SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harch* [2004] QCA 113
PARTIES:	**R** **v** **HARCH, Aaron Michael** (applicant)
FILE NO/S:	CA No 45 of 2004 DC No 5 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave to appeal against sentence
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED EX TEMPORE ON:	14 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2004
JUDGES:	McPherson and Williams JJA and Holmes J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – STEALING – where applicant a security guard who used position to enter premises of and steal money from employer – whether sentence of short term of imprisonment manifestly excessive given applicant 20 years old with no prior convictions *R v Wickham & Anor* [1998] QCA 168; CA No 454 of 1997, CA No 455 of 1997, 25 February 1998, considered
COUNSEL:	K M McGinness for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Qld) for the respondent

McPHERSON JA: The applicant pleaded guilty to two counts on an ex officio indictment of: (1) entering premises with intent, and (2) stealing as a servant.

On 28 January 2004 he was sentenced in the District Court at Toowoomba to a term of six months' imprisonment to be followed by three years of probation. A conviction was recorded in respect of each offence.

The offences were committed on 30 November 2003 when the applicant was employed as a security guard at a day and night pharmacy at Toowoomba. As part of his duties he was required to be present at the pharmacy at 9 p.m. to secure the premises and place the takings in the safe after they had been counted by a staff member.

On the night in question, at around 9 o'clock, he left the safe without spinning the dial, so that it could be opened later, and he did not secure the roller door, instead leaving it slightly ajar. He left the pharmacy after accompanying two staff members to their vehicles. A few hours later the applicant returned and entered the pharmacy by opening the unsecured roller door.

The alarm at the pharmacy went off at 11.42 p.m. that night, though it is not clear whether or not by design and was part of the applicant’s plan to mislead the police into thinking robbers had broken in. He then stole $5,049 in cash from the safe, plus cheques and receipts and left the scene.

The police suspected that an insider had committed the offences as there were no signs of forced entry. They questioned the applicant who at first denied any involvement in the offence. The police subsequently found a sum of $2,330 in cash in the motor vehicle of the applicant hidden in a smaller bag inside a green backpack.

The applicant, after that, admitted to the offence and co-operated with the police by showing them where to find the cheques and receipts which he had taken from the safe and had afterwards dumped in various rubbish bins around Toowoomba. A total of $2,719 was not recovered, and I am not sure that there is any explanation in the record of what happened to it.

The sentence of six months imprisonment was plainly well within range for an offence of this kind. In *Queen v Wickham and Wickham* (CA 454 of 1997), which was referred to by the learned sentencing judge, sentences of three years imprisonment were imposed on each of two brothers who broke into premises as to which Shane Wickham was employed in the capacity of a security guard.

On appeal, the sentence on the other brother was reduced to two years imprisonment. With respect to Shane, Justice Pincus said it was a particularly reprehensible feature of the case against him that he was in a position of trust. "Being employed to prevent others stealing from the property in question he used his inside knowledge", his Honour said, "to

some extent at least to do the very thing he was employed to stop". His sentence was, accordingly, not disturbed.

The same is true here. It was only because the applicant was a security guard that he had access to the premises and was able to contrive the means of stealing the money he was appointed to protect. The Judge took into account against him that the offence was not precipitate but planned and that he allowed himself time to secrete the money and leave the scene before the alarm was raised. It was a serious betrayal of his trust and of the very thing he was employed to ensure did not happen.

It is true that the amount of the loss was less than in *Queen v Wickham*; there $18,000 was taken of which only $1,000 was recovered. Here it was $5,000 of which $2,330 was recovered. In *Wickham* there was other damage caused when the offenders knocked holes in the wall to gain access and remove a safe. Here the applicant also took cheques, receipts and so on; but they appear, in the end, to have been recovered when he decided to co-operate with the police.

The major difference between *Queen v Wickham* and this case is that the ages of the offenders in *Wickham* were considerably more than that of the applicant here. That is a feature to which I will refer later.

The applicant at first lied to the police about being involved, but eventually confessed and pleaded guilty to the

ex officio indictment. His Honour took all of these matters into account in reducing the sentence to one of six months imprisonment. Plainly the offences could have warranted considerably more than the period of custody that the sentence entails.

What is said on appeal by counsel for the applicant is that no term of imprisonment at all should have been imposed. The applicant was only 20 years old and had no previous convictions. These are powerful factors in the applicant's favour on this application. The judge took them into account, remarking as he did, that no one liked sentencing a youth to gaol unless the offence was, as he put it, "just too serious" which his Honour evidently thought this one was.

With some reluctance I am inclined to agree with him. But even without affirmatively agreeing it is, in my opinion, not possible to say that the sentencing discretion was exercised wrongly in this case. Unless there is effectively a complete embargo (which plainly there no longer is by statute law) on sentencing a young offender to a short prison term followed by probation for a serious offence like this, it does not seem to me that the sentencing discretion can properly be said to have miscarried in this case. The form of penalty ultimately selected, that is to say a short period of imprisonment followed by probation, was to my mind an appropriate choice in the circumstances.

There is, it seems, some hope on the part of the applicant that he will be able to return to the army, from which he originally came into this employment, and, it seems, some prospect that he may be accepted for that purpose. The case is, therefore, not quite one in which it will necessarily follow that he will be unable to obtain further employment in the future.

However that may be, I can see no discernible error in the way the discretion was exercised and I would, for that reason, dismiss the application for leave to appeal against sentence.

WILLIAMS JA: The offence in question involved a serious breach of trust. The applicant did the very thing he was employed to stop other people doing. He used his position of trust to steal a substantial sum of money. There was a degree of planning involved.

Notwithstanding his age, a custodial sentence was within range. I can discern no error in the exercise of the sentencing discretion.

I agree with all that has been said by Justice McPherson. The application should be dismissed.

HOLMES J: I agree with the order proposed. I do not think that actual imprisonment in this case was the best or only sentencing option, given that the applicant was a young man not previously convicted, of good character and good work

history; the amount was not large; the means were not sophisticated. Indeed, part of the missing money came to light as a result of the applicant's consent to a search of his vehicle by police.

But I cannot say that the sentence was outside the range of a proper exercise of sentencing discretion, given the breach of trust involved.

For that reason I agree with the order proposed.

McPHERSON JA: The order is that the application for leave to appeal is dismissed.
