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ICAC
Independent Commissioner
Against Corruption
SOUTH AUSTRALIA

SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Criminal)

R v HARRAP; R v MOYSE

[2021] SASCA 22

Judgment of the Court of Appeal
(The Honourable Chief Justice Kourakis, the Honourable Justice Lovell and the Honourable Justice Livesey)

14 April 2021

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

CRIMINAL LAW - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEALS BY CROWN - EXERCISE OF DISCRETION - GENERALLY

This is an application by the Director of Public Prosecutions for permission to appeal against the sentences imposed on Mr Harrap and Ms Moyse. Mr Harrap also applies for permission to appeal against his sentences (the cross-appeal).

Mr Harrap pleaded guilty to two counts of deception and one count of conspiracy to improperly exercise power held in public office (the conspiracy). Ms Moyse pleaded guilty to the conspiracy offence.

On 19 and 22 May 2020, Mr Harrap deceived a business administration officer of the Courts Administration Authority, by misrepresenting the identity of the driver of his motor vehicle when it was detected in the commission of traffic offences. Mr Harrap procured the consent of Ms Foulkes, his partner, and Ms Freeman, his clerk, to incur the penalty for each traffic offence. Mr Harrap was on a bond at the time of the offences, and any additional fine would have had the effect of disqualifying him from driving for a period of six months.

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HIS HONOUR JUDGE SLATTERY) DCCRM-20-1182; DCCRM-20-1202

Appellant: R Counsel: MR M HINTON QC W MS A PERAKATH - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Appellant/Respondent: ROBERT BRUCE HARRAP Counsel: MR D EDWARDSON QC W MR J MARCUS - Solicitor: CALDICOTT LAWYERS

Respondent: CATHERINE JAYNE MOYSE Counsel: MR G ALGIE QC W MR A PANOUSAKIS - Solicitor: TIM DIBDEN

Hearing Date/s: 11/02/2021

File No/s: SCCRM-20-445; SCCRM-20-446; SCCRM-20-474

A

Between 10 May and 29 May 2020, Mr Harrap conspired with Ms Moyse, a legal practitioner and mother of his child, to improperly exercise the power Mr Harrap held by virtue of his public office as a Magistrate. The subject of the conspiracy was an administrative appeal by Ms Moyse's client against the disqualification of a provisional driver's licence. Ms Moyse secretly consulted Mr Harrap on the application. Mr Harrap offered an assurance that he would hear and grant the application or attempt to influence another Magistrate to grant the application if he could not hear it. Mr Harrap subsequently made arrangements for the matter to be listed before him.

The Judge sentenced Mr Harrap to 12 months' imprisonment after reduction for his pleas of guilty for each of the deception offences and 19 days' imprisonment after reduction for the conspiracy offence. The Judge allowed partial concurrences of six months for the deception offences and allowed the conspiracy offences to be served concurrently. Ms Moyse was given a fine of $600 after reduction and no conviction was recorded. The Director appeals on the grounds that the sentences imposed were manifestly inadequate. By cross-appeal, Mr Harrap appeals on the grounds that the sentences imposed were manifestly excessive and that the Judge erred by not suspending them or ordering they be served on home detention.

Held per Kourakis CJ (Lovell and Livesey JJA agreeing) granting permission to appeal in part and allowing the Director's appeal against Mr Harrap's sentence:

1. The sentence imposed for the conspiracy offence is manifestly inadequate. The sentence is set aside and Mr Harrap is to be resentenced.

2. The Director's application for permission to appeal against the sentence imposed for the deception charges is refused.

Held per Kourakis CJ (Lovell and Livesey JJA agreeing) granting permission to appeal and allowing Mr Harrap's appeal in part:

3. The sentence imposed for the deception charges is manifestly excessive. The sentence is set aside and Mr Harrap is to be resentenced.

4. Mr Harrap's application for permission to appeal against the sentence imposed for the conspiracy charge is refused.

Held per Lovell JA (Livesey JA agreeing) on resentencing Mr Harrap:

5. But for Mr Harrap's guilty plea, a sentence of 20 months would have been imposed for the conspiracy offence, eight months for the Foulkes deception offence and 10 months for the Freeman deception offence. A reduction of approximately 40 percent for early guilty pleas is allowed for sentences of 12 months, five months and six months, respectively. A period of two months concurrency is allowed between the deception offences. A final sentence of 21 months imprisonment is imposed with a non-parole period of 12 months to commence on 4 December 2020.

Held per Kourakis CJ on resentencing Mr Harrap:

6. But for Mr Harrap's guilty plea, a sentence of two years would have been imposed for the conspiracy, 10 months for the Foulkes deception offence and 15 months for the Freeman deception offence. A reduction of approximately 40 percent for early guilty pleas is allowed for sentences of 15 months, six months and nine months, respectively. A period of three months concurrency should be allowed between the deception offences. A final sentence of 27 months' imprisonment should be imposed with a non-parole period of 15 months to commence on 4 December 2020.

Held per Kourakis CJ (Lovell and Livesey JJA agreeing) granting permission to appeal and allowing the Director's appeal against Ms Moyse's sentence:

7. The sentence imposed is manifestly inadequate. The sentence is set aside and Ms Moyse is to be resentenced.

8. Ms Moyse is convicted and a fine of $10,000 reduced by 40 percent to $6,000 is imposed.

Magistrates Act 1983 (SA); *Motor Vehicles Act 1959* (SA) ss 81B, 98BE; *Magistrates Court Act 1991* (SA) s 44; *Oaths Act 1936* (SA) s 27; *Criminal Law Consolidation Act 1935* (SA) ss 139, 242, 251; *Sentencing Act 2017* (SA) s 119, referred to.
Einfeld v The Queen (2010) 200 A Crim R 1, applied.
R v Moss; Ex parte Mancini (1982) 29 SASR 385, discussed.
Fingleton v The Queen (2005) 227 CLR 166; *R v Bahrami* [2020] SASCFC 111; *R v Buttigieg* [2020] SASCFC 38; *Everett v The Queen* (1994) 181 CLR 295; *R v McPhee* [2014] SASCFC 107; *R v Dwyer* (2015) 121 SASR 587; *R v Nguyen* [2015] SASCFC 40; *R v Davey* [2017] SASCFC 151; *R v Wakefield* (2015) 121 SASR 569, considered.

R v HARRAP; R v MOYSE
[2021] SASCA 22

Court of appeal: Kourakis CJ, Lovell and Livesey JA

1 **KOURAKIS CJ:** This is an application by the Director of Public Prosecutions (the Director) for permission to appeal against the sentences imposed on Mr Harrap and Ms Moyse. Mr Harrap, a former Magistrate, pleaded guilty to, and was sentenced for, two counts of deception and one count of conspiracy to improperly exercise power held in public office (the conspiracy). Ms Moyse, a legal practitioner, pleaded guilty to, and was sentenced for, the conspiracy offence. The offences are summarised below:

- On 19 May 2020, Mr Harrap deceived BD, a business administration officer of the Courts Administration Authority (the CAA), by misrepresenting that Ms Foulkes, his romantic partner, was driving his motor vehicle when it was detected in the commission of a traffic offence. Mr Harrap sought to benefit himself by avoiding the accumulation of driver's licence demerit points, which would have had the effect of disqualifying him from driving (the Foulkes deception). The Judge imposed a sentence of 12 months' imprisonment, reduced by 40 per cent from 20 months on account of his early guilty plea.

- On 22 May 2020, Mr Harrap deceived BD by misrepresenting that Ms Freeman, his clerk, was driving his motor vehicle when it was detected in the commission of a traffic offence. Mr Harrap again sought to benefit himself by avoiding the accumulation of driver's licence demerit points, which would have had the effect of disqualifying him from driving (the Freeman deception). The Judge imposed a sentence of 12 months' imprisonment, reduced by 40 per cent from 20 months' imprisonment on account of his early guilty plea, six months of which is to be served concurrently with the sentence imposed for the Foulkes deception.

- Between 10 May 2020 and 29 May 2020, Mr Harrap conspired with Ms Moyse to improperly exercise power or influence he held by virtue of his public office as a Magistrate. The Judge imposed a sentence of 19 days imprisonment to be served concurrently with the sentences imposed for the deception offences, reduced by 40 per cent from one months' imprisonment for his early guilty plea.

2 For Mr Harrap's offending, the Judge fixed a non-parole period of 12 months. For Ms Moyse's offending, the Judge imposed a fine of $600.00 (reduced from $1,000.00 for her early guilty plea) and no conviction was recorded.

3 The Director seeks permission to appeal Mr Harrap's sentence on the grounds that the sentence imposed was manifestly inadequate. The Director's application for permission to appeal against the sentence of Ms Moyse is limited

to contentions that the Judge erred in not recording a conviction, and that the fine was manifestly inadequate.

4 Mr Harrap also seeks permission to appeal against each of the sentences imposed, and the overall non-parole period fixed with respect to those sentences, on the grounds that:

- the sentences are manifestly excessive;
- the Judge erred in failing to suspend them; and
- in the alternative, the Judge erred in not ordering home detention.

Background

5 From 2007 until shortly after the detection of the offences to which Mr Harrap ultimately pleaded guilty, Mr Harrap held judicial office under the *Magistrates Act 1983* (SA). Within three years of his appointment Mr Harrap was given supervisory responsibilities as the Regional Manager of the Elizabeth Magistrates Court. For most of the remainder of his time as a Magistrate Mr Harrap served in supervisory positions as the Magistrate in charge of the Criminal Division in the Adelaide Magistrates Court, the Regional Manager of the Magistrates Court at Berri and from May 2019 as the Regional Manager at Christies Beach.

6 The deception offences were committed in the following circumstances. The CAA manages a fleet of government vehicles. Some vehicles are pool vehicles which are available to staff for the performance of their work as, and when, they are needed. Other vehicles are allocated to staff and judicial officers, for work and personal purposes, as part of their remuneration. If a traffic infringement notice is issued with respect to one of those vehicles, a business administration officer of the CAA forwards it to the person to whom the vehicle was allocated at the relevant time.

7 In early 2020, two traffic infringement notices were forwarded to Mr Harrap for speeding offences committed by him with the use of the car allocated to him as part of his remuneration. The first was committed on 24 March 2020 at Verdun (the Verdun offence). The second was committed at Littlehampton on 11 April 2020 (the Littlehampton offence). Mr Harrap, knowing that he was the driver of his vehicle on the occasion of the Verdun offence, nonetheless persuaded Ms Foulkes, who was then his de-facto partner, and a Sergeant of Police, to allow him to nominate her as the driver for the Verdun offence. Mr Harrap, again knowing that he was the driver on the occasion of the Littlehampton offence, nonetheless persuaded Ms Freeman, who was his clerk, to allow him to nominate her as the driver for the Littlehampton offence. Mr Harrap procured from Ms Foulkes and Ms Freeman their licence details for the purposes of his planned deception. Mr Harrap emailed those details to BD nominating

Ms Foulkes and Ms Freeman as the drivers of his vehicle on the occasions of the Verdun and Littlehampton offences respectively.

8 In accordance with his usual practice BD swore statutory declarations, in the belief that the information given to him by Mr Harrap was true, identifying Ms Foulkes and Ms Freeman as the drivers of Mr Harrap's vehicle at the time the offences were detected. Unbeknown to Mr Harrap, the Independent Commission against Corruption (ICAC) had commenced an investigation into him as a result of information it had received. ICAC investigators spoke to Ms Freeman who eventually gave police a statement implicating Mr Harrap in the commission of both offences. ICAC also obtained text messages passing between Mr Harrap and Ms Foulkes, in which Mr Harrap asked Ms Foulkes to take his points, and which showed that she very reluctantly acquiesced to his request.

9 Mr Harrap was charged with the deception offences on 3 July 2020 and pleaded guilty on 27 July 2020. By his plea of guilty Mr Harrap accepted that he knew that that information was false. His deceit caused BD, albeit unknowingly, to swear a false statutory declaration.

10 Despite the overwhelming evidence against him, and without opposition from the prosecutor, Mr Harrap's sentence was reduced by 40 per cent because he pleaded guilty within four weeks of being charged.

11 The subject matter of the conspiracy was an arrangement between Mr Harrap and his former romantic partner, a solicitor, Ms Moyse, to have an administrative appeal against the cancellation and disqualification of a provisional driver's licence brought by Ms Moyse's client, HNJ, listed before Mr Harrap. In a telephone conversation, recorded by ICAC, Mr Harrap and Ms Moyse discussed, in general terms, the procedure for making such an application, and ultimately agreed that Mr Harrap would arrange to have it listed before him, and would grant HNJ's application after giving him a stern lecture. In the course of the conversations Mr Harrap suggested that if he did not, or could not, hear the application, he would seek to influence his colleague, Magistrate Duncan, who also sat at the Christies Beach Court, to grant the application.

12 Mr Harrap also pleaded guilty to the conspiracy charge on 27 July 2020.

13 The sentencing submissions made on Mr Harrap's behalf emphasised his good character and his contributions to community organisations. Of the many character references provided, two were from retired Magistrates. They spoke highly of his effectiveness as a court manager and his good working relationships with other Magistrates, court staff and lawyers. They stated that he had the confidence of, and was regarded to be of good character by, all with whom he worked.

Permission to appeal

14 I would grant permission to appeal, and allow the Director's appeal against the sentence imposed on Mr Harrap on the conspiracy conviction. The sentence of 19 day was manifestly inadequate. Accordingly, I would resentence Mr Harrap.

15 The object of the conspiracy was to have Mr Harrap control the listing of HNJ's application so that he could hear it, ostensibly in accordance with his oath, without favour or partiality, when in fact the outcome had been scripted in a private conversation between himself and Ms Moyse, who was his former partner and mother of his child. It is difficult to conceive of an abuse of judicial office more serious in the nature of its commission. Only the minor character of HNJ's application and the absence of any direct material benefit flowing to Mr Harrap, operate to deny the offence being dealt with as amongst the most serious conspiracies which might be committed by a judicial officer. Mr Harrap's motive appears to have been no more than the maintenance of friendly relations with Ms Moyse and an exaggerated belief in his own sense of justice. Mr Harrap's previous good character and solid prospects for rehabilitation must be weighed against the need to restore confidence in the judicial process, by imposing condign punishment for the gross abuse of the judicial office with which he was entrusted. It is necessary to proclaim clearly that heavy consequences will be visited on judicial officers who commit criminal offences in connection with their judicial office. I would set aside the sentence of 19 days imposed by the Judge and impose instead a sentence of 15 months from a notional starting point of two years for Mr Harrap's early plea of guilty.

16 I would also grant permission to appeal, and allow Mr Harrap's appeal against the sentences imposed on each of the deception offences on the ground that they are manifestly excessive. It follows that I would dismiss the Director's application for permission to appeal against them on the ground that they are manifestly inadequate. The deception offences are undoubtedly grave. Mr Harrap hoped to gain a significant benefit by saving on taxi fares and to avoid the great personal inconvenience and restriction on his freedom of movement that the loss of his licence would cause. Moreover, his offending entailed deceiving BD into unwittingly swearing false declarations for the purpose of obstructing the proper application of the statutory demerit point scheme of the *Motor Vehicles Act 1959* (SA) to Mr Harrap's offending. Again, condign punishment was necessary, for three reasons. First, offences of falsely nominating another person as the driver, if committed after taking the trouble, as Mr Harrap did, of checking the photographs, are difficult to detect. Secondly, the offending obstructs the operation of an important legislative road safety scheme. Thirdly, any serious offence committed by a judicial officer undermines confidence in the integrity of the judiciary. Despite the gravity of the deception offences, the sentences imposed are substantially longer than the sentences which would generally be imposed on offenders who are not judicial officers, law enforcement officers or legal

practitioners. The severity of Mr Harrap's sentence is more than that which can be justified by the circumstance that he held judicial office.

17 For the Foulkes deception, I would impose a sentence of six months after reducing a notional sentence of 10 months by 40 per cent for Mr Harrap's guilty plea. For the Freeman deception, I would impose a sentence of nine months after allowing a 40 per cent reduction on a notional starting sentence of 15 months.

18 It is appropriate to make the sentences partially concurrent because the offences were committed within four days of each other and for the same purpose. It was necessary to have the points on both offences assigned to someone else if Mr Harrap were to avoid breaching his bond and thereby retain his licence. I would therefore order that the sentence for the Freeman offence commence after Mr Harrap has served three months of the sentence imposed for the Foulkes offence.

19 I would order that the total of the terms of imprisonment imposed on the deception offences, 12 months, commence at the expiration of the sentence of 15 months imposed on the conspiracy offence. The total of the terms of imprisonment imposed on each of the three convictions is 27 months. I would impose a non-parole period of 15 months.

20 I would grant permission to the Director to appeal against the order of the Judge that no conviction be recorded on the adjudication of guilt against Ms Moyse. Rarely will the relevant sentencing circumstances justify a decision not to record a conviction against a solicitor who conspires with a judicial officer to fix a disposition in favour of his or her client. The conspiracy to which Ms Moyse pleaded guilty is a paradigm case for recording a conviction. Permission must be granted to establish the general rule and to restore confidence in the administration of justice. I would also grant permission to appeal on the manifest inadequacy of the fine. I would allow the appeal for the purpose of setting aside the order that no conviction be recorded, and in order to increase the fine to $6,000.00

21 I elaborate on my reasons below.

The deceptions

22 In February 2019, Mr Harrap committed a traffic offence travelling from Victor Harbor Magistrates Court to Christies Beach Magistrates Court. He attempted to persuade Ms Freeman to take those demerit points. She refused to do so and complained to a supervisor about Mr Harrap's approach, but Ms Freeman's complaint was not conveyed to the Chief Magistrate, the Judicial Conduct Commissioner or to ICAC.

23 Having failed to pass on the demerit points for that offence to Ms Freeman, Mr Harrap accumulated 12 driver's licence demerit points and in mid-2019 entered into a bond for a period of 12 months pursuant to s 98BE of the *Motor Vehicles Act*. The effect of that bond was that Mr Harrap was spared the

statutory three-month licence disqualification period, on condition that he not accumulate any further demerit points in the period of the bond. If, as Mr Harrap hoped, he satisfied the condition of the bond his demerit points would be reduced to zero. If he did not, he would be disqualified from holding a driver's licence for a period of 6 months.

24 Mr Harrap's hope was in vain. On 24 March 2020, he drove his vehicle through a speed camera on Onkaparinga Road, Verdun (the Verdun offence) travelling at 60 kilometres per hour (kmph) in a 50 kmph zone. That offence attracted three demerit points. On 6 April 2020, BD received the expiration notice issued for that offence.

25 On 11 April 2020, Mr Harrap drove his vehicle at 68 kmph in a 60 kmph zone on Adelaide Road, Littlehampton (the Littlehampton offence). That offence attracted two demerit points.

26 On 20 April 2020, BD sent Mr Harrap the expiation notice for the Verdun offence by email. On the same day Mr Harrap sent an email to BD stating that he was not 'entirely sure' whether he or a member of his family was the driver and asked for photographic evidence. The Judge found that Mr Harrap was not in any uncertainty about the identity of the driver, but wished to ensure there was no evidence standing in the way of any attempt he might make to have another driver take responsibility for the offence, and the associated demerit points. It follows that Mr Harrap turned his mind to the commission of the deception offence from when he was first notified of the infringement notice, if not before.

27 BD sent Mr Harrap the photos on the same day. They did not show the driver. Mr Harrap responded that he would chat with 'the troops' that night, meaning to suggest that family members may have been using the vehicle on that particular day, when he knew that was untrue. The informality of the exchange with BD was calculated to add credibility to the deception Mr Harrap had in mind. Mr Harrap told Ms Freeman that he had received the Verdun traffic infringement notice. With some irony, he suggested to Ms Freeman that he would ask Ms Foulkes to take the points by saying 'I'm going to have to go and ask my partner why she was driving so fast'.

28 On 1 May 2020, BD sent Mr Harrap an email attaching an additional expiation notice for the Littlehampton offence. On 5 May 2020, Mr Harrap requested photographic evidence of that offence, which BD sent by return email. Those photographs too did not show the driver.

29 On 14 May 2020, BD informed Mr Harrap that he had received a reminder notice for the Verdun expiation notice and requested details for both notices 'asap'. Mr Harrap had previously responded that it looked like his partner both times but that he would 'confirm re the 2nd one'.

30 On 15 May 2020, as the time for responding to BD's email approached, Mr Harrap sent an SMS message to Ms Foulkes asking for her driver's licence number with the expression 'pretty please' and an emoji. Ms Foulkes was the Acting Senior Sergeant of Prosecution Services at Murray Bridge Police Station at the time. Ms Foulkes responded in a number of messages making it plain that she was not happy about taking the points. One text read 'I don't really have a choice do I?'. Mr Harrap responded that Ms Foulkes did have a choice, but he made it plain that choosing not to go along with his plan would make it very difficult for him to travel from their Adelaide Hills residence to the Christies Beach Magistrates Court. He also reminded Ms Foulkes of his need to travel to see his disabled daughter.

31 On 19 May 2020, Mr Harrap sent BD an email containing Ms Foulkes licence details and identifying her as the driver on the occasion of the Verdun offence. He falsely told BD that 'the family is still working back to sort out who was driving' on the occasion of the Littlehampton offence, which was committed over the Easter holiday long weekend. From the text message exchanges with Ms Foulkes on the Verdun offence it is not surprising that Mr Harrap did not press her on taking the points for the Littlehampton offence. It seems too that no other family member was willing to come forward to take those points. So it was that Mr Harrap came to reprise his 2019 approach to Ms Freeman.

32 Ms Freeman was assigned to work as Mr Harrap's clerk at the Christies Beach Courthouse in February 2019. She had worked for him in the Adelaide Magistrates Court some years before then and was happy to serve as his clerk. She resided close-by to the Christies Beach Magistrates Court. However, on being transferred to the Christies Beach Courthouse Ms Freeman encountered some difficulties in her workplace. The difficulties largely arose out of Mr Harrap's insistence that only Ms Freeman serve as his clerk whereas the other clerks rotated in and out of court and between Magistrates. There were also some interpersonal tensions between Ms Freeman and the other clerks. The stressors built up to the point that Ms Freeman experienced a panic attack in August 2019.

33 The relationship between Mr Harrap and Ms Freeman was an unusual one. Their conversations were quite informal. Conversations on non-work matters involved the use of expletives, and sometimes sexual innuendo, but the banter was mutual. Ms Freeman looked to Mr Harrap for support in the workplace.

34 When he received the Verdun expiation notice Mr Harrap told Ms Freeman that he was on a 12-month bond and had about four months to go. Several weeks later Mr Harrap informed Ms Freeman that he had received yet another expiation notice. Some days later Mr Harrap adopted an even friendlier and more complimentary approach to Ms Freeman. He told her that they worked well together as a team. Mr Harrap was audacious enough to assure Ms Freeman that such was his level of 'trust and confidence' in her that he'd like her to consider 'taking these points'. The effect of that statement was that Mr Harrap trusted

Ms Freeman to be his criminal accomplice and not to disclose it. It is difficult to explain how Mr Harrap, as a Magistrate, could come to recruit the clerk allocated to support him in the performance of his judicial duties, to serve as his criminal accomplice other than to conclude that he had very little compunction about breaching the criminal law to advance his personal interests.

35 Mr Harrap's request understandably made Ms Freeman quite anxious. She felt trapped and believed that she had no option but to agree to take the demerit points. Mr Harrap assured Ms Freeman that if things went wrong he would 'take the blame'. By 'blame' presumably Mr Harrap meant responsibility for the crime. He must have known that if the crime were detected he would not be in any position to save Ms Freeman from criminal prosecution. The day after receiving Mr Harrap's assurance Ms Freeman gave Mr Harrap her licence details. On 22 May 2020, Mr Harrap sent BD an email identifying Ms Freeman as the driver on the occasion of the Littlehampton offence.

36 On 14 July 2020, Ms Freeman gave a statement to an ICAC investigator deposing to the above events.

The conspiracy

37 Ms Moyse was admitted to legal practice in July 2007. Mr Harrap and Ms Moyse had a brief relationship in 2007. Their son, A, is 13 years of age.

38 In the course of her practice, Ms Moyse was asked by a friend to act for her son, HNJ. HNJ was the holder of a provisional licence who had committed a traffic offence on 23 March 2020 which attracted five demerit points. In April 2020, he received a notice of cancellation of his provisional licence, and disqualification from holding a driver's licence for six months, from the Registrar of Motor Vehicles, pursuant to s 81B of the *Motor Vehicles Act*. On 26 April 2020, Ms Moyse contacted Mr Harrap about how to go about making an application to reduce HNJ's demerit points. Mr Harrap advised Ms Moyse to lodge an application appealing against the proposed disqualification. On 8 May 2020, Ms Moyse lodged an application for HNJ at the Christies Beach Magistrates Court. At the time of lodgement, Ms Moyse informed the Registry that Mr Harrap may be disqualified from hearing the application. The hearing was fixed for 29 May 2020 at 9.45 am. A note was placed on the court file stating:

> Do not list before Magistrate Harrap: appellant advises he knows him as a friend.

39 In a telephone conversation on 13 May 2020, Mr Harrap and Ms Moyse discussed the application:

> MOYSE: Oh I need to catch up with you cos I've got that matter next Friday.
>
> HARRAP: Oh Friday at, where is it?
>
> MOYSE: Christies.

…

HARRAP: But I'm certainly one of, I'm one of two magistrates, it's either myself or a women called – or Lynette Duncan but yeah anyway, we'll see ya –

MOYSE: Well you won't – I don't think you can hear me.

HARRAP: Oh I don't see that that's an issue personally.

MOYSE: Don't you?

HARRAP: I, I wouldn't – no I wouldn't absolutely repeat that. I'm feeling that based on the, based on that, I don't think that's necessarily a, a problem. Maybe yeah, don't know.

MOYSE: It will be if you don't grant my application.

HARRAP: Yeah I know that, as long as it's fuckin' granted it should be, it should be fine. Oh look I'll think about that. I mean you don't want anything to go wrong and you know, even at the last minute I could say to Lynette Duncan, listen here's a license Appeal I was going to grant, seems fairly obvious to do it and plant that seed with her and then say 'look I've realised got a, got a conflict' and I wouldn't need to tell her, give her any indication as to the conflict.

MOYSE: Yeah.

HARRAP: Look I've got a conflict and can you, can you hear this one. So we'll be able to get that sorted.

MOYSE: Yeah well that's what I'm hoping.

HARRAP: Yeah so no drama. If you – the trick will be when you get there and you report in to the Sherriff's Officer. You give the Sherriff's Officer the letter or whatever you're going to tender in support, get that because it's always handy if you read that on file cos as the matter gets called on, you're already reading the letter to say that look he's an apprentice mechanic who needs his license for work.

MOYSE: Yep so I've got a letter from his, he's a [inaudible] a carpenter or something.

40 I interrupt the transcript of the conversation to draw attention to three matters. First, on the sentencing hearing, and on the appeal, counsel for Ms Moyse relied heavily on Ms Moyse's disclosure to the Registry that Mr Harrap may be disqualified from hearing the matter. It is not surprising that Ms Moyse thought that her relationship with Mr Harrap, as the father of her child, disqualified him from hearing a matter in which she represented a party. What is surprising is that she ever thought otherwise. So much should be obvious to all judicial officers and legal practitioners from their compulsory academic and practical instruction in ethics, given before and after admission to practice law and their appointment to judicial office.[1] Secondly, Ms Moyse's counsel attributed her change of view to

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[1] See the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, November 2020) at [3.3.4]; Although not specifically referred, to a former partner and parent of the judge's child is the equivalent of a relation in the second degree.

Mr Harrap's comment to the effect that it was not an issue. However, as can be seen from the transcript, no sooner had Mr Harrap made that observation, he stepped back and took the more qualified position that it was not 'necessarily a problem'. The converse was true. It should have been obvious to Mr Harrap and Ms Moyse that it was necessarily a problem. Thirdly, notwithstanding the incidental humorous banter, it is clear that both Ms Moyse and Mr Harrap proceeded on the basis that Mr Harrap would grant the application. Fourthly, Mr Harrap's suggested workaround, should he not hear HNJ's application, that he would attempt to influence Magistrate Duncan's consideration of the matter, confirms the tacit understanding to which I just referred and shows that he was not much burdened by the ethical obligations of his office. Importantly the reference to approaching Ms Duncan exposes the real vice of the arrangement, which was to predetermine the outcome of HNJ's application.

41 In the conversation which followed, Mr Harrap then informed Ms Moyse that he would give HNJ a 'lecture' and Ms Moyse spoke to HNJ's good character:

> MOYSE: He's a good kid, like I've known him since he was born and known his mother since I was born. She's older than me.
>
> HARRAP: Yeah.
>
> MOYSE: You know, but I'm just saying he's a good kid.
>
> HARRAP: Oh yeah, no, no, I accept all that.
>
> MOYSE: He's, he's not been in trouble and he's just a fuckin' you know, dingbat so.
>
> HARRAP: Moment of madness, no that's alright, he'll get it so, beautiful.

42 It is difficult to overstate the import of that conversation. Submissions and character evidence were received, and accepted by Mr Harrap, in a private telephone conversation before the hearing of the matter, and an arrangement was made that the application would be allowed after giving HNJ a lecture.

43 Ms Moyse and Mr Harrap spoke again on 24 May 2020. During the conversation Mr Harrap appeared reluctant to have HNJ's matter discussed over the telephone:

> MOYSE: So what are you doing, what are you doing Friday cos I've got that matter, that driving matter.
>
> HARRAP: Oh I think I'm doing generals, no at the moment I'm doing generals, you're likely to be before me, that's alright. No drama.
>
> MOYSE: Alright, can you make sure that I am?
>
> HARRAP: Oh yeah there's no problem with that, no [inaudible] don't mention it again, no problem.
>
> MOYSE: [J], his name's [HNJ].

HARRAP: I think, I think I just indicated we didn't need to know any of those details so we just deal with it, alright.

44 Ms Moyse was anxious to receive an assurance that Mr Harrap would hear the matter:

MOYSE: Alright just make sure it happens because [clears throat] I've not done one of these before.

HARRAP: Darling.

MOYSE: I know and I love you too.

HARRAP: You'll be okay.

MOYSE: Okay.

HARRAP: Done, excellent, I'm glad we got that sorted.

MOYSE: Now his mother's not going to be there because she can't get any time off school, she's a school teacher.

HARRAP: Oh that's alright. No that's alright.

MOYSE: But his grandfather was bringing him.

HARRAP: Yeah he doesn't need his mother there, no that's alright.

MOYSE: No I know, but I said that – I told him that you get a – he's going to get a lecture and they want that to happen.

HARRAP: Yep, yep, not a problem, nah it's lovely, lovely and fresh, it's a beautiful day.

MOYSE: No it's not, its gold.

45 In that conversation Mr Harrap and Ms Moyse explicitly agreed on how the hearing of HNJ's application would be conducted, and on its disposition.

46 Sometime in the week before 29 May 2020, Mr Harrap telephoned a clerk at the Christies Beach Magistrates Court and confirmed that Magistrate Duncan was completing a part heard trial on 29 May 2020. Mr Harrap informed the clerk that he would conduct the general list.

47 On 29 May 2020, Mr Harrap presided over the *Motor Vehicles Act* application list. He heard and granted HNJ's application. There was no disclosure in open court of his relationship to Ms Moyse, or of his conversations with her. The appearance to all persons present in Court would have been that the statutory discretion conferred on the Magistrates Court had been exercised judicially, independently and impartially.

48 After the hearing, Ms Moyse telephoned Mr Harrap. She thanked him for granting HNJ's application. He replied, 'Oh, that's alright, stock standard, I did

half a dozen of them and do it exactly how I always would anyway, so yeah.' Mr Harrap's response suggests that, in his mind at least, he justified his arrangement with Ms Moyse because he dealt with HNJ's application as he would other similar applications. Ms Moyse then referred to the potentially serious consequences of a period of disqualification on HNJ's apprenticeship. Ms Moyse told Mr Harrap that she 'kept saying to [HNJ's mother] you know it's going to be okay because you know, provided Magistrate grumpy pants doesn't appear on the bench and get out of bed on the wrong side, we'll be fine.' Ms Moyse's remarks recognise that Magistrates may differ on the proper disposition of an application against a demerit point disqualification.

49 Later on that day, Ms Moyse spoke to a friend about the application:

MOYSE: He was – I was nervous.

UF: Yep.

MOYSE: Um and I've got my brother carrying on, 'oh it's a conflict, it's a conflict' and I'm like 'well it's not really because it's not like it's [their son] on the stand or me and there are plenty of practitioners that have relationships with people'.

UF: Yep.

MOYSE: Um and he said to me if I feel I'm conflicted I'll excuse myself.

UF: Yep.

MOYSE: And he's like – well he met the criteria, he was eligible, he is eligible to, for the application.

UF: Yep.

MOYSE: And the grounds are that he's gonna suffer undue hardship if I don't grant it. The undue hardship is he's gonna lose his job.

UF: Mm, well.

MOYSE: So there's nothing that's –

UF: Out there, yep.

MOYSE: No, it's certainly not borderline and [HNJ] didn't even really get it – cos I know, because Bob, he was in a foul mood last night and I spoke to him about it. Well not about it, but he was just in a foul mood generally.

UF: Mm.

MOYSE: And I thought 'fuckin' hell and just be wary – warn your client he's gonna get a lecture'.

UF: Yeah.

> MOYSE: I'm like, okay, well so I did and we walked out and Uncle Robyn's like 'that was hardly a lecture'.

50 It is not known whether or not Ms Moyse's brother was a legal practitioner, but his opinion that it was unethical of Mr Harrap to sit was plainly right. Ms Moyse's response, that the ultimate outcome could be justified, ignores the illegality of the course taken to get there.

Personal circumstances

51 Mr Harrap was raised, and received his early education, in Mount Gambier. He had a happy childhood and supportive parents. He won a scholarship to an elite Adelaide private school. He completed his law degree at Adelaide University and commenced practice on his own account as a sole practitioner in 1982. He was appointed a Magistrate in 2007 at the age of 48.

52 Mr Harrap maintained a relationship with HP, with whom he had two children, for about five years. Mr Harrap's youngest daughter of that relationship, A, is severely autistic.

53 Mr Harrap married HT in 1996 at age 37. For a long time Mr Harrap and HT were the primary carers of A. A resided with Mr Harrap and HT until she was 20, apart from a time when she was in Sydney and later the United Kingdom with HP for the purposes of treatment. HT provided a reference in support of Mr Harrap notwithstanding their separation. She described his devotion to his autistic daughter and how, with his support, her social relations and general wellbeing improved. Mr Harrap actively supported her involvement in physical activity and sports.

54 A has resided with HP for the last eight years. A's care is supported through the NDIS but Mr Harrap has provided financial assistance for her, including the purchase of the house in which A resides with HP. Mr Harrap services the mortgage on that home. Mr Harrap's contact with A was sporadic during 2020.

55 Mr Harrap commenced his relationship with Ms Foulkes in 2018. They purchased a property together at Mount Compass in 2020.

56 The psychologist, Dr Carol, who provided a report for sentencing purposes described Mr Harrap's personal history as having been marked by numerous relationships and break ups, largely brought about by his own lack of insight and wisdom. She offered the opinion that Mr Harrap suffered from mild depression and that his mental health would suffer if he were imprisoned.

57 Many character references were tendered on Mr Harrap's behalf. I have earlier referred to the references provided by HT and two retired Magistrates. The chief executive of a volunteer community sporting organisation, of which Mr Harrap is a life member, spoke of his dedicated support and service as a director

and honorary legal consultant up until he was appointed a Magistrate. Mr Harrap's daughter-in-law spoke of his loving support for his family. The director of prosecution for a national safety regulator, who knows Mr Harrap only through appearing before him in the Magistrates Court, spoke highly of Mr Harrap as a judicial officer and, in particular, his ability to relate to anyone who appeared in his court. Two solicitors who practise in Berri, where Mr Harrap served as a Regional Manager, described him as an intelligent, engaging, and personable individual who appeared to be conscious of his role of considerable responsibility within the region. They attested that he was well-regarded in the community. They were shocked, surprised and saddened to hear of his arrest.

58 A police prosecutor who had served in police prosecutions for 39 years also provided a reference. He first met Mr Harrap in the early 2000s when Mr Harrap was in private practice. He found him to be professional, friendly, and ethical. He reported that Mr Harrap was held in high regard as a trustworthy and ethical practitioner by many police prosecutors. He had never heard adverse comment about his professional conduct. Mr Harrap's appointment as a Magistrate was well-received. His courtroom demeanour was pleasant and fair, but firm when required. He was respectful and polite towards those appearing before him. He reacted to news of Mr Harrap's charges with disbelief and shock.

The sentencing remarks

59 The Judge referred to the following features of the conspiracy:

> Despite this knowledge on your part [that Ms Moyse acted for HNJ], you gave a direction to the court registry staff which ensured that the file for HNJ was put into your list and so his appeal was heard by you. That was your decision.
>
> You were also aware that after 24 May 2020 the mindset of Ms Moyse changed from raising a query about whether there might be a conflict in you hearing the matter to the position where she attempted to ensure that you heard the application. This included texts exchanged between you on the evening before the application was heard in which she was raising queries about whether you had ensured that you would be hearing the matter.
>
> It is apparent to me that due to her inexperience and lack of familiarity with the court, Ms Moyse panicked because of her lack of skills as an advocate. She did not do court work; in this instance she relied upon what you were saying to her. This affected her judgment sufficiently for her then to attempt to ensure that you did hear the application. You also said to Ms Moyse that if there was a possibility of another Magistrate hearing the matter you would take steps to "plant the seed" for that Magistrate to grant the appeal in the event that you made a decision to not hear the appeal.

60 It is to be observed that the abuse of office which was the subject matter of the conspiracy is not expressly identified in those passages. In some respects it appears to limit the objects of the conspiracy to the listing of HNJ's application before Mr Harrap and to ignore the arrangement pre-determining the result. Nonetheless, it is clear that the conspiracy had at least two objects. First, Mr Harrap was to use his position as Regional Manager to have HNJ's application listed before him. The *Magistrates Court Act 1991* (SA) conferred no immunity

on Mr Harrap for the exercise of his administrative responsibilities. Secondly, it was agreed that if Mr Harrap successfully engineered the first, he would exercise his discretion on the application favourably to HNJ. In the exercise of that judicial discretion Mr Harrap enjoyed the statutory immunity from liability for acts or omissions in the exercise of his judicial function, conferred by s 44 of the *Magistrates Court Act 1991* (SA). The immunity is strictly confined in its application to criminal offending and does not extend to acts and circumstances which do not fall within the judicial function.[2] The immunity does not extend to a conspiracy to improperly exercise the judicial power vested in Mr Harrap to hear HNJ's application. Mr Harrap did agree to exercise that power improperly precisely because he had committed to exercising his discretion in favour of Ms Moyse's client in accordance with their private and secret agreement.

61 In the prosecutor's submission before the Judge it was accepted that allowing HNJ's application was an 'available' outcome. Mr Harrap's counsel on the appeal attempted to stretch that acceptance so far as to contend that Mr Harrap's disposition of the application 'was the correct outcome'. That submission misunderstands the nature of a discretion and misstates the position put before the Judge. To say that in the exercise of a judicial discretion, an outcome is 'available', or even is 'a proper outcome', means only that the outcome is not, in itself, manifestly unreasonable. It does not mean that it is the only available outcome. Another Magistrate may reasonably have dismissed HNJ's application, as Mr Harrap's concern to influence Magistrate Duncan if he could not hear the application himself shows.

62 Moreover, it is precisely because both allowing and dismissing HNJ's application were available outcomes that Mr Harrap's predetermination of the application in a secret arrangement was a serious abuse of his office.

63 Turning to the deception offences, the Judge described Mr Harrap's manipulation of Ms Freeman as follows:

> Your relationship with Ms Freeman was multifaceted. She was in a very difficult situation in respect of her work at the court. Her position was fraught as a result of the combination of circumstances that I have earlier outlined. You knew of her difficult home circumstances. In 2019 you had attempted to cajole Ms Freeman into taking the penalty of some points from another speeding offence for you. As a result of her refusal, you entered into a good behaviour bond. The speeding offences in which you involved Ms Foulkes and Ms Freeman breached that bond with the effect that there would be a doubling of the period of the licence disqualification.
>
> In 2020 you twice attempted to cajole Ms Freeman into taking the points for you. In that time, her personal position continued to deteriorate. I am satisfied that you were aware of her deteriorating position. I am satisfied that you attempted to be more intimate with Ms Freeman in your relationship with her as a Magistrate and a Magistrate's clerk. You

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[2] *Fingleton v The Queen* (2005) 227 CLR 166 at [40] (Gleeson CJ).

> inveigled Ms Freeman into accepting the burden of your offending. This was an extraordinary breach of trust and an abuse of your position as a magistrate.

64 As to the relationship with Ms Foulkes, the Judge said:

> Similarly in relation Ms Foulkes, you imposed emotional pressure upon her to accept the penalty that you had incurred through your own driving. The SMS messages that you sent on 15 May are instructive. In one SMS message you told Ms Foulkes that she did have a choice as to whether she gave you her driver's licence. Then you immediately played upon her emotional and personal connection to you when you said that the consequences of her choosing not to do what you were requesting, would be that you would be put off the road for six months and you would have resulting difficulties in getting to and from work, let alone anything to do with your daughter which would be a major problem. You were casting upon Ms Foulkes the emotional burden and guilt of you being off the road for six months and not being able to have contact with your eldest daughter. You then compounded that guilt and that emotional burden by telling her that if she did not want to do it and it was going to be an ongoing sore point, she should not do it and it was really all your fault.

65 The Judge's analysis of the way in which Mr Harrap played on Ms Foulkes' romantic attachment to him can be accepted, but I would not place on it the significance for the purposes of sentencing that the Judge attached to it.

66 The Judge accepted the following personal circumstances put in mitigation by Mr Harrap's counsel:

> … I have already accepted that your risk of reoffending is nil. I accept that your prospects of rehabilitation are very high and that there will never be any repetition of this conduct. I accept that you have lost your career and everything that you built up in your life. I accept that your mental health will suffer and that you will need ongoing treatment as a result of the distress that you have experienced and that is likely to continue for some time, if not for the remainder of your life.
>
> I also accept that as a longstanding Magistrate, a custodial setting will place you at a high risk. However, that is a matter for the executive government. I accept that you are not a danger to the community and that consistent with authority, you have a lot to offer, especially because of your voluntary work with disabled children. All of these matters weigh heavily in your favour.
>
> …
>
> It becomes necessary for me to emphasise the matters that weigh most heavily in the balance of my sentencing discretion. You are ordinarily a person of good character. You have given freely of your time to various constructive charitable purposes. You have fulfilled your role as a Magistrate competently. Your various family members have particular needs, especially your eldest daughter. These considerations are to be balanced against the fact that you are an officer of the court and that at the time of your appointment you made a solemn oath 'to do right to all manner of people after the laws and usages of this State without fear or favour, affection or ill will.'

67 It was contended on appeal that the Judge was wrong to put aside the concerns about Mr Harrap's safety in prison, as his Honour did in the second paragraph, as a matter 'for the executive government' alone. I accept that the more

onerous conditions of imprisonment which may flow from precautionary measures to safeguard a prisoner at material risk of harm may properly reduce a term of imprisonment which might otherwise be imposed. The extent, if any, to which those conditions will reduce a term of imprisonment will vary greatly. No evidence of the special conditions in which Mr Harrap was likely to be kept was put before the Judge.

68 The Director contended that the especially heavy burden of imprisonment on a particular offender is of marginal weight in cases in which the offender ought to have been aware, of the additional burden which imprisonment would be for him or her, before committing the offence. It would, I think, be a harsh approach to insist that an offender should be left to endure the full brunt of the risks of imprisonment peculiar to his or her position which were foreseeable. Extreme hardship in prison may warrant a reduction, even if it should have been foreseen, in order to alleviate what would otherwise be a crushing and oppressive sentence. On the other hand, the seriousness of the offending may substantially curtail the reduction which can be made. The scope for any reduction, on this account must be marginal if it is not to subvert the objects of sentencing.

69 I accept, too, that the risk of harm, in itself, may operate to moderate, a little, a term of imprisonment in two circumstances. First, the threat to a prisoner's safety may cause distressing anxiety which so seriously affects a prisoner's psychological wellbeing that a slightly earlier release is justified. Secondly, the risk may be so high, and the degree of apprehended harm so great, that even special protective measures are incapable of providing an acceptable level of security. Some reduction in the sentence may then be necessary in the interests of the prisoner's safety if there is reason to apprehend that his or her safety can be better assured outside of prison. However, such cases will be rare and exceptional.

70 It is not necessary to decide whether or not the Judge erred in this respect because I would allow the appeals against each of the sentences for the other reasons I have given, and must therefore resentence Mr Harrap. I will deal with the evidential material about the conditions of Mr Harrap's imprisonment, which was adduced on appeal, when I resentence him.

71 The Judge referred to the seriousness of the commission of the charged offences by a judicial officer as follows:

> You were a judicial officer who has committed criminal offences. Those acts alone are apt to give rise to public disquiet about the integrity of the judicial system. They are, for that reason, of great significance. When you committed these offences you were required to have had an accentuated sensitivity to the need to maintain the highest reputation possible for the incorruptibility and integrity of the judicial system in which you operated. In your role as a judicial officer you fully appreciated the seriousness of the offences which you committed and there is no basis for the diminishment of your degree of culpability. You understood the significance accorded to your conduct by law and the heightened seriousness of these offences when committed by a person in your position.

> Your criminal conduct has struck at the very heart and foundation of that judicial function, and similarly it has struck at the importance of the role. On three separate occasions you deliberately ignored your role as a judicial officer and your solemn oath. In each instance of deception of BD, you would have been aware of the clear inconsistency between your criminal conduct, your position and your oath. In each case, you dealt with persons over whom you held and exercised varying degrees of power. Ms Freeman was the most diminished person when scrutinising the scale of power that you exercised. She was overborne by your authority, persistence and increasingly over time, your familiarity which overstepped the boundaries of a proper relationship between a Magistrate and a Magistrate's clerk. This is a relationship which by necessity is close and very interdependent. You prevailed upon her to commit an offence in 2020 after having been rebuffed by her for the same conduct in 2019. Your behaviour involving Ms Freeman was particularly egregious.

72 It was put by Mr Harrap's counsel on appeal that the first of the cited paragraphs discloses error in that the Judge fixed the sentence by reference to what the public might think is an appropriate sentence. Plainly, a Judge would be wrong to proceed in that way. But the Judge did no such thing. The impugned paragraph does no more than state an objective circumstance of the offending which marks it as particularly serious. That circumstance is the commission of the offences by a judicial officer which 'give[s] rise to public disquiet about the integrity of the judicial system'. The point made by the Judge is that Mr Harrap's offending undermined public confidence in the administration of the law by judicial officers. It echoes the point made by Basten JA, as to a retired judge, in *Einfeld v The Queen*:[3]

> [80] The appellant also complained of that consideration, noting that one "does not have to be a judge or lawyer to know that it is illegal to tell a lie on oath". That was something "every citizen knows".
>
> [81] Each of these complaints is misconceived. First, it is beyond question that for a senior legal practitioner and former judge of a superior court to commit offences against the administration of justice is apt to give rise to public disquiet about the integrity of the judicial system. These were offences to which the present status of, and the offices formerly held by, the applicant were of great significance.
>
> [82] There may be a public perception that an elite group in the community, such as, in this case, members of the legal profession, may tend to protect their own. However, there is a contrary risk, which may have more substance, namely that those involved in the administration of justice will have an accentuated sensitivity to the need to maintain the highest reputation possible for the incorruptibility and integrity of the system in which they operate. In such circumstances there may be a risk that judges will deal more harshly than some would think appropriate with those from within their own ranks who transgress in a way which could have a tendency to undermine those characteristics, and hence diminish respect for the rule of law in the community. Recognizing the latter danger, it should nevertheless be accepted that the applicant's status and former office-holding rendered the offences more serious than they would otherwise have been.

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3 (2010) 200 A Crim R 1 at [80]-[83].

> [83] Secondly, it is also true, as the sentencing judge recognised, that the applicant's status and former office-holding permitted him to appreciate fully the seriousness of the offences, thus removing an element of ignorance which might otherwise have diminished the degree of culpability. It was not merely a matter of knowing that it is a crime to lie on oath or seek to pervert the course of justice: it was a matter of understanding the significance accorded to such conduct by the law and the heightened seriousness of offences when committed by a person with the applicant's background and experience.

73 The Judge placed responsibility for the offences almost entirely on Mr Harrap:

> … Ms Freeman was the most diminished person when scrutinising the scale of power that you exercised. She was overborne by your authority, persistence and increasingly over time, your familiarity which overstepped the boundaries of a proper relationship between a Magistrate and a Magistrate's clerk. This is a relationship which by necessity is close and very interdependent. You prevailed upon her to commit an offence in 2020 after having been rebuffed by her for the same conduct in 2019. Your behaviour involving Ms Freeman was particularly egregious.
>
> You are the father of a son with Ms Moyse and she is dependent upon you for financial support for the education of your son and some emotional support in your position as his father. It was demonstrably clear that she initially relied upon your judgment about the appeal application concerning her client and she was concerned about your position without fully understanding the reasons. After your assurances that there were no problems, she then became reliant upon you to hear the appeal.
>
> Ms Foulkes is your life partner and so is in an intimate relationship with you. The broader aspects of that relationship include dependence and the housing of family at your property. She was a senior serving police officer. Following your entreaties she involved herself in criminal conduct that she knew was an offence and that was inconsistent with and completely compromised her role and appointment as a police officer. She advised you of her reluctance initially and then later through her texts. Your response was to highlight your own difficulties without regard to her position. The hallmark of your behaviour was your focus upon your own self-interest to the exclusion of these women whom you involved in this offending. You therefore failed to pay even lip-service to your position and to your oath.
>
> In those circumstances, I have formed the view that the only proper sentence in this regard is a sentence of imprisonment.

74 The Judge then gave the following reasons for not suspending the sentence or imposing home detention:

> I have canvassed in these sentencing remarks all of the relevant considerations which I have taken into account. I repeat that I have taken into account your otherwise unblemished record, your previous good character and your contribution to society. However, I consider that given your position as a judicial officer, your conduct was so egregious and opportunistic, so lacking in judgment and was so serious that good reasons does not exist to suspend your sentence.
>
> I turn then to the question whether you are a suitable person to serve this sentence on home detention. I accept the submission of your counsel that you are not a threat to the safety of the community. I turn then to consider the question arising under s.71(2)(a) of the

> *Sentencing Act 2017*, whether the making of such an order would or may affect public confidence in the administration of justice. The concept of the administration of justice involves a broad range of considerations. I consider that amongst these your position as a judicial officer is highly substantive. As I have earlier indicated and described, judicial officers are at the pinnacle of the judicial system and so the administration of justice. They obtain that position upon their appointment and upon the making of their oath and having done so, they hold a position of a primacy because they are part of the institution of government. Judicial officers are required to adjust to and to maintain a standard of behaviour that is without reproach having regard to their judicial independence.
>
> Your criminal behaviour is completely at odds with your role and all of those considerations. You consciously committed criminal offences and consciously co-opted Ms Foulkes and Ms Freeman into that behaviour. In relation to Ms Moyse and her client, you consciously ignored the obvious conflict of interest under which you were then labouring.
>
> For the same reasons, your criminal behaviour strikes at the very foundation of public confidence in the administration of justice that I am required to consider under the operation of s.71(2)(a) of the *Sentencing Act*. I consider that the making of a home detention order for those reasons would affect public confidence in the administration of justice in a stark and detrimental way. I further consider that the making of such an order would strike at the foundations of such public confidence in a way that is significant.

Consideration of the Harrap appeals

75 For a number of reasons, care must be taken in treating the maximum penalty for deception as a yardstick for the particular offences committed by Mr Harrap. First, the maximum penalty for deception covers a wide range of offending. It must accommodate, for example, the dishonest receipt of money or goods of substantial value from vulnerable victims in breach of their trust. Mr Harrap stood to gain some pecuniary and other benefits by his deception, but not at the expense of any particular individual. His gains would come at the expense of the statutory scheme calculated to improve road safety through the disqualification of drivers who are frequent offenders. The harm done by his offending was to the public interest in the due administration of that statutory scheme. For that reason, the maximum penalty for perverting the due administration of the law, four years, is of some relevance. The same maximum penalty applies to offences of swearing a false declaration contrary to s 27(1) of the *Oaths Act* 1936 (SA). There is also an analogy to be drawn between Mr Harrap's offending and subornation of perjury, contrary to s 242(2) of the *Criminal Law Consolidation Act* 1935 (SA) which carries a maximum sentence of seven years. In the case of Mr Harrap's deception, BD did not knowingly swear a false affidavit, but he did do so at the instigation of Mr Harrap and by reason of Mr Harrap's deception. Accordingly, comparisons with the sentences imposed for perjury or subornation of perjury, may be more useful than the penalties imposed for deception generally.

76 Finally, the effect of Mr Harrap's deception was to enable him to continue to drive over a period of time when he ought to have been disqualified from

driving. It is appropriate, therefore, also to have regard to the range of penalties imposed for the offence of drive disqualified.

77 I accept that Mr Harrap has many personality traits, intelligence, education and experience which engender confidence in his prospects of rehabilitation. However, given what is now known of his private conduct and his poor judgment, which has been exposed by this offending, some care is necessary in evaluating the testaments to his good character. Moreover many, if not most judicial, and other, office holders will share those antecedents. They are unlikely to hold office, in particular high office, if they did not. The offences of abuse of office and conspiracy to do so are abuses of a privileged position. There is therefore relatively less scope for personal circumstances like those to mitigate a sentence for abuse of office than in many other offences, if the sentencing objectives of deterrence and condemnation are to be achieved.

78 I accept that Mr Harrap will suffer some additional hardships whilst serving a term of imprisonment. On the affidavit of his solicitor, sworn on 9 February 2021, and received on the appeal, his early period of imprisonment in the Adelaide Remand Centre and his transfer to country prisons, arranged in order to better manage any risk to his safety, was trying and uncomfortable. Since 20 January 2021, he has been placed in a unit with 53 other inmates, several of whom he had acted for as a solicitor, and two of whom he had dealt with as a Magistrate. The affidavit does not assert that he had sentenced any of those prisoners to imprisonment or that they held any animadversion to him for that, or any other, reason. The affidavit did not claim that Mr Harrap had been assaulted or threatened with violence. Nor does the affidavit depose that Mr Harrap suffers from significant symptoms of anxiety because of his fear of violence. Nonetheless, I accept that Mr Harrap's conditions of imprisonment have been, and will be, from time to time, more onerous than for many other prisoners. In evaluating whether the sentence imposed by the Judge on the deception offences were manifestly excessive, and in formulating the sentences I would impose on resentencing, I have taken into account the additional burden of imprisonment on Mr Harrap by reason of his former judicial office. However, the additional burden is not of a degree that it can be allowed to substantially displace the objects of punishment and deterrence for these offences.

79 I hold that the notional sentence, before reduction for Mr Harrap's guilty plea, imposed by the Judge for the Foulkes deception was manifestly excessive. It is significantly greater than any sentence which would be imposed on a lay person who had no reason to be aware of the seriousness of the conduct. It is a severe sentence when measured against the considerations referred to in [75] to [76] above. When compared to offences of perjury, it approaches that level of sentencing for deliberately false testimony given in substantial personal injuries' claims, or the falsely sworn statements given in the course of participation in serious and organised crime. Finally, it is far in excess of the sentences imposed for driving whilst disqualified. The sentence also fails to reflect Mr Harrap's past

good character and contribution to the community. It reflects the error adverted to by Basten JA in [82] of his judgment in *Einfeld*[4] of imposing an excessive sentence in order to make it clear that judges do not 'protect their own'.

80 I would impose a sentence of six months for the Foulkes deception, after reducing by 40 per cent a notional sentence of 10 months. My reasons for commencing with a notional sentence of 10 months are as follows. First, the offence is not amongst the most serious of deceptions, but it calls for more than a short period of imprisonment which is sometimes said to be effective for the shock value of hearing the prison doors close shut. Secondly, the offence is more serious than an occasional violation of a licence disqualification because the deception was planned to allow Mr Harrap to drive, throughout the period during which he would otherwise have been disqualified, without fear of any consequence. Thirdly, even though Mr Harrap's conduct fell towards the less serious end of the spectrum of deceptive conduct which perverts the due administration of the law, the subversion of the demerit points scheme is a significant public mischief. Fourthly, the Foulkes deception was planned and skilfully executed by a combination of disarming email exchanges with BD and emotional pressure on Ms Foulkes. Fifthly, Mr Harrap well appreciated the criminality and public mischief of his conduct. Finally, even though Mr Harrap's conduct undermined the integrity of the judiciary, he appeared to have no qualms about breaching the ethical obligations of his office.

81 I indicate that in arriving at that sentence I have not placed any weight on Mr Harrap's abuse of his personal relationship with Ms Foulkes in persuading her to accept his points. She was plainly not happy about doing so but other than her interest in maintaining her personal relationship with Mr Harrap, she was not in any particularly vulnerable position. She was a Sergeant of Police and a police prosecutor. The relationship was not a long-standing one and they did not have children together. Mr Harrap's use of the emotional leverage he had as Ms Foulkes's partner reflects poorly on his personal morality, but is not such as to aggravate the offending in any way.

82 I turn to the Freeman deception. For the reasons given with respect to the Foulkes offence, I find that that sentence too is manifestly excessive. However, I would commence with a higher sentence of 15 months for that offence. After allowing for Mr Harrap's plea of guilty, I would reduce that sentence to nine months.

83 I commence with a higher notional sentence for two reasons. First, it was the second offence and committed after Mr Harrap had some time to reflect on the criminality of falsely nominating someone other than himself as the driver, particularly, in the face of Ms Foulkes's displeasure. Secondly, the offence involved the influence and trust that Mr Harrap enjoyed, by virtue of his judicial office, to manipulate his clerk, who was particularly vulnerable to his entreaties because of her dependence on him for support in her workplace. Mr Harrap's

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4 *Einfeld v The Queen* (2010) 200 A Crim R 1.

power over Ms Freeman was greater than that of an employer or manager. As a judicial officer, he commanded the trust and obedience of support staff. Magistrates and their clerks work under substantial pressure. Their work cannot be successfully undertaken without close collaboration and understanding between them. Mr Harrap's capacity to commit the deception by nominating Ms Freeman emanated from the power of his office. Mr Harrap made substantial efforts over time to cultivate Ms Freeman so as to make her amenable to participate in his fraudulent scheme. Ms Freeman had nothing to gain but Mr Harrap's magisterial favour, in exchange for which she was persuaded to lose licence points and become liable to prosecution for a serious criminal offence.

84 I would order that the nine months' sentence commence after Mr Harrap has served three months of the six months' sentence imposed for the Foulkes deception. That degree of concurrence is justified because Mr Harrap's end purpose was to retain his licence, a purpose which could only be achieved if he falsely nominated other drivers for both offences. Accordingly, even though each offence was a separate and discrete criminal incursion involving the recruitment of different individuals to give effect to his deception, there was sufficient commonality of purpose between the offending to allow that degree of concurrency.

85 I acknowledge that less severe sentences might properly have been imposed if Mr Harrap were not a judicial officer. However, his position as a judicial officer enlivens important considerations, in addition to his power over Ms Freeman, which demand a higher sentence. First as a judicial officer, particularly as a Magistrate who was involved in the administration of the licence demerit point scheme, Mr Harrap was aware of its important public purpose and of the seriousness of the offending on which he had embarked. Secondly, and importantly, the commission of the offences necessarily undermined the public perception of the integrity of the judiciary. A judicial officer has a duty to uphold the status and reputation of the judiciary and to avoid conduct that diminishes public confidence and respect for the judicial office.[5] Judges individually must be beyond reproach in order to maintain public acceptance of the authority of the independent judiciary. The rule of law depends on public confidence in the judiciary and its administration of justice. The commission of an offence by a judicial officer is an egregious transgression against the strictures which come with holding judicial office. The punishment of judicial officers who commit criminal offences must reflect their special culpability in order to restore confidence in the judiciary by reminding the public, including judicial officers, that there is little room for leniency in the sentencing of judges who commit offences.

86 I turn to the offence of conspiracy.

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[5] Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, November 2020) at [2.3].

87 In the course of the submissions before the Judge, there was not a clear and concise statement of the conduct which Mr Harrap and Ms Moyse conspired to effect. However, as I earlier observed, on the materials it is reasonably clear that the agreement extended to making arrangements to have the HNJ matter listed before Mr Harrap, and not Ms Duncan, and that Mr Harrap would allow the application, reduce the demerit points and do no more than give HNJ a stern warning about his driving. On one view, the agreement extended to attempting to influence Ms Duncan if Mr Harrap was not able for any reason to hear the matter himself. However, because that discussion occurred in passing and early on, it is not clear that Ms Moyse joined in that proposal and if she did, what her state of mind was about the unlawfulness of it. I will therefore exclude that from the subject matter of the conspiracy, but will have regard to that in a general way in evaluating Mr Harrap's overall culpability. Secondly, I observe that pursuant to s 44 of the *Magistrates Court Act 1991* (SA), Mr Harrap enjoyed the same privileges and immunity from liability as a judge of the Supreme Court in exercising the jurisdiction of the Magistrates Court. However, the defence, by its plea of guilty, did not contest that the immunity extended to the offence of conspiracy entered into antecedent to the exercise of the jurisdiction of the Court.

88 Thirdly, I note that the immunity does not extend to administrative responsibilities engaged in by a magistrate when serving as a regional manager.

89 The existence of the immunity when exercising judicial power, is a necessary incident of the independence of the judicial ensuring that they can adjudicate matters without being concerned about collateral suits which might call into question their judgment. However, that immunity emphasises the importance of condign punishment when offences, like the conspiracy of which Mr Harrap was convicted, are committed. It is necessary to impose condign punishment, which has a strong deterrent effect to those who would seek to abuse that immunity and undermine the exercise of judicial power, in order to maintain confidence in the Courts.

90 The *Guide to Judicial Conduct* (the Guide), published on behalf of the Council of Chief Justices of Australia and New Zealand, provides that a judge should not sit in a case in which the judge is in a relationship of the first, second or third degree to a party or the spouse or domestic partner of a party.[6] It also provides that where the Judge is in a relationship with the first or second degree of counsel, or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Unless the matter is uncontested or is of a relatively minor or procedural nature. The position of a former partner who is a parent of a dependent child is not expressly dealt with. However, by analogy with the in-laws

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[6] Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, November 2020) at [3.3.4].

of relatives of the first degree which are relatives of the second degree, it is clear that the parent of a child of a judicial officer should not appear before him or her.

91 Mr Harrap's conduct went well beyond an error of judgment in sitting to hear a case when he ought to have recused himself. The Guide does not expressly deal with actual bias to the point of pre-judging a matter for collateral and personal reasons is far too obvious to have to do so. It is contrary to the very judicial oath. In taking the judicial oath, judicial officers swear that they 'will do right to all manner of people after the laws and usages of this State, without fear or favour, affection or ill-will'.

92 Mr Harrap made a private arrangement with the legal practitioner representing a litigant in his court which pre-determined the outcome, and he did so in order to show favour to his former partner who was the parent of his child. When Mr Harrap came to hear the application in open court, he did so ostensibly as an independent judicial officer bringing an open and fair mind to the application, when in fact he was engaged in little more than a theatrical performance which had been scripted in private conversations between him and Ms Moyse. The arrangement was a criminal abuse of the judicial power with which he had been entrusted. Leaving aside the absence of any monetary dimension to that corruption of his office, and the relatively minor nature of the proceedings, it is conduct antithetical to the core values of the rule of law. Once detected, the offence necessarily undermined public confidence in the exercise of judicial power by the Magistrates Court. The penalty imposed for the conspiracy must be such as to restore that confidence and deter judicial officers from engaging in it.

93 The maximum penalty for the offence of abuse of public office is seven years. As I earlier observed, judges enjoy an immunity for acts or omissions in the exercise of their judicial office. It is appropriate to use that maximum of the yardstick for sentencing on a conspiracy to commit that offence. The immunity of judicial officers from proceedings, which would otherwise arise from the consequences of the exercise of judicial office, is premised on the honest and diligent discharge, by judges, of their duty, and is designed to ensure judicial independence by freeing them of any concern that their judgments may be impugned in collateral proceedings. That premise is falsified when a judicial officer dishonestly and improperly exercises the power of his or her office. On proof and conviction of ancillary offences, like conspiracy to commit an abuse of judicial office, the imposition of condign punishment is therefore necessary to restore confidence in the premise on which the immunity rests, and in the independence, impartiality and honesty of the judiciary.

94 Corruption of judicial officers poses greater dangers than the corruption of most other offices because the judiciary is the ultimate arbiter of all civil and criminal controversies. Substantial periods of imprisonment will generally be called for. However, the motivation for the offence and its immediate consequence may mitigate the seriousness of the offence. Mr Harrap was motivated only by a

desire to please Ms Moyse, which he felt justified in doing because of his great confidence in the correctness of his judgment. He did not stand to benefit financially or in any other material way. Nonetheless the sentence of 19 days imprisonment, to be served concurrently with the sentences imposed on the deception offences, was manifestly inadequate. It does not impose any additional effective punishment when the conspiracy offence was relatively more serious than the deception offences. It does not sound an effective warning by way of general deterrence and is incapable of repairing the damage to the integrity of the administration of justice caused by Mr Harrap's offending.

95 The general rule that Crown appeals against sentence only be allowed in rare and exceptional circumstances is well founded.[7] Prosecution appeals generate anxiety and hardship for a defendant who is vexed by a second attempt to secure a conviction or procure a higher sentence. If permission is too readily granted the power of the State to appeal, in the hope that some judges on appeal might take a more severe approach, could become an instrument of oppression. However, the sentence of 19 days, served concurrently, is so far below the standard of punishment demanded by sentencing principle that, in order to maintain confidence in the independent judiciary of the State, permission to appeal must be granted and the appeal allowed. I would allow the appeal and set aside the sentence of 19 days imprisonment.

96 I would select a starting point of two years which I reduce by close to 40 per cent for his guilty plea. I fix a sentence of 15 months, to be served cumulatively on the sentences imposed for the Freeman deception.

97 The sentences Mr Harrap must serve have been much reduced because of his early guilty pleas. He is fortunate to receive a 40 per cent reduction. The prosecution cases on all three offences were overwhelming. Moreover, there is little reason to allow a former judicial officer a reduction on account of his or her willingness to facilitate the administration of justice. Nonetheless, I have allowed about the same reduction because the prosecution accepted before the Judge that there was no reason not to allow the maximum reduction and the Director did not argue any differently on appeal. The concession made before the Judge was justified by the robust approach to reductions endorsed by this Court on numerous occasions, even when the prosecution case is a strong one.[8] That position was modified in *R v Bahrami*.[9] The strength of the prosecution case is now an important consideration which will tend to deny the maximum, or close to the maximum, available reduction.[10]

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7 See *R v Bahrami* [2020] SASCFC 111 at [21]; *R v Buttigieg* [2020] SASCFC 38 at [38]-[39]; *Everett v The Queen* (1994) 181 CLR 295 at 299-300.

8 See *R v McPhee* [2014] SASCFC 107 at [44], [46]; *R v Dwyer* (2015) 121 SASR 587 at [35]; *R v Nguyen* [2015] SASCFC 40 at [18]-[19]; *R v Davey* [2017] SASCFC 151 at [47]-[48]; *R v Wakefield* (2015) 121 SASR 569 at [53]-[54].

9 [2020] SASCFC 111.

10 *R v Bahrami* [2020] SASCFC 111 at [53].

Ms Moyse – Consideration of the Directors application

98 I reproduce the Judge's descriptions of Ms Moyse's conduct, numbering the paragraphs for later reference and underlining its salient points:

> 1. You were reassured on each occasion that you spoke to Mr Harrap that he did not see any problems with him hearing the matter. You accepted the expression of opinion from Mr Harrap. Your counsel, Mr Barnett, suggested that this clouded your judgment. I consider that as well as clouding your judgment, it is apparent that you were seeking guidance from Mr Harrap. You had concerns, you raised the concerns and those concerns that you had were assuaged by what Mr Harrap said to you.
>
> 2. You were doing the solicitor's work and the counsel work implicitly on a pro bono basis. These events were occurring in the background of your imperfect understanding of the judicial conduct in appearing before someone with whom you have had related connection. You were not aware of there being a judicial code of conduct but it is clear that you had a discomfort about the actions of Mr Harrap.
>
> 3. However, I do accept that at the time, Mr Harrap was a source of guidance and support to you. This was both in a professional and personal sense because of the relationship that he had with him. Over the years you had had discussions with him about issues of your practice involving wills and estates. He had been involved in that area of practice prior [to] the time of him becoming a magistrate. Conversely, any conduct of such an application in the court was an area with which you had no familiarity and so you sought out his assistance. You have not worked on such an appeal before. You were seeking guidance as to how the matter should proceed and how it should be prepared and presented.
>
> 4. You were reassured by what was said to you by Mr Harrap and you did not challenge the issue again. You set about to properly prepare for the appeal, to gather the relevant documents and letters and serve documents. This remained your mindset from that time.
>
> 5. This aspect of the matter was challenged by the Director. The prosecutor, Mr Longson, pointed to a telephone call on 24 May 2020 in which you asked Mr Harrap to ensure that he was the person hearing the appeal and that he should make sure he was the person that you appeared before for the appeal hearing. This occurred in the context that you read the cause list and could not identify the matter in the criminal cause list. This was a result of your misunderstanding because you were looking for the matter in the criminal list, not in the civil list. You then realised the matter was listed before Magistrate Duncan. This was the consequence of your identification to the registry staff of the concerns that you had about the position of Mr Harrap. You made a number of telephone calls and sent a number of text messages to Mr Harrap. However, in the end, it was the decision of Mr Harrap as to whether he heard the matter.
>
> 6. The Director described this matter as serious because you are a practitioner of the Supreme Court of South Australia. This was in the context that a conviction should be recorded in relation to your conduct. However, for the reasons which follow, I am unable to accept that submission.
>
> 7. In my opinion, having regard to all of the documentation put before me, your activity immediately prior to the hearing was much more indicative of your reliance upon Mr Harrap in the circumstances of that particular case, your inexperience in that area

> of law and your fear of bar work. I am satisfied that your concerns became elevated to a level of panic and that you wanted to ensure that you would not need to address another judicial officer. This was because of your high level of insecurity about what you were doing. You did not want to do barrister's work and you were seeking any assistance you could get from Mr Harrap in order to ensure the smooth passage of the application.
>
> 8. Your misunderstanding about whether it was a civil matter or a criminal matter is symptomatic of both your inexperience and your reliance upon Mr Harrap. Notwithstanding, your plea of guilty to the charge indicates your acceptance that your conduct involved your agreement with Mr Harrap for him to improperly exercise the power or influence he had by virtue of his public office.
>
> 9. In retrospect, you would now accept that your position was foolish and that it amounted to a failure to properly exercise your skill as a solicitor. However, I consider that there are a number of matters that contribute to that position. It is to those to which I now turn.
>
> (Emphasis added)

99 As the Judge observed in paragraph [8], by her guilty plea, Ms Moyse acknowledged that her agreement with Mr Harrap was that he would act improperly. However, by her guilty plea Ms Moyse also confessed that she was aware, at the time that the arrangement was made, that it necessarily required Mr Harrap to abuse his public office and act unlawfully and, even though not expressly referred to by the Judge, that abuse of office included an agreement with Ms Moyse that he would grant the application. On that admitted state of mind and contrary to the Judge's finding in paragraph [1], Ms Moyse could not have been 'reassured' by what Mr Harrap said to her. In addition, her culpability was much greater than a 'foolish … failure to properly exercise [her] skill as a solicitor', as the Judge found in paragraph [9]. On Ms Moyse's admission that she knowingly entered into the arrangement that Mr Harrap would abuse his judicial office, her ignorance of the Judicial Code of Conduct, noted by the Judge in paragraph [2], was of no real significance.

100 In addition, the Judge did not sentence Ms Moyse on the totality of the agreed facts. The Judge's findings are anchored in the first conversation of 13 May 2020. The Judge has not sentenced Ms Moyse on the arrangements made in the telephone conversation of 24 May 2020 when she requested assurances from Mr Harrap that he would ensure that he would have the matter listed before him and that he would allow the application. When sentencing Mr Harrap, the Judge referred to Ms Moyse's attempts on that day to 'make sure' that Mr Harrap heard the application. The Judge alluded to the changed approach of Ms Moyse in paragraph [7] in which he attributes it to Ms Moyse's panic about undertaking counsel work. My reading of the transcript of the conversation with Mr Harrap is that Ms Moyse was as concerned about the disposition of HNJ's application. The exchange between Ms Moyse and Mr Harrap on 13 May 2020, in which Ms Moyse warned that there would be a problem if he did not grant the application, also shows Ms Moyse's concern about the result of the application.

101 Finally, Ms Moyse's active attempts to ensure that Mr Harrap would hear the application are inconsistent with the finding in paragraph [4] that, having been reassured by Mr Harrap, she did no more than 'not challenge the issue again'.

102 The above errors are sufficient to vitiate the exercise of the Judge's discretion.

103 The Judge declined to record a conviction for the following reasons:

> An issue for my consideration is the question of public denunciation of your conduct by the imposition of a conviction. I have been made aware of your show cause application to the Supreme Court; that matter has been put to one side until such time as my sentence has been brought down. You have already suffered a very high level of public denunciation and you are very contrite. You have yet to deal with the denunciation of your professional position when your application is to be heard in the Supreme Court. I consider that there has already been a very high level of public denunciation for your conduct. You will be associated with the conduct of Mr Harrap for a very long time. This is a millstone which is not easily removed for a host of reasons, all of which are exacerbated by the fact that he is the father of your son and despite Mr Harrap's deficiencies as a parent, you are committed to your son having a father figure in his life.
>
> I have weighed the beneficial nature of an order to proceed without a conviction to the offending with the public interest inherent with convictions being recorded. I have had full regard to the judgment of the Full Court in *R v Stubberfield* [2010] 106 SASR 91 at [44] and following. I consider that the social prejudice resulting from a conviction for you would be so grave that you would be continually punished in the future well after appropriate punishment has been received. I do not consider that this is the type of offence which will always call for the recording of a conviction. I have had full regard to the decision of Stanley J in *Police v Watson* [2016] 125 SASR 212, the decision of Sulan J in *Police v Sherritt* [2015] SASC 43 at [19], the decision of Napier CJ in *Webb v O'Sullivan* (1952) SASR 65 at [66] and I have reached the conclusion that the absence of the recording of a conviction would still mean that the punishment fits the crime.
>
> I consider that because of all of the circumstances that I have set out, your case falls into the exceptional category and that this is an occasion to "temper justice with mercy" (*Police v Watson* at [35]). I am of the view that in all of those circumstances, good reason exists for not recording a conviction. I may therefore impose a penalty without recording a conviction.

104 It is difficult to imagine any circumstance in which a conviction would not be recorded against a legal practitioner found guilty of entering into a conspiracy with a judicial officer to have that judicial officer abuse his judicial office for the benefit of that practitioner's client. This is certainly not that case. In that respect, the Judge has erred in the way in which he took into account the effect of a conviction on Ms Moyse's career as a legal practitioner. Any adverse effects of a conviction on Ms Moyse, whether by way of a disqualification or suspension from practice, or the imposition of conditions on her practising certificate, would not be the consequence of the formal recording of a conviction, but of the commission of the conspiracy offence itself. The Judge's reasoning on that issue also vitiates his Honour's favourable exercise of the discretion.

105 Over and above those specific errors of reasoning process, the failure to record a conviction resulted in a manifestly inadequate outcome. The maintenance of high standards in the legal profession is a matter of public importance which demands a conviction in Mr Moyse's case. Those same public interest considerations warrant a grant of permission on the Director's application in the case of offences by legal practitioners which subvert the administration of the law. It is of public importance to maintain proper sentencing standards. A conviction will generally be necessary in such cases and it is demanded by the circumstances of Ms Moyse's offending. I therefore grant the Director permission to appeal and allow the appeal against Ms Moyse's sentence.

106 For similar reasons, the fine imposed by the Judge is manifestly inadequate. There is no statutory prescription of a maximum fine for the common law offence of conspiracy. Section 119 of the *Sentencing Act 2017* (SA) provides that the maximum fine which can be imposed by the District Court, in the absence of an offence-specific prescription, is $35,000.00. Even though it must be accepted for the purposes of this appeal that a sentence of imprisonment is not appropriate, the offence is nonetheless a grave one. In exchange for its monopoly to engage in legal practice the legal profession assumes onerous ethical obligations. Offences which subvert the impartial administration of the law must be met by strongly deterrent sentences.

107 Ms Moyse has an established practice which has generated a good level of work.

108 I would impose a fine of $6,000.00 after applying a 40 percent reduction to a nominal starting point of $10,000.00.

Orders

109 I would make the following orders:

1. The Director's application for permission to appeal against each of the sentences imposed on the deception offences is refused.

2. Mr Harrap's applications for permission to appeal against each of the sentences imposed on the deception offences are granted, the appeals are allowed and the sentences are set aside.

3. The Director's application for permission to appeal against the sentence imposed on Mr Harrap for the offence of conspiracy is granted, the appeal is allowed and the sentence is set aside.

4. Mr Harrap is resentenced as follows:

    4.1 On the Foulkes deception – 6 months' imprisonment to commence on 4 December 2020;

4.2 On the Freeman deception – 9 months' imprisonment to commence after Mr Harrap has served 3 months of the sentence of imprisonment imposed by 4.1;

4.3 On the conspiracy offence – 15 months' imprisonment to commence at the expiry of the sentence imposed by 4.2;

4.4 I fix an overall non-parole period of 15 months commencing on 4 December 2020.

5. The Director's application for permission to appeal against the sentence imposed on Ms Moyse on the conspiracy charges is granted, the appeal is allowed and the sentence is set aside.

6. Ms Moyse is convicted and a fine of $6,000.00 is imposed.

LOVELL JA:

110 I have had the advantage of reading the reasons of Kourakis CJ. I gratefully adopt his Honour's summary of the facts. I agree generally with Kourakis CJ's reasons but regretfully, I am unable to agree with his Honour's approach when resentencing the appellant Mr Harrap. I consider the sentences imposed for the deception charges are manifestly excessive. To that extent the appeal of Mr Harrap is successful. However, I also consider the sentence imposed for the conspiracy charge is manifestly inadequate. While acknowledging that the challenge to the sentence is an appeal by the Director of Public Prosecutions and therefore should be granted only in rare and exceptional cases, I consider here there is a need to correct an error of principle and the Director's appeal should be allowed.[11] Mr Harrap is therefore to be resentenced.

111 In relation to the Director's appeal against Ms Moyse, I agree with Kourakis CJ's reasons and the orders he proposes.

112 Before turning to resentencing Mr Harrap I add the following remarks.

113 Senior Counsel for Mr Harrap, during submissions before the Sentencing Judge, characterised the conduct of Mr Harrap on the conspiracy charge as failing to recuse himself having spoken to Ms Moyse about the matter. He then submitted that "it might well be said that the deception charges are more serious than the engaging in that conversation". Senior Counsel for Mr Harrap submitted that the result of the judicial proceedings was nothing "other than a proper outcome". The prosecutor, while pointing out that the conspiracy charge involved Mr Harrap abusing his judicial office, did not address Senior Counsel's characterisation of the respective seriousness of the offending nor that the result was "other than a proper outcome". The concession about the result being a proper outcome, one that was

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[11] *R v Buttigieg* [2020] SASCFC 38 at [38]–[39].

properly made, tended to obscure the gravamen of the conduct involved. That the Judge accepted the submission of counsel for Mr Harrap, in characterising the two deception offences as more serious than the conspiracy charge, is reflected in the penalties imposed by the Judge. The Judge imposed a sentence of 20 months, reduced to 12 months due to Mr Harrap's pleas of guilty, on each deception charge and ordered that the terms of imprisonment be served partially concurrently. In relation to the conspiracy charge the Judge imposed a sentence of one month imprisonment, reduced to 19 days to allow for Mr Harrap's plea of guilty. That term was to be served concurrently with the other terms of imprisonment for a final sentence of 18 months imprisonment with a non-parole period of 12 months.

114 I consider the Judge erred when characterising the seriousness of the offences in that manner; the conspiracy charge was, by far, the more serious of the charges.

115 There is an obvious distinction between the offending. The deception charges could be committed by any member of the community. While the offending is made more serious by Mr Harrap's position as a Magistrate, this offending did not involve the use, or abuse, of his judicial power. I accept, as observed by Kourakis CJ, that the offence did involve the influence and trust that Mr Harrap enjoyed because of his judicial office. However, while he, reprehensibly, pressured his clerk into assisting him to commit the offence, the pressure came from his power over her employment rather than his use or abuse of his judicial power. The same cannot be said of the conspiracy charge.

The conspiracy charge

116 The institutional independence of the judiciary from the executive and legislative branches is an aspect of the separation of powers, a constitutional principle Australia inherited from England. Whilst modified to suit Australian conditions this principle keeps power separate and divided. Judicial officers, who hold security of tenure, are independent of the legislature and the executive.

117 The requirement that those who administer justice be incorruptible and impartial has a long history.[12] The need for an independent judiciary, long recognised in England, was enshrined by the English Parliament in 1701 by the passing of the *Act of Settlement*. Amongst other matters the *Act of Settlement* provided that judges should hold office during good behaviour and that they should only be removed on an address of both Houses of Parliament. Security of tenure of judges has been adopted in Australia.

118 Judicial officers are required to make decisions between citizens and also between citizens and the government. The exercise of the judicial power includes upholding the rule of law. The rule of law, a concept of broad meaning, includes the principle that all persons in Australia, whether they be citizens, visitors or

[12] Clause 40 of the Magna Carta states: To no one will we sell, to no one deny or delay right or justice.

residents will obey the law. Further, it includes the principle that those involved in the administration of justice will perform their obligations effectively and fairly.

119 Thus, when exercising the judicial power, judicial officers must be independent from any government influence, independent of the parties and independent of anyone who may seek to influence the outcome of a legal proceeding.

120 As King CJ explained in R v Moss; Ex parte Mancini:[13]

> The independence of the judiciary lies at the heart of the rule of law and hence of the administration of justice itself. The essence of judicial independence is that the judge in carrying out his judicial duties, and in particular in making judicial decisions, is subject to no other authority than the law. To achieve that necessary independence of judicial decision, it has generally been thought to be necessary for the judges individually, and the judiciary as a body, to be secured, as far as law and practice can secure them, from the possibility of external influence or pressure.

121 Judicial officers in Australia, on appointment, take an oath or affirmation to administer justice and to "do right to all manner of people after the laws and usages of this State, without fear or favour, affection or illwill". To do right, that is to decide cases impartially and in accordance with the law, judicial officers must be independent of all litigants and of all who might directly or indirectly seek to influence the outcome of a legal action.

122 Impartiality is a condition upon which judicial officers are vested with authority. In an extra-curial speech in 2000, Gleeson CJ, on the topic of the judicial oath or affirmation, stated:[14]

> Judicial power, which involves the capacity to administer criminal justice, and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath.

123 This express trust requires judicial officers to fairly and impartially resolve disputes between the citizen and the state and between citizen and citizen. The quality which sustains judicial authority is fidelity.[15] Judicial independence does not mean judicial officers can do as they please; they must comply with their oath. The community requires fidelity from its judicial officers.

124 It is equally important that the community perceive that the justice system is administered according to the rule of law. Justice must not only be done, it must be seen to be done. That justice will always prevail is an aspiration not an axiom. Public trust in the judiciary cannot be assumed. To maintain public trust in the

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13 (1982) 29 SASR 385 at 388.

14 (Anthony) Murray Gleeson AC, 'Judicial Legitimacy' (Speech, Australian Bar Conference, New York, 2 July 2000).

15 (Anthony) Murray Gleeson AC, 'Judicial Legitimacy' (Speech, Australian Bar Conference, New York, 2 July 2000).

judiciary and the justice system constant vigilance is required to ensure that the judicial officers remain impartial.

125 Lawyers, when admitted to practice, take an oath or affirmation. As practitioners, they promise that they

> will diligently and honestly perform the duties of a practitioner of this Court and will faithfully serve and uphold the administration of justice under the Constitution of the Commonwealth of Australia and the laws of this State and the other States and the Territories of Australia.

126 Lawyers owe a duty to the court and the community to participate in the fair administration of justice and the laws of South Australia.

127 Both Mr Harrap and Ms Moyse breached their respective promises. Mr Harrap ought not have sat on the matter in which Ms Moyse was appearing. Ms Moyse, by her plea, has accepted that she knew Mr Harrap should not sit. That they had previously been in a relationship, although of short duration, and had a child from that relationship, was not well known. Ms Moyse well knew Mr Harrap should not sit, as she had initially informed the court registry that Mr Harrap "had a conflict". Further, Ms Moyse also discussed the case with him which was a more obvious reason for Mr Harrap not to hear the matter. Initial reticence about Mr Harrap hearing the matter receded and Ms Moyse, as demonstrated by the transcripts of the intercepted telephone calls, became insistent, indeed strident, that he do so. Ms Moyse allowed her fear of appearing in court to swamp her ethical and legal obligations.

128 But this is not simply a case of a "conflict" that was not disclosed leading to the application of the principles of reasonable apprehension of bias or actual bias. This is a case where the outcome of the case was discussed before the hearing and the result agreed. That is, the outcome of the hearing was pre-determined. To put that another way, when the defendant appeared in court, to be dealt with according to law, the proceedings were a sham. Mr Harrap pretended, in open court, to discharge his judicial function and exercise the appropriate discretion when in fact both he and Ms Moyse knew the outcome had been pre-determined. That both Mr Harrap and Ms Moyse understood the result was pre-determined is demonstrated by the telephone discussion between them about another Magistrate who also sat at Christies Beach. When there was a possibility that the other Magistrate may hear the matter, Mr Harrap suggested he would speak to her and "plant the seed" about the result Ms Moyse desired.

129 It was agreed before the Sentencing Judge that the actual outcome of the matter was a result that may reasonably have been expected. That is not a mitigatory factor. I accept the matter would have been more serious had an "unusual" outcome been pre-determined. The fact remains that Mr Harrap, without knowing the full details of the case and, to the knowledge of, and at the insistence

of, Ms Moyse, pre-determined the application. When in court Mr Harrap did not exercise his discretion. Ms Moyse knew that fact and encouraged it.

130 The conspiracy charge related to the agreement reached before Mr Harrap conducted the hearing; he cannot be punished for what he did in conducting the hearing. However, the agreement on the outcome was reached before Mr Harrap conducted the hearing.

131 The gravamen of the offending of Mr Harrap and Ms Moyse is that they entered into a secret arrangement to fix or rig the outcome of a judicial proceeding. The fact that the outcome can be seen, objectively, to have been one that was likely to have occurred in any event appears to have distracted counsel and the Sentencing Judge from correctly characterising the offending. To decide the case by preferring his personal relationship with Ms Moyse rather than obeying his judicial oath undermined the rule of law. The agreement between Mr Harrap and Ms Moyse struck at the very heart of the justice system and their conduct was a betrayal of their respective obligations. Undoubtedly their conduct, when brought to the public's attention, seriously undermined the community's trust in the justice system.

Resentence

132 The offending in relation to the deception charges is very serious. Mr Harrap undermined the very demerit point system he dealt with, on a regular basis, in court. Like Kourakis CJ, I consider the offending involving Ms Freeman to be more serious than that involving Ms Foulkes. While the Sentencing Judge found that Mr Harrap manipulated Ms Foulkes to participate in the offending, Ms Foulkes was not in the same position as Ms Freeman. Nor was the pressure to become involved the same.

133 Turning to the deception charge involving Ms Freeman, this was the more serious of the two, involving as it did, pressure from Mr Harrap's power over her employment. Clearly, as a Magistrate, Mr Harrap was aware of the consequences of his actions even though the act did not involve use of his judicial power. It was also Mr Harrap's second incursion into crime.

134 I have had regard to all the matters personal to Mr Harrap. I accept that he is contrite and accepts responsibility for his actions. I accept that he is likely to experience hardship in prison because he was a Magistrate. He is clearly unlikely to reoffend. However, the offending is very serious.

135 On the charge involving Ms Foulkes I would start with a sentence of 8 months. I allow close to 40% for the early plea of guilty. I reduce that sentence to 5 months imprisonment.

136 On the charge involving Ms Freeman, I would start with a sentence of 10 months imprisonment. I allow a discount of 40% as Mr Harrap, when first spoken to, immediately acknowledged the offending. This reduces the term of

imprisonment to 6 months. For the reasons given by Kourakis CJ, I consider a degree of concurrence is appropriate. While the offending can be seen as separate criminal acts, Mr Harrap, once he embarked on the first act, had to achieve the same outcome on the second matter otherwise he would still have lost his licence. In that sense it can be seen, to an extent, to be a connected course of conduct. I order that the 6 months imprisonment commence after Mr Harrap has served 3 months of the 5 months imprisonment imposed for the Foulkes offending.

137 In relation to the conspiracy charge I would impose a sentence of imprisonment of 20 months. I would allow a discount of 40% in relation to this charge. Applying the discount leaves a sentence of 12 months imprisonment.

138 I would order that this sentence be served cumulatively upon the earlier sentences. That leaves a final sentence of 21 months imprisonment. I would impose a non-parole period of 12 months. The sentence and non-parole period are backdated to commence when he was first taken into custody.

139 Mr Harrap was, prior to the offending, a person of good character. I accept that he is likely to be at risk in the prison system due to meeting offenders he may have sentenced. Simply having been a Magistrate will make him a target of abuse. I also accept that he is unlikely to reoffend.

140 However, the offending is serious. The deception and conspiracy offending cannot be said to have been on the spur of the moment or a momentary lapse of judgment. There was considerable opportunity for Mr Harrap to reflect on his conduct before he finally committed the offences. Clearly, he did not do so. In my view given the seriousness of the offending, good reason does not exist to suspend the sentence.

141 While I accept that Mr Harrap is a suitable person to serve the sentence on home detention I consider that due to the nature and seriousness of the offending a home detention order would affect public confidence in the administration of justice. I refuse to make an order that the sentence be served on home detention.

Orders

142 I would make the following orders:

1. The Director's application for permission to appeal against each of the sentences imposed on the deception offences is refused.

2. Mr Harrap's applications for permission to appeal against each of the sentences imposed on the deception offences are granted, the appeals are allowed and the sentences are set aside.

3. The Director's application for permission to appeal against the sentence imposed on Mr Harrap for the offence of conspiracy is granted, the appeal is allowed and the sentence is set aside.

4. Mr Harrap is resentenced as follows:

   4.1 On the Foulkes deception – 5 months imprisonment to commence on 4 December 2020;

   4.2 On the Freeman deception – 6 months imprisonment to commence after Mr Harrap has served 3 months of the sentence of imprisonment imposed by 4.1;

   4.3 On the conspiracy offence – 12 months imprisonment to commence at the expiry of the sentence imposed by 4.2;

   4.4 The final sentence imposed is 21 months imprisonment. I fix an overall non-parole period of 12 months commencing on 4 December 2020.

5. The Director's application for permission to appeal against the sentence imposed on Ms Moyse on the conspiracy charge is granted, the appeal is allowed and the sentence is set aside.

6. Ms Moyse is convicted and a fine of $6000.00 is imposed.

143 **LIVESEY JA:** I agree with the Chief Justice, for the reasons that he gives, that the Director should be granted permission to appeal and his appeal should be allowed against the sentence imposed on Mr Harrap on the conspiracy conviction on the ground that it was manifestly inadequate.

144 Likewise, I agree with the Chief Justice, for the reasons that he gives, that Mr Harrap's application for permission to appeal against the sentences imposed for the deception offences should be granted and the appeal allowed on the ground that they were manifestly excessive. Correspondingly, the Director's application for permission to appeal against those sentences must be dismissed.

145 In the circumstances described, the conspiracy offending was more serious than the deception offending because secret arrangements between the court and one of the parties regarding the outcome of litigation necessarily undermines public confidence in the judiciary and the administration of justice. In the case of the deception offending, that they were committed by a Magistrate makes them more serious than if committed by someone who was not expert in the law, sworn to uphold it. There is, nonetheless, a need to avoid "accentuated sensitivity" concerning this element.[16] These considerations were not reflected in the sentences imposed on Mr Harrap. The conspiracy sentence was seriously inadequate and the deception sentences were excessive. As for the Freeman deception, this was a second deception offence which depended upon an imbalance of power between a Magistrate and his clerk. Accordingly, it was more serious

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[16] *Einfeld v The Queen* (2010) 200 A Crim R 1, [80]-[83] (Basten JA): that is, just as it is necessary to avoid the perception that "members of the legal profession … protect their own", it is necessary to avoid dealing "more harshly than … appropriate with those from within their own ranks who transgress".

than the Foulkes deception. Nonetheless, as both deception offences represented a course of conduct designed to protect Mr Harrap's driver's licence, with the offences committed a few days apart, there was obvious scope for concurrency.

146 As for the resentencing of Mr Harrap, I agree with Lovell JA, for the reasons that he gives, that there should be a final sentence of 21 months' imprisonment imposed and a non-parole period of 12 months fixed, both backdated to when Mr Harrap was first taken into custody.

147 In the case of Ms Moyse, I agree with the Chief Justice, for the reasons that he gives, that the Director should be granted permission to appeal and that his appeal should be allowed, on the ground that the sentence was manifestly inadequate. I also agree with the Chief Justice, for the reasons that he gives, that a conviction should be recorded and a fine of $6,000 imposed.