# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Sheppard* [2000] QCA 57 |
| PARTIES: | **R**<br>**v**<br>**SHEPPARD, Ian Gordon**<br>(applicant/appellant) |
| FILE NO/S: | CA No 332 of 1999<br>DC No 438 of 1999 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Townsville |
| DELIVERED ON: | 7 March 2000 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 February 2000 |
| JUDGES: | McMurdo P, Pincus JA and Williams J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Leave to appeal against sentence granted.**<br>**Order made below set aside.**<br>**On each of counts 1, 3, and 6 on the indictment, imprisonment for a period of seven years, such sentences to be served concurrently, and to date from 16 September 1999.**<br>**On counts 2, 4, 5 and 7 on the indictment, convictions recorded but no further punishment imposed. Recommend that the applicant be eligible to apply for parole after serving three years of that sentence.**<br>**Declare that the applicant was in pre-sentence custody solely in relation to these offences for a period of 188 days from 12 March 1999 to 16 September 1999.**<br>**Further declare that the period of 188 days is to be time already served under the sentence hereby imposed.**<br>**Order that the applicant pay by way of compensation to the National Australia Bank pursuant to s 35 of the *Penalties and Sentences Act* 1992 the sum of $437,850.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AGAINST SENTENCE – convictions of three counts of uttering and four counts of false pretences – sentence of three years imprisonment concurrent on each of the uttering counts and |

five years imprisonment concurrent on each of the false pretence counts made cumulative making effective sentence eight years – whether sentencing judge breached s 16 of the *Criminal Code* by imposing a cumulative sentence – whether acts constituted separate and distinct offences or constituted one transaction – whether the court may increase a sentence in the absence of an appeal by the Attorney-General – *Neal* distinguished

*Corrective Services Act* 1988 (Qld), s 166
*Criminal Code* (Qld), s 16, s 17, s 427, s 488, s 489, s 598, s 668E, s 669A
*Penalties and Sentences Act* 1992 (Qld), s 35, s 157

*Brand and Hein v Parson* (1993) 68 A Crim R 147, considered
*Connolly v Meagher* (1906) 3 CLR 682, considered
*Dube v Knowles* (1987) 46 SASR 118, considered
*Heal v Police* [1999] SASC 374, 26 September 1999, considered
*Kellerman v Pecko* [1988] 1 Qd R 419, considered
*Parker v DPP* (1992) 65 A Crim R 209, considered
*Pearce v The Queen* (1998) 72 ALJR 1416, followed
*R v Bailey* [1999] QCA 40; CA No 15 of 1999, 24 February 1999, considered
*R v Brooks* CA No 183 of 1996, 20 September 1996, considered
*R v Cameron-Smith* CA No 537 of 1994, 5 April 1995, considered
*R v C D Hughes* [2000] QCA 16; CA No 306 of 1999, 11 February 2000, followed
*R v Corrigan* [1994] 2 Qd R 415, considered
*R v Davidson* CA No 435 of 1997, 19 March 1998, considered
*R v Elhusseini* [1988] 2 Qd R 442, considered
*R v Gage* (1992) 62 A Crim R 134, considered
*R v Green* CA No 426 of 1995, 30 January 1996, considered
*R v Griffiths* (1989) 167 CLR 372, considered
*R v Heiser & Cook* CA Nos 506, 507 and 513 of 1996, 4 March 1997, considered
*R v Hoad* (1989) 42 ACR 312, considered
*R v Holder* (1983) 3 NSWLR 245, considered
*R v Hughes* [1999] 1 Qd R 389, considered
*R v Kiripatea* [1981] 2 Qd R 686, considered
*R v M; ex parte Attorney-General* [1999] QCA 442; CA No 251 of 1999, 2 November 1999, considered
*R v Mansfield* CA No 91 of 1998, 18 June 1998, considered
*R v Malvaso* (1989) 168 CLR 227, followed
*R v Moffat* CA No 290 of 1998, 8 October 1998, considered
*R v Neal* (1982) 149 CLR 305, distinguished
*R v Pearce* (1998) 194 CLR 610, followed
*R v Pollock* (1993) 67 A Crim R 166, considered
*R v Robinson & Stokes; ex parte Attorney-General* Q L R 29 January 2000
*R v Taylor* CA No 406 of 1994, 23 November 1994, considered
*R v Ward* CA No 311 of 1995, 5 December 1995, considered

*R v Waters* [1998] 2 Qd R 442, considered
*R v Whelan* CA No 285 of 1997, 26 August 1997, considered

COUNSEL: Mrs K McGinness for the applicant/appellant
Mr T A Winn for the respondent

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

[1] **McMURDO P:** I have read the reasons of Williams J and agree with him that leave to appeal should be granted and the sentences imposed below set aside.

[2] Subject to Williams J's observations in respect of s 16 of the Code and the principle outlined in *Pearce v The Queen*,[1] with which I agree, the imposition of cumulative sentences in cases like this is not necessarily improper. Where, as here, there are a number of charges flowing from the same series of events, this Court is not usually concerned with whether the sentences are cumulative or concurrent; the primary consideration is whether the total effect of the combined sentences is appropriate: *Griffiths v The Queen*,[2] *R v Pollock*,[3] *R v Holder and Johnston*,[4] *Kellerman v Pecko*,[5] *R v Duke and Knowles*,[6] and *R v Gage*.[7]

[3] Here, as Williams J points out, the sentence imposed offended s 16 of the Code and it is therefore necessary to grant leave to appeal, allow the appeal and to set aside the sentences imposed below at least in respect of counts 1, 3 and 6. Were no further order to be made, the sentence of five years imprisonment in respect of counts 2, 4, 5 and 7 with a recommendation for eligibility for parole after serving three years and six months would stand alone. Two problems would then arise. Firstly, the comparable sentences referred to by Williams J demonstrate that a head sentence of five years on the facts of this case does not properly reflect the gravity of the offences. Secondly, an offender sentenced to imprisonment for five years is ordinarily eligible to be considered for parole after serving two and a half years: see s 166(2) of the *Corrective Services Act* 1988. Although s 157 of the *Penalties and Sentences Act* 1992 allows a court to recommend that an offender be eligible for release on parole after serving any part of the ordered term of imprisonment, it is unusual for a parole recommendation to be made beyond the half way point of the term of imprisonment to be served: see *R v Whelan*.[8]

[4] It is therefore in the interests of justice in this case to set aside all the sentences and to re-sentence in the manner suggested by Williams J. The sentences imposed in respect of counts 2, 4, 5 and 7 were part of a total sentence and were never intended to stand on their own.

[5] The only question is whether the imposition of the proposed sentences infringes the principle stated in *Neal v The Queen*.[9] Neal appealed against the severity of the

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1 (1998) 194 CLR 610.
2 (1989) 167 CLR 372, 393.
3 (1993) 67 A Crim R 166.
4 [1983] 3 NSWLR 245, 260.
5 [1988] 1 Qd R 419.
6 (1987) 46 SASR 118, 124.
7 (1992) 62 A Crim R 134,139.
8 CA No 285 of 1997, 26 August 1997.
9 (1982) 149 CLR 305.

sentence imposed upon him but his sentence was increased by the Court of Criminal Appeal under s 668E(3) of the *Criminal Code*. Gibbs CJ, with whom Wilson J agreed, noted:[10]

> "… the continued existence of the power is itself surprising, now that the Attorney-General has a right of appeal against sentence: see s 669A of the Criminal Code. The provisions of s 668E(3) may now be regarded as redundant, except perhaps in very special cases, and it appears that in practice those provisions are little used. In these circumstances, it is right to insist on a strict compliance with formality if it is intended to use the power conferred by s 668E(3). There are two reasons why the Court of Criminal Appeal should distinctly and formally grant leave to appeal, before proceeding, on an appeal, to increase a sentence. The first is that the law recognises the right of an appellant to abandon his appeal, and an appellant should not be deprived, by neglect or formality of the power to exercise that right. In the second place, an applicant is not entitled to be present on the hearing of an application for leave to appeal, but is entitled to be present, if he desires it, on the hearing of his appeal except where it is on some ground involving a question of law alone: see s 671D. An appellant may very well desire to be present on the hearing of an appeal which may possibly result in an increase of his sentence, and his counsel should have the opportunity to claim that right. For all these reasons, it seems right to insist on a strict compliance with the proper procedure in those cases, which I expect will be rare, in which the court proposes to avail itself of the power given by s 668E(3). In such cases there should be a formal grant of leave to appeal so that the applicant has a real opportunity to exercise his rights before the appeal commences."

[6] The passage quoted by Williams J from *Malvaso v The Queen*[11] suggests that the principle set out above applies only where the appellate court intends to deprive a prisoner of "the liberty left to him after sentencing at first instance." A similar view of *Neal* appears to have been taken in *R v Waters*,[12] *Parker v DPP*,[13] *Heal v Police*[14] and *Brand and Hein v Parson*.[15]

[7] A strict adherence to *Neal* would require this Court to grant leave to appeal in respect of all counts and to indicate its intention to allow the appeal, set aside the sentences originally imposed and to impose instead the sentence suggested by Williams J. The appellant would then be entitled to withdraw his appeal in respect of counts 2, 4, 5 and 7; the sentence on counts 1, 3 and 6 would be set aside with no penalty substituted (*Pearce* and s 16 and the *Code*), leaving a sentence of five years imprisonment with a recommendation for parole after three and a half years. Such a result would be plainly unjust.

[8] In *R v C D Hughes*,[16] the sentencing judge imposed a suspended sentence on one count and probation in respect of another. Such a combination of orders could not

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10 At 308.
11 (1989) 168 CLR 227, 233.
12 [1998] 2 Qd R 442.
13 (1992) 28 NSWLR 282.
14 [1999] SASC 374, 26 September 1999.
15 [1994] 1 VR 252.
16 [2000] QCA 16; CA No 306 of 1999, 11 February 2000.

be made: see *R v Hughes*[17] and *R v M; ex parte Attorney-General*.[18] This Court substituted a concurrent suspended sentence for the probation order. On one view, the substituted sentence was more lenient as Hughes was relieved of his obligations under the probation order; on the other hand, probation is ordinarily considered a lesser penalty than a suspended sentence. This Court held that in those circumstances "neither in procedure nor in substance is it necessary … to go through the process that was considered necessary in *Neal*."[19]

[9] In this case, the effective sentence proposed by Williams J is an unequivocally lesser sentence than that imposed below, both as to head sentence (seven years instead of eight years) and parole recommendation (after three years instead of three and a half years). The sentence imposed on counts 1, 3 and 6 must be set aside in any case because of s 16 of the *Code*. To leave the remaining sentences without their prior cumulative effect would be to create an unjust result. The sentences constituted a package; once part of the sentence was set aside, then, in this case, the remainder of the sentence was also required to be set aside. These issues were raised generally in oral argument; the appellant, who was ably represented by Mrs McGinness, did not seek to abandon his appeal in respect of any counts. This is one of the rare cases where it is appropriate for this Court to exercise its powers under s 668E(3) without strict compliance with the procedure set out in *Neal*.

[10] I agree with the orders proposed by Williams J and, subject to what I have said above, with his reasons.

[11] **PINCUS JA:** I have read the reasons of Williams J in which there are set out the circumstances giving rise to this application.

[12] The critical legal point in the case is whether it was lawful to impose a sentence on the uttering counts as well as on the false pretence counts. There is High Court authority establishing that, for the purpose of supporting a plea in bar, the question is whether "the elements of the offences charged are identical or ... all of the elements of one offence are wholly included in the other": *Pearce* [1998] HCA 57, (1998) 194 CLR 610 at 618. Related subjects are dealt with in three provisions of the Criminal Code, s 16, s 17 and s 598. Section 16 contains a general prohibition against punishment twice "for the same act or omission"; s 17 defines the circumstances in which a plea of autrefois acquit or autrefois convict must be upheld; s 598 contains provisions complementary to s 17. As was pointed out by the High Court in *Connolly v Meagher* (1906) 3 CLR 682 at 684, s 16 of the Code "is not quite the same as the law which allows the defence of '*autrefois convict*', which is dealt with in ss 17 and 598 of the Code".

[13] Although there can be difficulties in applying s 17 – see for example *Ward* (CA No 311 of 1995, 5 December 1995) – ordinarily application of the tests set out in s 17 will yield a clear answer. But that is not so when one considers the expression "the same act or omission" in s 16. It is at first sight uncertain whether in determining the identity of two acts the consequences are included: may the person who has been punished for an assault be punished again if the victim, unexpectedly, later dies as a result of the assault? Does s 16 cover the case where a person is punished for act A and is later sought to be punished for act B, which is

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17 [1999] 1 Qd R 389.
18 [1999] QCA 442; CA No 251 of 1999, 2 November 1999.
19 At [17].

not the same as but which includes A? It does not appear to me that the test I have quoted from *Pearce* relating to the availability of a plea in bar attempts to provide an answer to such questions. However a statement in *Pearce* which deals specifically with the common law as to punishment, rather than available pleas, is material:

> "To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn". (623)

[14] In my opinion this Court should treat the statement just quoted as expressing a principle which is at least *included* in s 16. I say "at least" partly because of the possibility that the overlap between two offences may not constitute what is, strictly speaking, an element of both; the overlap may be due to the fact that one offence includes a particular act as an element and the other offence includes it merely as a circumstance of aggravation. In the present case, there can be little doubt that the High Court's test is satisfied; with respect to the three groups, counts 1 and 2, counts 3, 4 and 5, and counts 6 and 7, the acts of presenting false documents to the bank, constituting the offences of uttering, were also the false pretences charged, which induced the bank to pay out money. It follows, in my opinion, that it was unlawful, by reason of s 16, to impose punishments, under those counts, both for uttering and for false pretences.

[15] The other legal point in this case is the effect, on the present circumstances, of the High Court's decision in *Neal* (1982) 149 CLR 305. I am in respectful agreement with the conclusions of Williams J on that aspect.

[16] I note that the orders proposed by Williams J include concurrent seven year sentences for all the uttering cases; I agree with his Honour's reasons for concluding that such sentences are warranted by the circumstances of the case. In *Kellerman v Pecko* [1998] 1 Qd R 419, there was a difference of view as to whether or not it is proper to "inflate a sentence for one offence to reflect the criminality inherent in other offences" (428); I expressed the opinion that a court could properly "impose a sentence for the stealing charge which reflected the overall criminality of the five offences in respect of which the magistrate had to sentence the applicant" (422). In the present case and ones like it, unless one accepts that it may be proper to impose a higher sentence for one offence because others have also been committed and are before the sentencing court, such sentences as Williams J proposes could not sensibly be made. The seven years imprisonment is intended to be punishment, not for one offence only, but for all the uttering cases. Because I adhere to the view I expressed in *Kellerman v Pecko* and because the orders would, in my opinion, achieve just sentences, I concur in the orders Williams J proposes.

[17] **WILLIAMS J:** This is an application for leave to appeal against sentence imposed by a District Court judge. The applicant pleaded guilty to three counts of uttering and four counts of false pretences. He was sentenced to three years imprisonment concurrent on each of the uttering counts, and five years imprisonment concurrent on each of the false pretence counts. The sentences of three years and five years

were made cumulative, making the effective sentence one of eight years. There was then a recommendation that the applicant be eligible to apply for parole after serving three and a half years of that sentence. The court also made a pecuniary penalty order in the sum of $437,850.

[18] For about nine years up to 1997 the applicant was the chief executive of the Northern Queensland Area Holiday Resorts ("NQAHR"), a non-profit organisation run through the Australian Defence Force for the purpose of providing holiday accommodation for Defence service personnel. The chairman of that organisation at the relevant time was Lieutenant Colonel Parrott. Specifically for present purposes NQAHR had a bank account with the National Australia Bank at the Aitkenvale Branch, with a balance of approximately half a million dollars. That was a permanent reserve account and the only approved expenditures from it were limited to the level of interest earned.

[19] On or about 3 February 1997 the applicant registered the business names "Townsville Building Services" and "Asset Park Cabins". He registered the principal place of business for each as his residential address. Bank accounts were opened in the name of each business. That was done as part of the scheme to defraud NQAHR of the funds in the National Bank account.

[20] On 4 April the applicant presented to the National Bank on NQAHR letterhead an authority purported to be signed by himself and Lieutenant Colonel Parrott authorising the transfer of $83,400 to Townsville Building Services. The applicant was given in return a bank cheque in that sum payable to that business name.

[21] The presentation of that false document to the Bank constituted the first count on the indictment, that of uttering on 4 April 1997. The offence occurred before the 1997 amendments to the *Criminal Code* came into force; the relevant sections of the *Code* prior to those amendments were s 488 and s 489.

[22] The obtaining of the amount of $83,400 from the Bank on 4 April constituted the offence of obtaining money by false pretences with intent thereby then to defraud, count 2 on the indictment. That offence was created by s 427 of the *Code* as it stood at the relevant date.

[23] Then on 10 April the applicant presented to the Bank another letter on NQAHR letterhead purported to be signed by himself and Lieutenant Colonel Parrott, directing the bank to pay $83,400 to Townsville Building Services and $145,200 to Asset Park Cabins. The bank complied with that direction by providing bank cheques for those sums to the applicant payable to the named businesses for the stated amounts.

[24] Presenting that false document dated 10 April to the Bank constituted count 3 on the indictment, an offence of uttering. The payment by the Bank in response to the presentation of that document of $83,400 to Townsville Building Services constituted count 4 on the indictment, obtaining that amount of money by false pretences. The payment by the Bank of $145,200 to Asset Park Cabins pursuant to that false document constituted count 5 on the indictment, obtaining that amount of money by false pretences.

[25] Finally on 14 April 1997 the applicant presented to the Bank a letter on NQAHR letterhead purported to be signed by himself and Lieutenant Colonel Parrott,

authorising payment of $125,850 to Townsville Building Services. The applicant was given a bank cheque for that amount in accordance with that direction.

[26] The presentation of the letter of 14 April to the Bank constitutes the offence of uttering, count 6 on the indictment. The payment by the bank in consequence constitutes the false pretences charge which is count 7 on the indictment.

[27] It is immediately obvious, but was apparently not so to those in the Townsville District Court on 16 September 1999 when the pleas of guilty were taken, that the documentary evidence establishing counts 6 and 7 did not accord with the monetary sum specified in count 7 on the indictment. Count 7 on the indictment refers to $83,400 being the amount of the payment by the bank to Townsville Building Services, whereas the documents establish that the amount in question was $125,850. The total sum referred to in the sentencing proceedings, in the remarks of the sentencing judge, and in the pecuniary penalty order which he made was $437,850. In this court counsel for each party referred to the total sum involved being $437,850. Counsel for the applicant did not oppose some alteration in the restitution order for that amount. $437,850 can only be arrived at if the amount obtained pursuant to the conduct which constitutes count 7 on the indictment was $125,850. The amounts in the indictment actually total $395,400. Whilst that discrepancy should have been noted at the time sentence was imposed, it is of no real significance so far as the present application is concerned. The difference between $395,400 and $437,850 would not in all the circumstances call for the imposition of any different sentence. Further, there is agreement between the parties that the restitution order should be for the sum of $437,850.

[28] Submissions on behalf of the applicant suggested he dissipated all of the funds fraudulently obtained with the exception of $42,000 which had been frozen in a Townsville bank account. After the transactions constituting the offences the applicant within a few days withdrew significant sums of money from the accounts in question. It is not necessary to give details of those transactions. Immediately thereafter the applicant fled to Indonesia and Singapore. He was located in Singapore in March 1999 and extradited to Australia. He agreed to plead guilty to an *ex officio* indictment; that possibly explains how the wrong figure was inserted in count 7. It was agreed that the applicant had spent 188 days in custody in Singapore and Australia prior to sentence solely in relation to the relevant charges.

[29] The prosecution case was an overwhelming one, but nevertheless it has to be conceded that the applicant's early plea to an *ex officio* indictment saves the State considerable expenditure which otherwise would have been associated with committal proceedings and a trial. On the other side of the ledger significant costs were incurred in extraditing the applicant from Singapore.

[30] The applicant was born on 27 June 1940 making him age 57 when the offences were committed and 59 when sentenced. He had a criminal history which was of some significance for present purposes. As a young man in 1964 and 1965 he was convicted of impersonating a member of the police force. His first conviction for attempted false pretences was in October 1967; he was placed on a good behaviour bond for three years. Then in August 1968 he was convicted of larceny, false pretences, forgery and uttering; the sentence was 18 months concurrent on each count to serve a minimum of 12 months. He was convicted in March 1973 of two counts of larceny as a servant and one count of false pretences; he was sentenced to

14 months imprisonment on each offence, concurrent. Next he was convicted in February 1980 of a charge of false pretences; again he was placed on a good behaviour bond for two years. Then followed a conviction in October 1982 for theft of a motor vehicle and lastly a conviction for false pretences on 5 April 1983. For that latter offence he was imprisoned for 18 months with a non-parole period of six months. In summary that record contains five previous convictions for false pretences, two for larceny as a servant, one of forgery and one of uttering.

[31] In his sentencing remarks the learned judge made the following relevant observations:

> "I take into account the combined seriousness of the seven offences and the total amount involved. All the charges are … in respect of the one activity, the one course of conduct. That course of conduct was deliberate and planned. … The offences were then carried out quickly; the money obtained quickly over a very short period of time and you then absconded to avoid your inevitable detection and apprehension. I take into account the totality of your conduct. … Effectively this is a case of stealing $437,850 as a servant. All of that money, with the exception of $42,000, appears to have been dissipated. … Your counsel conceded that this is a case of the embezzlement of a large amount of money from your employer, most of which has been spent or lost by you. … Whilst old, that criminal history indicates that you cannot be treated as a first offender, and that you were not acting entirely out of character. … I take into account your plea of guilty to an *ex officio* indictment, but in doing so I recognise also the concession made by your counsel that there was an overwhelmingly strong case against you … You would also appear to have co-operated with the authorities. … Nevertheless a great amount of money is involved and it is necessary to ensure that the punishment imposed on you is proportionate to the total criminality involved in your conduct. In my view, that can only be done here by requiring cumulative sentences. I will recognise the factors in your favour, in particular, your plea of guilty to an ex officio indictment and what that means, and also your incarceration in a Singapore jail by recommending your eligibility for parole at a time earlier than otherwise would be the case."

[32] It is in those circumstances that this application is made based on the contention that the sentences imposed were manifestly excessive.

[33] In my view there was a serious error of principle involved in imposing cumulative sentences in the circumstances of this case. Section 16 of the *Code* provides that a person "cannot be twice punished … for the same act or omission". *R v Elhusseini* [1988] 2 Qd R 442 at 455 and *R v Kiripatea* [1991] 2 Qd R 686 at 701 afford illustrations of the application of that. The High Court has recently considered at some length in *Pearce v The Queen* (1998) 194 CLR 610 the principle underlying that provision in the *Code*. Since *Pearce* there have been a number of decisions of this court where it has been applied (e.g. *R v Robinson & Stokes; ex parte Attorney-General* (Q L R 29 January 2000)).

[34] The learned sentencing judge was influenced in imposing a cumulative sentence by the observation of the Court of Appeal in *Heiser & Cook* (CA Nos 506, 507 and 513 of 1996, 4 March 1997) where it was said: "However, there is no principle that no matter how many different offences are committed, how long the period over which they are committed, or how much is involved cumulative sentences exceeding the maximum permissible for a single offence should never be imposed. It is necessary to ensure that the punishment imposed is proportionate to the total criminality, and it is permissible to achieve this by requiring some sentences to be cumulative upon others." As a statement of principle that is unobjectionable, provided there is no breach of s 16. For example, if an offender pleaded guilty to three counts of false pretences (different acts being involved) the court could impose a cumulative sentence if it considered that the total criminality could not be punished by imposing the maximum penalty for a single false pretence offence. But if there was a plea to charges of uttering and false pretences arising out of the same set of facts s 16 would preclude the court from imposing a cumulative sentence although the court considered that the total criminality was not adequately addressed by imposing the greater maximum penalty. Further, where there are a number of charges arising out of the one incident or series of incidents it is often inappropriate to impose cumulative sentences; in such circumstances the overall criminality can usually be adequately addressed by imposing up to the maximum for a single offence. *Hoad* (1989) 42 A Crim R 312 is a good illustration of that.

[35] Here, the same conduct on the part of the applicant constituted the offence of uttering and the offence of false pretences on each of the three occasions in question. The fact that there was an additional element to the false pretence charge, namely that the Bank handed over the money requested by the false document, does not alter the fact that there is an identity of criminal conduct involved in each of the charges of uttering and false pretences. For that reason there was a clear breach of s 16 of the *Code* in making the sentence for the uttering charges cumulative on that imposed with respect to the associated false pretence charges.

[36] Five years imprisonment was the maximum penalty for the offences of false pretences. The acts constituting each of the three false pretence offences were strictly separate and distinct, and in theory it would not have been contrary to s 16 to make the sentence on one false pretence charge cumulative on that imposed with respect to another. But, in my view in the circumstances of this case it would be wrong to do so. That is because, as the sentencing judge himself stated, there was "one activity … one course of conduct". Effectively the applicant fraudulently obtained $437,850 over 11 days; that defines the criminality involved.

[37] The error in imposing cumulative sentences was compounded by (indeed it may have been induced by) another error. Counsel for the prosecution on sentence informed the court that the maximum penalty for the offence of uttering was three years imprisonment. That was acted upon by the sentencing judge in constructing the sentence. In fact the maximum sentence for uttering in the circumstances here was imprisonment for a period of seven years. The relevant provision of the *Code* as it then stood was s 488 - 4(s). The false document in question was an authority or request for the payment of money. It was accepted by both counsel on the hearing of this application that the relevant maximum penalty for uttering was seven years imprisonment.

[38] The written outline presented by counsel for the applicant did not specifically take the point that the sentence as constructed could not stand because it breached s 16. The argument formulated therein was that the appropriate head sentence in the circumstances (given a seven year maximum for uttering) was six years. The general thrust of counsel's submission was that a head sentence of six years should be imposed with the possibility of a recommendation for early eligibility for parole. The outline of submissions by counsel for the respondent Director of Public Prosecutions raised the possibility of the sentence as constructed being wrong in principle because of the operation of s 16 and suggested, if a cumulative sentence was inappropriate, that a head sentence of seven years was called for.

[39] The misappropriation of money can give rise to a variety of offences under the *Criminal Code*, for example, stealing as a servant, uttering and false pretences. Different maximum penalties apply depending upon the particular offence. As a result it is difficult to reconcile all of the sentences imposed across the variety of offences. Whilst, for example, the amount of money involved is always a relevant circumstance it is not necessarily the determinative factor when it comes to sentence. Another relevant consideration is whether or not the series of counts constitute in effect one transaction because the relevant acts occurred over a short period of time, or whether they are to be regarded as separate and distinct offences.

[40] The approach in each written outline invited the court to increase the sentence imposed with respect to the uttering charges, though neither counsel suggested that the court should increase the actual time the applicant would spend, or was liable to spend, in custody. The practical effect of the submissions on behalf of the applicant was that there would be some relatively slight reduction in the overall head sentence with possibly a slightly earlier eligibility for parole date than was imposed at first instance. The submission for the respondent, at worst for the applicant, was that there should be no alteration in practical terms to the time the applicant would spend in prison and the date on which he would become eligible for parole. But the question was raised in the course of argument whether this court could increase the sentence on the uttering count in the absence of an appeal by the Attorney-General.

[41] Section 668E(3) of the *Code* gives the court power to increase a sentence; it provides:

> "On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore, and in any other case shall dismiss the appeal".

[42] Given that the Attorney-General may appeal to the Court against sentence pursuant to s 669A of the *Code* there would be few circumstances in which it would be proper for the court to increase a sentence in the absence of an Attorney's appeal. But where, as here, the sentencing judge wrongly imposed a cumulative sentence (possibly because he was influenced by an erroneous belief as to the maximum penalty for one of the offences) this court ought to be able to impose the sentence which, in all the circumstances, it considers "should have been passed". That is particularly so where the appropriate sentence in the view of the Court of Appeal would not require the offender to serve a greater period in prison though it did involve imposing for a particular offence a higher term of imprisonment than was initially imposed for that offence.

[43] The decision of the High Court in *Neal v The Queen* (1982) 149 CLR 305 imposes a gloss on s 669E(3). The effect of that decision is to make the Court of Appeal observe the requirements of natural justice before increasing a sentence. The applicant should generally be given notice of the court's intention to increase the sentence and should be given the opportunity of withdrawing the appeal before that is done if so minded. The first requirement loses much of its force when, as here, counsel for the applicant is asking for an increase in the particular sentence.

[44] I have come to the conclusion that *Neal* does not apply in the circumstances here. On a careful reading of the judgments it seems clear that it only applies where the consequence of the fresh sentence imposed by the appellate court would be that the applicant would serve (or be liable to serve) a longer term of actual imprisonment than if the initial sentence stood. Gibbs CJ at 308 used the expression "increase a sentence" on a number of occasions. All that he said there is compatible with the proposition that he was referring to a situation where the extent of deprivation of liberty would be increased. That also appears to be the sense in which Brennan J used the expression "more severe sentence" at 322. That interpretation of the reasoning in *Neal* is confirmed by a consideration of the judgment in *Malvaso v The Queen* (1989) 168 CLR 227 at 233. There Mason CJ, Brennan and Gaudron JJ said:

> "Strict compliance with procedures which authorise an increase in sentence by an appellate court should be insisted on, as it was in *Neal v The Queen*, before a prisoner is deprived of the liberty left to him after sentencing at first instance."

[45] The clear inference is that there is only an increase in sentence which calls for the application of the procedure in *Neal* if the sentence which the appellate court deems appropriate would deprive the applicant of some of the liberty left to him after sentencing at first instance.

[46] This Court in *Hughes* (CA No 306 of 1999, 11 February 2000) substituted a suspended prison term for a probation order with respect to one of a series of offences; the term equated the sentence initially imposed for the other offences. Pincus and Thomas JJA distinguished *Neal* on grounds broadly similar to those stated above.

[47] In the particular circumstances here *Neal* creates no impediment to substituting a prison sentence of greater than three years for the uttering offences.

[48] The respondent relied particularly for comparative purposes on the sentences imposed in *Heiser & Cook* (particularly the former), *Green* (CA No 426 of 1995, 30 January 1996), and *Bailey* (CA No 15 of 1999, 24 February 1999). Cook was convicted of 39 offences of inducing money to be delivered by wilful false promises with intent to defraud and two offences of dishonestly applying money the property of his employer. The total amount involved was in excess of $3.3M. Initially he was sentenced effectively to nine years imprisonment. The Court of Appeal increased that sentence so that effectively it was one of 12 years imprisonment. Heiser was convicted of 34 offences of inducing the delivery of money by wilful false promises with intent to defraud and two offences of dishonestly applying money of his employer. In his case some $300,000 was directly involved. Initially he was sentenced to an effective term of three years imprisonment with a recommendation for eligibility for parole after serving nine months. On appeal that

effective sentence was increased to seven years imprisonment without any recommendation with respect to parole. The convictions were recorded after trial, and neither had previous convictions. Cook was aged about 58 years and Heiser about 48; the latter was a qualified accountant.

[49] Green was sentenced with respect to 12 counts of misappropriation of property with circumstances of aggravation and two counts of making a wilful false promise. He had pleaded guilty to those charges which in total involved some $576,806. There were a number of "victims", many of whom had suffered greatly by reason of the fraud practiced on them by the applicant. The offender was aged 48 and had a history of previous similar convictions. The head sentence was nine years imprisonment to which was added a recommendation for eligibility for parole after serving four years. The Court of Appeal refused leave to appeal against sentence.

[50] Bailey pleaded guilty to offences of dishonesty; there were 33 charges on the indictment and 61 other offences taken into account. The charges on the indictment included 14 counts of fraud. The amount of property obtained by the applicant was in excess of $300,000. Bailey was aged 43 and had a significant criminal record; the property offences were said to be related to his addiction to gambling. The head sentence was eight years imprisonment with a recommendation that he be eligible for parole after serving three and a half years. There was a complication because earlier parole was revoked and the sentence of eight years was concurrent with the earlier sentence. The Court of Appeal noted that effectively he was to serve an additional six years and eight months for the offences in question and would be eligible for parole about halfway through that additional term. The Court refused to grant leave to appeal.

[51] Counsel for the applicant relied upon *Corrigan* [1994] 2 Qd R 415, *Taylor* (CA No 406 of 1994, 23 November 1994), *Cameron-Smith* (CA No 537 of 1994, 5 April 1995), *Brooks* (CA No 183 of 1996, 20 September 1996), *Mansfield* (CA No 91 of 1998, 18 June 1998), *Moffat* (CA No 290 of 1998, 8 October 1998), and *Davidson* (CA No 435 of 1997, 19 March 1998). Corrigan pleaded guilty to 28 counts of misappropriation with 75 other offences taken into account. The total amount misappropriated was some $1.2M. He had a number of previous similar convictions, but the last was some 10 years previous. He was sentenced to the maximum term of 10 years imprisonment with a recommendation for release after four years; that was reduced by the Court of Appeal to eight years imprisonment with a recommendation for release after four years.

[52] Taylor pleaded guilty to 35 misappropriation charges involving approximately $650,000. The offences took place over a period of six years and involved stealing money from various clients which had been entrusted to him for investment purposes. He was initially sentenced to seven years imprisonment, but the Court of Appeal added a recommendation for eligibility for release on parole after serving two and a half years to reflect the pleas of guilty. Cameron-Smith pleaded guilty to a series of charges including nine offences of false pretences, one of signing a document with intent to defraud, and one of misappropriation. The amount involved was some $283,000. The convictions were after a trial. The conduct in question involved defrauding elderly people. The criminal history was minor. The Court of Appeal refused leave to appeal against a five year term of imprisonment.

[53] Brooks was convicted after a trial of misappropriating $40,000 and of a false pretences charge involving $175,000. He had no prior convictions. He was sentenced to two and a half years imprisonment with a recommendation for parole after 12 months. That sentence was not disturbed on appeal. Mansfield pleaded guilty to more than 20 offences of dishonesty and other offences including stealing, forgery, and uttering. Over $500,000 was involved. The offences occurred over an approximate 13 month period. He had prior convictions for dishonesty. The sentence in that case was six years imprisonment with a recommendation for parole after two years; it was not disturbed on appeal.

[54] Moffat was an Attorney's appeal. The offences to which he pleaded guilty included seven of forgery, seven of uttering, and one of fraud. The amount of money involved was approximately $125,000. The offences had been committed over a period of 18 months and he had co-operated with police. He had no prior convictions. A non-custodial order was initially made, but that was increased on appeal to three years imprisonment with a recommendation for release after seven months. Davidson pleaded guilty to 15 wilful false promise charges involving some 11 different complainants. A total of approximately $765,000 was involved. Offences took place over a period of four years. He had no prior convictions. The initial sentence was constructed so that he was effectively sentenced to six and a half years imprisonment with a recommendation for eligibility for release on parole after two and a half years. On appeal that sentence was not disturbed.

[55] Taking into account all those authorities, the degree of planning that went into the commission of these offences, the applicant's prior criminal history involving as it does many convictions for like offences, the fact that he fled overseas with the proceeds of his crime and dissipated the money there, the sum of money involved, and the fact that he had to be extradited and brought back to Australia, the appropriate head sentence is seven years imprisonment. Given the plea of guilty to an *ex officio* indictment, the co-operation with authorities, the applicant's medical history, the short period of incarceration in a Singapore jail, and the level of remorse shown it is appropriate to make a recommendation that he be eligible to apply for parole after serving three years of that sentence. Even if the court were to formally receive the applicant's submissions sent directly to the court after the hearing of the appeal (which I have read), the matters referred to therein would not support any lesser sentence.

[56] At the request of counsel for the prosecution the learned sentencing judge made a pecuniary penalty order requiring the applicant to pay to the State of Queensland the sum of $437,850. On the hearing of the application in this court counsel for the respondent pointed to the disadvantages of that order and submitted that it was more appropriate to make an order for compensation in favour of the National Australia Bank in the amount of $437,850 pursuant to s 35 of the *Penalties and Sentences Act* 1992. Counsel for the applicant did not oppose the making of such an order.

[57] In the circumstances the orders of the court should be:

(i) grant leave to appeal against sentence;

(ii) set aside the sentences imposed on 16 September 1999 and in lieu thereof impose the following sentences:

(a) on each of counts 1, 3 and 6 on the indictment imprisonment for a period of seven years, such sentences to be served concurrently, and to date from 16 September 1999;

(b) on counts 2, 4, 5 and 7 on the indictment convictions recorded but no further punishment imposed;

(c) recommend that the applicant be eligible to apply for parole after serving three years of that sentence.

(iii) declare that the applicant was in pre-sentence custody solely in relation to these offences for a period of 188 days from 12 March 1999 to 16 September 1999, and further declare that the period of 188 days is to be time already served under the sentence hereby imposed;

(iv) order that the applicant Ian Gordon Sheppard pay by way of compensation to the National Australia Bank pursuant to s 35 of the *Penalties and Sentences Act* 1992 the sum of $437,850.