

COURT OF APPEAL

McPHERSON JA
WILLIAMS JA
WHITE J

CA No 149 of 2002

THE QUEEN

v.

CARL ALAN HEARN DEN

Applicant

BRISBANE

..DATE 24/07/2002

JUDGMENT

WILLIAMS JA: In this matter the applicant pleaded guilty on 10 May 2002 to an offence of fraud with a circumstance of aggravation. The offence occurred between 1 January 2001 and 3 August 2001. During that time the applicant fraudulently took some \$70,000 from his employer in circumstances which I will recount in a moment. He was sentenced to imprisonment for a period of three years. That imprisonment was ordered to be suspended after nine months with an operational period of five years. There was also an order that restitution in the sum of \$61,478.66 be paid within 30 days.

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The applicant had worked for Myers for some eight years. He worked in various areas of the store but in about January 2001 was moved to the returns area. Apparently he did not like working in that section and that appears to have been part of the motivation for the commission of the offences. Apparently what he would do was fill out return forms with personal particulars chosen at random from the telephone book and he would then take from the till the amount shown on that return form, usually in sums of between \$100 and \$200. The total that he obtained during the period was \$70,944.24 in some 507 transactions.

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He is a relatively young man born on 18 July 1973. Therefore he was aged 28 when the offences occurred. He had no prior convictions. He did have an impressive background. He had a sister who had problems coping with a young child and he had, to a large extent, adopted the role of a father figure with respect to that child. He had also been in a long-term

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relationship with a woman that he had initially met at school and it appears that they were putting a home together.

By the time he stood for sentence, through selling his motorcycle and obtaining a loan on the home, he had in hand \$61,478.66 to pay by way of restitution. He also undertook to pay the balance of \$8,034 within 12 months if he was able to return immediately to the work force. As I understand the submissions made today the general offer to make the repayment of the balance when he is able from his earnings still stands. He had, by the time he stood for sentence, also obtained alternative employment.

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The learned sentencing Judge accepted, as seems to be clearly established by the evidence, that he was genuinely remorseful for his conduct and it was recognised that his behavior in question was generally out of character. He made full admissions, had no previous convictions and pleaded guilty to an ex officio indictment. His counsel submitted today that the sentencing fact imposed did not sufficiently recognise his young age, lack of previous convictions and his good character references.

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I am of the view that the sentence, whilst in a broad sense generally within range, does not sufficiently reflect those particular factors. This Court has today given judgment in the matter of Fisher which was the case heard immediately after this one. Bearing in mind the sentence in Fisher it is difficult to justify a sentence on Hearnden which was greater.

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JUDGMENT

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In all of those circumstances I have come to the conclusion that there was insufficient recognition given by the sentencing Judge to the mitigating factors and, though the adjustment is relatively minimal, this Court ought to interfere. I would grant leave to appeal, allow the appeal and vary the sentence imposed to the extent of setting aside the order that the sentence be suspended after nine months with an operational period of five years and in lieu thereof order that the sentence be suspended after six months with an operational period of three years. Otherwise the orders made by the learned sentencing Judge should stand.

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McPHERSON JA: I agree.

WHITE J: I agree.

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McPHERSON JA: The order stated by Justice Williams will be the order of the Court.

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