# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Crouch; R v Carlisle* [2016] QCA 81 |
| PARTIES: | **In Appeal No 189 of 2015**<br>**R**<br>**v**<br>**CROUCH, Matthew Paul**<br>(applicant)<br><br>**In Appeal No 190 of 2015**<br>**R**<br>**v**<br>**CARLISLE, Liam Joseph**<br>(applicant) |
| FILE NO/S: | CA No 189 of 2015<br>CA No 190 of 2015<br>DC No 270 of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Southport – Date of Sentence: 30 July 2015 |
| DELIVERED ON: | 5 April 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 March 2016 |
| JUDGES: | Margaret McMurdo P and Gotterson JA and Burns J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The applications for leave to appeal are granted.**<br>**2. The appeals against sentence are allowed.**<br>**3. The sentences imposed at first instance are varied by setting aside the parole eligibility date of 30 July 2019 and substituting the parole eligibility date of 30 November 2018.**<br>**4. The sentences imposed at first instance are otherwise confirmed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicants each pleaded guilty to committing fraud to the value of more than $30,000 – where the applicants were each sentenced to 10 years imprisonment with parole eligibility after four years –where the applicants were not the architects |

of the fraud – where the applicants contended the judge did not set parole eligibility after one third of the sentence because they did not disclose to authorities the identity of the architect of the fraud – where there is no requirement for a sentencing judge who does not set a parole date, parole eligibility or suspension after one third of the head sentence to give reasons for not doing so – where the judge failed to give proper weight to the fact that that without the applicants' admissions a fraud of only $1.8 million, instead of $5.6 million, could have been established – whether the sentencing discretion should be re-exercised

*Penalties and Sentences Act* 1999 (Qld), s 13A

*R v Henderson* [2014] QCA 12, cited
*R v Jamieson* [2016] QCA 11, cited
*R v Kendrick* [2015] QCA 27, cited
*R v Lovell* [2012] QCA 43, cited
*R v Rooney; R v Gehringer* [2016] QCA 48, cited

COUNSEL: P J Callaghan SC, with B P Dighton, for the applicants
M T Whitbread for the respondent

SOLICITORS: AHA Taylor Lawyers for the applicants
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicants, Liam Carlisle and Matthew Crouch, together with another co-offender, Tiffany Lea O'Donnell, pleaded guilty on 23 June 2015 in the Southport District Court to fraud to the value of more than $30,000. O'Donnell's sentence was adjourned until September. This Court was not told whether she has been sentenced and, if so, the sentence she received. The applicants were each sentenced on 30 July 2015 to 10 years imprisonment with a parole eligibility date on 30 July 2019, that is, after four years. They have each applied for leave to appeal against that sentence on the grounds that the judge erred in not setting a parole eligibility date at one third of the head sentence; in failing to provide reasons for not doing so; and in failing to have regard to the fact that the applicants had admitted, by their pleas, to a quantum of fraud that was more than three times that which could be proven against them; and that, in all the circumstances, the sentence was manifestly excessive.

[2] Carlisle was born in New Zealand and was about 28 at the time of his offending and 31 at sentence. His New Zealand criminal history included public nuisance, assault, property and drug offences for which he was sentenced to community-based orders. His Queensland criminal history included a breach of a domestic and family violence protection order on which he was sentenced to nine months probation without conviction in 2003; a public nuisance offence for which he was convicted and fined in 2006 and a failure to appear in 2008 for which he was fined without conviction.

[3] Crouch was 31 at the time of the offending and 34 at sentence. His New Zealand criminal history included street, drug, traffic, dishonesty and assault offences, as well as offences involving the breaching of orders for which he received non-custodial sentences. In 1998 he was sentenced to home detention for offences including theft; taking obtaining or using a document for pecuniary advantage; obtaining accommodation by

fraud and associated offences. His Queensland criminal history included a public nuisance offence in 2006 and a failure to appear in 2008; he was fined without conviction on both.

**The circumstances of the offending**

[4] An agreed 20-page statement of facts was tendered at sentence.[1] The prosecutor explained that a fraudulent scheme of this type was known as a "boiler-room" operation which differed from a "Ponzi-type" scheme. In a Ponzi scheme funds were returned by way of interest to investors but in a boiler-room scheme, nothing was returned.

[5] Members of the public were contacted through telemarketers offering an opportunity to invest. They were then sent bogus, professional-looking information by email and asked to make payments into nominated bank accounts. Once the payments were made, the perpetrators of the fraudulent scheme quickly withdrew the money. The operation was well organised with offices with telemarketers who often used false names. The schemes operated from about December 2010 until around December 2011 and involved five different companies: Alpha Select Australia Ltd; Citicorp Australia Pty Ltd; West Trade Group Pty Ltd; West Trade Cars Pty Ltd and West Two Pty Ltd. In all, around 311 members of the public made approximately 480 deposits totalling $5,630,555.39. Of that, $4,900,000 was withdrawn by the fraudsters, with just under $586,000 recovered so that very little will be returned to investors.

[6] As investors became suspicious about one company, the applicants closed the scheme down and started a similar fraud using another company. The applicants put in place people who could give a semblance of legitimacy to the companies by properly registering them and then opening bank accounts in the companies' names. O'Donnell played a large role in that. The prosecutor described the modus operandi as "designed totally to rip people off." The applicants were running and managing the business but it was not clear whether they were its sole orchestrators. It may be there was another or others behind them. The applicants indicated that they would not provide information as to the identity of those who set up and principally benefited from the scheme.

The submissions at sentence

[7] The prosecutor emphasised that the applicants benefited from the fraud through wages, receiving a percentage of the investments. They used the proceeds to live a comfortable lifestyle. They sometimes drove luxury vehicles and travelled to the USA. Nothing had been recovered, save for some vehicles and cash totalling $586,000. Neither applicant gave an interview to police but each pleaded guilty in a timely way. Had there been a trial, the prosecution could not have alleged that they defrauded the full amount which they had now accepted in their pleas of guilty. The prosecutor agreed with the judge's observation that it was a strong prosecution case. The applicants were committed for trial in August 2013 and were then charged with the additional offence of money laundering. Negotiations took place as to the charges, with the money-laundering charge ultimately discontinued. The delay in listing the matter for sentence was caused by O'Donnell changing solicitors on a number of occasions. Her case had been listed for a contested sentence to be heard later in the year.

[8] Victim impact statements were tendered from 22 victims.[2] The offending had affected them most severely, occurring not long after the Global Financial Crisis. Some investors lost their life savings and many were retirees or no longer in full-time work.

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1 Exhibit 3, AB 52-71.

2 Exhibit 5, AB 75-101.

[9] The prosecutor emphasised the large number of victims. The offending involved fairly complex pre-planning and a very large amount of money. It was a large scale, significant fraud that demanded a heavy penalty. The maximum penalty was 12 years imprisonment, having been increased from 10 years imprisonment. The prosecutor referred to cases, including *R v Lovell*[3] and *R v Henderson*.[4] *Lovell* was the only case where, as here, the maximum penalty was 12 rather than 10 years imprisonment. The prosecutor emphasised that whilst the applicants were not the architect of the offending, together with O'Donnell they played a significant role in executing the fraud. They deserved a sentence which appropriately reflected deterrence and denunciation.

[10] Carlisle's counsel conceded the seriousness of the offending and that it warranted a very substantial term of imprisonment. The delay in listing the matter for sentence was no fault of Carlisle. Counsel tendered a letter from Carlisle to the judge, apologizing to his victims and expressing remorse. Carlisle, in his letter, claimed that his father died when he was 14 years old and he then turned to drugs and alcohol and exhibited anti-social behaviour. He claimed that being on bail for the past three and a half years had given him time to reflect. He had missed his grandmother's funeral as he could not travel to New Zealand because his passport had been surrendered but he realized he only had himself to blame. He claimed to now have insight into the hurt he had caused not only his victims but also his friends and family. He had, he wrote, at last learnt the value of hard work and honesty. After he was charged, he and his fiancée moved to Sydney where he returned to his trade as an arborist and obtained employment as a tree management officer with Hurstville Council. He planned to use his time in prison to better himself and ensure his rehabilitation. He wrote that he wanted to become a youth worker so that he could draw on his own experiences and mistakes to help and encourage troubled youths.[5]

[11] Counsel tendered references from Carlisle's partner and other community members, including a reference on behalf of Carlisle's current employer, supporting the submission that the applicant had made encouraging efforts to rehabilitate in recent years.

[12] His counsel explained that Carlisle had been living and working on the Gold Coast as a telemarketer when he was approached to take up a position which resulted in this offending. He did not initially realise he was involved in a sham. Around the time he discovered the fraud, he was promoted to sales manager and was paid about $1,800 a week. He then became responsible for administration and money collecting. He was not the architect of the fraud. The judge observed that it would have helped Carlisle if he had been forthcoming as to who was the architect. Counsel responded that Carlisle had limited knowledge as to where the money went. He was now caught between a rock and a hard place; if he co-operated there was a risk of people close to him being threatened. Carlisle did not personally benefit from most of the money obtained. He received between $2,000 to $2,500 cash a week so that his net personal gain was in the order of $90,000. Carlisle arranged for the collection of monies and Crouch was responsible for its distribution. Carlisle did not live an extravagant lifestyle or accumulate any substantial assets. He lived in rented premises. He had co-operated in the administration of justice and there was substantial utilitarian value in his guilty plea which benefited the community and the victims. Carlisle had admitted the totality of his offending without statements being taken from victims to formally prove the full amount of the fraud. Without that co-operation, on the police

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3 [2012] QCA 43.
4 [2014] QCA 12.
5 Exhibit 7, AB 133.

material a fraud of only about $1.8 million could be established. A trial would have been long and complex. His co-operation and guilty plea warranted proper recognition by way of mitigation of sentence. He had been living for some time with the knowledge that he would be going to jail for a lengthy time and had been unable to make long term plans with his partner, although they both wanted to start a family. He had not come to the adverse attention of the authorities in the years since the offending and had made genuine progress rehabilitating. There were real prospects of his continued rehabilitation in future.

[13] Carlisle's counsel submitted that the cases of most assistance were *Lovell* and *Henderson*, which supported a head sentence of 10 years imprisonment. The many mitigating factors should be reflected by a parole eligibility date after one third of the sentence.

[14] Crouch's counsel also tendered his client's letter of remorse.[6] Crouch explained that he was born in Australia but lived in New Zealand for 10 years from the age of 13. He moved back to Australia and applied for a telemarketing job. He was promoted to a tele-sales role in which he worked for over three years. He invested in a business involving a computer-based software product which initially proved successful. He and his partner put a deposit on a house and were planning a family together, until the Global Financial Crisis resulted in the business failing. He began to drink heavily and fell behind in mortgage payments. It was against that background that he became involved in this fraud. Not only had he now lost his house and cars but also the trust of his partner of 10 years. His grandfather, who played a pivotal role in his life, died in New Zealand without him being able to thank him and say goodbye. At the time of his offending he had no thought for the victims but he claimed he now realised the seriousness of his actions which disgusted him. He apologised to the courts and the victims. He claimed in his letter that since his arrest he had become a personal trainer and found great satisfaction in helping people and he was determined never to re-offend.

[15] Counsel also tendered a psychological report from Dr Paul Bowden.[7] The report noted that Crouch was forced to move to New Zealand aged 11 where he was unhappy and demonstrated conduct problems in his early adolescent years. For about a decade he experienced behavioural problems and substance abuse issues. He returned to Australia aged about 23 and successfully turned his life around. His upbringing left him extremely vulnerable to psychological and social problems. Since being charged he had made a genuine effort to rehabilitate. In the months leading up to the offending he developed mental health problems akin to an anxiety disorder with resulting problematic drinking and cannabis use. According to the tests administered, his overall risk of re-offending was in the average range. Over the past three years he had developed insight into his offending and made the necessary changes in his life to rehabilitate.

[16] Counsel emphasised Crouch's indication of a timely guilty plea in May 2014, following a consent committal in August 2013. This had saved the court and the State a very large investment of time, money and resources and had spared the victims the ordeal and inconvenience of trial. He had co-operated with the administration of justice. Significant recognition should be given to his admissions to a greater quantum of fraud than could be otherwise established by the prosecution. His guilty plea was convincing evidence of remorse. His Honour noted that further co-operation would be more convincing evidence of remorse. Counsel replied that Crouch feared for his life and that of his partner were he to disclose the architect of the scheme.

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6 Exhibit 10, AB 157-158.

7 Exhibit 9, AB 139-156.

Counsel also tendered character references, one of which was from Crouch's employer, and all of which supported the submission that Crouch had rehabilitated over the past three and a half years.

**The judge's sentencing remarks**

[17] In sentencing, the judge referred to the applicants' pleas of guilty to a $5.6 million aggravated fraud of citizens, often depleting their life savings. About $5 million remained outstanding with no prospect of recovery. His Honour referred to the applicants' criminal histories which were of limited seriousness compared with the present charge. This was a large scale and complex fraud which had a significant impact on the lives of many people. Accepting that the applicants' personal gain was limited and that someone else was the architect of the scheme, His Honour noted that the applicants had not disclosed the identity of that architect. They were not minor players; each was responsible for the setting up, monitoring and directing of staff and activities of each of the companies used in the fraud and had arranged for the collection and receipt of funds withdrawn from the companies' accounts. Each was at the top of the group of offenders who had been charged.

[18] His Honour noted that since their arrest there was some indication that each had developed insight into their offending. The judge referred to Crouch's psychological report and the submission that both had rehabilitated, stating: "You are entitled to appropriate recognition for your level of cooperation but in my view that cooperation has not been complete and it has been deficient in a most important respect. Your expressions of remorse must be considered in that light as well, in my view."[8]

[19] The judge observed that the comparable cases to which he had been referred placed strong emphasis on general deterrence for offending of this kind. A sentence that recognised the effect of this conduct on the victims had to be imposed. His Honour determined that a period of 10 years imprisonment was appropriate, adding:

> "In recognition of those matters that do weigh in your favour, I will recommend that you be eligible for parole earlier than would otherwise be the case. In my view, however, those matters do not entitle you to an eligibility after a third. Rather, in my view, you should be eligible to be considered for release on parole after you have served four years of those sentences."[9]

**The applicants' contentions**

[20] The applicants contended that the judge erred in not setting a parole eligibility date after one third of their head sentences. While accepting that there was no rule, they submitted that it was a normal sentencing practice in Queensland to reflect a plea of guilty and other mitigating circumstances by setting parole release or parole eligibility after about one third of the term of imprisonment. Any departure from this practice should have been explained in the sentencing judge's reasons. The applicants had pleaded guilty and co-operated in the administration of justice. The judge gave no reasons for not setting parole eligibility after one third, that is after three years and four months, and instead set parole eligibility after four years.

[21] If it can be inferred that his Honour considered the applicants' omission to name the architect of the fraud was the reason for not giving parole eligibility after one third,

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8 Sentence 2, lines 31-34, AB 37.

9 Sentence 2-3, lines 43-1, AB 37-38.

they contended this was an error. It was not necessary for those who plead guilty to name accomplices involved in the offending in order to benefit from the normal practice of parole eligibility after one third of the sentence. This was especially so when to do so would put the offenders or those close to them at risk. Had they co-operated to that extent, they would have been entitled to considerably greater recognition by way of mitigation than parole eligibility after one third, consistent with s 13A *Penalties and Sentences Act* 1999 (Qld).

[22] The applicants further submitted that the judge erred in not recognising, both in his sentencing reasons and in the sentence he imposed, the important mitigating fact that, without the applicants' admissions, a fraud of only $1.8 million could have been established. The applicants' voluntary admission that the fraud involved almost another $4 million was a matter which should have been given very significant weight in mitigation. The judge's omission to refer to this in his sentencing remarks, combined with the fixing of the parole eligibility date after four years rather than after one third, suggested that his Honour gave no or insufficient weight to this matter.

[23] Finally the applicants contended that the sentence was manifestly excessive given the mitigating features. Although the applicants conceded they were heavily involved in a serious fraud, they emphasised they were not its architects. They themselves gained only a very small portion of the amount defrauded. They pleaded guilty at an early stage and co-operated with the authorities to a very large extent, although not so far as to invoke s 13A. They were arrested and charged about three and a half years before sentence. Despite their troubled backgrounds as youths, they had rehabilitated since their arrest and stayed out of trouble. They had good prospects of further rehabilitation. The delay between their offending being detected and sentence was not their fault. The sentence imposed did not sufficiently reflect these considerable mitigating features and as a result was manifestly excessive.

[24] The applicants contended that the application for leave to appeal against sentence should be granted, the appeal allowed, the sentence in each case set aside and instead a sentence of nine years imprisonment with parole eligibility after three years substituted.

**The respondent's contentions**

[25] The respondent emphasised that whether parole eligibility should be granted after one third of the head sentence will always depend on the particular circumstances of each case; a departure from that practice does not necessarily evidence any error justifying appellate interference. The head sentence imposed could be seen as a 12 year head sentence with parole eligibility at the one third mark, but with a reduction in the head sentence to reflect the mitigating features. Such a sentence is not an error merely because it departs from a more common practice: *R v Rooney and Gerhinger*.[10]

[26] The reasons for setting parole eligibility at four years rather than after one third, the respondent contended, were clear from the judge's sentencing remarks and from the discussion between counsel and the judge during the hearing. Whilst there was no requirement for an offender to name accomplices in order to benefit in the sentencing process from a plea of guilty, the respondent contended that the judge correctly identified that the applicants could have given greater co-operation. Any discount in sentence for co-operation must not produce a result which is disproportionate to the objective gravity of the offence and the circumstances of a particular offender. The

10 [2016] QCA 48, [16] – [18].

judge correctly identified that the applicants were at the highest level of those charged and prosecuted in this sophisticated fraudulent scheme. This was because they chose to remain silent and to not disclose to police the identity of the architects of the fraud. The judge was entitled to take this into account, in determining the sentence.

[27] The respondent placed some emphasis on *Henderson* where a nine year sentence with parole eligibility after four years was imposed after a trial for a fraud involving $1.8 million over 15 months. The maximum penalty at that time was 10 years whereas the present maximum penalty is 12 years imprisonment. The only relevant decision involving the current maximum of 12 years imprisonment was *Lovell* where this Court reduced an effective head sentence of 13 years imprisonment to 11 years imprisonment with parole eligibility after four years. The respondent submitted that when compared to those cases, the sentence was not manifestly excessive. As the judge has not erred in any way, the respondent contended the application for leave to appeal should be dismissed.

## Conclusion

[28] The applicants pleaded guilty to their involvement at a high level in a staggeringly audacious fraudulent scheme defrauding some 311 people, often the retired, elderly and vulnerable, of their savings, sometimes their life savings. The victim impact statements record the devastating effects of the offending, which involved nearly $5.6 million, very little of which has been or will be recovered. The fraud was perpetrated over a 12 month period and involved five companies. The maximum penalty was 12 years imprisonment and this despicable offending was towards the upper end of the range of seriousness for such an offence.

[29] None of the cases to which the applicants referred this Court support their contention that, where there is a timely plea of guilty and other mitigating features and no parole date or parole eligibility is set after one third of the sentence, judges must explain why they have not done so. That said, it is common for Queensland sentencing judges to recognise mitigating features, including timely guilty pleas, by setting either parole eligibility or a parole release date after one third instead of at the statutory one half. Indeed, the applicants referred this Court to *R v Jamieson*[11] and *R v Kendrick*[12] where this practice has been called "normal." But nothing said in *Jamieson* or *Kendrick* alters the requirement for judges to exercise the sentencing discretion judicially. Whether a sentence warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case.

[30] The sentencing judge in this case correctly noted that the applicants had not informed the authorities of the identity of the architect or architects of this fraudulent scheme in which they were both significant players. This meant they could not benefit from s 13A *Penalties and Sentences Act* as their co-operation with the authorities was not at that high level. That was no reason, however, not to give appropriate weight to whatever features were in their favour. Whilst this was a most serious example of aggravated fraud in which the applicants, who had committed prior offences of dishonesty, played a pivotal role, there were important mitigating features. They entered timely pleas of guilty. Their co-operation with the authorities, although not such as to invoke s 13A, was extensive. But for their admissions, only $1.8 million of their $5.6 million

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11 [2016] QCA 11, [48].
12 [2015] QCA 27, [43].

fraud could have been established. His Honour made no mention of this important factor in his sentencing remarks. I cannot accept the respondent's contention that because his Honour was told of this special co-operation by counsel during the hearing, he must have been cognisant of it when sentencing. It seems to me that his Honour overlooked this in his understandable disappointment at the applicants' failure to disclose to the authorities the identity of the person or persons who masterminded this serious fraud which hurt so many. This error requires this Court to consider what sentence it would impose if resentencing the applicants, so as to determine whether leave to appeal should be granted.

[31] The cases emphasised at first instance and in this Court, *Henderson* and *Lovell*, support a head sentence of 10 years imprisonment to reflect the gravity of this audacious fraud which has so seriously harmed the peace of mind and prosperity of some 311 people. A 10 year rather than a nine year sentence is warranted to deter and appropriately punish the applicants and to deter others who might otherwise be tempted by greed to participate in such offending.

[32] In their youth, each applicant exhibited anti-social behaviour and participated in criminal offending, although relatively minor when compared to the monumental scale of this venture. It is therefore to their credit that in the three and a half years since being charged with this offence they have not re-offended and have led pro-social lives. This suggests each has promising prospects of rehabilitation. It is also significant that the lengthy delay between their arrests and their sentences, during which they lived with the knowledge that they will be serving a significant term of future imprisonment, was no fault of theirs. For all these reasons, together with the timely guilty pleas and the important, albeit incomplete, co-operation with the administration of justice, I would set a parole eligibility date after one third of the 10 year sentence, that is after three years and four months, on 30 November 2018.

[33] It follows that the applications for leave to appeal should be granted, the appeals against sentence allowed and the sentences varied to set parole eligibility on 30 November 2018.

**Orders**

1. The applications for leave to appeal are granted.
2. The appeals against sentence are allowed.
3. The sentences imposed at first instance are varied by setting aside the parole eligibility date of 30 July 2019 and substituting the parole eligibility date of 30 November 2018.
4. The sentences imposed at first instance are otherwise confirmed.

[34] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

[35] **BURNS J:** I agree with the reasons of, and the orders proposed by, the President.