

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Spalding* [2002] QCA 538

PARTIES: **R**  
**v**  
**SPALDING, Craig Samuel**  
(applicant)

FILE NO/S: CA No 241 of 2002  
DC No 42 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Bundaberg

DELIVERED EX TEMPORE ON: 6 December 2002

DELIVERED AT: Brisbane

HEARING DATE: 6 December 2002

JUDGES: McMurdo P, Helman and Philippides JJ  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence refused**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - where applicant pleaded guilty by ex-officio indictment to offences of misappropriation and fraud as an employee – whether sentence manifestly excessive in the circumstances

*R v Banauch* [1999] QCA 207; CA No 88 of 1999, June 4 1999, referred to  
*R v Cheers* [1997] QCA 329; CA No 214 of 1997, 21 October 1997, referred to  
*R v Gadaloff* [1999] QCA 286; CA No 24 of 1999, 24 September 1999, referred to  
*R v Power* [1998] QCA 032; CA No 440 of 1997, 11 February 1998, referred to  
*R v Reischl* [2000] QCA 215; CA No 81 of 2000, June 1 2000, referred to  
*R v Taylor* [1994] QCA 574; CA No 406 of 1994, 23 November 1994, referred to  
*R v Wheeler & Sorrensens* [2002] QCA 223; CA Nos 56 and 57 of 2002, 25 June 2002, referred to

COUNSEL: K M McGinness for the applicant  
B G Campbell for the respondent

SOLICITORS: Legal Aid Queensland for the applicant  
Director of Public Prosecutions (Queensland) for the  
respondent

THE PRESIDENT: The applicant pleaded guilty by ex officio indictment in the District Court at Bundaberg on 10 April 2002 to one count of misappropriation as an employee of property worth more than \$5,000 between 1 July 1995 and 30 June 1997 and to a second count of fraud as an employee of property worth more than \$5,000 between 1 July 1997 and 7 July 2001. His sentence, which was then contested, was adjourned to allow the defence to have a psychological report prepared. On 2 July 2002, the applicant was sentenced to six years' imprisonment with a recommendation for post prison community based release after two years. The applicant contends the sentence is manifestly excessive.

The applicant was the payroll master and commercial manager for four separate companies, operating as Stewart and Sons, which employed more than 50 staff. He was responsible for paying the employees on a weekly basis.

The second offence in time occurred in this way. At the suggestion of the applicant, a desk bank computerised system was introduced for which the applicant was solely responsible. The owner of the companies, Mr Brian Stewart, was unfamiliar with computers and relied completely on the applicant who entered false records into the computer indicating that employees were owed amounts in addition to their wages.

The employees would receive their normal wages' entitlement and the applicant transferred the additional amount into his bank account. Six hundred and 35 individual transactions were involved. The applicant sent the inflated tax liability on the higher false amount to the Australian Tax Office. The amount misappropriated in respect of this offence was \$240,751 of which \$175,786 was directed to the applicant, the remainder going to the Australian Tax Office to the detriment of other employees who sometimes wrongly lost other important benefits to which they were entitled such as family allowances.

Count 1 occurred prior to the implementation of the computerised system when the applicant had a similar manual system in place and misappropriated \$62,122, \$46,592 of which went directly to him and \$15,530 of which was wrongly directed to the Australian Tax Office to the detriment of other employees. The applicant therefore received a total of \$222,378 whilst the Tax Office was paid a total of \$80,495 wrongly.

The total amount of moneys misappropriated was \$302,873. The applicant has not made restitution and it was unclear on the material before us whether the Australian Tax Office has repaid the overpayments.

The offending behaviour came to light when the applicant tendered his resignation and trained his replacement. She noticed suspicious behaviour and anomalies in the records which she reported to Mr Stewart. The applicant denied any

knowledge of misappropriation to Mr Stewart who then contacted the police.

The applicant made full admissions to the police in a formal interview. He had worked for the Stewart companies for 16 years commencing in July 1985. He told police he committed the offences to get back at his employer whom he did not like and who constantly humiliated him.

The prosecution denied this allegation of bullying and humiliation and tendered statements from a number of current workers for the companies. The workers stated that they were satisfied with their working conditions. Mr Brian Stewart's statement was also tendered. Mr Stewart saw himself as a flexible employer. He noticed a change in the applicant's behaviour over the last few years of his employment when his work performance slipped and absenteeism increased. They had occasional and unexceptional arguments over the years concerning work practices.

The Prosecutor also stated that Mr Stewart had been concerned for the applicant's health during the last months of his employment and discussed this with the applicant who at no stage raised any problems as to working conditions or his treatment. Although the applicant returned to the office whilst on leave to do the companies' pays and discouraged any assistance in this area, with hindsight this conduct was apparently to ensure his fraud was not detected.

The applicant was 36 years at sentence and between 30 and 35 years during the period of the offending. He had no previous convictions. He is married with a nine year old child. He completed year 12, has a solid work history but does not have tertiary qualifications. At the time of the offences, he was drinking heavily but is not now addicted to alcohol or drugs. The money misappropriated was spent on heavy drinking, regularly upgrading his motor vehicle and holidays. He was currently unemployed but managed his son's soccer team.

Defence counsel at sentence did not contend that there was a deliberate campaign of bullying in the workplace by Mr Stewart but, rather, that the applicant subjectively felt miserable and that this was unwittingly contributed to by Mr Stewart.

The prosecution accepted Mr Stewart sometimes used inappropriate language such as "get your arse in here" in the largely all male workplace.

The defence tendered a report from psychologist Desley Fraser. The report was based on the applicant's account of workplace conditions which was much more critical of the work environment than that put forward by defence counsel at sentence. The applicant reported to her an increasing sense of being trapped in a workplace where he was subjected to verbal and emotional abuse, unable to find alternative work and needing to work there because he had a wife, a child and a mortgage to support. This increasing stress and strain resulted in an adjustment disorder with disturbance of conduct

which allowed him to feel justified in maintaining his dishonest activities. He knew he was doing wrong but he felt he needed to pay back his employer for the ongoing verbal and emotional abuse and this overwhelmed his moral sense. His feelings of guilt contributed to his increasing stress. He accepts he must be punished for his crime, which he regrets, and now realises resignation from the workplace was a better option than misappropriating money. Psychotherapeutic intervention is recommended to assist him address his identity issues and develop skills and strategies to cope with difficult situations in the workplace and in interpersonal relationships. With such intervention, he is unlikely to reoffend in the future.

In a second report, Ms Fraser observed that even if there were no objective supporting evidence in relation to the applicant's allegation of bullying in the workplace, people with the applicant's presentation tend to misconstrue the behaviour of others and this was consistent with his identity disorder. In addition, his use of alcohol further inhibited his behaviour resulting in poor judgment and other acting out behaviours whilst intoxicated.

The prosecution did not take issue with the facts relied upon by defence counsel at sentence.

In a statement attached to the application for leave to appeal, the applicant complained of his barrister's presentation of his case at sentence but those grounds are not

now pursued. Ms McGinness, who appears for the applicant in this appeal but did not appear at the sentence, instead emphasises the applicant's personal circumstances including his marriage, nine year old child, impressive work record, drinking problem, full co-operation with the authorities, early plea of guilty to an ex officio indictment, remorse and co-operation, lack of criminal history, prior good character and the matters raised in the psychologist's report. Ms McGinness contends that the sentence was manifestly excessive for the amount misappropriated and that a sentence of between four and five years' imprisonment suspended after 12 to 15 months was appropriate.

The applicant does not have the mitigating factor of youthful immaturity. He was in a position of trust which he abused over a five year period. The offences involved many transactions totalling over \$300,000. The applicant has turned his mind to misappropriating from his employer and, effectively, his fellow employees on at least a weekly basis. There were, as Ms McGinness has pointed out, a number of significant mitigating factors. Nevertheless, the applicant's conduct warrants a substantial custodial sentence as a personal and general deterrent.

It is always difficult to find truly comparable sentences. A review of those to which we have been referred by the applicant indicate that a slightly lesser sentence could have been imposed - see, for example, R v. Wheeler [2002] QCA 223; CA No 56 of 2002, 25 June 2002; R v. Stephens, CA No 300 of

1990, 26 November 1990; R v. Baunach [1999] QCA 207; CA No 88 of 1999, 4 June 1999; and R v. Reischl [2000] QCA 215; CA No 81 of 2000, 1 June 2000.

On the other hand, the comparable sentences referred to by the respondent including R v. Gadloff [1999] QCA 286; CA No 24 of 1999, 24 September 1999; R v. Cheers [1997] QCA 329; CA No 214 of 1997, 26 August 1997; R v. Power [1998] QCA 032; CA No 440 of 1997, 11 February 1998; and R v. Taylor [1994] QCA 574; CA No 406 of 1994, 23 November 1994 suggest that, balancing the aggravating and mitigating circumstances, here the sentence imposed of six years' imprisonment with a recommendation for post prison community based release is within a sound exercise of the sentencing discretion. It adequately reflects the applicant's psychological state, which explains but does not excuse his conduct, and his co-operation, remorse, early ex officio plea of guilty, prior good history and other mitigating factors.

I would refuse the application for leave to appeal against sentence.

HELMAN J: I agree.

PHILIPPIDES J: I also agree.

THE PRESIDENT: That is the order of the Court.

-----