

IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA Numbers: 7799/7800 of 2003

Appellant/Applicant: David William Ettridge

And

Respondent: The Director of Public Prosecutions (Queensland)

Appellant's Written Submissions

This Court's jurisdiction

1. A Notice of Appeal from the decision of Chesterman J refusing David William Ettridge ("the Appellant") bail has been filed: R157-8. The record book contains all of the material that was before his Honour in the Appellant's application.¹
2. The Appellant seeks to demonstrate that his Honour erred - in the sense identified in *House v The King* (1936) 55 CLR 499 at 503 - in the exercise of the bail discretion and applied an incorrect test in determining the Appellant's application.²
3. This Court also has original jurisdiction to determine an application for bail by the Appellant pending the determination of his application for leave to appeal against sentence.³ An application for bail to this Court has also been filed: **R156**. In this

¹ The application was heard jointly with an application by one Pauline Lee Hanson, but they remained separate applications.

² *Scrivener v DPP* (2001) 125 A Crim R 279 at 282 per McPherson JA: "There is therefore nothing in these or other recent changes to the appeal rules that would operate to alter the principles governing appeals from decisions involving the exercise of a judicial discretion, as to which *House v The King* (1936) 55 CLR 499 remains the leading and binding authority." See also *Williamson v DPP* [2001] 1 Qd R 99 at 104 and *Fountain v DPP* [2002] 1 Qd R 167 at 168.

³ Section 10(1) together with section 6 of the *Bail Act*.

Application, the same material is relied upon plus the further affidavit which deposes to the uncertainty surrounding the listing of the Appeal.⁴ It raises a “material change of circumstances”.⁵

4. Whichever way this Court’s jurisdiction is exercised, the essential question that remains is whether the Appellant should be released on bail pending determination by this Court of his application seeking leave to appeal the sentence imposed by Wolfe CJDC on 20 August 2003.
5. It is accepted that “exceptional circumstances” need to be established: *Ex parte: Maher* [1986] 1 Qd R 303. However, what falls within the meaning of that term in respect of a bail application following a conviction but which only points to an application for leave to appeal a sentence, which is not a “short sentence”,⁶ is the issue for present determination.

The proper test to be applied – “exceptional circumstances”

6. It has generally been accepted that this Court’s decision in *Ex Parte Maher* (supra) is the primary ‘common law’ authority as to the test to be applied in the grant of bail to an offender after a conviction following a trial. The Court there dealt with the proper approach to be taken in respect of an application for bail made by an offender who has been regularly convicted,⁷ which of course includes the sentencing process. For reasons articulated in the Appellant’s written submissions below: **R79-92** it has been

⁴ Pursuant to R 766(2) of the *Uniform Civil Procedure Rules*.

⁵ *Scrivener v DPP* (2001) 125 A Crim R 279 at 282 per McPherson JA: “As well as going from one judge to another in the Supreme Court, an application for bail may also be renewed in the Court of Appeal. This was recognised in *R v Hughes* [1983] 1 Qd R 92. There the application was made to the Full Court; but the Court of Appeal now has jurisdiction to hear and determine all matters formerly within the jurisdiction of the Full Court: *Supreme Court of Queensland Act 1991*, s 29(1), so that a bail application can, on the authority of *R v Hughes*, now be renewed before this Court. For the reason given in *ex parte Edwards* [1989] 1 Qd R 139, 141-143, however, an application to renew is ordinarily not likely to fare better in this Court than it did before a single judge, unless the applicant is in a position to show a material change of circumstances.”

⁶ Viz., a sentence, a substantial part of which will have been served by the time of the hearing of an appeal: *Ex parte Maher* [1986] 1 Qd R 303 at 312 per Thomas J.

⁷ [1986] 1 Qd R 303 at 307 per Thomas J: “It is necessary for this Court to consider the proper approach towards an application for bail made by an offender who has been regularly convicted.” See also at 310. Moynihan J agreed.

demonstrated that the sentencing procedure in this matter was not at all ‘regular’.

7. These reasons can be briefly summarised as follows:
 - 7.1. In reality, no one was heard and nothing was placed before the Court on behalf of the Appellant in mitigation.
 - 7.2. There was no proper ascertainment of the Appellant’s criminality.
 - 7.3. The Appellant was sentenced to the same punishment as his co-offender Hanson notwithstanding fundamental points of disparity which clearly favourably distinguished the Appellant from her.
 - 7.4. There was no proper discernment of the cases to be used for guidance as to the appropriate sentence. In the result no comparable cases were considered. *Ehrmann* [2001] QCA 50 was in respect of an offence that carried a maximum penalty of 10 years imprisonment. *Rouse* (unreported) (Tasmanian Court of Criminal Appeal) CCA 25 of 1990, involved an offence that attracted a maximum of 21 years imprisonment.⁸ The sentencing court was not aware of this.⁹ (c.f. 5 year maximum penalty for the Appellant’s offence). *Foster* (unreported) 17 March 1999, per Shanahan CJDC, which was almost identical to *Ehrmann*’s case and which resulted in a period of imprisonment wholly suspended, was not considered by the Court (notwithstanding reference to it in *Ehrmann*).
 - 7.5. No material was placed before her Honour going to matters to which the Court must have regard in sentencing, in particular, matters identified in subsections 9(2)(a), (b), (c), (d), (e), (f), (g), & (h) of the *Penalties & Sentences Act 1992* (Qld).
8. The Court in *Maher* did not purport to prescribe all of the features that might amount to “exceptional circumstances” in this context.¹⁰ However, the reasoning in it, particularly that of Thomas J at p.310, was adopted by the High Court in *United Mexican States v Cabal* (2001) 75 ALJR 1663 at 1670-1671. *Maher* is often cited

⁸ Sections 72 and 389(3) of the *Criminal Code Act 1924* (Tas). At the time that the written submissions before Chesterman J were lodged, this had not been ascertained: see para 29.2.2: **R88**.

⁹ **R28, L40-50**: [Referring to *Rouse*]:
Her Honour: “What was the maximum of the charge with which – of the count with which he was charged, do they say that?”

Mr Campbell: “I don’t recall it being mentioned in the judgement, your Honour.”

Her Honour: “Yes.”

¹⁰ In *Re Kulgari* [1978] V.R. 276 at 277 Young CJ thought it “not possible or desirable to attempt to describe what might be regarded as very exceptional circumstances...”

with approval in other State jurisdictions. The Court in *Cabal* (Gleeson CJ, McHugh & Gummow JJ), when looking at that Court’s jurisdiction to grant bail “generally” observed that there are usually two pre-requisites to the grant of bail following conviction viz.,

“First, the applicant must demonstrate that there are strong grounds for concluding that the appeal will be allowed.”

And that,

“The applicant must show that the sentence, or at all events the custodial part of it, is likely to have been substantially served before the appeal is determined.”¹¹

9. There are several points to be made:

- 9.1. The observations in *Cabal* must be seen in the context of their Honours’ focus on the prospects of success in respect of an attack following upon the jury’s verdict. Their Honours also referred to the case of *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711 and noted that the absence of an intermediate Court of Appeal’s confirmation of a verdict in that case was a “significant matter” in favour of granting bail in respect of a ‘short sentence’ even if the prospects of success on appeal were “not considerable”.¹²
- 9.2. The treatment of the issue in *Cabal*, the observations in *Pelechowski* and the catalogue of circumstances listed by Callinan J in *Marotta v The Queen & Oths* (1999) 73 ALJR 265 as being relevantly ‘exceptional’ should be seen as developments of the approach in *Maher*. Indeed, in *Marotta*, Callinan J doubted one of the “public factors” relied upon by Thomas J in *Maher*.¹³

“In *Chamberlain v The Queen [No. 1]* Brennan J observed that a verdict of a jury was not to be treated for the purposes of an application for bail as provisional. That was a case, however, in which an application for bail being brought pending the hearing of an application for special leave to appeal to this Court. With respect, I doubt whether a grant of bail does treat a verdict of guilty as provisional. The verdict stands unless and until it is quashed. One of the consequences, the service of a custodial sentence, is only interrupted by a grant of bail.”

- 9.3. In Western Australia – where *Marotta* was originally decided – there is a statutory provision which requires the existence of “exceptional reasons why the defendant should not be kept in custody” to permit release pending appeal.¹⁴ A similar provision is found in New South Wales,¹⁵ which speaks of “special or exceptional circumstances”. There is no such provision in the Queensland legislation. The statutory provisions reflect the test as set out in

¹¹ At 75 ALJR 1663 at 1671, paras. [39] to [42].

¹² At 75 ALJR 1663 at 1671, para. [43].

¹³ Callinan J appeared as counsel for the Crown in *Maher*.

¹⁴ *Bail Act 1982 (WA)* Schedule 1, Part C – Manner in which Jurisdiction is to be exercised, s. 4.

¹⁵ Section 30AA *Bail Act 1978*.

Maher.

10. The treatment of the term “exceptional” by Chesterman J: para [10]: **R148**¹⁶ focuses upon the term without full appreciation of the context in which the Court expected the term to be applied. The Court specifically stated, as put below: para [10] **R81**, per Thomas J at 310 that:

“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. I am content to use the phrase “exceptional circumstances” to describe such factors.”¹⁷

11. It is accepted that, at least in respect of regular proceedings, the circumstances in which the power to grant bail pending appeal will be exercised are to be “exceptional” in the context explained above. However, it must also be accepted that when circumstances are “exceptional” - and there are absent any bail ‘risks’: s.16 *Bail Act* - the power to grant bail pending appeal must be exercised.

Approach taken by Chesterman J

12. In refusing the Appellant (and Hanson) bail in respect of his application for leave to appeal, Chesterman J at para [31]: **R154**, held:

“A judge hearing an application for bail pending appeal cannot – and may not – determine the outcome of an appeal against sentence. The applicants advance a number of reasons, some or all of which may ultimately be accepted, to show why their sentences should be reduced. The decision whether they should be reduced is one which only the Court of Appeal can make. It is only if the likelihood that the sentences will be substantially reduced, and that the reduction will be such that it would be unjust to require the applicants to spend the time that will elapse until the appeal is heard in custody, is high, that bail should be granted. In specific terms that means that it must appear almost certain that the appeals on sentence will succeed and result in terms of imprisonment of about three months, or less. Unless that can be demonstrated it cannot be said that there will be injustice in requiring the applicants to remain in prison for the three months that will elapse before the appeals can be heard.”

13. His Honour had been asked to find that at least one of the grounds in the Appellant’s application for leave to appeal against sentence disclosed a “patent” or obvious error

¹⁶ “The grant of bail pending appeal is most unusual. The applicant must show exceptional circumstances. Sometimes they have been described as ‘very exceptional’ or ‘exceptional or unusual’. The point of the varying descriptions is merely to underline the fact that bail pending an appeal is granted very rarely. A principal reason for this approach is that a grant of bail after conviction undermines the finality of a jury verdict so that the trial and conviction take on a provisional aspect and appear to be only a step in the process of conviction which would not conclude until judgment was given on an appeal. The law, on the contrary, has always regarded jury verdicts as final and only open to limited challenge.”

¹⁷ These are catalogued by Thomas J in *Maher* at p.310 and are set out at footnote 10 to the Appellant’s Written submissions below: **R81**

and revealed “good prospects” of success, in line with the approach by Thomas J in *Maher*: paras [8] to [12] of the Applicant’s outline below: **R81-82**.¹⁸ It was also said in argument that the Applicant did not need to establish, at this stage, that leave would be granted by a Court of Appeal for the sentence application, rather only that “good prospects” of success had been shown: **R132, L20**, and that a non-custodial outcome was within range and indeed the appropriate sentence: **R91**.

14. The record reveals:

- 14.1. Chesterman J identified the Appellant’s arguments but did not record any assessment of their prospects. It is plain, however, that his Honour determined the Application on the basis that the Appellant was obliged to demonstrate that:

“it must appear almost certain that the appeals on sentence will succeed and result in terms of imprisonment of about three months, or less.”: para [31]: **R 154**.

This approach is unsupported by and is contrary to authority.¹⁹ In the result his Honour did not properly exercise the discretion.²⁰

- 14.2. The Appellant’s application was heard with that of his co-offender, Hanson. This was of itself unusual and resisted: **R103**. It perhaps led his Honour to applying the same test in respect of each application: para [10] **R148**:

“A principal reason for this approach is that a grant of bail after conviction undermines

¹⁸ His Honour did not differentiate in this respect between an error going to conviction or sentence.

¹⁹ See *Maher* (supra) *Cabal* (supra) et al. Also see *Madden* (unreported) Court of Criminal Appeal W.A., 20 May 1993, per Walsh J: “...I must also have regard to whether I feel that it has been established that he has a reasonably arguable case that the appeal will succeed...”
Walser (1994) 73 A Crim R 154 at 159:

“In *Bond* (unreported), Franklyn J, dealing with an application for release on bail pending an appeal against conviction and sentence, said that:

“... it was conceded by the applicant’s counsel that for an exceptional case to be made out on the strength of its arguments on conviction and sentence, exceptional grounds would only exist if I were to be convinced that the arguments would almost certainly succeed before the Court of Appeal.”

That concession may have gone further than the reported decisions, and it was not adopted in *Madden* or in *Bernt* but the case did not involve the possibility that the appeal would be rendered futile by the fact that the sentence would have been largely or entirely served before the hearing.”
Bernt (1994) 70 A Crim R 1 was a ‘short sentence’ situation with Scott J granting bail without even concluding that there was “any particular merit” in the appeal, rather did so to “secure the ends of justice.”

²⁰ *House v The King* (1936) 55 CLR 499 at 503: “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.”

the finality of a jury verdict so that the trial and conviction take on a provisional aspect and appear to be only a step in the process of conviction which would not conclude until a judgement was given on appeal. The law, on the contrary, has always regarded jury verdicts as final and open to limited challenge.”

- 14.3. His Honour did not consider that a distinction was warranted between the exercise of discretion to grant bail reliant on an error affecting a conviction and one pointing only to an error attending the sentence imposed. The “public factor” (treating the verdict and conviction provisional) principally relied upon by his Honour in rejecting the Appellant’s application was entirely irrelevant in the Appellant’s case. His Honour failed to make this clear distinction between the Appellant’s case on bail and that of Ms Hanson. The Appellant’s submissions in this respect were clear: para 11: **R81**²¹ and **R132, L8**.²²

Bail pending determination of sentence appeal

15. White J in *Walser* (1994) 73 A Crim R 154 considered this distinction:

“The present case does not involve an attack upon the verdict of a jury. There is no question, therefore, of any attempt to treat the verdict of a jury as provisional only, subject to confirmation by an appellate court. The applicant pleaded guilty to the charge on which he was convicted and makes no attempt to resile from that position.

It may be that different considerations arise in the case of an appeal against sentence alone, compared with the case which is, or includes, an appeal against conviction.”

16. His Honour then suggested that in such a case the following principles ought apply:

- 16.1. A proper regard to the considerations expressed in *Gruffyd* (1972) 56 Cr App R 585.²³ This consideration was acknowledged by Thomas J in *Maher*.²⁴
- 16.2. Consideration of whether a refusal to grant bail might render an appeal “nugatory”.²⁵ His Honour’s approach is in line with the observations of

²¹ Para 11, Applicant’s Written Submissions: “This application does not treat the jury’s verdict as provisional.”

²² Boe: “I should make it very clear – I’m sure your Honour appreciates – that our application does not treat the jury’s verdict as provisional. We proceed on the basis that that does not need to be agitated at this stage.”

²³ (1972) 56 Cr App R 585 at 589 per Edmund Davies LJ: “Once bail is granted pending an appeal, judges, who later hear it are presented with an additionally heavy problem. Bail inevitably raises hopes and to wreck them by ordering a return to custody is a painful duty for any judge. Nevertheless there are times when such a duty is unavoidable.”

²⁴ [1986] 1 Qd R 303 at 310.

²⁵ (1994) 73 A Crim R 154 at 157: “Where the considerations applicable to an attack upon the verdict of a jury are absent, as it seems to me, the principles relating to the stay of judgement in civil appeals ought to apply: see *Wilson v Church (No.2)* (1879) 12 Ch D 454 at 458; *Scott v ANZ Banking Group Ltd* [1989] WAR 256 at 260; *Deputy Commissioner of Taxation (Cth) v Fontana* [1989] WAR 262 at 264. Those cases are authority for the proposition that special circumstances may exist where, if a stay of execution is not granted, the appeal may be rendered “nugatory.”

Callinan J in *Marotta*: see para. [9.2] above. Scott J in *Bernt* (1994) 70 A Crim R 1 used the term “rendered effectively futile.”

- 16.3. A “prima facie” view of the “likelihood of success” on appeal. His Honour cited *Madden* with apparent approval where Walsh J had used the term “reasonably arguable case”.
- 16.4. His Honour then found that:
 “the danger that the appeal will be rendered nugatory should outweigh the considerations set out in *Gruffydd* (supra).²⁶”
17. In *Pacino v The Queen* (1998) 105 A Crim R 309, Wallwork J, also sitting as a Court of Criminal Appeal, adopted the approach taken in *Walser*.
18. Approaching the discretion in this way is consistent with the notions in *Maher, Cabal & Marotta* as to the need for “exceptional” circumstances to be in existence, following upon a jury verdict, but it makes the necessary distinction as to what needs to be established to warrant the grant of bail given that a sentence application does not involve treatment of a jury verdict as provisional.
19. It ought to be noted that the *Gruffydd* point is in some respects an illusory one. The Appellant’s appeal might be heard in the first week of November. There are no foreseeable changes in the circumstances in that time, or by when its judgement is delivered, which could cause ‘embarrassment’ to the Court of Appeal. Further and importantly, the Appellant is on clear notice about this consideration and assumes that risk in applying for bail.²⁷

The exercise of discretion in this case

20. It is not intended to reiterate the substantial submissions before Chesterman J: **R79-92** other than that they are each maintained in this Court. A minor correction should be made to para [2]: **R79**: it should be section 408C(1)(f). A perhaps more significant correction should be made to para [29.2.2]: **R88**, as noted earlier, *Rouse* faced a

²⁶ (1994) 73 A Crim R 154 at 159.

²⁷ See para 18 of the Appellant’s affidavit: **R4**.

maximum penalty of 21 years i.e. more than 4 times that faced by the Appellant.

21. However there is a need to amplify the complaint concerning section 9(2)(c), (d) & (e) *Penalties & Sentences Act* considerations and the absence of any treatment of them before the Chief Judge. The circumstances of the offence of which the Appellant was convicted are unique. Not only is there no discernable pattern of similar cases, there is no other case like it. The Crown conceded this below: **R22**.²⁸

22. A perusal of the detail is necessary. The Crown case is that there were two distinct groups of people:
 - ?? The Political Party – an organisation whose object was the promotion of the election of candidates, which it endorsed, to the Legislative Assembly.

 - ?? The Pauline Hanson Support Movement – a “non-political” organisation which existed to support the aims and policies of the Political Party.

23. To be registered under the *Electoral Act* as a political party, there must be 500 or more eligible voters in Queensland who are members of the political party. The crime is said to be not that there was not very significant support for the political party, but that the membership pertained to the support movement and not the political party and therefore registration as a political party was fraudulent. The suggestion that the fraud impacted significantly upon the political landscape, or the ‘electoral process’, goes too far. Evidence of support for the political party is incontrovertible. The aims of each group were the same – the promotion of the election of candidates of the party.

24. One can understand the criminality involved in an application for registration when a party has only a handful of supporters and a false list of supporters is put forward for the purpose of registration. That did not occur here. The party had significant support and but for the structure created, would have met the necessary criteria to be duly registered. In effect, by these actions, the Appellant and Ms Hanson retained

²⁸ **R22:** Sentencing Transcript: Mr Campbell (DPP): “Your Honour, as might be expected, I’ve been unable to find any precisely comparable factual situation that has come before the court.”

control of the machinations of the political party. If that is so, the supporters may have been left with a limited say in the running of the party. But that is all. The conduct did not go essentially to a fraud *vis a vis* the Electoral Commission.²⁹ There is no evidence that the supporters generally feel cheated or victimised by the structure of the party created by the Appellant and Ms Hanson: section 9(2)(c) & (d). It is at least an exaggeration, if not a misstatement to suggest, apropos this situation:

“...it is essential that the electoral processes – and the registration of political parties is one of them – are not thwarted or perverted”: **R14** and **R94**

25. And it seems, judging from the community response after conviction and sentence, that the further assertion of the Chief Judge that:

“The crimes you committed affect the confidence of people in the electoral process”: **R14**, is unsupportable.

26. In this context, the point made by Mr Hampson QC for Hanson before Chesterman J as to section 154 of the *Electoral Act* is, with respect, a powerful one: **R111-113**. It was also adopted by the Appellant below: **R132, L5**. The conduct alleged in Count 1 falls squarely within that section and the prescribed maximum penalty was then 6 months imprisonment.³⁰ At the relevant time, section 154 provided:

False, misleading or incomplete documents

154. A person must not give a document under or for the purposes of this Act containing information that the person knows is false, misleading or incomplete in a material particular without—

- (a) indicating that the document is false, misleading or incomplete and the respect in which the document is false, misleading or incomplete; and
- (b) giving the correct information if the person has, or can reasonably obtain, the correct information.

Maximum penalty—20 penalty units or 6 months imprisonment.

27. The choice of which charge was to be brought rested with the DPP. It does seem unlikely that DPP Prosecution Guideline [145,085]³¹ was followed in preferring the

²⁹ That is not an element of the offence under section 408C(1)(f) of the *Criminal Code* (Qld).
³⁰ Section 154 now appears as section 98B of the *Criminal Code*. Upon indictment it now has a prescribed maximum of 7 years imprisonment but if dealt with summarily under section 552B(ka) of the *Criminal Code*, 3 years. Of course the applicable maximum in respect of the Applicant is 6 months: section 11 *Criminal Code*; *R v Lipinski* (1994) 75 A Crim R 54 at p.57.

³¹ Volume 2, *Carter’s Criminal Code*, page 150,062: “In many cases the evidence will disclose offences against several different provisions of the criminal law. Prosecutors must ensure that the

Code offence under section 408C(1)(f) with a maximum penalty of 5 years instead of the specific offence under section 154.³² The latter is a specific provision in the Act which regulates registration of political parties and clearly captures what was alleged against the Appellant (and Hanson) in Count 1. None of this was discussed before the Chief Judge at sentencing. It should have, considering section 9(2)(b) & (q).

28. Although a prosecutor's discretion to choose which charge to bring is largely unreviewable, the existence of a specific offence in the legislation which regulates registration of political parties does give considerable guidance as to the legislature's regard for the criminality associated with the Appellant's conduct as at the time the offence was committed.³³ It is an important consideration as to the appropriate sentence to be imposed.
29. There are two other points to clarify and perhaps augment what was expressed below. Firstly, the manifest disparity. The points of disparity were set out below and recorded by Chesterman J at para [29](b) & (c): **R152**. The DPP's rejoinder is recorded at para [30](a): **R153**. The DPP's position is patently wrong. Other than *Postiglione* (1995-1996) 189 CLR 295, reference should be made to *Lowe* (1994) 154 CLR 606 and *Gerhardy v Brown* (1985) 159 CLR 70.³⁴

charge or charges adequately reflect the nature and extent of the conduct disclosed by the evidence and will provide the court with an appropriate basis for sentencing."

³² At the relevant time there was no time limit for a summary prosecution under section 154 as s.556 of the *Criminal Code* had been repealed.

³³ It was a summary offence. The maximum of 20 penalty points or 6 months imprisonment should be viewed with regard to the Magistrate Court's statutory limit of 3 years imprisonment.

³⁴ *Gerhardy v Brown* (1985) 159 CLR 70 at 129, per Brennan J, citing a passage from the judgment of Judge Tanaka in the *South West Africa Cases (Second Phase)* [1966] ICJR 3 at 305-306, including: "We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely to treat equally what are equal and unequally what are unequal ... Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law. Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness." Brennan J also referred to the observation of Ray CJ in *Kerala v Thomas* [1976] 1 SCR 906 (Supreme Court of India) that "Equality of opportunity for unequals can only mean aggravation of inequality."

30. The DPP, in its submissions below, spoke inconsistently on this point. Its submissions before Chesterman J, in the two separate proceedings, were:
- 30.1. Crown Submission re: Ettridge
 para [5.4]: **R94:**
 “The applicant [Ettridge] was convicted of the serious offence of fraud. The fraud was committed upon the Electoral Commission of Queensland. As Her Honour the Chief Judge commented in sentencing: “It is essential that the electoral processes – and the registration of political parties is one of them – are not thwarted or perverted. The crimes you committed affect the confidence of people in the electoral process.”
 para [5.6]: **R95:**
 “Her Honour had heard all of the evidence in the trial and there is no reason to consider that she misunderstood the level of the applicant’s criminality. Considering the position the applicant held within the organisation and his involvement in the registration process, there was no reason to differentiate between the culpability of the applicant and Ms Hanson in relation to count 1.
 Her Honour sentenced both accused to the same sentence in respect of count 1 and restricted the sentence imposed on Ms Hanson on counts 2 and 3 because of facts peculiar to her.”
- 30.2. Crown Submission re: Hanson:
 para [5.3]: **R97:**
 “The applicant was found guilty of dishonestly inducing the Electoral Commission of Queensland to register a political party. Such dishonest interference with the political process calls for a strongly deterrent sentence. [*Ehrmann* cited]. It is submitted that a sentence involving a significant period of actual custody was inevitable. The applicant was also convicted of offences of dishonesty obtaining approximately \$500,000. A sentence of three years imprisonment can only be considered as a very moderate sentence compared to other fraud offences involving significant amounts of money.”
31. On the one hand, the Respondent argues that Hanson’s criminality was clearly more significant than that of the Appellant as Hanson was convicted of three offences including offences of dishonesty involving obtaining approximately \$500,000 and that “a sentence of three years imprisonment can only be considered as a very moderate sentence (when) compared to other fraud offences involving significant amounts of money”.
32. On the other hand, the Respondent argues that, in effect, the learned Chief Judge ignored Hanson’s convictions on Counts 2 and 3 and the sentence of 3 years imprisonment reflects only the criminality in Count 1.
33. Clearly, the Respondent’s submission that her Honour could and did ignore the convictions in Counts 2 and 3 is a nonsense. The Chief Judge’s language may have been less precise than what was intended, but, in arriving at an overall penalty for

Hanson, her Honour could not avoid assessing the overall criminality which included the convictions for Counts 2 and 3 which involved fraudulent conduct attracting maximum penalties of 10 years imprisonment.

34. With respect, there is a clear error in imposing on the Appellant the same sentence as that imposed upon Hanson.
35. The Chief Judge then erred by finding a feature of mitigation said to be “peculiar” to Hanson. Her Honour noted that Hanson had “suffered substantially” as a result of the criminal and civil proceedings: **R15**. This feature was not peculiar to Hanson. It was obvious that the Appellant too suffered substantially. There is no allowance for this in the sentence imposed upon him.
36. It is also important to observe that when a Court of Appeal is adjusting a sentence due to disparity, this may result in a reduction of the sentence to be imposed to less than what might otherwise be considered the permissible range of sentencing options.³⁵
37. Secondly, Ground 7: **R67**, which is amplified in pa ras [21] – [22] of the Appellant’s written submissions below: **R86** and raised in argument: **R132-132** called for and continues to call for an evidentiary response from the respondent. Before Chesterman J, the DPP merely submitted:
- “There was the finding that there was some benefit to each of them in controlling the funding which was received and that was certainly our finding which was open on all the evidence on that between the two of them, they were two of the three controlling members of the party and therefore funding that went to them was within their control.
Now, Mr Ettridge wasn’t charged with obtaining that money because the evidence simply was that it was Ms Hanson who, as party agent, received the money but, nevertheless, it was paid – money received on behalf of the party which was under the control of each of the two applicants.”: **R142**
38. In this context, see also Mr Campbell’s response at **R137**:

His Honour: “Do you accept that the money, the half million dollars or so, which was paid to the party, was then disbursed by the party to the candidates who would have been entitled to it in any

³⁵ *Postiglione v The Queen* at 301 per Dawson and Gaudron JJ: “However, the parity principle, as identified and expanded in *Lowe v The Queen*, recognises that equal justice requires that as between co-offenders there should not be a marked disparity which gives rise to “a justifiable sense of grievance”. If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate within the permissible range of sentencing options.”

event?”

Mr Campbell: “There was no specific evidence in the trial about what happened to the money and it was my submission on sentence that there was no allegation that it had been misused after it had been paid.”

39. Clearly, the evidentiary response from the Respondent is inadequate. The ground is unanswerable. If the Crown’s assertion below is maintained, then the Respondent must point to evidence to support that proposition.

Conclusion

40. In sum, it is submitted that the Appellant is entitled to have the bail discretion applied in his favour because there are in existence factors which outweigh the relevant “public factors” that have been traversed in the aforementioned cases.³⁶
41. They are:
- 41.1. The circumstances of the offence are unique.
- 41.2. The Appellant’s application for bail does not seek to undermine or treat the jury verdict as provisional.
- 41.3. It is obvious that the sentencing process miscarried in several respects, and was not “regular”, most obviously because the Chief Judge:
- 41.3.1. Failed to properly assess the Appellant’s criminality in line with the verdict and the available evidence.
- 41.3.2. Failed to comply with the dictates of parity.
- 41.3.3. Incorrectly took guidance from cases which were not comparable.
- 41.3.4. Failed to comply with mandatory statutory sentencing guidelines.
- 41.4. There are good if not compelling reasons why a non-custodial outcome, including a wholly suspended sentence, is well within the range of a sentencing court properly exercising the sentence process in respect of this matter: section 9(2)(b); and indeed that it is the most appropriate course. Particularly since appellate re-sentencing on the basis of ‘equal justice’ can often warrant the imposition of a sentence less than what might otherwise be considered to be the permissible range of sentencing options.
- 41.5. A failure to grant, in effect, a “stay of execution” will render the Appeal nugatory or futile.³⁷

³⁶ *Maher* (supra) per Thomas J at 310 and *Walser* (supra) at 159.

³⁷ See a recent example of this approach following the grant of special leave in: *Putland v The Queen* [2003] HCATrans 307 (14 August 2003) per Kirby J: “The applicant has presented today. I think

42. A number of these factors in isolation disclose “exceptional circumstances”. In combination they make an overwhelming case warranting the Appellant’s release, on appropriate conditions, pending the determination of his appeals.
43. A draft order is attached.

Andrew Boe
Boe Callaghan
Lawyers for the Appellant (Ettridge)
8 September 2003

These submissions were settled by B Walker SC (Syd) and TD Martin SC (Bris).

you made the point in the application for bail last week, or for a stay of the order of the Court of Criminal Appeal in the Northern Territory, that unless he were granted bail the appeal would be rendered futile. That position is now, in a sense, enhanced by the grant of special leave. Do you ask for bail on behalf of the applicant?” Bail was then granted on this basis.