SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gladkowski* [2000] QCA 352
PARTIES:	**R** **v** **GLADKOWSKI, Bogdan Tomasz** (applicant/appellant)
FILE NO/S:	CA No 165 of 2000 DC No 237 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	1 September 2000
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2000
JUDGES:	Pincus and Thomas JJA, Atkinson J Judgment of the Court
ORDER:	**Application granted and the appeal allowed. The sentences below are varied by reducing the sentences to two and a half years with a recognisance release order after eight months. The recognisance is to be in the sum of $2,000 conditioned to the applicant's being of good behaviour for a period of 22 months. Under s 21E of the *Crimes Act* it is declared that the sentences are reduced for the reason that the offender has undertaken to co-operate with law enforcement agencies in proceedings, and that the sentences that would have been imposed but for this reduction would have been three years and three months with a non-parole period of 13 months.**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – INFORMERS - informer's discount – whether discount adequate –applicant co-operated in the incrimination of co-offenders and provided undertaking pursuant to s 21E of the *Crimes Act* 1914 to co-operate and give truthful evidence in the prosecution of co-offenders – discount inadequate to reflect value of incrimination of co-offenders and consequential danger to applicant – s 21E requires only future co-operation to be taken into account – other aspects of co-operation (including self-incrimination and pre-sentence incrimination of others) covered by s 16A(2)(h)

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS

Crimes Act 1914 (Cth), s 16A(2)(h), s 21E

Golding (1983) 3 A Crim R 26, considered
McGookin and Robinson (1986) 20 A Crim R 438, referred to
R v D CA 13 of 1995, 4 August 1995, referred to
R v Gangelhoff [1998] VSCA 20, 29 July 1998, referred to
R v Krogh [1999] QCA 464, CA 261 of 1999, 4 November 1999, referred to
R v Pang (1999) 105 A Crim R 474, considered
R v Thompson (1994) 76 A Crim R 75, considered

COUNSEL: A W Moynihan for the applicant/appellant
D Adsett for the respondent

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

[1] **THE COURT:** This is an application for leave to appeal against sentences imposed on 23 counts of defrauding the Commonwealth and 11 counts of attempting to defraud the Commonwealth. The effective sentence was three and a half years imprisonment with a non-parole period of 12 months.

[2] The circumstances were that during a little over three years, between 1996 and 1999 the applicant, who had some book-keeping experience but no formal qualifications, carried on business as a tax consultant on the Gold Coast. He prepared and lodged tax returns for various clients, taking advantage of the self-assessment system by overstating his clients' expenses and deductions or inventing or inflating alleged credits under the Prescribed Payments Scheme (PPS). On some occasions he provided false supporting documentation.

[3] The consequence of all this was that the taxpayers involved received increased tax refunds, the applicant charged larger fees than he would otherwise have obtained, and his business increased. A Sydney resident named Abouzeid was involved as a principal in the scheme. Abouzeid recruited the majority of taxpayers involved, prepared and supplied some false documents and received a significant proportion of the taxpayers' refunds.

[4] The scheme was successfully employed in 34 instances resulting in advances by the Commonwealth to persons not entitled to them of $347,485.73. The 11 counts of attempted fraud would have involved a further $203,672.90. In all the applicant received $54,765 as payment for his services over the relevant three year period.

[5] The applicant was in no position to pay compensation, and no order was made in that respect. It was accepted that the applicant was an initiator of the fraudulent

scheme and was one of the principal offenders. His conduct continued over a period in excess of three years but it was pointed out that his personal gain over that period was not particularly great. However he involved many others in fraudulent schemes that produced substantial loss to the Commonwealth.

[6] Most significantly the applicant not only co-operated with police a relatively short time after he was interviewed, but also provided them with assistance enabling the prosecution of others. This included his implication of Abouzeid, the provision of signed statements against five co-offenders, and the provision of an undertaking under s 21E of the *Crimes Act* 1914 to co-operate and give truthful evidence in any prosecution.

[7] In these circumstances the applicant is entitled to a substantial informer's discount for his extensive co-operation, which should take into account the risk of incidental retributive violence against him whilst incarcerated. The major point on this application is the extent to which effect should be given to this important factor. It is well recognised that co-operation of this kind, particularly where society benefits from it and it places the informer in a position of danger, calls for "very substantial discount" (*McGookin and Robinson* (1986) 20 A Crim R 438, 449). The necessity of encouraging persons to inform so that offenders may be convicted is regarded as a matter of "high public policy". The benefits of such a policy are not likely to ensue without substantial inducement (compare *Golding* (1983) 3 A Crim R 26; *R v Pang* (1999) 105 A Crim R 474, 477). Discounts of one-third or even one-half of the sentence that would otherwise be appropriate are not uncommon, according to the value and risk of the assistance rendered (*Golding*, above; *R v Thompson* (1994) 76 A Crim R 75; *R v D* CA 13 of 1995, 4 August 1995). In *Pang*, Wood CJ at CL, without purporting to cover the field, described the discount "customarily given" in New South Wales as ranging between 20 and 50 per cent. Other decisions including *Thompson* recognise the possibility of the discount exceeding 50 per cent, but at the same time the court must ensure that the reduction does not result in a sentence that is an affront to community standards.

[8] There is little doubt that in the present case the applicant has been placed at personal risk by his conduct and it is desirable that he should not be discouraged from maintaining his promised further co-operation. The learned sentencing judge acknowledged the applicant's risk to some extent by making a special recommendation that the applicant be detained in protective custody.

[9] We do not find it necessary to canvass the cases which assist in fixing the prima facie level of sentence in the present case that would be appropriate apart from the factor of special co-operation. There is very little contest between the parties on this, although counsel for the applicant submitted that the appropriate range for the head sentence was between three and four years. There is no reason to differ from the view of the learned sentencing judge that, putting the question of co-operation to one side, the convenient starting point in this case would be a sentence of four years imprisonment with a recommendation for parole after 18 months (cf *R v Krogh* [1999] QCA 464, CA No 261 of 1999, 4 November 1999). That starting point sufficiently recognises the circumstances, the applicant's favourable antecedents, his plea of guilty and his "co-operation" in the limited sense of his willingness to incriminate himself.

[10] In our opinion the benefit given to this applicant for his co-operation with law enforcement authorities in the incrimination of others was far too slight. It consisted of a mere reduction of six months in the head sentence and a reduction of six months in the period by which parole could be granted. His co-operation in this regard, the public benefit flowing from it and the risk factors were in this case quite substantial. Overall they justify a reduction of greater than one-third of the sentence that would otherwise be imposed. The appropriate result in our view would be a head sentence on each matter of two and a half years and a recognisance release order after eight months.

[11] There is a difficulty in the application of s 21E of the *Crimes Act*. The specification that the section requires from the court seems to be in respect of future co-operation of the offender rather than co-operation that has already been provided to the time of sentence. Co-operation of the latter kind is recognised as a relevant matter in s 16A (2)(h).[1] That provision includes co-operation in the form of self-incrimination, and also co-operation already given to law enforcement agencies in relation to their offences up to the time of the sentence. Co-operation of those kinds has no part to play in s 21E. The purpose of ss 21E(2) and (3) is to enable an appeal court to know what variation to make to the sentence in the event that the future co-operation "in proceedings", presumably against other persons, is not forthcoming. Past co-operation therefore plays no part in this particular exercise (compare *R v Gangelhoff* [1998] VSCA 20, 29 July 1998). In the present case valuable co-operation had already been rendered by time of sentence, and it is difficult to conclude otherwise than that the value of the past and future co-operation were roughly equal to one another. This view will therefore be reflected in the declaration that will be made as part of the sentence, so that only the reduction applicable to future co-operation will be specified.

[12] A reference to "co-operation" of an offender may encompass at least three relevant matters – self-incrimination, incrimination of others up to time of sentence, and a promise or undertaking to provide further co-operation in other proceedings. The past aspects (self-incrimination and incrimination of others up to the time of sentence) are encompassed in s 16A(2)(h), and the future aspect relating to the offender's undertaking to co-operate in proceedings is encompassed in s 21E. In combination those sections require the court to take all such matters into account in the sentence which it actually imposes, but the benefit in relation to the undertaking is potentially reversible under s 21E. Apart from the manifest excess of the sentence at first instance the learned sentencing judge erred in making a declaration under s 21E that was based on both past and future co-operation. Such an order would place the applicant at risk of losing the benefit of credit which he had already earned for his co-operation as well as the benefit of credit that he might yet fail to deliver. Section 21E is concerned with giving the courts power to remove a provisional benefit granted on the basis of an undertaking in circumstances where the undertaking is not fulfilled.

[13] The application should be granted and the appeal allowed. The sentences below are varied by reducing the sentences to two and a half years with a recognisance release

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[1] "Section 16A(2) In addition to any other matters the court must take into account …
(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences; …"

order after eight months. The recognisance is to be in the sum of $2,000 conditioned to the applicant's being of good behaviour for a period of 22 months. Under s 21E of the *Crimes Act* it is declared that the sentences are reduced for the reason that the offender has undertaken to co-operate with law enforcement agencies in proceedings, and that the sentences that would have been imposed but for this reduction would have been three years and three months with a non-parole period of 13 months.