

SUPREME COURT OF QUEENSLAND

CITATION: *R v Mackay* [2019] QCA 97

PARTIES: **R**
v
MACKAY, Andrew David
(applicant)

FILE NO/S: CA No 91 of 2019
DC No 436 of 2018

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane – Date of Sentence: 8 April 2019
(McGill SC DCJ)

DELIVERED ON: Date of Order: 14 May 2019
Date of Publication of Reasons: 24 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 14 May 2019

JUDGES: Fraser and Morrison JJA and Davis J

ORDER: **Date of Order: 14 May 2019**
Application for leave to appeal against sentence is refused.

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – MISCELLANEOUS OFFENCES AND MATTERS – BRIBERY AND CORRUPTION – where the applicant bribed an official of the Public Trustee of Queensland in order to be given information about tenders for building work so the applicant could underquote and get the work – where the applicant was charged with three counts of official corruption, pleaded guilty to the charges, and was sentenced to two years imprisonment for each count, to be served concurrently – where the sentence is to be suspended after the applicant had served eight months imprisonment, with an operational period of four years – where the applicant seeks to appeal the sentences on the ground that they are manifestly excessive – whether the sentence should have been wholly suspended, or if a suspension was warranted, whether a lesser term of imprisonment prior to suspension should have been imposed instead

Penalties and Sentences Act 1992 (Qld), s 13A

R v Gmeinder [\[2001\] QCA 354](#), cited

COUNSEL: L K Crowley QC for the applicant
S J Bain for the respondent

SOLICITORS: Anderson Fredericks Turner for the applicant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **FRASER JA:** The reasons for judgment of Morrison JA reflect my own reasons for joining in the orders refusing the application for leave to appeal against sentence.
- [2] **MORRISON JA:** Mr Mackay bribed an official of the Public Trustee of Queensland to give him information about tenders for building work, so that Mr Mackay's business could underquote and get the work. As a result he was charged with three counts of official corruption, the maximum penalty for each being imprisonment for seven years. He was sentenced on each count to two years' imprisonment, the sentences to be served concurrently, with those sentences being suspended after he had served eight months' imprisonment. The operational period of the suspension was four years.
- [3] Mr Mackay seeks to challenge those sentences on the ground that they are manifestly excessive. However, no challenge is mounted to the head sentence of two years' imprisonment. The contention is that the sentence should have been wholly suspended, or alternatively if a suspension was warranted, a suspension of less than eight months was appropriate.

Circumstances of the offending

- [4] The learned sentencing judge was provided with an agreed summary of the facts. His Honour took the view that it did not summarise the relevant facts in an appropriate fashion and therefore he set out his own summary in the sentencing remarks. No challenge is made to that summary and therefore they form the basis of what follows.
- [5] Mr Mackay was the principal of a business, based solely in Sydney, operating as a builder. It eventually contracted to perform refurbishment work for the Public Trustee of Queensland.
- [6] A Mr Myers was an employee of the Public Trustee, and in that role obtained quotations for the work done by the Public Trustee in 2015, refurbishing offices in various cities.
- [7] Mr Mackay's dealings with Mr Myers gave him reason to believe that Mr Myers would be willing to take a bribe and to assist Mr Mackay to secure contracts to do building work for the Public Trustee. Mr Mackay took the opportunity and offered a bribe to Mr Myers.
- [8] Mr Myers was willing to accept the bribe and provide information about competing quotes for work, so that Mr Mackay knew the price he had to meet in order to get the contracts. Mr Myers was also principally responsible for the selection of the company to undertake any particular works, and recommended that Mr Mackay's

firm be awarded the contracts, though he was not the person who made the final decision.

- [9] The contracts that were secured in that fashion were worth a total of \$251,734.22 of public funds.
- [10] While he remained in his position Mr Myers also approved Mr Mackay's invoices for payment, one of which included a payment which was made to Mr Myers.
- [11] On about 5 June 2015 an invoice was created by Mr Myers in the name of a company entitled "Lawrence Interiors Pty Ltd". It was in the amount of \$7,500. It was a false invoice, and the bank details on it were for an account in the name of Mr Myers. Mr Mackay's company transferred \$5,000 in relation to that invoice into Mr Myers' account. Mr Mackay knew he was paying Mr Myers directly.
- [12] On 18 June 2015 Mr Myers opened a bank account in a false name. Mr Mackay asked Mr Myers to do so in order that the payments could not be traced. Subsequently, an internet transfer of \$7,000 was made from Mr Mackay's business into that account.
- [13] On 2 July 2015 Mr Mackay's business made a payment of \$547.70 to Virgin Airlines. That transaction corresponded with an occasion when Mr Myers travelled to Sydney to meet Mr Mackay.
- [14] The three payments of \$5,000, \$7,000 and \$547.70 were made as a result of the corrupt agreement.
- [15] When it became apparent that the matter was being investigated by the CCC, Mr Mackay and Mr Myers engaged in a number of conversations (which were intercepted) in which they discussed the need to work out an innocent version of events. Mr Mackay took steps to cover his tracks.

Approach of the learned sentencing judge

- [16] Having recited the nature of the offending, the learned sentencing judge turned to the matters which affected the sentence he intended to impose. The following matters were mentioned specifically:
 - (a) the plea of guilty was entered on the day of the trial, that being preceded by way of a committal with cross-examination; however, the result of negotiations between the defence and the prosecution was that two other counts (including one for a much larger sum of money) were discontinued;
 - (b) Mr Mackay had not offended again in the period of about four years since the current offences were committed; his Honour considered that not entirely surprising given the failure of the exercise and that it came to the attention of authorities;
 - (c) his Honour did not regard the current offences as "a particularly serious example of the offence", but "the offence is inherently one which is serious, because official corruption strikes at the integrity of government"; Australians expect and believe that they will have a system of government which is free from corruption and it was particularly

important that the system operated with integrity, because of the trust proposed in it; the system of public tenders for government works was one which was designed to guard against any corruption in the allocation of government work, and as a means of guarding against excessive costs for government work; the integrity of that system depended upon the officers involved in it not being corrupted, and the system not being distorted by the payment of bribes to such officers; and

- (d) as to the suggestion that the criminality involved on the part of the officer accepting the bribe was greater than the criminality of the person offering and paying the bribe, the learned sentencing judge said that whilst there might be something in the proposition, “it is to a relatively small degree”; his Honour explained that if corrupt businessmen did not pay public servant bribes, there would be no official corruption.

[17] The learned sentencing judge contrasted features which were apparent in the case of Mr Myers¹ when compared with that of Mr Mackay. Mr Myers had been sentenced to a period of two years’ imprisonment, with immediate suspension. Mr Myers had co-operated with the investigating police and the Crime and Corruption Commission, and made full admissions in relation to his behaviour. That co-operation was sufficient to attract the operation of s 13A of the *Penalties and Sentences Act* 1992 (Qld). None of that was applicable in Mr Mackay’s case. When spoken to by investigating police, he declined to be interviewed. There was no true confession by him, nor co-operation with the authorities. In Mr Mackay’s case there was “in the circumstances, little sign of any real remorse”.

[18] The learned sentencing judge noted that Mr Mackay had no criminal history, was married and had two children in respect of which he was the sole provider. He had served no time by way of presentence custody.

[19] His Honour then turned to a matter which had been raised by way of defence submissions, namely the impact upon Mr Mackay of the convictions he would inevitably suffer. His Honour said:

“I expect that there are likely to be adverse consequences, under the New South Wales legislation, under which you hold a builder’s licence, and that ... you could well face difficulties in relation to that licence in New South Wales; although I have not been provided with any particular details about it. I would expect as well that this conviction is likely to damage your reputation, your business reputation, and give rise to difficulties in the operation of your company, and that will adversely affect you apart from any consequences of this sentence that I impose. Nevertheless, I expect that that is almost an inevitable consequence of convictions and sentencing for the offence of official corruption.”

[20] The learned sentencing judge noted that the purposes of the sentence he was to impose included punishment of Mr Mackay in a way that was just in all the circumstances, the provision of conditions to help in rehabilitation, personal and

¹ Who had already been sentenced.

general deterrence. His Honour also noted the purpose of denunciation of the conduct in which he had been involved. His Honour went on:

“Because of the circumstances, and the importance of general deterrence, in relation to this offence, I consider that there is no reasonable alternative to a term of imprisonment to achieve those purposes, but, in view of your plea of guilty, and the fact that you have not previously been in prison, I am prepared to order that the sentence be suspended after you have served one-third of the sentence.”

Discussion

[21] Senior Counsel for Mr Mackay did not challenge the head sentence, nor was there any challenge to the learned trial judge’s conclusion that there was no reasonable alternative in the circumstances but to impose a term of imprisonment. Rather, the focus of the contentions was on the need for any period of actual custody, or alternatively as much as eight months’ actual custody. In that respect the contentions advanced included the following matters:

- (a) the building works the subject of the corrupt behaviour had been performed and there was no suggestion that it was other than of a high standard;
- (b) the vast majority of the money paid by the trustee for the works was paid to subcontractors and the total profit to Mr Mackay’s business was only about \$13,000;
- (c) Mr Mackay did not set out to corrupt an otherwise untainted official; Mr Myers was already corrupt;
- (d) although the bribes meant that Mr Mackay secured an unfair advantage in the tender process, he ultimately quoted a lower figure than others in order to get the contracts; thus, this was not a case where there was overpayment or loss of public funds;
- (e) whilst the offence was serious, Mr Mackay’s culpability should be seen as less than that of Mr Myers, simply because Mr Myers was the public official and Mr Mackay was not;
- (f) because it was a “one off” offence, and Mr Mackay had not reoffended in any way in the next four years, it was appropriate to order that the sentence be wholly suspended, an approach for which even the Crown contended at the sentencing hearing;
- (g) alternatively, it was plainly unjust to impose a partially suspended sentence which required serving eight months in actual custody; and
- (h) Mr Mackay was a married man with a young family to support, he owned his own business, had no prior convictions, had never been in custody before, and had not committed any further offence for four years, during which time he was on bail; in those circumstances there was little or no need for personal deterrence, his prospects of rehabilitation were excellent, and there was little risk of him reoffending.

- [22] In my respectful view, the contentions on behalf of Mr Mackay must be rejected. There are several reasons for that conclusion.
- [23] First, offences of official corruption are inherently serious, calling for general deterrence and community denunciation. Courts have repeatedly recognised the seriousness of such offending, as epitomised by Thomas JA in *R v Gmeinder*:²
- “Official corruption strikes at the health of society and unless strongly deterred has a ready capacity to spread. The honest administration of our system of government is a very important and fundamental matter that needs support from the Courts.”
- [24] This offending subverted the Public Trustee’s tender process which was supposed to operate transparently and fairly. It called for condign punishment which, as Senior Counsel for Mr Mackay accepted, warranted a term of imprisonment. Equally, the serious nature of the offending, and particularly the purposes of denunciation and general deterrence, called for the imposition of a period of actual custody. Mr Mackay participated in arranging a corrupt relationship with a public official, assisted in suggesting fraudulent means of conveying the payments to that official,³ and he tried to cover up what had occurred once it became known. That level of participation warranted actual custody as part of the sentence.
- [25] Secondly, once it was conceded that a head sentence of two years’ imprisonment was not beyond the scope of appropriate sentencing discretion, the contention had to be that it was simply not open to the learned sentencing judge to impose a period of actual custody. That proposition need only be stated to be seen to be wrong.
- [26] Thirdly, having selected two years as the appropriate head sentence, Mr Mackay had one-third of that time (eight months) imposed as the period to be served before suspension. Given that there was an unchallenged finding of a lack of any real remorse and no co-operation whatever beyond pleading guilty, there was no discernible basis to reduce the period of actual custody below one-third. The one-third mark has often been recognised as being appropriate where a plea of guilty is entered and that reflects co-operation with the authorities and remorse. Here the co-operation was limited to saving the State the costs of a trial, but there was no remorse. No further reduction was warranted.
- [27] Fourthly, if it be right to conclude, as I have, that it was open to the learned sentencing judge to impose a period of actual custody before suspension, the contention that it should have been less than eight months is untenable when the ground of challenge is manifest excess.
- [28] For these reasons I joined in the orders made on 14 May 2019, refusing the application for leave to appeal against sentence.
- [29] **DAVIS J:** I joined in the orders made on 14 May 2019 refusing the application for leave to appeal against sentence. The reasons of Morrison JA reflect my reasons for joining in the orders.

² [2001] QCA 354, p 4.

³ It was Mr Mackay who suggested a bank account be created in a false name, and that false invoices be used.