SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAK* [2013] QCA 310
PARTIES:	**R** **v** **KAK** (applicant)
FILE NO/S:	CA No 116 of 2013 SC No 43 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2013
JUDGES:	Holmes, Muir and Fraser JJA 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 against sentence be granted.** **2. The appeal be allowed.** **3. The sentence imposed for count 1 be set aside and a sentence of seven years imprisonment with a non-parole period of three years and six months from 16 April 2013 be substituted therefor.** **4. The sentence imposed for count 2 be set aside and a sentence of seven years imprisonment with a parole eligibility date fixed at three years and six months from 16 April 2013 be substituted therefor.** **5. A parole eligibility date fixed at three years and six months from 16 April 2013 be substituted for the parole eligibility date of four years fixed in respect of counts 5, 8, 10 and 11.** **6. The terms of imprisonment imposed on 16 April 2013 in respect of counts 3 to 20 inclusive are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG

PRINCIPLE – where the applicant pleaded guilty to one count of trafficking in a child (count 1); one count of procuring a young person to engage in prostitution (count 2); four counts of maintaining a sexual relationship with a child; and 14 counts of procuring a child to commit an indecent act, with the aggravating circumstance that the child was the applicant's lineal descendent – where the applicant was sentenced to nine years imprisonment for each of counts 1 and 2 and lesser sentences in respect of counts 3 to 20 inclusive – where the sentencing judge imposed a non-parole period of four years in respect of count 1 and fixed a parole eligibility date after serving four years in respect of the remaining counts – where the applicant operated a Thai massage business and provided additional sexual services to customers on request – where the applicant brought her daughter, the complainant, to Australia for the purpose of use in the applicant's prostitution – where the applicant "corrupted and sexualised the complainant" and required the complainant to provide sexual services to clients – where the applicant had no prior criminal history and had a low risk of recidivism – where the applicant expressed remorse, entered early pleas of guilty and cooperated extensively with authorities – where the applicant contends that the sentencing judge erred in applying s 9, s 13 and s 13A of the *Penalties and Sentences Act* 1992 (Qld) and s 21E of the *Crimes Act* 1914 (Cth) – where the applicant submits that the sentencing judge erred in not finding that count 1 was incidental to the applicant's overall culpability for offending, which was encapsulated in count 2 – whether the sentencing discretion miscarried – whether the sentences imposed in respect of counts 1 and 2 and the parole orders in respect of the remaining counts were manifestly excessive

Crimes Act 1914 (Cth), s 16A(2)(h), s 21E
Criminal Code 1899 (Qld), s 229G(1)(a)
Criminal Code 1995 (Cth), s 271.2(2B), s 271.4(1)
Penalties and Sentences Act 1992 (Qld), s 9, s 13 , s 13A

Assafiri v R [2007] NSWCCA 159, cited
R v Baldock (2010) 269 ALR 674; [2010] WASCA 170, cited
R v Barrientos [1999] NSWCCA 1, cited
R v Blanch [2008] QCA 253, cited
R v Cartwright (1989) 17 NSWLR 243, considered
R v Chu [1998] NSWSC 568, cited
R v Dobie [2011] 1 Qd R 367; [2009] QCA 394, considered
R v El Hani [2004] NSWCCA 162, cited
R v Gallagher (1991) 23 NSWLR 220, considered
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, cited
R v Hoad [2005] QCA 92, cited
R v L; ex parte Attorney-General [1996] 2 Qd R 63; [1995] QCA 444, cited

R v Norton [2007] QCA 320, cited
R v Phillips & Woolgrove (2008) 188 A Crim R 133; [2008] QCA 284, cited
R v SBI [2009] QCA 73, cited
R v SBS [2010] QCA 108, cited
R v Sukkar (2006) 172 A Crim R 151; [2006] NSWCCA 92, considered
R v TR & FV; ex parte A-G (Qld) (2008) 186 A Crim R 420; [2008] QCA 221, considered
R v Webber (2000) 114 A Crim R 381; [2000] QCA 316, cited
SZ v R (2007) 168 A Crim R 249; [2007] NSWCCA 19, cited
Ungureanu v The Queen (2012) 272 FLR 84; [2012] WASCA 11, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: A Boe, with A D Anderson, for the applicant
P J McCarthy for the respondent

SOLICITORS: Robertson O'Gorman for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA: Introduction** The applicant was convicted on her pleas of guilty of trafficking in a child (count 1), procuring a young person to engage in prostitution (count 2), four counts of maintaining a sexual relationship with a child under 16 (counts 5, 8, 10 and 11) and 14 counts of procuring a child under 16 to commit an indecent act with the circumstance of aggravation that the child, to the knowledge of the applicant, was her lineal descendant (counts 3, 4, 6, 7, 9, and 12 to 20 inclusive). In counts 3, 4, 6, 7 and 9 there was the additional aggravating circumstance that the child was under 12.

[3] The following sentences were imposed on 16 April 2013:

- Count 1 – nine years imprisonment with a non-parole period of four years;
- Count 2 – nine years imprisonment;
- Counts 3, 4, 6, 7, 9 and 12–20 inclusive – three years imprisonment; and
- Counts 5, 8, 10 and 11 – seven years imprisonment.

[4] The parole eligibility date fixed in respect of counts 2 to 20 inclusive was a date four years from the date of sentence. The sentences were ordered to be served concurrently.

[5] The maximum penalties for the count 1 and count 2 offences were, respectively, 25 and 14 years imprisonment. The maximum penalty for the maintaining offences was life imprisonment and the maximum penalty for the indecent treatment offences was 20 years imprisonment.

[6] The applicant seeks leave to appeal against the sentences imposed in respect of counts 1 and 2 and the parole orders imposed in relation to the other counts on the following grounds:

1. The sentencing judge erred in not finding that count 1 was incidental to the applicant's overall culpability for offending which was encapsulated in the commission of count 2.

2. The sentencing judge erred in applying s 9, s 13 and s 13A of the *Penalties and Sentences Act* 1992 (Qld) (the PSA) and s 21E of the *Crimes Act* 1914 (Cth).

3. The sentences imposed in respect of counts 1 and 2 and the parole orders in respect of the remaining counts were manifestly excessive.

The applicant's antecedents

[7] The applicant was born in Thailand in 1971. She was aged between 33 and 39 during the period of her offending and had no prior criminal history. The applicant has three children, the complainant, who was born in Thailand in 1995, and two sons, who were aged 13 and 14 at the time of sentencing. The sons are the children of the applicant and her former Australian husband whom she married in Thailand in 1997.

[8] The applicant was employed in Thailand as a hotel waitress. She started a Thai massage business after she and her former husband moved to Brisbane in 2002. After initially providing therapeutic Thai massage services, she later came to provide additional sexual services to customers on request. A number of references from the applicant's customers were tendered on her sentencing hearing. They wrote of the provision by the applicant to them of effective non-sexual Thai massage services and of her generosity with her time and money. The President and Chief Monk of Queensland's largest Thai Buddhist temple stated that he had known the applicant since she moved to Brisbane in 2002 and she had engaged extensively in the spiritual activities of the temple as well as in regular acts of charity in relation to the temple and its monks.

[9] When the applicant came to Australia, the complainant initially stayed in Thailand with her maternal grandparents. The applicant brought her mother and the complainant to Brisbane in 2004 for a holiday. In 2006, the applicant arranged for her parents to come to Brisbane with the complainant with a view to the complainant residing permanently with her in Brisbane.

The offending conduct

[10] When the complainant was nine years of age and in Brisbane for six weeks in 2004, her mother masturbated a number of customers in her presence. The complainant was initially required to massage naked customers but eventually, at the applicant's request, masturbated some customers. These facts relate to counts 3 and 4.

[11] The maintaining counts involved the provision by the complainant to repeat customers of sexual services which, depending on the customer, consisted of masturbation and/or fellatio. The complainant was often fully or partially undressed and the customers were normally naked. The complainant was frequently touched

indecently by the customers. One of the customers took photographs of the naked complainant and the complainant was required to take a video recording of the applicant and that customer engaging in sexual activity. One regular customer required the complainant to urinate in his mouth as he masturbated.

[12] The complainant and the applicant were often together in the room and present when the other of them interacted sexually with a customer.

[13] None of the offending conduct involved vaginal or anal penetration or the touching of the complainant's uncovered genitalia. Such acts were forbidden by the applicant.

[14] The undisputed schedule of facts before the sentencing judge states that count 2 encapsulates "the provision of prostitution by [the applicant] by procuring her daughter to engage in prostitution". The schedule states that the applicant "corrupted and sexualised the complainant"; that at times the complainant was required to "engage with clients both before and after school"; and that during 2010 there were occasions when the complainant was providing sexual services three to four times per week.

Ground 2

[15] It is convenient to now consider ground 2.

[16] Counsel for the applicant contended that the sentencing judge erred in respect of the application of s 9(2)(i), s 13 and s 13A of the PSA and s 21E of the *Crimes Act* 1914 (Cth). The respondent contended to the contrary. In view of my appreciation of the import of the sentencing remarks, it is unnecessary for me to discuss the applicant's submissions in this regard. The respondent submitted that the closed court sentencing remarks made it apparent that the sentencing judge "was limiting the further reduction" in the proposed sentence from 11 years to nine years imprisonment to take into account future cooperation within the ambit of s 13A. I do not accept that submission.

[17] It is not clear how the sentencing judge took the applicant's cooperation with authorities into account. In his sentencing remarks in open court, the sentencing judge relevantly said:

> "To your credit you have pleaded guilty to these offences when arraigned before me today. I accept that those pleas of guilty are early pleas of guilty. I accept that they are accompanied by a level of cooperation and remorse on your part …
>
> I also have regard to your pleas of guilty and the cooperation that they show with the authorities. Whilst it may be the case that initially you were not cooperative, the fact is that you ultimately have been cooperative, by early pleas of guilty. That cooperation is very important and should receive proper recognition. I accept that that cooperation, and those pleas of guilty are accompanied by remorse on your part.
>
> The purpose for which I am sentencing you today is to punish you to an extent or in a way that is just in all of the circumstances … I do so having regard to the totality principle, and having regard to your pleas of guilty …

> Having regard to all of the circumstances, and your pleas of guilty, and the cooperation shown in the administration of justice, I impose the following sentences …"

[18] The first of the quoted paragraphs suggests that the sentencing judge had in mind a form of cooperation in addition to that inherent in a plea of guilty. The second paragraph strongly suggests that the sentencing judge is referring only to the cooperation inherent in a plea of guilty but the fourth paragraph quoted, perhaps, gives rise to some doubt. Any doubt, however, about the sentencing judge's approach is removed by his Honour's *in camera* remarks. After identifying the discount to be given in respect of the applicant's pleas of guilty, his Honour stated:

> "The [applicant's] cooperation, however, was of a greater magnitude than the entering of early pleas of guilty. The [applicant] indicated a willingness to provide a statement … I accept that that cooperation is significant … That additional cooperation has been reflected in the imposition of the sentences requiring the [applicant] to serve nine years in custody.
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> The early pleas of guilty and further cooperation have been reflected in that sentence."

[19] It is plain that, apart from the cooperation inherent in pleas of guilty, the sentencing judge had in mind only that cooperation which consisted of the provision by the applicant of a detailed statement.

[20] The applicant provided a number of extensive statements to police well prior to her sentencing. It is reasonable to conclude that when the sentencing judge said, in his *in camera* sentencing remarks, that "the [applicant] indicated a willingness to provide a statement …" he was referring to a statement which had already been provided. There was no reference in the material before the sentencing judge to any other statement or of the need for a further statement or statements. Nor was there mention of any offer by the applicant to provide such further statement or statements. Accordingly, the sentencing discretion miscarried as the cooperation which the sentencing judge had in mind was past and not future cooperation within the ambit of s 13A of the PSA.

[21] Section 13A of the PSA applies where a sentence "is to be reduced by the sentencing court because the offender has undertaken to cooperate with law enforcement agencies in a proceeding about an offence".[1] The offender's "written undertaking to cooperate … must be handed up to the court" after the offender is invited to address the Court.[2]

[22] Even if, which appears unlikely, the sentencing judge mistakenly described the actual provision of a written undertaking to cooperate with law enforcement agencies as an indication of a willingness to provide a written statement in future, no consideration would have been given by him to the provision of a discount for the applicant's extensive cooperation with authorities prior to the sentencing hearing as the initial discount from 14 years to 11 years was given only in respect of the applicant's early pleas of guilty. That cooperation was required to be taken into

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1 *Penalties and Sentences Act* 1992 (Qld), s 13A(1).

2 *Penalties and Sentences Act* 1992 (Qld), s 13A(3).

account in respect of the Queensland offences by s 9(2)(i) of the PSA and, in respect of count 1, by s 16A(2)(h) of the *Crimes Act* 1914 (Cth). It does not seem, however, that s 21E of the *Crimes Act* was applicable. Neither the sentencing judge nor counsel referred to it during the *in camera* proceedings.

[23] The sentencing discretion having miscarried in respect of the sentences imposed, this Court, being in position to do so, should exercise that discretion afresh. Before addressing the question of the appropriate discounts for cooperation with the authorities, it is appropriate to consider the submissions in respect of counts 1 and 2.

The submissions in respect of counts 1 and 2

[24] In relation to the sentences imposed for counts 1 and 2, counsel for the respondent submitted that the applicant's overall criminality was not limited to her conduct in procuring her child to engage in prostitution over a lengthy period, but included facilitating the entry of her child into Australia with the intent that she be used to provide sexual services. The decision in *R v TR & FV; ex parte A-G (Qld),*[3] was relied on to support the 14 year notional starting point adopted by the sentencing judge. The sentences imposed on TR for prostitution related offences were 13 years imprisonment with parole eligibility dates after serving four years. Although the complainant in that case was 12 to 13 years old at the commencement of the offending, the offending, which involved a similar breach of trust, occurred over a five month period only.[4] The conduct in *TR* involved more serious sexual acts, but there was not the "volume of systematic sexual exploitation" which occurred in this case. Nor did *TR* involve the organisation of a child to move to this country with the intention of commercial sexual exploitation.

[25] The significant features of the offending in this case were submitted by the respondent's counsel to be: the complainant's young age; the complainant's systematic corruption by her mother; the significant breach of trust; the number of men involved; and the nature of the sexual conduct, particularly the oral sex. These features, it was submitted, show that the applicant's offending was within the worst category of offending within the offence of procuring the prostitution of a young person.

[26] Limited weight should be given to a perceived low risk of reoffending where, as was the case here, the offending was commercially driven. Other favourable mitigating circumstances were appropriately reflected in the moderation of the sentence from 14 years to 11 years with a parole eligibility date at five years in the absence of cooperation pursuant to s 13A of the PSA.

[27] Counsel for the applicant submitted that the offending in *TR* was considerably worse than that of the applicant in that it involved full penetrative sex with numerous men: fully fledged prostitution. By way of contrast, the applicant limited the sexual activity in which the complainant could engage and took protective measures such as the use of condoms and generally providing supervision. Nor did the applicant, by way of contrast with TR, who was convicted of rape, perform sexual acts on the complainant. Other submissions made by counsel for the applicant were that: TR did not provide the applicant's significant level of pre-sentence cooperation or an undertaking under s 13A of the PSA; and the early

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3 (2008) 186 A Crim R 420.

4 The indictment alleged an offending period of approximately nine months.

parole eligibility date for TR, set at approximately 30 per cent of the head sentence, was more beneficial than the treatment afforded to the applicant. It was submitted that these features showed that the applicant's offending did not fall within the worst category of cases. The submission referred implicitly to *Veen v The Queen [No 2]*,[5] in which Mason CJ, Brennan, Dawson and Toohey JJ relevantly said:

> "[T]he maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed … That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

[28] Counsel for the applicant submitted that count 1 involved the single act of bringing the complainant to Australia for the purpose of use in the applicant's prostitution. It was not the case, and the prosecution did not contend at first instance, that it could be inferred that the applicant's only intention was that the complainant be used for sexual services. Furthermore, it was submitted, the applicant's conduct lacked many of the aggravating features that might be associated with sexual servitude such as slave labour and cruelty. *R v Dobie*,[6] although not involving a minor, tends to show that the sentence imposed in respect of count 1 for trafficking was manifestly excessive.

Consideration of the submissions in respect of counts 1 and 2

[29] No example of an offence under s 271.4(1) of the *Criminal Code* 1995 (Cth) concerning a minor could be found and the sentencing judge was referred to *R v Dobie*,[7] in which the adult male applicant was sentenced to concurrent terms of four years imprisonment for each of two counts of trafficking under s 271.2(2B) of the *Criminal Code* 1995 (Cth). The maximum penalty for that offence was 12 years imprisonment. The applicant organised the entry into Australia of two Thai women under separate arrangements made with each of them to provide sexual services in Australia. He deceived them as to their working conditions and, in particular, as to the time they would able to take off work each week. One of the women was in Australia for 36 days; the other worked for the applicant for a little over a month. Both women were pressured and subjected to verbal abuse.

[30] The applicant was 45 years of age. He had a criminal history which included fraud and prostitution offences and he had previously been imprisoned. His offending was described as "pernicious and callous"[8] in nature.

[31] By way of contrast, the occasions during which the complainant was required to provide sexual services were relatively limited, although extending over a period of years. For example, the agreed statement of facts confirms that in 2010 the complainant provided sexual services on at least 45 occasions to seven different clients. The diary indicated that in that year there were at least three occasions on which the complainant had to service two clients on the one day.

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5 (1988) 164 CLR 465 at 478.
6 [2011] 1 Qd R 367.
7 [2011] 1 Qd R 367.
8 *R v Dobie* [2011] 1 Qd R 367 at 388.

[32] The sentencing judge accepted that the applicant's early guilty pleas were "accompanied by a level of … remorse". There is evidence of the existence of remorse in the report of a psychologist, Mr Smith. Mr Smith was also optimistic concerning the applicant's prospects of rehabilitation. His opinion was that the risk of recidivism was low. There were also genuine attempts at rehabilitation during the 18 months between the applicant being charged and her conviction. That is also of some significance.[9]

[33] Notwithstanding the matters in the applicant's favour discussed above and the matters on which the applicant relied, the prostitution and corruption of a child, particularly one's own, is plainly far more criminally reprehensible than arranging for two mature aged prostitutes to enter Australia to ply their trade. This is so even though the applicant, misguided though she was, appeared to be concerned about the complainant's welfare and perceived herself to be acting in the complainant's interests. The applicant saw that the complainant was properly housed, fed, clothed and educated.

[34] Although counsel for the applicant's arguments on the point were not lacking substance, I have concluded that if, which I doubt, the applicant's offending was recognisably outside the worst category of cases for which the 14 year penalty for procuring was prescribed, it was only marginally so. The offending conduct, involving as it did the substantial corruption and degradation of the applicant's daughter from an early age for monetary gain, was singularly abhorrent and merits strong denunciation.

[35] The offending involved in the s 271.4(1) offence was also grave for many of the same reasons. Although it did not have the exacerbating circumstance of being committed over a lengthy period, it could be inferred that a lengthy period of sexual exploitation was contemplated. Also the maximum penalty was 25 years imprisonment, as opposed to 14 years imprisonment for the count 2 offence.

[36] The conduct involved in the maintaining offences was an aspect of the applicant's procuring of the complainant to engage in prostitution. The conduct involved in the offence under s 271.4(1) of organising the complainant's entry into Australia with the intention that she provide sexual services was also preparatory and incidental to the offending under s 229G(1)(a) of the *Criminal Code* (Qld). It is thus logical that a head sentence to reflect the overall criminality of the applicant's conduct be imposed in respect of count 2. I do not accept, however, that it would be an error of law, as the applicant claimed in her counsel's written submissions, to impose such a head sentence in respect of the count 1 offence. Such a course would need to be taken if the sentence to be imposed for the count 2 offence was inadequate to reflect the seriousness of the count 1 offending. That is not the case here.

[37] I consider an appropriate notional head sentence for count 2, before taking into account pleas of guilty and cooperation with the authorities, to be 13 years imprisonment. I now turn to a consideration of the consequences of the early pleas of guilty and cooperation with the authorities.

The respondent's submissions in respect of cooperation with the authorities

[38] The respondent submitted that a head sentence of 14 years reduced to 11 years to take into account the early plea of guilty before considering questions of future

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[9] *R v Phillips & Woolgrove* (2008) 188 A Crim R 133; *R v L; ex parte Attorney-General* [1996] 2 Qd R 63 at 66.

cooperation with authorities was within the range of the sound exercise of the sentencing discretion. It was further submitted that the two year reduction in sentence for promised cooperation with the authorities under s 13A was appropriate.

[39] The respondent's outline of submissions did not address the appropriate allowance for pre-sentence cooperation with the authorities other than by referring to inconsistencies between the applicant's and the complainant's accounts of events. Attention was drawn to the submission at first instance of senior counsel for the Crown to the effect that there were limitations to the applicant's cooperation in that her statements "[did] not support that the sexual interaction occurred as early in time or as frequently as disclosed by the child".

[40] Counsel for the respondent submitted that the applicant's cooperation had been sufficiently provided for by the reduction of the notional head sentence from 14 years to nine years. It was pointed out that the sentencing process does not involve a precise mathematical exercise and that the obligation is to take account of all relevant factors and arrive at a single result accommodating them all. Furthermore, it was submitted that any reduced sentence should not be "an affront to community standards".[10]

The applicant's submissions in respect of cooperation with the authorities

[41] It was submitted on behalf of the applicant that a guilty plea ordinarily attracts a full third reduction[11] and that a discount for s 13A cooperation was ordinarily in the order of a further 20 to 30 per cent.[12] Reference was made to *R v Sukkar*,[13] in which it was stated by Latham J, McClellan CJ at CL and Howie J agreeing, that "[g]enerally speaking … a discount of 50 percent is regarded as appropriate to assistance of a very high order".

[42] It was further submitted that a combined discount range of between 20 and 50 per cent was confirmed in *SZ v The Queen*,[14] in which Buddin J cited with approval *R v El Hani*,[15] in which Howie J indicated that a composite discount for a plea of guilty and future cooperation remained established practice.

Consideration of deductions for cooperation with the authorities and early pleas of guilty

[43] Principles applicable to the role in the sentencing process of an offender's cooperation with authorities are usefully discussed in the following passage from the reasons of Hunt and Badgery-Parker JJ in *R v Cartwright*:[16]

> "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.

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10 *R v Gladkowski* (2000) 115 A Crim R 446 at 448.
11 *R v Hoad* [2005] QCA 92 at [31]; *R v Norton* [2007] QCA 320; *R v Blanch* [2008] QCA 253 at [24].
12 *R v Webber* (2000) 114 A Crim R 381 at [4] and [16]; *R v SBI* [2009] QCA 73 at [6]; *R v SBS* [2010] QCA 108 at [19].
13 (2006) 172 A Crim R 151 at [54].
14 (2007) 168 A Crim R 249 at 258.
15 [2004] NSWCCA 162.
16 (1989) 17 NSWLR 243 at 252–253.

> 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 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:[17]

> "… 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."

[44] The joint judgment 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.[18]

[45] In *R v Gallagher*,[19] Gleeson CJ, with whose reasons Meagher JA agreed, observed that it will often be difficult to determine a specific and separate discount for

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17 *R v Cartwright* (1989) 17 NSWLR 243 at 253.

18 *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].

19 (1991) 23 NSWLR 220 at 227–228.

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:[20]

> "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."

[46] Gleeson CJ, referring to s 21E of the *Crimes Act* 1914 (Cth), observed:[21]

> "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 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."

[47] That there is no fixed discount or tariff for cooperation with the authorities has been restated in many cases,[22] at times, along with comments about discounts customarily given in a particular jurisdiction. In *R v Barrientos*,[23] the range was said, by reference to *R v Chu*,[24] to be 20 to 50 per cent for "significant assistance".

[48] I note that in *R v Sukkar*,[25] Latham J, McClellan CJ at CL and Howie J agreeing, said:[26]

> "While there is no fixed tariff for assistance to the authorities, discounts customarily ranged between 20 percent and 50 percent. There have been comparatively rare cases where a discount in the order of 55 percent or 60 percent has been given. Generally speaking however, a discount of 50 percent is regarded as appropriate to assistance of a very high order. No doubt, that is in part a reflection of the principle that a discount for assistance must

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20 *R v Gallagher* (1991) 23 NSWLR 220 at 228.
21 *R v Gallagher* (1991) 23 NSWLR 220 at 230.
22 *Ungureanu v The Queen* (2012) 272 FLR 84 at 31–33; *R v Barrientos* [1999] NSWCCA 1 at [47]; *R v Baldock* (2010) 269 ALR 674 at [6].
23 [1999] NSWCCA 1 at [47].
24 [1998] NSWSC 568.
25 (2006) 172 A Crim R 151.
26 *R v Sukkar* (2006) 172 A Crim R 151 at 167.

> not produce a result which is disproportionate to the objective gravity of a particular offence and the circumstances of a particular offender."

[49] Howie J, with whose additional remarks McClellan CJ at CL agreed, observed, in effect, that it should not be assumed automatically than an offender assisting the authorities will be at risk in prison and will be required to serve his or her sentence in more difficult conditions. Having regard to these considerations, it was his Honour's view that "discounts for a plea and assistance of more than 40 per cent should be very exceptionally, if at all, granted in a case where there is no evidence that the offender will spend the sentence, or a substantial part of it, in more onerous conditions than the general prison population".[27]

[50] If the extent and value of the applicant's cooperation were diminished by the matters referred to by the respondent, it was only to a slight degree. The applicant's statements were extensive and clear. She took the approach that where her account differed from that of the complainant, she would not dispute the complainant's account. The mere fact that the applicant's recollection differed in some respects from that of the complainant does not lead to the conclusion that the applicant was withholding information or even that the applicant's recollection was faulty. Also, it was not suggested that the matters raised by the respondent would prevent the applicant from giving valuable evidence in future prosecutions. There was no evidence that suggested that the applicant was not acting bona fide in her cooperation or that her cooperation was other than frank and full. On the other hand, there is evidence that the Crown was, and remains, happy to make use of the applicant's assistance. The nature and extent of her cooperation are discussed more fully in the *in camera* reasons.

[51] The applicant's past and promised future cooperation has been, and is, very extensive. Having regard to the nature and extent of her cooperation, I would not readily conclude that there is no appreciable risk of physical or other retribution.

[52] In order to allow for the early pleas of guilty and past cooperation, I consider that a sentence of nine years imprisonment with a parole eligibility date fixed after serving four years and six months is appropriate in respect of count 2.

[53] Having regard to the applicant's undertaking pursuant to s 13A of the PSA, I would reduce that sentence pursuant to those provisions to seven years imprisonment with a parole eligibility date fixed after three years and six months. In the case of count 1, the appropriate penalty to recognise the early plea of guilty and cooperation with the authorities is seven years imprisonment with a non-parole period of three years and six months.

[54] Accordingly, the orders I would propose are that:

1. The application for leave to appeal against sentence be granted.

2. The appeal be allowed.

3. The sentence imposed for count 1 be set aside and a sentence of seven years imprisonment with a non-parole period of three years and six months from 16 April 2013 be substituted therefor.

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[27] *R v Sukkar* (2006) 172 A Crim R 151 at 154.

4. The sentence imposed for count 2 be set aside and a sentence of seven years imprisonment with a parole eligibility date fixed at three years and six months from 16 April 2013 be substituted therefor.

5. A parole eligibility date fixed at three years and six months from 16 April 2013 be substituted for the parole eligibility date of four years fixed in respect of counts 5, 8, 10 and 11.

6. The terms of imprisonment imposed on 16 April 2013 in respect of counts 3 to 20 inclusive are otherwise confirmed.

[55] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.