**[2018] QCA 288**

**COURT OF APPEAL**

**MORRISON JA**
**PHILIPPIDES JA**
**DAVIS J**

**CA No 237 of 2018**
**DC No 396 of 2014**

**THE QUEEN**

**v**

**MORRISON, Paul Joseph** **Applicant**

**BRISBANE**

**WEDNESDAY, 24 OCTOBER 2018**

**JUDGMENT**

**MORRISON JA:** I'll ask Justice Davis to commence reasons first.

**DAVIS J:** The applicant seeks leave to appeal sentences imposed upon him in the District Court at Ipswich on 7 September 2018.

Earlier, on 3 April 2018, the appellant had pleaded guilty to a total of nine counts of offences of dishonesty. Counts 1 to 8 were offences of making false declarations against s 194(1) of the *Criminal Code*. Section 194 carries a maximum penalty of three years imprisonment. Count 9 was an offence of fraud against s 408C of the *Code* with a circumstance of aggravation, namely that the yield from the dishonesty was a value of $30,000 or more. That offence carries a maximum penalty of 14 years imprisonment.

On each of counts 1 to 8 the applicant was sentenced to a term of imprisonment of 12 months. On count 9 he was sentenced to a term of imprisonment of three years. All sentences were ordered to be served concurrently. All sentences were suspended after the applicant had served six months imprisonment. All sentences were made subject to an operational period of three years. An order for restitution was made in the sum of $71,448.25.

The sole ground of appeal in the notice of appeal is that the sentences are manifestly excessive. However, in her submissions for the applicant, Ms Bain of counsel submits that a particular error in the approach of the learned sentencing judge can be identified which has, she submits, then resulted in the sentence being manifestly excessive. Put shortly, Ms Bain submits that the learned judge has misunderstood the significance of the applicant's prior criminal history which has led his Honour then to a conclusion that a wholly suspended sentence was not appropriate. She submits that consideration by his Honour of the prior history has improperly overtaken the special circumstances of the case which she identifies and which she submits would justify a sentence involving no actual custody.

Ms Bain makes no complaint about the effective head sentence of three years imprisonment which his Honour imposed, but submits that in the special circumstances of this case the sentence should be suspended now. That would result in the applicant having served about six weeks in prison.

The offences arise from the mass flooding experienced in Queensland in January of 2011. Major damage was suffered in areas of the Lockyer Valley. A Commonwealth fund known as the National Disaster Relief and Recovery Fund became involved and the Lockyer Valley Regional Council was tasked with distributing money from that fund to finance clean-up and repairs.

The Council called for tenders and accepted a tender made by KTM Alliance. The applicant became the project manager of KTM on 19 February 2011. Over the period of the time of the offending the applicant was bankrupt, but seemed to be a director of a company, Agstock Rural Pty Ltd. That company had a bank account which was controlled by the applicant.

By the arrangements between KTM and the Council, the Council would distribute the money to KTM, some of which was to pass to subcontractors of KTM who were doing the work. Other money was to be retained by KTM to meet some of its internal costs, including wages. The applicant was paid a wage by KTM.

Under the terms of the agreement with the Council, KTM was required to pay its subcontractors before recovering money from the Council. The Council would only pay KTM upon receipt of a statutory declaration swearing to payment of nominated subcontractors in nominated sums.

The applicant made eight false declarations where he swore that particular subcontractors had been paid particular sums by KTM. Each of counts 1 to 8 charged the making of one of those declarations. On the basis of those eight statutory declarations, KTM claimed money from the Council. The Council, in reliance upon the false declarations, paid money to KTM and that is the substance of count 9. The money was paid to the Agstock account.

The total amount claimed in the invoice is the subject of counts 1 to 8 was $107,988.50. $36,540.20.25 was subsequently paid by KTM to its subcontractors. Subcontractors were left unpaid in the amount of $71,448.25 which is the restitution sum which has been ordered.

The fate of the missing money is not clear. It seems, though, that the money went to the benefit of KTM. The Crown though do not allege that the applicant benefited personally.

In an agreed statement of facts tendered before the learned sentencing judge, this was said:

> "The Crown does not dispute that the defendant had intended to pay the persons owed, and proceeds on the basis that dishonest act of misrepresenting the documents to the council was an ill-conceived attempt to keep the Alliance's work moving forward in difficult and often chaotic circumstances."

While that should be accepted, the applicant, by his plea to counts 1 to 8, has accepted that the declarations he swore were knowingly false and, by his plea to count 9, has accepted that he obtained the money dishonestly.

The applicant was born on 31 March 1972. Counts 1 and 2 were committed the day before his 39th birthday. Count 8 was committed on the 4th of May 2011 and constitutes the last of the offending. He has always been self-employed. He has worked in the gas industry, the earthmoving industry and has been involved with the construction and infrastructure and roadworks.

In July 2015 he purchased a truck and has built a transport business which now involves a fleet of 64 trucks and a significant number of staff. The applicant has suffered a number of health issues including a work accident where his foot was crushed and bowel operations during one of which a tumour was removed. He has ongoing bowel problems. He has also had benign tumours in his wrist removed and has ongoing difficulties with his wrist.

It was submitted on the applicant's behalf and without challenge by the Crown that he had worked hard in the flood clean-up and contributed labour and equipment for which he was not remunerated.

A number of references were tendered which attest to his good character and his work ethic. They also evidence the fact that the applicant has contributed to the local community, not only through his work in the aftermath of the 2011 floods, but also through his involvement with the rural fire brigade and other community works.

The pleas of guilty were entered in April, some six months before the sentence. There had been a pre-trial hearing on 18 September 2017. The matter had previously been listed for trial. The learned sentencing judge accepted that at least some of the delay had been caused through the applicant making legitimate enquiries into the quantum and detail of the sums paid unpaid to subcontractors.

Ultimately, his Honour found that the pleas of guilty could not be said to be early, but the applicant had assisted in the administration of justice and the steps that were taken by the applicant were of utility in eventually resolving the case and avoiding a trial. His Honour took the plea into account on that basis and no complaint is made by Ms Bain on his behalf as to his Honour's approach in that respect.

The applicant has a prior criminal history in Queensland and in the Northern Territory and has also committed an offence against a law of the Commonwealth.

The Northern Territory criminal history pre-dates the Queensland history. In October 1994, the applicant was convicted of obtaining credit or property by deception and other related offences of dishonesty. Some of the sentences were made cumulative on others and it is difficult from the record to discern the overall result. It seems though that the applicant served at least three months imprisonment.

The applicant's first criminal conviction in Queensland was for an offence of dishonesty in the Roma Magistrates Court on 24 September 1996. That was an offence of imposition. On 29 November 1996 he was convicted in the Toowoomba District Court of offences of forging, uttering and misappropriation and was ordered to perform 240 hours of community service. On 28 April 1997 he was convicted in the Dalby Magistrates Court of two counts of stealing and was fined. On 13 January 2000 in the Toowoomba Magistrates Court he was placed on three years probation for a number of offences of passing valueless cheques.

Significantly, on 9 January 2013 the applicant was sentenced to an effective head sentence of six years with an eligibility for parole after serving 27 months. Those offences included passing valueless cheques, unlawful possession of a motor vehicle and fraud with a circumstance of aggravation. Most of the offences occurred while the applicant was on probation. The fraud offences concerned earthmoving equipment. The applicant obtained possession of earthmoving equipment, namely excavators, which were the subject of hire purchase agreements. He gave them what was described by the sentencing judge as a "new identity", presumably by changing the chassis and engine numbers, and then disposed of them, causing a loss of $245,113.26.

On 1 August 2003, the applicant was sentenced for further fraud charges in the Toowoomba District Court. Those offences occurred prior to the offences dealt with in January 2003. Terms of imprisonment were imposed, but were ordered to be served concurrently with the

earlier sentences. Perhaps unsurprisingly, the probation order which had been imposed on 13 January 2000 was revoked in the Toowoomba Magistrates Court on 1 August 2003.

The present offending occurred in 2011. In October 2012, the applicant was again convicted in the Southport Magistrates Court for passing valueless cheques to an amount of $4,215. That offending occurred in December 2009, so before the current offences but after the applicant was released from prison as a result of the sentences imposed in January 2003. The Commonwealth offence is one of failing to file a statement of affairs under the *Bankruptcy Act* 1996 (Cth). That offending occurred in March 2010 and resulted in a fine.

The learned sentencing judge here in the District Court identified all the relevant mitigating circumstances. His Honour also referred to the relevant aggravating circumstances and considered the comparatives that had been provided to him. His Honour was faced with imposing a sentence for a significant fraud involving over $70,000, one which did not involve personal gain but was committed by a person with a significant prior criminal history.

Ms Bain submits that error can be identified from the following passage of the sentencing remarks, namely:

> "The offending here should be regarded less seriously because of your lack of motive of financial gain. Your criminal history, though, does have relevance. I am not to punish you afresh for offences or crimes you committed, now, years ago. The relevance of your history is that it cannot be said you are a person of good character and you are not deserving of the allowance that is usually made in that respect.
>
> The result is that your criminal past is relevant to whether, and to what extent, allowance should be made for the many other matters that are in your favour. But for your criminal record, it may have been open, in light of the matters in your favour, to wholly suspend the sentences, as occurred in the cases of *Schwerin*, *Driscoll*, *Tully*, *McCahill* and *Butner*, to which I have been referred.
>
> The allowance that can be made for you is lessened by reason of your history. I still must sentence you for deliberate dishonesty, which resulted in the council paying out a significant sum of money, or sums of money. The matters in your favour and which do mitigate the penalty include your pleas of guilty and the savings for the community, your evident remorse, your lack of financial motive, that you have offered full restitution, your health problems, and that the sentence of imprisonment will be more onerous for you, the extent of your rehabilitation and

> charitable conduct, that you are now married with a child and support your family as well as an older child of your ex-partner, that you have responsibilities in business and that you are well-regarded in the community.
>
> I have concluded that notwithstanding these matters, a period of actual imprisonment is necessary for this deliberate dishonesty. A sentence of imprisonment is necessary to register the community's disapproval of this dishonest conduct and hopefully to act as a deterrent to others not to engage in this conduct themselves. In addition, the sentence should act as a personal deterrent to you."

Ms Bain submits that the comment that the wholly suspended sentence was not "open" because of the applicant's criminal history is inconsistent with the correct statement of principle made by his Honour that the court was "not to punish [the applicant] afresh for offences or crimes you committed, now, years ago."

In *R v CBG* [2013] QCA 44, Atkinson J, with whom White and Gotterson JJA agreed, referred to and followed the statement of Cooper J in *R v Aston (No 2)* [1991] 1 Qd R 375, which in turn quoted from *Veen v The Queen [No 2]* (1988) 164 CLR 415 at 477 in these terms:

> "The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted."

Also of note is what the High Court said at page 477 of *Veen*:

> "It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

There was no error in principle in the approach which his Honour took to the consideration of the prior criminal history of the applicant. When the sentencing remarks are considered as a whole, his Honour's comment, in effect, that it was not open to impose wholly suspended sentence was not an impermissible restriction upon the sentencing discretion. His Honour clearly meant, with respect, that notwithstanding all the mitigating factors, the serious

criminal history led him to exercise the sentencing discretion in a way which required the applicant to serve a period of actual custody. No error is demonstrated in that approach.

The applicant committed the current offences after he had been before the courts on many occasions for offences of dishonesty. He had been the subject of sentences involving actual custody, including a substantial sentence of six years, requiring him to serve 27 months. Consistently with proper sentencing principles, that could and should have been taken into account by his Honour. As said previously, no error is identified from the sentencing remarks. While other sentences may have been open, the sentence cannot be said to be manifestly excessive. I would dismiss the application.

**PHILIPPIDES JA:** I agree.

**MORRISON JA:** I agree. The order of the court is the application for leave to appeal against the sentence is refused.