

SUPREME COURT OF QUEENSLAND

CITATION: *R v Latemore* [2019] QCA 55

PARTIES: **R**
v
LATEMORE, David John
(applicant)

FILE NO/S: CA No 23 of 2019
DC No 279 of 2017

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Maroochydore – Date of Sentence:
1 February 2019 (Long SC DCJ)

DELIVERED ON: 9 April 2019

DELIVERED AT: Brisbane

HEARING DATE: 4 April 2019

JUDGES: Sofronoff P and Gotterson JA and Bowskill J

ORDER: **Application refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant plead guilty to six counts of obtaining a financial advantage by deception, two counts of attempting to obtain a financial advantage by deception and four counts of using a forged document – where the applicant was sentenced to two years and six months imprisonment to be released after serving four months upon entering into a recognizance of \$2,500 – where the applicant had mental health conditions during the period of offending – where the sentencing judge considered the applicant’s mental conditions – whether a sentence involving actual incarceration was manifestly excessive

R v Charleson, unreported, Robertson DCJ, DC No 371 of 2015, 29 March 2016, considered
R v Fidler (2010) 199 A Crim R 54; [\[2010\] QCA 25](#), considered

COUNSEL: The applicant appeared on his own behalf
D A Holliday for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

- [1] **SOFRONOFF P:** The applicant had a normal and reasonably happy upbringing. His parents brought him up well and decently. He also did well enough at school but decided to leave school at grade 9. He went to work at an aquarium business and later bought it from his employer. He sold it and then worked in different positions. He married at 19 but that marriage ended after three years. In his mid-twenties he applied to join and was accepted by the Queensland Police Force. By then he had completed grade 12 schooling by correspondence and had begun to study for a Business Diploma and a Justice Administration Diploma. He succeeded in earning these diplomas and was sworn in as a constable in 1996.
- [2] He married again in 1997. There was a child of the marriage. He was an honest and reliable Queensland policeman for 10 years. He was promoted to senior constable in 2003. Between 2005 and 2009 he was often appointed an acting Sergeant.
- [3] From late 2008 the applicant began to act in a way that was abnormal for him, judged by his past life and what it showed about his character. Indeed, his behaviour was bizarre. For reasons that will become clear, it is desirable to relate the applicants total offending, including the State offences to which he pleaded guilty and for which Judge Robertson sentenced him in January 2016. I will later identify the Commonwealth offences for which he was sentenced separately by Judge Long three years afterwards, in February 2019, and which are the subject of this application.
- [4] In August 2008 the applicant bought an expensive watch on eBay, an “Omega Seamaster James Bond 007 Limited edition”. It cost him \$3,812.94. He paid for the watch using PayPal, which furnishes certain guarantees of completion. After he received the watch, he falsely claimed that he had never received it. During 2009, he persisted in this claim and even reported to police that the watch had been stolen in transit. He obtained a refund of the purchase price and a refund of import duty.
- [5] In May 2005 the applicant had obtained an ABN and had registered for GST as a sole trader. Why he did this at that time has not been explained. However, in the same month in which he fraudulently obtained his “James Bond” watch, August 2008, he notified the ATO that he elected to report GST on a quarterly basis and then, in October 2008, submitted a claim to the ATO for a refund of GST in the sum of \$3,341. His BAS recited sales and purchases that he claimed he had made but, in fact, there was no business, and there had been no sales and no purchases. The ATO paid the money into his nominated bank account. This was count 1.
- [6] In June 2010 he tried to defraud the P & C Association of his daughter’s primary school of \$1,000 worth of chairs. He was then President of the P & C Committee.
- [7] In late 2010 he bought an iPad at Myer for \$879. He left the store and then returned and claimed that the box was empty when he opened it. He was given a replacement iPad.
- [8] In early 2011 he tried to steal some water spraying equipment from Bunnings and made ludicrous attempts to talk his way out of trouble when confronted, including the use of barely plausible forged receipts.

- [9] He repeated his BAS fraud in March 2011 claiming \$7,857, in July 2011 claiming \$9,090, and in September 2011 claiming \$8,811 and, once more, the ATO paid him the sums he claimed. These were counts 3, 4 and 5.
- [10] On 10 December 2011 he repeated his eBay trick, this time by ordering and paying for a laptop. After he received the computer, he claimed he had not received it. When he got the replacement, he falsely claimed that he had returned it, and asked for and obtained a refund of the purchase price. In the case of the laptop that he had bought, he then additionally claimed to the vendor that he had returned the replacement that had been sent to him and tried to get a full refund while keeping the two laptops. In the same month he was able to shoplift about \$3,000 worth of goods from David Jones while leaving a brilliantly lit trail leading directly to himself.
- [11] Two days after he bought the laptop, on 12 December 2011, the applicant lodged a BAS falsely declaring sales of \$225,000, purchases of just under \$10 million and claiming a GST refund of \$879,253. This became count 6. In support of the claim, the applicant faxed the ATO a forged "Bill of Sale" evidencing the purchase of a yacht for \$8,997,073. This became count 7. In the following days, in response to ATO phone inquiries, the applicant told a set of easily detectable lies to cover his tracks.
- [12] On 10 January 2012 the applicant lodged a further BAS, this time claiming a refund of \$83,519. The money was not paid because the whole file was then under internal investigation. The applicant made repeated calls to the ATO chasing payment. This was count 8.
- [13] The ATO arranged to interview the applicant. On 17 February 2012, four days before the scheduled interview, the applicant called the ATO and said that he needed to amend some BAS statements (counts 3, 4 and 5) because "the contracts won't be going ahead". He had been paid the money and was told how to reverse the position, but never did so. During the subsequent interview, the applicant said that the first submitted BAS, count 1, related to the purchase of a Mazda for resale. Records that were easily accessible, and which the ATO accessed, showed that the car had been registered in his wife's name, it was the car she always used, it had been insured as a private vehicle and, in any case, his wife had disposed of it in November 2011. During the same interview he falsely said that the BAS lodged in January related to the purchase of Mercedes Benz cars for resale. He falsely said that he was in the used car business. He provided forged documents to support that story. The furnishing of these documents became counts 9 and 10.
- [14] In March 2012 the applicant lodged another fraudulent BAS claiming a \$15,940 refund. This sum was paid. This was count 12. In response to further inquiries, he later furnished the ATO with forgeries to support this claim. This was count 13.
- [15] In February and March 2012, having applied for and received an American Express card, he used it to buy almost \$9,000 worth of property and then falsely claimed that he had never received or used the card.
- [16] In June 2012 the applicant lodged his last fraudulent BAS. The ATO paid him \$93,257.50.

- [17] In late 2012 he tried to defraud a cabinet maker whom he had retained by pretending that he had paid \$5,000 that he had not paid. He created false paperwork to support his story.
- [18] In early 2014 he repeated his earlier fraudulent method to get another expensive camera from an online vendor. He then sold the camera to somebody but sent the buyer a box containing cheap crockery instead.
- [19] The oddity of this offending was largely explained by the applicant's deteriorating mental health. In 1999, after being diagnosed with a tumour on his pituitary gland and after suffering a laceration to his arm, he was referred to a doctor to establish whether he was fit to continue as a police officer. He was found to be fit. In 2000 he consulted a psychiatrist because of stresses caused by workplace bullying. He was diagnosed with "Obsessional Personality Traits" and with a pre-disposition to depression. He was injured in a traffic accident in 2003 after which he began to suffer migraine headaches. In 2006, and again in 2007, he suffered a needle stick injury. Undoubtedly, those injuries must have resulted in acute anxiety about their possible effects. He required surgery for an injury in 2006. In October 2007 a psychiatrist diagnosed him as suffering from an adjustment disorder with mixed anxiety and depressive symptoms and another psychiatrist who saw the applicant a little later related this condition to the injuries he had suffered. The applicant made a claim for workers' compensation. Undoubtedly his mental state had existed for some time before the actual diagnoses.
- [20] In January 2008, while in this mental state, the applicant was called upon to resuscitate an elderly woman but those efforts were unsuccessful. In the next month he was headbutted and, as a result, his jaw was dislocated and some of his teeth were broken. He was dealing with continuing workplace bullying and his expected promotion to Sergeant did not come. In November 2009 he collapsed at work and in June 2010 he collapsed at home. By no later than 2010 the applicant was seriously ill. He was suffering from major depression, post-traumatic stress disorder and continuing migraine attacks. He was self-medicating with alcohol. Over the next two years he was admitted to hospital several times and tried to kill himself repeatedly.
- [21] In February 2010 he came under the care of a psychiatrist who negligently misdiagnosed his condition and then prescribed a set of wholly unsuitable medications. These drugs taken in combination were capable of producing, and did produce, periods of delirium and intermittent impairment of his cognition. They would make him liable to great impulsivity. They would cause anxiety, irritability and mood swings from depression to manic grandiosity, confusion and impairment of the ability to understand the moral nature of his actions. The errors were later discovered and correct medicines were prescribed.
- [22] On 3 December 2010 the applicant was discharged from the Police Force on medical grounds.
- [23] In the middle of 2011 his wife left him taking their child. The divorce was acrimonious. It involved his wife's obtaining a restraining order against him and it also led to the Family Court holding the applicant in contempt and jailing him although, it seems, that decision was later set aside.

- [24] On 18 December 2015 the applicant pleaded guilty to a series of charges that Queensland authorities had brought in relation to the non-tax offences that I have described. This Court was informed in oral argument that in the same year Commonwealth authorities charged him in connection with the tax offences. On 29 January 2016 Judge Robertson sentenced the applicant in the District Court. In relation to the offences charged on indictment, his Honour imposed probation for three years. In relation to the summary offences, his Honour imposed a nine month term of imprisonment wholly suspended for three years. His Honour took into account the applicant's previous good character and lack of criminal history, his health problems and the fact that restitution had been made.
- [25] Proceedings in the Mental Health Court delayed the Commonwealth prosecution because the applicant's mental state required consideration. However, an indictment was presented in September 2017 and on 13 June 2018 the matter was listed for trial on 19 November 2018. On that date the parties appeared before Judge Long. The Crown entered a *nolle prosequi* in relation to four counts and the applicant pleaded guilty to the remainder. The case was adjourned for sentence on 23 November when Judge Long heard submissions on sentence on that day. The matters that I have set out in relation to the applicant's personal history and the circumstances of his offending and the relationship of his mental state to that offending was placed fully before his Honour. His Honour received a number of medical reports and written submissions from the prosecution and the applicant's counsel.
- [26] His Honour observed that the offending was persistent and that it had the outward appearance of deliberateness. His Honour also observed that the money amounts escalated over time. Overall, the applicant falsely claimed just over \$1.1 million in GST refunds, and received a total of \$138,723.46.
- [27] The Commonwealth offences, his Honour said, were different and generally of a more serious kind than the State offences for which Judge Robertson had sentenced the applicant.
- [28] Judge Long carefully studied the applicant's medical history and the fact that his mental state had a real effect upon his offending. He also said that the applicant's prospects for rehabilitation were good because, on the evidence, his health had improved and was improving.
- [29] By the date of sentencing for these offences, the applicant had satisfied the requirements of all of the orders that Judge Robertson had made. Judge Long took that into account in mitigation. He also took into account the fact that any orders that he made would be cumulative upon the earlier sentence and, as a result, his Honour had to mitigate his sentence for that reason. His Honour also took into account the applicant's pleas of guilty. His Honour took into account that, although restitution had not been made, it was promised.
- [30] It was common ground between the parties below, and correctly so, that these offences called for a sentence of imprisonment. They were serious offences because they were an attack upon the administration of the revenue and they involved very substantial sums of money.
- [31] His Honour also considered that, while the applicant's medical history was a very important mitigating factor, it did not serve to explain the offending completely.

That was, with respect, correct because although the disabilities were an inextricable part of the offending, their effect was to reduce the applicant's moral responsibility and not to extinguish it and the disabilities did not remove the applicant's legal responsibility. Nevertheless, the applicant's extreme illness called for extreme leniency.

- [32] Judge Long sentenced the applicant to two years and six months imprisonment on each count of the indictment to which he had pleaded guilty. His Honour further ordered that the applicant be released after serving four months of those sentences upon entering into a recognizance in the sum of \$2,500 to be of good behaviour for three years. His Honour ordered that the applicant make reparation in the sum of \$138,723.46.
- [33] The applicant has sought leave to appeal on the ground that the sentence was manifestly excessive. The real issue is whether the applicant should have been required to serve any period of actual imprisonment.
- [34] This case requires the Court to consider whether Judge Long's exercise of discretion in sentencing was mistaken. To succeed in overturning a decision like this one, a decision that was made on discretionary grounds, and which therefore required the application of judgment, an applicant must show one or more of three things. The first two are an error of fact or an error of law. The applicant correctly accepts that Judge Long did not make any such errors. The third way in which an applicant might be able to show that a judgment is wrong, although it is a discretionary judgment, is to demonstrate that, although the actual error is invisible, the result itself is so wrong that an error must have been made in the reasoning that led to it. In a case like this one, an applicant must show that the sentence was so extreme, so severe, that that severity itself demonstrates that the judge made an error of some kind in his reasoning process.
- [35] The applicant submits that, but for his mental state at the time, he would not have committed any of these offences. He points out, rightly, that the doctor who mistreated him made his situation much worse. He points out that his prospects of recovery are excellent and he is not going to reoffend.
- [36] These are all sound propositions.
- [37] However, it is important to recognise that this Court is not free to form its own view about the sentence that was imposed. The law limits its role. Whatever sentence the members of this Court might themselves have imposed, the only relevant question now is whether Judge Long was wrong in his own decision. I am not able to come to that conclusion.
- [38] Previous case authority establishes that offences like these, involving large amounts of money and which were committed over a period of time, generally call for actual imprisonment to be served. While the applicant's moral culpability was substantially reduced by reason of his mental condition when he committed these offences, as I have said, and as Judge Long also said, that was not a complete answer.
- [39] I would accept that the applicant's behaviour was aberrant and that he is unlikely to reoffend. It appears that his intelligence, which was evident at the hearing of this appeal, and determination, which is evident in his past achievements, will enable him to restore his life. However, while that diminishes the significance of personal

deterrence as a consideration in sentencing, it does nothing to address general deterrence or denunciation.

- [40] As Ms Holliday of counsel, who appeared for the respondent, pointed out, general deterrence is capable of being served both by the head sentence and by an order requiring actual time in prison to be served. In this case, it was Judge Long's view that some time of actual incarceration should be served. Cases like *R v Charleson*¹ and *R v Fidler*² show the scope of the available outcomes. In *Charleson*, which the applicant correctly emphasised, the offences also involved false BAS statements used to obtain money. The offender tried to get over \$300,000 and succeeded in getting about \$140,000. During the period of offending, like the applicant, she also committed State offences involving dishonesty. She pleaded guilty and was sentenced to a non-custodial penalty. Judge Robertson, who sentenced her, took into account severe mental health problems suffered at the time of the offences, that she was recovering and her future health prospects were good and that imprisonment would have serious effects upon her young children.
- [41] On the other hand, in *Fidler*, which is also a very similar case, the offender had been sentenced by a judge to imprisonment for three years with release on a bond after serving 18 months. On appeal, that sentence was reduced, on account of the appellant's mental problems that related to the offending, and on account of other factors, to a sentence of three years with release after one year. In that case the Court pointed out that a mental disorder suffered by an offender will usually reduce the weight to be given to general deterrence as a factor in sentencing. Indeed, in an extreme case that factor in combination with others may entirely outweigh general deterrence. However, in every case a judge must weigh the circumstances of the particular case in order to arrive at a just penalty.
- [42] Having regard to the factors involved in this case, and even giving deserved weight to the applicant's condition at the time he offended, his condition now, and the fact that his future health and personal prospects are excellent, in my opinion the penalty that was imposed was within the range of proper penalties. I am unable to conclude that his Honour was wrong in making the orders that he did.
- [43] For these reasons I would refuse the application for leave to appeal.
- [44] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.
- [45] **BOWSKILL J:** I also agree that the application for leave to appeal should be refused, for the reasons given by the President.

¹ District Court, unreported, Robertson DCJ, 29 March 2016.

² [2010] QCA 25.