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| PARTIES: | DESLEY DAWN SMITH<br><br>v<br><br>JAN LOUISE SPEIRS |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | No. JA25 OF 1995 |
| DELIVERED: | Darwin 24 November 1995 |
| HEARING DATES: | 1 and 8 November 1995 |
| JUDGMENT OF: | Kearney J |

**CATCHWORDS:**

CRIMINAL LAW AND PROCEDURE - sentencing - federal offence - significance of maximum penalty when magistrate hearing summarily an offence punishable on indictment

Crimes Act (C'th) s4J(1)
*Maynard v O'Brien* (1991) 78 NTR 16, followed

CRIMINAL LAW AND PROCEDURE - sentencing - whether consequences of criminal conduct relevant

*R v Webb* [1971] V.R. 147, followed

CRIMINAL LAW AND PROCEDURE - sentencing - federal offence - approach to be taken before imposing a sentence of imprisonment - whether non-compliance with approach is appealable error

Crimes Act (Cth), s17A(1) & (3)
*R v Morris* (1992) 61 A Crim R 233, referred to
*R v Whitnall* (1993) 68 A Crim R 119, followed
*R v Wright* (1994) 74 A Crim R 152, considered
*R v Tacey* (unreported, Court of Appeal (Qld), 2 March 1994), considered
*R v Bird* (1988) 56 NTR 17, considered

CRIMINAL LAW AND PROCEDURE - sentence - suspended sentence of imprisonment - circumstances in which sentence of imprisonment may be suspended - order for immediate release - continuing character of custodial sentence

*Wood v Samuels* (1974) 8 SASR 465, followed
*R v Lloyd* (1991) 53 A Crim R 198, referred to
*McDonald v The Queen* (1993-94) 120 ALR 629, followed

**REPRESENTATION:**

*Counsel:*

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| Appellant: | C.R. McDonald |
| Respondent: | S.A. Sievers |

*Solicitors:*

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| Appellant: | David Francis & Associates |
| Respondent: | Director of Public Prosecutions |

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| Judgment category classification: | A |
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| Number of pages: | 37 |

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA25 of 1995

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF an appeal against sentences imposed by the Court of Summary Jurisdiction at Darwin

BETWEEN:

DESLEY DAWN SMITH
Appellant

AND:

JAN LOUISE SPEIRS
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 24 November 1995)

The appeal

This is an appeal against the severity of cumulative sentences of 6 months and 3 months imprisonment respectively, imposed on the appellant by the Court of Summary Jurisdiction in Darwin on 27 July 1995. The sentences were imposed after the appellant pleaded guilty to 2 charges of failing to act honestly in the discharge of her duties as an officer of a corporation, with intent to deceive the Australian Tax Office.

His Worship directed that the appellant be released after serving 2 months of the effective 9 months sentence, upon entering into a recognizance in the sum of $1000 to be of good behaviour for a period of 3 years.

The amended Notice of Appeal sets out 3 grounds of appeal, viz:-

(1) The learned Magistrate erred in his approach to sentencing law when he said (p16):-

> "The guiding principle in a case of this type is that an immediate term of imprisonment is warranted unless there are substantial mitigating circumstances. Try as I might I am unable to find any substantial mitigatory circumstances in this case".

(2) The learned Magistrate erred in law when sentencing the appellant to imprisonment, in that he failed to observe the restrictions in s.17A(1) of the *Crimes Act 1914 (C'th)* on imposing such sentences.

(3) The sentence imposed was manifestly excessive.

The appeal is instituted under s163(1) of the Justices Act. The authorities establish that to succeed the appellant must show that his Worship improperly exercised his sentencing discretion. This Court can intervene only where the effective sentence "appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority", as the High Court put it in *Cranssen v The King* (1936) 55 CLR 509 at p520. As their Honours also observed (p520), the question on appeal is not whether this Court approves of the effective sentence imposed, but whether it so

exceeded the occasion as to be unreasonable, or whether there were any circumstances which vitiated the exercise of the sentencing discretion which led to its imposition.

The appeal was argued on 1 November. On 8 November I ordered, for reasons to be published in due course, that the appeal be allowed in part, and the sentencing of 27 July varied as follows: sentences of 6 months and 3 months imprisonment affirmed, but the latter directed to be served concurrently with the former (not cumulatively) making a total effective sentence of 6 months imprisonment (not 9 months); service of those sentences directed to be suspended with immediate effect (not after 2 months), upon the appellant entering into her own Recognizance in the sum of $5000 (not $1000) to be of good behaviour for a period of 3 years. I now publish the reasons for that decision.

Particulars of the offences charged

The first charge was that between 1 July 1991 and 31 January 1993 at Darwin the appellant, as an officer of a corporation Darwin Swimpool Sales and Services Pty Ltd, failed to act honestly in the discharge of the duties of that office, with intent to deceive the Australian Taxation Office, contrary to s232(2) of the Corporations Law ("the Law").

Section 7 of the Corporations (Northern Territory) Act (NT) applies the Law (enacted as a Commonwealth Act) as the law of the Territory, while Part 8 of the Act applies Commonwealth criminal law to the Law; the result is that an

offence against the Law in the Territory is treated as if it were a federal offence.

The particulars of the first offence charged were that between 1 July 1991 and 31 January 1993 the appellant failed to include certain company employees in the company's formal wages records, failed to deduct the appropriate tax instalments from employees' wages, and falsified company cheques and cheque books to disguise the payment of those wages as other company expenses. The offence charged under s232(2) carried a maximum punishment of 5 years imprisonment or a fine of $20,000, or both; this penalty was imposed by s232(3)(a) of the Law, now repealed but preserved for the purposes of the first charge by s1375(1).

The second charge was that between 1 February 1993 and 27 July 1993 the appellant committed the same type of offence (this time the allegation being that she 'knowingly' failed to act honestly, a requirement of s1317FA(1)(a)) in a similar factual manner, contrary to ss232(2) and s1317FA(1) of the Law. As from 1 February 1993 the offence carried a maximum punishment of 5 years imprisonment or a fine of $200,000, or both. The provision which fixed the maximum penalty for the first charge, s232(3), was repealed with effect from 1 February 1993; the penalty for the second charge was provided for by the combined effect of ss232(6B), 1317FA(1), 1311(2), 1311(3)(b) and Schedule 3 (as amended with effect from 1 February 1993) of the Law.

However, when dealt with summarily under s4J(1) of the Crimes Act, as here, each offence carried a maximum

punishment of 1 year's imprisonment or a fine of $6000, or both; see s4J(3)(a) of that Act. I indicate that I consider that when an offence under the Law - treated as a federal offence - is dealt with summarily as here, the significance of the maximum sentence his Worship could impose on each charge is as set out in *Maynard v O'Brien* (1991) 78 NTR 16 at p21. That is to say, the maximum sentence which his Worship could impose on each charge, 12 months imprisonment, is not reserved for a 'worst case' example of the offence thus dealt with. When a Magistrate is considering the significance of the 'worst case' principle of sentencing in this type of federal offence, the proper approach is to treat a 'worst case' as attracting a sentence of the order of 5 years imprisonment (and as requiring trial on indictment). In short, 12 months imprisonment constitutes the limit on the Magistrate's sentencing power, not the sentence appropriate only to a 'worst case' in his Court.

I was informed that the 2 charges were laid to cover 2 consecutive periods of what was a single course of criminal conduct by the appellant; the need for two charges instead of one arose because the law dealing with the general subject was changed on 1 February 1993 part way through the course of the appellant's offending, by the introduction of s1317FA(1) and consequential amendments. I set out the relevant statutory provisions.

Section 232(2) of the Law provides, as far as material:-

> "An officer of a corporation shall at all times act honestly in the exercise of - - - her powers and the discharge of the duties of - - - her office."

Until 1 February 1993 breach of this duty was an offence punishable under s232(3)(a). Amendments which come into force on 1 February 1993 distinguished for the first time between civil and criminal penalties for different contraventions of certain provisions of the Law; see generally the article by V. Mitchell in (1994) 12 CSLJ 231. Thus s232(6B) of the Law, introduced on 1 February 1993, provides as far as material, that s232(2) and certain other provisions -

> "- - - are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening any of them - - -."

Section 1317FA(1) of the Law, introduced on 1 February 1993, is within Part 9.4B and provides as far as material:-

> "A person is guilty of an offence if the person contravenes a civil penalty provision:
>
> (a) knowingly, - - -; and
> (b) either:
> (i) - - -; or
> (ii) intending to deceive - - - someone."
> (emphasis mine)

Hence the existence and wording of the second charge, relating to that part of the appellant's criminal conduct which occurred after 1 February 1993. The difference in wording no doubt persuaded his Worship that the option under s4K(4) of the Crimes Act of imposing a single penalty covering both offences was not open, because the offences were not "against the same [legislative] provision".

The facts relating to the offences

The facts which the appellant admitted to be correct were as follows. During the 2 years in which she engaged in the course of criminal conduct described at p4 she was the company secretary of Darwin Swimpool Sales and Services Pty Ltd, which carried on the business of selling and constructing swimming pools. It was registered as a "group employer" for the purposes of the Income Tax Assessment Act 1936 (C'th) ('the Tax Act'), and as such was required to deduct tax from wages it paid its employees, and to remit those deductions promptly to the Commissioner; see ss221C(1A) and 221F(5)(a) of the Tax Act.

As company secretary, the appellant was responsible in those 2 years for the day-to-day running of the company's business. In carrying out those responsibilities she calculated the wages due to employees, paid them their wages, maintained the company's formal wages records, and drew company cheques.

Between 1 July 1991 and 27 July 1993 the calculations of wages due to employees were made weekly on separate sheets of paper called in these proceedings "wage summary sheets"; they were not part of the formal accounting records of the company. The wage summary sheets listed first the weekly gross wages due to employees, the tax payable thereon, and their resulting after-tax wages; all of these details were recorded in the formal wages records of the company. That is to say, those details corresponded with the

entries made in the formal wage records kept by the company under s262A(1) of the Tax Act.

However, the wage summary sheets also listed separately what have been called in these proceedings "further amounts" of money, payable to individuals named in the sheets. Most of these names were not recorded in the formal wage records of the company. For those whose names were so recorded the further amounts in the sheets against their names represented overtime payments payable (and paid) to them. All of the further amounts were gross amounts; that is, no tax deductions were set out in the wage summary sheets, and they did not list net (after-tax) amounts due to the individuals named. None of the further amounts were included in the formal wage records of the company.

For the period 1 July 1991 - 27 July 1993 the difference between the amount of the wages recorded in the formal wage records of the company as paid, and the amounts listed in the wage summary sheets, was $115,909.53. This was the total of the further amounts.

A substantial number of these further amounts purported on their face to have been paid to employees and contractors by way of company expenditure. Analysis of the company's cheque butts revealed 89 occasions when 'cash' cheques were drawn on its bank account, for amounts which in each case were equal to the total of the further amounts shown on the weekly wage summary sheet of that date. These cheques were ostensibly drawn to pay company expenses, but the cash withdrawn was in fact paid to company employees and

contractors in the form of gross wages (that is, wages without deductions for tax). Some $70,823 in all was drawn by 'cash' cheques and paid in this manner.

The fact that the cheques purported to be drawn to pay company expenses, and the fact that the formal wage records of the company made no reference to the further amounts, together had the effect of disguising the payment of further amounts totalling $70,823 (which were in fact paid as gross wages without deduction of tax) as non-wage company expenditures relating to the ordinary conduct of its business. The effect of disguising in this way the fact and nature of wage payments totalling $70,823 was threefold.

First, the company was enabled to claim the $70,823, which purported to be expenditure it had necessarily incurred in carrying on business for the purpose of gaining assessable income, as a deduction for the purpose of arriving at its taxable income. Second, the income actually earned by the company's employees and contractors was understated. Third, the company was enabled to avoid its liability under s221F(5)(a) of the Tax Act to remit to the Commissioner the tax deductions it should have made from the wages of its employees and contractors.

As to the last matter, comparison of the wage summary sheets with the employee tax deductions remitted by the company reveals that on 557 occasions in the period 1 July 1991 - 27 July 1993 when it actually paid wages to its employees or contractors (by way of the further amounts totalling $70,823), it did <u>not</u> remit monies it should have

deducted by way of tax from the wages due to them, to the Commissioner. In the result, an amount of $35,324.25 in tax was not deducted from those wages by the company and remitted to the Commissioner, as it was obliged to do under the Act.

The appellant was interviewed by officers of the Australian Securities Commission on 1 September 1993 and 9 months later by officers of the Australian Taxation Office, on 2 June 1994. She admitted that what was shown on the wage summary sheets reflected the fact that the company had paid gross wages to a number of employees and contractors, tax in respect thereof not having been deducted and remitted by the company to the Commissioner. She said that these concealed payments of further amounts related to a partnership which leased pumps to the company, and that the payments were records of repayments. She admitted that a number of the 'cash' cheques drawn on the company's account were actually utilized for payment of those gross wages, although the cheque stubs indicated that they were for expenses. She did not explain why she had adopted this practice.

The Magistrate's remarks on sentence

After hearing lengthy submissions in mitigation, and taking time to consider them, his Worship in sentencing said:-

> "The gist or the gravamen of the offending in this matter is that the defendant failed to act honestly in the discharge of the duties of her office with the intent to deceive the Australian Taxation Office. The court considers that the behaviour giving rise to the offences squarely meets the description of fraudulent conduct, and that in effect these offences represent a fraud on the revenue.

Mr Spazzapan [then of counsel for the defendant/appellant] - - - put material before the court with a view to mitigating the objective seriousness of these offences; and in effect submitted that the company, through the actions of the defendant, received no real advantage or benefit.

I consider that as a result of the scheme undertaken by the company through its agent, the defendant, the company was able to avoid liability for tax which ought to have been deducted from the wages of employees and contractors, and the company wrote off payment of these wages as company expenses and in turn [claimed it] as a tax deduction.

The facts are that as a result of the scheme an amount - - - in excess of $35,000 in taxes was not deducted.

As to the benefit or advantage the company received, I think that's quite clear although it cannot be expressed in clear monetary terms. The company was at the time in dire financial straits and - - - with a view to employing persons to keep the company afloat this scheme was implemented; and in the case of a company which appears to have been almost on the rocks, or pretty close to it, this scheme enabled the company to continue trading as a going concern. The fact is that this company is still operating today.

- - -

There is of course another aspect to this case which should not be overlooked, and that is that by virtue of the scheme - - - people employed by the company were able to avoid paying tax. And although there is not clear evidence in terms of a conspiracy in the legal sense, I think it's fair to say that the employees engaged by this company were aware what was happening and to that extent there was an element of conspiracy, albeit in a lay sense. So the company derived a benefit and likewise the employees; though it appears now to be the case that the employees will now be called upon to pay tax in respect of the wages they had been paid, that process now having been set in train by the Taxation Office.

Mr Spazzapan has submitted that the magnitude of the offending ought not to be tested by the amount of the unpaid tax, or assessed in terms of the unpaid tax, because it may well be that some of the employees have in fact remitted tax.

I'm not altogether persuaded by that submission. The fact is that taxes of that magnitude were not paid. But in any event there is this intangible benefit, so to speak: that is, that the company was able to continue operating and to my mind that is a substantial benefit. Mr Spazzapan did not like the word 'substantial'; it is a relative term but I think that in - - - today's economic climate the fact that a company is in dire straits financially and is able to continue to operate at the expense of the revenue, - - - is a substantial benefit. In many ways it's like accessing an overdraft facility without the burden of interest. So to that extent I consider the benefit which accrued to this company was substantial.

One of the more difficult areas in this case was the involvement of the defendant in the scheme. The defendant was the secretary of the company. She stood in a fiduciary position, a position of trust, and the courts have traditionally taken the view that people who commit frauds in a position of trust ought to go to gaol immediately unless there are substantial mitigating circumstances.

One cannot help but feel that in this particular case there are other people behind the scene.

The defendant says that she was thrown into this situation. I accept that. I accept that somebody else had masterminded this scheme, though I'm unable to say who was responsible for the scheme. I can only entertain suspicions. But she was thrown into it, and over time she became aware of how things were to operate. Her involvement extended over a period of some 2 years.

The defendant was a willing participant in a scheme which was designed to perpetrate a fraud on the revenue. At no time did she attempt, on the evidence before me, to divorce herself from that scheme. She had full knowledge of how the scheme operated and I can reasonably infer that she knew what it meant in terms of the Australian Taxation Office.

I'm told that the defendant had prior to assuming this position as secretary, very little accounting experience. That might be so, but I'm satisfied that over the period July '91 to July '93, she acquired sufficient expertise to be able to carry into effect the scheme which was already there, and to allow it to continue. It would appear on the evidence that it took the Taxation Office some time to detect the scheme.

> It was open to this defendant, of course, to seek to apportion blame to another person if she wished to do so, if in fact another person was to blame. As I see it if there were other people, or another person really, who was the major player in this scheme, then it was open to her to seek to apportion blame to that person. It's fair to say in this particular case the defendant has not sought to do that and if in fact, somebody else was responsible, she's prepared to 'take the rap', so to speak." (emphasis mine)

I observe in passing that had the appellant named "the major player" that would have been a mitigating factor in sentencing, but her failure to do so cannot be penalized; it is not suggested that his Worship fell into that error. He continued:-

> "Quite apart from that, though, is the fact that she was prepared to continue to operate as secretary and prepared to continue to be a willing participant in the fraud. That on its own to my mind carries no mitigating effect; it was always open, on the evidence, to this defendant to divorce herself from it and let the company fold.
>
> There may well have been some moral coercion from another party for her to continue in that position, but again I'm told nothing about that; therefore I cannot find on the facts that she was morally coerced to continue to operate this scheme."

Section 16A(2) of the Crimes Act lists the matters to be taken into account by sentencers in federal offences; it is not intended to be exhaustive and the common law principles of sentencing still apply to federal offences - see *Director of Public Prosecutions (C'th) v El Karhani* (1990) 21 NSWLR 370. Although his Worship was not required to refer to each of the matters in s16A when explaining his sentence - see *R v*

*Ferrer-Esis* (1991) 55 A Crim R 231 and *R v Gallagher* (1991) 23 NSWLR 220 - he proceeded to do so, viz:-

> "The relevant matters in relation to this matter for sentencing purposes are set out in section 16A of the Crimes Act. The nature and circumstances of the offence [s16A(2)(a)]: I think I've said sufficient about that already. Clearly this is a very serious matter. It does involve a fraud on the revenue. It not only involves a fraud on the revenue but involves a fraud by a person in a position of trust and I've already addressed the benefit or advantages which have flowed to the company.
>
> And - - - in my view, any advantage which would flow to the company, indirectly would've flowed to the defendant.
>
> The defendant of course comes before the court with no priors whatsoever. The defendant is clearly a person of otherwise excellent character. The defendant is a mature lady of some 50 years. It should be said at this stage in this particular matter there was a course of conduct [s16A(2)(c)], and I'm referring back now to the nature and circumstances of the offence, - - - which extended over a period of two years; and that, indeed, is a substantial period, during which the offence was committed.
>
> In my view, the scheme into which this defendant stepped was calculated and systematic. As to the injury, loss or damage resulting from the offence [s16A(2)(e)], I think that's clear. Any fraud on the revenue really speaks for itself in terms of a loss or damage.
>
> Clearly, this particular type of offending not only allows a company such as the one involved to continue to run - in other words, the Taxation Office subsidises the running of the business - but at the same time, other taxpayers in the community suffer indirectly as a result of these types of offences [since income tax which should have been paid is not paid].
>
> In relation to the personal circumstances of this defendant, as to whether or not the defendant has shown contrition for the offence [s16A(2)(f)], the court has a report from a psychologist, Mr Damien Howard. He is of the opinion that Mrs Smith is expressing remorse for her actions.
>
> As to the issue of reparation [s16A(2)(f)(i)], : that is a difficult matter, in the context of these

offences. This is not a matter where the defendant has any legal liability to pay the tax, and one can well understand why the defendant may not have volunteered reparation. I think that in this particular case the absence of any attempt to make reparation should not adversely work against the defendant. In my view, it is a matter which can be taken out of the sentencing equation.

The defendant has pleaded guilty to the charge [s16A(2)(g)]. As to whether or not the defendant has pleaded guilty at the first practicable opportunity: I can't accept that. This is a matter which was originally set down for [a contested] hearing. It is a matter which has been running since October '94; and it is now some nine months down the track that eventually the defendant has pleaded guilty.

Although some discount can be allowed for the guilty plea, it is not proper to discount for a guilty plea which has been entered at the earliest practicable time, because that's simply not true.

The psychological assessment provided by Mr Howard addresses a number of matters concerning the defendant [s16A(2)(m)]. It does indicate that the defendant is suffering from a condition of depression.

The psychologist expresses the view that a term of imprisonment is unlikely to contribute significantly to a further degree of deterrence [s16A(2)(j)]. Of course, specific deterrence is a relevant consideration in the sentencing process. - - - I am prepared to accept that the defendant has already gone through such a traumatic experience that a term of imprisonment would be unlikely to add further to the question of specific deterrence. It has to be said that general deterrence is an aspect which looms large in matters of this type.

- - - under section 16A [of the Crimes Act] there is no direct reference to the matter of general deterrence, but as a matter of law [see *Director of Public Prosecutions (C'th) v El Karhani* (supra), *R v Sinclair* (1990) 51 A Crim R 418 at p430 per Malcolm CJ and *Tapper v The Queen* (1992) 39 FCR 243] it is a matter which can be properly taken into account.

Quite apart from the matter of deterrence, there is the need to ensure the person is adequately punished for the offence [s16A(2)(k)]. That goes without saying. These are serious matters and the punishment should not only fit the crime but also

> the offender. The character, antecedents, age, means and physical/mental condition of the person must also be taken into account, and I do so [s16A(2)(m)].
>
> The prospect of rehabilitation of the person [s16A(2)(n)]: I consider that in the case of this defendant there are good prospects of rehabilitation. The probable effect that any sentence would have on any the person's family or dependents [s16A(2)(p)]: that's a matter which must be taken into account, and on the limited material before me I do take that into account.
>
> The guiding principle in a case of this type is that an immediate term of imprisonment is warranted unless there are substantial mitigating circumstances. Try as I might, I am unable to find any substantial mitigating circumstances in this case. Or if there are any mitigating circumstances, in my view they are not sufficiently substantial.
>
> This is a very serious matter which involves, as I say, the calculated and systematic fraud on the revenue. The defendant at no time resiled from her willingness to take part in this particular scheme.
>
> - - - The defendant clearly is a person of prior good character and, in my view, owing to that and her age, a presentence report would've been totally inappropriate.
>
> I have considered whether or not a term of imprisonment could be suspended fully. For the reasons that I have given, I don't consider that I can fully suspend a term of imprisonment. I have considered the option of home detention. I haven't called for a home detention report but I see no need to call for one because, even if this defendant were considered suitable to undergo home detention, I don't consider that that, as an option, would have sufficient general deterrent value, given the magnitude of the offending in this case." (emphasis mine)

His Worship then proceeded to impose the sentences under appeal.

The submissions on appeal

I note that the approach to sentencing for a federal offence is governed by Part 1B of the Crimes Act. Mr McDonald

of counsel for the appellant submitted in general that the proceedings before his Worship, outlined at pp7-16, disclosed that when sentencing he had erred in principle, as later set out.

He submitted that the facts showed that the offences had been under investigation for over 2 years, the appellant had co-operated with the investigating authorities, and had made incriminating admissions. However, his Worship clearly took those matters into account.

Before turning to the matters relied on by Mr McDonald, I deal with the effect of a possibly misleading reference by the prosecutor.

(a) The significance of the maximum punishment on summary conviction

His Worship was informed by the prosecutor that the maximum punishment he could impose was "2 years imprisonment or a $12,000 fine", this being "for both offences". I think it is probable, in context, that his Worship understood this to mean, correctly, that each offence as charged carried on summary conviction a maximum punishment of 1 year's imprisonment or a $6000 fine.

However, here in substance there was a single course of criminal conduct, extending over 25 months. It was for that single course of criminality that the appellant was to be punished. That it was necessary to lay 2 charges to cover that conduct was due solely to the change in the law on 1 February 1993, referred to on pp5-6. The fact that the appellant faced 2 charges instead of 1 was in reality a purely

technical matter, though necessary; her criminal conduct was precisely the same after 1 February 1993 as before. As such, it would have been wrong for his Worship to assess the appropriate sentence on the basis that the maximum sentence available on summary conviction was 2 years imprisonment. To have done so, would be to put form (the fact that 2 charges were laid) before substance (the fact that there was a single course of criminal conduct).

Once his Worship had decided that the appropriate punishment was a sentence of imprisonment, his task was to decide whether an effective sentence of up to 1 year's imprisonment was appropriate, in the circumstances, to the appellant's single course of offending over the 25 months. This course of offending involved a repetition of the same criminal behaviour directed ultimately towards the same victim (the Commissioner) over this period. If his Worship considered that a sentence of more than 1 year's imprisonment was appropriate he should have committed the appellant to this Court for sentence; see s121C of the Justices Act and cf. *Barnsley v Hiatt* (1987) 9 NSWLR 663 at pp668-670. Clearly his Worship did not think, in the result, that a sentence of more than 12 months imprisonment was appropriate. It is probable that he considered that a total effective sentence of 9 months imprisonment was appropriate (in the circumstances related to him) to the appellant's offending over the whole period 1 July 1991 - 27 July 1993, and that is why he sentenced as he did. That is to say, it is probable that he made the sentences on the 2 charges consecutive, to achieve

what he considered to be the fair and just punishment for the whole course of criminal conduct, in effect applying the totality principle.

It is possible that in directing that the sentence (3 months) for the appellant's criminal conduct in the 6 months between 1 February and 27 July 1993 be served cumulatively upon the sentence (6 months) for her criminal conduct in the preceding 19 months between 1 July 1991 and 31 January 1993, his Worship was misled by the prosecution reference, treated the maximum sentence available as being "2 years imprisonment", and sentenced against that background. However, no point was taken on the appeal in relation to the somewhat misleading prosecution reference. Accordingly I discard any possibility of error arising therefrom, and turn to the matters relied on by Mr McDonald.

(b) The issue of reparation; the significance of matters not disclosed to his Worship

Section 16A(2)(f)(i) of the Crimes Act required as one of the factors to be taken into account when sentencing, if relevant, the degree to which the appellant had shown contrition "by taking action to make reparation for any injury". When sentencing, his Worship treated "the issue of reparation" as irrelevant in the circumstances, for the reasons stated in the passage emphasized at p15.

Mr McDonald informed me that he understood that the tax ($35,324.25), which should have been deducted from the $70,823 paid as wages by the company, and remitted to the Commissioner, had in fact later been paid to the Commissioner

by the company or its employees. He was not aware when he first addressed me whether this reparation had been made before or after the sentencing of the appellant on 27 July 1995.

During the course of her address Ms Sievers of counsel for the respondent informed me that the amount in question ($35,324.25) had in fact already been "recovered" by the Commissioner from the company. She said that the circumstances of its recovery were "not directly relevant" to the charges against the appellant, and accordingly neither those circumstances nor the fact the monies had been "recovered" had been placed before his Worship. She explained that the monies had been "recovered" in the following way.

Sales tax was payable by the company whenever it sold or constructed its swimming pools. From a date which Ms Sievers was unable to identify, the company paid more sales tax in that regard than it was liable to pay. When it was discovered that the company had made these overpayments, an accounting took place between the Commissioner and the company as a result of which the amount of $35,324.25 which should have been remitted to the Commissioner as deductions of employees' income tax, was set-off against the refund due by the Commissioner to the company of overpaid sales tax. Later, however, Ms Sievers informed me that the refund due to the company by way of overpaid sales tax, was about $35,500, of which $16,853 was then set-off by way of the company's "outstanding tax liabilities", while the balance of "$18,721.57" was apparently authorized "to be transferred over

to pay off the other taxation debts". She observed that the overpayment of sales tax ceased in February 1992, but the appellant's criminal behaviour continued until 27 July 1993.

I find this rather confusing, but it seems clear enough that when the appellant stood for sentence on 27 July, unknown to his Worship, the Commissioner had in fact already "recovered" in the way I have described the $35,324.25 which her activities had been directed to cheating him of. It was therefore a fact (of which his Worship was not made aware) that the offences committed by the appellant had not resulted in the loss to the public purse which his Worship obviously believed had occurred when he sentenced.

It seems that this refund to the company of sales tax which it had overpaid was the refund stemming from the Swimming Pools Tax Refund Act 1992 (C'th), in force 21 September 1992. That Act was passed because certain legislative provisions introduced in 1986, which purported to impose a sales tax upon the value of so much of a swimming pool as was constructed in situ, and pursuant to which that sales tax was collected, were in law of no effect. That was the consequence of the decision of the High Court in *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 104 ALR 545, which held that the imposition of such a sales tax was contrary to Constitution s55. That case was argued before the High Court on 9 May 1991; its decision was handed down on 12 February 1992. The appellant's offending covered the period 1 July 1991 - 27 July 1993. The 1992 Act provided that in certain circumstances the Commonwealth was

required to refund to a pool builder, with interest, sales tax it had paid pursuant to the provisions held to be unconstitutional.

Ms Sievers rightly submitted that the fact that the public purse had not in fact been mulcted of the $35,324.25 did not go to the essence of the criminality of the appellant's conduct. As his Worship rightly said (p12):-

> "The [appellant] was a willing participant in a scheme which was designed to perpetrate a fraud on the revenue."

However, the fact that there had in fact been no actual loss to the public purse from her criminal conduct, and the reason why that was so, were clearly matters relevant to sentence. The consequences of criminal conduct are always relevant; see, for example, *R v Webb* [1971] V.R. 147 at pp150-1. The facts indicating that the money had been "recovered" should have been placed before his Worship. It is clear from the combined thrust of his sentencing remarks - for example, that in effect "these offences represent a fraud on the revenue" (p10), that "as a result of the scheme an amount - - - in excess of $35,000 in taxes was not deducted" (p11), that "it appears now to be the case that the employees will now be called upon to pay tax in respect of the wages they had been paid" (p11), that "the fact is that taxes of that magnitude [$35,324.25] were not paid" (p12), and that "any fraud on the revenue really speaks for itself in terms of a loss or damage" (p14) - that his Worship gave weight when sentencing to his understandable belief that as matters stood, due to the criminal conduct of the appellant, the Commissioner had not

been paid the $35,324.25. His Worship was not informed that the Commissioner had never been out-of-pocket at all, since in fact he had extracted that sum from the company, and possibly more, by way of an impost of sales tax in the past which had been levied unconstitutionally under the 1986 Act and which, following the 1992 Act, he was legally bound to repay. It was a matter relevant to sentence, not to guilt, that the appellant's criminal conduct (clearly aimed at defrauding the revenue) had not succeeded; s16A(2)(e) of the Crimes Act and the common law required that it be taken into account.

As I say, his Worship was not informed of the true situation in this regard, as he should have been. If he had been informed of it, he may not have treated the issue of reparation in s16A(2)(f)(i) of the Crimes Act, as one "which can be [entirely] taken out of the sentencing equation" (p15). Ms Sievers eventually conceded that the fact that the public purse was never in fact out-of-pocket as a result of the appellant's criminal behaviour, was a relevant sentencing factor in the appellant's favour.

(c) Grounds (1) and (2) on p2: error in approach to sentencing

Mr McDonald submitted that in the passage emphasized on p16, his Worship had articulated and applied an incorrect sentencing principle.

I observe that it was not correct to characterize the appellant as having committed this crime while she "stood in a fiduciary position, a position of trust". That

aggravating factor when sentencing applies where the prisoner has committed a crime against the person who extended trust, or to whom the prisoner stood in a fiduciary position; the appellant was not in a fiduciary position or a position of trust vis-a-vis the Taxation Office, the object of her deception.

Mr McDonald submitted that s17A(1) of the Crimes Act mandated the approach to imposing a sentence of imprisonment for a federal offence such as this, viz:-

> "17A.(1) A court shall not pass a sentence of imprisonment on any person for a federal offence - - - unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case." (emphasis mine)

I note that s17A(3) provides:-

> "(3) The failure of a court to comply with the provisions of this section does not invalidate any sentence."

I dealt with the effect of s17A(3) in *Freeman v Pulford* (1988) 92 FLR 122 at pp127-8; it does not have the effect that a failure to comply with s17A(1) is not, ipso facto, appealable error.

I was referred to 4 authorities, which bear on s17A(1) and his Worship's approach at p16. First, in *R v Morris* (1992) 61 A Crim R 233 the Court of Criminal Appeal (Vic), upholding an appeal against a suspended sentence and a fine of $19,200 imposed on a barrister for a "massive fraud" involving understatement of income totalling $473,712 with avoidance of tax of $270,286.47, and imposing a sentence of immediate imprisonment, observed at pp238-9:-

> "- - - the critical consideration is that taxpayers cannot be permitted to defraud the revenue in the belief that detection can lead to no more than a requirement merely to make financial reparation and to pay a monetary penalty so as to enable the offender to "purchase" immunity from prosecution under the criminal law."

At p240 the Court said:-

> "We have been referred to a number of authorities in which the question arose as to whether a custodial or non-custodial sentence was appropriate in the case of fraud upon the Commonwealth revenue. Many involved social security fraud. It is clear that in recent years the trend has been towards the imposition of custodial sentences even upon first offenders (which most of such offenders seem to be) in the absence of substantial mitigating circumstances." (emphasis mine)

There the offence was under s29B of the Crimes Act which carries a maximum penalty of 2 years imprisonment.

His Worship was referred to *R v Whitnall* (1993) 68 A Crim R 119. There the Full Court of the Federal Court dismissed an appeal by the Director of Public Prosecutions against the inadequacy of a suspended sentence and an order for community service, for an offence under s29D of the Crimes Act of defrauding the Commonwealth; this offence carries a maximum penalty of a $100,000 fine or 10 years imprisonment or both. The respondent had understated his income by $155,612, avoiding payment of $74,667.14 in tax. Davies J said at p121:-

> "It would be wrong to hold as a matter of principle, that persons convicted of an offence under s29D of the Crimes Act of defrauding the Commonwealth by virtue of the non-disclosure of income or the overclaiming of deductions should necessarily serve a term of actual imprisonment. So to hold would be to discriminate in an arbitrary and unfair manner against persons so convicted. Rather, a sentencing judge should take account of all relevant circumstances including, as is in this case, any payment of the assessed tax and administrative penalties." (emphasis mine)

Higgins J said at pp122-3:-

p122 "- - - as [the learned sentencing Judge Miles J] observed,

> '... these are not victimless crimes, the victims are the taxpayers who have to make up the deficiencies in revenue, brought about by offenders who fraudulently conceal the true income derived by them and who fail to pay the correct amount of tax. Whilst an offender who has defrauded the revenue is not to be allowed to purchase his or her immunity from proper punishment for the offence committed, it is nonetheless true that if the deficiency can be made good, more particularly if it has been made good before the date of sentence, then severity of punishment may be ameliorated.'

There is, in my view, no error in that statement of principle: see *O'Keefe* [1959] Qd R 395." (emphasis mine)

p123 "It is true that frauds on the revenue, whether Social Security frauds or taxation frauds, are being treated more and more severely."

His Honour then referred to various cases illustrating this approach and observed at pp125-6:-

p125 "It should also be remembered that a sentence of imprisonment, even if suspended, is a substantial punishment."

p126 "At least, so far as the courts are concerned, serious frauds on the revenue will result in custodial sentences. In the absence of "substantial mitigating circumstances", that sentence will include a period actually to be served." (emphasis mine)

At pp127-8 Drummond J said:-

p127 "- - - the main purpose of this appeal was, as the Director of Public Prosecutions frankly acknowledged, to establish a prima facie rule that an offender against the tax, social security and related laws of the Commonwealth must go to gaol, even after full weight has been paid to the sentencing directions in Pt 1B of the Crimes Act 1914 (Cth). I do not think revenue offences should be regarded, for the purpose of sentencing, as any different from other offences having serious antisocial consequences. Actual imprisonment may often be appropriate in such cases and consistency

> in sentencing is also an important aim of the criminal justice system: *Griffiths* (1977) 137 CLR 293 at 326-327. But "a fair margin of discretion must be let to the sentencing judge" (at 326). There is no justification for departing from the fundamental principle that the proper sentence in the case of any serious offence will be dictated by the circumstances of the particular case. The nature of the offence, here in question, as revenue offences, is but one of those circumstances, albeit an important one." (emphasis mine)

p128 "Higgins J describes the suspended sentence imposed here as a substantial punishment. Although suspended, the head sentence of three years imprisonment serves a real function in demonstrating to like-minded offenders the seriousness with which this kind of offence is treated and the kind of punishment they are likely to receive, in the absence of substantial mitigating factors: see *Weetra v Beshara* (1987) 46 SASR 484 at 491-492; 29 A Crim R 407 at 414-415; *Gillan* (1991) 54 A Crim R 475 at 489; *Beadman* (unreported, Federal Court, Davies, Morling and Drummond JJ, 1 April 1993)."

Third, in *R v Wright* (1994) 74 A Crim R 152 the Court of Appeal (Qld) allowed a Crown appeal against the inadequacy of a suspended sentence for four offences of imposing on the Commonwealth, an offence under s29B of the Crimes Act which carries a maximum penalty of imprisonment for 2 years. The offences were designed to avoid paying tax on sums totalling more than $211,000. Davies JA and White J said at p156:-

> "The questions in this appeal are whether the sentence of imprisonment for 12 months is too low and, more importantly, whether the learned sentencing judge was wrong in not requiring the respondent to actually serve a term of imprisonment. Before answering those questions, we propose to consider how courts have sentenced for frauds of this kind. There are two main categories of cases: those involving social security fraud and those involving taxation fraud. An analysis of the two categories of sentences shows, in our opinion, that it is difficult to reconcile them. Whereas offenders convicted of social security frauds have

> generally been required to serve terms of imprisonment, even where the amounts involved have been small, the same cannot be said generally of those convicted of tax frauds, even where the amounts involved have been relatively large."

Their Honours then discussed various fraud cases and said at p160:-

> "It has been said of the social security fraud cases that they are prevalent and that they are difficult to detect. That is undoubtedly true and those factors are important considerations in the decisions to impose custodial terms in those cases. But there is no reason to believe that tax fraud is not prevalent or that it is easier to detect. It is true that there have been many more sentences, reported and unreported, in respect of social security fraud in recent years than there have been in respect of tax fraud. However, as pointed out in *Whitnall* (at 513, 517-518; 120, 125-126), there are a number of other avenues open to the authorities in respect of evasion of tax. The reluctance in the past, in the light of these, to prosecute for tax fraud under the Crimes Act may explain the relative infrequency of tax fraud cases under s29B or 29D. We would also be surprised if tax fraud were easy to detect. - - - But even if it is correct that social security fraud is more prevalent and more difficult to detect than tax fraud, and that this is, at least in part, the explanation for the requirement that offenders serve a term of imprisonment even when relatively small sums are involved, we think that where a calculated and systematic tax fraud involves a substantial sum of money the offender should usually be required to serve a term of imprisonment particularly where, as in this case, it is not an isolated act but is persisted in for some time." (emphasis mine)

In *R v Wright* (supra) there was very little loss to the revenue, some $3859, because the respondent unknowingly had overstated his taxable income in certain years and had paid tax on those amounts. Their Honours said at p155 that this factor had to be taken into account -

> "- - - but we do not think it an important factor. A better measure of the seriousness of the fraud, in our view, is the amount by which the respondent thought he had understated his income in the 1990 and 1991 tax years."

Pincus JA said at p165:-

"The Australian case in which penalties for tax fraud have been most comprehensively discussed appears to be *Whitnall* (1993) 42 FCR 512; 68 A Crim R 119. It was argued for the appellant before us that a principle mentioned in *Whitnall* should be applied; that is to be found at 519;126:

> "At least, so far as the courts are concerned, serious frauds on the revenue will result in custodial sentences. In the absence of 'substantial mitigating circumstances', that sentence will include a period actually to be served."

In my view the inclusion of the word "serious" makes the principle one which is unlikely to be of great practical value; the Court must consider all the circumstances to determine whether the offence is serious enough to warrant imprisonment, as it would do if not using the principle. The Victorian Sentencing Manual provides examples of the variety of considerations which bear upon the gravity of taxation offences. They include the extent of the fraud and the amount avoided, the potential loss of revenue, the length of time the fraud continued, the nature of the planning and execution, and whether professional or technical skills were used to facilitate the fraud (at 356, 357). Many other matters may bear upon the seriousness of the offence, such as whether the fraud was due to desperate financial circumstances and whether there was an element of carelessness or self-delusion rather than undiluted dishonesty. The simplest way to compare one tax fraud with another is to look at the amount of money involved and that will usually be of central importance; but to adopt, expressly or implicitly, the practice that tax frauds involving more than a certain sum bring a custodial sentence might produce an undesirable lack of attention to the merits or demerits of the particular case. Frauds involving relatively small amounts of money might perhaps produce a gaol sentence if committed in particularly bad circumstances." (emphasis mine)

Fourth, *R v Tacey* (unreported, Court of Appeal (Qld), 2 March 1994) involved three charges against a company director of defrauding the Commonwealth, the offence under s29D of the Crimes Act. The total of cash receipts not brought to account was $298,000, the total tax avoided being

$114,615. The Director of Public Prosecutions appealed against the inadequacy of a fine of approximately $20,000, submitting that -

> "- - - the respondent's frauds were serious frauds on the revenue, - - - that there were no substantial mitigating circumstances, and that consequently they justified the imposition of a custodial sentence which included a period of imprisonment actually to be served."

This appeal was argued immediately after *R v Wright* (supra), before the Court as constituted in that case. Their Honours said:-

> "The offences in this case are of the same order of seriousness as those in *Wright.* Prima facie therefore they call for the imposition of a term of imprisonment and a requirement that the respondent serve part of that term. - - - It was also submitted to us, in effect, that tax fraud should be treated more leniently than social security fraud. However, for reasons which we have stated in *Wright*, we reject that argument.
>
> A number of mitigating factors were then referred to, all of which, in our view, should properly be taken into account in imposing sentence. First, the respondent, who is 55 years of age and married with a family, has no previous convictions and, as appears from references tendered on her behalf, was of good repute. Secondly, she pleaded guilty during the course of the committal proceedings. It was conceded by the appellant that this plea was timeous and consequently saved the time and expense of a trial. Thirdly, the tax evaded had been paid, together with a penalty of $66,000. There was some dispute as to whether this caused hardship to the respondent. - - - it is difficult to conclude that this subjected the respondent to any great financial hardship. Nevertheless the payment of these sums should be taken into account in her favour because it made good the loss of government revenue at some cost to the respondent. Fourthly, the respondent and the business had received adverse publicity in consequence of her being charged and convicted for these offences. And fifthly, her future involvement in the business will be restricted by reason of her conviction. See generally s16A(2) of the Crimes Act.

> - - - we propose to take into account in her favour the payment and the plea of guilty for the reasons we have given.
>
> Although all of the matters referred to above as mitigating factors should properly be taken into account in the respondent's favour, they are not sufficient, when taken together, to justify a sentence less than one of imprisonment including a period actually to be served. Indeed, all of the above factors were present in *Wright* and were it not for the matter to which we are about to refer, we would have found this case indistinguishable from *Wright* and consequently would have imposed on the respondent a sentence of 18 months' imprisonment with an order that she be released upon giving security by recognisance that she be of good behaviour for two years after serving three months of that term." (emphasis mine)

The Court then referred to the evidence of the respondent's medical condition, concluding:-

> "On that evidence the learned sentencing judge concluded that there was an unacceptable risk, with the stress of prison, that the respondent would suffer a stroke, in consequence of which, we infer, she could die.
>
> It should not be thought that a sentence of imprisonment may be avoided by an offender merely because she or he has a serious illness, even one involving some risk of death. In every case the risk of death or serious deterioration of health must be measured and balanced against those factors which would ordinarily require the imposition of a term of imprisonment. - - - However, in view of the learned sentencing judge's conclusion in this case that there was an unacceptable risk that the respondent would suffer a stroke if sent to jail, we conclude, though with some hesitation, that the respondent should not be required to serve a term of imprisonment.
>
> Because of the seriousness of the offences, the difficulty in their detection, and the fact that in this case but for the respondent's health we would have required her to serve a term of imprisonment, we think that she should be required to pay substantial fines. We propose therefore to allow the appeal, set aside the sentences imposed below, and in each case substitute a fine of - - - $35,000.

> This will mean that for her crimes the respondent has been required in addition to paying the tax evaded, - to pay penalty tax of $66,000;
> - and to pay fines totalling $105,000."

It is clear from the passage emphasized at p16 that his Worship's approach to sentencing was that "substantial mitigating circumstances" had to be identified if a term of immediate imprisonment was not to be imposed. This was clearly a reference to the language used in *R v Morris* (supra) at p240 (p25), picked up by Higgins J in *R v Whitnall* (supra) at p126 (p26). In my opinion his Worship's approach was wrong; it contravenes s17A(1) of the Crimes Act. I consider that the proper approach to sentencing for these offences is set out by Davies J and Drummond J in *R v Whitnall* (supra) at p121 (p25) and p127-8 (pp26-7) respectively. Properly understood, I do not think that anything said in *R v Wright* (supra) and *R v Tacey* (supra) is inconsistent with their Honours' approach. Apart from that, the passage at p16 wrongly proceeds on the basis that this was a "breach of trust" case and so fell within the special sentencing guidelines set out in *R v Bird* (1988) 56 NTR 17, which did not deal with a federal offence. A sentence of imprisonment is at common law normally "a sentence of last resort", as Burt CJ put it in *R v James* (1985) 14 A Crim R 364 at pp364-5. When sentencing for federal offences, that normal approach is made mandatory, by virtue of s17A(1); see *Freeman v Pulford* (supra) at p127. In the result his Worship did not approach his task of sentencing by addressing the question he was <u>required</u> by

s17A(1) to address, before sentencing to a term of imprisonment, viz:-

> "Having considered all other available sentences, am I satisfied that no sentence other than a sentence of imprisonment is appropriate in all the circumstances of the case?"

I reject Ms Sievers' submission that his Worship sentenced on the basis that imprisonment was the "last resort". The approach adopted by his Worship at p16 involved appealable error, since it did not accord with s17A(1).

Conclusions

There is no doubt that the appellant, as described by his Worship, fell squarely within the classic pattern of a defendant who would normally be eligible for consideration for a suspended sentence; see *Wood v Samuels* (1974) 8 SASR 465 at pp468-9. His Worship considered suspending the sentence, and rejected that approach (p16); it is in that connexion that the fact that his Worship was not informed that the public purse was never in fact out of pocket (pp19-23), assumes particular significance. As to that, Ms Sievers sought to rely on the approach taken by their Honours in *R v Wright* (supra) at p155 (p28); I respectfully agree that what the appellant had in mind is a "better measure of the seriousness of [her] fraud", but the fact that the company had been unlawfully mulcted of sales tax by unconstitutional legislation must be given weight.

For the reasons I have indicated at pp23-32, I consider that grounds of appeal nos. (1) and (2) have been established. Further, for the reasons set out at pp19-23

there was, as Mr McDonald put it, "an error in the substratum of the sentence." The exercise of his Worship's sentencing discretion was thereby vitiated; the appeal against sentence should accordingly be allowed and the appellant re-sentenced, unless no substantial miscarriage of justice actually occurred (s177(2)(f) of the Justices Act).

I bear in mind the cases involving the imposition of suspended sentences to which Mr McDonald referred: *R v McCarthy* (unreported, Supreme Court (NT) (Thomas J), 17 May 1994, and *R v Solczaniuk* (unreported, Supreme Court (NT) (Thomas J), 9 December 1994).

I also note *R v Lloyd* (1991) 53 A Crim R 198, a case where a director of a company improperly used his position, causing the company detriment by organizing a loan of $6 million nominally for the company but in fact for Rothwells Ltd; on appeal, his punishment was reduced to a fine of $15,000, part of his sentence of imprisonment having already been served.

I also bear in mind and apply here the observations by Burchett and Higgins JJ in a case involving fraud by a person in a position of trust, *McDonald v The Queen* (1993-94) 120 ALR 629 at p639:-

> "- - - the most serious consequence of the conviction of a "white collar" offender, as indeed of many other persons - - - must be the loss of his own self respect and the suffering of disgrace and humiliation, as well as the complete loss of his previous standing in the community, his professional position, and the means of livelihood he has chosen and in which he has acquired expertise. The conviction is a personal calamity. So far as gaol is concerned, to be sent there at all is also a disaster of the greatest magnitude. These are the considerations that must loom large if a

> professional person is confronted by a situation inducing thought about the personal cost of committing comparable offences, and a significant period in gaol, attended by such consequences, must constitute a weighty general deterrent. Indeed, an equivalent gaol term is plainly a severer punishment for a man like the appellant than it would be for many violent criminals, who could take up much the same life upon leaving gaol as they had led before."

I consider that his Worship was correct in deciding that the appellant received an indirect benefit from her crime; she was married to the sole proprietor of the company, a small family company from which she and her husband drew their sole income. I bear in mind her background, as related by Mr McDonald, and the matters in her favour to which his Worship referred (p14). I bear in mind that the disposition to be made must be "of a severity appropriate in all the circumstances of the offence" (s16A(1)) of the Crimes Act. I have taken into account all the matters referred to in s16A(2) disclosed by the evidence. Mr McDonald seeks a conditional release without sentence passed, under s20(1)(a) of the Crimes Act. I bear that in mind, and the other non-imprisonment dispositions that may be made under Part 1B of the Crimes Act.

Bearing all these matters in mind, I have concluded that no sentence other than a sentence of imprisonment was appropriate in all the circumstances of this case. Pursuant to s17A(2) of the Crimes Act I indicate why that is so. The whole object of the appellant's dishonesty was to defraud the revenue. The public interest requires that persons who behave in this way must be led to expect punishment, when they are

detected. Defrauding the revenue is a serious offence, because it means in effect that ordinary honest taxpayers are defrauded. It is also necessary to deter other businesses which may be tempted to engage in similar practices, which are often hard to detect. To send 'white-collar' criminals such as the appellant immediately to prison will therefore often be appropriate and in that regard the particular need for inter-State consistency in sentencing for a federal offence is important. In appropriate cases, a swingeing fine may also be imposed. Sentencing must always be subject to compliance with the requirements of s17A(1) of the Crimes Act. In each case the scale of the fraud, and the money actually lost to the revenue, are significant sentencing factors; the present case is unusual in the latter respect, for the reasons earlier set out.

The question then is whether the sentence of imprisonment should involve a period of immediate custodial detention. With considerable hesitation, having regard in particular to the authorities I have discussed, but in light of the particular facts and circumstances of the offending and the appellant, I have concluded that in this case such a sentence would be too severe. In the result, I consider that the appropriate sentence for the whole of the course of offending is 6 months imprisonment; in the light of the full facts as they emerged at the hearing of the appeal, an effective sentence of 9 months imprisonment would be manifestly excessive. I direct that service of the sentence be suspended, and the appellant be immediately released

pursuant to s20(1)(b) of the Crimes Act, upon entering into a bond in the sum of $5000 to be of good behaviour for a period of 3 years.

In making this disposition, I bear in mind that the order for immediate release is part of what is a sentence of imprisonment, even though non-custodial; see *Weetra v Beshara* (1987) 46 SASR 484 at p485 per Jacobs ACJ, and at pp490-2 per Prior J. The unusual feature of this case, that the public purse was never in fact out of pocket, is such that the suspension of service of any part of the sentence imposed should not be treated as a sentencing precedent. In general, subject always to compliance with the provisions of the Crimes Act, and depending on the circumstances of the particular case, a sentence of immediate imprisonment (and, where appropriate, a swingeing fine) is entirely appropriate for persons who engage in criminal activity of the type engaged in by the appellant, directed to defrauding the revenue.

These are the reasons for the orders (p3) made on 8 November.

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