Putland v The Queen [2003] NTCCA 3

PARTIES:	ROBERT JOHN PUTLAND
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING FEDERAL JURISDICTION
FILE NO:	CA20 of 2001 (9923435)
DELIVERED:	15 April 2003
HEARING DATES:	19 and 20 March 2003
JUDGMENT OF:	Martin CJ, Mildren & Riley JJ

CATCHWORDS:

Criminal law – Sentencing – Commonwealth offences - Whether sentencing court can impose an aggregate sentence for Commonwealth offences – Whether sentences manifestly excessive – Relevance of health to sentencing

Statutes:

Bankruptcy Act 1966 (Cth) s 269(1)(b)
Criminal Code (NT) s 411(4)
Criminal Law (Sentencing Act) (SA) 1988 s 18A
Crimes Act 1914 (Cth) ss 4K, 16, 18,19, 20, 29D
Judiciary Act 1903 (Cth) ss 68,79
Justices Act (NSW) s 57
Sentencing Act (NT) s 52
The Constitution s 109

Cases:

Anthony Horden & Sons Ltd v The Amalgamated Clothing & Allied Trades Union of Australia (1932) CLR 1, referred to
Austral Pacific Group Ltd v Air Services Australia (2000) 203 CLR 136 at 144, referred to
Australian Securities Commission v Marlborough Mines Ltd (1992) 177 CLR 485 at 492, referred to
Bailey (1988) 35 A Crim R 458, referred to
Cameron v R (2002) 187 ALR 65 AT 68, referred to
Eliasen (1991) 53 A Crim R 391, referred to
Houssein v Under Secretary of Industrial Relations and Technology (NSW) (1981-82) 148 CLR 88 at 94, referred to
Leith v The Commonwealth (1991) 174 CLR 455 at 467, referred to
Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672 at 678, referred to
Northern Territory of Australia v GPAO (1998) 196 CLR 553, applied
Pearce v The Queen (1998) 194 CLR 610 at 623-4, referred to
R v Baboui [1997] 2 VR 600, followed
R v Jackson (1998) 72 SASR 490; (1999) 104 A Crim R 196, followed
R v Smith (1987) 44 SASR 587, referred to
R v Wallace; Ex parte Employers Association of Wool Selling Brokers (1949) 72 CLR 529, referred to
Ruggiero (1998) 104 A Crim R 358 at 364, referred to
Ryan v The Queen (2001) 179 ALR 193, referred to
Spratt v Hermes (1965) 114 CLR 226, referred to
Stock Motor Ploughs Ltd v Forsyth (1932) 48 CLR 128 at 136, referred to
The Queen v Gee [2003] HCA 12, applied
TV and Appliances Pty Ltd v Falconer (1971) 125 CLR 591, referred to

Texts:

Pearce and Geddes, *Statutory Interpretation in Australia*, 5th Edition at para 4.28

REPRESENTATION:

Counsel:

Appellant:	Mr D Grace QC
Respondent:	Mr G Fisher,
Intervenor:	Mr T Pauling QC with Ms S Brown-Hill for the Attorney General of the Northern Territory Intervening

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions
Intervenor:	Solicitor General of the Northern Territory

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IN THE CRIMINAL COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Putland v The Queen [2003] NTCCA 3
No. CA20 of 2001 (9923435)

BETWEEN:

ROBERT JOHN PUTLAND
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 15 April 2003)

THE COURT:

[1] This is an appeal against sentence. The appellant pleaded guilty to two counts of defrauding the Commonwealth contrary to s 29D of the Crimes Act 1914 (Cth) and two counts each of breaching s 266(1) and s 269(1)(b) of the Bankruptcy Act 1966 (Cth). The maximum penalty for each offence contrary to s 29D of the Crimes Act is ten years imprisonment and the maximum penalty for each bankruptcy offence is three years imprisonment.

[2] The learned sentencing judge imposed an aggregate sentence of four years imprisonment and ordered that the appellant be released after serving twelve months upon entering into a bond to be of good behaviour for three years.

[3] The grounds of the appeal are that:

1. the aggregate term of imprisonment was manifestly excessive;

2. the unsuspended period was manifestly excessive;

3. the learned sentencing judge erred in failing to order the applicant's immediate release; and

4. the learned sentencing judge did not have power to impose an aggregate term of imprisonment thereby making the order of imprisonment a nullity.

[4] Before dealing with the other grounds of appeal, it is convenient to deal with ground 4.

Did the learned sentencing judge have power to impose an aggregate sentence?

[5] The appellant argues that the learned sentencing judge had no power to impose an aggregate sentence for the following reasons:

1. Subject to the applicability of s 4K of the Crimes Act 1914 (Cth) (the Act) in relation to summary criminal proceedings, Part 1B of the Act impliedly excludes aggregate sentencing by superior courts upon conviction for two or more federal offences.

2. Alternatively, it was put that s 4K alone, or together with the provisions within Part 1B, as supplemented by Commonwealth common law, impliedly excludes aggregate sentencing by superior courts.

3. That s 52 of the Sentencing Act (NT) enabling an aggregate sentence to be imposed had no application because that provision was not "picked up" by s 68 or s 79 of the Judiciary Act 1903 (Cth).

4. Alternatively, it was argued that if s 52 of the Sentencing Act were to apply to the exercise of Federal sentencing by the Northern Territory's Supreme Court, this would require or provide for the unequal treatment of equals and is discriminatory in a relevant sense and unconstitutional.

[6] Section 4K(3) of the Act provides:

> (3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.

[7] Section 4 K(4) provides:

> (4) If a person is convicted of two or more offences referred to in sub-section (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence.

[8] In *R v Bibaoui* [1997] 2 VR 600, the Court of Appeal of Victoria held that a court's power under s 4K(4) of the Crimes Act to impose a single penalty in respect of two or more offences charged in the same information, complaint or summons pursuant to s 4K(3), did not apply to offences charged on indictment. The effect of the decision was to confine the operation of s 4K(4) to offences tried summarily. Counsel for the respondent did not invite us to hold that *R v Bibaoui* was wrongly decided, although the Solicitor-General suggested that the case was not really relevant. In our

view the decision is relevant and this Court ought to follow it unless there is some manifest error in the reasoning. None was suggested to us.

[9] The argument that is contended for by the respondent and by the Attorney-General, is that s 52 of the Sentencing Act is picked up by s 68 of the Judiciary Act. In *R v Jackson* (1998) 72 SASR 490; (1999) 104 A Crim R 1996, the Court of Criminal Appeal of South Australia held by a majority (Millhouse J dissenting) that in that State s 18A of the Criminal Law (Sentencing) Act 1988 was picked up by s 68 of the Judiciary Act 1903 and accordingly, that it was open to the sentencing judge to impose a single sentence on all counts, notwithstanding that they involved Commonwealth offences.

[10] The arguments which are put on behalf of the appellant, seek to demonstrate that the majority (Perry and Nyland JJ) were wrong and that the correct conclusion was reached by Millhouse J. This Court must apply the reasoning of the majority in *R v Jackson* unless convinced that it is plainly wrong; see *Australian Securities Commission v Marlborough Mines Ltd* (1992) 177 CLR 485 at 492.

[11] The appellant contended that the majority of the Supreme Court of South Australia erred in finding that s 4K was not intended to exclude by implication, aggregate sentencing by superior courts of federal offenders and that the reasoning of the dissenting Judge, Millhouse J, should be

preferred. Counsel for the appellant, Mr Grace QC, submitted that the majority dealt cursorily with the issue without reference to other provisions of the Act, other provisions of Commonwealth statutory law or the common law.

[12] However we do not consider that the appellant's argument is able to withstand sustained analysis. Leaving aside for the moment the provisions of Part 1B of the Act, there is nothing in our opinion which shows that s 4K impliedly excludes aggregate sentencing when the charges have been preferred upon indictment. Sub-sections 4K(3) and (4) are clearly empowering provisions. Sub-section (3) empowers the joinder of certain charges in the same information, complaint or summons; sub-s (4) empowers the aggregation of penalties in the circumstances envisaged by sub-s (3). If the appellant's argument is right, it is difficult to see how the joinder of charges against the same person for any number of offences, would be possible when that person is proceeded against by way of indictment. Yet even in *Bibaoui*, supra, the Court of Appeal of Victoria has accepted that the joinder rules as prescribed by r 2 of the Presentment Rules contained in the 6th Schedule of the Crimes Act 1958 (Victoria) – which are *in para materia* with ss 308 and 309 of the Criminal Code (NT) – permitted the joinder of more than one charge in the same indictment or presentment, when the accused is charged with Commonwealth offences by application of s 68 of the Judiciary Act 1903; see *R v Bibaoui, supra,* at 601. A similar point was made by Perry J in *The Queen v Jackson,* supra, at p 513.

[13] Moreover, there is an explanation for the presence of these provisions. The power to join charges on complainant or information in summary courts is not available in some courts of summary jurisdiction: see s 57 of the Justices Act (NSW). In our view, ss 4K(3) and (4) were intended to apply to charges which are dealt with summarily and had nothing to say about the position either relating to the aggregation of sentences or the joinder of charges in the superior courts.

[14] The appellant's argument rested upon an application of the principle of statutory interpretation *expressio unius est exclusio alterius*; an express reference to one matter indicates that other matters are excluded. But as the High Court said in *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1981-82) 148 CLR 88 at 94;

> That maxim must always be applied with care, for it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument; *Saunders v Evans*. It is "a valuable servant, but a dangerous master"; *Colquhoun v Brooks*.

[15] There is nothing on the "face of the instrument" in this case to indicate that the maxim was intended to apply.

[16] For the sake of completeness, we should also refer to a branch of the maxim which is referred to by the Latin tag "*expressum facit cessare tacitum*". Pearce and Geddes, Statutory Interpretation in Australia, 5th Edn at para 4.28, observe that a particular use of the *expressum facit* approach occurs "where a particular procedure is designated to achieve something,

other procedures are thereby excluded" The learned authors referred to two principal authorities, the first being *Anthony Horden & Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 where Gavan Duffy CJ and Dixon J said:

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

[17] The second authority referred to by the learned authors is *R v Wallace; ex parte Employers Association of Wool Selling Brokers* (1949) 72 CLR 529 where Dixon J said at 550:

> ... an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.

[18] In *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672-678, Mason J said:

> It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power.

[19] Thus formulated, the *expressum facit* principle bears a strong similarity to another grammatical aid to interpretation, *generalia specialibus non derogant*; where there is a conflict between general and specific provisions, the specific provisions prevail.

[20] It might be observed that the general power in question, s 68 of the Judiciary Act, is to be found in an entirely different instrument, but we would not think that is critical. The real question is whether, because a specific power to impose an aggregate sentence is limited to charges dealt with summarily, it must be inferred that the Commonwealth Parliament thereby intended that a similar power vested in superior courts by State law could not be exercised in relation to charges brought upon indictment.

[21] The argument of the appellant rested upon some of the considerations referred to by Ormiston JA in *R v Bibaoui*, supra, at pps 603-604:

> If what I have said be correct, sub-s (4) has no relevance to offences charged on indictment. Although such a conclusion may seem to depend upon relatively slight indications, I consider that in its favour is the desirability of the accused, upon conviction being informed of the penalty for each offence of which he is convicted and the reasons for that penalty; and, moreover, the need, if there be any appeal brought on either side, for an appeal court fairly to understand not only the penalty imposed but the reasoning behind the imposition of each penalty. The desirability of there being separate dispositions of each count on an indictment has been discussed in such cases as *Castro v R* (1881) 6 App.Cas 229 at 237-8 per Lord Selborne L.C. and in *Ryan v R* (1982) 149 CLR 1, although no concluded views were expressed in the latter case. In summary jurisdictions where the appeal process more often than not requires a re-hearing, the need for separate penalties may not be so great and convenience may dictate an overall head sentence for offences capable of being heard summarily especially where fines are being imposed, but in my opinion convenience should not dictate what is the proper method which should be adopted upon the hearing and determination of prosecutions by indictment.

[22] Counsel for the appellant added that the imposition of separate penalties rather than an aggregate sentence, would make it easier for courts in different jurisdictions to impose equal sentences.

[23] It is not universally the case that appeals from courts of summary jurisdiction are appeals *de novo*. It is certainly not the case in either South Australia or the Northern Territory. Experience suggests that offenders are more interested in the bottom line or the total sentence to be served rather than the precise way the sentence is arrived at. In any event, a number of jurisdictions have now taken a different view about the desirability or otherwise of separate sentences by expressly empowering superior courts to impose aggregate sentences. Mr Grace QC went so far as to submit that, notwithstanding the existence of the power, the power should never in any event be exercised. We are unable to accept that submission. If a power is validly conferred by parliament, it would be wrong for a court to ignore it entirely.

[24] So far as the position of appeal courts is concerned, it is true that it is unwise to impose an aggregate sentence when, after a trial, a jury has found an accused person guilty of more than one offence. If an appeal against conviction is partly successful, the appeal court will have no choice but to re-consider the whole question of sentence, but it is otherwise in the case of pleas of guilty where there can only be an appeal against sentence and when, in any event, an appeal against sentence arises only by leave and the appeal can only be allowed if the court is of the opinion that some other sentence, whether more or less severe, is warranted in law: see for example s 411(4) of the Criminal Code and like provisions in State jurisdictions.

Consequently, an appeal is unlikely to succeed where the court thinks that the total sentence imposed is appropriate.

[25] Counsel referred us to the case of *Pearce v The Queen* (1998) 194 CLR 610 at 623-4 (paras [45] to[48]) where McHugh, Hayne and Callinan JJ said:

> [44] To an offender, the only relevant question may be "how long", and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.
>
> [46] Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision. It is, then, all the more important that proper principle be applied throughout the process.
>
> [47] Questions of cumulation and concurrence may well be affected by particular statutory rules. If, in fixing the appropriate sentence for each offence, proper principle is not applied, orders made for cumulation or concurrence will be made on an imperfect foundation.
>
> [48] Further the need to ensure proper sentencing on each account is reinforced when it is recalled that a failure to do so may give rise to artificial claims of disparity between co-offenders or otherwise distort general sentencing principles in relation to particular offences.

[26] All that is very true but those comments were made not with reference to a power to aggregate sentences, but rather assumed that such a power did not exist. The power to aggregate sentences is really a recognition by the Legislature that where there are multiple offences, the overriding

consideration of the sentencer will be the totality principle and that in such circumstances the imposition of separate sentences is an exercise in artificiality.

[27] Whatever the respective merits of these views may be, there is no reason to suppose that the Commonwealth when it enacted s 4K intended to take a particular view of the wisdom of aggregate sentencing.

[28] The appellant's argument was supported by a number of propositions to be inferred from the provisions of Part 1B of the Act. First, it was submitted that Part 1B expressly requires the imposition of separate sentences in relation to each Federal conviction. Reference was made to a number of provisions, for example s 19(1) and s 19(2). It is not necessary to mention them all, but on an examination of those provisions it is plain in our opinion that the Commonwealth Parliament was not mandating the imposition of separate sentences for separate offences, but merely providing for what was to flow from the imposition of several separate sentences. Moreover, it is difficult to see how the argument can be sustained in the light of s 4K itself.

[29] An argument was pressed upon us that in s 16(1) there is a definition of "aggregate" which evinces an intention to exclude aggregate or global sentencing by superior courts exercising federal sentencing jurisdiction. We are quite unable to see how this is so. Clearly the definition deals with a totally different subject matter from aggregate sentencing. Again, if it had the effect contended for by the appellant it is difficult to see why it would

not also apply to aggregate sentences imposed by courts of summary jurisdiction.

[30] Mr Grace QC referred us to the observations of Millhouse J in *R v Jackson*, supra, at p 500 where his Honour said:

> One of the primary objectives of Commonwealth legislation is to provide consistency between the States. It would be quite illogical for the Commonwealth to allow Commonwealth offences to be treated differently in the Australian Capital Territory and South Australia without an express intention stated.

Although his Honour was there speaking about joinder in the superior courts, it was submitted that the same reasoning applies in respect of aggregate sentencing.

[31] However, this argument cannot be accepted. It is sufficient in this respect to refer to the most recent pronouncement on the subject from the High Court in the case of *The Queen v Gee* [2003] HCA 12 at paras 6 and 7 in the judgment of Gleeson CJ:

> [6] As was acknowledged by Doyle CJ, who was in the majority in the Full Court, the language of s 68(2) [of the Judiciary Act] is both general and ambulatory. This is consistent with its purpose, which is to "assimilate criminal procedure, including remedies by way of appeal, in State and Federal offences". In *Williams v The King* [No. 2], Dixon J, speaking of the reference to appeal procedure, said:
>
> > But when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description "appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith". This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the

> same footing as that of the State and to avoid the establishment of two independent systems of criminal justice.
>
> [7] That general policy reflects the legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth, or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The federal legislation enacted to give effect to that choice, therefore, had to accommodate not only differences between State procedures at any given time, but also future changes to procedures in some States that might not be adopted in others. That explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time.

[32] Reference was made by Mr Grace QC to a number of other provisions in Part 1B of the Crimes Act as further evidence in support of the contention that it was not the intention of the Legislature that Part 1B be supplemented by local sentencing powers. Reference was made to ss 16E(1), 16E(2), 18(2), 19A, 19AA, 19AZD(1) and 20AB(1), but none of these are provisions which relate to sentencing powers.

[33] Next it was submitted that, notwithstanding the majority opinion in *Jackson*, supra, s 52 of the Sentencing Act was not picked up by ss 68 or 79 of the Judiciary Act 1903 (Cth).

[34] It is to be observed that all members of the Court in *Jackson* were of the view that the equivalent South Australian provision to s 52 is a law with

respect to procedure for trial and conviction on indictment within the meaning of s 68(1) of the Judiciary Act.

[35] It was not suggested by the appellant that s 68 of the Judiciary Act was *ultra vires* in its application to the Supreme Court of the Northern Territory. However, s 79 of the Judiciary Act applies only to courts "exercising federal jurisdiction" and if this Court is not exercising federal jurisdiction, s 79 can have no application to the current proceedings. It has been held that a Territory court is not a court invested with federal jurisdiction; see *Spratt v Hermes* (1965) 114 CLR 226; and *TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591. It may be that those decisions are distinguishable on the basis that the courts of the Australian Capital Territory, to which those decisions referred, were not created by the Legislative Assembly of a self-governing Territory, but for the moment, although there is indication in more recent authorities suggesting that the authority of *Capital TV and Appliances Pty Ltd v Falconer* is in doubt (at least so far as this Court is concerned), we think the safer course is to consider the position under s 68 of the Judiciary Act which is not subject to that problem.

[36] The question then is whether there is any inconsistency between s 52 of the Sentencing Act as applied by s 68 of the Judiciary Act and the provisions of the Crimes Act (Cth). In the present case, the question of inconsistency is not one arising under s 109 of the Constitution, but whether there is an intention by the Federal Parliament that its laws shall be a complete statement of the law governing a particular question, such that the

Commonwealth law would be impaired if the Territory law were allowed to affect the matter at all; see *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136 per Dixon J. The question of inconsistency between Commonwealth and Territory laws is to be resolved by applying the "narrower notions of textural collision or indirect consistency and repugnancy" with "greater scope for the concurrent operation of Territorial laws"; see *Northern Territory of Australia v GPAO & Ors* (1998) 196 CLR 553 at 582 para [59]. Those notions find inconsistency where two laws make contradictory provision upon the same topic making it impossible for both laws to be obeyed, or where one law varies, detracts from, or impairs the other; see *Northern Territory of Australia v GPAO,* supra.

[37] We are unable to see why both laws cannot be obeyed; nor is there any variation, detraction from, or impairment of the other.

[38] Another test may be whether the operation of the Crimes Act would so reduce the ambit of s 52 that it is irreconcilable with the Crimes Act; see *Austral Pacific Group Ltd v Air Services Australia* (2000) 203 CLR 136 at 144. If this be the correct test, it is still our view that s 52 is not inconsistent with and is readily reconcilable with the provisions of the Crimes Act.

[39] The final argument raised by the appellant is that if s 52 applies to the exercise of federal sentencing by the Supreme Court of the Northern Territory, that requires or provides for the unequal treatment of equals and

is discriminatory and unconstitutional; see *Cameron v R* (2002) 187 ALR 65 at 68 para [15].

[40] There is no suggestion in that judgment that discrimination in that way is contrary to the Constitution. The passage refers to the case of *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 which concerns s 117 of the Constitution relating to discrimination in a State against residents of another State and in which the phrase "unequal treatment of equals" to describe the notion of discrimination was coined. There is nothing to suggest that discrimination outside the narrow sphere of s 117 is prohibited by the Constitution.

[41] In any event, as Mr Fisher, counsel for the respondent, submitted, s 52 of the Sentencing Act is not a provision which provides for the unequal treatment of equals as it applies equally to all federal offenders sentenced in the Northern Territory. It has no substantive impact upon a penalty imposed. It is simply an example of the kind of varied application of State or Territory laws in Commonwealth matters arising from the policy "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice"; see *Leith v The Commonwealth* (1991) 174 CLR 455 at 467 per Mason CJ, Dawson and McHugh JJ citing Dixon J in *Williams v The King [No. 2]*, supra. Their Honours went on to say:

> There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.

[42] We accept the submission of the Solicitor-General for the Northern Territory that there is no support for the appellant's conclusion that the fact that persons charged with offences against the laws of the Commonwealth may receive aggregate sentences in some States or Territories and not others, renders an aggregate sentence imposed in the Supreme Court of the Northern Territory improper and a nullity.

[43] W therefore consider that it has not been established by the appellant that the decision of the majority in *Jackson*, supra, is plainly wrong. In those circumstances, this Court ought to follow that decision. In our opinion, ground 4 must therefore be dismissed.

Factual background

[44] Before dealing with the remaining grounds of appeal, it is necessary to set out in some detail, the factual basis upon which the appellant was sentenced.

[45] The Crown facts were not in dispute. Between 1985 and 1989, the appellant owned and operated two companies in the Northern Territory; Putland Haulage Pty Ltd and Centre Transport Industries Pty Ltd. These two companies went into liquidation in September 1987 with the Australian Taxation Office being the principal creditor. During the operation of these companies, the accused failed to remit either partially or totally, taxation instalment deductions and Prescribed Payment System payments (PPS) that

were deducted from employees' gross salaries by way of taxation. The debt to the Commissioner was significant.

[46] Following the liquidation of these companies, the appellant continued to trade and on 12 February 1992, he was a sole trader using the business name "Northstate Transport Services". The appellant simply continued with his previous business activities operating from the same premises, with the same employees and the same equipment. On 12 February 1992, the appellant was declared bankrupt on the petition of a solicitor for the non-payment of a modest amount owed for legal fees.

[47] In about 1989, Ilene Roberts met the appellant at a time when she was about 22 years of age. Ms Roberts was employed and obtained work experience with the appellant, following which she became employed full-time and had secretarial duties, including being a signatory to Northstate Transport Services bank account. Putland's co-accused, a person called Fawcett, was a qualified accountant and registered tax agent. At the time of the appellant's bankruptcy and resultant closure of his business, Fawcett was the accountant for the appellant.

[48] Following the appellant's bankruptcy in 1992, nothing but the trading name effectively changed. The same employees continued to be employed, a transport business using the same assets operated from the same premises and initially, stationery from Northstate Transport Services was used.

[49] A dishonest Statement of Affairs was lodged by the appellant in which he neglected to list a number of assets, listed some assets or their value incorrectly and omitted some major creditors. The Statement of Affairs showed a surplus and the appellant advised the Insolvency Trustee Service of Australia (ITSA), the appellant's Trustee in Bankruptcy, that he intended to apply for an annulment of his bankruptcy. Due to the seeming surplus, the Trustee did little in securing the assets and gave the appellant permission to work, but not to trade.

[50] On 11 May 1990, the appellant registered the name Putland Equipment Hire. This business name was not used until it was transferred to Ms Roberts in April 1992 at the appellant's request. Ms Roberts has said that in April 1992 she and the appellant contacted a counsel at the Melbourne Bar for advice. That counsel has advised that he was not told, nor was he made aware, that the appellant was a bankrupt and that in the circumstances, Ms Roberts was merely carrying on the business as trustee for Putland.

[51] Transfer of the business name from the appellant to Ms Roberts was done without the authority or knowledge of the Trustee in Bankruptcy. The attempts by him to ascertain the whereabouts of assets were frustrated by the appellant. When the Trustee wrote advising it had information that Putland Equipment Hire was in fact the appellant's business, Putland's solicitors refused to supply information on the basis that to supply any information would be in breach of legal professional privilege. The Trustee did nothing to use its regulatory powers of compulsion.

[52] It was conceded that once it became evident that the affairs of the appellant were not in surplus and that he was misleading in his dealings, the administration of the estate by ITSA was not satisfactory. The appellant, Putland, continued to trade as he had previously done using the name Putland Equipment Hire and Ms Roberts as his "front". Nothing changed; the premises, the assets, telephone numbers and accounts with the Power and Water Authority all remained the same. The appellant never advised creditors of the new entity or that he had personally become a bankrupt. Putland Equipment Hire began to fall into financial difficulties almost from the outset. Ms Roberts used some of her money to rebuild a damaged truck, which cost her approximately $20,000. The truck was transferred to her in 1991, then to Putland Equipment Hire on 17 August 1993, then back to Ms Roberts again on 2 September 1993 and finally, on 17 December 1993, to a company called Gold Earth Resources a company owned by the co-accused Fawcett.

[53] According to Fawcett, he purchased the truck for $20,000 and Ms Roberts used the money to pay her creditors. Ms Roberts however has never received payment of this amount and any debts that were incurred by Putland Equipment Hire were not hers but Putlands.

[54] In relation to the taxation debts of Putland Equipment Hire for the financial year period February 1992 until 30 June 1992 and from the period 1 July 1992 to 30 June 1993, the Australian Taxation Office has not raised any assessment against Putland as it had no documentation from which it

might validly raise such an assessment. Documents were seized under warrant from Fawcett's premises which purported to set out a history of wages paid to employees, but these documents were so unreliable that the Australian Taxation Office was unable to use them. Thus in relation to count 1, no amount can be pointed to as an amount by which the Australian Taxation has been defrauded.

[55] For the period 1 July 1993 to October 1993, Ms Roberts paid in April 1994 an amount of $11,307 from an inheritance to the Australian Taxation Office for the tax liability of Putland Equipment Hire. As a result of continued pressure from Putland Equipment Hire's creditors, Ms Roberts personally went bankrupt on 30 March 1995. It was never in doubt that Ms Roberts was only a trustee of Putland Equipment Hire for Putland. Putland himself asserted as much in a letter dated 1 October 1993 to Roberts' solicitors, the wording of which was settled by counsel.

[56] At no time during the operation of the business in the name of Putland Equipment Hire did the appellant advise his creditors or others that he was in fact a bankrupt and that Ms Roberts was running that business on his behalf, or as he put it, as trustee for him. This lead to a significant number of instances of his obtaining credit as a bankrupt, all of which could be charged as individual offences, but which were subsumed in count 8 on the indictment. As an example, significant amounts were owed for petrol and mechanical repairs.

[57] Ms Roberts had no further participation in the business of Putland Equipment Hire after approximately mid-November 1993. On 11 April 1994, she sold a house in Geelong which had been left to her by an uncle. When the proceeds of this sale were deposited into her bank account, an amount of $10,226.73 was deducted by the bank in satisfaction of a guarantee she had given to the bank for the overdraft facility granted to Putland Equipment Hire.

[58] At all times, Putland was the true owner and operator of Putland Equipment Hire and he made no bona fide effort to remit group tax to the Commissioner, and in fact, gave instructions that all other creditors were to be paid first. The dissipation or non-isolation of Putland Equipment Hire funds specifically to meet taxation obligations imperiled the economic interest of the Commonwealth by rendering Putland Equipment Hire unable to fund its taxation obligations either out of working capital during its operation, or out of assets on its cessation. The naming of Ms Roberts as the owner of the business name was nothing more than a sham. She was a mere figurehead for Putland and through this he was able to continue operating his business as a bankrupt.

[59] On 22 December 1993, the business name Putland Transport and Services was transferred from a company known as Sapphire Bay Pty Ltd to one Geoffrey Wayne Tucker. Both the company and the business name were Fawcett's. Tucker had known Putland for about 20 years and when Ms Roberts left Putland Equipment Hire, Putland asked Tucker to become

the figurehead for Putland Transport and Services. In reality this was a sham. It was the appellant's business being operated under Tucker's name.

[60] Putland Transport and Services operated from 1 January 1994 to late August 1996. During this period no group tax or PPS was ever submitted to the Commissioner on behalf of the entity known as Putland Transport and Services.

[61] The appellant continued to operate the business through Putland Transport and Services in the same way as before. He continued not to pay his taxation obligations. All correspondence for the business went to a post office box held by Fawcett and for which he was the only keyholder. Fawcett did the banking and wrote out all the cheques for the business and effectively controlled the finances. He chose not to pay the Commissioner acting, as he said, on the appellant's instructions.

[62] The tax debt for the period for which Tucker was the figurehead was assessed at $84,810.32, which consists of the quantum of unpaid tax instalment deductions, PPS and superannuation guarantee charges. This sum does not include any amount by way of statutory penalties.

[63] The advice given by Putland in 1993 to his Trustee in Bankruptcy that he intended to apply for an annulment of his bankruptcy on the basis that the value of his assets exceeded that of his debts, resulted in negotiations which took place over the next two years. However, the appellant was never in a

position to annul his bankruptcy as his debts always exceeded the value of his assets.

[64] The appellant was never honest in his dealings with his Trustee. In relation to his annulment, he stated that his assets, without the value of a yard which he owned in Alice Springs, exceeded his debts. This list of debts failed to include a figure of $102,000 to Mobil and a figure of $162,000 for debts owing by Putland to the liquidator of Putland's companies in 1987, which arose from Putlands continued use of the same assets. If those amounts had been included, the yard would have needed to have been sold. The assets set out in counts 5 and 6 of the indictment were transferred to Gold Earth Resources on 17 December 1993. Ownership in them was purportedly in that company which was, on the face of it, Fawcett's company.

[65] The appellant, as stated previously, owned a transport yard at 17 Cameron Street, Alice Springs. Its value on the Statement of Affairs was about $335,000 with encumbrances to the ANZ Bank and Esanda totalling $110,000, leaving a surplus of $225,000. When the Trustee in Bankruptcy identified the non-disclosure of the $102,000 Mobil and $162,000 Southwell debts, it became necessary to sell the yard to pay the creditors 100 cents in the dollar. Putland and his solicitor engaged in various delaying tactics, including not replying to correspondence or attending at a court appearance. Once the Trustee made it clear at the end of 1994 that this behaviour would no longer be tolerated and that the yard would be sold, the appellant had his

solicitor write a letter which substantially under-valued the assets still in his possession.

[66] A creditors meeting was held on 31 March 1995 in relation to a composition proposed by Putland through his solicitor, who submitted a composition which proposed to pay creditors about ten cents in the dollar on the remaining debt. The funds were to be provided by Desmond Putland, the appellant's brother, and a Mr Danny Kunoth. The meeting voted against the composition. It was discovered by the Trustee that Mr Kunoth denied any knowledge of his taking part in raising funds in relation to the proposed composition.

[67] Further investigations revealed that the appellant phoned his brother and asked him to take over a debt for $5,000. The brother initially agreed, but ultimately declined to take any part in any composition or debt assignment. During the creditors' meeting of 31 March 1995 the appellant, when asked, denied trading or being involved with Gold Earth Resources and did not use the opportunity to advise the meeting of his role in Putland Transport and Services.

[68] Another creditors' meeting took place on 13 June 1995 to obtain permission from the creditors to sell the yard. An offer of $376,000 had been submitted. The major creditors voted for the sale, but Southwell advised that he had not made a decision. The meeting was adjourned to 14 June 1995. On that day, Mobil and Southwell advised that their debts

had been assigned and they would vote against the motion. The meeting was adjourned and the sale of land was not approved.

[69] The Trustee was advised that the $102,000 Mobil debt had been assigned to Des Putland for $20,000 and the $162,000 Southwell debt was assigned to Des Putland for $30,000. Some other minor debts were also assigned to friends of Putland. The Trustee was never provided with any documentation concerning these transactions, although it had been requested. Desmond Putland denied ever having signed anything, insisting that he refused repeatedly and eventually threw the documents sent to him in the fire.

[70] At the same time, the appellant had approached a sub-contract driver, one Geoffrey Glover. Glover agreed to lend Putland $50,000 to allow him to save his yard. Glover refused to accept an assignment of debt and the funds were used without Glover's knowledge or permission to pay for the assignments of debts to Desmond Putland and the others. Mr Glover, seeking to obtain security for what he regarded as a simple loan, obtained a bill of sale over the assets being used by Putland Transport and Services, with the only complication being that the assets were actually registered to Gold Earth Resources. Fawcett was present during meetings with Glover and Putland regarding the loan and the Bill of Sale. Many of those assets were the assets which the appellant had listed on his Statement of Affairs in February 1992 and vested in the Trustee in Bankruptcy. In fact in April 1992, the Trustee had instructed a bailiff to seize the assets listed on the

Statement of Affairs. The bailiff however was unable to do so as the assets were not at the yard as required.

[71] Eventually, as a result of not repaying the loan, Mr Glover sold all but one of the assets on his Bill of Sale to recoup his loan.

[72] In 1998, the Trustee received documents purporting to be from Desmond Putland, Vern Schrapel and Ian Staker which forgave the debts. In short, the documents stated that they would not seek to enforce their rights in relation to the debts. Des Putland has asserted that a signature apparently his appearing on certain of those documents is not his. The appellant has admitted that he signed his brother's signature on these documents prior to handing them to the Trustee. The appellant said that he was authorised by his brother by telephone to do so. Desmond Putland denies doing this. The appellant's girlfriend witnessed the purported signature of Desmond Putland.

[73] The appellant owned a screening plant which in 1988 washed down a river in a flood and was fully repaired. During the period when Northstate Transport Services was active, the screening plant was listed in a document as a 1986 model, jointly owned by the appellant and a Mr Brown, for $40,000. In the appellant's Statement of Affairs in February 1992, it is listed as being owned by the appellant and having a value of $20,000. A Mr Paul Glim, the owner of a business called Centre Plumbing located immediately next to Putland's yard, was told by the appellant that some assets were hidden from the Trustee and were in South Australia. On

20 October 1994, a Mr Anthony Wilson of South Australia purchased the screening plant for $25,000 and a generator for $4,000 from the appellant and sent a cheque payable to Gold Earth Resources to Fawcett in payment thereof. The $20,000 was never forwarded to the Trustee in Bankruptcy.

[74] The appellant had no prior convictions. At the time of sentence he was a single man of 53 years who had been in the transport business all of his working life since leaving school at the age of 16. After 1996, the appellant left Alice Springs and moved to Adelaide where he became employed as a driver.

[75] A number of matters were urged on his behalf, including the appellant's age, his clear record and his plea of guilty, his poor health and the delay in bringing proceedings against him. The submission of the appellant's counsel to the learned sentencing judge was that those factors should persuade the Court that a wholly suspended custodial sentence would probably meet the circumstances of both the offence and of the offender.

[76] The learned sentencing judge accepted that the prisoner's plea had saved the prosecution, the Court and witnesses a good deal of expense and inconvenience. The trial had been expected to occupy several weeks and his Honour noted that it would have involved the calling of numerous witnesses, many from interstate and at least two for whom planes would have had to have been chartered. The learned sentencing judge observed that the appellant deserved considerable credit for his plea, but that it also had to be

recognised that the plea came at a very late stage, namely the first day fixed for trial. Counsel for the appellant had submitted that the appellant's financial difficulties precluded him from receiving comprehensive legal advice until recently. The learned sentencing judge observed that whilst that may be so, it must have been apparent to the appellant that the case against him, whilst complex, was very strong, if not overwhelming. As to remorse, the learned sentencing judge observed that whilst the plea might be accepted as a sign of remorse, there had been no practical demonstration of it by payment of restitution for any of the tax evaded. The learned sentencing judge also noted that the record of interview undertaken on 18 November 1998 fell a very long way short of full co-operation with the authorities. In general terms, the learned sentencing judge said the appellant during the interview sought to shift the blame to others, claimed ignorance of Mr Fawcett's activities or motives and when pressed for answers resorted to claims of lack of memory. His Honour observed:

> This is not a case where a tax offender co-operates, fully, and seeks to make restitution for tax evaded. It is much more the situation that Mr Putland has sought to maintain lies, create confusion and generally hinder the full and true picture of his activities from emerging. In such circumstances he cannot expect nor would he receive much benefit by pointing to alleged delay in the investigation and prosecution of his offences.

[77] Counsel for the appellant, Mr Grace QC, submitted that the aggregate sentence and the period ordered to be served before release, were manifestly excessive and in particular, that the learned sentencing judge gave insufficient weight to the appellant's age, the absence of any prior

convictions, the appellant's excellent employment record, his pleas of guilty, the appellant's poor health and the delay between the detection of the offence and the date of sentence during which the appellant had not re-offended. All those matters were referred to by the learned sentencing judge who plainly took them into account.

[78] Before returning to those matters, it is necessary to observe that, as the learned sentencing judge found, the summary of facts demonstrated that the appellant was prepared to engage in a sustained course of lies, deceit, fraud and flagrant dishonesty over a substantial number of years. The learned sentencing judge said:

> Mr Boylan, conceded that the prisoner's offences are serious. He recognised that in recent years the courts have developed a consistent approach in sentencing to the effect that notwithstanding the previous good character and a plea of guilty, those guilty of deliberate, sustained and substantial tax fraud should receive a sentence of imprisonment at least a part of which should be served, in the absence of substantial mitigating circumstances.

[79] There is no ground of appeal challenging the correctness of his Honour's approach in this regard.

[80] One matter that counsel for the appellant directed criticism towards was his Honour's view that any delay in the investigation and prosecution of the applicant did not amount to a significant mitigating factor. In our view, the conclusion reached by the learned sentencing judge was perfectly proper and open to him having regard to the extensive efforts made by the applicant to hide the truth from the prosecuting authorities and to delay any investigation

by his Trustee in Bankruptcy. The investigation in this matter was lengthy and difficult and it was the appellant's conduct which made the investigation lengthy and difficult. In those circumstances, the finding by the learned sentencing judge was correct.

[81] Another matter raised by the appellant is the fact that the learned sentencing judge gave little weight to the appellant's ill health. His Honour referred to a number of authorities starting with *R v Smith* (1987) 44 SASR 587 where King CJ noted at page 589:

> Generally speaking, ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or where there is a serious risk of imprisonment having a gravely adverse affect on the offender's health.

(See also *Bailey* (1988) 35 A Crim R 458 and *Eliasen* (1991) 53 A Crim R 391.)

[82] The material placed before the learned sentencing judge provided no basis for the appellant's health to be regarded as a substantial mitigating factor because there was nothing in that material to suggest that any punishment which might be imposed on the appellant would be a greater burden on him by reason of his state of health, or that it would affect adversely his health. In our opinion, the approach of the learned sentencing judge was correct. The fact that s 16A(2)(m) of the Crimes Act requires a sentencer to take into account the appellant's physical or mental condition, does not determine the degree of weight which is to be attached to the fact that a person may have

been suffering from bad health. The learned sentencing judge was required to take it into account and he did so and the weight which attached to it was, in the circumstances, appropriate.

[83] Much was also made of the appellant's previous good work record and lack of prior convictions. There was no character evidence submitted on his behalf. Counsel for the appellant referred us to the decision of the High Court in the case *Ryan v The Queen* (2001) 179 ALR 193. In that case, the relevant legislation required the sentencer to consider whether or not the offender was "otherwise of good character". Section 16A(2)(m) merely requires the Court to take into account the character, antecedents, age, etc. of the person. In *Ryan's* case there was considerable evidence led concerning the appellant's prior good character, a feature which is lacking in this case. On the other hand, there is the observation in *Ruggiero* (1998) 104 A Crim R 358 at 364 per Olsen J (with whom Cox and Pryor JJ agreed):

> It seems to me that the considerations discussed in the authorities related to social security cases are certainly no less apposite to taxation imposition situations. Considerations of both personal and general deterrence must necessarily loom large as considerations in the sentencing process. Absent substantial mitigating circumstances, actual service of a custodial sentence must be seen as a norm in cases involving deliberate and sustained evasion of taxation, especially when an offence is motivated by greed rather than need. This was the view expressed in *Wright* and I consider it compelling. The fact that an offender has no relevant antecedent history will, usually, not serve to avoid such a result. Good character will have been lost where there has been a sustained offending over a significant period of time (*Schneider* (1988) 37 A Crim R 395 at 397; *Veen (No* 2) (1988) 164 CLR 465; 33 A Crim R 230).

[84] Thus whilst we think that there are cases involving taxation fraud where it would be wrong to give no weight at all to the lack of prior convictions of the offender particularly where the offender is a person past middle age, the weight to be attached to it will depend very largely upon the facts and circumstances of each case. Here there was a prolonged period of offending over a number of years. There was no character evidence called. The only submission that was made was that he had at some stage assisted the Ghan Preservation Society and that a person from that Society would have been called had he been alive. If the applicant had made a significant contribution to the Ghan Preservation Society, one would have thought that there would still be someone available to give evidence of it, but in any event we are not persuaded that inadequate weight was given to those factors by the learned sentencing judge.

[85] We were referred to s 16G and the argument was put that although the learned sentencing judge said he took it into account, if he had done so he must have started off with a head sentence of at least six years imprisonment. We were also referred to a few sentences imposed in the County Court of Victoria and the South Australian District Court for offences against s 29D of the Crimes Act. Only five cases are contained in the table and they hardly are sufficient in number to establish a range. The material available is inadequate to draw any particular conclusions. One of the arguments that was put on behalf of the appellant was that in each of the cases referred to, the defendant received a lesser sentence than the applicant

in this case, although sums of money between $290,000 and $532,000 had been avoided. In the present case, no amount was able to be calculated in relation to count 1, whilst the amount able to be calculated in relation to count 2 was assessed at $84,810.32. However, the reason why no amount was able to be calculated in relation to count 1 was because of the inadequacy of the applicant's records. In any event, although the amount involved is a factor and often a significant factor, it is by no means the only factor which needs to be taken into account by a sentencer. As counsel for the respondent pointed out, there was material tendered at the time of the plea from which some indication of the magnitude of the amount involved in relation to count 1 might have been calculated and perhaps the combined amount involved in relation to both counts was between $120,000 to $140,000. This does not include the amounts lost in relation to the other counts which were also significant.

[86] It is not difficult to see how in the circumstances of this case, bearing in mind that there were six counts, a total sentence of four years might have been arrived at after allowing for s 16G of the Crimes Act, and for each sentence to be properly made cumulative or concurrent, and then applying the totality principle.

[87] We are not persuaded that the total head sentence is manifestly excessive or that the learned sentencing judge erred in requiring the applicant to serve a term of at least twelve months before being released on his own

recognizance. We consider that the sentences imposed were well within the learned sentencing judge's discretion.

[88] The appeal is dismissed.
