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ICAC
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SOUTH AUSTRALIA

SUPREME COURT OF SOUTH AUSTRALIA

(Court of Criminal Appeal)

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R v BARTELS

[2018] SASCFC 34

Judgment of The Court of Criminal Appeal
(The Honourable Justice Peek, The Honourable Justice Lovell and The Honourable Justice Doyle)

11 May 2018

CRIMINAL LAW - PARTICULAR OFFENCES - PROPERTY OFFENCES - OTHER FRAUDS AND IMPOSITIONS - MISAPPLICATION OF MONEY ETC BY PUBLIC SERVANT

CRIMINAL LAW - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - GROUNDS FOR INTERFERENCE - SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE

The appellant pleaded guilty to eight counts of abuse of public office and two counts of failing to comply with a bail agreement. In addition there was one further count of abuse of public office to be taken into consideration in sentencing.

In relation to two of the counts of abuse of public office to which the appellant pleaded guilty, the sentencing judge commenced with a notional head sentence of three years imprisonment. After a reduction of approximately 30 per cent on account of the appellant's guilty pleas her Honour imposed a sentence of two years, one month and one week imprisonment. In relation to the other six counts of abuse of public office and the further count to be taken into consideration, the sentencing Judge commenced with a notional head sentence of six years imprisonment. After a reduction of approximately 40 per cent on account of the appellant's guilty pleas, her Honour imposed a sentence of six years imprisonment. Her Honour ordered that these sentences be served cumulatively, resulting in a head sentence of five years, six months and one week imprisonment. Her Honour fixed a non-parole period of two years and six months. In relation to the two breach of bail offences, the appellant was convicted without further penalty. Her Honour further ordered that the appellant pay restitution.

The appellant appealed on the ground that the sentence imposed was manifestly excessive.

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HER HONOUR JUDGE DAVISON) DCCRM-17-2557, 17-2258, 17-442

Appellant: ALANA MARIE BARTELSCounsel: MR A EY - Solicitor: MANGAN EY ASSOCIATES
Respondent: R Counsel: MS C MATTEO - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Hearing Date/s: 17/04/2018

File No/s: SCCRM-18-34

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Held per Doyle J (Peek and Lovell JJ agreeing), allowing the appeal:

1. The sentence imposed, which commenced with notional starting points totalling nine years imprisonment, was manifestly excessive.

2. On resentencing, it is appropriate to commence with notional starting points totalling six years imprisonment.

3. After reductions for her pleas of guilty, it is appropriate that the appellant be resentenced to three years and ten months imprisonment, with a non-parole period of 21 months.

Criminal Law (Sentencing) Act 1988 (SA) s 18A; *Criminal Law Consolidation Act 1935* (SA) s 251; *Sentencing Act 2017* (SA) s 26, referred to.
R v Hronopoulos [2017] SASCFC 143; *R v Wiskich* (2000) 207 LSJS 431; *House v The King* (1936) 55 CLR 499; *R v Nath* (1994) 74 A Crim R 115; *R v Buckskin* [2010] SASC 138; *R v Howat* [2017] SASCFC 41; *R v Davies* (1996) 88 A Crim R 226; *R v Cavanagh* [1999] SASC 418; *R v Powell* (2001) 81 SASR 9; *Heaft v Police* (2004) 87 SASR 496; *Police v Curtis* (2004) 145 A Crim R 587; *R v Jorquera* [2013] SASCFC 145; *R v McPhee* [2014] SASCFC 107; *R v Wakefield* (2015) 121 SASR 569; *R v Siviour* [2016] SASCFC 51; *Hili v The Queen* (2010) 242 CLR 520; *R v Morse* (1979) 23 SASR 98; *R v W, PL* [2017] SASCFC 119; *Hili v The Queen* (2010) 242 CLR 520, considered.

R v BARTELS
[2018] SASCFC 34

Court of Criminal Appeal: Peek, Lovell and Doyle JJ

1 **PEEK J:** I would allow the appeal. I agree with the orders proposed by Doyle J and with his reasons.

2 **LOVELL J:** I agree with the reasons of Doyle J.

3 **DOYLE J:** While employed by the Public Trustee, the appellant engaged in a series of dishonest transactions that resulted in her benefiting at the expense of various deceased estates.

4 Following pleas of guilty, the appellant was sentenced for eight counts of abuse of public office contrary to s 251 of the *Criminal Law Consolidation Act 1935* (SA). They were counts 2, 4, 5, 12, 13, 14 and 15 on an information dated 10 February 2017, and a further count on an *ex officio* information dated 25 September 2017. In addition there was one further count of abuse of public office to be taken into consideration in sentencing. The appellant also pleaded guilty to two counts of failing to comply with a bail agreement.

5 The maximum penalty for each count of abuse of public office was seven years imprisonment. For the breaches of bail, the maximum penalty for each count was two years imprisonment or a fine of $10,000.

6 In relation to counts 2 and 4, the sentencing judge commenced with a notional head sentence of three years imprisonment. After a reduction of approximately 30 per cent on account of the appellant's guilty pleas, her Honour arrived at a sentence for these offences of two years, one month and one week imprisonment.

7 In relation to counts 5, 12, 13, 14 and 15 on the original information, the count on the *ex officio* information, and the further count to be taken into consideration, the sentencing judge commenced with a notional head sentence of six years imprisonment. After a reduction of approximately 40 per cent on account of the appellant's guilty pleas, her Honour arrived at a sentence of three years and five months imprisonment.

8 The sentencing judge held that these sentences should be served cumulatively, resulting in a total head sentence of five years, six months and one week imprisonment. Her Honour fixed a non-parole period of two years six months. Her Honour ordered that the appellant pay restitution in the sum of $24,681 (in addition to the $5,000 that she had already paid by the time of sentencing).

9 In relation to the two breach of bail offences, the appellant was convicted without further penalty.

10 In this appeal against sentence, the appellant contends that the sentence imposed was manifestly excessive. The appellant has been given permission to appeal in relation to this ground.

Circumstances of the offending

11 The appellant committed the offences in her role as an estate manager at the Public Trustee. She commenced employment at the Public Trustee in 2006, and in March 2012 became an estate manager. In that role, her salary was slightly in excess of $59,000 per annum. She remained in that role until her arrest in May 2016.

12 The appellant's offending occurred over a period of almost three years from September 2013 through to her arrest. It involved her taking, or using for her own benefit, various items of property and cash from a number of different estates that she managed during that period. It is instructive to consider her offending in the order it occurred, rather than by reference to the numbering of the counts.

Chronology of abuses of public office

The Matthews estate: the ex officio count and the count taken into consideration

13 The charge laid on the *ex officio* information related to the appellant's dealings with a Hyundai motor vehicle, which formed part of the estate of the deceased Ms Matthews. Ms Matthews died in late July 2013, and the appellant was assigned to manage her estate.

14 In late July or early August 2013, the appellant was provided with the keys to the Hyundai, which was located at the deceased's residence. The vehicle was removed from that location within a few weeks of Ms Matthew's death, and on 23 September 2013 the appellant privately paid for its registration for a period of three months.

15 On 14 December 2013, the appellant, claiming to be doing so on behalf of her sister, sold the Hyundai to her then partner's friend for $5,000. She received an initial instalment of $500, and the remainder in further instalments of cash paid directly to her. The purchaser signed the paperwork for the transfer of the Hyundai in the appellant's presence. The appellant, however, did not sign the paperwork in front of the purchaser. At the time the motor vehicle was still registered to the estate of Ms Matthews, and the transfer paperwork was subsequently stamped with the words "Pro Public Trustee". The value recorded in the paperwork was $3,000.

16 The Public Trustee's records for the Matthews estate do not show the Hyundai as forming part of the estate to be managed by the Public Trustee. The records did not include the form that would usually list assets such as motor vehicles. The estate did not receive the benefit of either the Hyundai or the cash received for it.

17 The additional count taken into consideration related to the appellant's dealings with other items in the Matthews estate, namely personal items and household furniture and effects. In October 2013, the appellant arranged for the packing and collection of the contents of the deceased's premises. On 5 November 2013, the appellant signed for the receipt of various personal items from the premises which were delivered to the Public Trustee's office. The items were recorded as going into the securities room, but were not receipted there and have not subsequently been located.

18 The appellant also arranged for furniture and whitegoods from the deceased's premises to be collected by an auction house. She did so pursuant to an agreement with an acquaintance of hers, which was intended to result in him obtaining the items or the proceeds from their sale. The appellant prepared an unauthorised letter from the Public Trustee addressed to the acquaintance, nominating him as the owner of the goods and advising the auction house of the same. The acquaintance received $2,446.06[1] from the auction house on account of the proceeds of sale of the items, and retained a refrigerator for his own use. The appellant had expected, but did not receive, some payment from the acquaintance for her role in the arrangement.

The Davis estate: count 14

19 The estate of Mr Davis included property in Port Pirie. The appellant arranged for the owner of a local antique shop to clear out the house. In May 2014, she was informed by the antique dealer that $1,000 cash had been found in a wallet collected from the house. The appellant arranged for collection of the money and deposited it into her own bank account.

The Curl estate: count 12

20 This offending related to a Commodore sedan belonging to the Curl estate. In late 2014, the appellant was instructed by the beneficiaries to sell the Commodore, which was located in Mt Gambier. The beneficiaries had found a dealer in Mt Gambier who was willing to pay $11,000. In January 2015, the vehicle was driven to Adelaide on instructions of the appellant. The appellant falsified an email purported to have been sent on 4 December 2014 by the beneficiaries to her, authorising transfer of the Commodore to Adelaide.

21 Soon after its transfer to Adelaide, the Commodore was bought by acquaintances of the appellant. They paid her $8,000 or $9,000 cash for the

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[1] Proceeds of sale of $4,427, net of the auction house's costs of $1,980.94.

vehicle. The beneficiaries were advised that it had been sold for $11,000, but no such proceeds were received in the estate. The disbursement statement to the beneficiaries recorded $11,000 for the vehicle. The appellant had edited the disbursement statement to account for that amount. The net result of the appellant's actions was the estate was in deficit of $11,000, although the editing of the disbursement statement concealed this fact.

The Anderson estate: count 13

22 In May 2015, the appellant falsely authorised payment of $13,000 from the Anderson estate to an acquaintance of hers for "work carried out on the property". $13,000 was deposited into an account belonging to that acquaintance, and withdrawn the following day. The appellant received $9,000 as a result of these dealings.

The Danneberg estate: count 15

23 The Danneberg estate included a wooden plant stand valued at $80. The plant stand was collected on the appellant's instructions, but was never receipted into property at the Public Trustee. The appellant removed the plant stand from the Public Trustee office and placed it in her home.

The Rogers estate: count 2

24 This offence related to a Mazda sedan belonging to the Rogers estate. The Mazda was valued at $17,500, and the beneficiaries had instructed the appellant to sell it. The appellant told them it had been sold and that the proceeds would be divided between them. She recorded on the estate file that the Mazda had been received by one of the beneficiaries. The appellant then renewed the registration and used the car as her own. The Mazda was collected on 8 July 2015, and the appellant was observed driving it up until her arrest on 17 May 2016. The Mazda had been re-registered by her in the days preceding her arrest.

The McLaren estate: count 4

25 This offence involved the use of a parking permit belonging to the McLaren estate. The appellant received the parking permit from the deceased's widow. On many occasions when driving the Mazda (from the Rogers estate), the appellant was seen to park in a disabled parking space and display a disabled permit that belonged to the McLaren estate. On being interviewed, she said she had taken and used the permit because she was late to work most days and there were no carparks left.

The Sawell and Taylor estates: count 5

26 On 13 May 2016, the appellant sold $450 worth of jewellery taken from various estates, including from the Sawell and Taylor estates to a second hand dealer. The money was not deposited into the estates from which the jewellery came. The appellant's actions in moving items around the Public Trustee office

for removal of the premises had been detected by police searches and CCTV recordings between 28 April 2016 and 11 May 2016.

Summary of abuses of public office

27 As mentioned, the appellant's offending spanned the period of almost three years from September 2013 through to her arrest in May 2016. It involved a number of transactions over a significant period of time, and did not cease until the appellant's arrest. Several of the counts involved the appellant engaging in multiple dishonest acts over an extended period of time in order to secure the intended benefit or to conceal the obtaining of a benefit. Several of the counts involved the falsification of documents.

28 Certain of the offences involved the appellant obtaining direct financial benefits. In relation to the Matthews estate she received the benefit of $5,000 from the sale of the Hyundai motor vehicle (the *ex officio* count); in relation to the Davis estate she received $1,000 cash from the wallet (count 14); in relation to the Curl estate she received $8,000 or $9,000 from the sale of the Commodore (count 12); in relation to the Anderson estate she received $9,000 from contractor services that were never performed (count 13); and in relation to the Sawell and Taylor estates she received $450 for jewellery (count 5). That gives a total benefit of close to $25,000. The appellant also had the benefit of the use of the Mazda from the Rogers estate, the disabled parking permit from the McLaren estate, and the wooden plant stand from the Danneberg estate.

29 Had the offending not been discovered, the loss to the various estates would have been in excess of $50,000, comprising $5,000 for the Hyundai from the Matthews estate (the *ex officio* count), $4,427 plus a fridge that has not been valued from the Matthews estate (the consideration count), $1,000 cash from the Davis estate (count 14), $11,000 for the Commodore from the Curl estate (count 12), $13,000 for the unauthorised payment for work out of the Anderson estate (count 13), $80 for the wooden plant stand from the Danneberg estate (count 15), $17,500 for the Mazda from the Rogers estate (count 2), the parking permit from the McLaren estate (count 4) and the jewellery from the Sawell and Taylor estates (count 5).

30 The total loss after the recovery of various items was about $32,000. By the time of sentencing, the appellant had paid $5,000 by way of restitution.

31 The offending represented a sustained course of conduct, motivated by greed. While some of the offences, when viewed in isolation, had a flavour of opportunism about them, it is apparent, when view as part of the overall course of conduct, that they were not spur of the moment offences. Rather they are properly characterised as involving a sustained and systematic course of dishonesty.

32 Significantly, the offences involved repeated gross breaches of the trust reposed in the appellant by reason of the public office she held. They involved a breach of the trust placed in the appellant by her employer, by the deceased persons and beneficiaries of the various estates which were the subject of her offending, and by the public more generally. Her offending was inherently likely to damage the reputation of the Public Trustee and the public confidence in that office.

33 The significance of the breaches of the trust reposed in the appellant by reason of her public office was elaborated upon in a victim impact statement provided by a representative of the Public Trustee. That victim impact statement highlighted the importance of the role of the Public Trustee in ensuring the safe and independent administration of estates in South Australia. It explained the significance in that respect of the Public Trustee not only acting with the utmost integrity and good judgment, but also having a reputation for acting in this way. The confidence of the public had been hard earned over a long period of service to the public, and was crucial to the Public Trustee's effective fulfilment of its function.

34 The victim impact statement described the appellant's conduct as damaging, and involving breaches of trust, at various levels. The appellant had put her own self-interest and greed ahead of the interests of the deceased persons and numerous intended beneficiaries of the various estates affected by her offending. She had done so in the context where the deceased persons and beneficiaries had entrusted their affairs to the Public Trustee. Those deceased persons and beneficiaries were thus in a vulnerable position, and the appellant's conduct had not only been to the beneficiaries' financial detriment in several cases, but had also resulted in a number of them becoming embroiled in legal processes, having their inheritances delayed, and having their grief prolonged.

35 The appellant's offending also had a significant impact upon her work colleagues at the Public Trustee. In part this was because the appellant had betrayed the trust they had placed in her. In part it was also because of the impact upon them of the harm done by her offending to the public reputation of, and confidence in, the Public Trustee.

Breaches of bail

36 The appellant was on bail prior to her sentencing in this matter. She was subjected to numerous tests for illicit drugs. The appellant returned some positive urine analysis results, and admits that she lapsed into using cannabis and amphetamines while on bail. Her two breaches of bail relate to breaches of the condition of her bail that she not consume amphetamines.

The Appellant's personal circumstances

37 The appellant was born in August 1979, and at the time of sentencing was 38 years of age. She was born in Adelaide, although she spent periods living in

other parts of Australia as a result of her father's employment. She considers that she had a normal childhood, although she describes her upbringing as "strict and religious." She has maintained a relationship with her parents, although they are now both relatively elderly and experiencing difficulties with their health.

38 The appellant had no criminal history prior to the present offending.

39 As the age of 17, the appellant left the family home in the Riverland and moved to Adelaide. By the time she moved to Adelaide the appellant had completed her schooling through to the end of year 12. She enrolled in a secretarial course at the Adelaide Legal & Commercial College. She then spent about seven years working in the distribution department of a chain of jewellery stores, before obtaining her employment with the Public Trustee.

40 When she moved to Adelaide at the age of 17, the appellant commenced living with her then partner. Their relationship lasted 17 years, ending in 2013. They had a son in 2008. He was about nine years of age at the time of sentencing.

41 The appellant describes her relationship with her partner as extremely abusive. She describes him as physically and emotionally abusive, and very controlling of her. She claims that his behaviour, and the nature of their relationship, led to her becoming isolated from her family and friends.

42 The appellant says that through her partner she became exposed to an antisocial peer network. She began using various illicit drugs. At first this was on a 'recreational' basis, although in due course she became a regular user of methamphetamines. She considers that her use of illicit drugs was a mechanism for coping with her difficult home environment and isolation. Her use of illicit drugs increased as her relationship deteriorated.

43 The appellant's relationship ultimately came to an end in 2013. She experienced significant grief upon the loss of this relationship. She struggled with the adjustment required for her to live independently. She had difficulty in coping with looking after her son, maintaining the household and carrying on her employment. In relation to her employment, she said that she struggled by reason of a combination of her high workload, together with ostracism by her colleagues and what she considered to be unfair and differential or targeted treatment by her superiors.[2]

44 The appellant says that she was too proud to seek help. Instead, she continued to use methamphetamines as a coping device, spending around $500 per week in funding her addiction.

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[2] I observe that some of this treatment by her colleagues and supervisors was during the period of her offending and so it is difficult to know what, if anything, should be made of the appellant's complaints in this regard.

45 The appellant explains that it was after her relationship breakdown, and during this period while she was struggling to cope, that she commenced her offending.

46 The sentencing judge was provided with a report from a psychologist, Ms Starkey, dated 25 June 2017. Ms Starkey was the appellant's treating psychologist, having conducted seven therapeutic sessions with the appellant (commencing from October 2016) by the date of the report. According to Ms Starkey, the appellant was suffering from complex PTSD as a result of the domestic violence she was subjected to during her relationship. She was also suffering from a depressive disorder and a stimulant use disorder.

47 Ms Starkey described these conditions as unresolved as at the date of her report. She said that the appellant's mental health difficulties were contributing to her feelings of anxiety, and her difficulties in coping more generally. She said that the appellant was experiencing significant shame and guilt about her conduct, and that she was remorseful.

48 Ms Starkey reported that the appellant's feelings of anxiety, as well as shame, were exacerbated by the publicity surrounding her case. She had become withdrawn and isolated, albeit that her family were continuing to support her. Ms Starkey expressed concerns about the appellant's likely limited access to psychological treatment if she were imprisoned.

49 In addressing the appellant's prospects of reoffending, Ms Starkey described the appellant's offending as occurring in response to a unique constellation of situational factors, including her abusive relationship of 17 years; her adjustment disorder consequent upon the end of that relationship; isolation from her support networks; engagement with antisocial peers; stress in the workplace as a result of a high workload, ostracism by her colleagues and unfair or differential treatment by her superiors; and her complex PTSD, major depressive disorder, and untreated stimulant use.

50 Ms Starkey opined that given this unique constellation of factors, and that the appellant was unlikely to be employed in an area that would present the opportunities to offend that existed in her role at the Public Trustee, it was unlikely that she would reoffend. She suggested that the appellant's main ongoing dynamic risk factor for reoffending was her stimulant use disorder.

51 As at the date of sentencing, the appellant had been in a new relationship for over two years. She had been living with this new partner, and his son from a previous relationship, since October 2016. He was employed as an engineer, and did not have any alcohol or substance abuse issues. She described him as understanding and supportive of her. The appellant described an intense fear that she would lose her partner and home situation as a result of her offending and its consequences.

52 In addition to the engagement with her psychologist, the appellant has taken some other steps intended to address her mental health and substance abuse issues. She attended a methamphetamine treatment programme, and has undertaken some counselling.

53 That said, the appellant's progress to date in her rehabilitation has been relatively gradual, if not slow, and punctuated by setbacks. While she cooperated with aspects of the investigation of her offending, and made some significant disclosures to her psychologist, it remains the case that she was not entirely frank or complete in the disclosures she made. Her breach of bail offences also demonstrate her continued difficulties with the use of illicit drugs.

54 It is nevertheless apparent that the appellant had, by the time of sentencing, made some material progress in her rehabilitation, including through a greater openness about, and insight into, the seriousness and impact of her offending and her mental health and substance abuse issues.

55 It would appear that the appellant had been drug free for a period of at least a few months by the time of sentencing. She had made restitution of the sum of $5,000. She provided the sentencing judge with a letter in which she acknowledged and apologised for her wrongdoing, and the effects it had had upon the Public Trustee, her work colleagues, the estates that she was managing and the beneficiaries. She had managed to obtain employment in a financial officer role with a company run by her partner's brother (who was prepared to support her in this employment despite his knowledge of her wrongdoing). She had also been volunteering in the tuckshop at her son's school. The sentencing judge was also provided with letters of support from the appellant's new partner and various of her friends, relatives and associates. Those letters contained references to the appellant's expressions of remorse, and her qualities as a kind person.

Sentencing remarks

56 The sentencing judge outlined the nature and circumstances of the appellant's offending in terms similar to the above. Her Honour also described in some detail the various circumstances personal to the appellant that I have mentioned.

57 In turning to the sentence to be imposed, her Honour highlighted various matters, including the seriousness of the offending; the breaches of trust and exploitation of the vulnerable that the offending involved; the requirement that the sentence reflect a significant amount of general deterrence; the motivation of greed; the lengthy period of the offending; the significant number of people deceived; the calculated rather than spontaneous nature of the offending; and the fact the offending only came to an end upon the appellant's arrest.

58 The sentencing judge also highlighted various of the circumstances personal to the appellant, namely that the appellant had become more open about her use of amphetamines; had made some progress in addressing her substance abuse; had obtained employment; and had in a letter to the Court acknowledged and apologised for her wrongdoing, and the effects it had had upon the Public Trustee, her work colleagues, the estates that she was managing and the beneficiaries.

59 In arriving at a sentence, her Honour commenced by observing that ordinarily she would have imposed one sentence in relation to all offending, but that by reason of the differing guilty plea discounts applicable to the various offences, she had determined to split the offending into two groups.

60 The first group of offences comprised counts 2 and 4, which attracted discounts of up to 30 per cent for the appellant's guilty pleas. For this group her Honour indicated that, utilising s 18A of the *Criminal Law (Sentencing) Act 1988* (SA), her Honour started with a notional head sentence of three years imprisonment, which her Honour then reduced by approximately 30 per cent to two years, one month and one week imprisonment.

61 The second group of offences comprised counts 5, 12, 13, 14, 15, the count on the *ex officio* information and the further count to be taken into consideration. Again utilising s 18A her Honour indicated a notional starting point of six years imprisonment, which after making an allowance of approximately 40 per cent[3] on account of the appellant's guilty pleas and cooperation, was reduced to three years five months imprisonment.

62 The sentencing judge then explained that each of the offences involved a separate incursion into crime. Each required a particular act that was premeditated, planned and concealed. Her Honour thus considered that the sentences imposed should be served cumulatively, giving a total head sentence of five years, six months and one week imprisonment.

63 In relation to the non-parole period, her Honour said that she took into account the appellant's lack of prior offending, her pleas of guilty, the fact that she had the care of her young son, her previous abusive relationship and her mental health issues and the restitution she had made. Her Honour considered it appropriate to fix a non-parole period of two years and six months.

64 The sentencing judge then addressed the submission that there was good reason to suspend the sentence of imprisonment, or alternatively to order that it be served on home detention. In rejecting this submission, the sentencing judge acknowledged that the appellant had been receiving treatment in relation to her drug use, had the care of her child, and that imprisonment would cause

[3] In fact the discount was an impermissibly high 43 per cent.

dislocation and hardship to that child. Her Honour also took into account the restitution that had been made and the appellant's remorse.

65 However, her Honour concluded that the offending was so serious, and involved such a significant abuse of trust placed in the appellant by so many people, that she could not find good reason to suspend the term of imprisonment. Nor did she consider that serving the term of imprisonment on home detention was an appropriate penalty. Her Honour added that deterrence plays such a significant role in relation to offences of this type that the only appropriate sentence would be one served in a custodial setting.

66 The sentencing judge noted that the appellant had assets that would enable her to make restitution in addition to the sum of $5,000 that had already been made, and accordingly ordered that the appellant pay additional restitution in the sum of $24,681.

67 Finally, in relation to the two counts of breach of bail, the sentencing judge convicted the appellant without further penalty.

Sentence manifestly excessive

68 The appellant's sole ground of appeal is that the sentence imposed was manifestly excessive. While accepting that the offending was very serious, and warranted a significant term of imprisonment, the appellant contends that the total head sentence (particularly bearing in mind that the total notional starting point for the overall offending was nine years imprisonment) was unreasonably high.

69 In an attempt to particularise, or identify the source of, the contended outcome error, the appellant, at least in her written submissions, focused upon the sentencing judge's treatment of the appellant's mental health issues. It was contended that her Honour failed to appreciate the full significance of, or failed to attach sufficient weight to, these matters.

70 There are two difficulties with this submission. The first is that it is apparent from the sentencing remarks that her Honour did have appropriate regard to the appellant's mental health issues. Her Honour made several references to Ms Starkey's report, and accurately summarised and took account of the essential aspects of the matters that it addressed.

71 The second, and related, difficulty with this submission is that, while relevant, the appellant's mental health issues were not of great significance in the context of the overall circumstances relevant to the sentencing of the appellant. The evidence did not suggest that the appellant's mental health issues rose as high as impairing the appellant's capacity to appreciate the gravity and significance of her criminal conduct. While her mental health issues formed a relevant part of the background and overall context of her offending, they were at most a partial explanation for her conduct. They were not causative of her

offending in any direct way. As such, and bearing in mind the seriousness of the offending, and the importance of general deterrence in respect of offending such as the present, the appellant's mental health issues were of only modest significance in determining the sentence to be imposed.

72 In light of the above, I do not consider that any error flowing from her Honour's consideration of these matters has been identified. To the contrary, her Honour's sentencing remarks suggest an entirely orthodox and appropriate application of the principles governing the relevance of such matters in the sentencing process, as expounded in authorities such as *R v Hronopoulos*[4] and *R v Wiskich*.[5]

73 Similarly, I do not accept that the sentencing judge's sentencing remarks reveal any failure to appreciate the significance of the progress the appellant had made in her rehabilitation prior to her sentence being imposed. Again, these were matters both mentioned and taken into account by the sentencing judge, and were in any event, for the reasons I have earlier explained, of limited significance in the overall analysis.

74 Ultimately, the appellant fell back to the more general submission that despite the seriousness of the offending, and despite her Honour's sentencing remarks accurately summarising all of the relevant matters, the sentence imposed was nevertheless unreasonably high; that is, too high in the sense required by *House v The King*,[6] or manifestly excessive.

75 There is no doubt that abuse of public office is a very serious offence. This is reflected in the maximum penalty of seven years imprisonment. The offence is all the more serious where, as here, it involves a systematic course of dishonesty by a public officer involving multiple breaches of trust over an extended period of time. To the extent that authority is required for these propositions, it may be found in authorities such as *R v Nath*[7] and *R v Buckskin.*[8]

76 In *R v Howat*,[9] I recently had occasion to survey a number of this Court's decisions in relation to sentences imposed for offending involving multiple and systematic breaches of trust.[10] While acknowledging, as I did in that case, the limited assistance that can be gleaned from individual cases, they each nevertheless serve to underscore the seriousness of such offending, and in particular the importance that general deterrence plays in sentencing for such

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4 *R v Hronopoulos* [2017] SASCFC 143.

5 *R v Wiskich* (2000) 207 LSJS 431 at 457-458.

6 *House v The King* (1936) 55 CLR 499 at 504-505.

7 *R v Nath* (1994) 74 A Crim R 115 at 118-119.

8 *R v Buckskin* [2010] SASC 138 at [53].

9 *R v Howat* [2017] SASCFC 41.

10 *R v Howat* [2017] SASCFC 41 at [56]-[62], referring to *R v Davies* (1996) 88 A Crim R 226; *R v Cavanagh* [1999] SASC 418; *R v Powell* (2001) 81 SASR 9; *Heaft v Police* (2004) 87 SASR 496; *Police v Curtis* (2004) 145 A Crim R 587; *R v Jorquera* [2013] SASCFC 145; *R v McPhee* [2014] SASCFC 107.

offending. It is important that the sentence imposed is not only a sufficient disincentive to others who might be minded to commit such offences, but also sufficient to reassure the public that such conduct will not be tolerated. Those cases also serve as reminders that while in cases such as the present the appellant's previous good character, and absence of previous convictions, remain relevant considerations, their weight is somewhat diminished by reason of the nature of the offending and the need to ensure adequate weight is afforded to general deterrence.

77 The respondent submitted that the fact that the present offending involved abuses of public office by the appellant made the appellant's offending even more serious than the offending considered in the cases surveyed in *R v Howat*. There is some force in this submission. Certainly it is important to bear in mind the particular offences for which the appellant is being sentenced (here, abuse of public office), and the element of abuse of public office does add an extra dimension to the offending that is not present in many of the other cases involving systematic breaches of trust. It is also significant in the present case that the offending was likely to cause financial harm to a large number of individuals with an interest in the various estates, and also had the potential to harm the public confidence in the Public Trustee.

78 At the same time, several of the cases surveyed in *R v Howat* did involve breaches of trust at multiple levels, and with large numbers of victims. While some involved 'mere' breaches of the trust placed by an employer in their employee, others involved breaches of trust flowing from a position of significant responsibility and with broader implications in terms of the number of persons affected.

79 Those cases also tend to suggest that terms of imprisonment of the length imposed in this case (again, focussing for the moment on the combined notional head sentence for the two groups of offences of nine years imprisonment) have generally been reserved for cases involving a larger number of defalcations, and defalcations of far greater sums of money, than occurred in the present case.

80 In considering the appropriateness of the overall sentence, I of course bear in mind my earlier articulation of both the detail of the offending, and the nature and significance of the abuses of office, and breaches of trust, involved in that offending. I also bear in mind the lengthy period of the offending, the number of dishonest acts that it involved, and the fact that it only came to an end by reason of the appellant's arrest. On the other hand, and while the offending affected a number of people in significant ways, the dollar value of the benefits gained and losses inflicted was relatively modest in the scheme of offending of the present type. When considered in the light of my earlier summary of the appellant's personal circumstances, a starting point, or notional head sentence, of nine years for the overall offending is high.

81 In my view, as well as the overall notional head sentence of nine years being high, a consideration of the structure of the sentence imposed by the sentencing judge in this case is revealing.

82 The sentencing judge started with a notional head sentence of three years imprisonment for the first group of offences, and six years imprisonment for the second group of offences. I make no criticism of her Honour for adopting this grouping of offences. Indeed, I agree with her Honour that the differing discounts required some dissection of the offences.[11] And while I made the observation in *R v Siviour*[12] that commonality of discounts will not necessarily be a sufficient or appropriate basis for grouping offences, I see no difficulty in a case such as the present (where the offences are the same, and involve conduct of a similar character) in grouping the offences in the way the sentencing judge did.

83 However, I consider that there is something of a tension or disparity between the starting points selected by her Honour in respect of the two groups of offences. The first group of offences involved counts 2 and 4. Count 2 (involving the use of the Mazda from the Rogers estate) was relatively serious in the context of the appellant's offending, albeit that the Mazda was recovered from the appellant meaning that there was limited loss ultimately suffered by the Rogers estate. Count 4, on the other hand, was relatively trivial. Assuming, as I think it should be assumed, that count 4 contributed very little to the sentence imposed in respect of this first group of offences, it is difficult to see how the sentencing judge could reasonably have arrived at a starting point of three years imprisonment for these offences.

84 The second group of offences involved 6 counts (plus the additional count to be taken into consideration). While some of these counts were relatively less serious in the context of the appellant's overall offending for example, count 15 (involving the wooden plant stand from the Danneberg estate), and perhaps also count 5 (involving the $450 of jewellery from the Sawell and Taylor estates) and count 14 (involving the $1,000 from the Davis estate), the remaining three counts (plus the additional count to be taken into consideration) were of at least approximately equivalent seriousness to the count 2 charge.

85 I consider that the sentence imposed in respect of the second group of offences was itself high. However, in my view, the sentence imposed in respect of that group also serves to highlight the unreasonably high sentence imposed in respect of the first group of offences. Even if the totality of the conduct comprising the second group of offences warranted a starting point of six years imprisonment, it is difficult to see how the relatively much more limited conduct comprising the first group of offences warranted anything close to a starting point of three years imprisonment.

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[11] *R v Wakefiled* (2015) 121 SASR 569 at [38]-[41].
[12] *R v Siviour* [2016] SASCFC 51 at [38].

86 The respondent sought to justify the sentence for the first group of offences by pointing out that count 2 occurred after most of the other offending, and hence occurred against a background of that other offending. That is of course true, and a relevant consideration, however in my view it is not sufficient to justify the sentence imposed for that offending. A similar observation might be made in respect of some of the counts in the second group of offences.

87 What the above analysis reveals is that the sentencing judge's approach appears to have made significant allowance for concurrency between the sentences imposed for the individual offences within the second group of offences. On the other hand, by reason of its separation into the first group of offences, the sentencing judge does not appear to have made any allowance for concurrency in relation to count 2, either by reducing the head sentence or by allowing for some concurrency when combining the sentences for the two groups of offences.

88 In considering the issue of whether the sentence imposed by the sentencing judge was manifestly excessive, I bear in mind the approach to the identification of manifest excess required by the High Court in *Hili v The Queen*.[13] This requires a consideration of the range of matters relevant to the sentencing task, including the maximum penalty for the relevant offending, where the objective circumstances of the offending sit in the scale of seriousness of crimes of that type, and the personal circumstances of the offender.[14] In the context of sentencing for multiple offences, regard must also be had to the need to ensure proportionality in the overall sentence through the application of one or more of the mechanisms available to the sentencing judge.[15] But ultimately, there is a limit to the amount of analysis that may be brought to bear. Often manifest excess will be a conclusion that does not admit of lengthy exposition.[16]

89 Here, in light of the considerations, and for the reasons, I have set out, I am satisfied that the sentence imposed by the sentencing judge was manifestly excessive. I would therefore allow the appeal, and proceed to resentence the appellant.

Resentencing

90 As the *Sentencing Act 2017* (SA) has now come into operation it is appropriate that the appellant be resentenced under that Act. However, there is nothing in that Act that would result in a sentence that differs from that which would have been imposed were the appellant to be resentenced under the *Criminal Law (Sentencing) Act 1988* (SA).

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13 *Hili v The Queen* (2010) 242 CLR 520 at [59]-[60].
14 *R v Morse* (1979) 23 SASR 98.
15 *R v W, PL* [2017] SASCFC 119 at [38]-[50], [56].
16 *Hili v The Queen* (2010) 242 CLR 520 at [59]-[60].

91 I have already described the salient features of the appellant's offending and personal circumstances. There is no utility in me repeating what I have said, particularly in circumstances where I have made no criticism of the sentencing judge's articulation of all of the relevant considerations. The only error in her Honour's approach was in the sentence ultimately imposed.

92 Ordinarily I would have considered the offending as a whole and have commenced with a notional head sentence for this offending of six years imprisonment. However, given the differing guilty plea discounts that are applicable, I consider it appropriate to group the offences in the same way the sentencing judge did.

93 In relation to the first group of offences (counts 2 and 4), I have already explained that I regard the count 4 offence as being relatively trivial. However, given the relatively serious nature of count 2, and utilising s 26 of the *Sentencing Act*,[17] I would start with a notional head sentence of 18 months imprisonment for this group of offences. I would reduce this by close to 30 per cent on account of the appellant's pleas of guilty to 13 months imprisonment.

94 In relation to the second group of offences (counts 5, 12, 13, 14, 15, the *ex officio* count and having regard to the other count to be taken into consideration), and utilising s 26 of the *Sentencing Act*, I would start with a notional head sentence of four years six months imprisonment. I would reduce this by close to 40 per cent on account of the appellant's pleas of guilty to two years nine months imprisonment.

95 In arriving at an overall sentence, and again utilising s 26 of the *Sentencing Act*, I would accumulate the sentences for the two groups, and impose a combined head sentence of three years 10 months imprisonment. I would fix a non-parole period of 21 months.

96 Having allowed for a degree of concurrency in the starting points for the two groups of offences, I do not consider it appropriate to make any further reduction at this point of the sentencing process. Nor is there any occasion for a reduction on account of totality. I consider the sentence I would impose to be proportionate to the criminality of the appellant's overall offending.

97 I do not consider that there is good reason to suspend this sentence of imprisonment. While there are some features of the appellant's personal circumstances that weigh in her favour at this point in the sentencing exercise (including the absence of any previous convictions, and her (admittedly modest) early progress in terms of rehabilitation), the nature and seriousness of her offending make a suspended sentence an inappropriate sentence. I have earlier emphasised the aspects of the appellant's offending that make it important that

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[17] The equivalent of s 18A of the *Criminal Law (Sentencing) Act 1988* (SA).

the sentence be sufficient to achieve the general deterrent, punishment and denunciation objectives of the sentencing process.

98 It is for similar reasons that I also consider that it would not be appropriate to order that the appellant serve her sentence on home detention. I accept that home detention involves a real and significant imposition upon the individual concerned. While significantly less onerous than a custodial sentence, a home detention sentence does have the capacity to achieve some level of general deterrence, punishment and denunciation. However, as this Court has previously observed, there will be some cases in which these sentencing objectives will not adequately be met by a sentence of home detention. In my view, this is such a case. In my view, despite the considerations personal to the appellant that I have mentioned, and which suggest she might be an appropriate candidate for a home detention sentence, the nature and circumstances of her offending, and the need in particular for a significant measure of general deterrence, tip the balance against such an approach. I would not make an order that the appellant serve her sentence on home detention.

99 I would not interfere with the order for restitution made by the sentencing judge. Nor would I interfere with any forfeiture orders that her Honour may have made.

100 Similarly, in relation to the breach of bail offences, I would not interfere with the sentencing judge's order convicting the appellant without further penalty.

Orders

101 For the reasons set out above, I would allow the appeal. I would set aside the sentence of imprisonment imposed by the trial judge. I would substitute a sentence of three years 10 months imprisonment. I would fix a non-parole period of 21 months. I would order that the sentence of imprisonment commence from the date of the original sentence, being the date when the appellant was first placed in custody, namely 23 January 2018.