SUPREME COURT OF QUEENSLAND

CITATION:	*R v Alt* [2013] QCA 343
PARTIES:	**R** **v** **ALT, Stephen Wayne** (applicant)
FILE NO/S:	CA No 137 of 2013 DC No 433 of 2012 DC No 432 of 2012 DC No 370 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	15 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2013
JUDGES:	Gotterson and Morrison JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence refused.** **2. The confidential reasons for judgment of Morrison JA handed down to the parties today and marked "A" be not further published, a copy thereof be placed in a sealed envelope, and that envelope be opened only by order of the Court or upon an application under s 188(2) of the *Penalties and Sentences Act* 1992 (Qld).**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was convicted on his own plea of guilty to 14 counts, under three indictments, of dishonesty and property related offences committed over a three year period – where the applicant was sentenced to six years imprisonment with parole eligibility set at 30 per cent – where the applicant seeks leave to appeal against his sentence – where the applicant contends the learned sentencing judge erred in the regard given to the time that has elapsed (and rehabilitation) since the commission of the offences – where there was a delay of nine years from the last offence to sentence – where the delay was caused by the

applicant pursuing lawful avenues (for example, assisting police) and failing to appear in court – where the applicant gained lawful employment and ceased all criminal activity during the delay – whether the learned sentencing judge erred in taking the applicant's rehabilitation into account, but discounting it where it was the product of delay caused by the applicant

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant seeks leave to appeal against his sentence – where the applicant contends the learned sentencing judge erred in her application of sections 9, 13 and 13A of the *Penalties and Sentences Act* 1992 (Qld) – where the applicant provided assistance (*PSA*, s 9), pleaded guilty (*PSA*, s 13) and provided an undertaking to cooperate (*PSA*, s 13A) – whether the learned sentencing judge confused the separate reductions required where there has been both presentence cooperation with a s 13A undertaking

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant seeks leave to appeal against his sentence – where the applicant contends the learned sentencing judge erred in failing to give regard to the applicant's willingness to make full restitution or pay compensation – where the applicant sought an order for the payment of restitution or compensation in lieu of imprisonment – where there were difficulties quantifying the actual loss – where the Crown did not seek restitution or compensation – whether the learned sentencing judge erred in not making an order for restitution or compensation

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant seeks leave to appeal against his sentence – where the applicant contends the learned sentencing judge did not adequately explain why her Honour made orders accumulating the sentence imposed in respect of the robbery with that imposed in respect of the break and enter – whether the learned sentencing judge erred in imposing cumulative sentences on the two offences chosen

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant contends that the sentences imposed are manifestly excessive – where the applicant contends that the comparable cases relied upon by the Crown did not include the mitigating

factors present in the applicant's case – where the applicant seeks a wholly suspended sentence coupled with an order for restitution or compensation – whether the sentence is manifestly excessive – whether there must have been some misapplication of principle, identifiable or not, to warrant appellate intervention

Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 9, s 13, s 13A

Carroll v The Queen (2009) 254 CLR 379; [2009] HCA 13, cited
Director of Public Prosecutions (Cth) v De La Rosa (2010) 79 NSWLR 1; [2010] NSWCCA 194, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, applied
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
R v Chapman & Attorney-General of Queensland [1998] QCA 476, considered
R v Cockerell (2001) 126 A Crim R 444; [2001] VSCA 239, cited
R v Kitching [2003] QCA 539, considered
R v Kukunoski (unreported, New South Wales Court of Criminal Appeal, 17 August 1989), cited
R v L; ex parte Attorney-General (Qld) [1996] 2 Qd R 63; [1995] QCA 444, applied
R v Major; ex parte A-G (Qld) [2012] 1 Qd R 465; [2011] QCA 210, cited
R v Mather [1999] QCA 226, considered
R v Morse (1979) 23 SASR 98, considered
R v Norton [1995] QCA 277, considered
R v Phillips & Woolgrove (2008) 188 A Crim R 133; [2008] QCA 284, applied
R v Ross [2004] QCA 21, considered
R v Shore (1992) 66 A Crim R 37, considered
R v Sparks; *R v D Stracey*; *R v P Stracey* [2010] NSWSC 1512, cited
R v Suarez [2012] QCA 190, cited
R v Thompson (1987) 37 A Crim R 97, cited
R v Tiburcy (2006) 166 A Crim R 291; [2006] VSCA 244, cited
R v Todd [1982] 2 NSWLR 517, cited
R v Whyte (2004) 7 VR 397; [2004] VSCA 5, cited

COUNSEL: I D Temby QC, with A Boe, for the applicant
D Holliday for the respondent

SOLICITORS: Nyst Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** This is an application for leave to appeal by Stephen Wayne Alt in respect of sentences imposed upon him on 21 May 2013. The applicant pleaded guilty to a total of 14 counts under three indictments.[1] In general the charges and sentences were as follows:

(a) Indictment 1:[2] robbery with a circumstance of aggravation; sentence of four years imprisonment.

(b) Indictment 2:[3]

(i) Count 1 – unlawfully possessing a motor vessel; sentence of three years imprisonment;

(ii) Count 2 – fraud to the value of $5,000 or more; sentence of three years imprisonment;

(iii) Counts 3 and 4 –unlawfully possessing a motor vehicle with damage (two counts); sentence of four and a half years imprisonment;

(iv) Counts 5 to 7 – unlawfully possessing a motor vehicle; sentence of three years imprisonment.

(c) Indictment 3:[4]

(i) Counts 1 and 3 – unlawful use of a motor vehicle; sentence of three years imprisonment;

(ii) Count 2 – break and enter premises with intent; sentence of two years imprisonment;

(iii) Counts 4 and 5 – fraud; sentence of two years imprisonment;

(iv) Counts 7 – receiving; sentence of six months imprisonment.

[3] All sentences were ordered to be served concurrently, with the exception of that for the break and enter[5] which was ordered to be served cumulatively with the four years imposed in respect of the robbery. There was, therefore, a total sentence of six years imprisonment with a parole eligibility date set at 19 May 2015.

[4] The grounds of the application for leave to appeal (as amended without objection on the morning of the hearing) were that the learned sentencing judge had erred:

1. Ground 1 – in the regard given to the time that has elapsed (and rehabilitation) since the commission of the offences;

2. Ground 2 – in her application of ss 9, 13 and 13A of the *Penalties and Sentences Act* 1992 (Qld) ("PSA");

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1 Count 6 and 7 on Indictment 3 were in the alternative.

2 Indictment No 370 of 2001, presented 22 June 2001.

3 Indictment No 432 of 2012, presented 6 December 2012. Formerly indictment No 24 of 2005, presented 6 April 2005.

4 Indictment No 433 of 2012, presented 6 December 2012. Formerly indictment No 412 of 2004, presented 29 October 2004.

5 Count 2 on Indictment 3.

3. Ground 3 – in failing to give regard to the applicant's willingness to make full restitution or pay compensation;

4. Ground 4 – in making orders accumulating the sentence imposed in respect of the robbery with that imposed in respect of the break and enter; and

5. Ground 5 – the sentences imposed are manifestly excessive.

Circumstances of the offences

[5] Three schedules of facts were placed before the sentencing judge.[6] The applicant did not dispute any of the underlying facts.

Indictment 1 – robbery with a circumstance of aggravation

[6] On 4 July 2000, the applicant overheard one Austin talking in Club Conrad (Jupiters Casino) about cashing in his gambling chips worth $125,000, and going to pay cash for a property at a real estate office the following day. The applicant told an acquaintance, Stapylton, that they had an opportunity to grab the money. Stapylton followed Austin home that night in a rented car used for the subsequent robbery.

[7] On 5 July 2000, the applicant went to the casino early and had breakfast. He then stood around waiting for Austin to arrive. The applicant and Stapylton kept in contact on mobile telephones as Stapylton had the car. The applicant saw Austin coming out of the casino with security guards, carrying the envelope of money. Stapylton arrived shortly thereafter in the car and, with the applicant as passenger, they followed Austin in his car waiting for an opportunity to grab the money. While following in the car, the applicant put on a blue coat jacket, baseball cap and sunglasses which were bought for the purpose of disguising himself.

[8] In his statement[7] the applicant told Stapylton, "about what this old guy had been saying. At this time I came up with the idea to rob that person and started discussing with Bernie[8] how we would do it. We came up with the idea that we would try and grab the money of this guy the following day if the opportunity arose."

[9] Austin went straight from the casino to a real estate agency at Mermaid Beach. A real estate agent greeted Austin at his vehicle, and carried the envelope of money into the real estate office. Austin and the real estate agent sat at a desk with their backs to the front entry door. Another real estate agent sat on the opposite side of the desk. The envelope of money was placed on top of the desk.

[10] The applicant got out of the vehicle and went and looked through the glass windows of the real estate office to check out the scene. He saw the envelope of money on the desk and took his opportunity. The applicant walked into the office, pushed a female witness and put his arm around her shoulder. He had his hand in a black bag and said words to the effect, "Don't be stupid, I've got a gun". The female elbowed him thinking he was joking because it was not said in a threatening manner.

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6 AR 58-66.

7 Statement of S W Alt, dated 18 December 2010, at para 10; AR 69.

8 Stapylton.

[11] One real estate agent (Collins) then stood up and backed away from the desk with his hands in the air. The applicant reached between Austin and the other real estate agent (Hicks), and grabbed the envelope of money. Hicks attempted to grab the envelope from the applicant but failed to do so.

[12] The applicant then ran out of the office. Hicks chased the applicant on foot. Collins called to Hicks, "Don't Ian, he's got a gun". Collins then followed Hicks down the road as well. The applicant was seen getting into the passenger side front door of the vehicle, which then drove away.

[13] The applicant and Stapylton drove to the applicant's residence. The applicant rang his ex-wife, who drove to the residence and picked up both him and Stapylton. The applicant gave Stapylton $35,000, or possibly $40,000, when they dropped him off in Southport. The applicant's ex-wife then drove him around, allowing him to drop the clothing he had worn in the robbery into different charity bins. She then dropped him at a car dealership for him to pick up his own car. He gave his ex-wife $25,000. The ex-wife did not know about the robbery.

[14] The applicant then paid $22,000 to get his car back from Motorworld. He also put $1,500 into his bank account; paid $3,600 to the pawn dealership "Money Bags" to get back his wife's wedding ring; paid $2,900 for rent, $300 for a video cassette player and approximately $200 for groceries.

[15] Out of the $125,000, $34,500 was still unaccounted for. The total amount recovered was $14,855. As a result of a witness obtaining a partial licence plate, the applicant was identified as the person renting the vehicle. He was spoken to by police and made a full admission and provided a statement dated 18 December 2000.

Indictment 2

Counts 1 and 2

[16] In September 2003 the applicant sold a boat and trailer for $75,000. The boat and trailer had been stolen from the premises of Prestige Marine in June 2003. The value of the boat and trailer was approximately $112,500.

[17] In late August the applicant met a buyer for the boat and took $20,000 as a holding deposit. On 4 September 2003, the applicant went to Queensland Transport and represented to them, in documentation produced to that Department, that he was the owner of the boat and trailer. Further monies were paid by the buyer to the applicant, as a result of which he received about $45,000 (including the holding deposit) for the boat and trailer. About 15 days after the initial deposit, police took possession of the boat and trailer.

Counts 3 – 7

[18] Between May and September 2003, the applicant was involved in the conduct the subject of these counts. He negotiated the lease of a shed. The applicant told the owner of the property that a person called Corrick, with whom the applicant was associated, lived in Western Australia and had a heavy machinery business, and they needed a shed to clean and maintain equipment. The applicant negotiated the lease and was employed to supervise and carry out work of the stripping of two

stolen graders worth $250,000, and packing the parts in shipping containers. The containers were bound for the Philippines and were to be sold at auction. In addition the shed also contained stolen vehicles, namely a Mitsubishi truck, a backhoe and a bobcat.

[19] The offences came to light when the shipping containers were intercepted by Australian Customs, and investigation led to the shed which had been rented by the applicant.

Indictment 3

[20] The offences the subject of this indictment were committed whilst on bail for the robbery charge.

Count 1

[21] Between 12 October 2002 and 14 October 2002, a Honda CRV was stolen from the Sunshine Ford car dealership at Southport. The applicant told police that he took a friend to the Sunshine Ford dealership during the day and that the friend stole a key from inside the glove box of the vehicle. He took his friend back later that night so he could steal the car.

Counts 2 and 3

[22] On 6 November 2002, a bobcat was stolen from Budget Landscape Supplies at Southport.[9] Entry had been gained by way of a chain and padlock being cut from the front gate.[10]

Counts 4 and 5

[23] On 6 November 2002, the applicant attended Neumann's petrol station at Southport to hire a trailer. He was driving the stolen Honda CRV. The applicant produced a New South Wales driver's licence in the name of Richard Evans and provided a mobile phone number. He then signed a hire agreement to hire the trailer. Enquiries with the New South Wales Transport Authority revealed that the licence was a forgery. The applicant admitted that he had obtained the forged driver's licence in New South Wales and presented it on 6 November 2002, stating that he was Richard Evans.

Counts 6 and 7

[24] The number plates on the Honda CRV had previously been stolen from a Honda motor vehicle which was parked at the Highway Auto Centre in Springwood, between 17 October 2002 and 18 October 2002.

[25] The offences under indictment 2 came to light on 6 November 2002 when police were called to attend a single vehicle traffic accident. The Honda CRV had a trailer attached, and was carrying the bobcat. The forged New South Wales driver's licence was found inside, along with a pair of red bolt cutters. The applicant's right index finger print was also located on the outside of the rear driver's side door. The applicant was spoken to by police on 13 April 2003, at which time he was in a holding cell at Surfers Paradise station.

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9 Count 3.

10 Count 2 – break and enter with intent to commit an indictable offence.

The applicant's personal circumstances

[26] The applicant was born on 9 September 1956. As a consequence he was 43 years of age when the robbery offence was committed, and between 46 and 47 years of age when the remaining offences were committed. He was 56 years when sentenced.

[27] The applicant was married to his first wife for about 12 years from around 1979. From that relationship there were two sons, one born in 1987 and the other in 1989. The applicant and his first wife separated in about 1992.

[28] The applicant married a second time in August 1997 (when he was about 41) and as at the date of his sentence had a 17 year old daughter from that relationship.

[29] The applicant was born in Emmaville in New South Wales. He grew up with his mother and father, and one sister. He went to boarding school at The Armidale School, and finished year 12. He then started an engineering degree, but abandoned that after one year. He moved into work in the construction industry where he had remained.

[30] For a time the applicant operated a business called Gold Co Landscaping, contracting to undertake work on various development projects. Toward the end of 1993 that business ceased operating and the applicant relocated to Malaysia. He returned from Malaysia in 2000.

[31] His statement in December 2000 stated that the applicant gambled at the casino, in the high rollers' room. He lost quite a lot of money that way.

The issue of delay

[32] The annexed chronology reveals considerable delay between when the applicant was charged and when all of those matters were finally dealt with. Some of that delay was the product of the applicant's cooperation with the police, and some of the delay was simply caused by the applicant's choice to ignore the proceedings while he secured employment in order to provide for his family. Since delay is relied upon in this application as being a matter that should affect the sentence that ought to be imposed, some further detail is provided.

[33] Bench warrants were issued on four occasions.[11] The first in October 2001 was clearly related to the first indictment. This was shortly after an adjournment was sought by the applicant's representatives in order to "finalise instructions". Subsequently the applicant committed the offences the subject of indictment 3, in 2002. He was not interviewed about those offences until 13 April 2003, at which time he was in a holding cell in a police station. The indictment in respect of those offences was initially presented on 29 October 2004, and a bench warrant issued shortly thereafter, on 5 November 2004. In the meantime, in early September 2003, the police discovered the store of stolen goods, and dismantled stolen heavy machinery, and the applicant's involvement in those offences. Whatever cooperation was provided at that time seems to have run its course by the end of 2004.

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[11] See Crown's submissions (AR 31-32), learned primary judge's reasons (AR 50-51), defence's written sentencing submissions (AR 75-76) and Crown's "time line" ("chronology") (AR 95-96). The bench warrants were issued on 31 October 2001 (AR 3, 31, 75 and 95), 5 November 2004 (AR 31, 75 and 95), 19 January 2006 (AR 31, 76 and 95) and 8 April 2008 (AR 3, 32, 76 and 95).

[34] The applicant was arrested on 13 April 2003 in respect of the offences the subject of indictment 3. Some admissions were made in an unrecorded interview. In respect of the offences under indictment 2, the applicant was arrested on 9 September 2003, and charged. At some time in early 2004 the applicant assisted the police in an interview, identifying locations where his co-accused resided, and providing other information. That assistance enabled the recovery of most of the parts of the stolen earthmoving equipment, by identifying previously unknown locations where the equipment had been hidden. The assistance also extended to identifying other persons suspected to be involved in those offences, and other unrelated offences. By October 2005 the applicant's assistance was still of some utility to ongoing police investigations. The chronology records that in November 2005 police had still not finalised their Section 13A considerations.[12]

[35] However, by January 2006 the applicant had left his legal representatives in the position where they could not proceed because he was interstate and had "advised he won't return". That resulted in the issue of another bench warrant on 19 January 2006.

[36] As one can best understand the chronology, it seems that in November 2007 the applicant was arrested, and recommitted to the District Court. However, only a few months later in January 2008 there was an adjournment because of a suggestion that the applicant was assisting police. Whether or not that is so is not clear. It is not supported by any direct evidence.

[37] By April 2008 the chronology shows that the defence representatives had lost contact with the applicant and had withdrawn. As a consequence, a fourth bench warrant issued.

[38] The applicant accepts that he caused some part of the delay. On his own account the applicant secured employment with a firm called Ostwalds in October 2004, working at Roma. He worked with Ostwalds from that time, necessitating travel to various country areas, returning to the Gold Coast each weekend.

[39] At some point he stopped appearing as required by his bail conditions.[13] His explanation is that he chose to turn his back on the issue of the offences and the bail requirements, and concentrated on work in order to make provision for his wife and daughter in the event he was sent to jail. He did not maintain contact with his lawyer at all. This certainly coincides with the chronology which shows that by April 2008 the defence representatives had lost contact with the applicant and withdrawn. That was the occasion when the fourth bench warrant issued.

[40] This recitation of the events reveals that any delay associated with assistance being given to the police is relatively confined to the period between early 2004 and November 2004, at which time a bench warrant issued. At about October 2004 he gained employment which took him away from home for substantial periods. A second period in July 2005 to January 2006 involved consideration of possible cooperation; this sits in a different category for that very reason. From early 2006 the applicant was interstate and advising he would not return, and on his own account shortly thereafter decided to prefer his family's interests over his obligations under his bail conditions and to respond to the indictments.

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12 A reference to a proposed undertaking to cooperate.

13 From the chronology this started in November 2004 when the second bench warrant issued.

[41] On any view the conclusion of the learned primary judge, that most of the delay was caused by the applicant, was open on the facts.

Ground 1 – delay and rehabilitation

[42] The applicant's contentions focused on how the issue of rehabilitation was treated by the learned primary judge rather than any particular unfairness to the applicant by reason of excessive delay. The submissions referred to what this court had to say in *R v Phillips & Woolgrove*,[14] and in particular the two aspects of delay referred to in this court's decision in *R v L; ex parte Attorney-General of Queensland*.[15]

[43] In *L* it was held that the lapse of time between the commission of the offence and the imposition of sentence should ordinarily not be a mitigating factor in a sentence unless that delay had resulted in some unfairness to the offender. Two examples of that unfairness were given. The first is where the delay has the consequence that the offender's liberty may be curtailed, his reputation called into question, or he is left in a state of uncertainty caused by a failure to prosecute his case more quickly. The second is where "the time between commission of the offence and sentence is sufficient to enable the court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress".[16]

[44] The applicant did not advance any argument that delay had caused unfairness in the sense in which that term was used in *L*. Rather, reliance was placed on the second aspect of delay, namely that which permits the court to see that rehabilitation has occurred or that its progress is underway.

[45] In that respect, the applicant pointed to the fact that there was no relevant criminal history prior to the commission of the robbery in 2000, and there had been no further reoffending since 2003. So much may be accepted. It may also be accepted that in September 2004 the applicant managed to obtain employment with Ostwald Bros Civil Constructions ("Ostwalds"), commencing in October 2004, and has remained in their employ ever since. As at the date of sentencing he was an Area Manager for Queensland. Affidavit evidence was presented from Mr Gall, the owner and operator of a civil construction business, and Mr Borlase, a recently retired operator of a fencing business.

[46] Mr Gall's evidence was that in 2008 his business tendered for work with Ostwalds and in that context he had regular contact with the applicant who oversaw much of the work that Mr Gall did. He found him to be very capable, hard working and enthusiastic in that role, and always a pleasure to deal with. He also described him as an "honest, hard-working and conscientious man, totally responsible and decent in every way", and "a truly good, caring, hard-working man".[17]

[47] Mr Borlase's affidavit dealt with his contact with the applicant up to 1994, and then since 2008. His overall experience with the applicant led him to believe that "he is a normally responsible, moral and law-abiding man, in my experience he has a widespread reputation in the construction community as a capable, hard-working, and honest businessman".[18]

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14 *R v Phillips & Woolgrove* [2008] QCA 284 at [56].
15 *R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63 at 66-67; [1995] QCA 444.
16 *R v L; ex parte Attorney-General (Qld)* at 66.
17 AR 90.
18 AR 92.

[48] The learned primary judge took into account the question of lengthy delay and rehabilitation. The following passages show her Honour's treatment of those issues:

> "The offences now have some age on them. They began in 2000 and concluded in 2003, nine years ago. That is a lengthy delay. Most of it appears to have been due to your own conduct, a combination of pursuing lawful avenues and, more significantly, failing to appear in Court.
>
> …
>
> I accept that you lost a lot of money after you relocated to Australia. The offending period is confined to three years following that. Your criminal activity in its entirety had been about making a lot of money quickly. It stopped after you took on lawful employment. You have had no convictions before or since.
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> Each time you were caught, you admitted what you had done. You gave early indications that you might plead guilty and eventually you did plead guilty, but the level of your cooperation has been impaired by your act of[19] resistance to a resolution. Events suggest that your cooperation was borne of pragmatism rather than remorse. As early as 2001 your lawyers were in discussion with the Crown, but after the Crown revealed the sentence it was seeking you failed to show up. You went on to commit the other offences. There were sentence listings in 2005 and 2008. On those occasions you made claims on the eve of sentence which had to be investigated. Then, when the investigation ended, you failed to appear. There were four bench warrants in total, although surprisingly you were prosecuted only for breaches in 2001 and 2002. You have admitted that at some point you simply stopped answering your bail and that you turned your back on the whole issue. From 2008 it was some three and a half years before you were back in Court. You ignored your lawyers' attempts to contact you and it seems that it was simply a case of hiding in plain sight. You bought a unit in your own name and your wife's name. Your wife maintained that home while you worked away from home during the week. The most recent delays have involved a proposed challenge to your confession and the 2013 statement.
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> …
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> In respect of the long delay, or the long passage of time since the commission of the offences, there is no suggestion that you have been prejudiced by that delay, and in fact you say that you wanted to make sure that there was financial stability for your family. You re-established yourself and have been working for a large mining company since 2004. You are the area manager.
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> The opportunity to rehabilitate yourself has come largely from your own efforts to avoid sentence. You cannot expect to benefit from that.

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19 The phrase "act of" should probably read "active".

> The significance of the cessation of offending is that the offending period is limited to three years of your life. You have demonstrated that you still have marketable skills and that while you are employed you are unlikely to re-offend."[20]

[49] As is evident from the passages referred to above, the learned primary judge was fully conscious of the level of rehabilitation evident in the fact that there had been no further offending since 2003, full-time and responsible employment since 2004, and an established and stable family. However, her Honour took the view that on the evidence that rehabilitation had been achieved substantially because of the applicant's responsibility for the delay and his preferring of the opportunity to make financial provision for his family.

[50] In my opinion the learned primary judge did not err in the way she treated the impact of the rehabilitation, given that it was largely achieved by the applicant's efforts to avoid sentence, or the applicant's turning his back on the process.

[51] In *L*, the second example of delay as a mitigating factor was that where the court could see that the rehabilitation had occurred or was well underway.[21] However, that was not put forward on the basis that it was applicable where the delay was caused by the offender, either wholly or substantially. Indeed, in *R v Phillips & Woolgrove*[22] this court went on to refer to a passage quoted by Maxwell P in *R v Tiburcy*.[23] The passage came from the judgment of Chernov JA in *R v Cockerell*:[24]

> "The courts have … recognised that such delay which, as here, cannot be attributed to the offender, constitutes a powerful mitigating factor at a number of levels – see, for example, *Miceli*, *Todd*, *Schwabegger*, *MWH*, *Blanco*. First, and perhaps foremost, where there has been a relatively lengthy process of rehabilitation since the offending, being a process in which the community has a vested interest, the sentence should not jeopardise the continued development of this process but should be tailored to ensure as much as possible that the offender has the opportunity to complete the process of rehabilitation."

[52] In *L*[25] the court also referred to the approval given by the High Court in *Mill v The Queen*[26] to a passage by Street CJ in *R v Todd*.[27] Chief Justice Street, with whose reasons the other members of the court agreed, said:

> "… it would be wrong, in my opinion, to disregard the practical situation that the appellant has already served a substantial period of imprisonment in Queensland for offences so closely related in time and character to the Sydney offences …
>
> … where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires

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20 AR 49-51.
21 *R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63 at 66.
22 *R v Phillips & Woolgrove* [2008] QCA 284.
23 *R v Tiburcy* (2006) 166 A Crim R 291 at 292; [2006] VSCA 244.
24 *R v Cockerell* (2001) 126 A Crim R 444; [2001] VSCA 239.
25 *R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63 at 66.
26 *Mill v The Queen* (1988) 166 CLR 59 at 64.
27 *R v Todd* [1982] 2 NSWLR 517 at 519-520.

> weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach – passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner."

[53] As can be seen, that statement also was not concerned with the situation where the delay has been caused by the offender.

[54] What is apparent from the learned primary judge's treatment of the question of rehabilitation is that she did take it into account, but limited its utility by reference to the period where rehabilitation came from the applicant's efforts to avoid sentence; in other words, discounted where it was the product of delay caused by the applicant. That much seems clearly evident from this passage in her Honour's remarks:

> "The opportunity to rehabilitate yourself has come largely from your own efforts to avoid sentence. You cannot expect to benefit from that.
>
> The significance of the cessation of offending is that the offending period is limited to three years of your life. You have demonstrated that you still have marketable skills and that while you are employed you are unlikely to re-offend."[28]

[55] The applicant contends that the learned primary judge's approach was wrong, on the basis that "the opportunity for a Court to see demonstrated rehabilitation, through delay in the resolution of a matter, is not diminished or rendered irrelevant even if it could be found that the entire period of delay was solely caused by the applicant".[29] I do not accept that submission. It finds no foundation in decisions such as *R v Phillips & Woolgrove*[30] or *L*.[31] Further, to go as far as that contention would have it, would run counter to the approach evident in *R v Shore*:[32]

> "To allow leniency because of delay alone would be, as the learned sentencing judge pointed out, to place a premium on absconding and would be entirely contrary to the public interest … not to encourage absconding by affording any additional leniency in relation to it. That is not to say that genuine rehabilitation during such period is to be entirely ignored: *Thompson*.[33] But inevitably, it cannot be given the same significance as in a case of the other sort."

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28 AR 51.
29 Applicant's Outline of Submissions, filed 1 August 2013, page 4.
30 *R v Phillips & Woolgrove* [2008] QCA 284 at [56].
31 *R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63, at 66-67.
32 *R v Shore* (1992) 66 A Crim R 37 at 47. See also: *R v Whyte* [2004] VSCA 5 at [25].
33 *R v Thompson* (1987) 37 A Crim R 97.

[56] It is well established that where delay has been caused by the offender, whether by way of absconding, or simply ignoring the pending proceedings, any consequent rehabilitation is discounted. Thus an offender cannot claim the full benefit of rehabilitation where the freedom used in order to achieve it is freedom that has flowed from the offender's absconding, or has otherwise been caused by the offender's own conduct.[34] In *R v Whyte*[35] the Victorian Court of Appeal dealt with the contention that delay cannot figure largely in the sentencing process where it is "self inflicted", rather than the product of the fault in the prosecuting authority or the system of administration of justice. As to that they said:

> "Where, however, the delay cannot be sheeted home to the prosecution or the system, but can be fairly attributed to the accused, such as absconding from bail, fleeing the jurisdiction or otherwise avoiding being brought to justice, delay must necessarily become of less significance, even to the point of giving less credit for rehabilitation established during that period."[36]

[57] Where delay has permitted almost complete rehabilitation, the mitigating effect will still be discounted if the delay has been caused by the offender. In *R v Sparks*; *R v D Stracey*; *R v P Stracey*[37] the court was dealing with co-accuseds on a manslaughter charge. Those concerned had destroyed sufficient evidence to avoid detection for 23 years. By that time one of the accused, David Stracey, who had a substantial prior criminal record involving drug offences, had so rehabilitated himself that the judge was able to describe his previous record and him in these terms:

> "It came to an end, however, in 1992 and I am satisfied that, since then he has not only been drug free but also crime free. Indeed, his life has been utterly transformed into that of a decent hard-working family man. In a very real sense the person who has come before me is no longer the person who committed the serious crimes for which he must now be sentenced."[38]

[58] Notwithstanding that, the mitigation justified by the rehabilitation of the offender was still discounted.[39] Further, even where mitigation is sought on the basis that delay has meant the applicant had unresolved charges hanging over his head for a lengthy period of time, mitigation on that account is justified where the delay is not attributable to the offender.[40] In *R v Suarez* the applicant had contributed to the delay by the way in which he had dealt with the matter of the offences; the matter had been listed for trial on a number of occasions, adjournments had been granted for a variety of reasons, and on occasions he did not have legal representation. Some of the delay had been caused by the applicant and some was the responsibility of the prosecution.

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34 *R v Thompson* (1987) 37 A Crim R 97, adopted in *Shore* (1992) 66 A Crim R 37 at 45-46; *R v Kukunoski* (unreported, New South Wales Court of Criminal Appeal, 17 August 1989) where the delay was caused by the applicant's election to plead not guilty.

35 *R v Whyte* [2004] VSCA 5.

36 *R v Whyte* at [25], adopting *R v Thompson* (1987) 37 A Crim R 97 at 100 per Street CJ.

37 *R v Sparks*; *R v D Stracey*; *R v P Stracey* [2010] NSWSC 1512.

38 *R v Sparks*; *R v D Stracey*; *R v P Stracey* [2010] NSWSC 1512 at [50].

39 *R v Sparks*; *R v D Stracey*; *R v P Stracey* [2010] NSWSC 1512 at [50].

40 *R v Suarez* [2012] QCA 190 at [29].

[59] In my opinion the learned primary judge has taken into account the rehabilitation, but discounted its impact where it was the product of delay caused by the applicant. I do not consider that approach involved error.

Rehabilitation – report of Professor Morris

[60] The second aspect of the applicant's challenge on this ground relates to the learned primary judge's treatment of a report by a psychiatrist, Professor Morris. That report expressed the diagnosis that during the period of the offending behaviour from 2000 to 2003 the applicant suffered from a major depressive disorder with anxiety features, but the depressive disorder recovered and was resolved in 2004 when the applicant obtained employment and started to receive a regular income. The report expressed the view that the psychiatric condition had now resolved, and no further psychiatric treatment was required. It went on to express a prognosis in these terms:

> "He has recovered from his psychiatric condition and no longer uses alcohol in a hazardous way. His recovery from his psychiatric problems has been complete and has remained stable. He has a very good prognosis. I doubt whether he will develop psychiatric problems for the foreseeable future. He has removed himself from contact with his previous criminal associates. He has now developed a new social support network with people he works with in his stable employment and he continues to have a loving and supportive family life. The poor state of mood and the anxiety that he suffered from contributed to impulsive and poor judgements made during the time of his offending behaviour. Since he has recovered from his psychiatric condition and now that he has employment and regular income I consider the likelihood of his reoffending is extremely remote."[41]

[61] There were features about the report which justified some reservation as to its acceptance. Professor Morris was not the applicant's treating psychiatrist at any time. The report was based on a single examination of the applicant on 10 December 2012, and a review of documentation sent a few days before that, and certain information about the indictments.

[62] Further, insofar as the history is recorded in that report, it is based on self-reporting by the applicant. There are some difficulties with that, including the fact that Professor Morris' recitation of the incident history does not expressly deal with the robbery offence. It refers to the offences between 2000 and 2003 as being offences which "involved him breaking and entering business premises in order to get machinery".[42] Then, "[t]here were no assaults and no weapons used".[43] Those descriptions do not particularly match the real facts involved in the robbery, particularly as there was an assault on the female in the real estate office. Further, the suggestion that "[h]e was working with a criminal syndicate during this period" is at odds with the facts surrounding the robbery, if that comment is meant to include the offence in 2000. The facts concerning the robbery make no reference to any criminal syndicate. The plan to commit the offence was one thought up by the applicant.

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41 AR 86.
42 AR 84.
43 AR 84.

[63] The learned primary judge took Professor Morris' report into account and dealt with it in this way:

> "Late last year you spent a session with a psychiatrist for the purpose of a Court report. This was nine years after the last offence. Professor Morris had not seen you, of course, at the time of the offending. He relied upon your self-report, together with details of the offences and the fact that the offending followed financial losses and ended when you obtained another job.
>
> On the strength of what you described, Professor Morris concluded that you were suffering at the time from major depression and anxiety with excessive drinking, and that that condition had resolved itself by the following year. He concluded you must have made a full recovery when you went back to work in 2004. There had been no treatment and the condition had not been diagnosed until you spoke to Professor Morris last year.
>
> Unfortunately there is an issue of credit. The foundation of the diagnosis lacks credibility. It is uncorroborated. It depends on your account. You are here because you admitted substantial dishonesty. Your conduct over the last 13 years suggests a very strong instinct for self-preservation. Other claims that you have made do not appear to have been substantiated.
>
> I accept that you felt under pressure because of the financial situation, but I do not accept that your judgment was impaired by illness."[44]

[64] The deficiencies to which the learned primary judge referred were the subject of an exchange between her Honour and counsel for the applicant during the sentencing hearing.[45] The applicant's counsel accepted that they were matters of weight and matters affecting the credibility of the report.

[65] Before this Court the contention was that in the absence of any challenge by the Crown, either by way of cross-examination of Professor Morris or by producing a competing report, it was not open to dismiss the report's independent findings as to the diagnosis of illness at the time of offending, or the prognosis for recovery and the future prospects of not reoffending.

[66] In making that submission the applicant relied upon the absence of any dispute as to the contents of the report or to require Professor Morris for cross-examination, the requirement under s 9(4)(j) of the *PSA* to "have regard primarily to ... any ... psychiatric ... report in relation to the offender"; and thirdly by drawing support from s 132C(2) of the *Evidence Act* 1977 (Qld).

[67] The first point can be disposed of shortly. The diagnosis was clearly not accepted by the learned primary judge or the respondent. Her Honour questioned the validity of the opinion on the basis that it lacked a proper foundation, being based on one examination many years after the relevant time, and on self-reporting by the

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44 AR 51.
45 AR 42.

applicant. The respondent deferred dealing with it until after the applicant's submissions;[46] there was evidently no need to do so in light of her Honour's view.

[68] In my opinion the learned primary judge did not dismiss the report entirely. She referred to the fact that it was a single consultation nine years after the offence, and that the report proceeds upon the basis of an explanation given by the applicant, rather than any course of treatment. Her Honour then focused on the diagnosis in the report, namely that during the period of offending the applicant suffered from a major depressive disorder with anxiety features. It was that diagnosis which her Honour found lacked credibility. That was because it was uncorroborated and depended solely on the applicant's account of events. That account had to be seen in the light of demonstrated dishonesty by the applicant, both in the offences committed and in the contradictory nature of the explanations before her. Ultimately her Honour did not accept the diagnosis saying: "I accept that you felt under pressure because of the financial situation, but I do not accept that your judgment was impaired by illness". The learned primary judge's acceptance that, while employed, the applicant was "unlikely to re-offend",[47] reveals that while her Honour rejected the diagnosis, she nonetheless relied in part upon Professor Morris' report. That report ends with this sentence: "Since he has recovered from his psychiatric condition and now that he has employment and regular income I consider the likelihood of his reoffending is extremely remote".[48]

[69] That finding is sufficient to dispose of the argument advanced in relation to s 9(4)(j) of the *PSA*. Clearly her Honour did have regard to the psychiatric report.

[70] The final submission made on this aspect was that relating to s 132C(2) and (3) of the *Evidence Act*, which provide:

> "(2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.
>
> (3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true."

[71] The submission was that subsection (3) deals with the situation where an alleged fact is not admitted or challenged, and provides that in that circumstance the matter is to be decided on the balance of probabilities. In other words, if the judge or magistrate is satisfied on the balance of probabilities that the alleged fact is true, then it can be acted upon even though it was not admitted or was challenged. The submission then proceeded to say that because subsection (3) dealt with facts not admitted or challenged on the basis that they **may** be acted upon, that meant that subsection (2) should be read as though "may" meant "must". In other words, where a fact was admitted or not challenged then the judge or magistrate was required to act upon it.

[72] I do not need to resolve the contention as to how the two subsections operate. The two relevant facts which were at the heart of this contention were Professor Morris' diagnosis that at the time of offending the applicant was under

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46 AR 36.
47 AR 51.
48 AR 86.

a depressive condition, and that while employed the likelihood of reoffending was extremely remote. It is clear that the first of those facts, the diagnosis, was not "admitted or not challenged". That challenge took the form of demonstrating an insufficient foundation for that diagnosis, based, as it was, on a single examination of the applicant nine years after the event, and in reliance entirely upon self-reporting as to the applicant's alleged mental state. In those circumstances the learned primary judge was not obliged to act upon the fact, and in my opinion she was right not to.

[73] The second fact, the likelihood of reoffending, was one her Honour accepted and did act upon.

[74] For the reasons expressed above I do not consider that the applicant can succeed on ground 1.

Ground 2 – application of s 9, s 13 and s 13A of the *Penalties and Sentences Act* 1992 (Qld)

[75] The applicant's contentions under this ground were that the sentencing judge confused the separate reductions required where there has been both presentence cooperation and the provision of a s 13A undertaking.

[76] This submission pointed to the separate aspects of assistance under s 9 and the pleas of guilty under s 13, as well as the fact that the applicant had provided an undertaking to cooperate for the purposes of s 13A of the *PSA*. Those matters were:

(a) the applicant's immediate confession in respect of the robbery offence and the provision of a police statement implicating both himself and his accomplice;

(b) his provision of other assistance to the police as confirmed in an affidavit by a chief superintendent; that assistance took the form of revealing details about the offences under indictment 3, revealing of locations where the property was secreted, and the implication of others in those offences, as well as the revealing of other persons suspected of other offences not related to those with which the applicant was charged;

(c) his admissions to police when apprehended in respect of the offences under indictments 2 and 3;

(d) his pleas of guilty; and

(e) the provision of his s 13A undertaking.

[77] There is no doubt that the learned primary judge took into account the applicant's confessions on each occasion when apprehended. As to the robbery her Honour recorded:

> "You confessed when questioned in July of 2000, and you later provided a detailed statement in December of the same year. You admitted the facts on the schedule that has been tendered. The summary is consistent with what you told the police in 2000".[49]

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[49] AR 49.

Then as to the events under indictment 2 she recorded:

> "Once again, you cooperated assisting in the recovery of parts that police had not found as well as confessing".[50]

As for the events on indictment 3 she recorded:

> "When the police found you, you again confessed. This confession was not recorded."[51]

[78] Then by way of summary her Honour said:

> "Each time you were caught, you admitted what you had done. You gave early indications that you might plead guilty and eventually you did plead guilty, but the level of your cooperation has been impaired by your act of[52] resistance to a resolution. Events suggest that your cooperation was borne of pragmatism rather than remorse."[53]

[79] Those passages demonstrate that her Honour did take into account both the admissions and the cooperation provided on each occasion.

[80] The sentencing transcript reveals the following:

(a) her Honour was told that the assistance to police in respect of the matters the subject to indictment 2 included identification of one other involved in the offences;

(b) the affidavit of Chief Superintendent Wilson was tendered as Exhibit 5; that affidavit identified that in respect of the matters the subject of indictment 2, the assistance included the recovery of stolen equipment, the identification of previously unknown locations where the equipment had been secreted, the identification of previously unknown other persons involved in those offences, as well as the identification of other persons suspected to be involved in unrelated offences;

(c) that some delay in 2005 was caused by the need for police to consider some promised cooperation by the applicant; the cooperation being considered was referred to as "possible 13A investigations", a clear reference to consideration of whether an undertaking might be given for future cooperation;[54]

(d) that in January 2008 there had been advice that the applicant was assisting police again;

(e) after the robbery full admissions had been made to the police, including identification of the accomplice;

(f) that the applicant had provided an undertaking to cooperate within the meaning of s 13A of the *PSA*.

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50 AR 50.
51 AR 49.
52 The words "act of" should probably read "active".
53 AR 50.
54 AR 31.

[81] The Crown contended for a range of between three to five years as a sentence for the armed robbery, and five to seven years in respect of the other indictments. If there was a cumulative effect in relation to the sentences for unlawful use of motor vehicles they contended for a range of approximately eight to nine years. The Crown's contention was for a sentence of seven years which acknowledged past cooperation by the applicant.

[82] The contentions on behalf of the applicant were for a sentence of five years by way of sentence, suspended on the basis that there would be restitution or compensation.

[83] When the learned primary judge dealt finally with the matter of sentence she said this:

> "Given the persistent offending in the face of charges and release on bail it is appropriate that there be a cumulative component to the sentence, but that will be moderated to avoid oppression. There must also be a reduction to reflect the value of the pleas of guilty and the total level of your cooperation.
>
> The sentence will be one of six years' imprisonment with parole eligibility after two years. ..."[55]

[84] Her Honour then went on to record sentences in respect of each offence and the degree to which they would be cumulative.

[85] Her Honour identified the cooperation in her sentencing remarks in two ways. First, she recorded the confessions in the way set out in paragraphs 75 and 76 above. Secondly, she added:

> "The level of your involvement beyond the stated facts is not known. This year, on the eve of another sentence date, you provided a statement about it. That seems to have been an attempt to minimise your own criminality. In my view, it is not credible.
>
> …
>
> There were sentence listings in 2005 and 2008. On those occasions you made claims on the eve of sentence which had to be investigated. Then, when the investigation ended, you failed to appear."[56]

[86] What then followed in terms of references to cooperation, is the passage cited above in paragraph 82.

[87] It is apparent that when her Honour referred to a reduction acknowledging "the total level of your cooperation", that was a reference to past cooperation. The passage comes at the end of a recitation all to do with past events, and the references made to occasions of cooperation were all to past cooperation.

[88] Consideration of the balance of this point requires reference to matters contained in the transcript and reasons which are the subject of an order by the learned primary judge under s 13A(7)(c) of the *PSA*. For that reason it is appropriate that those

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55 AR 52.
56 AR 50.

matters should be kept confidential and that section of my reasons will be published only to the parties and made the subject of a similar order.

[89] Resolution of this point requires consideration of s 13A(7)(b), and in particular what the section requires of a sentencing judge when it says that the judge must "state in closed court … that the sentence is being reduced under this section". I do not consider that s 13A(7)(b)(i) requires that the sentencing judge must use the precise words of the subsection. All that section requires is that the judge state some form of words to make it clear that the sentence is being reduced under s 13A of the Act. Thus, a sentencing judge is not required to say "the sentence is being reduced under s 13A", though that would be quite sufficient. In my view if a judge said "I would have given you a longer sentence but for the fact of the undertaking you have given", such a formulation would, in my opinion, satisfy the subsection. That would be to "state … that the sentence is being reduced under this section." No doubt there is a variety of formulations that might be used, but in my view as long as the judge makes it plain that the sentence is being reduced under s 13A, that will be enough.

[90] For the reasons which appear above, and those in the confidential reasons, I do not consider that the applicant can succeed on ground 2.

Ground 3 – Failure to give due regard to the willingness to make restitution

[91] This ground contends that the learned primary judge erred in failing to give due regard to the applicant's willingness to make full restitution or pay compensation. The applicant contends that even if the learned primary judge held some scepticism about the genuineness of the offer, it was not available to then make no order. This is because, there were avenues available under ss 35 and 39 of the *PSA* under which restitution could have been ordered in such a way as to safeguard against the consequences of failing to do so. Secondly, it was suggested a proper course, where restitution was offered, was to make an order for payment of restitution and for imprisonment in lieu thereof.

[92] The learned primary judge identified the difficulties of quantifying the actual loss as a consequence of the offences and eventually identified a figure of $150,000 as a minimum. No challenge is made to that aspect of her Honour's assessment. Dealing with the matter of restitution or compensation her Honour said:

> "As for the matter of compensation, the Crown has not sought it. Mr Austin, the main victim of loss,[57] has died, and most of the other amounts of loss are unknown. You are said to be willing and able to pay compensation but only if you stay out of jail.
>
> I have some scepticism about the genuineness of the offer. In any event, it is trite to say that you cannot buy your way out of prison. There will be no order for compensation."[58]

[93] One contention is that there was no evidentiary basis to doubt the genuineness of the offer. I do not accept that submission. The relevant matters which were before her Honour, and which would justify that conclusion are as follows:

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57 Austin was the subject of the robbery.

58 AR 52.

(a) the demonstrated dishonesty of the applicant in the past, and his giving a contradictory version of events to the first statement about the robbery;

(b) no offer of restitution had been made at any time prior to the date of sentence;

(c) for some years prior to the date of sentence the applicant had been working in order to generate wealth for his family, and there was no evidence that the question of restitution or compensation had been raised with the Crown at any time;

(d) there was difficulty assessing what the actual loss was, and at one point the applicant made the submission that the amount should be the subject of evidence;[59]

(e) the applicant made it clear that the offer of compensation was on the basis of a wholly suspended sentence, saying: "He literally won't have the capacity to – given that it's going to be in the vicinity of one hundred and fifty thousand-odd dollars, he just wouldn't have the capacity to otherwise pay that";[60] and

(f) no evidence was adduced as to the precise circumstances of the applicant, and his actual ability to meet what was being offered, namely an immediate payment of $20,000 and the total of whatever compensation was ordered, within three months.

[94] In light of those matters there was a sufficient foundation for her Honour's expression of scepticism. Given that, in my opinion it cannot be demonstrated that her Honour erred in not ordering compensation, whether conditional or otherwise.

Ground 4 – cumulative sentences

[95] The contention under this ground is that her Honour did not adequately explain why it was she made cumulative sentences. In particular, it is contended there is no indication that her Honour took into account the obligation to look at the totality of the criminal behaviour and ask what is the appropriate sentence for all the offences.

[96] The learned primary judge's explanation appears in the passage as follows:

> "Given the persistent offending in the face of charges and release on bail it is appropriate that there be a cumulative component to the sentence, but that will be moderated to avoid oppression. There must also be a reduction to reflect the value of the pleas of guilty and the total level of your cooperation."[61]

[97] The two sentences which were ordered to be served cumulatively were those for the robbery (four years imprisonment) and that for the break and enter on indictment 2 (two years imprisonment). That offence occurred on 6 November 2002, at which time a chain and padlock was cut from the front gate of Budget Landscape Supplies

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59 AR 44-45.
60 AR 47.
61 AR 52.

and a bobcat was stolen. At that time the applicant was still on bail in respect of the robbery charge. Of all the offences that occurred in the 2002 period, the break and enter charge was one of the most serious in terms of penalty.

[98] In light of the foregoing matters I do not consider it can be shown that her Honour erred in imposing cumulative sentences on the two offences which she chose. Her succinct statement demonstrates adequately the explanation for making the sentences cumulative: there was persistent offending and at a time when the applicant was already facing a charge of robbery, and was on bail in respect of that charge.

[99] I do not consider that ground 4 can be sustained.

Ground 5 – sentences manifestly excessive?

[100] I have earlier set out the nature of the offences: see paragraphs 5 to 24. In total there were 14 counts[62] for a range of offences, the bulk of which occurred while on bail for the first, namely the robbery.

[101] In terms of the penalty imposed the sentences were as follows:

(a) Robbery with a circumstance of aggravation[63] – four years imprisonment;

(b) Two counts of unlawfully possessing a motor vehicle with intent to remove part of it (the Caterpillar graders)[64] – each four and a half years imprisonment;

(c) All other offences committed in 2003[65] – each three years imprisonment;

(d) Breaking and entering with intent to commit an indictable offence (2002)[66] – two years imprisonment;

(e) Two counts of unlawful use of a motor vehicle (2002)[67] – each two years imprisonment;

(f) Two counts of fraud (2002)[68] – each two years imprisonment; and

(g) Receiving (2002)[69] – six months imprisonment.

[102] The learned primary judge ordered the sentences for the robbery and the break and enter in 2002 to be served cumulatively, leading to the head sentence of six years imprisonment. Her Honour specified parole eligibility after two years.

[103] It is not necessary for present purposes to adopt a definitive formulation for the determination of reaching a conclusion of manifest excessiveness. However, there is much to be said for the approach adopted by King CJ in *R v Morse*,[70] where his Honour said:

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62 Count 6 and 7 on Indictment 3 were in the alternative.
63 Count 1, Indictment 1.
64 Counts 3 and 4, Indictment 2.
65 Counts 1, 2, 5, 6 and 7, Indictment 2.
66 Count 2, Indictment 3.
67 Counts 1 and 3, Indictment 3.
68 Counts 4 and 5, Indictment 3.
69 Count 7, Indictment 3.
70 *R v Morse* (1979) 23 SASR 98 at 99.

> "To determine whether a sentence is excessive, it is necessary to view it in the perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type, and the personal circumstances of the offender."

[104] As to the approach which must be adopted in considering whether a sentence is manifestly excessive, the High Court recently restated the position in *Hili v The Queen*.[71] At paragraph 59 the High Court stated:

> "As was said in *Dinsdale v The Queen*[72], "[m]anifest inadequacy of sentence, like manifest excess, is a conclusion". And, as the plurality pointed out[73] in *Wong*, appellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate "is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases". Rather, as the plurality went on to say[74] in *Wong*, "[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons". But, by its very nature, that is a conclusion that does not admit of lengthy exposition. And, in the present matters, the Court of Criminal Appeal, having described the circumstances of the offending and the personal circumstances of the offenders, said[75] that "the sentence imposed in these matters is so far outside the range of sentences available that there must have been error".
>
> The Court of Criminal Appeal also said[76] that "manifest error is fundamentally intuitive". That is not right. No doubt, as the Court went on to say[77], manifest error "arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it". But what reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence. The references made by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of each offender were, therefore, important elements in the reasons of the Court of Criminal Appeal."

[105] In *Hili v The Queen* the High Court were considering a sentence said to be manifestly inadequate. As to that the plurality said:[78]

> "The chief considerations which pointed to inadequacy in these cases were the nature of the offending, and the sentences that had been imposed in cases most closely comparable with the present."

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71 *Hili v The Queen* (2010) 242 CLR 520, at 538-539 [59]-[60].
72 (2000) 202 CLR 321 at 325 [6].
73 (2001) 207 CLR 584 at 605 [58].
74 (2001) 207 CLR 584 at 605 [58].
75 (2010) 76 ATR 249 at 261 [42].
76 (2010) 76 ATR 249 at 261 [41].
77 (2010) 76 ATR 249 at 261 [41].
78 *Hili v The Queen* at 539-540 [62].

[106] The court must come to the conclusion, if this ground is to be sustained, that a "substantial wrong has in fact occurred", even if the precise nature of the error cannot be discovered.[79]

[107] The applicant's approach was not to attack any particular sentence imposed. Rather it was to contend that the comparable cases relied upon by the Crown did not, in any of them, include the combination of compelling mitigation factors present in the applicant's case. This was a plain reference to the early admissions of guilt, cooperation with the police, rehabilitation, s 13A undertaking, and the offer of restitution. Particular emphasis was placed upon the factor of rehabilitation, focussing on the fact that there had been no reoffending since 2003 and during that time the applicant had secured and maintained gainful employment in positions involving responsibility and trust. The applicant's contention was that a sentence should be substituted at such a level that it could be wholly suspended, coupled with an order for restitution or compensation.

[108] In the present case the applicant was guilty of serious offending. First in time was the robbery in 2000. That was a premeditated offence which involved a degree of planning, the adoption of a disguise and the threat of being armed with a gun. The events also included an assault on the female in the real estate agent's office, although it has to be said that, whilst no doubt frightening, the assault was of a minor nature. The offence involved the theft of $125,000 of which only $14,855 has been recovered.

[109] The second set of offences occurred in 2002 whilst the applicant was on bail for the robbery offence. Those offences involved considered dishonesty, by use of a forged driver's licence in order to rent a trailer, to be attached to a stolen vehicle bearing stolen number plates from another vehicle. The other relevant circumstance was a break and enter in order to steal a bobcat. The offences came to light, not through any remorse, but rather because of an accident in which the applicant was involved with the stolen vehicles.

[110] The third set of offences occurred in 2003, again whilst the applicant was on bail for the robbery and the other offences. These offences involved significant theft and misuse of expensive equipment, including a truck, backhoe, and a couple of graders. A conservative estimate of the value of the property the subject of these offences was of the order of $500,000. Further, the offences involved activity on the part of the applicant to dismantle the equipment and assist in its transportation overseas for sale. The offences only came to light when the Australian Customs Service intercepted a couple of shipping containers by which the disassembled equipment was being shipped overseas.

[111] Overall the offences can be described as serious and involving substantial sums in terms of money or equipment. Further, those in 2002 and 2003 have the added circumstance that they were committed whilst on bail for the robbery. It was open, in the circumstances, for the sentence to have a cumulative component; indeed, counsel for the applicant at sentencing accepted that to be a possibility. At that hearing the prosecutor submitted that seven years imprisonment was the appropriate sentence.[80]

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[79] *House v The King* (1936) 55 CLR 499 at 505; see also *R v Major; ex parte A-G (Qld)* [2011] QCA 210 at [88]-[90]; and *Carroll v The Queen* [2009] HCA 13 at [8]-[9].

[80] AR 33-34 and 35.

[112] The respondent put forward a number of cases by way of suggesting comparable sentences. The use of comparable cases is something acknowledged by the High Court in *Hili v The Queen*.[81] As was said in that case, comparable cases "can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*".[82] It may be accepted that in using comparable cases one must look for the degree of similarity of factual matters concerning both the offence and the circumstance in which it was committed, and the personal circumstances of the offender. In addition, one should look for the existence, if any, of similar principles at play in the imposition of the sentence in question.

[113] In *R v Norton*[83] a 35 year old offender engaged in a series of offences involving dishonest treatment of motor vehicles. There were 26 offences in total committed over a period of about one year. The offender was the principal of a "large scale, professional auto theft enterprise".[84] The vehicles involved included family sedans, prime movers and semi-trailers. Once the vehicle had been stolen, various steps were taken to erase their identification numbers and plates and substitute new ones. The value of the property involved in the charges was $925,000 of which $350,000 worth was damaged or unrecoverable through damage. The offender cooperated with the police once apprehended, but declined to identify others involved. He had an extensive criminal history including assault, theft of motor vehicles, receiving, false pretences, and possession of a motor vehicle with intent to deprive. He received a term of six years imprisonment, which was not the subject of interference on appeal, as being "plainly within range, and an appropriate response to extreme criminal behaviour … committed by a person with a significantly bad past criminal history".[85]

[114] In *R v Chapman*[86] the offender was convicted of 53 offences of dishonesty consisting of one burglary, 10 of unlawful use of motor vehicles, 22 of stealing, one of attempted stealing, two of wilful damage and 17 of receiving. He was a 34 year old man with a serious criminal history including offences such as those with which he was charged, as well as offences relating to violence, drugs, driving and breaching court orders. Twenty-five of the offences occurred in September to October 1995, and the remaining offences occurred in August 1996 to February 1997, whilst he was on bail. The offences were committed to feed a drug habit and involved a net loss of close to $29,000. There was no prospect of restitution. The case involved early guilty pleas and cooperation with police. In addition he had a cardiac condition which could have been affected if he went off methadone in custody. As well there were family circumstances pointing to a change in attitude and lifestyle after being charged. At trial he was sentenced to five years imprisonment, wholly suspended. On appeal that was altered to five years imprisonment, suspended after 18 months. The Court of Appeal took the view that a wholly suspended sentence was not an option considering the number and scope of the offences, the number of uncompensated victims, the fact that their commission was to feed a drug habit, and the extensive previous criminal history.

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81 *Hili v The Queen* (2010) 242 CLR 520 at 537 [54].

82 *Hili v The Queen* (2010) 242 CLR 520 at 537 [54] quoting in approval Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 at [303]-[305].

83 *R v Norton* [1995] QCA 277.

84 *R v Norton* [1995] QCA 277 at page 3.

85 *R v Norton* [1995] QCA 277 at page 5.

86 *R v Chapman and Attorney-General* [1998] QCA 476.

The Court of Appeal took the view that to wholly suspend the sentence was to place too great an emphasis on the rehabilitative aims, and too little on the aspects of deterrence and consistency.

[115] In *R v Ross*[87] an offender with a heroin addiction committed 70 offences involving entering dwelling houses with intent and stealing, attempted unlawful use of a vehicle and unlawfully using vehicles, as well as 60 property offences The total value of unrecovered goods was about $122,000. There was a degree of cooperation with the police in terms of identifying those premises that he had committed offences at. The offender there was hardly out of custody when he began to reoffend, driven by his heroin addiction. Quite a number of the offences had been committed while he was on bail. There was no suggestion of restitution and no rehabilitative aspect. He was given six years imprisonment, with a recommendation for post prison community based release after two years. The Court of Appeal did not interfere with that sentence, and in particular refused a suspended sentence.

[116] As can be seen both *Norton* and *Chapman* involved younger offenders than in the present case, and multiple offences of a broadly similar nature to some of those in question here. Neither of them involved an offence of the nature of robbery. The property value the subject of the offences was sizeable and the net loss was large in *Norton*, and smaller (though not negligible) in the case of *Chapman*. There was a degree of cooperation with police in each case and each had a substantial previous criminal history. The sentences in each of them suggest that six years in the present case is not out of the range. The same should be said of *Ross* where there were a substantial number of property offences and a substantial amount irrecoverable. In addition a number of the offences had been committed while Ross was on bail, once again the offences did not include one such as robbery, though there was burglary, and stealing of goods. The six year sentence suggests that the overall sentence in this case is not beyond the range.

[117] The respondent suggested that the decision in *R v Kitching*[88] was of particular assistance in assessing whether the sentence imposed for the robbery offence was appropriate. In that case a 25 year old man with no relevant criminal history was involved in committing a robbery of a hotel. The offence involved demanding money from two employees at knifepoint, and stealing $15,000. The offender's involvement included planning the robbery, driving his accomplice to and from the robbery, and burying some of the clothes used by way of disguise. Full admissions were made to the police, he entered a guilty plea and cooperated fully with the police investigation. Restitution had been made via his parents, in the sum of $7,500. He was sentenced to three and a half years imprisonment, to be suspended after serving nine months. The Court of Appeal did not interfere with the sentence, in these terms:

> "A sentence of three and a-half years' imprisonment for armed robbery, which involved menacing two employees with a large knife, and obtaining $15,000, is impossible to describe as excessive."[89]

[118] In the course of examining the sentence in *R v Kitching*, the court looked at comparable cases, including the decision of the Court of Appeal in *The Queen*

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87 *R v Ross* [2004] QCA 21.

88 *R v Kitching* [2003] QCA 539.

89 *R v Kitching* [2003] QCA 539 at page 4.

v Mather,[90] in which the applicant received a sentence of four years imprisonment for armed robbery. He was 35 years of age, with a good work record and an insignificant criminal history. He had been unarmed but manufactured a toy to make it appear as though he held a pistol. The crime was spontaneous, involving almost no preparation and no planning to avoid detection. Restitution had been made, a plea of guilty entered and compensation was offered to an employee who had been terrified by the offence.

[119] Having regard to the cases referred to above, the decisions in *R v Kitching* and *R v Mather* demonstrate that the sentence of four years in respect of the robbery charge in this case was well within the range of available sentences. *Kitching* was a younger man and not the primary offender, but the robbery involved the use of a weapon to menace employees and cause them symptoms of stress and anxiety. The circumstances of the early guilty plea and full cooperation, together with some restitution, no doubt were factors in why he received a sentence of three and a half years, suspended after serving nine months. By contrast the present case involves a much more significant sum of money, no acceptable prospect of restitution[91] and a much older offender.

[120] In *R v Mather*, the offender was sentenced to four and a-half years' imprisonment for armed robbery. The offender was closer to the age of the applicant in this case and committed a robbery for a relatively insignificant sum, namely $135. The crime was spontaneous, whereas in this case it was premeditated. In *Mather* there was restitution, a guilty plea and an offer of compensation. In this case restitution was found to be unlikely – in any event it was predicated on there being no imprisonment.

[121] In my opinion it is not possible to describe the sentence of four years for the robbery as being manifestly excessive.

[122] When one has regard to the other offences, a sentence of six years also cannot be described as manifestly excessive. The other decisions in *R v Norton*, *R v Chapman* and *R v Ross* involved a greater number of offences by persons who had greater criminal histories. However, *Chapman* and *Ross* involved the commission of offences whilst on bail. In each of those three cases there was a degree of cooperation with the police, but overall a substantial value of property that could not be recovered. The particular circumstances of *Chapman* led to him receiving a slightly lower sentence than those that were imposed in *Norton* and *Ross*, but in my opinion it is not possible to say that it demonstrates that the six year sentence in this case was manifestly excessive.

[123] In light of the conclusions above, the question of a suspended sentence does not arise. Under s 144 of the *PSA* such a suspended sentence would be applicable only if the sentence otherwise was "five years imprisonment or less". Even if the sentence had been five years it could be suspended "only if it is appropriate to do so". The applicant has urged as mitigating factors the delay between the commission of the offences and sentencing, the rehabilitation of the applicant, the absence of any further offending, the psychiatrist's report and the cooperation with police. I am by no means convinced that those matters, understood in their proper context as detailed in the reasons above, would have justified the sentence being wholly suspended in any event.

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90 *R v Mather* [1999] QCA 226.

91 In fact the complainant in the robbery charge has since died.

Conclusion and disposition

[124] For the reasons given above I do not consider that grounds exist for the grant of leave to appeal. I would refuse the application for leave to appeal.

Orders

[125] The orders I propose are:

1. Application for leave to appeal against sentence refused.

2. The confidential reasons for judgment of Morrison JA handed down to the parties today and marked "A" be not further published, a copy thereof be placed in a sealed envelope, and that envelope be opened only by order of the Court or upon an application under s 188(2) of the *Penalties and Sentences Act* 1992 (Qld).

[126] **NORTH J:** I have read the reasons of Morrison JA. I agree with his Honour's reasons and with the orders proposed.

Annexure 1 – Detailed chronology

5 July 2000	-	Robbery offence.
7 July 2000	-	Applicant arrested; confession and details of his accomplice are given.
18 December 2000	-	Applicant signs a statement in relation to the robbery.
22 June 2001	-	Indictment 1 presented.
10 July 2001	-	Indictment 1 reviewed before McLauchlan DCJ; adjourned to the callover on 8 October 2001.
5 October 2001	-	Defence told that the penalty range to be sought would be 3 to 5 years; defence sought an adjournment of 2 weeks to finalise instructions.
29 October 2001	-	Indictment 1 reviewed by Newton DCJ; Crown ordered to serve a Notice to Appear on the applicant.
31 October 2001	-	Indictment 1 reviewed by Newton DCJ; bench warrant issued for the arrest of the applicant.
12 October – 15 October 2002	-	Theft of Honda CRV.
17 October – 18 October 2002	-	Theft of number plates.
6 November 2002	-	Production of forged drivers licence to hire a trailer.
6 November 2002	-	Break and enter to steal a bobcat.
6 November 2002	-	Single vehicle accident involving the Honda CRV, trailer and bobcat.
March 2003	-	Theft of a grader valued at $130,000.00.
March 2003	-	Theft of a second grader valued at $120,000.00.
8 May 2003	-	Applicant negotiates lease of a shed at 62 Heritage Drive, Mount Nathan.[92]
20 May 2003 – 6 September 2003	-	The applicant supervises and carries out work to strip down stolen graders and other property.
16 June 2003	-	Theft of boat and trailer.
19 July 2003	-	Theft of Mitsubishi truck.
19 July – 21 July 2003	-	Theft of a bobcat.

[92] An agreement was reached on 8 May 2013 that the applicant would rent the shed commencing 12 May 2013.

25 August 2003	-	Applicant agrees to sell the boat and trailer for $75,000.00 and takes $20,000.00 as a holding deposit.
29 August – 30 August 2003	-	Theft of a caterpillar backhoe.
4 September 2003	-	Applicant represents to Queensland Transport that he is the owner of the boat and trailer, in order to obtain registration in the name of the buyer.
4 September 2003	-	Police investigate two shipping containers containing stolen goods, including stolen graders.
September 2003	-	Police retrieve the boat and trailer.
9 September 2003	-	Police attend 62 Heritage Drive, Mount Nathan; locate a large amount of stolen heavy machinery including stolen bobcat, backhoe, Mitsubishi truck.
29 October 2004	-	Indictment No 412 of 2004 (later replaced by indictment 3) presented.
5 November 2004	-	Bench warrant issued.
6 April 2005	-	Indictment No 24 of 2005 (later replaced by indictment 2) presented.
27 April 2005	-	Indictment 412/04 listed for sentence on 15 June 2005.
19 May 2005	-	Indictment 412/04 delisted as Southport matters not ready to proceed.
1 July 2005	-	Crown seek relisting of indictment 412/04 due to "possible 13A investigations".[93]
27 September 2005	-	Indictment 412/04 adjourned as Queensland Police Service require further 4 weeks.
10 November 2005	-	Indictment 412/04 delisted as Police had not finalised 13A investigations.
17 January 2006	-	Re indictment 412/04: defence advised not in a position to proceed as defendant interstate and advised he will not return.
19 January 2006	-	Indictment 412/04 listed for mention.
2 November 2007	-	Applicant picked up and recommitted to the District Court.
24 January 2008	-	"Advised matter to take certain course – adjourned as defendant assisting police".[94]

[93] AR 95.
[94] AR 95.

15 February 2008	-	Defence instructed to list all three matters for sentence; listed for sentence on 8 April 2008.
8 April 2008	-	Indictment 1 reviewed before Newton DCJ; bail revoked and warrant issued for the arrest of the applicant. Defence lost contact and withdrew.
31 August 2011	-	Appearance in the Magistrates Court.
10 October 2011	-	Further appearance.
22 November 2011	-	Appearance in the Southport Magistrates Court.
9 January 2012	-	Correspondence seeking matters to be recommitted to the District Court at the next mention on 10 January 2012; copies of indictments before District Court provided to both parties.
10 January 2012	-	Appearance in the Magistrates Court.
15 February 2012	-	Crown disclosed material to defence lawyers.
20 March 2012	-	Appearance in the Magistrates Court.
17 April 2012	-	Matters recommitted to the District Court.
30 April 2012	-	Indictment 1 reviewed by McGinness DCJ at District Court callover; adjourned to 5 June 2012.
5 June 2012	-	Indictment 1 reviewed by Newton DCJ at District Court callover; adjourned to 16 July 2012.
16 July 2012	-	Indictment 1 reviewed by Martin DCJ at District Court callover; adjourned to callover 23 August 2012.
30 July 2012	-	Crown provided defence with schedule of facts for all matters.
23 August 2012	-	Indictment 1 reviewed by Wall DCJ at District Court callover; listed for Section 590AA hearing on 19 October 2012.
26 September 2012	-	Crown received urgent request for further material for Section 590AA hearing.
2 October 2012	-	"material on hand disclosed … req sent to AO".[95]
3 October 2012	-	Crown received letter requesting balance of material.[96]
5 October 2012	-	Crown advised defence that material was not going to be available and Crown would seek all matters be delisted.

[95] AR 96.
[96] AR 96.

8 October 2012	-	Defence requests confirmation from Crown that Crown would seek to adjourn all matters.
12 October 2012	-	Crown advises defence that the matter was listed for mention on 15 October 2013, for Crown application to adjourn all matters.
15 October 2012	-	Indictment 1 reviewed by McGinness DCJ; Section 590AA hearing delisted and rescheduled for 6 December 2012; directions as to outlines (Applicant's outline to be filed and served by 29 November 2012); and listed for mention on 15 November 2012 (to confirm s 590AA hearing ready to proceed).
5 November 2012	-	Indictment 1 reviewed by O'Brien DCJ; adjourned to 6 December 2012.
6 December 2012	-	Indictment 1, 2 and 3 before Wall DCJ.[97] Defence failed to file outline. On all indictments: applicant arraigned, plea of guilty entered, listed for sentence on 8 February 2013, and bail enlarged.
16 January 2013	-	Crown received undertaking from the applicant (signed on 28 November 2012).
6 February 2013	-	Signed statement provided by applicant.
8 February 2013	-	Indictment 1, 2 and 3 before Wall DCJ; bail enlarged, and sentencing adjourned until 20 May 2013 so that Crown can make enquiries.
15 May 2013	-	Advised the defence "no 13A no future proceedings".
20 May 2013	-	Indictment 1, 2 and 3 before Clare DCJ; applicant remanded in custody, and matter adjourned until 21 May 2013.
21 May 2013	-	Clare DCJ convictions on all counts and sentences imposed on all counts.

[97] By this point in time, indictment 24/05 has been replaced by indictment 2, and indictment 412/04 has been replaced by indictment 3.