[2002] QCA 259

COURT OF APPEAL

McPHERSON JA
WILLIAMS JA
WHITE J

CA No 148 of 2002

THE QUEEN

v.

MICHAEL JOHN FISHER Applicant

BRISBANE

..DATE 24/07/2002

JUDGMENT

McPHERSON JA: I will ask Mr Justice Williams to give the first judgment in the matter of Queen against Fisher.

WILLIAMS JA: The applicant pleaded guilty on the 3rd of May 2002 to three offences in the District Court. The first was stealing as a clerk; the second was fraud with a circumstance of aggravation; and the third was wilful destruction. He was sentenced to three years' imprisonment for stealing as a clerk; 18 months' imprisonment for the fraud offence; and one month imprisonment for the wilful destruction. Those sentences were to be served concurrently and it was ordered that the sentences be suspended after serving six months with an operational period of three years. He was also ordered to pay restitution in the sum of $53,820 within one month.

The circumstances of the offences were that the applicant was the assistant manager of the Woolworths Supermarket at Inala. He had been employed by Woolworths for some 22 and a-half years, virtually all of his working life. He was aged 42 at the time of his apprehension on the 21st of June 2001. The offences involved the applicant taking cartons of cigarettes from the store and selling them to a nearby newsagent who believed that he was genuinely buying stocks of cigarettes from Woolworths. The method that the applicant used was to take a carton of tissues, substitute cigarettes for the tissues, reseal the carton and then pay at the checkout the sum of $24 which was the price for a carton of tissues. Being a manager he was in a position of some trust.

The offences occurred over the period of time from the 7th of June 2000 to the 21st of June 2001 and ultimately it was estimated that the total value of cigarettes stolen was $83,387.42. The applicant had no previous convictions.

Before the sentencing Judge evidence was led from a Dr Curtis, a psychiatrist, that the applicant had been treated after his arrest for a compulsive gambling addiction. However, following his apprehension the applicant made a full confession of his criminal behaviour and told the police that he did not have a gambling problem. Evidence was also placed before the sentencing Judge that the family finances were significantly in credit at the end of the period in question. The applicant throughout the period was drawing his wage as a manager and his wife was also working. He said that he used the money obtained through his fraudulent behaviour to meet family living expenses, in particular paying off the MasterCard debt and also for gambling.

But it has to be said in the light of the fact that the family accounts were significantly in credit, that this was not a compulsive gambling addiction which resulted in the wasting of all family assets. If anything, it does seem to have been a very controlled activity. The complaint made by senior counsel who appears on this application for the applicant is that the sentencing Judge erred in concluding that the dishonest conduct was not the result of the applicant's gambling addiction.

I am not entirely convinced that that is the conclusion which the learned sentencing Judge reached, but in any event, even if that be the basis on which he sentenced, it does seem to me to be a conclusion supported by the whole of the evidence. The applicant is entitled to some discounting for his early plea of guilty and for the fact that he was in a position to make within one month repayment of a significant portion of the amount fraudulently obtained.

However, when all those factors are taken into account it is clear that they are adequately reflected in suspending the head sentence of three years after serving six months. If anything, whilst that sentence is clearly within range, it is towards the lower end of the range for an offence of this type. It follows that in all the circumstances I am not satisfied that there has been any error in the exercise of the sentencing discretion and I am not satisfied that the sentence imposed was manifestly excessive. It therefore follows that the application for leave to appeal against sentence should be refused.

McPHERSON JA: I agree.

WHITE J: I agree.

McPHERSON JA: The order is that the application for leave to appeal is dismissed.
