SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barnes* [2003] QCA 126
PARTIES:	**R** **v** **BARNES, Jane Elizabeth** (applicant)
FILE NO/S:	CA No 49 of 2003 DC No 2971 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	20 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2003
JUDGES:	McMurdo P, McPherson JA and White J 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 – JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT – SENTENCE – where applicant pleaded guilty to 22 offences of defrauding the Commonwealth – where applicant sentenced to three years imprisonment, released after three months on entering into a recognisance in the sum of $1,000 conditioned that she be of good behaviour for three years – where applicant had no previous convictions – whether learned sentencing judge gave insufficient weight to circumstances in which the offences were committed - whether sentence manifestly excessive *R v Brown* [2001] QCA 553; CA No 290 of 2001, 30 November 2001, distinguished *R v Tacey* [1994] QCA 15; CA No 434 of 1993, 2 March 1994, distinguished *Wright* (1994) 74 ACrimR 152, considered
COUNSEL:	AJ Glynn SC for the applicant AJ Rafter for the respondent
SOLICITORS:	Deacon & Milani for the applicant Director of Public Prosecutions (Commonwealth) for the respondent

THE PRESIDENT: The applicant pleaded guilty on the 28th of February this year to 22 offences of defrauding the Commonwealth of taxation revenue in the financial years 1995, 1996 and 1997. She was sentenced to three years imprisonment to be released after three months on entering into a recognisance in the sum of $1000 conditioned that she be of good behaviour for three years. She contends the sentence was manifestly excessive.

The applicant has no previous convictions and was aged 39 to 41 years at the time of the offences and 46 years at sentence.

The maximum penalty for each offence is 10 years imprisonment with or without a fine up to $110,000.

The offences were discovered after a spot audit by the taxation office of the debt collection and private investigation company Austwide Investigations. This company was controlled by the applicant's de facto husband Brian Crowley. The financial and administrative services were supplied through a management service company Netshire. She kept most of the books of accounts, paid the wages and completed the group tax certificates. She issued group certificates falsely recording Brian Crowley's three young adult children who lived permanently in the United Kingdom as employees in the three financial years ending 1995, 1996 and 1997 (counts 1 to 5, 8 to 12 and 15 to 19).

She additionally understated her own taxable income (counts 6, 13 and 20) which was the automatic result of the money being falsely sent to the children as employees.

She was also knowingly concerned in the understatement in the income tax returns of Austwide and Netshire based on the certificates the subject of the other offences (counts 7, 14, 21 and 22). In total $109,000 of tax was avoided and with penalties and interest, this amount rose to $165,613.

The Prosecutor tendered a statement of facts which were agreed, but for the claim that the money supposedly paid to the three children was diverted to the applicant and Brian Crowley. The defence emphasised the money was not used by the applicant. The prosecution appeared to accept that and did not contend that the applicant obtained the spending benefit of the money received but that she was a party to the receipt of that money.

The prime offender, Brian Crowley, whose children benefited from the fraud, died of a heart attack shortly after tax investigations commenced and before he was charged. The applicant was charged in February 2002 after his death. She currently runs Austwide and is its director. The plea of guilty was an early plea, first indicated on 26 July 2002, although there was no significant cooperation with the authorities before that plea.

The applicant met Brian Crowley through her work in England. They commenced a relationship and she later followed him to Australia. He had three children from his prior marriage. Although she had married before she had no children. They began living and working together. He bought into Austwide and eventually bought out other directors, not without acrimony. The relationship was referred to by psychiatrist Ian Curtis as co-dependant dominant-subservient and she was, at the time she committed these offences, heavily under his influence, both professionally and personally. This is also supported to some extent by an affidavit from Mr Crowley's sister, who was not on good terms with the applicant, and by other statements tendered on behalf of the applicant. Mr Crowley was very keen to continue to provide financial support to his three young adult children. The applicant's role in Austwide commenced as an unpaid worker and she developed her skills so that by 1995 she was working in the financing area under Mr Crowley's direction doing personnel wages and book-keeping. She opposed Mr Crowley's directions to falsely place his children on the payroll, but because of her relationship with him she was unable to resist his claims. There is no suggestion, however, that he offered violence to her or that he threatened to end the relationship if she did not act in this way. In the end, her actions were her own free choice. The issuing of the false group certificates was the extent of her involvement in the offences, although her English bank account was used to conveniently transfer the funds to Crowley's children.

The repayment of the tax and penalties was commenced after the tax investigation in 1998 and was completed before the instigation of the criminal investigation. She was not charged until February 2002.

A number of references tendered on the applicant's behalf attested to her good character, hard work and determination especially since the commission of these offences. Following her husband's death and before she was charged, she took over the reigns of the business and worked very hard and capably to develop the company which now is successful and employs 45 people. By February 2002 when she was charged, about four years after the fraud was first discovered by the taxation office, she was responsible for multi-million dollar borrowings secured against her house and the building in which the business is located; it was submitted at sentence that if she were gaoled, it would be highly likely the bank will foreclose because she is seen as the essential figure of the business whose personal presence is necessary to ensure its viability, but Mr Glynn SC, who appears for the applicant today, very properly informs us that the bank has decided not to foreclose.

It is common ground that generally speaking offences of tax fraud of this magnitude require salutary punishment involving a substantial head sentence with an actual period of imprisonment required to be served, general deterrence being a very important sentencing factor: see Wright (1994) 74 ACrimR 152. Wright, who was charged under the less serious provision

of section 29B Crimes Act 1914 (Cth), failed to include in his income tax returns income received as cash: $129,264 in the 1990 tax year and $81,988 in the 1991 tax year. Because of other errors made by him the amount owing to the Commissioner was only $3,859.64 even with penalty tax. He had no previous convictions and pleaded guilty at an early stage. His sole motive was greed. His sentence was increased to 18 months imprisonment with conditional release that he be of good behaviour for two years and that he be released after serving three months.

The respondent relies on the cases of R v. Tacey [1994] QCA 15; CA No 434 of 1993, 2 March 1994 and R v. Brown [2001] QCA 553; CA No 290 of 2001, 30 November 2001 to support the sentence imposed.

In Tacey the respondent pleaded guilty to three counts of defrauding the Commonwealth and was fined $6,666 on each count making a total fine of about $20,000. The Commonwealth Director of Public Prosecutions appealed against that sentence for its manifest inadequacy. Tacey was a director of Curtain Wonderland. She failed to bring the cash takings into account in the income tax returns of the company for the financial years 1988 and 1989 and only part of them in the financial year 1991. The total of cash receipts not brought to account was $298,000 and the tax avoided was $114,615. The Court determined that the level of offending was similar to that in Wright and a similar penalty should be imposed, namely a term of imprisonment with the requirement that Tacey serve part of

that term. Tacey was 55 years old with no prior convictions and she had a plea of guilty at an early stage. The tax evaded had been repaid together with penalties. The business received adverse publicity in consequence of her being charged and convicted and her future involvement in the business would be restricted because of her conviction. Tacey, however, unlike Wright and this applicant, had significant heart problems and the primary Judge concluded that there was an unacceptable risk that she would suffer a stroke if sent to gaol. For that reason the Court of Appeal, though with some hesitation, determined that Tacey should not be required to serve a term of imprisonment. The appeal was, however, allowed and a fine of $35,000 substituted for the lesser fines imposed at first instance.

Brown pleaded guilty to two counts of defrauding the Commonwealth and was sentenced to three years imprisonment to be released after six months upon giving security by recognisance in the sum of $1,000 but should be of good behaviour for four years. She applied for leave to appeal against that sentence. The offences arose out of the operations of a company in which the applicant and her husband, who were the shareholders, had effective control. Brown deliberately and calculatingly over six years deducted group tax from the salaries of employees certifying that these amounts had been remitted to the Australian Tax Office without doing so. The amounts deducted but not remitted totalled $107,000. The second count involved similar conduct in respect of her own income; she failed to remit tax of a little

over $5,000. The conduct was detected in an audit by the Australian Taxation Office. This Court affirmed the need for general deterrence in such cases. A psychiatric report was tendered which stated that the applicant attributed her failure to remit tax to a need to constantly juggle limited resources in the business, but that claim was rejected by this Court. All but $15,000 of the amount outstanding had been repaid. The applicant made full admissions and was cooperative with the authorities. She pleaded guilty at an early stage; there was a delay of two and a half years before charging. Brown was 54 years old with no previous convictions, was a victim of domestic violence and had some psychiatric problems which were at least exacerbated by her own dishonesty. The Court did not interfere with the sentence imposed.

The applicant contends there are two significant differences between this case and Brown, Wright and Tacey. The first is the substantial delay here between the discovery of the offending and the charging during which time the applicant had rehabilitated herself: R v. Law; ex parte Attorney-General [1996] 2 QdR 63, R v. Todd [1982] 2 NSWLR 517 and R v. Crawley

(1981) 5 A CrimR 451.

The delay between detecting the fraud and charging the applicant is unsatisfactory.

The second matter relied on by the applicant is that she committed these offences under the direction of her domineering partner and despite her initial protests and she received no personal benefit from the fraud.

Despite these factors the applicant's conduct in defrauding the revenue was abhorrent and warrants condign punishment. Although it is common ground that she received no direct benefit in that the money was sent to Mr Crowley's children in the United Kingdom with whom she did not get on, on the other hand, had Mr Crowley been determined to send the money even without committing this fraud, she did obtain an indirect benefit in avoiding tax in this way. All in all this offence is slightly less serious than the offence of Brown and that is reflected in the sentence imposed here. The unusual significant mitigating health factors that applied in Tacey do not apply in this case.

When all the unusual combination of factors in this case are taken into account, including the delay; that she was not the prime mover and to some extent was overborne by Mr Crowley; that she did not receive a direct benefit from the fraud; the repayment of the money with penalties before the criminal investigation commenced and her significant efforts of rehabilitation channelled into her business skills which now provide employment for 45 employees, the head sentence of three years imprisonment with the very early release after three months is not manifestly excessive and rightly reflects

both the community's concern about offences of this type and the important principles of general deterrence.

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

McPHERSON JA: I agree.

WHITE J: I agree also. It is important to bear in mind that the amount of undeclared income was $363,704, considerably more than the undeclared income in the cases of Wright and Mai to which we have been referred and where imprisonment was ordered. It was also more than in the case of Tacey to which the learned President has made reference and it was only the extraordinary circumstance of that applicant's grave health condition that prevented a term of imprisonment that was imposed below standing.

Deterrence, as has been regularly said, is a particularly important aspect of sentencing for fraud against the revenue which is so difficult to detect. I would be disturbed to think that a person who was subject to non-physical pressure could be said to be less culpable and so escape a term of imprisonment than others.

I agree, though, that delay in preferring charges in this case is greatly to be regretted. I agree with the orders that are proposed.

THE PRESIDENT: Yes, that is the order of the Court.
