SUPREME COURT OF QUEENSLAND

CITATION:	*R v de Figueiredo* [2013] QCA 303
PARTIES:	**R** **v** **DE FIGUEIREDO, Philip Eric** (applicant)
FILE NO/S:	CA No 77 of 2013 SC No 525 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2013
JUDGES:	Muir and Gotterson JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal be granted.** **2. The appeal be allowed but only to the extent that it be ordered that the applicant be released after serving two years rather than two years and five months imprisonment.** **It is declared under s 21E of the *Crimes Act* 1914 (Cth) that the non-parole period is being reduced because the applicant has undertaken to cooperate with law enforcement agencies in proceedings relating to an offence, or offences, and that the non-parole period, but for that reduction, would have been two years and six months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to three counts of conspiring to defraud the Commonwealth – where the applicant was sentenced to six years imprisonment for each of counts 1 and 2 and to six months imprisonment for count 3 and was ordered to be released on recognizance after serving two years and five months imprisonment – where the applicant, an accountant acting under the direction of his employer, played an integral role in the establishment and implementation of the schemes

– where the applicant was not an architect, promoter or direct beneficiary of the schemes – where there was no actual loss to the Commonwealth – where the applicant had no criminal history – where the applicant entered an ex-officio plea in respect of count 3 and pleaded guilty to counts 1 and 2 despite his co-conspirators being acquitted on one count – where the applicant showed remorse and provided valuable assistance to the Australian Crime Commission – where the applicant submitted that although the head sentence of six years imprisonment was far from "beneficial", justice could be done if the recognizance release order was reduced to 18 months – whether the applicant's pleas of guilty and past cooperation were properly reflected in the head sentence or recognizance release order – whether the sentences were manifestly excessive

Crimes Act 1914 (Cth), s 21E

Assafiri v R [2007] NSWCCA 159, cited
Bulger v Queensland Community Corrections Board [1994] 2 Qd R 239; [1993] QCA 493, cited
Director of Public Prosecutions (Cth) v Gregory (2011) 34 VR 1; [2011] VSCA 145, cited
Director of Public Prosecutions (Cth) v Hamman, unreported, Court of Criminal Appeal, NSW, CA Nos 60388 of 1998 and 60457 of 1998, 1 December 1998, cited
Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7, cited
R v Baldock (2010) 269 ALR 674; [2010] WASCA 170, considered
R v Barrientos [1999] NSWCCA 1, cited
R v Cartwright (1989) 17 NSWLR 243, considered
R v Cox; R v Cuffe; R v Morrison [2013] QCA 10, considered
R v El Hani [2004] NSWCCA 162, cited
R v Gallagher (1991) 23 NSWLR 220; (1991) 53 A Crim R 248, considered
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, cited
R v Golding (1980) 24 SASR 161; (1980) 3 A Crim R 26, cited
R v Hargraves & Stoten [2010] QCA 328, considered
R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP (2011) 219 A Crim R 209; [2011] QCA 350, considered
R v Ronen (2006) 161 A Crim R 300; [2006] NSWCCA 123, cited
Ungureanu v The Queen (2012) 272 FLR 84; [2012] WASCA 11, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, cited

COUNSEL:	B Walker SC, with P Kulevski, for the applicant A MacSporran QC, with N Weston, for the respondent
SOLICITORS:	Potts Lawyers for the applicant Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA: Introduction** The applicant pleaded guilty to three counts of conspiring to defraud the Commonwealth and was sentenced on 6 March 2013 to six years imprisonment for each of counts 1 and 2 and to six months imprisonment for count 3. The sentences were ordered to be served concurrently. He was ordered to be released on recognizance after serving two years and five months imprisonment and 55 days spent in presentence custody were declared as time served under the sentences. The applicant applies for leave to appeal against the sentences on the ground that they are manifestly excessive.

[2] On the hearing of the application, although it was contended that, contrary to the sentencing judge's remarks, the head sentence of six years imprisonment was far from "beneficial", it was not submitted that the head sentence should be reduced. It was submitted that justice could be done if the period for the recognizance release order was reduced to 18 months.

[3] A reason for this approach was the acceptance by both parties on the sentencing hearing that it was open to the sentencing judge to impose a head sentence of six years imprisonment.

The applicant's antecedents

[4] The applicant, a qualified accountant, was employed by an accounting firm, Strachans, in Jersey, from 1983. From 2001, the applicant was based in Geneva. He is now 61 years of age. His wife and two children reside outside of Australia. He had no criminal history.

The PDC conspiracy

[5] The conspiracy the subject of counts 1 and 2 was referred to in submissions as the "PDC Conspiracy". Count 1 concerned the period between 18 June 1999 and 23 May 2001. Count 2 was in respect of the period between 24 May 2001 and 9 June 2005. The conspiracy involved a Queensland company, Phone Directories Company Pty Ltd (PDC), which produced local telephone directories. Its shares were held equally by Adam and Glenn Hargraves until July 2001 when Mr Stoten and his wife acquired a 10 per cent shareholding. PDC used a Chinese company, QH Data, to compile data for incorporation into PDC's products. The alleged conspiracy was an agreement to make false representations to the Commonwealth as to the allowable deductions of PDC and thereby prejudice the economic interests of the Commonwealth and/or deprive the Commonwealth of taxation monies.

[6] The conspiracy was implemented by a scheme which involved PDC entering into an arrangement, devised by Strachans, under which, instead of rendering its invoices to PDC for services provided by it to PDC, QH Data would provide the services, in theory, to a British Virgin Islands incorporated company, Amber Rock Pty Ltd (AR). AR would inflate the amount of each invoice by an amount specified by a director of PDC and forward the invoice to PDC. PDC would then pay the inflated invoiced amount to AR. AR would pay QH Data the amount originally

invoiced by QH Data and pay the balance into trust accounts from which distributions would be made into the bank accounts of the directors. Those accounts would be accessed by withdrawals from automatic teller machines in Australia.

[7] The applicant, an employed accountant acting under the direction of Strachans' principal, Mr Egglishaw: communicated with directors of PDC to explain the workings of the scheme; maintained communication with them in relation to the operation of the scheme; signed documents to establish trusts for each director of PDC; signed documents for the establishment of AR as a British Virgin Islands corporation; signed documents to open bank accounts for each trust to enable monies paid by PDC into the AR bank account to be divided among the three directors; supervised the balance of bank accounts held on behalf of the trusts; and supervised other staff members of Strachans who monitored the various bank accounts and created AR invoices. The applicant also signed a brokerage agreement on behalf of AR with PDC which was to be relied on to substantiate the services AR purported to provide to PDC although, in fact, AR provided no services beyond preparing invoices for the inflated amounts as instructed by the directors of PDC. In short, the applicant, although not an architect, promoter or direct beneficiary of the scheme, was intimately involved in its establishment and operation. The foregoing list of the applicant's actions does not purport to be exhaustive.

[8] The sentencing judge observed in her sentencing remarks:

> "The conspiracy was brought to an end when search warrants were executed in Australia on the PDC directors in June 2005. Ultimately, because the conspiracy was uncovered the Commonwealth managed to recover what it would otherwise have lost in tax revenue plus penalty tax. The potential for loss over the period of six years from this conspiracy to the Commonwealth was $3,812,942. Strachans' fees paid by PDC for this conspiracy were $561,206."

The Wheatley conspiracy

[9] The conspiracy the subject of count 3 involved an even simpler fraud than the PDC conspiracy and occurred between 28 March 2003 and 26 May 2004. Mr Wheatley wished to avoid income tax on his share of the proceeds of a professional boxing match that he had organised. Strachans procured a company controlled by it to falsely claim $700,000 of Mr Wheatley's share of the proceeds of the match. Following bogus "settlement" negotiations with Mr Wheatley, $400,000 was paid to the Strachans controlled company. Mr Wheatley claimed the $400,000 as a business expense and accessed that amount, less Strachans' fee, from a bank account using credit cards.

[10] As with the PDC conspiracy, the applicant, although not the scheme's architect, promoter or beneficiary, was deeply involved in its implementation. The potential loss to the Revenue from this conspiracy of $194,000 was recovered from Wheatley.

Comparable sentences

[11] Counsel for the applicant argued that the comparable sentences particularly relied on by the primary judge (*R v Hargraves & Stoten*,[1] *R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP*[2] and *R v Cox; R v Cuffe;*

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1 [2010] QCA 328.

2 [2011] QCA 350.

R v Morrison[3]) and also *R v Baldock*,[4] a decision of the Court of Appeal of Western Australia, demonstrated that the sentences imposed on the applicant were manifestly excessive. Before summarising the applicant's arguments, it is useful to set out the facts of three of these cases. The facts of *R v Hargraves & Stoten* emerge sufficiently from the foregoing account.

[12] The salient facts of *Fox* are as follows. Fox, an accountant, was found guilty after a trial of conspiring with his co-accused, Huston and Henke, to defraud the Commonwealth over a period of a little under two years. Although "hardly sophisticated"[5] in nature, the scheme, which involved directors transferring their companies' assets to themselves leaving corporate shells unable to discharge their tax liabilities, avoided detection due to the transfer of the companies' ownership to Vanuatu. Henke and Huston promoted the scheme for their own personal reward. Fox "received little from it".[6] It was found that he appeared to have been motivated by his desire to provide a service for his clients. The amount of income tax imperilled by the conspiracy was in excess of $4,500,000 but no revenue was actually lost. The Australian Taxation Office (ATO) recovered from the directors of the target companies the amount of tax that was lawfully payable as well as some relatively minor sums for the late lodgement of returns. Fox was 58 years of age when sentenced. He had no previous convictions and had cooperated with investigating authorities by agreeing to an interview and in the conduct of the trial. The sentencing judge observed:[7]

> "The hardship of your actual imprisonment for your family has also resulted in my determining that you spend in actual custody [a] far less proportion of the sentence than would otherwise be the norm."

[13] On appeal, Fox's sentence of three years and nine months imprisonment, with a non-parole period of nine months, was set aside and a sentence of five years imprisonment with a non-parole period of two years and six months was imposed.

[14] *Morrison*, together with his co-offenders Cox and Cuffe, was convicted after a trial of conspiring to defraud the Commonwealth. Cox was sentenced to nine years and 11 months imprisonment with a non-parole period fixed at three years and four months. Cuffe and Morrison were both sentenced to six years imprisonment with non-parole periods of three years. The conspiracy was an agreement to defraud the Commonwealth by promoting tax minimisation schemes for the 1999 and 2000 tax years. Under the schemes, at least in theory, participating taxpayers borrowed thousands of dollars under loan agreements at five per cent interest for 10 years, paying a fee to the promoters, which was typically 12 per cent of the amount borrowed. Life bonds or insurance policies were issued as security against the loans and the monies were then purportedly invested in retirement village joint ventures or employee welfare funds or paid by way of donation to a church building fund so as to produce an immediate tax deduction.[8]

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3 [2013] QCA 10.

4 (2010) 269 ALR 674.

5 *R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP* [2011] QCA 350 at [24].

6 *R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP* [2011] QCA 350 at [25].

7 *R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP* [2011] QCA 350 at [43].

8 *R v Cox; R v Cuffe; R v Morrison* [2013] QCA 10 at [2].

[15] There were in fact no lenders, no loans, no genuine life bonds or insurance polices and receipts issued to support donations or investments were false and/or misleading. There were over 400 participants in the schemes. They paid more than $4.25 million pursuant to the schemes in respect of which they received no benefit and, in some cases, were charged penalty tax.

[16] None of the accused showed any sign of genuine remorse or cooperated with investigations. There was, however, no evidence of any loss to the Commonwealth as a result of the implementation of the schemes. Morrison was aged between 37 and 39 at the time of his offending. He had no previous convictions. When he commenced working as office manager for the company which promoted the schemes, he was unaware of the schemes' illegality but he became aware of it shortly thereafter. Although Cox was the architect of the schemes, it was held that it was Morrison's "effort which kept the schemes going".[9] The sentences imposed on Cuffe and Morrison were reduced on appeal to five years imprisonment with non-parole periods fixed at two and a half years.

[17] *Baldock* was the respondent to a Crown appeal against sentences imposed in relation to five charges of being knowingly concerned in the defrauding of the ATO. He was a certified practising accountant with responsibility for the group tax affairs of various entities known as "Goldfields" which were controlled by a Mr Pollock. In the first instance as an employee and later as an independent accountant, Baldock, acting on the instructions of Mr Pollock, implemented a fraud by under-remitting and failing to remit tax instalment deductions to the ATO that had been withheld from Goldfields' employees in the total amount of $6.9 million. Baldock received no personal benefit from the scheme; he was not the architect of it and had agreed to participate in it out of fear of losing his job at a time when his wife was in a state of ill health.[10]

[18] Having found that the exercise of the sentencing discretion miscarried, Pullin JA and Kenneth Martin J found that the appropriate starting point for the sentence in respect of count 1 was five and a half years, as opposed to the sentencing judge's starting point of six years.[11] Their Honours concluded that a discount of approximately 25 per cent should have been provided for the early pleas of guilty thereby reducing the sentence to 49 months and that, after a further reduction of 25 months for Baldock's undertaking to cooperate with authorities, a sentence of 24 months should have been imposed. Their Honours concluded that a similar approach should be taken in respect of the other offences and that a total sentence of two years imprisonment was an appropriate reflection of Baldock's overall criminality.

[19] In relation to the fixing of the period of imprisonment to be served before which the respondent should be release on recognizance, their Honours took into account "two very significant mitigating factors",[12] the early plea of guilty and cooperation with the authorities. Also taken into account were Baldock's rehabilitation, absence of a criminal record and the fact that he derived no direct personal benefit from the money withheld.[13] The sentencing judge ordered concurrent sentences each of two

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9 *R v Cox; R v Cuffe; R v Morrison* [2013] QCA 10 at [96].
10 *R v Baldock* (2010) 269 ALR 674 at [2].
11 *R v Baldock* (2010) 269 ALR 674 at [51].
12 *R v Baldock* (2010) 269 ALR 674 at [56].
13 *R v Baldock* (2010) 269 ALR 674 at [56].

years imprisonment with a recognizance release date after six months. As the Court's conclusions as to the appropriate sentences and recognizance release date did not differ materially from the sentence imposed, the Court, exercising its discretion under s 31(4)(a) of the *Criminal Appeals Act* 2004 (WA), dismissed the appeal, whilst substituting 25 months for the 16 months specified by the sentencing judge as the reduction in sentence pursuant to s 21E of the *Crimes Act* 1914 (Cth).

The applicant's contentions in respect of the head sentence and past cooperation

[20] Counsel for the applicant made submissions to the following effect.

[21] Adam Hargraves and Mr Stoten were both acquitted on count 1 and convicted on count 2. Glenn Hargraves was acquitted on both accounts. The sentencing judge sentenced the applicant on the basis that Hargraves and Stoten's involvement in the PDC conspiracy had only been for a period of 16 months. In that regard, the primary judge remarked:

> "Even allowing for your guilty pleas and other mitigating factors the starting point for your sentence for the conspiracy that is the subject of counts 1 and 2 must be in excess of the sentence[s] imposed on Hargraves and Stoten."

[22] On appeal, Hargraves and Stoten were each sentenced to five years imprisonment with a non-parole period of two and half years. Unlike Hargraves and Stoten, the applicant pleaded guilty, he did not actively seek out tax reduction strategies to implement for his own gain and he showed remorse. Hargraves did not assist in the administration of justice and Stoten was found to have destroyed evidence.

[23] In order to take part in the same conspiracy, the alleged conspirators must have the same unlawful intent. The subject offences involve "an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others".[14] The applicant should receive significant credit for pleading guilty to the dishonest agreement the subject of count 1 in circumstances in which his co-conspirators had successfully evaded conviction.

[24] In relation to *Fox*, counsel for the applicant pointed to the absence of a plea of guilty and remorse and the benefits flowing to Fox from the enhancement of his professional relationship with wealthy clients. It was submitted that notwithstanding Fox's inability to cooperate with authorities in a similar manner to that of the applicant, he received one year less imprisonment than the applicant and a virtually identical non-parole period.

[25] Counsel for the applicant pointed to the fact that Morrison was convicted after a trial but, nevertheless, received a lesser head sentence than that of the applicant and a release date which was only one month later.

[26] Counsel for the applicant submitted that the Court in *Baldock* gave large discounts for factors that Baldock had in common with the applicant: an early plea of guilty which "routinely attracts a discount in the order of 25%–35%";[15] lack of personal

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14 *Peters v The Queen* (1998) 192 CLR 493 at 509–510.

15 *R v Baldock* (2010) 269 ALR 674 at [52].

benefit from the frauds; lack of antecedents; good prospects of rehabilitation; and cooperation with the authorities.

[27] It is apparent that, when regard is had to the comparable sentences, insufficient allowance was made for the pleas of guilty in respect of counts 1 and 2 which, although not early, were entered nine days before the commencing date of the trial, which was anticipated to last three weeks, and for past cooperation. The applicant entered an ex-officio plea in respect of count 3.

The respondent's contentions in respect of the head sentence and past cooperation

[28] The respondent submitted that the head sentence of six years imprisonment was appropriate as:

- it properly reflected the criminality of the applicant's offending in the PDC and Wheatley conspiracies; and
- it properly reflected the applicant's past cooperation.

[29] Noting the sentencing judge's finding that the applicant "was really integral to setting up the vehicles by which the scheme was actually implemented" and "keeping the wheels of the scheme greased", it was further submitted that the applicant played a central role in both the PDC and Wheatley conspiracies. The schemes had the potential to cause an overall loss to the Commonwealth of over $4 million. While the "Wheatley" conspiracy occurred during the course of count 2, it was a different conspiracy involving different conspirators and the applicant's role in it merited additional punishment.

[30] An appropriate starting point for the sentences was to consider the sentences imposed on Hargraves and Stoten for offending which lasted 16 months and caused a loss to the Commonwealth of $1,284,315. Hargraves and Stoten did not intentionally establish an unlawful scheme, nor did they abuse a position of trust, and they voluntarily met all of their tax liabilities prior to the start of their trial, including $3.2 million in penalty tax. Those were significant mitigating factors.

[31] By way of contrast with the offending of Hargraves and Stoten: the applicant's offending spanned six years; he admitted that he knew from the outset that the PDC scheme was fraudulent; the potential tax loss was much greater; he did not receive any of the proceeds of the scheme and was not required to pay tax or penalty tax; his pleas of guilty were not early; and his role in setting up and managing the fraudulent PDC scheme was "essential and indispensible".[16]

[32] The sentences imposed in respect of counts 1 and 2 were supported by *Fox* which was less serious and of a much shorter duration than the present case. If the applicant had been sentenced on count 3 alone, that is in respect of the Wheatley conspiracy, *Director of Public Prosecutions (Cth) v Gregory*[17] suggests that a head sentence of three years would have been within range. After making due allowances for the plea to an ex-officio indictment and the totality principle, a head sentence of seven and a half years was within range. It was appropriate to reduce

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16 *R v Baldock* (2010) 269 ALR 674 at [166].

17 (2011) 34 VR 1.

the sentence by 20 per cent to recognise past cooperation and the sentencing judge did that.

Consideration of the head sentence and of past cooperation

[33] The amount of income tax imperilled by the conspiracy in *Fox* was in excess of $4,500,000, but there was only one conspiracy. As in this case, the Commonwealth suffered no loss. Referring to an observation made in *Director of Public Prosecutions (Cth) v Hamman*[18] to the effect that an offer by an offender when caught to pay the tax due and penalty tax is relevant but "of small account", the Court in *Fox* observed:[19]

> "Notwithstanding the force of these remarks it is, we think, the case that an actual loss of revenue will be a factor, other things being equal, of greater weight than the potentiality of loss. We do not mean to say that potential losses of substantial sums to the revenue of the Commonwealth is not a matter highly relevant to sentence. But, again on the basis that other things are equal, an offence resulting in an actual loss of revenue would be more serious than one in which the same amount was at risk, but was not lost."

[34] Although Fox did not devise the scheme, he benefited from his promotion of it through the enhancement of his professional relationship with clients. The period of his involvement in the conspiracy was also only about six months and he cooperated with investigating authorities, but not to the extent of pleading guilty.

[35] Morrison, like the applicant, was an employee who derived no personal benefit from the scheme except the benefit of cementing his relationship with his employer through his participation. The scheme involved the 1999 and 2000 tax years but Morrison's involvement was not for the whole of that period. He became aware of the fraudulent nature of the scheme shortly after commencing employment in March 2000. The investigations into the scheme commenced in 2000 but proceedings were not commenced against Morrison and his co-offenders until November 2007. It was the primary judge's failure to make due allowance for the lengthy delay in prosecuting Morrison and his co-offender, Cuffe, and for their not having reoffended within that period that caused this Court to find an appellable error. The sentences imposed on Morrison and Cuffe were reduced from six years with non-parole periods of three years to five years with non-parole periods fixed at two and a half years reflecting these matters and, no doubt, the relatively brief period of Morrison's participation in the scheme and the absence of any loss to the Commonwealth. Morrison showed no sign of genuine remorse and did not cooperate with investigations, although he took part in recorded interviews. He did not plead guilty but he cooperated in the facilitation of the trial process.

[36] Hargraves and Stoten, unlike the applicant, set out to obtain substantial personal benefits from the PDC scheme and, unlike the applicant, they did not have the benefit of late pleas of guilty. It was regarded as relevant that punishment, in the form of payment of penalty tax, had been imposed on the appellants "in addition to

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18 Unreported, Court of Criminal Appeal, NSW, CA Nos 60388 of 1998 and 60457 of 1998, 1 December 1998 at [30].

19 *R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP* [2011] QCA 350 at [30].

that which the Court imposes by way of sentence".[20] Also remarked on were the absence of any prior criminal history, the short duration of the offending conduct, the fact that the appellants did not intentionally set up an unlawful scheme and their good prospects of rehabilitation.

[37] Baldock's offending was similar in nature to that of the applicant, having been committed initially as an employee. Although in the later stages of offending Baldock was an independent accountant, he acted throughout the relevant period on the instructions of the controller of Goldfields. The amount actually lost to the Commonwealth was greater than the losses which the applicant's offending had the potential to cause. Like the applicant, Baldock had no relevant criminal history and his prospects of rehabilitation were good. On appeal, the Court considered five and a half years to be an appropriate starting point for the sentences which were then reduced by approximately 25 per cent to 49 months for early pleas of guilty before cooperation with authorities was taken into account.

[38] The reduction on account of Baldock's undertaking to cooperate, which was regarded as valuable by the authorities, was 25 months resulting in concurrent terms of imprisonment of two years with a recognizance release date after six months. Baldock's treatment was thus more favourable in a number of respects than that of the applicant.

[39] There was no disagreement between the parties as to the principles applicable to the role in the sentencing process of an offender's cooperation with authorities. Counsel for the applicant relied on the following passage from the reasons of Hunt and Badgery-Parker JJ in *R v Cartwright*:[21]

> "It is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information.
>
> In order to ensure that such encouragement is given, the appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. What is to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless the offender discloses everything which he knows. To this extent, the inquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of

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20 *R v Hargraves & Stoten* [2010] QCA 328 at [223]; see also *R v Ronen* (2006) 161 A Crim R 300 at 312–313.

21 (1989) 17 NSWLR 243 at 252–253.

> normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.
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> *Again, in order to ensure that such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as could significantly assist the authorities.* The information must, of course, be true; a false disclosure attracts no discount at all. *What is relevant here is the potential of the information to assist the authorities, as comprehended by the offender himself*." (emphasis added)

Their Honours continued:[22]

> "… the offender will not lose the discount because in fact (unknown to him) the authorities are already in possession of that information. Nor should he lose it if the authorities do not in the end act upon his information, because (for example) they subsequently receive or they have already received more cogent information from another source — or if the offender does not in the end give evidence as promised, because (for example) the person who is the subject of his information has pleaded guilty."

[40] It was submitted that the rationale in the passage relied on by the applicant had been "endorsed numerous times", including by the High Court in *York v The Queen*[23] and by this Court in *Bulger v Queensland Community Corrections Board*.[24] The submission is generally accurate even if better examples of judicial endorsement could have been selected. *York* was concerned with whether this Court had erred in interfering with the exercise of the sentencing judge's discretion to extend particular leniency to an offender by suspending a sentence of five years imprisonment because imprisonment would involve "a very high risk of extreme retributive violence".[25] Gleeson CJ observed that the relevant principles were discussed "for example, in *R v Cartwright* and *R v Gallagher*".[26] No other member of the Court found it necessary to refer to or discuss those principles. Bulger's cooperation with authorities came after he was sentenced. The issue for determination was whether the Queensland Community Corrections Board, in considering Bulger's parole application, had failed to take into account a relevant matter: the public interest in encouraging cooperation with the authorities by offenders.

[41] Hunt and Badgery-Parker JJ in *Cartwright* placed emphasis on the subjective nature of the offender's cooperation and on the potential, rather than actual usefulness, of the offender's cooperation. There is no doubt, however, that the actual usefulness of the cooperation to the authorities is a relevant consideration in assessing the extent of the discount to be given for cooperation.[27]

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22 *R v Cartwright* (1989) 17 NSWLR 243 at 253.
23 (2005) 225 CLR 466.
24 [1994] 2 Qd R 239.
25 *York v The Queen* (2005) 225 CLR 466 at 468.
26 *York v The Queen* (2005) 225 CLR 466 at [3].
27 *R v El Hani* [2004] NSWCCA 162 at [73]; *R v Barrientos* [1999] NSWCCA 1 at [45]–[47]; *Assafiri v R* [2007] NSWCCA 159 at [23]; and *Ungureanu v The Queen* (2012) 272 FLR 84 at [30]–[31].

[42] In *R v Gallagher*,[28] Gleeson CJ, with whose reasons Meagher JA agreed, observed that it will often be difficult to determine a specific and separate discount for cooperation as the cooperation will often overlap "with other subjective matters to be taken into account in [the offender's] favour", such as "the remorse or contrition which may be demonstrated in a given case by co-operation with the authorities, and the more difficult time which an informer is likely to have during the period of incarceration as a result of having co-operated". His Honour explained:[29]

> "It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical."

[43] His Honour referred, with apparent approval, to *R v Golding*,[30] observing:[31]

> "A leading South Australian case on the subject is *R v Golding*. Wells J set out in detail the relevant considerations, and it is not necessary to repeat them. It is, however, interesting to note the first two of them. His Honour said:
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> > '1 Nothing in the propositions following should be construed as suggesting that the ample discretion exercised by sentencing judges should be in any way curtailed or limited by inflexible rules.
> >
> > 2 A permissible judicial process in sentencing an alleged informant is to arrive at a sentence that would ordinarily meet the case if the prisoner were not an informer, and then to determine what, if any, allowance should be made by reason of his informing work.'
>
> The use of the word 'permissible' in proposition number (2) and the whole of proposition number (1), are to be noted." (citations omitted)

[44] After briefly discussing the requirements of s 21E of the *Crimes Act* 1914 (Cth), his Honour observed:[32]

> "A judge who extends leniency on the ground here in question should say that this is being done and why. However, I am of the view that, subject always to any relevant statutory requirement, a sentencing judge is entitled, but not obliged, to give a discrete quantifiable discount on the ground of assistance to authorities, provided it is otherwise possible and appropriate to do so … Even in cases where, as a matter of legitimate discretionary decision, a judge decides to give a specified discount it is essential to bear in

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28 (1991) 23 NSWLR 220 at 227.
29 *R v Gallagher* (1991) 23 NSWLR 220 at 228.
30 (1980) 24 SASR 161.
31 *R v Gallagher* (1991) 23 NSWLR 220 at 229.
32 *R v Gallagher* (1991) 23 NSWLR 220 at 230.

> mind that what is involved is not a rigid or mathematical exercise, to be governed by 'tariffs' derived from other and different cases but, rather, one of a number of matters to be taken into account in a discretionary exercise that must display due sensitivity towards all the considerations of policy which govern sentencing as an aspect of the administration of justice."

[45] Gleeson CJ drew attention to the width of the discretion reposed in sentencing judges as to the extent of the discount, if any, to be given for cooperation and the manner in which it could be taken into account. His Honour said:[33]

> "All the authorities dealing with those principles [i.e. the principles governing the benefit to be given to an offender for assistance to law enforcement authorities] emphasise the width of the discretion available to a sentencing judge in relation to this subject matter, and the leading judgments repeatedly disclaim any suggestion that there are rigid formulae to be applied. It was open to his Honour, as a matter of discretion, to take the approach that the most appropriate method of dealing with the matter was to relate the discount to the two most serious offences. He was not obliged to do that, but, consistently with the authorities, he was entitled to do so. It would be quite wrong to suggest that in a case such as the present the sentencing judge has no option but to relate the so-called discount to all the offences with which he is dealing."

[46] The applicant's past and future cooperation are obviously interrelated. The undertaking in respect of future cooperation is based upon, although not limited to, the information and assistance provided previously by the applicant to the Australian Crime Commission (the Commission). As was observed by Gleeson CJ in *Gallagher*, there is an artificiality in separating past from future cooperation and, indeed, from guilty pleas in arriving at an appropriate reduction in the sentence. Nevertheless, s 21E of the *Crimes Act* 1914 (Cth) requires that where a court reduces a federal sentence because "the offender has undertaken to co-operate with law enforcement agencies in proceedings, relating to any offence, the court must … specify that the sentence is being reduced for that reason and state the sentence that would have been imposed but for that reduction". A like obligation exists in respect of the reduction of a non-parole period.

[47] When regard is had to the overall criminality of the applicant's conduct, including his involvement in the Wheatley scheme, a head sentence of six years, although high when regard is had to the matters on which the applicant relies, particularly: the absence of personal gain; the applicant's status as an employee doing his employer's bidding; the absence of loss to the Revenue; and pleas of guilty is not such that appellable error must be inferred. It is apparent, however, that even allowing for the width of the discretion reposed in a sentencing judge, the applicant's pleas of guilty and cooperation are not properly reflected in the head sentence or in the recognizance release order. The sentencing judge's sentencing remarks suggest that, in arriving at her determination that the applicant serve two years and five months imprisonment, she did not have regard to past cooperation or to the pleas of guilty.

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33 *R v Gallagher* (1991) 23 NSWLR 220 at 230–231.

[48] The pleas of guilty, which were entered some nine days prior to the date on which the trial was listed to commence, not only avoided the expense and inconvenience of a lengthy trial but, as counsel for the applicant pointed out, were entered despite the applicant's co-conspirators being acquitted on one count.

[49] The applicant's cooperation with the authorities and the submissions made in relation to it are discussed in detail in separate reasons. The cooperation prior to the sentencing hearing with the Commission was extensive and took place over more than five months. It was regarded by the Commission as valuable. It may be inferred also that the applicant's undertaking to give future assistance to the authorities was also regarded by the Commission as valuable.

[50] In my respectful opinion, the applicant's past cooperation was substantial and, when coupled with the pleas of guilty, deserving of more recognition than that given by the sentencing judge. The cases referred to above support this conclusion. The effect of the applicant's counsel's submission was that the non-release period should have been set at 18 months as a result of a stepped progression to take into account the early pleas, past cooperation and future cooperation. The submission fails to sufficiently take into account the fact that the sentencing process is not a precise mathematical exercise in which particular deductions are made on account of particular factors (putting aside the requirements of s 21E of the *Crimes Act* 1914 (Cth)). The sentencing judge is obliged to "take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all".[34]

[51] In my view, due allowance can be made for past cooperation, the early pleas of guilty and future cooperation by leaving the head sentences unaltered and by fixing a non-parole period of two years. Any lesser non-parole period would, in my opinion, result in a sentence which is "an affront to community standards".[35]

[52] I would declare under s 21E of the *Crimes Act* 1914 (Cth) that the non-parole period is being reduced because the applicant has undertaken to cooperate with law enforcement agencies in proceedings relating to an offence, or offences, and that the non-parole period, but for that reduction, would have been two years and six months.

Conclusion

[53] For the above reasons, I would order that:

1. The application for leave to appeal be granted.

2. The appeal be allowed but only to the extent that it be ordered that the applicant be released after serving two years rather than two years and five months imprisonment.

[54] I would also make a declaration in the terms stated above.

[55] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[56] **PHILIPPIDES J:** I agree with the reasons of Muir JA and the orders proposed.

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34 *Wong v The Queen* (2001) 207 CLR 584 at 611 [75].

35 See *R v Gladkowski* (2000) 115 A Crim R 446 at 448.