CITATION:	*The Queen v Mossman* [2017] NTCCA 6
PARTIES:	THE QUEEN
	v
	MOSSMAN, Paul Scott
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 1 of 2017 (21532632)
DELIVERED:	24 July 2017
HEARING DATE:	29 May 2017
JUDGMENT OF:	Grant CJ, Southwood and Hiley JJ
APPEALED FROM:	Barr J

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Corrupt receipt of a benefit for the manner in which the appellant carried out his powers, duties or functions – employee of Minister – whether sentence manifestly inadequate having regard to the circumstances of the offending and the appellant – whether unjustifiable disparity with sentence imposed on co-offender for like offending – appeal dismissed.

Criminal Code (NT) s 236, s 414(1A)

Bara v The Queen [2016] NTCCA 5, *Bodmin Case* (1869) XX TLR 989, *Delaney v The Queen* (2013) 230 A Crim R 581, *DPP (Cth) v Gregory* (2011) 34 VR 1,

Everett v The Queen (1994) 181 CLR 295, *Green v The Queen* (2011) 244 CLR 462, *Griffiths v The Queen* (1977) 137 CLR 293, *Hili v The Queen* (2010) 242 CLR 520, *HM Advocate v Dick* (1901) 3F (Ct of Sess) 59, *House v The King* (1936) 55 CLR 499, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, *Lowe v The Queen* (1984) 154 CLR 606, *Pastras v The Queen* (1993) 65 A Crim R 584, *Pecora v The Queen* [1980] VR 499, *Postiglione v The Queen* (1997) 189 CLR 295, *R v BJW* (2000) 112 A Crim R 1, *R v Delcaro* (1989) 41 A Crim R 33, *R v Hitanaya* [2010] NTCCA 3, *R v Jamieson* [1988] VR 879, *R v Lo* (2007) 174 A Crim R 541, *R v Nath* (1994) 74 A Crim R 115, *R v Nguyen* [2010] NSWCCA 331, *R v Osenkowski* (1982) 30 SASR 212, *R v Radloff* (1996) 6 Tas R 99, *R v Riley* (2006) 161 A Crim R 414, *R v Rivkin* (2004) 59 NSWLR 284, *R v Smith* (2000) 116 A Crim R 447, *R v Vaughan* (1796) 4 Burr 2494, *R v Wilson* (2011) 30 NTLR 51, *Steer & Ors v R* (2000) 171 ALR 463, *The Queen v Renwick & Johnston* [2013] NTCCA 3, *Woodward v Maltby* [1959] VR 794, referred to.

Fox & Freiberg's sentencing: state and federal law in Victoria (Third Edition), Law Book Company, 2014.

REPRESENTATION:

Counsel:

Appellant:	D Morters
Respondent	I Read SC

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent	Northern Territory Legal Aid Commission

Judgment category classification:	A
Number of pages:	39

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

The Queen v Mossman [2017] NTCCA 6
No. CA 1 of 2017 (21532632)

BETWEEN:

THE QUEEN
Appellant

AND:

PAUL SCOTT MOSSMAN
Respondent

CORAM: GRANT CJ, SOUTHWOOD and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 24 July 2017)

THE COURT:

Introduction

[1] In October 2016 the respondent stood trial before a jury in the Supreme Court on five counts on an indictment dated 13 October 2016. The jury was unable to reach a verdict on count 1 and was discharged on that count. The jury found the respondent not guilty of counts 2 and 4 but guilty of the alternative counts 3 and 5. The effect of the discharge of the jury on count 1 is that the respondent may be retried on that count but the presumption of innocence prevails unless the respondent is found guilty following a retrial.

[2] Both counts 3 and 5 on the indictment pleaded offences contrary to s 236 of the *Criminal Code* (NT) which carry a maximum sentence of imprisonment for three years. Count 3 pleaded that:

> Between 9 September 2013 and 15 November 2014 at Darwin in the Northern Territory of Australia, [the respondent] *as an employee* of the Minister for Stuart (sic) in the Government of the Northern Territory of Australia having powers, duties or functions to carry out, *corruptly received a benefit for himself and another*, namely a waiver of service fees and deferral of full payment on a return airfare from Darwin to New York for Nathanael Mossman, *on account of the manner in which he carried out those* powers, *duties* or functions.

[3] Count 5 pleaded that:

> Between 9 September 2013 and 15 November 2014 at Darwin in the Northern Territory of Australia, [the respondent] *as an employee* of the Minister for Stuart (sic) in the Government of the Northern Territory of Australia having powers, duties or functions to carry out, *corruptly received a benefit for himself and another*, namely a waiver of service fees and deferral of full payment for return flights between Darwin and Sydney for himself and his daughter Laura, *on account of the manner in which he carried out those* powers, *duties* or functions.

[4] The only benefits obtained by the respondent from the commission of the crimes pleaded in counts 3 and 5 was the waiver of the service fees and the deferral of full payment of the return flights.

[5] Counts 2 and 4 also charged offences contrary to s 236 of the *Criminal Code*. The difference between counts 2 and 4 and the alternative counts, 3 and 5, is that counts 2 and 4 alleged the respondent corruptly received the benefit of the price of the airfares rather than the benefit of having the payments deferred. The effect of the jury's findings of not guilty on counts 2 and 4 was the respondent was acquitted of corruptly receiving benefits in

the amounts of $1,895 and $1,100 respectively. The respondent is entitled to full credit for those acquittals.

[6] On 17 January 2017 the sentencing judge sentenced the respondent for counts 3 and 5 on the indictment to a wholly suspended aggregate sentence of 12 months' imprisonment.

[7] The Crown has appealed against that sentence. There are two grounds of appeal:-

1. The learned sentencing Judge imposed a sentence that in all the circumstances was manifestly inadequate.
2. The learned sentencing Judge misapplied the parity principle or the principle of equal justice.

Crown appeals

[8] Crown appeals against sentence should be a rarity brought only to establish some matter of principle, and to afford an opportunity to the Court of Criminal Appeal to perform its proper function in this respect; namely, to lay down principles for the guidance of courts sentencing offenders.[1] The reference to a "matter of principle" must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle.[2]

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1 *Griffiths v The Queen* [1977] HCA 44; 137 CLR 293 at 310.

2 *Everett v The Queen* [1994] HCA 49; 181 CLR 295 at 300.

[9] As to what will constitute an error in point of principle, in *R v Riley* this Court stated:[3]

> In *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997), Hunt CJ at CL, with whom the other members of the Court agreed, pointed out that the passage from the judgment in *Everett* cited by Thomas J was not limited to laying down some new point of principle. His Honour said:
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> > "It is usually overlooked by respondents that the High Court has at the same time also clearly indicated that sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have this Court correct."

[10] These remarks do not operate to displace the principle expressed by King CJ in *R v Osenkowski*, namely:[4]

> It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where the judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for leniency which has been traditionally extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of an offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

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3 *R v Riley* (2006) 161 A Crim R 414 at [19].

4 *R v Osenkowski* (1982) 30 SASR 212 at 212-213.

[11] The principles enunciated in *House v The King*[5] remain applicable to the determination of manifest inadequacy.[6] In the oft-quoted passage from that decision, the High Court stated:[7]

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his, if it has the materials for doing so. *It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.* Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power. But even with respect to the particular jurisdiction conferred on courts of criminal appeal, limitations upon the manner in which it will be exercised have been formulated. Lord Alverstone LCJ said that *it must appear that the judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts* (*R v Sidlow*). Lord Reading LCJ said the court will not interfere because its members would have given a less sentence, but only if the sentence appealed from is manifestly wrong (*R v Wolff*). Lord Hewart LCJ has said that the court only interferes on matters of principle and on the ground of substantial miscarriage of justice (*R v Dunbar*).

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5 [1936] HCA 40; 55 CLR 499.

6 *Lacey v Attorney-General (Qld)* [2011] HCA 10; 242 CLR 573.

7 *House v The King* [1936] HCA 40; 55 CLR 499 at 503-504.

[12] In *Hili v The Queen*, the plurality reasons contain the following observations concerning the assessment of manifest inadequacy, in the absence of any assertion of specific error, on the basis that the sentence subject to appeal was unreasonable or plainly unjust:[8]

> [A]ppellate intervention on the ground that the sentence is manifestly excessive or manifestly inadequate "is not justified simply because the result arrived at is markedly different from other sentences that have been imposed in other cases". Rather as the plurality went on to say (72) in *Wong*, "[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes there must have been some misapplication of principle, even though where and how is not apparent from the statement of the reasons.
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> […] But what reveals manifest excess, or inadequacy, of sentence is consideration of all the matters that are relevant to fixing the sentence. The references made by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of each offender were, therefore, important elements in the reasons of the Court of Criminal Appeal.
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> The applicants' submissions criticising the sufficiency of the reasons given by the Court of Criminal Appeal pointed out that the Court of Criminal Appeal identified no specific error in the sentencing judge's findings of fact or reasons. That is right, but because the only ground advanced by the Director was the ground of manifest inadequacy, it had to be assumed that the Director alleged no specific error. That the Court of Criminal Appeal identified no specific error is, therefore, unsurprising. *The absence of identification of such an error does not bespeak error on the part of the Court of Criminal Appeal.*

[13] Even where manifest inadequacy is found, this Court retains a residual discretion as to whether the respondent should be re-sentenced. In *R v BJW* the New South Wales Court of Criminal Appeal stated:[9]

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8 *Hili v The Queen* [2010] HCA 45; 242 CLR 520 at [59] and [60].

9 *R v BJW* [2000] NSWCCA 60; 112 A Crim R 1 at [29].

> The right of the Crown to appeal against a sentence on the grounds of inadequacy is exceptional. However, where sentences imposed are so inadequate as to indicate error or departure from principle, or depart from accepted sentencing standards, they demonstrate error in point of principle which the Crown is entitled to have this Court correct. The case must be a compelling one before this Court will interfere. It is not sufficient that this Court would itself, in the position of the sentencing judge, have imposed a more severe sentence. However, sentences outside the permissible range of those the product of a properly exercised sentencing discretion prima facie manifest error. Even so, in the case of a Crown appeal, there remains a residual discretion as to whether the Court will interfere. (Footnotes omitted)

[14] As to the exercise of the residual discretion, in *Green v The Queen* the plurality of the High Court stated:[10]

> A primary consideration relevant to the exercise of the residual discretion is the purpose of Crown appeals under s 5D which, as observed earlier in these reasons, is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons." That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.

[15] That principle has been accepted and applied by this Court in *R v Hitanaya*[11] and *R v Wilson.*[12] In *R v Hitanaya* this Court stated:[13]

> The principles governing Crown appeals are not in doubt and are well known. They were discussed in *R v Riley* [(2006) 161 A Crim R 414 at [18]-[20]] and it is unnecessary to repeat that discussion. Even if the manifest inadequacy is such as to demonstrate error in point of principle, the Court must carefully consider the next step which involves determination as to whether this is one of those rare and

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10 *Green v The Queen* [2011] HCA 49; 244 CLR 462 at [35].

11 [2010] NTCCA 3.

12 [2011] NTCCA 9; 30 NTLR 51.

13 *R v Hitanaya* [2010] NTCCA 3 at [78].

exceptional cases in which the Crown appeal should be allowed and the respondent resentenced.

[16] Following *Hitanaya*, and before *Wilson* was decided, s 414(1A) of the *Criminal Code* was enacted to provide that in exercising its discretion on an appeal against sentence with respect to an indictable offence, the Court must not take into account any element of double jeopardy when deciding whether to allow the appeal or impose another sentence. In *R v Wilson*[14] Riley CJ considered the impact of s 414(1A) of the *Criminal Code* on the Court's residual discretion, and described the ambit of the discretion in light of that section. His Honour stated:[15]

> [Section 414(1A) of the Criminal Code] removes any need for the Court of Criminal Appeal to give consideration to ensuring that Crown appeals are "rare and exceptional". Responsibility in that regard rests with the Director of Public Prosecutions.
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> ....
>
> Apart from double jeopardy considerations, the Court retains a residual discretion to determine that, despite error having been established and being satisfied that a different sentence ought to have been passed, a Crown appeal should be dismissed or a reduced sentence should be imposed.
>
> Factors that may be relevant to the exercise of the residual discretion to dismiss an appeal, despite inadequacy of sentence, include the presence of unfairness arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown.

[17] Accordingly, the principle of double jeopardy no longer requires this Court to ensure that appellate intervention is rare and exceptional in the manner

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14 [2011] NTCCA 9; 30 NTLR 51.

15 *R v Wilson* [2011] NTCCA 9; 30 NTLR 51 at [27].

spoken of in *Hitanaya*. It remains the case, however, that this Court will not intervene where no point of principle arises, and will be slow to intervene where there is a countervailing factor which may warrant the exercise of the residual discretion.

An offence contrary to s 236 of the *Criminal Code*

[18] In order to properly consider the first ground of appeal it is necessary to say something about the nature of the offence in s 236 of the *Criminal Code*.

[19] Relevantly to this appeal, s 236 of the *Criminal Code* provides:

> Any person *who as: … employee of any person …* has any powers, duties or functions to carry out and *who corruptly* asks for, receives or *obtains … from any third person, any … benefit* for himself or another *on account of … the manner in which he carries out those powers duties or functions* and any third person who corruptly gives … such … benefit, are guilty of an offence and each is liable to imprisonment for 3 years.

[20] The submission by counsel for the appellant that s 236 is "the identical provision for public service corruption [contained in] s 77 [of the *Criminal Code*]" fails to capture the true distinction between the two provisions.

[21] The offence created by s 236 appears in Part VII of the *Criminal Code*, which deals with property offences and related matters. Its place in the Criminal Code stands apart from Part IV, which deals with offences against the administration of law and justice and against public authority. That Part includes offences relating to official corruption and abuse of public office. More particularly, an offence contrary to s 236 of the *Criminal Code* stands

apart from an offence contrary to s 77 of the *Criminal Code* which deals with official corruption.

[22] The legislature has maintained a clear distinction between official and non-official corruption. It treats official corruption more seriously than non-official corruption. The maximum penalty for an offence contrary to s 77 of the *Criminal Code* is imprisonment for seven years, which is more than twice the maximum penalty specified for s 236. The maximum penalty specified in s 236 places the offence amongst the lowest offences in the hierarchy of offences in the *Criminal Code*.

[23] At common law secret commissions have long involved criminal offences by both donor and recipient, but only where the recipient is acting in an official capacity or the benefit is given in anticipation of appointment to an official position.[16] The common law did not have secret commission offences such as s 236 of the *Criminal Code*. Such offences are a product of early twentieth century scandals in Australia and England about the extent of corrupt behaviour in the private sector. The Commonwealth Parliament enacted the *Secret Commissions Act 1905* following a report of a *Royal Commission on the Butter Industry 1904-1905*.[17] Secret commission offences are essentially an attempt to create a bribery offence for corruption

16 *R v Vaughan* (1796) 4 Burr 2494; *HM Advocate v Dick* (1901) 3F (Ct of Sess) 59.

17 *R v Jamieson* [1988] VR 879 at 882.

in the private or non-public sector.[18] The common law has been extended by statute to provide criminal sanctions for corruption of non-officials as well as public officials. However, there is some overlap in the sense that a person "employed in the public service or … the holder of any public office" who is acting in an official capacity and engages in corrupt conduct could be convicted of an offence contrary to either s 77 or s 236 of the *Criminal Code*.

[24] Section 236 is primarily concerned with transactional morality, fair dealing, the avoidance of conflicts of interest, and the abuse or taking advantage of certain kinds of agency-like relationships involving fiduciary obligations or obligations of fidelity, the integrity of which the law says must be protected.

[25] The kinds of relationships protected by s 236 of the *Criminal Code* include relationships of employment or agency; trustee or guardian; lawyer, medical practitioner, accountant, auditor or other professional advisor; officer, partner, manager or other participant in the direction, management or administration of the business or affairs of a corporation or an unincorporated association; or an arbitrator, adjudicator or referee.

[26] The respondent was not an employee within the Public Sector as described in the *Public Sector Employment and Management Act* (NT) and his employment was not regulated by that Act. Nor was he a public officer or a

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18 Model Criminal Officers Committee, *Model Criminal Code Chapter 3 Blackmail, Forgery, Bribery and Secret Commissions Discussion Paper*, July 1994 at p 61.

public official. Nor was he charged with engaging in any corrupt conduct in such a capacity. However, he was employed under a contract of employment with the Northern Territory of Australia.

Sentencing principles applicable to corruptly receiving a benefit on account of the manner in which a person carried out his powers, duties and functions

[27] Despite those distinctions and the relatively low maximum sentence specified in s 236 of the *Criminal Code*, offences of corruptly receiving a benefit on account of the manner in which a person carries out his powers, duties and functions may be serious offences if they threaten the integrity of social institutions or involve a serious breach of trust.

[28] The factors to be taken into account when sentencing a person who has committed an offence contrary to s 236 of the *Criminal Code* are the identity of the corrupted party and the nature and importance of the protected relationship, the objective of the offence, the value of the benefit obtained by the corrupted party, the level and seriousness of any breach of trust, the duration and complexity of the corrupt conduct, whether the corrupt conduct was systematic and sophisticated, and the amount of harm suffered by the corrupted party's "principal", "employer", "beneficiary" or "fiduciary".

[29] As most of the relationships subject to s 236 of the *Criminal Code* are relationships of considerable trust and fidelity; as such offences are often hard to detect and prosecute; and as corruption in all forms has now become

widespread, the main sentencing objects are denunciation and deterrence.[19] The courts must show that giving and receiving secret commissions will not be tolerated and the integrity of the specified relationships will be protected. While the courts have not adopted any sentencing policy which would exclude the use of particular types of disposition for this offence, there seems to be a consensus that serious examples of these offences will receive proportionate punishment, particularly if the offence involves a serious breach of trust. Often in such cases, the object of rehabilitation of the offender cannot be permitted to outweigh the need for punishment and the need to deter other persons from engaging in similar activity.

[30] Regrettably, offences such as these are often committed by persons who were regarded as being of good character and reputation. Often, they are also committed by people who are financially well-to-do. This affords a further reason why, in cases involving those features, less weight is to be given to a person's previous good character and prospects of rehabilitation.[20]

The facts

[31] The facts of the offending are as follows.

[32] The respondent was employed at Executive Contract Officer 1 level as the Acting Chief of Staff and Senior Ministerial Advisor to the Honourable Bess

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19 *R v Jamieson* [1988] VR 879 at 888.

20 This is because courts are disinclined to allow good character to mitigate rational, premeditated and profit-seeking crimes: see *Fox & Freiberg's sentencing: state and federal law in Victoria* (Third Edition), Law Book Company, 2014, [5.45]; *R v Jamieson* (1988) VR 879 at 898; *R v Rivkin* [2004] NSWCCA 7; 59 NSWLR 284 at [410]; *R v Lo* [2007] NSWSC 105; 174 A Crim R 541 at [28]; *DPP (Cth) v Gregory* [2011] VSCA 145; 34 VR 1 at [53].

Price, who was a Member of the Legislative Assembly and Minister for Community Services in the Northern Territory Government between 2012 and 2016. The respondent was employed in that position pursuant to a contract of employment with the Northern Territory of Australia. As we have stated, the respondent was not an employee within the public sector as described in the *Public Sector Employment and Management Act* and his employment was not regulated by that Act. Nor was he a public officer or a public official.

[33] The respondent's duties included managing the office budget of the Minister's Office and providing leadership to the office team. When performing his duties he was subject to the Ministerial Officer's Code of Conduct which imposed on him the following obligations among others.

> Ministerial Officers must not only act lawfully but also in a manner which withstands the closest public scrutiny. However, neither the legal standard nor this Code is exhaustive and there will be occasions on which Ministerial Officers will find it necessary to be more stringent in their conduct *in order to protect the public interest* and to enhance public confidence and trust.
>
> Merely avoiding breaking the law will not always be enough to guarantee an acceptable standard of conduct.
>
> Ministerial Officers must recognise the importance of transparent and open government, and acknowledge that they are expected to behave according to the highest standards of personal conduct in the performance of their duties to maintain and strengthen the democratic traditions of the Northern Territory.
>
> Ministerial Officers must agree to act in the public interest and abide by the following ethical principles:
>
> - to have respect for law;
> - to respect our system of government;

- *to behave honestly and with integrity in the course of their employment*;
- *to be frank, timely, transparent and impartial in official dealings*;
- *to act with care, attention and due diligence in the performance of their duties*; and
- to use public resources in a proper manner with due economy and not subject those resources to wasteful or extravagant use.

General Standard

Ministerial Officers must act in a manner that demonstrates respect for the framework of Ministerial responsibility and the system of government including:

- not engaging in behaviour that adversely affects or tends to adversely affect the Minister's reputation; and
- ensuring their behaviour maintains public confidence in the integrity of the government.

Conflict of Interest

In performing official duties, a Ministerial Officer must act in the public interest.

Ministerial Officers must:

- *take reasonable steps to avoid any actual, potential or perceived conflicts of interest, financial or non-financial, in connection with their employment;*
- *take personal responsibility for preventing any such conflicts of interest*;
- take care to ensure that their private activities and involvement in political and community organisations do not give rise to any actual or perceived conflicts of interest; and
- ensure that all conflicts of interest are to be resolved promptly in favour of the public interest.

Declaration of Interests

Ministerial Officers must annually, and on a continuing ad hoc basis, declare their private interests to the Chief of Staff.

Improper Advantage

Ministerial Officers must not use their status, power or authority gained from their employment in order to gain, or seek to gain, a benefit or advantage for themselves or for any other person or persons including using:

- information or material acquired in or in connection with the performance of their official duties in order to obtain appointment, promotion, advancement or transfer; or
- official information which is not in the public domain, or information obtained in confidence in the course of their official duties or positions, for the advantage or benefit of themselves or another person or persons, during and after leaving Office.

…

Gifts and Benefits

Ministerial Officers must:

- *not solicit, encourage or accept gifts, benefits or favours, the receipt of which may tend to influence or appear to tend to influence the Ministerial Officer in the exercise of his or her duties*;
- *take all reasonable steps to ensure that his or her family members, and staff members, are not the recipients of benefits which could give the appearance of an indirect attempt to secure influence or favour*;
- *declare all gifts and benefits, including hospitality and travel, received in connection with official duties*. This may include using a register to declare such gifts and benefits; and
- report any direct or indirect offer or suggestion to proffer a substantial gift or benefit to the Chief of Staff.

[34] The obligations set out in the Ministerial Officer's Code of Conduct are important obligations. The Chief of Staff is a confidential agent of the Minister and probity and integrity must define any Ministerial office and its activities.

[35] The respondent was a personal friend of Ms Alexandra (Xana) Kamitsis. They were not close friends. He had known her since 2005. Ms Kamitsis owned and operated a travel business, Latitude Travel.

[36] The respondent commenced as Acting Chief of Staff to Minister Price on or about 10 September 2013. Before becoming the Minister's Chief of Staff, the respondent had never purchased or otherwise obtained travel services from Ms Kamitsis. From the time the Country Liberals (NT) came into government on 25 August 2012 until 10 September 2013 Latitude Travel had provided no travel services to the Government.

[37] However, from the beginning of his employment as Acting Chief of Staff, the respondent made it clear to Ms Kamitsis that the Minister's Office would book all travel through her. In an email the respondent sent to her on 10 September 2013 he stated, "Hey there, you're about to get more business from me." The respondent made it clear that he would be directing the travel business of the Minister's Office to Ms Kamitsis. He assured her that her travel agency would be the exclusive provider of travel services to the Minister. In the same email he stated, "We will book all our travel through you."

[38] Between 12 September 2013 and 21 November 2014 Latitude Travel was the only travel agency to provide travel services for the office of the Honourable Bess Price MLA. During that period it was and remained the exclusive provider of travel services to the Minister's Office. Following the respondent's email of 10 September 2013, Latitude Travel provided travel bookings for the Minister's Officer at a cost of $337,265 in the period from 12 September 2013 to 21 November 2014.

[39] It is unclear why the respondent decided at such an early stage that Ms Kamitsis was to be the exclusive provider of travel services to the Minister. At no stage did he approach any other travel agents to ask for quotes to enable him to assess whether the prices quoted and charged by Ms Kamitsis were or would be competitive or otherwise.

[40] The respondent claimed in his evidence before the jury that he introduced Ms Kamitsis to the Minister and recommended her in the following terms, "This is Xana. She is a friend of mine. I have known her since 2005 when I was a candidate. I know that she is a good travel agent but know that politically she is good for us because she is a female, we have a women's policy, she is a Territorian, she owns a business in the Territory, she employs Territorians and she also supports our side of politics." The appellant claimed Minister Price said in response, "Sounds great. Welcome on board."

[41] The sentencing judge stated that he had difficulty accepting the respondent's evidence about this meeting because the conversation described by the respondent was inconsistent with the contents of the email he sent to Ms Kamitsis on 10 September 2013. Nonetheless, the respondent's evidence provided some insight into his motive for choosing Ms Kamitsis as the sole and exclusive provider of travel services to the Minister's Office. At least part of the reason was the respondent's understanding that Ms Kamitsis was a Country Liberals (NT) supporter.

[42] The sentencing judge also found, "However, your knowledge that Ms Kamitsis was a 'CLP' supporter does not explain your undignified eagerness to ingratiate yourself to Ms Kamitsis."

[43] The respondent protected the exclusive arrangement throughout notwithstanding quite serious complaints about Latitude Travel's travel systems and poor performance. When complaints were made by the Minister's Personal Assistant concerning Latitude Travel's performance the respondent told her to continue using Latitude Travel. He did so despite serious problems which arose during the Minister's travel to New York between 7 and 17 March 2014.

[44] Prior to the Minister and the respondent travelling to New York, Ms Kamitsis made an error in completing the Electronic System for Travel Authorisation online applications to enable the respondent and the Minister to enter the United States of America without a visa. The respondent's passport details were entered on the Minister's application and the Minister's passport details were entered on the respondent's application. Because of this the Minister and the respondent were unable to check in at the Brisbane International Airport and had to go to Flight Centre to fix the problem. Further, Ms Kamitsis did not give the Waldorf Astoria Hotel in Manhattan adequate security or guarantee for prepayment and the hotel took $4,000 for security from the respondent's credit card and $2,700 from the Minister's credit card, effectively blocking those credit cards from further

use in New York until additional cash was deposited in the respective accounts.

[45] After the respondent confirmed the exclusive arrangement with Latitude Travel on 10 September 2013 he engaged in an ongoing course of conduct, not very subtle at times, of seeking favours from Ms Kamitsis.

[46] On about 30 October 2013 Ms Kamitsis booked a return flight to Kuala Lumpur and one night's accommodation in a hotel in Kuala Lumpur in the respondent's name. The respondent travelled on the flights and used the accommodation. The total cost of the flights and accommodation was $703.75. The respondent made no payment in relation to this travel. The accounting records of Latitude Travel record the travel and accommodation arranged for the respondent as a gift by Ms Kamitsis to the respondent. This benefit was the subject of count 1 on the indictment, of which the jury was unable to reach a verdict and was discharged.

[47] As to count 3 on the indictment, in March 2014 the respondent received a benefit for airline travel by his son, Nathaniel, from Darwin to New York and return. He was given a waiver of service fees and an unlimited extension of time to pay the full price of his son's airfare. On 25 February 2014, Ms Kamitsis sent an email to the respondent asking if she could ticket his son's itinerary and charge it to his credit card. The respondent replied, "Please ticket and if I could pay it back to you that would be appreciated." Ms Kamitsis replied, "Absolutely no problem." An invoice dated 3 March

2014 issued by Ms Kamitsis for Nathaniel's travel in the sum of $2,895 stated, "Cost price. No service fees charged."

[48] The respondent transferred $1,000 to Latitude Travel in part payment of the invoice dated 3 March 2014, but did not pay the outstanding balance until 25 June 2015 after he was spoken to by police.

[49] As to count 5 on the indictment, the respondent received a benefit in March 2014 in respect of return flights from Darwin to Sydney for him and his daughter, Laura. He and his daughter flew to Sydney on 21 March so he could take her to a show called, "Dance Mums". Ms Kamitsis told the respondent that she would make the arrangements for $500 each and the respondent asked her to make the bookings. Meanwhile, the respondent used his position to arrange for Ms Kamitsis to receive an invitation to a function at the Australian Consulate-General in New York. When Ms Kamitsis invoiced the respondent on 3 April 2014 the invoice was for $1,100 inclusive of GST. The amount was described as a "special price". In the covering email Ms Kamitsis stated, "Hi my darling no rush on this okay. Happy to do it over a few months and whenever you can – no stress whatsoever." The respondent thus received the benefit of a waiver of service fees and unlimited time to pay the price of those flights. The respondent did not pay the price of those tickets until 3 July 2015, which was some weeks after he was spoken to by police.

[50] The sentencing judge stated that he was satisfied beyond reasonable doubt that the respondent had received the benefits from Ms Kamitsis because of the way in which he managed the provision of travel services by Ms Kamitsis and Latitude Travel to Minister Price and her office. His Honour was also satisfied beyond reasonable doubt that at the time the respondent received the benefits he believed Ms Kamitsis intended the benefits should influence him in favour of Latitude Travel in carrying out his duties as Chief of Staff to Minister Price in the arrangement of travel services for the Minister and her office. In other words, the respondent knew that Ms Kamitsis was seeking to influence him to favour Latitude Travel. He knew the benefits were a reward to him for the significant commercial advantage he had provided and was continuing to provide to Latitude Travel.

Consideration of ground 1 – manifest inadequacy

[51] The salient features of the offending the subject of this appeal are as follows.

[52] The appellant is an intelligent adult who was 41 years of age when he committed these two offences. He is now 44 years of age. He was employed in a senior position as the Chief of Staff of a Government Minister. In that position he was well paid and exercised a degree of power and influence. The position involved the disbursement of a significant amount of public funds. He was in a position of considerable trust and he deliberately betrayed that trust.

[53] The position of Chief of Staff carried with it commensurate obligations of honest dealing with his employer and with others with whom he dealt on behalf of his employer. Under the terms of his employment, he was subject to a code of conduct which required him to act in accordance with the following principles:-

- To behave honestly and with integrity in the course of his employment.
- To act with care, attention and due diligence in the performance of his duties.
- To take reasonable steps to avoid any actual, potential or perceived conflicts of interest, financial or non-financial, in connection with his employment.
- To take personal responsibility for preventing any such conflicts of interest.
- Not to use the status, power or authority he gained from his employment in order to gain, or seek to gain, a benefit or advantage for himself or for any other person.
- Not to solicit, encourage or accept gifts, benefits or favours, the receipt of which might tend to influence or appear to tend to influence him in the exercise of his duties.
- To take all reasonable steps to ensure that his family members were not the recipients of benefits which could give the appearance of an indirect attempt to secure influence or favour from him.

- To declare all gifts and benefits, including hospitality and travel, received in connection with his duties.

[54] If the respondent engaged in conduct contrary to those principles, his contract provided that action could be taken against him, including but not limited to counselling; a formal caution; reductions in his salary; reassignment of duties; or termination of employment.

[55] The respondent's conduct in this offending demonstrated the antithesis of the obligations imposed on him in every respect. On behalf of the Minister's office, and in the course of carrying out his duties as Chief of Staff, the respondent entered into an exclusive arrangement with Latitude Travel for the provision of travel services in a non-transparent manner in circumstances where he could do as he liked and the procurement process was open to abuse. The respondent made it clear to Ms Kamitsis that he was favouring her travel business and he would be grateful to accept any travel benefits she might wish to provide to him in return. Under those arrangements, the business provided travel services to the Minister's office at a cost of $337,265. After Latitude Travel was engaged, the respondent protected the exclusive arrangement and he engaged in an ongoing course of conduct of seeking favours from Ms Kamitsis. As a result, he received nominal benefits on two occasions.

[56] The court below did not receive any evidence about the level or amount of the service fees. Given the absence of this evidence, the sentencing court

was obliged to proceed on the basis that only a nominal benefit accrued to the respondent as the result of his offending. The appellant does not suggest otherwise.

[57] The respondent received the benefits he did receive because of the way he deliberately managed the provision of travel services to the Minister's office. The respondent knew the benefits were a reward to him for the significant commercial advantage he had provided and was continuing to provide to Latitude Travel. It is most unlikely that the respondent could have obtained those benefits if he was not employed as the Minister's Chief of Staff. In cases such as these the weight to be given to the respondent's prior good character and prospects of rehabilitation is considerably outweighed by the weight which must be given to denunciation and general deterrence.

[58] The objective of the two offences committed by the respondent was to obtain a benefit for directing travel purchases by the Minister's office through Ms Kamitsis's business. The benefit obtained by Ms Kamitsis was a continuation of the exclusive arrangement she had with the Minister's office for the provision of travel services. While the offending involved a serious breach of trust, the benefit obtained by the offender was only of nominal value. The harm suffered by the Minister's office was the loss of an opportunity to have acquired travel services through a proper and transparent tender process. However, it was not established in this case that

the amounts charged by Latitude Travel were any more than would have been charged *bona fide* by another travel agent.

[59] The objective seriousness of the respondent's offending is significantly tempered by the facts that he only received a nominal benefit on two occasions; the offences were committed over a short period of time; the offending was not systematic; the offending was relatively unsophisticated; and there was no evidence to suggest that the respondent knew Ms Kamitsis was engaged in any greater criminality. While the offences were committed in a context in which the respondent was wholly responsible for granting the exclusive travel services arrangement to Ms Kamitsis, a significant element of the offences is the obtaining of the benefits, which in this case were of only nominal value. In addition, the sentencing judge did not find that the respondent entered into the arrangements with Ms Kamitsis for the sole purpose of obtaining travel benefits for himself.

[60] While counsel for the appellant vigorously and properly directed attention to the nature of the respondent's position and the significance of the breach of trust involved, those matters cannot obscure that the nominal value of the benefit received is critical in the result. So much is illustrated by the fact that had the indictment been pleaded differently the respondent might conceivably have been able to argue that as a matter of law so slight a benefit could not have influenced him. In days gone by, "meat and drink" of

small value seems to have been considered acceptable[21] and, more recently, gifts and boxes of matches carrying an exhortation to vote for a candidate in an election were held not to be an offence because the value was too small to influence the recipient.[22]

[61] The sentence passed by the sentencing judge was structured in such a way as to reflect the sentencing objectives of general deterrence and denunciation. His Honour considered that because of these objectives a sentence of imprisonment and not some lesser sentence was appropriate. However, his Honour considered that a sentence which required the respondent to be imprisoned was not required because the respondent was a first offender and this was not a case which required any weight to be given to the sentencing objective of personal deterrence. The offender was of prior good character and he had the care of a dependent daughter. In the circumstances, he was unlikely to reoffend. Such a conclusion was open to his Honour and does not constitute an error in the exercise of the sentencing discretion.

[62] In our opinion, the head sentence imposed on the respondent duly reflected the sentencing objectives of denunciation and general deterrence. It was a third of the length of the maximum sentence which could be imposed on the appellant. If anything, the head sentence was towards the upper end of the

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21 *Bodmin Case* (1869) 1 O'M & H 124; (1869) XX TLR 989 per Willes J at 991.

22 *Woodward v Maltby* [1959] VR 794.

range of sentences for offences of this magnitude. The only real issue was whether a wholly suspended sentence of imprisonment was justified and whether the respondent should have been required to spend some time in prison. While reasonable minds might differ about the appropriate disposition in the circumstances, it could not be said that the sentence was so disproportionate to the seriousness of the crimes as to shock the public conscience, or that it was plainly unjust.

[63] Ground 1 of the appeal cannot be sustained and the appeal should not be allowed on that ground. In reaching this conclusion we acknowledge that offences such as these involving a gross breach of trust frequently and justly attract sentences of actual imprisonment. If the benefits the respondent received had been anything more than nominal, a term of actual imprisonment would have been justified.

Consideration of ground 2 – parity and equal justice

[64] As this court observed in *Bara v The Queen*:[23]

> The principle of parity operates to ensure that sentences are proportionate and just as between co-offenders. It is an aspect of "equal justice" in sentencing, which requires identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect [*Wong v The Queen* (2001) 207 CLR 584 at 608 per Gaudron, Gummow and Hayne JJ; *Green v R* (2011) 244 CLR 462 at [28] per French CJ, Crennan and Kiefel JJ].

23 [2016] NTCCA 5 at [31].

[65] The ground of appeal is expressed to be that the sentencing judge "[m]isapplied the parity principle or the principle of equal justice". The principle of parity in sentencing is an aspect of the broader principle of equal justice, and those principles have no independent or different operation for the purposes of this appeal.

[66] Counsel for the respondent makes the preliminary contention that recourse to the principle of parity is not available to the Crown as a ground of appeal.[24] Counsel for the appellant contends in response that the relevant observation by Simpson J in *Nguyen* (on which the respondent relies) may be traced through *Steer* back to the Tasmanian case of *R v Radloff*.[25] The appellant's contention follows that the proposition in *Radloff* denying to the Crown the availability of parity as a ground on which to press for an increase in sentence was predicated on double jeopardy, and therefore has no application in jurisdictions which have abrogated double jeopardy as a relevant consideration in prosecution appeals. The appellant contends further that the observations made by Hoeben CJ in *Delaney* (with whom Harrison and Beech-Jones JJ agreed) were *per incuriam* to the extent they concerned offences which had been committed after that statutory abrogation in New South Wales and failed to take that matter into account.

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24 *Delaney v The Queen* (2013) 230 A Crim R 581 at [69]; *Steer & Ors v R* (2000) 171 ALR 463 at [11]-[12]; *R v Nguyen* [2010] NSWCCA 331 at [62].

25 (1996) 6 Tas R 99 at 32-33.

[67] On proper analysis, the authorities cited in this respect are to the effect that while in a severity appeal the parity principle may warrant intervention and reduction in respect of sentences that are otherwise appropriate but for the disparity,[26] in a Crown appeal disparity cannot be an independent or stand-alone ground which would warrant appellate intervention and an increase to a sentence which otherwise falls within the sentencing range. The Crown must establish that the sentence is manifestly inadequate other than by reference to parity considerations. In other words, any contention that the sentencing court has imposed a sentence giving rise to disparity is properly viewed as a particular of the ground asserting manifest inadequacy.

[68] So much is apparent from an analysis of the nature and purpose of a Crown appeal, and the circumstances in which one might be brought asserting unjustifiable disparity between the sentences imposed upon the respondent and a co-offender. An appeal brought on that ground will necessarily involve the sentence against which the appeal is brought and the heavier comparator sentence imposed on the co-offender for the same or like offending. For there to be genuine disparity one or other of two circumstances must ordinarily exist. Either the subject sentence is within range and the comparator sentence manifestly excessive, or the comparator sentence is within range and the subject sentence manifestly inadequate.[27]

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26 See, for example, *Lowe v The Queen* (1984) 154 CLR 606 at 613 per Mason J.

27 So much follows from the fact that in order to attract the application of the principle of parity it must be shown that the disparity between the sentences is unjustified in the sense that it "is manifestly and not merely arguably excessive": see *Pecora v The Queen* [1980] VR 499 at 504; cited with approval in *Pastras v The Queen* (1993) 65 A Crim R 584 at 588.

In the former circumstance, a Crown appeal could not properly be brought with a view to increasing the subject sentence in order to achieve parity. In the latter circumstance, the proper ground of appeal must be that the subject sentence is manifestly inadequate in the application of ordinary principles rather than by reference solely to parity considerations.[28]

[69] This was the import of the following observation made in *Radloff* concerning Crown appeals:[29]

> However, if the [offender's] sentence is an adequate or appropriate one in the sense that Mason J used the latter expression in *Lowe*, namely as falling within an appropriate range having regard to all relevant factors, it would be quite wrong, in my opinion, for an Appeal Court to intervene to cure [a disparity between that sentence and one imposed on a co-offender] by increasing the sentence at all. Even if an increase to eliminate the discrepancy would not bring it to the point that it no longer fell within the appropriate general range and might not be regarded as excessive, an Appeal Court should not intervene to substitute for one sentence within the permissible discretionary range a higher one within that same range.

[70] The same principle was expressed in *Nguyen* in different terms:[30]

> Parity in sentencing, in the sense discussed in *Lowe v The Queen* [1984] HCA 46; 154 CLR 606 and *Postiglione v The Queen* [1997] HCA 26; 189 CLR 295, is not a concept available to the prosecution. A judge cannot be expected to pass a heavier sentence than he or she otherwise would, merely because another judge had, in a related or compatible case, done so: see *Steer v R* [2000] FCA 462; 171 ALR 463.

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28 Similar considerations would apply where the disparity alleged was that the same head sentence was imposed in circumstances where the respective conduct and antecedents warranted the imposition of disparate sentences.

29 *R v Radloff* (1996) 6 Tas R 99 at 32.

30 *R v Nguyen* [2010] NSWCCA 331 at [62].

[71] Similarly, an appeal court will not intervene to impose a heavier sentence in order to rectify an apparent disparity merely because a heavier sentence was imposed on a co-offender for the same or like offending.

[72] Advertence in a Crown appeal to a sentence imposed on a co-offender for the same or like offending can only be for the purpose of measuring the subject sentence against a background of a range of sentences imposed on like offenders in aid of the assertion of manifest inadequacy. This was the point being made by the court in *Steer* when it said:[31]

> It is important to recognise that there is no principle in sentencing, whether relating to parity or otherwise, which requires or justifies an increase in the severity of a sentence passed on an offender in order to bring it into line with more severe sentences passed on co-offenders …
>
> On the other hand, it is difficult to see that, when considering alleged manifest inadequacy, regard should not be had to other offenders who had been sentenced in like circumstances.

[73] Those results follow necessarily from the principles which govern Crown appeals. They should be brought rarely, they may only be brought in the public interest, and they should be confined to the correction of manifest errors in the application of sentencing principle. As this Court observed in *The Queen v Renwick & Johnston*:[32]

> Crown appeals enable the courts to establish and maintain adequate standards of punishment for crime, to correct idiosyncratic views and to correct sentences which are so disproportionate to the seriousness of the crime as to "shock the public conscience" [*R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213; *R v Riley* (2006) 161 A Crim R 414 at

31 *Steer & Ors v R* (2000) 171 ALR 463 at [11]-[12].

32 [2013] NTCCA 3 at [3].

> 18-20; *R v Hitanaya* [2010] NTCCA 3]. The Crown is entitled to have sentences corrected which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards [*R v Riley* (2006) 161 A Crim R 414 at 19 citing *Barbara* (unreported, CCA (NSW), No. 60638 of 1996 (24 February 1997); *R v Rindjarra* (2008) 191 A Crim R 171 at [28], [29]].

[74] Those principles would not be served by Crown appeals directed to the increase on parity grounds of a sentence which otherwise falls within the sentencing range. There must be an attendant and manifest inadequacy to warrant appellate intervention. It is for those reasons that the principle of parity is not available to the Crown as an independent and freestanding ground of appeal. Those reasons have nothing to do with double jeopardy, and remain unaffected by the statutory abrogation of double jeopardy as a relevant consideration in prosecution appeals.

[75] Even were that not so, the principle of parity would have no application to these circumstances. In *Lowe v The Queen*, Gibbs CJ made the following observation concerning the operation of the principle of parity:[33]

> It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as … the part which he or she played in the commission of the offence, have to be taken into account.

[76] In that same case, Dawson J made similar comment:[34]

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn

33 (1984) 154 CLR 606 at 609.

34 (1984) 154 CLR 606 at 623.

between them. Obviously where the circumstances of each offender or of his involvement in the offence are different then different sentences may be called for.

[77] Similar observations were made in *Postiglione v The Queen*:[35]

> The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated …
>
> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality.

[78] Against that background, the Crown's assertions on this ground may be summarised as follows. The offence created by s 236 of the *Criminal Code* envisages reciprocity of conduct, in that the person who corruptly receives the property or benefit does so from the "third person" who corruptly gives the property or benefit. The provision imposes criminal liability on both to a maximum period of imprisonment for three years.

[79] Ms Kamitsis, the third person who corruptly gave the benefit to the respondent in the present case, was sentenced in separate proceedings to imprisonment for 19 months for what the appellant contends was the "mirror image" of the respondent's offending. The conduct to which Ms Kamitsis

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35 (1997) 189 CLR 295 at 301-2 per Dawson and Gaudron JJ.

pleaded guilty included gifting the respondent approximately $4,700 in respect of the airfares to New York and Sydney, and gifting the respondent a further $700 in respect of airfares to Malaysia for which there was no finding of guilt concerning the respondent.

[80] At the same time as she was sentenced for that offence, Ms Kamitsis was also sentenced for a further 21 offences as part of the same sentencing exercise. The total amount of the benefits she obtained by her various deceptions was in the order of $125,000. The sentencing court ordered a total effective period of imprisonment for three years and 11 months, to be suspended after she had served 18 months.

[81] Given the structure of the sentence and the involvement of the other offences, it is not possible to identify what order the sentencing court would have made concerning the suspension of sentence in respect of the "mirror image" offence had it been dealt with in isolation. Counsel for the appellant suggests Ms Kamitsis would necessarily have spent time in actual imprisonment. That may well be so, but it does not answer the question whether there was an unjustifiable disparity between the sentence imposed on her and the sentence imposed on the respondent to this appeal.

[82] Counsel for the appellant draws attention to the fact that had Ms Kamitsis been found guilty by a jury, rather than pleading guilty, the court would have imposed a head sentence of imprisonment for two years for the relevant offence. Counsel for the appellant contends that Ms Kamitsis's culpability

must necessarily have been of a lower order than that of the respondent. That is said to follow from the fact that it was he who occupied the position of trust to which the relevant powers, duties and functions attached. It is said on this basis that the sentencing judge failed to recognise the "greater criminality" in the respondent's conduct, and by that failure created an unjustifiable disparity between the two sentences.

[83] In the course of the sentencing remarks the sentencing judge gave careful consideration to the parts which each played in the commission of the offences, the differences between the factual bases on which they were sentenced, and their relative degrees of criminality. His Honour made the following observations in those respects (emphases added):

> I need to say something about the parity principle in your case. It has been a matter that has been the subject of submissions by counsel for the Crown and also defence counsel. The parity principle requires identity of outcomes in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect.
>
> The learned Crown prosecutor has drawn to my attention that Ms Kamitsis was sentenced by Justice Mildren to a term of imprisonment of 19 months, reduced by approximately 20% from a starting sentence of 2 years for an offence contrary to s 236 of the *Criminal Code* of corruptly giving benefits to an employee of a Minister of the government so that he could corruptly exercise his powers, duties or functions. It appears that Ms Kamitsis was charged with corruptly giving you the benefits which the jury found you corruptly received.
>
> In pleading guilty, Ms Kamitsis admitted that she provided you with the following benefits:-
>
> - A return flight from Darwin to Kuala Lumpur in November 2013 costing $504.75, plus accommodation at a cost of $199.
> - In March 2014, a payment of $1,895 towards the cost of a flight from Darwin to New York for your son.

- In April 2014, a payment of about $2,785.75 towards the trip that you and your daughter took to Sydney.

However, the facts in your case were materially different from the facts in the sentencing of Ms Kamitsis. I put to one side the differences in your personal circumstances and concentrate on the facts of offending.

First, Ms Kamitsis admitted to corruptly giving you the benefit of the return flight from Darwin to Kuala Lumpur and accommodation. Although you admitted that you received that benefit, you denied that you corruptly received that benefit on account of the manner in which you carried out your powers, duties or functions as an employee of the Minister. As mentioned earlier, the jury were unable to reach a verdict in relation to whether you corruptly received that benefit. *In the circumstances, the presumption of innocence remains.*

Second, Ms Kamitsis admitted that she corruptly gave you the benefit of a payment of $1,895 towards the cost of your son's airfares. *However, the jury found you not guilty of corruptly receiving the benefit of $1,895, but instead found you guilty of corruptly receiving the benefit of a waiver of service fees and deferral of full payment for your son's airfares; arguably, a lesser benefit.*

Third, Ms Kamitsis admitted that she corruptly gave you the benefit of a payment of about $2,785.75 towards your and your daughter's trip to Sydney. In your trial, however, the evidence in the Crown case was that you received a benefit of $1,100, plus a waiver of service fees, and not an amount of $2,785.75. *Further, irrespective of the amount alleged, the jury found you not guilty of corruptly receiving the benefit of return flights for yourself and your daughter but instead found you guilty of corruptly receiving the benefit of a waiver of service fees and deferral of full payment for those flights, again, arguably a lesser benefit.*

Therefore, although it might first appear that Ms Kamitsis was sentenced for the 'mirror image' of your offending, close analysis shows that that was not the case - factually or legally. In those circumstances, *I do not accept the Crown's submission that her offending was "for all intents and purposes" identical to yours.*

I note an additional matter. Not only did Ms Kamitsis admit that she corruptly provided benefits to you to obtain government business for her travel agency, and specifically, that she paid $1,895 towards your son's return airfares to New York, Ms Kamitsis dishonestly overcharged the Northern Territory Government an amount of $13,632 for the New York travel arrangements for the Minister and yourself. While she was convicted and sentenced separately for obtaining that

> benefit by deception, the purpose of or at least the result of her corruptly providing that benefit or benefits to you was that she was able to dishonestly profit from the exclusive commercial arrangement you secured for her. *In your case, however, there is no evidence that you were aware of any such ulterior purpose or dishonest overcharging by Ms Kamitsis*.

[84] As already noted, the respondent was not found guilty of receiving the value of the airfares to Malaysia, New York and Sydney to which Ms Kamitsis pleaded guilty. The effect of the guilty verdicts in respect of the respondent was only that he received a waiver of service fees and a deferral of full payment for the flights to New York and Sydney. That in itself represents a significant difference between the factual bases on which they were sentenced, and their relative degrees of criminality.

[85] There was also another more significant distinction. It may be accepted that with this type of offending an offender's position as a public officer will ordinarily serve to elevate the moral culpability of his or her offending above that of the person providing the benefit.[36] In this case, whatever the nature of the respondent's employment might have been in terms of its public character, there is no doubt that he occupied a significant position of trust. As has already been described in the context of the manifest inadequacy ground, however, the respondent's conduct and intention was to allow Ms Kamitsis a monopoly on the Minister's travel business. The

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36 *R v Nath* (1994) 74 A Crim R 115 at 119. See also *R v Delcaro* (1989) 41 A Crim R 33 at 36; *R v Smith* (2000) 116 A Crim R 447.

consequence of that was to deprive the employer of any benefit that might have accrued from a competitive tendering process.

[86] The respondent's conduct was not for the purpose or with the intention of enabling Ms Kamitsis to engage in some further criminal activity under cover of that monopoly. Conversely, Ms Kamitsis's purpose and intention in providing the benefit was manifestly directed to the dishonest exploitation of that exclusive commercial arrangement. While it is true to say that she would not have been able to do so but for the respondent's breach of trust, that quite different purpose and intention elevated her moral culpability beyond that of the respondent in the particular circumstances of this case.

[87] This ground of appeal must fail both because in these circumstances the principle of parity does not operate independently of the question whether the sentence was manifestly inadequate, and because there was no unjustifiable disparity in any event.

Disposition

[88] The appeal is dismissed.
