SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wheeler & Sorrensen* [2002] QCA 223
PARTIES:	**R** **v** **WHEELER, Graham John** (applicant) **SORRENSEN, Leslie Carl** (applicant)
FILE NO/S:	CA No 56 of 2002 CA No 57 of 2002 DC No 364 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence applications
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2002
JUDGES:	McPherson JA, Mackenzie and Atkinson JJ
ORDER:	**Applications for leave to appeal sentence are refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICITION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – where applicant/s pleaded guilty to an ex-officio indictment - agreed Schedule of Facts - nature of some transactions disputed in oral submissions on appeal CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant/s convicted of fraud as a trustee of a sum greater than $5,000 – where misappropriation of $632,435.44 with claims totalling $453,123.00 paid out of Fidelity Guarantee Fund – no previous convictions - good work histories - whether sentence of six years imprisonment with a recommendation for parole after two years is manifestly excessive *Auctioneers and Agents Act* 1971 (Qld) s 104(1), s 104 (5),

s 19(8), s 408(2)(d)

Tilley (1991) 53A Crim R applied

COUNSEL: M Hogan for the applicant Wheeler
The applicant Sorrensen appeared on his own behalf
M Copley for the respondent

SOLICITORS: Mitchells Solicitors for the applicant Mr Wheeler
The applicant Sorrensen appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

[1] **McPHERSON JA:** I agree with the reasons of Mackenzie J for dismissing these applications for leave to appeal against sentence.

[2] **MACKENZIE J:** Each of the applicants was a director of Queensland Motor Auctions Pty Ltd, ("QMA") licensed auctioneers and motor dealers. When an administrator was appointed to the company on 10 December 1999 it was found that there was a general deficiency in the trust account of $632,435.44. Only $21,703.70 remained in it. Subject to one issue raised in the submissions by the applicant Sorrensen, who appeared on his own behalf, the business received vehicles from customers for sale on consignment. The proceeds of sale of those vehicles, less commission and expenses, were to be paid into a statutory trust account and ultimately disbursed to the consignor of the vehicle.

[3] The business had been set up in 1996 by the two applicants who had previously worked together at similar businesses. They had hoped for a substantial investment in it by an associate but it did not materialise. The applicant Wheeler obtained an overdraft facility of $93,000 against the security of his mother's home unit. The applicant Sorrensen had not contributed any capital. A third director who had a financial interest in the business withdrew his capital in 1997. A decision was taken in January 1999 to relocate the business from the Valley to Rocklea. The relocation, fierce competition from other similar businesses and a downturn in the motor industry caused the business to struggle.

[4] By about March 1999 there were serious doubts about its viability but, as it was put to the sentencing judge by their counsel, they had an expectation of an injection of funds from another person (which fell through) and hopes of obtaining contracts for which they had tendered. Out of loyalty to their 12 staff, they had decided to keep the business running. It was suggested that the prospect of an injection of funds which did not eventuate encouraged them to run the business for longer than they might otherwise have done.

[5] Unfortunately, the *modus operandi* adopted was to withdraw moneys from the trust account by cheque and pay them to the general account from which withdrawals were made to cover business costs including salaries of the staff and the applicants. Book entries were, in the meantime, falsified to conceal that the moneys had been paid to the general account. The terms of contract with the consignors required them to be paid within 42 days of sale. Prior to that period expiring, sufficient sums of money were returned to the trust account so that the consignors could be paid. This cycle of conduct occurred until the general deficiency was discovered.

[6] Claims totalling $453,123 were paid out of the Fidelity Guarantee Fund set up under the *Auctioneers and Agents Act* 1971. The remaining sum of about $180,000 was owed in respect of vehicles which originated from a large commercial organisation, Chubb, but because the view was taken that those transactions fell outside the scope of the legislation, payment was not made from the fund. The sentencing judge was told that Chubb ranked only as an unsecured creditor of the company. It was in relation to these vehicles that the matter raised by Sorrensen arose.

[7] Under s 104(1) of the *Auctioneers and Agents Act* 1971 a motor dealer who receives money in respect of a "sale or other transaction" must, immediately on receiving the money, pay it into a trust account of a kind appropriate to the transaction. Further, a licensee must not pay into a trust account moneys not required to be paid pursuant to s 104(1) into such an account (s 104 (5)). Section 119(8) excludes from payment out of the Fidelity Guarantee Fund a claim by a licensee who suffers pecuniary loss in the course of carrying on business as a licensee. In his submissions to the sentencing judge, counsel for the applicants said that, because of the interposition of a New South Wales motor dealer between Chubb and the applicants, Chubb's claim was unsuccessful. It appears from submissions that advice from the administrator as to the nature of the transactions was acted upon in this regard.

[8] The indictment alleged that the sum of money subject to a trust that it should be paid to the vendors of the motor vehicles sold through the company was "of a value in excess of $5,000, namely not less than $600,000." As part of the process of disposing of the matter by *ex officio* indictment, a Schedule of Facts, signed by the solicitor for both applicants, was prepared and tendered in the proceedings. It includes the following:

> "Regarding the claims by Chubb (the only transactions queried by both Wheeler and Sorrensen), inquiries reveal that the vehicles were consigned by Chubb to Tony Hyman Auctions Pty Ltd (a motor vehicle auction business operating in Sydney) and that there were no direct dealings between QMA and Chubb. Tony Hyman Auctions Pty Ltd, if they wanted to sell the vehicles in Queensland, would consign them to QMA. The sale of the Chubb vehicles were obviously treated as consignment sales. The records of QMA show the sales as consignment sales and in fact the trust account cheque butts and the Stock Purchase Payments entries show the payee of the trust account cheque as Tony Hyman Auctions when in fact the relevant cheque was made payable to QMA and banked in the general account."

[9] It can be seen that it states that the nature of the transactions concerning Chubb vehicles was queried by the applicants, but then states what was revealed about the transactions when they were examined. The effect of the report is that $632,435.44 of the moneys that had been paid into the trust account were withdrawn and utilised as working capital.

[10] However, during the prosecution's submissions, the sentencing judge sought to clarify the sum of money that was subject to a trust, in light of the Auctioneers and Agents Committee decision not to pay the claim from the Fidelity Guarantee Fund. The Crown Prosecutor said that the money with respect to the Chubb transactions was supposed to have gone through the trust account because of the nature of the

dealings. The applicants were bound by statute to place the moneys in the trust account and pay out the consignors.

[11] In his submissions below, counsel for the applicants said that the arrangement was that Chubb had Mr Hyman as agent. He dealt with the applicants under an arrangement that the vehicles would come to the applicants to sell at auction at a reserve price, or if that sum was not achieved, they would buy the vehicle themselves. Presumably, the transactions were conducted by the companies rather than Mr Hyman and the individual applicants, but nothing turns on that for present purposes since the two applicants were parties to the overall scheme.

[12] When Mr Sorrensen made his oral submissions on appeal, he claimed that the Chubb transactions were all purchases by QMA and that, rather than the moneys being trust moneys, only a debtor-creditor relationship was created. If that were the case, the circumstance of aggravation was wrongly particularised as "not less than $600,000". Counsel for the applicant Wheeler said that he had not pressed the argument since he took the view that he was constrained by the record.

[13] Several problems are created by Mr Sorrensen's submission. One is that there is only the assertion by him that the legal nature of the transactions is as he explained it. There is no evidence which establishes that his explanation is correct. The second is that his view is inconsistent with the Schedule of Facts (compiled, as the document states, after the nature of the transactions had been queried by the applicants and investigated). While what was said by counsel below is not as clear as it might be, what was said is not inconsistent with the Schedule of Facts. The third is that all the moneys appear to have been paid into the trust account and appropriated from it, with the result that there was, in fact, a deficiency of the amount alleged in respect of the account. How much, if any, was money that was not required to be paid into the trust account is not established. The fourth is that, when arraigned, a plea of guilty was entered by each applicant to the indictment alleging an amount subject to a trust of not less than $600,000. No application to withdraw the plea has been made.

[14] It is by no means clear cut that the true legal nature of the Chubb transactions is as the applicant Sorrensen states. It seems to be common ground that Chubb dealt with Mr Hyman and that his company was the recipient of moneys in respect of Chubb vehicles. According to Mr Sorrensen's explanation, there was an arrangement entered into between QMA and Mr Hyman as a result of which Chubb's vehicles in Queensland were delivered to QMA for disposal. The proposition, accepted by QMA, was that QMA adopt the same method of operation as that used in Sydney, that the dealer nominate an amount that would be paid to Chubb in any event, with the dealer having three weeks in which to sell the vehicle before Chubb was to receive the agreed payment. If the vehicle was sold within three weeks, a cheque would be paid to Hyman who paid Chubb. If it was not sold within that time the agreed sum would be paid to Hyman in any event.

[15] The appellant Sorrensen said in his submissions that the arrangement was a sale by Chubb to QMA on 21 days' credit. His explanation did not demonstrate when the property in the vehicle passed to QMA or if it ever did in cases where the vehicle was sold within three weeks. The only material formally before the Court is the Schedule of Facts which has the appearance of a considered statement, signed on behalf of the applicants, that inquiries revealed that there were no direct dealings

between QMA and Chubb, that Chubb consigned the vehicles to Hyman and the QMA records treated them as consignment sales, the vehicles having been consigned to QMA by Hyman. If property did not pass to QMA - as the Schedule of Facts suggests since the inquiries (made with knowledge that the applicants had queried the transactions) did not establish any direct dealings between Chubb and QMA and the records showed the dealings as consignment sales - there is no cogent reason for not giving full weight to the plea of guilty to the indictment.

[16] It follows that the applications for leave to appeal should be considered on the basis upon which the applicants were sentenced. In reaching that conclusion, the principle that an offender has a right to be sentenced on a factual basis that accurately reflects the extent of criminality has not been overlooked. Since the matter proceeded by *ex officio* indictment, it proceeded in accordance with Practice Direction No 2 of 2000 which required a certificate signed on behalf of the Director of Public Prosecutions and by the legal representatives of the accused, confirming that the factual basis for an intended plea of guilty has been agreed upon. The Schedule of Facts is incorporated by reference into the certificate which expressly states that it "is the factual basis of the plea of guilty and that there are no factual issues in dispute that remain to be resolved at the hearing". The case is therefore unlike the typical sentence hearing where the prosecution tells the court its version of the facts and, if the defence wishes to dispute any of those facts, the Crown is put to proof if it wishes to maintain its version.

[17] The case is not one where the applicant has been convicted of an offence with a circumstance of aggravation that cannot be established. The circumstance of aggravation is that the property is of a value of $5000 or more (s 408C (2)(d)). It is a case where it is now alleged that the particularised amount is substantially in excess of the amount actually subject to a trust because of the nature of some of the transactions. The allegation that the amount was not less than $600,000 was not a necessary inclusion in the indictment and, in a sense, was surplusage. Since it was included in the indictment, had the issue been raised in the present form (notwithstanding the certificate) and resolved in favour of the applicants at sentence, one appropriate course would have been to amend the particulars in the indictment accordingly, if necessary. However, while the Chubb transactions were focused on in the way described in paras [9] and [10], the issue was not exposed with the same emphasis as in this Court. The need to resolve it was apparently not seen to arise on the state of the information then before the District Court.

[18] The real difficulty with the applicant's contention in this Court is that it is implicit in the Schedule of Facts that, during the investigation phase, the nature of the Chubb transactions was queried by the applicants and an answer contrary to the applicant Sorrensen's present claim was reached after investigation. The Schedule of Facts to that effect was relied on at sentence, having been agreed to by the solicitor representing them and without any clearly inconsistent version having been advanced at sentence. There is no reason to think that the Schedule of Facts was agreed to without reciprocal advice and instructions. Investigation of a claim of the kind made by the applicant Sorrensen involves legal and accounting analysis of the relevant transactions. In view of what is stated in the agreed Schedule of Facts it is, in my opinion, not established that there is a cogent reason for thinking that the applicants were sentenced on a wrong basis. The merits of the applications should be determined on the basis that the sentencing judge did not proceed on an erroneous view of the facts.

[19] The applicants cooperated with the investigation and pleaded guilty to an *ex officio* indictment. The investigation was lengthy; two years elapsed before the proceedings were completed. Neither of the applicants has any previous convictions and each of them had a good work history and was well thought of by those who gave references, principally people in the motor trade and from community organisations. The sentencing judge expressly took into account the pleas of guilty to the *ex officio* indictment, the cooperation with the authorities and the fact that the applicants had revealed their misconduct by calling in the administrator. So were the facts that they had no previous convictions and, but for the present matter, were apparently of good character.

[20] The sentencing judge decided that there was no distinction to be made between the two applicants' culpability and sentenced each to 6 years imprisonment with a recommendation for release on parole after 2 years. It is submitted, however, on their behalf that sentences of 5 years imprisonment with a suspension after 12 months was appropriate and that the sentences imposed were manifestly excessive.

[21] The submissions are founded on the arguments that the matters mentioned so far in the applicant's favour and certain other matters were given insufficient weight by the sentencing judge and that the sentence was heavy by comparison with other sentences referred to before the sentencing judge. In the case of the applicant Wheeler there is a medical report to the effect that from late 1998 he was under stress and strain and on two occasions in 1999 had migraines. In October and November 2001 he complained of migraine headaches and had depression. This was reactive depression directly associated with the consequences of the collapse of the business. It was also submitted that he was under family and emotional pressure regarding the care of his wife's terminally ill mother.

[22] Other consequences were said to be that he had suffered the loss of his business and his motor dealer's licence, impacting on future employability, and that his mother may lose her home because of the mortgage over it to secure the loan for the business. The applicant Sorrensen also relied on the fact that his career in the motor trade had been destroyed. Further, among the material tendered in favour of the applicants are letters from Wheeler's partner and Sorrensen's former wife, both of whom explained that they and children of their relationships will suffer hardship. Sorrensen's present wife has said that she will also be in financial difficulties because of his imprisonment.

[23] These kinds of consequences are regrettably frequent in cases of this kind. To paraphrase what Thomas J said in *Tilley* (1991) 53 A Crim R 1,3 courts take account of such matters in a number of ways but are not overwhelmed by them. It is well recognised that very often a prison sentence will result in equal hardship to persons other than the offender. It is common that hardship or stress is shared by the family of an offender but that may be an inevitable consequence if the offender is to be adequately punished. As Thomas J said an offender cannot shield himself under the hardship he or she creates for others and the courts must not shirk their duty by giving undue weight to personal or sentimental factors.

[24] A number of comparative sentences were referred to. They stress that general deterrence is important in these kinds of cases. They demonstrate that sentences of the level imposed are common where large sums of money are involved. Counsel for the applicant Wheeler argued that, in a number of them, a point of distinction

was that the fraud extended over a significantly longer period. In cases where the businesses are of much the same kind, the duration of the conduct may be a distinguishing factor. However, where there is a business with a large turnover and large sums are taken over a short period, comparison with outcomes in cases where advantage is taken, when the situation presents itself, more infrequently is not, in my view, decisive. Where the sum is of the order involved in this case, the fact that the amounts are marginally different in other cases is not, standing alone, a necessarily decisive factor in determining whether a sentence is manifestly excessive. Cases involving breach of trust have an additional element of seriousness.

[25] In *R v Reischl* [2000] QCA 215 an effective sentence of 7 years imprisonment with a recommendation for release on parole after 2 ½ years was imposed for offences of stealing as an agent. Some of these were committed while the applicant was on bail for others, for which 5 years imprisonment was imposed. He had a minor criminal history. He used the moneys received from selling boats (about $600,000) to pay business debts over an 18 month period. He hoped to eventually repay the creditors. There was no evidence of extravagant lifestyle. There was initial cooperation although he absconded for a period before sentence. Leave to appeal was refused.

[26] In *R v Baunach*, CA88/99, a Commonwealth DPP appeal, a tax agent had by fraud misappropriated clients' taxation payments or refunds. He received 6 years imprisonment for misappropriation of $800,000 of which $92,000 was restored to the victims. There was a plea of guilty and limited cooperation in other respects. There was some evidence of using money to fund an acceptable lifestyle. The court said that 6 years imprisonment was at the lower end of the appropriate range but since it was a DPP appeal a conservative approach should be adopted. In the end the appeal was allowed only to the extent of increasing the non-parole period from 1 year to 2 years.

[27] In *Taylor* CA 406 of 1994, 7 years imprisonment without a recommendation for parole was imposed for dishonest application of moneys he had received for investment in insurance company financial products. The amount involved was $650,000. The moneys were spent to keep his business running and were not used for high living. There was a plea of guilty and it was conceded by the prosecution that there was no evidence that his cooperation had been reflected in the sentence. The appeal was allowed only to the extent that a non-parole period of 2 ½ years was added.

[28] In *Anderson* 2000 QCA 257, upon which the applicants particularly relied, the applicant disposed of assets which had the effect of reducing the value of securities available to creditors. The reduction in value was $1.5m but the judgment states that the actual loss was not stated in the record. The Court, however, accepted that it should approach the matter on the basis that $1.5m was involved, irrespective of that. It involved an attempt by a man of otherwise good character to keep a failing business alive. He hoped to be able to repay his creditors, not to enrich himself. The sentence of 6 years with a recommendation for release on parole after 2 years was held to be not manifestly excessive. It was said that lesser sentences than those imposed could perhaps have been defended but it was impossible to conclude that the sentencing judge went beyond the bounds of a proper discretion. The tentative nature of the qualification does not suggest that the sentence imposed was necessarily at the top of the range.

[29] In my opinion none of the comparative sentences suggests that the sentencing judge did not impose an appropriate sentence in the present case. None of them supports the view that the head sentence imposed was manifestly excessive. Making a parole recommendation after two years was within proper discretionary limits. So was the decision to make a recommendation rather than a suspension of the sentence. The applications for leave to appeal should be refused.

[30] **ATKINSON J:** I agree that for the reasons given by Mackenzie J the applications for leave to appeal should be refused.