HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, HAYNE, CALLINAN AND HEYDON JJ

GLORIA JEANETTE YORK APPELLANT

AND

THE QUEEN RESPONDENT

York v The Queen
[2005] HCA 60
6 October 2005
B79/2004

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 8 October 2004 and in their place order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Queensland

Representation:

B W Walker SC with A J Kimmins for the appellant (instructed by Ryan & Bosscher Lawyers)

M J Copley for the respondent (instructed by Director of Public Prosecutions (Queensland))

CATCHWORDS

York v The Queen

Criminal law – Sentencing – Appellant pleaded guilty to serious drug offences – Appellant cooperated with prosecuting authorities to secure murder conviction – Evidence that the appellant's life would be endangered in prison – Appellant sentenced at first instance to a wholly suspended term of imprisonment because of that risk – Attorney-General's appeal alleging the sentence was manifestly inadequate – Court of Appeal re-sentenced the appellant to serve a term of actual imprisonment – Whether appropriate to wholly suspend sentence – Whether sentencing judge entitled to take into account risk to appellant's safety whilst serving a term of imprisonment.

Criminal Code (Q), ss 669A(1), 671B
Penalties and Sentences Act 1992 (Q), s 9
Criminal Code (WA), s 689(3)

Words and Phrases – "unfettered discretion".

1 GLEESON CJ. On a Crown appeal, the Court of Appeal of Queensland, by majority (Williams JA and Cullinane J, White J dissenting) and "[n]ot without serious hesitation", intervened in an exercise of sentencing discretion by Atkinson J. The primary judge, in what she described as a "most unusual case" sentenced the appellant to imprisonment for five years and suspended the sentence. She added:

> "You must know, Ms York, that if you offend at all during those five years you will come back before me for sentencing, and I will have no compunction in sentencing you to serve that five years' imprisonment."

2 What made the case so unusual, in the opinion of Atkinson J, was the nature and extent of assistance to the authorities given by the appellant. That assistance had resulted in the conviction of a man "for a very brutal execution style murder". The conduct of the appellant was described as "very brave". There had been resulting threats to kill the appellant, who was evidently in serious danger both inside and outside prison. Atkinson J said that imprisonment involved "a very high risk of extreme retributive violence". Even so, she also made it clear that, in the event of any further offending by the appellant, she would have "no compunction" in sending the appellant to prison.

3 It is common sentencing practice to extend leniency, sometimes very substantial leniency, to an offender who has assisted the authorities, and, in so doing, to take account of any threat to the offender's safety, the conditions under which the offender will have to serve a sentence in order to reduce the risk of reprisals, and the steps that will need to be taken to protect the offender when released. The relevant principles are discussed, for example, in *R v Cartwright*[1] and *R v Gallagher*[2]. Atkinson J gave the appellant credit for her assistance to the authorities, her early plea of guilty, and other personal factors of no present relevance, in a combination of two ways. She imposed a lesser term of imprisonment than would otherwise have been the case (but not lesser to an extent that she considered would of itself fully recognise such factors), and she suspended the sentence. Her reasoning made it clear that, if she had not suspended the sentence, she would have fixed a shorter term of imprisonment.

4 There was a Crown appeal, but not on the ground that Atkinson J's reasoning process involved any error of principle. The sole ground of appeal was that the sentence was manifestly inadequate. It was common ground in the Court of Appeal, and in this Court, that the principles governing appellate intervention under s 669A(1) of the *Criminal Code* (Q) (notwithstanding the reference in that

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1 (1989) 17 NSWLR 243.

2 (1991) 23 NSWLR 220.

section to "unfettered discretion") were as stated in *House v The King*[3] and *Dinsdale v The Queen*[4].

5 In the Court of Appeal, the proceedings took an unusual turn. The Court of Appeal, over the objection of the present appellant, received evidence, which had not been before Atkinson J, from a departmental officer, concerning the practical capacity of the authorities to protect the appellant from danger in prison. It is one thing for a court to hear evidence of the circumstances in which a person will serve a term of imprisonment, perhaps involving close protection and isolation, in order to take that into account in fixing a sentence of an appropriate length[5]. It is another thing to set out to investigate the executive government's capacity to discharge its obligations of taking proper care of people in its custody. It may be added that, if A threatens to kill B, or to arrange for B to be killed, an enquiry into A's prospects of carrying out that threat is, in most cases, unlikely to lead to a clear conclusion. The factors most relevant to the question are unlikely to be the subject of reliable evidence. Atkinson J did not go beyond finding that there was a "very high risk". An attempt, on appeal, to measure the extent of the risk was bound to fail. For some offenders, prisons are dangerous places. It is the responsibility of the executive branch of government, in whose custody prisoners are placed, to take reasonable steps to minimise the danger. In dealing with questions of sentence, a court may need to know of any special circumstances of confinement that will be involved. But it is difficult for a court to measure the prospects of success of a criminal enterprise. In the result, the further evidence was found to be unsatisfactory. The Court of Appeal did not overrule Atkinson J's finding as to risk.

6 The majority in the Court of Appeal said that threats of criminal activity "cannot justify the court in refusing to send a criminal to jail where that is the only appropriate penalty available under our law". That is correct[6]. Nothing that was said by Atkinson J, or by White J, was to any different effect. The question was whether a custodial sentence, without suspension, was the only appropriate penalty. The majority said, without further elaboration:

> "Not without serious hesitation we have come to the conclusion that the offences committed by the [appellant] are so serious that, notwithstanding her co-operation with the authorities, her plea of guilty, and the threats directed at her by other criminals she should serve a term of actual imprisonment."

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3 (1936) 55 CLR 499.

4 (2000) 202 CLR 321 at 324-325 [3], 329 [21], 339 [57]-[58].

5 See, for example, *Burchell* (1987) 34 A Crim R 148 at 151.

6 *R v Gooley* (1996) 66 SASR 380 at 382-383.

7 The Court of Appeal sentenced the appellant to five years imprisonment to be suspended after two years.

8 It is true that a conclusion that a sentence is manifestly inadequate may not be susceptible of much elaboration[7]. Even so, having regard to the very unusual circumstances of the case, and the detailed reasons for her decision given by Atkinson J, the bare statement of a conclusion by the majority in the Court of Appeal is not persuasive. It may be that there was a concern that Atkinson J had been in some way overborne by the threats of criminal harm to the appellant; a concern perhaps reflected in the course of proceedings in the Court of Appeal. That, however, overlooks her concluding statement that she would have no compunction in sending the appellant to prison in the event of any re-offending during the period of suspension. Having regard to the appellant's previous history, including a history of involvement with drugs, that is no mere theoretical possibility. For a number of reasons, she is likely to be the subject of police attention. An assumption that, for her, a suspended sentence is the equivalent of no punishment at all would be quite unwarranted.

9 I would allow the appeal, set aside the orders of the Court of Appeal, and, in place of those orders, order that the appeal to that Court be dismissed.

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7 cf *Dinsdale v The Queen* (2000) 202 CLR 321 at 325-326 [6]-[7].

10 McHUGH J. This appeal presents the issue: whether, in sentencing a convicted person, a judge is entitled to take into account that, if the prisoner is imprisoned, there is a grave risk that fellow prisoners will kill the convicted person while he or she is in custody? If it is a relevant consideration, as I think it is, then the Queensland Court of Appeal erred in finding that the sentence that the trial judge imposed on the appellant in this case was manifestly inadequate.

Statement of the case

11 The appellant, Mrs Gloria Jeanette York, pleaded guilty in the Supreme Court of Queensland to one count of trafficking in a dangerous drug, two counts of possessing a dangerous drug and one count of possessing a dangerous drug in excess of 500 grams. The Crown accepted her guilty pleas on these counts in full discharge of the indictment, which also charged her with a number of counts of supplying dangerous drugs. The primary judge, Atkinson J, sentenced Mrs York to five years imprisonment, but wholly suspended that sentence for a period of five years. Her Honour said that: "[a]bsent any other factors I would have thought that a head sentence of 10 to 12 years would be the sentence that would be imposed for offending of this type."

12 Atkinson J held that other factors existed and that it was appropriate to discount this notional sentence by sixty percent. First, Mrs York had not re-offended since her arrest in April 2001. Second, and "more importantly", Mrs York had given the police and the Court assistance in prosecuting "a major drug dealer", Mr Lace, for "an execution style murder". Her Honour said:

> "[i]t is very unusual for someone in your position to give that level of assistance to the police and to the Court. Acting Detective Inspector Binney says that your assistance continued after Lace was charged, and at no time did you falter or waver despite the continuance of threats made against both you and family members."

13 Her Honour also took into account an affidavit from Mr Michael Bosscher, the appellant's solicitor. That affidavit detailed information that Mr Bosscher had been given by Mr Rob Wildin, a member of the Intelligence Unit in the Department of Corrective Services. The affidavit stated:

> "6. Mr Wildin informed me, and I verily believe, that the conclusions of the report [the intelligence assessment report] state that Gloria York will be at significant risk should she be detained in the Brisbane Women's Correctional Centre.
>
> 7. Mr Wildin further informed me, and I verily believe, that the report he has provided to his superiors contains the following information –
>
> (a) Mrs York has and will continue to be subject to threats;

(b) That the Department's assessment is that the threats are genuine;

(c) That they have had information in the past that Mr Lace has contacted female associates at the Brisbane Women's Correctional Centre with the intent that they inflict harm upon Gloria York should she be incarcerated at that location; and

(d) That it is believed Mr Lace will again endeavour to secure these arrangements with female associates in the Brisbane Women's Correctional Centre."

14 On this evidence, Atkinson J formed the "belief ... that if [the appellant] were to be imprisoned [she] would face the very real danger of being killed."

15 Atkinson J held "that a head sentence of four years would not adequately reflect the seriousness of the offences that [the appellant had] committed." Accordingly, the judge imposed a head sentence of five years. Then, the "further discount" was incorporated into an "ameliorating order made on that head sentence", which also took account of the appellant's "early plea of guilty" and the appellant's personal factors. For those reasons, Atkinson J held that:

> "[t]he strongest deterrence that I can think of is to impose five years' imprisonment upon you and to wholly suspend that for a period of five years."

16 Acting under s 669A(1)(a) of the *Criminal Code* (Q) ("the Code"), the Attorney-General appealed against the sentence on the ground that it was manifestly inadequate. On the hearing of that appeal, the Court of Appeal, acting under s 671B of the Code:

> "took the very unusual step of adjourning the hearing 'to give the appellant Attorney-General the opportunity of placing before the Court material from Corrective Services indicating the administrative arrangements that would be made if the Court determined that the respondent should serve an actual period in custody.'"

17 The Attorney-General then placed before the Court a letter from Mr Noel Taylor, the Acting Executive Director of Custodial Corrections, that stated:

> "In Ms York's case (if sentenced to imprisonment) such management processes that may be considered are the placement of the prisoner in a protection unit at the Brisbane Women's Correctional Centre or the accommodation of the prisoner at Townsville.
>
> ...

> If sentenced to a period of imprisonment the Department will develop a management plan for Ms York which will focus on her safety and security."

18 The majority of the Court of Appeal (Williams JA and Cullinane J) "formed the view that Taylor failed to appreciate the seriousness of the issue with which the court was concerned and about which it was seeking some assistance from him." The majority said:

> "[b]ecause of what has been learnt through trials associated with those murders [which have taken place within Queensland Correctional Centres in recent years] some judges of this court have very real concerns about the capacity of Corrective Services to deal with the kind of situation presented by the threats against the respondent. The failure of Taylor to address those issues has only heightened this court's concerns about those matters."

19 Despite these concerns, the majority (White J dissenting) came "to the conclusion that the offences committed by the respondent are so serious that, notwithstanding her co-operation with the authorities, her plea of guilty, and the threats directed at her by other criminals she should serve a term of actual imprisonment." The majority said:

> "Once this Court accepts that the risk to a criminal's safety whilst in prison was such that the otherwise appropriate penalty, namely imprisonment, ought not be imposed then the whole of the criminal justice system which operates in our society would be undermined. This court cannot bow to pressure from criminals. In our society imprisonment is the method of punishment primarily imposed for serious criminal offences. Judges must be able, however, to have confidence that those administering the prisons will ensure the physical safety of those persons placed in their responsibility."

20 The Court of Appeal upheld the Attorney's appeal on the ground that the sentence imposed at first instance was manifestly inadequate. It set aside the sentence that Atkinson J imposed and sentenced Mrs York to five years imprisonment to be suspended after serving two years with an operational period of five years.

<u>The safety of the prisoner is a relevant sentencing consideration</u>

21 With great respect, the Court of Appeal erred in finding that "the risk to a criminal's safety whilst in prison" was not a consideration that was relevant to whether "the otherwise appropriate penalty, namely imprisonment, ought not be imposed". In fixing an "appropriate penalty", a sentencing judge is entitled to take into account any matter that ensures that, to some extent, the fixing of the

sentence "discharge[s] the true function of the criminal law and the purposes of punishment"[8] in the instant case. The common law's conception of the "purposes of punishment" is settled. Sentences are imposed to further "the public interest"[9] – which may include the rehabilitation of the prisoner – and to enhance the liberty of society by ensuring "the protection of society"[10] from the risk of a convicted criminal re-offending[11] or others engaging in similar criminal activity[12].

22 The common law's conception of liberty is not limited to "liberty in a negative sense", that is, "the absence of interference by others"[13]. It extends to a conception of liberty in a "positive" sense, which is "exemplified by the condition of citizenship in a free society, a condition under which each is properly safeguarded by the law against the predations of others."[14] Thus, sentencing judges must impose sentences that are apt, not merely to prevent a convicted criminal from interfering with others, but also to enable the prisoner's rehabilitation so as to resume citizenship in the free society[15]. They must seek to ensure that each and every citizen, including a convicted criminal, "is properly safeguarded by the law against the predations of others."[16] That means that a sentencing judge must endeavour not only to protect society from the risk of a convicted criminal re-offending but also to protect the convicted criminal from the risk of other prisoners re-offending while in jail.

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8 *Leach* (1979) 1 A Crim R 320 at 327.

9 *Ball* (1951) 35 Cr App R 164 at 165.

10 *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Leach* (1979) 1 A Crim R 320 at 327; *R v Jackway; Ex parte Attorney-General* [1997] 2 Qd R 277.

11 *R v Morris* (1958) 76 WN (NSW) 40; *R v Radich* [1954] NZLR 86.

12 *R v McCowan* [1931] St R Qd 149; *R v Skeates* [1978] Qd R 85; *R v McGlynn* [1981] Qd R 526; *R v Radich* [1954] NZLR 86.

13 Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1990) at 55.

14 Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1990) at 57.

15 *Duncan v The Queen* (1983) 47 ALR 746; *Bell* (1981) 5 A Crim R 347 at 351-352.

16 Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1990) at 57.

23 The common law's equal concern for the physical safety of each citizen makes it appropriate for a sentencing judge to take into account the grave risk that a convicted criminal could be killed while in jail. What weight should be given to the risk of a prisoner being killed or injured will depend on all the circumstances of the case including the likelihood of its occurrence.

24 The Attorney-General's appeal was brought under s 669A(1) of the Code. That section provides that the Attorney-General may appeal to the Court of Appeal against any sentence pronounced by the court of trial or a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court. Section 669A(1) declares that "the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper." The section's declaration that the Court of Appeal has an unfettered discretion to vary the sentence indicates that the Court may allow an appeal for any reason that the Court thinks proper. In particular, it indicates that the Court of Appeal is not required to find error on the part of the trial court or the court of summary jurisdiction or that the sentence is "manifestly inadequate" before it interferes with a sentence imposed by those courts. This construction appears plain on the face of the section. But the history of s 669A(1) puts it beyond doubt.

25 Section 669A(1) was inserted in the Code in 1939. At that time it did not contain the term "unfettered". That was added in 1975 as the result of the decision of the Court of Criminal Appeal of Queensland in *R v Liekefett; Ex parte Attorney-General*[17]. In *Liekefett*, the Court of Criminal Appeal held[18] that an appeal by the Attorney-General under s 669A(1) was an appeal against a discretionary judgment and should be dealt with in accordance with the principles referred to in *House v The King*[19]. Two years later, the Queensland legislature amended the section by adding the term "unfettered" in front of the term "discretion". In the Second Reading Speech for the Bill introducing the amendment, the Minister said[20]:

> "The Bill is being amended to make it clear that the Court of Criminal Appeal has an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence. The private legal profession is opposed to this amendment.

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17 [1973] Qd R 355.

18 [1973] Qd R 355 at 366.

19 (1936) 55 CLR 499.

20 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1975 at 993.

> I do not propose to alter this amendment because it only makes clear what was always intended, and was in fact acted upon by the Court of Criminal Appeal for 30 years until 1973, when a court decision effectively changed the law to what was not intended."

26 In the light of the decision in *Liekefett*[21], the Second Reading Speech on the amending Bill and the words "unfettered discretion", I find it impossible to conclude that, in an appeal under s 669A(1), the Attorney-General must demonstrate error on the part of the trial court or the court of summary jurisdiction that satisfies the requirements laid down in *House v The King*. Yet in *R v Melano; Ex parte Attorney-General*[22], the Court of Appeal held that except "perhaps, in exceptional circumstances", the Attorney had to demonstrate error, in accordance with the principles laid down in *House v The King*, before an appeal under s 669A(1) could succeed. With great respect, this cannot be correct. It was because the Court of Criminal Appeal in *Liekefett* had held that the *House v The King* principles applied to s 669A(1) that the Legislature intervened to declare that the Court's discretion was not shackled by those principles.

27 The words "may ... vary the sentence" indicate that the Attorney-General's appeal is not by way of rehearing. But the term "unfettered" must mean that, subject to any statutory direction, the Court can interfere with the sentence for any reason that it thinks is sufficient, so long as the reason is not an arbitrary one. The discretion is to be exercised by a court and must be exercised judicially in accordance with the broad principles laid down by Lord Halsbury LC in *Sharp v Wakefield*[23]. This seems to have been the view of Macrossan J in *R v Osmond; Ex parte Attorney-General*[24] who thought that, "in the absence of good reason, to interfere with the decision below", the Court would not uphold an appeal under the section.

28 Nothing in this Court's decision in *Dinsdale v The Queen*[25] supports a contrary conclusion. The appeal provision considered in that case[26] empowered the Court of Criminal Appeal of Western Australia "if they think that a different sentence should have been passed" to quash the sentence "and pass such other

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21 [1973] Qd R 355.

22 [1995] 2 Qd R 186 at 189-190.

23 [1891] AC 173 at 179.

24 [1987] 1 Qd R 429 at 437.

25 (2000) 202 CLR 321.

26 Section 689(3) of the *Criminal Code* (WA).

sentence warranted in law". In *Dinsdale*, the Court held that, before exercising the power conferred, the Court of Criminal Appeal must find error on the part of the sentencing judge before setting aside the primary sentence. But the statutory provision considered in *Dinsdale* did not contain the term "unfettered". Nor did it have the legislative and judicial history that s 669A has had. In my view, *Dinsdale* provides no assistance in construing s 669A(1).

29 However, counsel for the Crown expressly accepted in the Court of Appeal and in this Court that the Attorney-General's appeal against the sentence imposed by Atkinson J could not succeed unless he established error in accordance with the principles laid down in *House v The King*. But, so counsel argued, the Court of Appeal correctly set aside the sentence of Atkinson J because the sentence was manifestly inadequate, a ground that constitutes error for the purpose of the *House v The King* principles. Given the findings of fact made by Atkinson J, the sentence that she imposed could not be said to be manifestly inadequate. It could not be manifestly inadequate if the likelihood of injury to the prisoner was a relevant consideration. Nonetheless, despite the concession by counsel for the Crown that he had to establish *House v The King* error, I would not have favoured allowing the appeal had I not concluded that the Court of Appeal itself had made an error of principle. Absent error, the unfettered discretion of the Court of Appeal is so wide that a sufficient ground for varying the sentence is that the Court thinks it is inadequate.

30 However, the Court of Appeal allowed the appeal because:

> "We are conscious of the fact that the learned sentencing judge and Justice White, both experienced judges, have concluded that the risk to the respondent's safety in prison is so great that the court ought not impose the two to two and a half years imprisonment we have referred to above. Not without grave hesitation we have come to the conclusion that it would be wrong for this court to so conclude. Once this court accepts that the risk to a criminal's safety whilst in prison was such that the otherwise appropriate penalty, namely imprisonment, ought not be imposed then the whole of the criminal justice system which operates in our society would be undermined. This court cannot bow to pressure from criminals."

31 As this passage shows, the Court of Appeal concluded that to take into account the threat to the safety of Mrs York would be "bow[ing] to pressure from criminals". To characterise the reasoning of the sentencing judge in this way was an error that has the result that the orders of the Court of Appeal cannot stand. The safety of Mrs York in prison was a matter that Atkinson J was entitled to take into account in determining what the sentence should be and whether it should be suspended. The fact that the threat to her safety arises from the activities of a criminal did not require the judge to disregard the threat. The duty of sentencing judges is to ensure, so far as they can, that they do not impose sentences that will bring about the death of or injury to the person sentenced.

32 Where a threat exists – as it often does in the case of informers and sex offenders – recommendations that the sentence be served in protective custody will usually discharge the judge's duty. Here the learned sentencing judge concluded on persuasive evidence that no part of the Queensland prison system could be made safe for Mrs York. That created a dilemma for the sentencing judge. She had to balance the safety of Mrs York against the powerful indicators that her crimes required a custodial sentence. In wholly suspending Mrs York's sentence, Atkinson J appropriately balanced the relevant, even if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her from the risk of her fellow inmates committing serious offences against her on the other side. In suspending the sentence, the learned judge made no error of principle. Nor was the suspended sentence manifestly inadequate.

33 The "unfettered" discretion of the Court of Appeal, therefore, miscarried. Ordinarily, that would require the matter to be remitted to the Court of Appeal to reconsider the matter. But given that the parties have conducted the case on the basis that the Attorney-General had to show a *House v The King* error on the part of the sentencing judge, the appropriate order is to allow the appeal and restore the orders of the sentencing judge. The Attorney-General has failed to demonstrate an error of that type and the Attorney should not be permitted now to conduct an appeal on the basis of what I think is the correct construction of s 669A(1). Since the conferral on the Crown of rights of appeal against sentences, appellate courts have been much influenced in their approach to such appeals by the principle of double jeopardy[27]. The sentence imposed on Mrs York was put in jeopardy by the appeal to the Court of Appeal. It should not be put in jeopardy once again by allowing the Attorney to conduct a further appeal on a basis that the Attorney has hitherto disclaimed.

Order

34 The appeal should be allowed.

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27 *Malvaso v The Queen* (1989) 168 CLR 227 at 233-234; *Everett v The Queen* (1994) 181 CLR 295 at 305; *R v Jermyn* (1985) 2 NSWLR 194 at 204; *Western Australia v Miller* (2005) 30 WAR 38 at 41-42 [12]; *Attorney-General (Tas) v McDonald* (2002) 11 Tas R 221 at 227 [19].

35 HAYNE J. This appeal was argued by both sides on the footing that the principles governing appellate intervention by the Court of Appeal of Queensland under s 669A(1) of the *Criminal Code* (Q) were as stated in *House v The King*[28] and *Dinsdale v The Queen*[29]. Whether the reference in that section, not found in the equivalent legislation of other jurisdictions, to "unfettered discretion" may permit or require some modification of those principles in appeals brought under s 669A(1) is not a question that was argued. I express no view about the question.

36 The only question for the Court of Appeal raised by the sole ground of appeal to that Court was whether the sentence passed by the primary judge was manifestly inadequate. Yet it would appear from the reasons of the Court of Appeal that arguments were advanced alleging identifiable error in the primary judge's reasons. Thus the majority of the Court of Appeal (Williams JA and Cullinane J) concluded[30] that the primary judge erred in not considering "as a separate issue" whether there was proper ground for not imposing the sentence otherwise determined to be appropriate "because of the risk to the [appellant's] safety whilst in prison". It appears, however, that this error was not treated by the majority as sufficient reason to reopen the sentencing discretion. Rather, the determinative question was treated as being that raised by the Notice of Appeal: was the sentence passed manifestly inadequate? On this issue the majority concluded[31] "[n]ot without serious hesitation", that the offences committed by the appellant were so serious that "notwithstanding her co-operation with the authorities, her plea of guilty, and the threats directed at her by other criminals she should serve a term of actual imprisonment".

37 As is recorded in the reasons of other members of this Court, the Court of Appeal received evidence about what could be or would be done to lessen or eliminate the risk of harm to the appellant were she to be imprisoned. Execution of sentences of imprisonment passed by the courts, and caring for prisoners under sentence, are tasks committed to the executive arm of government and regulated, for the most part, by legislation. For the reasons given by Gleeson CJ, any attempt to measure the extent of the risk of harm to the appellant in prison was an attempt that was bound to fail. And in the present matter, it was not argued in the Court of Appeal, or on appeal to this Court, that the primary judge's qualitative description of that risk as "very high" was wrong. In these circumstances the inquiries made by the Court of Appeal about what could be done to eliminate or

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28 (1936) 55 CLR 499.

29 (2000) 202 CLR 321 at 324-325 [3], 329 [21]-[22], 339 [57]-[58].

30 *R v York; Ex parte Attorney-General of Queensland* [2004] QCA 361 at [11].

31 [2004] QCA 361 at [24].

reduce the risks the appellant faced in prison were irrelevant to, and a distraction from, the only issue that was raised by the Notice of Appeal in that Court: was the sentence passed manifestly inadequate?

38 That the appellant faced a real risk of serious harm in prison was not a consideration irrelevant to deciding what sentence should be imposed upon her. The effect of serving a term of imprisonment, and the conditions under which an offender would serve that sentence, are relevant matters that may be taken into account by a sentencing judge – at least when that effect and those conditions are shown to be different from, and more onerous than, the effect on and conditions undergone by other prisoners[32]. And in this case, it was well open to the primary judge to conclude that the "very high" risk of physical harm to the offender in prison would not only affect the conditions under which she would serve a sentence but also be likely to lead to radically different consequences for the appellant from the consequences of imprisonment for other prisoners. The Court of Appeal's inquiries about the risks which the appellant faced served only to reinforce those conclusions, leading the majority of that Court to say that the relevant department of the executive "was not in a position to demonstrate … that it has the capacity to deal adequately with problems highlighted by this case"[33].

39 As noted earlier the majority of the Court of Appeal treated the question of risk of harm to the appellant as a matter relevant to sentence but as a matter to be considered only after first deciding what was otherwise a proper sentence to be imposed. This approach is erroneous. In the present matter, it caused the majority of the Court of Appeal to frame the relevant question[34] as whether the Court should "bow to pressure from criminals". To that question only one answer can be given. But because their Honours approached the issue in the appeal in this way, their Honours first identified the "appropriate penalty" as being a term of actual imprisonment *without* having considered the effect of imprisonment on the appellant and the conditions under which the appellant would serve that term, and then decided whether those conditions constituted reason enough *not* to pass that sentence. That was not the issue presented for the Court's decision. That issue was, as pointed out earlier, only whether the sentence was manifestly inadequate, having regard to *all* of the matters that were properly to be taken into account in sentencing the appellant, including the effects on the appellant of imposing a custodial term and the conditions under which she would serve any term of imprisonment.

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32 *R v Perez-Vargas* (1986) 8 NSWLR 559 at 565 per Street CJ; *R v Rostom* [1996] 2 VR 97 at 100, 102 per Charles JA; *Laws (No 2)* (2000) 116 A Crim R 70 at 78 per Wood CJ at CL; *R v ZMN* (2002) 4 VR 537.

33 [2004] QCA 361 at [22].

34 [2004] QCA 361 at [21].

40 This Court has expressed reluctance to grant special leave to appeal against sentencing decisions[35]. One of the chief reasons given for that course is that it recognises the advantages which Courts of Appeal in the States have because of their knowledge of local conditions and local sentencing practices[36]. Those conditions and practices are important elements in deciding what is or is not a proper sentence. Ordinarily this would suggest that this Court should not interfere with the decision reached in the Court of Appeal about the adequacy of a sentence. In the present matter, however, the Court of Appeal was divided in opinion about the adequacy of the sentence passed at first instance. The majority having erred in the manner described earlier, I am not persuaded that it was shown that the sentence passed by the primary judge was manifestly inadequate and the appeal to the Court of Appeal should have been dismissed. It follows that the appeal to this Court should be allowed and consequential orders made in the form proposed by Gleeson CJ.

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35 *Colefax v The Queen* [1962] ALR 399; *Veen v The Queen* (1979) 143 CLR 458 at 461 per Stephen J, 467 per Mason J, 497 per Aickin J; *Neal v The Queen* (1982) 149 CLR 305 at 309 per Gibbs CJ, 323 per Brennan J; *Lowe v The Queen* (1984) 154 CLR 606 at 608-609 per Gibbs CJ, 611 per Mason J, 620 per Brennan J, 621-622 per Dawson J; *Radenkovic v The Queen* (1990) 170 CLR 623 at 634-635 per Mason CJ and McHugh J, 640 per Dawson J, 646 per Toohey and Gaudron JJ. See also *Postiglione v The Queen* (1997) 189 CLR 295 at 337 per Kirby J; *Ryan v The Queen* (2001) 206 CLR 267 at 294 [89] per Kirby J.

36 *Neal* (1982) 149 CLR 305 at 309 per Gibbs CJ, 323 per Brennan J; *Veen* (1979) 143 CLR 458 at 497 per Aickin J.

CALLINAN AND HEYDON JJ.

Issue

41 The question in this case is whether the Court of Appeal of Queensland should have interfered with the exercise of a sentencing judge's discretion to suspend wholly a serious offender's term of imprisonment because of a grave risk of harm to the offender were she to be imprisoned.

Facts

42 On 11 April 2003, the appellant pleaded guilty to one count of trafficking in a dangerous drug, two counts of unlawful possession, and one count of unlawful possession of a dangerous drug in excess of 500 grams. The pleas were accepted in satisfaction of these and some other offences with which she had been charged. She came before the Supreme Court of Queensland (Atkinson J) for sentencing on 18 June 2004.

43 At the sentencing hearing, the respondent adduced evidence of the assistance she had given to the respondent in the ultimately successful prosecution of a murderer. The killing had been effected as if it were an execution. An Acting Detective Inspector deposed to the appellant's unwavering assistance during the course of the committal, the trial and a re-trial of the offender in the face of serious and alarming threats to her own and her family's safety. The detail of the evidence of the threats is summarized later in this judgment.

44 There was other, uncontradicted evidence on behalf of the appellant. Mr Bosscher, her solicitor, swore that he was informed by an officer in the Intelligence Unit within the Department of Corrective Services, Mr Wildin, that the appellant's life would be endangered if she were to be imprisoned in the Brisbane Women's Correctional Centre. The solicitor had also been informed by Mr Wildin that the latter had reported to his superiors that the appellant had been, and would continue to be subject to threats assessed as genuine by the Department, including that the convicted murderer had contacted the appellant, and would again try to arrange with female associates at the prison for the appellant to be harmed. Mr Wildin had added that any person who associated with the appellant at the prison would also be at risk from inmates there. Finally, Mr Wildin had informed Mr Bosscher that he should suggest to counsel for the appellant that he ask the sentencing judge to make the strongest possible recommendation that the appellant serve any term of imprisonment that might be imposed upon her in a northern correctional institution, preferably in Townsville. Not only did the respondent make no effort to contradict any of this evidence, but also it offered no argument that it was irrelevant or exaggerated.

45 The sentencing judge (Atkinson J) accepted that the offences would ordinarily attract a long sentence of imprisonment. Her Honour referred to the appellant's serious criminal history. The offences, she noted, were committed in the course of the conduct of a well-organized criminal business. There was an additional aggravating factor to which she had regard, that the appellant was convicted while she was on bail on another charge.

46 The sentencing judge was of the view that a head sentence of 10 to 12 years was appropriate, a view that came to be approved by all of the judges on appeal.

47 The sentencing judge said however that the appellant's conduct in assisting the respondent in the investigation and conviction of the murderer displayed great courage; the level of assistance provided by the appellant to the police and to the criminal court was very unusual, she said, for someone in the appellant's position. There is no doubt that what the appellant did made a significant contribution towards bringing the murderer against whom she testified to justice.

48 The sentencing judge's conclusion on the central factual matter, of the appropriate penalty, incarceration or otherwise, was that if the appellant were to be imprisoned, she would face a very real danger of being killed. Indeed, in the face of the evidence and its sources, which were not contradicted, she could hardly have held otherwise: she was bound therefore to take into account the very real risk of retributive violence against the appellant in prison. She also took into account the appellant's early plea of guilty.

49 The sentencing judge considered whether there should be a discount from the head sentence: a discount of 60 per cent would, she thought, be too much. The seriousness of the offences required, and she therefore imposed, a head sentence of five years.

50 Her Honour then wholly suspended the term of imprisonment for its operational period of five years.

The Court of Appeal

51 The respondent successfully appealed to the Court of Appeal (Williams JA and Cullinane J, White J dissenting). It was recognized by all of their Honours that the evidence before the sentencing judge that the appellant would be at considerable risk while in custody, was clear and unchallenged. The majority pointed out that there had however been no evidence before the sentencing judge to support Mr Wildin's assertion that the risk to the appellant would be slighter if she were to be imprisoned in Townsville. The Court was concerned as to the absence of evidence on this and other matters from the

respondent and adjourned the appeal to give the Attorney-General an opportunity of assembling and placing material before the Court[37] from the Department of Corrective Services setting out the administrative arrangements that would be undertaken if the Court were to determine that the appellant should spend time in prison. This course was adopted despite objection by the appellant.

52 Some material was then filed by the respondent. It consisted of a letter described as a report, written by the Acting Executive Director of Custodial Corrections, Mr Taylor supplemented by oral evidence that he was called to give. Williams JA and Cullinane J described the report as trite, and said, accurately, that Mr Taylor had not addressed the real issue at all, that his failure even to have read Mr Wildin's report showed scant regard for the very important issues raised by the Court, and that he had failed to appreciate the seriousness of the issue. White J denounced Mr Taylor's evidence as a failure, and a deliberate exercise in

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37 See s 671B of the *Criminal Code* (Q) which relevantly provides:

"**671B**(1) The Court may, if it thinks it necessary or expedient in the interests of justice –

(a) order the production of any document, exhibit, or other thing connected with the proceedings; and

(b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the Court, or before any officer of the Court, or justice, or other person appointed by the Court for the purpose, and admit any depositions so taken as evidence; and

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness; and

...

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the Court.

(2) However, in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

..."

non-responsiveness. The majority concluded that his evidence really came down to the proposition that the appellant would probably be sent to the Townsville Women's Prison. The problem about that is that it is a mainstream women's prison without a protective custody section.

53 We record at this point our concurrence with the criticisms made by the judges of the Court of Appeal. Indeed even stronger criticism might not be inappropriate. The report made no real effort to meet the concerns of the Court. The best that the Department was disposed to offer was the "[development of] a management plan [to] focus on her safety and security." It also emerged in cross-examination, that Mr Taylor had not even troubled to consult Mr Wildin before writing his report and giving evidence.

54 Although they expressed serious misgivings about the attitude of the Department of Corrective Services, and said that they had grave concerns for the appellant's safety, the majority decided to uphold the respondent's appeal. In doing so, they said this[38]:

> "Looked at objectively in the light of the criminality of the [appellant's] offending, her criminal history, her co-operation with the authorities with respect to Lace, and the plea of guilty we are of the view that the [appellant] ought to have been sentenced to a term of imprisonment in the range of two to two and a half years."

55 The particular matters that weighed with the majority are set out in this passage from the joint judgment[39]:

> "We are conscious of the fact that the learned sentencing judge and Justice White, both experienced judges, have concluded that the risk to the [appellant's] safety in prison is so great that the court ought not impose the two to two and a half years imprisonment we have referred to above. Not without grave hesitation we have come to the conclusion that it would be wrong for this court to so conclude. Once this court accepts that the risk to a criminal's safety whilst in prison was such that the otherwise appropriate penalty, namely imprisonment, ought not be imposed then the whole of the criminal justice system which operates in our society would be undermined. This court cannot bow to pressure from criminals. In our society imprisonment is the method of punishment primarily imposed for serious criminal offences. Judges must be able, however, to have

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38 *R v York; Ex parte Attorney-General (Q)* [2004] QCA 361 at [6].

39 [2004] QCA 361 at [21].

confidence that those administering the prisons will ensure the physical safety of those persons placed in their responsibility."

56 White J expressed her different conclusion in the following way[40]:

"What then should the court do in light of the further material provided by the Department of Corrective Services? In my view the Attorney-General has failed to adduce evidence or sufficient evidence to contradict that which was before her Honour. This, it cannot be emphasised too strongly, is far from concluding that the Department is unable to keep the [appellant] safe from the harm to which the material clearly shows she is exposed. The Department has chosen not to be responsive to the uncontested detailed evidence of risk contained in its own Intelligence Unit report in a way which would permit this court to decide if the [appellant] ought, in balancing all of the factors, serve some actual period in prison. Any concerns about revealing security programmes or the like could have been accommodated by sealing the evidence. Had I been satisfied on the further evidence which the Attorney-General had an opportunity to adduce of an appropriate plan for the [appellant] I may well have allowed the appeal and ordered that the sentence of five years be suspended after serving two years. But this has not occurred."

The appeal to this Court

57 The appellant appeals to this Court, contending that there was no, or no sufficient basis for the interference by the Court of Appeal with the exercise of the sentencing judge's discretion.

58 The respondent's appeal to the Court of Appeal was governed by s 669A(1) of the *Criminal Code* (Q) ("the Code") which provides:

"**669A**(1) The Attorney-General may appeal to the Court against any sentence pronounced by –

(a) the court of trial;

(b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court,

and the court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

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40 [2004] QCA 361 at [62].

"Court of trial" includes a sentencing court (s 668). Section 669A(1) in its present form replaced the earlier s 669A which was introduced in 1939, and which was in similar terms to the current section except for the important addition of the word "unfettered" before the word "discretion".

59 It is convenient to deal first with the proposition that undue significance was given to the risks the appellant potentially faced if imprisoned, because they were, and would remain as great if she were at large. In this regard reliance was placed by the respondent on some matters advanced by the appellant's counsel at the sentencing hearing. After the murderer's committal in December 1999, the appellant was visited at her residence by a masked and armed male former prison inmate. The intruder told the appellant that if she testified she would be shot. The man was in possession of a transcript of the appellant's evidence. After the appellant testified at the first trial of the murderer further threats were made, and, after his appeal on 27 June 2001, another former inmate of the prison where he was being held, visited the appellant and reiterated the threats. Despite them, the appellant continued to refuse witness protection. As late as August 2003, she was advised by police that their information was that "a contract [had been] put out on her". During June 2004, the appellant was living on a property in northern Queensland. The malice of the threats provides not only a measure of the risk to the appellant, but also of the importance of the assistance that she rendered to the respondent.

60 The respondent drew attention to *Dinsdale v The Queen*[41]. The statutory language, of s 689(3) of the *Criminal Code* (WA)[42] under consideration there, is different from s 669A(1) of the Code, but in substance is to much the same effect, because it obliges the Court of Criminal Appeal of Western Australia, if it think a different sentence should have been passed, to pass it.

61 We would have been inclined to give "unfettered" in s 669A(1) of the Code its ordinary meaning, that is, fully unrestricted. Such a reading is, we

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41 (2000) 202 CLR 321.

42 Section 689(3) of the *Criminal Code* (WA) provides:

> "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict or which may lawfully be passed for the offence of which the appellant or an accused person stands convicted (whether more or less severe) in substitution therefor as they think ought to have been passed and in any other case shall dismiss the appeal."

think, consistent with the second reading speech for the Bill introducing this section into the Code[43]:

> "The Bill is being amended to make it clear that the Court of Criminal Appeal has an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence. The private legal profession is opposed to this amendment. I do not propose to alter this amendment because it only makes clear what was always intended, and was in fact acted upon by the Court of Criminal Appeal for 30 years until 1973, when a court decision effectively changed the law to what was not intended."

62 The decision referred to in the speech was *R v Liekefett; Ex parte Attorney-General (Q)*[44] in which the Court of Criminal Appeal of Queensland (Hart, Matthews and Kneipp JJ) said[45]:

> "In the result we have concluded that there is no decision which binds us to any particular view as to the circumstances in which the discretion reposed in this Court by s 669A should be exercised. We think that the most satisfactory approach in an appeal by the Attorney-General is that which the High Court said should be adopted in an appeal by a convicted person in the passage we have cited from *House v The King*[46]. So to hold, is in accordance with the views expressed by Isaacs J in *Whittaker v The King*[47], and by the Court of Criminal Appeal of New South Wales in *Reg v Cuthbert*[48]. Both appeals are from the exercise of a discretion and there is no reason why the same principle should not apply."

63 Despite the ample, explicitly unfettered discretion that the Code appears to confer, this appeal falls to be resolved upon the basis that error in the exercise of the sentencing judge's discretion must be demonstrated before an appellate court

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43 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1975 at 993.

44 [1973] Qd R 355.

45 [1973] Qd R 355 at 366.

46 (1936) 55 CLR 499.

47 (1928) 41 CLR 230 at 250.

48 [1967] 2 NSWR 329.

can intervene to alter the sentence imposed at first instance, for these reasons. First, *Dinsdale* so holds. The holding that was made there was made under legislation relevantly indistinguishable, and was that error of the kind referred to in *House v The King*[49] must still be shown to justify appellate intervention. Queensland appellate authority[50] directly on point is to a similar effect. The respondent in this appeal offers no argument to the contrary. Indeed the respondent expressly accepted in the Court of Appeal, and on this appeal, that such an onus lay upon it. The appellant has not therefore ever had to conduct her case and this appeal upon any other basis. It would be unjust for her to be required to deal with them upon any different basis now. These reasons are compelling, and relieve us of any necessity to consider the other submissions of the parties[51].

64 It was not suggested that the sentencing judge failed to apply or misapplied the sentencing guidelines prescribed by s 9 of the *Penalties and Sentences Act* 1992 (Q), or that, for example, the matters she took into account were not "relevant circumstance[s]" within sub-s (2)(q) thereof.

65 It is accordingly necessary to approach the appeal on this basis, as both parties accept, that the respondent was bound to show in the Court of Appeal appellable discretionary error on the part of the sentencing judge. The error, the respondent submitted, was that the sentence was manifestly inadequate: anything less, as the sentence at first instance was, than two and a half years of actual imprisonment, would be, as the Court of Appeal held, manifestly inadequate. The appellant's submission is of course that no discretionary error on the part of the sentencing judge has been established, either in the Court of Appeal or here.

66 There is no doubt that a gross, indeed even perhaps a marked deficiency or excess in a sentence, may constitute a manifest error in the sentence: that error has been made appears sufficiently from the fact of the deficiency or the excess. But we do not think that this can, without important qualification, be said to be so of this case.

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49 (1936) 55 CLR 499.

50 *R v Osmond; Ex parte Attorney-General (Q)* [1987] 1 Qd R 429.

51 For example, the effect of the constraints imposed by the *Penalties and Sentences Act* 1992 (Q) s 9; the principle that courts should impose sentences at the lower end of the scale in appeals by the prosecution; and error on the part of the prosecution is ordinarily not to be used or held against an accused in a prosecution appeal.

67 The majority having concluded that the appellant's destination, if they were to substitute a custodial sentence, was in all likelihood a prison without a protective custody section, and not having reached any different factual conclusion as to the risks to the appellant from that of the sentencing judge, were not, in our opinion, bound, as they thought they were, to substitute a custodial sentence on this basis[52]:

> "Once [the] court accepts that the risk to a criminal's safety whilst in prison was such that the otherwise appropriate penalty, namely imprisonment, ought not be imposed then the whole of the criminal justice system which operates in our society would be undermined. ... Judges *must* be able, however, to have confidence that those administering the prisons will ensure the physical safety of those persons placed in their responsibility."

68 This is not to identify sentencing error on the part of the trial judge, but to express a hope that the facts will turn out to be different from the uncontradicted, plausible and therefore compelling evidence as to them which was accepted and relied on by the trial judge. This is so even if "must" were intended in the passage quoted, to mean "should". If the responsible authorities choose not to, or are unable to respond to the risks proved in a case, courts can and will be left with the impression, as the sentencing judge was here, that those authorities are indifferent to, or insufficiently concerned for the physical safety of incarcerated persons. The imposition of a sentence of a shorter duration, because of the risks to the appellant's safety, than would otherwise be imposed, can do nothing to meet or reduce those risks except the period of exposure to them. The unusually strong and uncontradicted evidence in this case made it a special one. In those circumstances there was no sufficient basis for interference with the primary judge's sentencing discretion.

69 We would allow the appeal, set aside the orders of the Court of Appeal, and order that the sentence and orders of the primary judge be restored.

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52 [2004] QCA 361 at [21] (emphasis added).