SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vinson* [2002] QCA 379
PARTIES:	**R** **v** **VINSON, Damien John** (applicant)
FILE NO/S:	CA No 180 of 2002 DC No 1593 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2002
JUDGES:	Williams and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the application for leave to appeal**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – ASSISTANCE TO AUTHORITIES AND CO-OPERATION – where applicant committed 27 separate dishonesty offences – where applicant volunteered to police the commission of 22 of these offences – where applicant submits that the fraud would have continued undetected had he not disclosed the offences to police – where applicant did not disclose all of the offences when originally questioned – where learned sentencing judge described the applicant as exhibiting some remorse – whether learned sentencing judge erred in not finding that the applicant's co-operation evidenced the presence of overwhelming remorse CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – REPARATION AND RESTITUTION BY OFFENDER – where applicant dishonestly applied his employer's money

for his own use – where applicant did not volunteer a willingness or a capacity for restitution until sentencing date – whether this willingness should have been given more weight by learned sentencing judge

R v Bourke [1993] QCA 579; CA No 428 of 1993, 8 December 1993, considered
R v Cox [1995] QCA 563; CA No 367 of 1995, 15 December 1995, considered
R v Ferguson [1995] QCA 554; CA No 381 of 1995, 12 December 1995, considered
R v Sigley [2002] QCA 11; CA No 297 of 2001, 4 February 2002, considered

COUNSEL: P J Davis for the applicant
P F Rutledge for the respondent

SOLICITORS: Ryan & Bosscher for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA and there is nothing I wish to add thereto. The application for leave to appeal against sentence should be refused.

[2] **JERRARD JA:** The applicant pleaded guilty on 31 May 2002 to an ex officio indictment charging him with having dishonestly applied for his own use money belonging to his employer between 10 October 2000 and 8 August 2001. He acknowledged by his plea that he had dishonestly applied a total amount of $24,667.65 of his employer's money to his own purposes. He was sentenced to two years imprisonment, and the learned sentencing judge ordered that that sentence be suspended for two years after the applicant had served six months of that term. Mr Vinson applies for leave to appeal against that sentence, alleging that it is manifestly excessive.

[3] He is a 25 year old man with no previous convictions for offending behaviour. He was employed at the time of the offences at the Chifley On George Hotel, having started employment there as a porter, and worked his way up to the position of accounts administrator. The learned sentencing judge was informed by the applicant's counsel that all of the monies stolen from the employer had been expended for the benefit of the applicant's fianceé, either directly on presents for her, on her 21st birthday, and expenses associated with their expected wedding. That wedding had been cancelled two weeks prior to its scheduled date, when the applicant and his fianceé were obliged to tell their families of the offences he had committed.

[4] The applicant was described by his counsel as having had the benefit of a good education, and having a sound working history. He still had the ongoing support of each of his parents and his fianceé. He had suffered the embarrassment of the cancelled wedding, lost his employment, and only obtained employment again in December of 2001. That was casual employment at the Greenslopes Private Hospital, which had become full time employment at the Accident and Emergency Centre Reception at that Hospital in April 2002.

[5] The offences of dishonesty he committed involved two varieties of fraud. One was by falsification of cheques coming into his possession, and the other was by the creation of fictitious leave entitlements. His employers had themselves begun investigation of the first variety of the offences, suspected by them, and those revealed that he had misappropriated $9,126.00. He admitted having done so in an interview with police on 24 August 2001.

[6] On 28 August 2001 he voluntarily participated in a second interview in which he acknowledged a further 20 instances of fraud, and in a second voluntary interview on 15 October 2001 he identified two further offences he had committed. He thus volunteered to the police the fact of the commission of a further 22 instances of dishonesty by him in which he misappropriated a total of $15,541.65. It was common ground that that fraud may well have gone undetected had he not himself disclosed the commission of those offences to police. All up there were 27 separate fraudulent transactions committed by him over ten and a half months.

[7] He committed those offences when in a position of trust. He had not made any restitution at all as at the date of sentence, although he volunteered a willingness and capacity to do so to the learned judge. This willingness included the asserted common intention that he and his fianceé would sell their motor vehicles for the purpose of restitution. No particular reason was forthcoming as to why that had not already occurred (and restitution been made) before the applicant appeared for sentence.

[8] The learned sentencing judge was referred by both counsel for the Crown and for the applicant to the decision of this Court in a matter of *Sigley* [2002] QCA 11, judgment delivered 4 February 2002. The learned judge himself made reference to other decisions of this Court, which were referred to by McMurdo P when giving the judgment of the Court in *Sigley*.

[9] Four principal judgments of this Court seem relevant when judging the applicant's argument that the sentence imposed on him was manifestly excessive. The first is a matter of *Bourke* (CA No. 428 of 1993). In that case the applicant had been sentenced to three years imprisonment, with a recommendation for release on parole after four months, on his pleas of guilty to five counts of misappropriation of $30,000.00. Those offences were described by the sentencing judge as systematic and extending over a period of time. That applicant had a previous good character and no prior convictions, an excellent work history, had made full restitution by taking out a loan repayable over ten years to do so, and performed a large amount of volunteer work with a community organisation. This Court ruled on his application for leave to appeal that while the sentencing judge might have suspended the sentence entirely, a systematic breach of trust over time for substantial amount of money made a custodial sentence almost inevitable. It was held that the sentence imposed was not manifestly excessive. That sentence makes it very hard to show that this one is manifestly excessive.

[10] In a matter of *Ferguson* (CA No. 381 of 1995) the applicant for leave to appeal in that case had misappropriated either $14,000.00 or $12,800.00 from his employer. He pleaded guilty and was sentenced to three years imprisonment, with the imprisonment to be suspended after three months for an operational period of four years. No restitution had been paid. The applicant was 24 years old and had taken the money over a period of about eight months. He had no previous convictions,

and had references testifying to his good character. The sentencing judge ordered that he pay compensation of $12,800.00 within two years and nine months, in default six months imprisonment. His counsel argued that the sentence of three years imprisonment ought to have been suspended entirely, but this Court held that while the sentence might have been suspended in its entirety a term of actual imprisonment was not manifestly excessive. The sentence was reduced from three to two years imprisonment, still to be suspended after three months. I point out that in that case restitution was ordered.

[11] In the matter of *R v Cox* (CA No. 367 of 1995) the applicant in that case pleaded guilty to an ex officio indictment charging him with misappropriating the property of his employer between August 1993 and November 1994. He had taken $7,000.00 whilst in a position of trust. This Court considered in its judgment a considerable number of sentences imposed by judges in the District Court on offenders who, like Mr Cox, also had no prior convictions, and who had pleaded guilty. In the result a sentence of two years imprisonment, with release on parole recommended after six months had been served, was not altered on appeal.

[12] In the matter of *Sigley* (supra) that applicant had pleaded guilty to a charge of defrauding her employer, and her offending behaviour involved 12 separate transactions in which she misappropriated approximately $11,000.00. She had been the office manager in the business. She had no prior conviction. She had repaid $2,000.00 of the money taken, and was sentenced to two years imprisonment to be suspended after she served six months of that term.

[13] This Court held that by reference to its earlier decisions, including those in the matters of *Cox* and *Ferguson,* a sound exercise of the sentencing discretion would have been the imposition of a sentence of two years imprisonment, either fully suspended or suspended after a short term of imprisonment of up to six months. Accordingly, the sentence imposed was not manifestly excessive; but because of an error made by the sentencing judge in assessing the weight to be given to the applicant's plea of guilty and extent of remorse, this Court was entitled and obliged to re-sentence the applicant.

[14] Upon the re-sentence, this Court took into consideration some particularly strong matters entitling that applicant to some merciful treatment. These included that she provided the sole support for her two teenaged children, and also for her eldest daughter and her daughter's two children aged 11 and 5. The youngest grandchild was quite severely disabled. That applicant had suffered two significant personal tragedies, one being the murder of her brother by his step son, and the other the discovery that her then de facto husband was a paedophile. He was convicted, in part on her evidence, of sexual offences involving children. She was receiving ongoing counselling and medication for depression.

[15] When this Court re-sentenced her, the President remarked that had she been sentencing that applicant at first instance on those facts, the President would have fully suspended the two year term of imprisonment, and awarded some further partial restitution. As that applicant had served over three months imprisonment, the Court suspended the remainder of her sentence and ordered immediate discharge.

[16] In my judgment those past sentences confirmed or imposed by this Court establish that the sentence imposed by the learned judge was not manifestly excessive. This is particularly so because no restitution was ordered and none had been made. The applicant principally argued that the learned judge had erred in not finding the presence of "overwhelming remorse" in the applicant. That submission in turn principally relied upon the fact of the applicant having volunteered the commission of offences by himself to the police. As to that, although the prosecution quite fairly conceded that those volunteered offences "may well" have gone undetected, the simple fact is that the agreed schedule of facts showed that those offences largely consisted of the applicant having created false entries in the payroll system for recreation leave entitlements payable to five specific other co-employees, some of whom were named more than once. Payment for those recreation leave entitlements were directed by the applicant into his own bank account. Although the applicant in each case reversed the entry, returning those co-employee's recreation leave balance to their original amounts, any inquiry by those co-employees about their own recreation leave may well have identified the fact of the commission of those offences. People are usually very interested in their recreation leave entitlements. Further, the applicant did not volunteer those offences when first questioned on 24 August 2001, but rather on 28 August and then 15 October 2001. In those circumstances the learned judge was accurate in describing the applicant as having cooperated with the police by reason of those confessions, and with the administration of justice by reason of the ex- officio indictment. The judge was also correct in describing this as a case in which there was some indication of remorse, and in not describing it as a case in which there existed overwhelming remorse.

[17] The amount taken by the applicant was twice as much as the applicant in *Sigley* took, and she had made some restitution. It was also at least twice what the applicant in *Cox* took, after allowing for inflation. The asserted capacity to make periodic restitution from future wages described to the learned sentencing judge, and the asserted capacity to make some lump sum restitution, carry considerably less weight than would have been accorded to evidence of steps already taken to make restitution. In the circumstances the sentence imposed was a sound exercise of sentencing discretion in accordance with judgments of the District Court and of this Court. I would dismiss the application for leave to appeal.

[18] **ATKINSON J:** For the reasons given by Jerrard JA I agree that the application for leave to appeal should be dismissed.