

**IN THE SUPREME COURT OF QUEENSLAND
AT BRISBANE**

No. S7539 of 2003

RE AN APPLICATION FOR BAIL BY DAVID WILLIAM ETTRIDGE

Submissions for the Applicant – David William Ettridge

The Applicant's material

1. The Applicant reads the following material:
 - 1.1. Application filed 26 August 2003.
 - 1.2. Affidavit of Paula Morreau filed 26 August 2003.
 - 1.3. Affidavit of David William Ettridge filed 27 August 2003.
 - 1.4. Affidavit of Paula Morreau filed 28 August 2003.

The relevant facts and the course of proceedings

2. In or about July 2001 the Applicant was charged conjointly with a Pauline Lee Hanson ("Ms Hanson") of an offence under section 408C(1)(c) of the *Criminal Code (Qld)* ("the joint charge"). He was granted bail on his own undertaking subject to certain conditions. He honoured his bail conditions.¹
3. On 20 August 2003:
 - 3.1. The Applicant was convicted of the joint charge.
 - 3.2. He was sentenced by Wolfe CJDC to 3 years imprisonment.
 - 3.3. Ms Hanson was convicted of the joint charge and two counts of misappropriation under sections 408C(1)(a) and 408C2(d).
 - 3.4. Ms Hanson was also sentenced to 3 years imprisonment.²

¹ Para 13-15, Affidavit of David William Ettridge, 26 August 2003.

² **Sentencing Remarks**, Exhibit PM-1, Affidavit of Paula Morreau, page 7. Wolfe CJDC ordered that each 3 year term was to be served concurrently: "In respect of counts 2 and 3, because you

4. On 25 August 2003 the Applicant lodged a Notice of Appeal against the conviction and an Application for leave to appeal against sentence.³
5. On 26 August 2003:
 - 5.1. The applicant lodged an amended Application for leave to appeal against the sentence.⁴
 - 5.2. He also filed this application for bail.
6. On 27 August 2003 the Applicant lodged a further amended Application with the inclusion of one further ground.⁵

This Application

7. The Applicant seeks to be released on bail pending the determination of his appeal and application.⁶
8. Although an Appeal against conviction has been lodged, there has not yet been an opportunity for the grounds of appeal in respect of the conviction to be examined by the Applicant's lawyers.⁷ Therefore, this application seeks to rely only upon the "chances of success" in the application for leave to appeal the term of imprisonment imposed.⁸

suffered substantially as a result of the effect of your conviction and the events that have occurred since the decision and the proceedings in the Supreme Court began, the sentence I will pass for counts 2 and 3 is three years, no more. They are to be served concurrently with each other and with count 1 and all other sentences."

³ Exhibit PM-3, Affidavit of Paula Morreau

⁴ Exhibit PM-4, Affidavit of Paula Morreau

⁵ Exhibit PM-10, Affidavit of Paula Morreau

⁶ Section 6 of the *Bail Act*: "criminal proceeding" includes a "hearing, trial or appeal in relation to an offence"

⁷ See second affidavit of Paula Morreau, 28 August 2003

⁸ The Applicant was self-represented at his trial. Although an appeal against conviction has been lodged, the grounds are being drawn and the Court of Appeal has been informed that they will be lodged within the Appeal period: Exhibits PM-4 to PM-7, Affidavit of Paula Morreau

9. To be entitled to bail pending appeal, the applicant must demonstrate the existence of “exceptional circumstances”: *Ex Parte Maher* [1986] 1 Qd R 303.⁹ The correct formulation of the approach can be gleaned from looking at the following phrase from *Maher’s case* per Thomas J at the bottom of page 310:

“The discretion is one that is not lightly to be exercised, and is one that requires factors of sufficient force to outweigh the public factors I have mentioned.”

10. It is submitted that the amended grounds of appeal reveal several “patent errors” in the sentence proceeding which demonstrate that the applicant has a “good chance of success” at the hearing of the sentence application. One such error is sufficient to entitle him bail. See *Ex parte Maher* [1986] 1 QD R 303 at 311 per Thomas J:

“In some cases it may be possible to discern immediately a patent error in the proceedings below which indicates that the applicant has a good chance of success upon appeal. This may afford sufficient reason to grant bail.”

11. As the Applicant is not, at present, relying on a conviction point, the public interest issues which warrant the “cautious approach” from a bail Justice as identified by Thomas J in *Maher* at 310¹⁰ do not so readily arise. This application does not treat the jury’s verdict as provisional. Although each ground in the Applicant’s amended application for leave to appeal the sentence has, it is submitted, considerable force, it is intended in the present application for bail to focus on the grounds that have the most obvious prospects of success.

⁹ Per Kelly SPJ at 305: “... a judge exercising that discretion in the case of an application for bail by a convicted person should continue to have regard to the principles enunciated by the Court of appeal in *R v Byrne* [1937] Q.W.N. 30, *R v Henderson* [1967] QWN 19 and *R v Wood* [1970] QWN3, the effect of which is that after conviction bail should be granted only if the applicant can show exceptional circumstances”. See also Thomas J at 310 and Moynihan J at 314.

¹⁰ Per Thomas J at 310: “... the undesirability of regarding a verdict as contingent upon confirmation by an appellate court (*Chamberlain v R*); the fact that release on bail may place an appellate court in the invidious position of returning to prison a person whose circumstances may have changed greatly during the period of liberty pending appeal; the risk that general availability of bail would lead to a proliferation of unmeritorious appeals induced by the temptation to persons undergoing punishment in custody to seize any opportunity to secure release and to leave the future to take care of itself; the prospect that appeals will be launched irrespective of their chances of success simply in order to obtain prompt release (*R v Giordano*). (...) It also seems to me that it is against the public interest that a person duly convicted after a regular trial and sentenced to a substantial period of imprisonment be seen at large shortly after conviction.”

12. It should also be kept in mind that when exercising a discretion to grant bail, albeit pending appeal, the Court must still bear in mind the framework of the *Bail Act 1980* (Qld), particularly the considerations which are relevant under section 16, namely, risks of reoffending, failure to appear, interfering with witnesses and putting others or themselves at risk. There is no proper basis upon which it could be said that the Applicant poses any such risk, let alone an unacceptable one.¹¹

Ground 3 – Sentence proceeding miscarried

13. The Applicant was not legally represented at the trial, including at the sentencing phase.¹² That, of itself, does not necessarily mean that the proceedings were flawed or unfair however they were not likely to be adversarial in any real sense.¹³ It was appropriate that the Chief Judge queried the Applicant on this issue after conviction.¹⁴ In retrospect however it is apparent that Her Honour should have been more vigilant as the Applicant's efforts at this point of the trial manifestly demonstrated his poor appreciation of the sentencing process:

HER HONOUR: I might hear from Mr Ettridge first. Mr Ettridge, do you wish to make any submissions?

PRISONER ETTRIDGE: Yes, I do, your Honour. I'm still coming to grips with the decision of the jury. I mean throughout this trial I have sat in on the bench and ----

HER HONOUR: Well would you find it easier if Mr Nyst spoke first?

PRISONER ETTRIDGE: No, well, if I may continue, your Honour?

¹¹ See *Ex Parte Maher* [1986] 1 Qd R 303 at 304 per Kelly SPJ and at 307 per Thomas J.

¹² Section 1 of the *Criminal Code*: “**trial**” includes a proceeding wherein a person is to be sentenced.

¹³ See *Dietrich* (1992) 177 CLR 293:

“The advantages of representation by counsel are even more clear today than they were in the nineteenth century. It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious ((16) *McInnis v. The Queen* (1979) [143 CLR 575](#), per Barwick C.J. at p 579; see also *Galos Hired v. The King* (1944) AC 149, at p 155 and *Foster v. The Queen* (1982) 38 ALR 599, at p 600.). Lord Devlin stressed the importance of representation by counsel when he wrote ((17) *The Judge*, (1979), p 67):

“Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.””

¹⁴ **Sentence Transcript**, Exhibit PM-2, Affidavit of Paula Morreau, page 1947:

Her Honour: Before you proceed, Mr Ettridge do you wish to retain counsel for the sentence to represent you on the sentence?

Prisoner Ettridge: I have no counsel for that, your Honour.

Her Honour: Do you wish to retain counsel? That was my question.

Prisoner Ettridge: Yes - no, your Honour.

Her Honour: You don't. You will continue as you have in the trial representing yourself?

Prisoner Ettridge: Yes, your Honour.

Her Honour: Very well. Yes, Mr Campbell?

HER HONOUR: Yes, you may, it's a matter for you.

PRISONER ETTRIDGE: Thank you, I've - I've listened to a considerable amount of perjury during the course of this trial and I think there is no honour and no credit in a trial which produced this decision when it's been such a dishonest trial. And it is my view that, having arrived at their decision, that this Court should give consideration to the credit of so many of those witnesses who lied to this Court and give consideration to whatever penalties you wish to impose but to do it with - on the basis of some integrity at some stage.

And my submission to the Court is that the penalty should be very light, certainly nothing like Mr Campbell has suggested as he gloats on the result of the trial that really has been quite a disgrace from his point of view. For him to encourage you to impose maximum penalties adds further to the shame and dishonour of this prosecution.

HER HONOUR: Have you anything else to say, Mr Ettridge?

PRISONER ETTRIDGE: No, your Honour.

HER HONOUR: Thank you, Mr Ettridge.

PRISONER ETTRIDGE: Thank you.

14. It is clear that the Applicant did not appreciate that following a conviction after a trial a prisoner is entitled to maintain his/her innocence if he/she chooses, but is not precluded from making submissions in the sentencing process which have to be conducted according to a statutory framework requiring consideration of issues such as deterrence, rehabilitation, protection, culpability, comparability, parity, consistency etc.
15. Even though the Applicant wished to proceed without legal representation, this does not of itself mean that the sentence proceeding that followed was not flawed as a direct result of him being not represented by competent counsel.¹⁵ Both the Chief Judge and the Crown Prosecutor were placed in an invidious position, as there are differing views as to whether it is part of their function to advise the Applicant how to place appropriate matters before a court in the sentence phase of the trial process.¹⁶

¹⁵ *MacPherson v The Queen* (1981) 147 CLR 512 at 547 per Brennan J:
 “Finally, an accused who elects to defend himself forfeits none of his rights thereby. If he has not had a trial according to law, his intransigent refusal to accept legal representation is no ground for dismissing his appeal, either under the proviso or otherwise. The absence of legal representation imposes a heavier burden upon the trial judge and denies an accused the assistance of an advocate, who can usually present an accused’s case more effectively than the accused himself; but it is a circumstance which is entirely neutral on appeal except in so far as it is relevant to the fairness of the trial.”

¹⁶ *Dietrich v The Queen* (1992) 177 CLR 293
 See Brennan J at p. 325: “The procedure of the criminal courts is designed to produce as fair a trial as practicable in the circumstances of each case. Where an accused person is unrepresented, a particular burden is placed on the trial judge to ensure that the trial is fair.”
 And also Deane J at p. 334-335 “While the prosecution has a duty to act fairly and part of the function of a presiding judge is to seek to ensure that a criminal trial is fair, neither prosecutor nor

Be that as it may, what is clear is that they did not, and the direct consequence is that the Court did not receive all that was necessary from him (or at all) in order for it to properly pass an appropriate sentence upon him.

16. Whether due to not being represented or otherwise, the flaws in the sentencing process fall into the following categories:
 - 16.1. The Chief Judge was led into error and:
 - 16.1.1. Failed to consider parity.
 - 16.1.2. Incorrectly took into account as an aggravating factor an alleged benefit.
 - 16.1.3. Misapprehended the appropriate range and misconstrued the cases which are in fact comparable.
 - 16.1.4. Misapplied a sentencing principle.
 - 16.2. Matters that must be taken into account by a sentencing court were not.

Parity – Ground 6

17. The transcript of the sentence proceeding and the sentencing remarks reveal that the Chief Judge gave no regard to the dictates of parity. Her Honour was unassisted by the Crown Prosecutor on this issue. That this occurred whilst the Applicant was unrepresented obviously compounds the error.
18. The criminality and circumstances that attended the Applicant for sentencing purposes differed considerably from that of his co-accused Hanson.
19. These differences included:
 - 19.1. The Applicant was convicted of one offence with a maximum penalty of 5 years imprisonment. Ms Hanson was also being sentenced for two further

judge can or should provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented ((134) See, e.g., *Richardson v. The Queen* (1974) [131 CLR 116](#), at p 122; *Whitehorn v. The Queen* (1983) [152 CLR 657](#), at pp 682-683.)” cf. *MacPherson v The Queen* (1981) 147 CLR 512 at 534 per Mason J: “Giving full weight to the adversary character of a criminal trial and the difficulties of advising an accused who is not represented, I nevertheless consider that the trial judge is bound to ensure that an accused person has a fair trial. To that end, he is under a duty to give the accused such information and advice as is necessary to ensure that he has a fair trial.”

- offences of misappropriation of \$225,071.07 and \$273,566.24 which conduct made her liable to a 10 year term of imprisonment: section 9(2)(b).
- 19.2. The Chief Judge found that Ms Hanson gained considerable political advantage from the fraud.¹⁷ There is no finding or indeed any evidence of any similar advantage to the Applicant.
- 19.3. The Chief Judge found that both Ms Hanson and the Applicant derived a specific benefit, namely control of the allocation of the electoral funding subsequently received by the One Nation party as a result of the registration.¹⁸ This may have been true in respect of Ms Hanson, but certainly not true in respect of the Applicant. The funds received by the Queensland Office of the One Nation party were administered and distributed without any involvement of the Applicant.¹⁹
- 19.4. Ms Hanson was, and perhaps still is, a “prominent public figure”. The Applicant is not. Any recent notoriety attaches to his having been convicted and gaoled in respect of the same offence of Ms Hanson. The principles in *R v Fingleton* [2003] QCA 266 should not have been applied to the Applicant (see details below).
20. In *Postiglione* (1995-1996) 189 CLR 295 at 301 Dawson and Gaudron JJ relevantly held at:

“The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that the like should be treated alike but that, if there are relevant differences, due allowance should be made. 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. On some occasions, different sentences may indicate that one or other of them is infected with error.”

¹⁷ **Sentencing Remarks**, Exhibit PM-1, Affidavit of Paula Morreau, pages 5-6:

“There is no doubt that the registration of the party gave it an advantage. Before the 1998 election a coalition government held government with the help of one independent. After the election, when eleven One Nation candidates were elected, a Labour government held government with the help of one independent. I cannot speculate what might have happened had each One Nation candidate gone to the election without the benefit of registration. They would have been able and permitted to advertise as One Nation candidates but they would have had to lodge their candidacies for election independently and they would have been entitled to claim electoral funding if they had qualified with the four per cent. They would not have had their names identified with One Nation, the political party on the ballot paper.”

¹⁸ **Sentencing Remarks**, Exhibit PM-1, Affidavit of Paula Morreau, page 7:

“The advantage you received for yourselves has not been suggested by the learned Crown Prosecutor to be an advantage which benefited you personally, financially. The benefit was that you continued to control the allocation, both of you, (emphasis added) of the electoral funding and how the Party was run but it was the electoral funding and the control of that, having misrepresented that there were at least 500 people in 20 Queensland who were members of the Party.”

¹⁹ The Applicant only ever administered the Federal party. The funds were received by the Queensland party.

A material fact of aggravation – Ground 7

21. The Chief Judge sentenced the Applicant on the basis that he had received a specific benefit albeit not a financial one:

“The advantage you received for yourselves has not been suggested by the learned Crown Prosecutor to be an advantage which benefited you personally, financially. The benefit was that you continued to control the allocation, both of you, (underlining emphasis added) of the electoral funding and how the Party was run but it was the electoral funding and the control of that, having misrepresented that there were at least 500 people in 20 Queensland who were members of the Party.”

22. This finding was wrong. There was no evidence at the trial to support this finding. It is a manifest error.

Matters that a sentencing judge must have regard to

23. Section 9(2) of the *Penalties & Sentencing Act* 1992 is expressed in mandatory terms. The Court must have regard to certain matters.
24. In the present case the Chief Judge was never ultimately informed of all that Her Honour was required to have regard to, in order to properly sentence the Applicant viz.:
- 24.1. Information as to the Applicant’s “character”, background and antecedents: section 9(2)(f);
 - 24.2. The “extent to which the Applicant was to blame for the offence”, that is a proper characterisation of the Applicant’s role in the offence: section 9(2)(d); and
 - 24.3. The “presence of any aggravating or mitigating factor concerning [the Applicant]”: section 9(2)(g).
25. It is submitted that the Applicant should have been informed as to the process that attended the sentencing function and that the Applicant was entitled to make submissions as to his culpability in line with the verdict and to place evidence before the Court in line with the requirements of section 9 of the Act. The Applicant’s limited submissions to Her Honour demonstrate that he had no comprehension of this process. Paragraphs 5-11 of the Applicant’s affidavit filed in these proceedings on 27 August 2003 suggest that the Applicant’s family circumstances, his work and

personal history were all worthy of positive regard, had they been placed before the sentencing Court: section 9(2)(f).

26. No attempt was made by either the Crown Prosecutor or the Chief Judge to determine the criminal culpability of the Applicant. Nowhere in the sentence submissions or the Chief Judge's sentencing remarks is there treatment of the conduct which comprised the gravamen of the joint offence insofar as it was committed by the Applicant: section 9(2)(d).

The appropriate range and the issue of comparable cases

27. The Crown prosecutor placed only three cases before the Court viz., the decisions in *R v Ehrmann* [2001] QCA 50, *R v Fingleton* [2003] QCA 266 & *R v Rouse* (unreported) (Tasmanian Court of Criminal Appeal) CCA 25 of 1990 to attempt to support a submission that the appropriate range for the offence started at 3 years and ranged up to the 5 year maximum:

Mr Campbell: Your Honour, in my submission, it is therefore appropriate, particularly in relation to count one, that the appropriate range, the lower end of that range, is the three years, and, of course, the maximum penalty available in relation to count one is five. ²⁰

28. The Chief Judge took this submission to mean that "the range in respect of count 1 is, in effect, three to five years."²¹
29. Bearing in mind that the Applicant was unrepresented, it not just unfortunate that the Crown Prosecutor did not point out some significant matters concerning these cases to Her Honour. It misled her Honour and rendered the proceeding into a one-sided and obviously flawed process where only aggravating factors were highlighted. The following points should have been made in relation to two cases put forward as being comparable:
- 29.1. **In *Ehrmann*:**
- 29.1.1. The offence for which E was sentence attracted a maximum penalty of 10 years imprisonment.

²⁰ **Sentence Transcript**, Exhibit PM-2, Affidavit of Paula Morreau, page 1958.

²¹ **Sentencing Remarks**, Exhibit PM -1, Affidavit of Paula Morreau, page 5.

- 29.1.2. In *E*, having due regard for the maximum penalty of 10 years the Crown submitted that the appropriate head sentence was 3 years.²²
- 29.1.3. *E* committed 47 offences over a period of 3 years. It was protracted and repeated conduct. It involved planned deception. The conduct included both forging and uttering.
- 29.1.4. The prosecution submitted, and the sentencing judge found, that *E*'s criminal actions were done with the intention of benefiting her.²³
- 29.1.5. *E* entered a late plea in the face of an overwhelming case.
- 29.2. In *Rouse*:
- 29.2.1. *R* was a wealthy man who had attempted to bribe a politician in order to change the Government of Tasmania. It was a corrupt act.
- 29.2.2. *R* faced a maximum penalty which almost certainly was more than 5 years.²⁴
- 29.2.3. It is not known what was the Tasmanian statutory framework for sentencing, particularly whether it had the equivalent of section 9(2)(a) of the *Penalties & Sentences Act 1992 (Qld)*.
30. By contrast in the Applicant's case the following are the comparable features:
- 30.1. The Applicant faced a maximum of 5 years imprisonment (*Ehrmann* and *Foster* both faced a maximum of 10 years imprisonment and the situation in respect of *Rouse* is unclear).
- 30.2. The Crown Prosecutor urged in respect of the Applicant the same term as was urged in *Ehrmann*, namely 3 years imprisonment, notwithstanding the fact that the Applicant faced a maximum penalty which was half that faced by *Ehrmann*.
- 30.3. The Applicant's conduct was a single offence involving one act.²⁵ It is important to note that whilst the trial was of a significant duration, the particularised conduct as against the Applicant, which made him culpable for the offence is limited to the allegation that he "assisted (in the dishonest inducement of the Electoral Commissioner) by supplying the names that were represented (to him) to be members of the party."²⁶

²² See *The Queen v Ehrmann* [2001] QCA 50 at page 4, per McMurdo P: "The prosecution submitted at sentence that bearing in mind the maximum penalty of 10 years imprisonment on each count, the appropriate sentence was imprisonment for 3 years with 12 months to be actually served."

²³ See *The Queen v Ehrmann* [2001] QCA 50 at page 4, per McMurdo P.

²⁴ The Tasmanian Court of Criminal Appeal's report does not detail the maximum or even the offence of which he was convicted, however given the comments of the Court in the judgement, it was almost certainly in excess of 5 years.

²⁵ **Sentence Transcript**, Exhibit PM-2, Affidavit of Paula Morreau, page 1961. It was conduct done without pre-meditation and was described by Mr Hanson's Lawyer as being committed in a "rush", which description was not disputed or rejected.

²⁶ **Trial Transcript**, Exhibit PM-11, p49 110-20 (Crown opening). "The Crown alleges against Mr Ettridge that he is a party to this offence of dishonestly inducing Mr O'Shea to register the party because he assisted by supplying the names that were represented to be members of the party."

- 30.4. In the Applicant's case the Chief Judge found that the Applicant was not motivated by a desire for personal gain.
31. In these circumstances, the Crown Prosecutor's submission that the applicable 'range' for the sentencing of the Applicant was from 3 years imprisonment to the maximum of 5 years imprisonment relying on these disparate and barely comparable cases, was wrong. That Her Honour seemed to accept it was an error.
32. No cases were placed before the Court on behalf of the Applicant or Ms Hanson. One case, *R v Foster* (unreported) 17 March 1999, per Shanahan CJDC should have come to the clear notice of the Crown Prosecutor and the Chief Judge as it is referred to and distinguished in *Ehrmann* by the Chief Judge. The salient features in *Foster* were:
- 32.1. F pleaded guilty to 22 counts of forging and uttering Commonwealth electoral forms.²⁷ The maximum penalty was 10 years imprisonment.
- 32.2. The conduct involved tampering with the Australian Electoral Rolls. Shanahan CJDC held that the offences:
 "strike at the system of electoral rolls which is part of our democratic tradition. Conduct like this can undermine public confidence in our electoral rolls system and I have to send out signals to the community as a whole."
- And that F was:
 "moved by a misguided desire to assist in the preselection process of a person who F considered to be the appropriate candidate in the pre-selection process".
- 32.3. There was a "great deal of planning" by F
- 32.4. There was no financial gain by F
- 32.5. F was a decent family man who had given "excellent service to the community".
- 32.6. F had no previous convictions.
- 32.7. F faced difficulties in gaining future employment.
- 32.8. There was great strain placed on the family by the advent of the charges.
- 32.9. F co-operated with law enforcement agencies.

F was sentenced to 3 months imprisonment which was wholly suspended due to the final feature.

²⁷ He was in fact charged under Section 67(b) of the *Crimes Act 1914* (Cth) (now repealed). See indictment which is PM-11, Affidavit of Paula Morreau, 29 August 2003.

33. Save for the issue of contrition and co-operation with the authorities, the Applicant's case, his personal circumstances and motivation are broadly comparable with that of *Foster* except that the Applicant committed only one offence and *Foster* was convicted of 22 offences, each of which had a prescribed maximum penalty of 10 years imprisonment.
34. The Chief Judge, when sentencing *Ehrmann* distinguished *Foster* on the following basis:
- 34.1. F's offending was not as persistent as E, he having committed 22 counts, whereas E had committed a total of 47.
 - 34.2. F had not planned or received any financial gain whereas E had been found have acted with an intention to personally benefit.
 - 34.3. F had shown greater contrition and co-operation with the authorities than E.
35. To exclude this case from determining the appropriate range in respect of the Applicant was a manifest error.

Sentencing principles to be applied

36. *R v Fingleton* (supra) was seemingly relied upon by the Crown Prosecutor for the issues of principle in paras [28] and [29] of the Court of Appeal judgment. The Chief Judge thought that paras [29] and [30] were more relevant.²⁸ What neither recognised is that whilst Ms Hanson might be properly regarded as "occupying [a] prominent position[s] in public life"²⁹ that could not be said of the Applicant at the time the offence was committed.³⁰ To apply such principles to the Applicant's case was again a manifest error.

Summary

37. It is readily apparent that the grounds set out in the Amended Notice of Appeal filed on 27 August 2003 – particularly those addressed above – have "good prospects of success" and suggest "patent errors" in the sentencing process even from this cursory

²⁸ **Sentence Transcript**, Exhibit PM-2, Affidavit of Paula Morreau, page 1953

²⁹ *R v Fingleton* [2003] QCA

³⁰ As distinct from the "15 mins" of infamy that is following his conviction and gaoling together with a public figure such as Ms Hanson.

examination. It follows that the question of sentence will certainly have to be reconsidered by the Court of Appeal. This is of course an “exceptional circumstance” sufficient to warrant bail pending the determination of the application for leave to appeal the sentence imposed: *Ex parte Maher* [1986] 1 Qd R 303 at 311.

38. Having regard to section 9(2)(a) of the *Penalties & Sentences Act*, a wholly suspended sentence is well within range for any Court re-sentencing the Applicant, indeed is in fact the appropriate sentence if a Court had proper regard to all of the relevant features in the Applicant’s case. Bail ought to be granted to the Applicant so as to not make this appeal process a futile one.³¹

Need for applicant to attend upon his lawyers to assist in the preparation and prosecution of the appeal

39. A final further consideration which militates, of itself, in favour of bail is that the Applicant was unrepresented throughout a complex and lengthy trial of about 5 weeks duration.³² If he remains in gaol, his ability to properly instruct his appeal lawyers will be unacceptably compromised given all of the circumstances.³³ To properly prosecute the Applicant’s appeal against conviction will be almost unworkable if one takes into account the time frame in which this appeal must be prepared, if the suggested but not yet allocated date of 3 November 2003 is confirmed.³⁴ There are only 13 working days before the grounds of appeal against conviction must be filed without the need for leave from the Court. The inherent legal and forensic complexity of the culpability of the Applicant and the fact that it was a joint trial distinguishes this case from *Maher*. Also, the Applicant was not represented by lawyers at *any*

³¹ In *DPP v Ali* [2001] QCA 489, McMurdo P (with whom McPherson JA and Chesterman J agreed) considered it relevant to consider whether a likely appropriate sentence would be exceeded before an appeal is determined.

³² 28 witnesses, 1456 pages of trial transcript, approximately 150 exhibits tendered at trial, 466 pages of pre-trial transcripts as well as committal depositions and volumes of extraneous material that may be relevant to presenting a defence case or fresh evidence argument on appeal.

³³ See *Maher* (supra) at 312. That this can be an exceptional circumstance was acknowledged in *DPP v Ali* (supra) at page 3. The comments of McPherson JA on this issue can be readily distinguished

³⁴ The Court of Appeal Registrar has indicated that the earliest date is 3 November 2003, but that will not be confirmed for a week or so.

stage of the trial process.³⁵ There are not even any written instructions as to the evidence, presently available to the Applicant's lawyers.³⁶ It is not, as was found in *Maher*, merely an inconvenience that the Applicant is in gaol. Rather, it is likely to lead to an unworkability that could result in unduly delaying the appeal or a further miscarriage.

40. The Court of Appeal has been considering whether to list this matter expeditiously and the 3 November 2003 date has being mentioned by the Court of Appeal Registrar, it seems, to respond to community expectations to settle this controversy expeditiously.³⁷ It should also be borne in mind that the Court of Appeal will need time, one would suspect, to consider its decision in a complex case such as this, after the matter is argued.

Andrew Boe
Boe Callaghan
28 August 2003.

These submissions were settled by Mr B Walker SC (Syd) and Mr P Callaghan (Bris).

³⁵ In *Maher* [1986] 1 Qd R 303, Thomas J observed at 313 that Maher's Counsel had been involved in the trial process for three months by the time of final addresses. This case can also be distinguished from the situation in *DPP v Ali* (supra)

³⁶ See Affidavit of Paula Morreau, 28 August 2003. They were retained and first met the Applicant on 23 August 2003, 3 days after the conviction. They received a copy of the trial transcript on 26 & 27 August 2003. The settled summing up is yet to be published by the Chief Judge.

³⁷ The Court can take judicial notice of the current media saturation in respect of the conviction and appeal.