SUPREME COURT OF QUEENSLAND

CITATION:	*R v Prentice* [2003] QCA 34
PARTIES:	**R** **v** **PRENTICE, Mark Paul** (applicant/appellant)
FILE NO/S:	CA No 320 of 2002 DC No 310 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	14 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2003
JUDGES:	Davies and Williams JJA and Cullinane J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted** **2. Appeal allowed to the extent only of substituting a fine of $23,800.00 for the fine of $40,000.00**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant wound back odometers on used cars before selling them – where substantial fine imposed – where applicant had no reasonable means of paying the amount – whether the fine imposed was manifestly excessive *Fair Trading Act* 1989 (Qld), s 40(a) *Penalties and Sentences Act* 1992 (Qld), s 48 *R v Australian Rent-a-car and Theodore Coppens*, unreported, Dodds DCJ, 25 February 2000, considered *R v Kiripatea* [1991] 2 Qd R 686, applied *R v QSD New Cars P/L and Steven Mark Conn*, unreported, Newton DCJ, 29 November 2001, considered
COUNSEL:	The applicant/appellant appeared on his own behalf T Rynne for the respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
C W Lohe, Crown Solicitor, for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Williams JA and with the orders he proposes.

[2] **WILLIAMS JA:** The applicant, who appeared on his own behalf before this court, seeks leave to appeal against the quantum of the fine imposed upon him consequent upon his pleading guilty to 34 charges of breaching s 40(a) of the *Fair Trading Act* 1989 on the ground that it was manifestly excessive. The learned District Court judge imposed a fine of $40,000.00, which represented approximately $1,176.00 per offence. The applicant was allowed five years within which to pay the fine, and the default penalty was 12 months imprisonment.

[3] The appellant in his written outline furnished a number of grounds on which he sought to challenge the fine. Some of the matters particularised can be summarily rejected. He claimed he was not given an opportunity to provide mitigating evidence, but he was represented by a solicitor and gave oral evidence before the sentencing judge on issues relevant to mitigation. He then claimed that both he and the solicitor then representing him were overborne by the learned sentencing judge. The transcript indicates that the judge adopted a fairly robust approach to the issue of sentencing but there is nothing in the material which would support the contentions raised by the applicant.

[4] The only matter raised by the outline which needs further consideration is the assertion that he was dealt with as if he was a company rather than an individual trader. Associated with that is the assertion that too much significance was placed on prosecution material in determining the appropriate fine.

[5] Orally before this court the applicant contended that the fine was oppressive, that he had no reasonable means of paying the amount, and that given the provisions of s 48 of the *Penalties & Sentences Act* 1992 ("the Act") there was a ground for this court reducing the amount of the fine. Before considering further those contentions it is necessary to state the relevant facts. An agreed statement of facts for sentence was placed before the sentencing judge and the matter proceeded on the basis thereof, together with the oral evidence from the applicant.

[6] In essence the applicant pleaded guilty to making a false representation in connection with the supply of goods, namely used motor vehicles. The particulars were that the odometers of 34 vehicles sold by the applicant, who conducted a used car dealership, had been significantly wound back. The agreed statement indicated that covering all the 34 vehicles there had been a winding back of a total of 3 million kilometres. In the case of 14 of the vehicles the odometer had been wound back by at least 100,000 kilometres. In one instance the wind back was approximately 300,000 kilometres. Given those figures it was stated that the average wind back was approximately 90,000 kilometres.

[7] The offence created by the Act is one of strict liability, the offence being committed if the representation was not in fact correct. In consequence what mattered was not

so much how the odometers came to present false readings, but rather the fact that in each case they did.

[8] The offences took place over a 14 month period from April 1999 to June 2000.

[9] The material placed by the prosecution before the sentencing judge suggested that each vehicle sold was over priced given the false odometer reading by an average of $2,400.00 and it was submitted that the additional gross profit figure resulting therefrom was of the order of $101,020.00. That is a matter which the applicant addressed in oral evidence. The learned sentencing judge accepted that he would have incurred various pre-sale costs ranging from $400.00 to $1,500.00 per car. In consequence the learned sentencing judge estimated that the profit attributable to the winding back of the 34 odometers was about $67,000.00.

[10] The learned sentencing judge then referred, correctly, to the considerations that there was a safety issue involved and that the warranties given with each of the vehicles on sale was voided by the applicant's conduct. The latter fact would have the result that purchasers could have valid claims against the Property Agents and Motor Dealers claim fund – a burden on the taxpayer.

[11] The legislation provides that the penalty for a breach of the provision in question is to be a fine, and there is no doubt that serious contraventions of the Act will attract very substantial monetary penalties. The maximum fine per charge is now $40,500.00 for an individual and five times that for a corporation. The fine imposed must have a deterrent effect and send a message to other traders that such conduct will not be tolerated. The policy of the legislation is clearly to protect consumers and conduct of the type in question is likely to have serious consequences for consumers.

[12] The learned sentencing judge was referred to penalties imposed in comparable cases, and there was specific reference in the sentencing remarks to those. In particular reference was made to two comparable Queensland cases; in each the maximum penalty was the same as here.

[13] Judge Dodds on 25 February 2000 imposed fines on Australian Rent-A-Car Pty Ltd and TJ Coppens for 16 offences involving the winding back of odometers on motor vehicles. Coppens beneficially owned 50 per cent of the shares in the company. The offences covered the period March 1996 to April 1998. The business was far more extensive than that carried on by the applicant in this case, but the wind back with respect to each odometer in question was substantially less than the wind back here. Judge Dodds fined Coppens $700.00 on each count, a total of $11,200.00, and fined the company $3,000.00 on each count, a total of $48,000.00. Coppens was allowed two years to pay in default 12 months imprisonment.

[14] Then Judge Newton on 29 November 2001 dealt with QSD New Cars Pty Ltd and SM Conn with respect to 40 charges involving the winding back of odometers on motor vehicles. Conn was the sole director of the company. Again the company had an extensive operation as a car fleet leasing company primarily to facilitate the business activities of an associated rent a car company. All of the businesses involved were much more substantial than that carried on by the applicant here, but again each odometer wind back was for a substantially lower figure than that

involved in the present case. Conn was fined $500.00 on each charge, a total of $20,000.00, and the company $2,000.00 on each charge a total of $80,000.00. Conn was allowed two years to pay in default one years imprisonment.

[15] In my view, particularly when one is looking at significant business operations involving the sale or other disposal of motor vehicles, significant penalties are called for with respect to the winding back of odometers. The fines imposed in the two other cases referred to indicate the appropriate range.

[16] The fine in fact imposed here was approximately $1,176.00 per charge well below the maximum of $40,500.00.

[17] Section 48 of the *Penalties & Sentences Act* requires a court in determining the amount of a fine and the way in which it is to be paid to take into account the financial circumstances of the offender and the nature of the burden that payment of the fine will place on the offender. In the present case the learned sentencing judge indicated that the applicant's "capacity to pay" was taken into account.

[18] It appears from the agreed statement of facts that though the operation was a relatively small one in some five years of trading gross sales amounted to $5,500,000.00. That does not accurately indicate what the profit was from such trading. As a result of the charges in question the applicant has had to close his car yard but did operate from his residence for some time thereafter. He has now lost his licence as a motor dealer and given the convictions it is unlikely he would be granted another. He and his wife sold their residence at Runcorn for $205,000.00 and purchased a more modest one for $140,000.00. There was apparently money owing to the bank secured by a mortgage over the first property.

[19] The applicant has continued in the motor vehicle industry as a commissioned salesman and has been earning approximately $600.00 per week gross which represents about $480.00 per week nett. They were figures accepted by the sentencing judge.

[20] To pay off a fine of $40,000.00 over five years the applicant would have to pay approximately $154.00 each and every week of that period from his earnings. That would be difficult given the level of his current earnings and the need to support himself and his wife. The applicant is not a young man, he was 56 when sentenced, and his effective working life is limited.

[21] Though reference was made in the sentencing remarks to the applicant's "capacity to pay" it is unlikely that payment of the fine in total could be realistically achieved. I said in *R v Kiripatea* [1991] 2 Qd R 686 at 702 (with the concurrence of Shepherdson and Ambrose JJ) that a sentence "should not be a crushing one, and there is good reason for avoiding a sentence which would effectively destroy any hope a prisoner may have for rehabilitation". Those remarks are, to my mind, apposite here. The fine in fact imposed is a crushing one and, if the applicant realistically sees he has no hope of satisfying it, the fine loses its effectiveness; the default provision becomes the sentence in fact.

[22] Though fines of the magnitude imposed by the sentencing judge are appropriate to offences of this type when committed in the context of substantial business

operations, the fine here, given the personal circumstances of the applicant, is manifestly excessive.

[23] Whilst I am not satisfied that he was sentenced as if he was a corporation, it is of some significance that the personal fines on him were much greater than the personal fines imposed on each of Coppens and Conn, namely $700.00 and $500.00 respectively.

[24] In the circumstances, given the personal factors referred to, the fine that should have been imposed was $700.00 per charge, a total of $23,800.00.

[25] The application for leave to appeal should be granted, and the appeal allowed to the extent only of substituting a fine of $23,800.00 for the fine of $40,000.00.

[26] **CULLINANE J:** I have read the reasons of Williams JA in this matter and I agree with them and the orders he proposes.