members, friends or friends of family members from the Philippines in circumstances where the applicants did not satisfy visa requirements (count 1).

[6] Between 30 December 2013 and 31 March 2014, by arrangement with a co-offender, Minh Huy Lam, he self-allocated and then unlawfully approved General-Skilled Migration visas for 42 people from Vietnam who did not satisfy visa

---

1 Exhibit 1, AB 31 – 42.

requirements. In each case he attached a corrupt PDF file, purporting outwardly to evidence the applicant's qualifications. The corrupt file could not be opened. Lam paid the respondent regular cash amounts totalling $563,290.00. The respondent deposited the money into bank accounts which on 21 May 2014 became subject to restraining orders.

[7] The offences were detected on about 31 March 2014 when an immigration inspector at the international airport noticed that the language skills and occupations of two newly arrived visa applicants did not match visa requirements. A search warrant for the respondent's premises was executed and enquiries revealed that he had approved the visas. Following his arrest, he was co-operative, participated in interviews and in due course made and signed a 74 page statement making full admissions and implicating Lam.

[8] In a letter to the court, a federal police officer identified the assistance as of high value. It was likely to be crucial in prosecuting Lam and without it, Lam would not have been charged. The respondent had placed himself and his family at some risk from unknown co-offenders.

[9] He told police that Lam approached him to obtain 42 visas in return for money. He approved the visas, not only because of the money offered but also because of Lam's veiled threats to expose him if he did not co-operate. He made a number of ineffectual attempts to dissuade Lam from continuing the illegal operation. He spent some of the money he received on a Land Rover. He accepted the money out of temptation and to ease financial burdens.

The submissions at sentence

[10] The prosecutor at sentence stated that the respondent was 52 years old, was born in the Philippines, and had no prior criminal history. He had consented to forfeiture of $421,096.42 of the restrained money but the remaining $142,193.58 was not accounted for.

[11] He emphasised the importance of general deterrence and that this offending constituted a serious breach of trust. The offences were serious, carrying maximum penalties of five (count 1) and ten years imprisonment (count 2). The respondent received over $560,000.00. The offences were "rolled up" to encompass 17 unlawful approvals in count 1 and 42 in count 2. The offending was sophisticated in that the respondent and Lam used additional mobile phones, one in a false name, to correspond with each other and different email accounts to avoid detection. He submitted that the respondent's prior good character was of less weight when sentencing for offences such as this. He had, however, pleaded guilty at an early stage and assisted authorities. Whilst his assistance was not as high as that in *Gladkowski*,[2] his sentence should be reduced to reflect these matters. The prosecutor referred the court to comparable cases, emphasising *R v Bruce*,[3] *R v Tae*[4] and *Commonwealth Director of Public Prosecutions v Afiouny*.[5] The court, he contended, must consider the value of the respondent's co-operation and the risk to his personal safety, while ensuring that the reduction does not result in a sentence which is an affront to community standards. The factors raised in the federal police letter placed him

---

2 [2000] QCA 352, [11].
3 (Unreported, District Court of New South Wales, Hosking DCJ, 23 July 2004).
4 [2005] NSWCCA 29.
5 [2014] NSWCCA 176.

towards the higher end of the discount range for co-operation, but a fifty per cent discount should be reserved for the most exceptional level of assistance.

[12] Defence counsel emphasised that the respondent commenced his offending to assist family and friends. When approached by Mr Lam, he obtained further visas, not only because of the money offered but because of veiled threats to expose him if he did not co-operate. He made ineffectual attempts to end the illegal operation. He did at least ensure that the applicants had no criminal history and "clear medicals" although he conceded they were probably unskilled and unable to speak English, so that they may not have been granted visas if they had applied in the usual way. Counsel submitted that, but for the respondent's co-operation, a total head sentence in the order of two years and eight months was appropriate.

[13] He tendered a psychological report from Mr Nick Smith which noted the following.[6] The respondent grew up in a middle-class household in the Philippines with his mother, an anaesthetist, and his father, a bank manager. His sister, a paediatrician, lives in the USA. After completing a university degree he worked in a bank for four years, becoming an assistant branch manager. He left to follow his love of scuba diving, becoming a diving instructor in the Philippines, Micronesia and Australia where he married and gained permanent residency. After working in a number of fields, he obtained a position as an immigration officer. He had been in that role for 12 months when first approached to unlawfully obtain a visa for someone in Vietnam. After his arrest he was employed as a garbage truck operator for 15 months. He had not been in receipt of Centrelink benefits and has a strong work ethic. He had two children from a former relationship. He then married and divorced. He had been in his current relationship for 10 years. He claimed he deposited the bribes into bank accounts so that authorities would be alerted as he was too ashamed to tell his superiors. He was deeply sorry for what he had done and its effect on his children and current partner. His overall risk of re-offending was in the very low range. He was in a stable family relationship and did not have substance abuse issues or anti-social personality traits. He may benefit from consulting a psychologist or counsellor to assist in processing his offending and to identify how he can make better decisions in the future.

[14] The respondent's counsel at sentence also tendered medical reports stating that he had suffered from carpal tunnel syndrome, high cholesterol, and glaucoma.[7] Counsel conceded these could be properly managed in custody. In 2015 the respondent performed volunteer work for the RSPCA.[8] He wrote a letter to the judge[9] stating that he was relieved when he was arrested and his misconduct could stop. He claimed to be truly sorry for his conduct and for letting down the community and his own family. His children had been deported from Australia. In his 16 years in Australia, until this incident, he had been a law abiding and contributing community member and he would not re-offend. His wife also wrote the judge a letter of support.[10] Other references which spoke well of the respondent were tendered including from his employer at the time of sentence and a past co-worker.[11]

---

6 Exhibit 4, AB 161 – 174.
7 Exhibit 5, AB 175 – 176.
8 Exhibit 6, AB 177.
9 Exhibit 7, AB 178 – 180.
10 Exhibit 8, AB 181.
11 Exhibit 9, AB 182; Exhibit 10, AB 183.

[15] Defence counsel emphasised the respondent's remorse and his co-operation with authorities, as a result of which he was concerned that he and his family may be in danger. The deportation of his children was a form of extra-curial punishment. Given his high level of co-operation and the other mitigating factors, counsel submitted that an effective head sentence of two years and five months with release after one year and six months was appropriate.

The judge's sentencing remarks

[16] After setting out the facts of the offending, his Honour noted that the aggravating features were that the respondent received $563,290.00 over an extended period of 11 months in a pre-meditated and sophisticated operation. By way of mitigation, he had entered an early plea, had no criminal history and was essentially a man of good character who went off the rails, initially to help family and friends, but was later caught in a web of intrigue from which it was difficult to escape. The judge referred to the psychological report and testimonials which were consistent with the respondent's behaviour being aberrant and with his otherwise good character. He noted the respondent's medical conditions, his voluntary work and accepted that he was remorseful. Tragically, his son and his son's girlfriend were to be deported and his 17 year old daughter was likely to be returned to the Philippines when she turned 18. As noted, his Honour sentenced the respondent to 18 months imprisonment on count 1 and two years imprisonment on count 2 with a recognizance release order after eight months.

[17] In closed court, the judge indicated that, but for the respondent's "assistance, co-operation", he would have imposed a sentence of two years imprisonment on count 1 and four years imprisonment on count 2.

The contentions in this appeal

[18] The appellant contended that s 21E *Crimes Act* 1914 (Cth)[12] required that the court state the reduction in sentence that would have been imposed but for the undertaking to co-operate in the future. In reducing the effective sentence of four years imprisonment by 50 per cent, the appellant contended the judge seemed to take into account all aspects of the respondent's co-operation, not just future co-operation. In doing so, the judge erred.

[19] In any case, the appellant submitted that the discount for co-operation was too high given the objective seriousness of the offending and comparable cases. Ensuring the lawful and orderly arrival of foreign citizens into Australia is a matter of considerable public interest. Abuse of this sort of public office subverts the orderly immigration program and undermines trust in the integrity of public administration. The respondent gave no explanation for what happened to over $142,000.00 of unrecovered bribes, and the judge did not refer to this in his reasons. On the evidence, any risk of retribution arising from his co-operation was vague at best, and would probably be from visa applicants outside prison rather than whilst in custody. There was no suggestion he would serve a sentence in more difficult circumstances than others. His co-operation was high but not so exceptional as to warrant a 50 per cent discount. The appellant again emphasised *Bruce*, *Tae* and *Afiouny*. The respondent's criminality, the appellant contended, was above that of *Bruce* and *Tae* but below that of *Afiouny*. The sentence was manifestly inadequate.

---

12 Now *Crimes Act* s 16AC.

[20] The appellant contended that the appeal should be allowed and this Court should impose a heavier sentence.

The respondent's contentions

[21] The respondent emphasised his early plea of guilty, indicated prior to committal, and his immediate co-operation with police in the investigation. He had no criminal history and an excellent work record. His offending was an aberration. This conclusion was supported by the psychological report and references. The judge rightly noted, the respondent contended, that he went off the rails initially to help family and friends but was later caught in a web of intrigue from which it was difficult to escape. He was at very low risk of re-offending and had demonstrated his rehabilitation. He was genuinely remorseful. His co-operation with authorities was at a high level and had increased the risk to his personal safety and that of his family. He had suffered extra-curial punishment as a result of the deportation of his 20 year old son who had almost completed a nursing course in Melbourne, his son's girlfriend, and his 17 year old daughter once she turned 18. He co-operated in relinquishing any claim to the restrained monies. The respondent submitted that the starting point of a global sentence of four years imprisonment, adopted by the primary judge, was within the sound exercise of the sentencing discretion and was supported by *Tae* and *Bruce* to which the present case was broadly similar. *Afiouny* was more serious and not comparable.

[22] The respondent accepted the sentencing judge conflated the discounts for the plea of guilty, other mitigating circumstances and past co-operation with the s 21E discount for future co-operation, in reducing the original sentence of four years imprisonment by 50 per cent. The starting point sentence before s 21E co-operation was considered, to reflect the respondent's extensive additional co-operation and his early indication of a guilty plea, should have been somewhere between two years and five months and three years and three months imprisonment.

[23] The final sentence the judge imposed, the respondent contended, was within range. There was no mathematical or mechanistic rule or norm in fixing the appropriate discount for the various mitigating factors and in determining both the head sentence and the non-parole period. The judge appropriately discounted the sentence to reflect all the mitigating features, including the s 21E co-operation. In *Tae* the combined discount was 53.3 per cent. In *Gladkowski*, this Court observed that discounts for co-operation commonly range from one third to even one half and sometimes exceeded 50 per cent, although cautioning that the court must ensure the reduction does not result in a sentence that is an affront to community standards.[13] In *York v The Queen*[14] a starting point sentence of 10 to 12 years imprisonment was reduced to reflect co-operation to five years imprisonment wholly suspended. The High Court found that the primary judge did not err in combining the effective discounts to impose such a sentence. Gleeson CJ observed:

> "It is common sentencing practice to extend leniency, sometimes very substantial leniency, to an offender who has assisted the authorities, and, in so doing, to take account of any threat to the offender's safety, the conditions under which the offender will have to serve a sentence in order to reduce the risk of reprisals, and the

---

13 [2000] QCA 352, [7].
14 (2005) 225 CLR 466.

> steps that will need to be taken to protect the offender when released."[15]

[24] The respondent contended that the ultimate combined discount, reducing the sentence of four years imprisonment to two years imprisonment with release after eight months, was a sound exercise of the sentencing discretion; the appeal should be dismissed.

Conclusion

[25] Abuse of public office and bribery are serious offences and the respondent's conduct constituted concerning examples of those offences. His behaviour was the antithesis of the public service he was employed to provide. The taking of bribes by officers of the executive arm of government undermines the essence of the honest governance expected by all Australians as a given. Despite his secure, reasonably paid employment, he seriously betrayed the trust the community had placed in him by accepting bribes to grant visas to those who were ineligible. Save in exceptional circumstances, such offending calls for a significant term of actual imprisonment to denounce the conduct, punish the offender, and deter others from committing such offences.

[26] The respondent's case had significant mitigating features. He pleaded guilty at an early stage, was extremely co-operative with authorities and had undertaken to further assist the police in the prosecution of Lam. He was unlikely to re-offend and was remorseful.

[27] In determining the appropriate sentence, and in achieving consistency in sentences for federal offences, this Court should consider sentences imposed for like offending throughout Australia.[16] Thankfully, this type of offending is rare in Australia. None of the cases to which the primary judge and this Court have been referred closely resemble this matter. But, as the parties recognised, some general guidance can be obtained through a consideration of *Bruce*, *Tae* and *Afiouny*.

[28] *Bruce* was a counter officer with a Commonwealth Department whose duties included deciding applications for tourist (long stay) visas, resident return visas and student permission to work visas. He worked corruptly with a South Korean man, Seung Tae Kim, to grant between four and six visa applications weekly. Kim introduced Bruce to Cheung Pong Tae who paid Bruce between $50.00 and $100.00 for each visa application approval, almost all of which should not have been made and were contrary to migration policy or legislation. The offending involved almost 50 approvals and about 30 illicit extensions over a period of years for which Bruce received between $2,500.00 and $10,000.00. He did not co-operate with police at an early stage although he pleaded guilty. He was unlikely to re-offend. The sentencing judge noted that general deterrence was important. Bruce was a bright man who was extremely unhappy in his job. He had published a detailed and scholarly book which was highly regarded in the international world of ornithology. He cared for his elderly, hearing-impaired mother who was in her mid-80's and he and his partner had an eight year old daughter. Money was not his motivation for offending; it was a misguided protest against what he saw as unfair treatment by his superiors at work. At the time he had profound personal problems due to the break-up of his former marriage and the death of his father. The judge gave a 20 per cent

---

15 Above, [3].

16 *Hili v The Queen* (2010) 242 CLR 520, [56] – [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

discount for the timely plea of guilty and imposed a global sentence of three years and three months imprisonment with release after two years.

[29] In *Tae*, Bruce's co-offender was sentenced to two years and two months imprisonment with release after one year and four months. His sentence was not found to be manifestly excessive.[17] He had no criminal history and, unlike Bruce, co-operated significantly with authorities in the investigation of co-offenders and others. He provided an undertaking to give important evidence for the Crown. As a result, he was at risk of retaliation from co-offenders and others. The sentencing judge considered that Tae's offending warranted a starting point sentence of four years imprisonment which he discounted by 20 per cent for the plea of guilty and by another one third for his assistance to authorities.

[30] In *Afiouny* the offender pleaded guilty to two offences of bribing a Commonwealth official. He paid seven bribes totalling $352,190.00 and US$20,000.00 to a customs officer between July and August 2011 to circumvent between $25.3 million and $27 million of tobacco import duty. He was sentenced to three years and three months imprisonment with a non-parole period of one year and eight months imprisonment. On an appeal brought by the Commonwealth Director of Public Prosecutions, the New South Wales Court of Criminal Appeal found the sentence manifestly inadequate in that the judge had given an excessive discount for assistance. The court determined that the starting point sentence was eight years imprisonment. On each offence a 50 per cent discount should be given for the early guilty plea and assistance to authorities. The court substituted an effective head sentence of four years imprisonment with a non-parole period of two years and six months.

[31] As in *Bruce*, *Tae* and *Afiouny*, the maximum penalty in the present case (count 2) was 10 years imprisonment. The respondent's offending occurred over 11 months. Count 1 involved 17 wrongful visa approvals and count 2, 42 wrongful visa approvals. He received over $560,000.00 in bribes, more than $142,000.00 of which was not accounted for. If undetected, his conduct was apt to undermine local and international confidence in the integrity of Australia's system of governance. There were mitigating features: the respondent's pre-sentence co-operation with authorities; his anticipated future co-operation which was of high value in the prosecution of another; his guilty plea; his prior good history; his rehabilitation and his low prospects of re-offending.

[32] This case turns on its own facts but it is broadly comparable in seriousness to *Bruce* and *Tae* and not as serious as *Afiouny*. The cases to which counsel has referred, clearly demonstrated that a sentence which required the respondent to spend only eight months in actual custody was manifestly inadequate, given the objective seriousness of the offending. The appeal against conviction had to be allowed and this Court was required to re-sentence the respondent.

[33] I note that, in imposing the notional sentence for the offences absent future co-operation, as required under s 21E, the sentencing judge erred in also taking into account his co-operation other than his future co-operation. It is only future co-operation with which s 21E (now s 16AC) is concerned. Were it otherwise, an offender who was re-sentenced for not meeting his future co-operation undertaking to authorities

---

17 *R v Tae* [2005] NSWCCA 29.

might lose the benefit of other mitigating features, here, his extensive pre-sentence co-operation and early guilty plea.[18] This error, however, did not necessarily invalidate the sentence.[19]

[34] Taking into account all mitigating features other than future co-operation,[20] the following sentences were appropriate: on count 1, three years imprisonment with a recognizance release order in the sum of $1,000.00 after two and a half years imprisonment conditioned that he be of good behaviour for four years; and on count 2, four years imprisonment with a recognizance release order in the sum of $1,000.00 after two and a half years imprisonment conditioned that he be of good behaviour for four years.

[35] It was not suggested that the respondent was at particular risk whilst in custody as a result of his promised future co-operation so that this case bore no resemblance to *York*. The respondent's future co-operation with authorities, was, nonetheless, expected to be highly valuable and warranted a significant discount to encourage other offenders to provide genuine and useful co-operation of this kind. I considered that, in light of the promised future co-operation, it was appropriate to sentence the respondent on count 1 to two years imprisonment with a recognisance release order in the sum of $1,000.00 after 15 months conditioned that he be of good behaviour for four years; and on count 2 to two and a half years imprisonment, with a recognisance release order in the sum of $1,000.00 after 15 months conditioned that he be of good behaviour for four years. I note that this sentence allows for the respondent's release earlier than requested by his counsel at sentence.[21]

[36] For those reasons I joined in this Court's orders of 22 June 2016.

[37] **FRASER JA:** I agree with the reasons for judgment of Margaret McMurdo P.

[38] **MORRISON JA:** I have had the advantage of reading the draft reasons of the President. They reflect my own reasons for joining in the orders made on 22 June 2016.

---

18 *Gladkowski* [2000] QCA 352, [12].
19 *Tae* [2005] NSWCCA 29, [19] – [20].
20 See s 21E.
21 See [15] of these reasons.