SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson; ex parte A-G (Qld)* [2004] QCA 169
PARTIES:	**R** **v** **ROBINSON, Geoffrey Frederick** (respondent) **ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 102 of 2004 DC No 552 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	20 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2004
JUDGES:	McMurdo P and Chesterman and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal** **2. Instead of the sentence imposed at first instance, including the order for compensation, substitute a sentence of two and a half years imprisonment suspended after six months with an operational period of three years** **3. A warrant is ordered for the arrest of the respondent but it is to lie in the Registry for seven days**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OTHER OFFENCES – where respondent convicted on plea of guilty to dishonestly obtaining $33,239 from employer over 14 month period – where sentenced to six months imprisonment wholly suspended and ordered to pay compensation within three months, with six months imprisonment in default – where respondent was carer for

elderly mother and imprisonment would cause her hardship – where compensation had not yet been paid – where fraud was committed to support gambling addiction – whether sentence imposed was manifestly inadequate

R v Blackhall-Cain [2000] QCA 380; CA No 178 of 2000, 15 September 2000, distinguished
R v Bourke [1993] QCA 579; CA No 428 of 1993, 8 December 1993, considered
R v Geertz [1995] QCA 240; CA No 121 of 1995, 26 April 1995, considered
R v Mara; ex parte A-G (Qld) [1999] QCA 308; CA No 107 of 1999, 6 August 1999, distinguished
R v Riesenweber; ex parte A-G (Qld) [1996] QCA 504; CA No 430 of 1996, 15 November 1996, distinguished
R v Sigley [2002] QCA 11; CA No 297 of 2001, 4 February 2002, distinguished
R v Symes [1999] QCA 200; CA No 46 of 1999, 28 May 1999, considered
R v Vinson [2002] QCA 379; CA No 180 of 2002, 27 September 2002, considered

COUNSEL: R G Martin for the appellant
N V Weston for the respondent

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

THE PRESIDENT: Robinson pleaded guilty to dishonestly obtaining $33,239 from the Queensland Police Credit Union Ltd between April 2002 and June 2003. He was sentenced to six months imprisonment suspended forthwith with an operational period of two years and ordered to pay compensation of $28,928.74 within three months in default imprisonment for six months. The appellant, the Attorney-General of Queensland, contends that the sentence is manifestly inadequate.

Robinson was employed as an insurance consultant with the Queensland Police Union for two years. He used his position to fraudulently transfer a total of $33,239 of members' funds on their home loan policies into his own bank account through another employee's computer who was authorised to transfer money. He then opened an account in his mother's name to further facilitate the fraud. His mother was unaware of and not involved in his deceit.

The respondent performed 101 transactions over a 14 month period. To cover his tracks he falsely recorded on paper and on electronic ledgers that the money had been credited to the members' accounts. On four occasions during the offending period he was asked by members about refunds and to cover his tracks refunded $4,310.34 to their accounts. The balance of $28,928.74 remained outstanding at sentence and still remains outstanding.

His fraud was detected during an external audit. Police interviewed him. He admitted that he had used the money for his gambling habit on poker machines and to buy personal everyday items. At sentence the Prosecutor contended that a term of imprisonment of two and a half years to three years suspended after six months was warranted.

Robinson was 49 years old at sentence and 47 to 48 at the time of the offending. He had no criminal history. He completed Year 12 and has worked largely in the financial services industry. At sentence he was employed at the Hudson Institute as a loans processor where he was highly regarded. His current employer provided a reference which was tendered and, although it did not refer to her knowledge of the present offence, counsel for Robinson at sentence submitted that the employer was aware of it. Another favourable reference was tendered from a past employer who was clearly aware of the offence.

Robinson lives with his 74 year old mother who has emphysema. She wrote a letter to the Judge explaining that she relies on him to do her cleaning, shopping, laundering and garden maintenance and to take her to doctor's appointments. Were Robinson to be incarcerated this would cause her hardship.

The report of clinical psychologist Julie Salter was tendered. It recorded that Robinson had been in a physically and emotionally abusive seven year relationship which led to him attempting suicide by a drug overdose. He was then placed on antidepressants. He began to gamble on poker machines. By May 2002 he was in financial difficulty. He has managed to avoid being in places with poker machines but Ms Salter points out that this is unlikely to be helpful long term and he is at

risk of relapse if faced with future crises. She anticipates that he will require further psychological intervention for his problems.

Defence counsel at sentence took no issue with the length of sentence proposed by the Prosecutor, namely two and a half to three years, but submitted that it should be fully suspended and coupled with the maximum community service order of 240 hours or at least suspended after three or four months. At sentence Robinson had not made restitution but his counsel said there was a possibility that he could get access to his superannuation by arranging for a personal loan with his mother as guarantor using her substantial equity in her home as collateral and then when in default use his superannuation fund to satisfy the mortgage.

His Honour seems to have placed unusual and undesirable emphasis on this fact in framing the sentence, which encouraged the making of the restitution by sending him to gaol for six months if he defaulted. By the time of sentence the respondent had ample opportunity to have made arrangements to pay the compensation but he did not do so.

The appellant contends comparable cases of *R v Vinson* [2002] QCA 379; CA No 180 of 2002, 27 September 2002; *R v Bourke* CA No 428 of 1993, 8 December 1993; *R v Geertz* CA No 121 of 1995,

26 April 1995 and *R v Symes* CA No 46 of 1999, 28 May 1999 demonstrate that the sentence imposed here was manifestly inadequate.

Vinson contended that his sentence of two years imprisonment suspended after six months for misappropriating $24,667.65 of his employer's money was manifestly excessive. He was 25 years old, younger than this respondent, with no previous convictions. He spent the money on his fiancée and planning their wedding.

Bourke was sentenced to three years imprisonment after pleading guilty to five counts of misappropriation of property with a recommendation that he be considered for release on parole after serving four months of his sentence. He was 26 years old, again younger than this respondent, with no prior convictions. He had misappropriated about $30,000 in his capacity as an insurance agent. He had made full restitution by taking out a loan to do so.

Geertz misappropriated about $18,000 and was sentenced to three years imprisonment with a recommendation for parole and eligibility after nine months. He had been the registrar of the Corinda State High School and, although not initially cooperative, ultimately pleaded guilty. He was 41 with no

prior convictions and at the time of sentence had been diagnosed as HIV positive.

Symes was 41 years old, separated from his wife, and the sole carer of their 14 year old son. He had no prior convictions. He stole steel from his employer the Townsville Port Authority on 18 occasions. The steel was valued at $19,930, but he received only $7,168 from a scrap metal dealer. He also pleaded guilty to unlawfully using a work motor vehicle to facilitate the theft of the steel. He lost his job and his employer's contributions to his superannuation worth about $30. He was in a desperate domestic situation when he committed the offences and used the money for basic household needs. He was sentenced to two years imprisonment with a recommendation for parole after nine months and ordered to make restitution of $19,930.40.

In *Vinson*, *Bourke* and *Geertz* this Court held that the sentences imposed were not manifestly excessive. In *Symes* instead of the parole recommendation after nine months this Court suspended the sentence after serving four months because of the mitigating factors there.

The respondent relies on the following cases to support the sentence: *R v Riesenweber; ex parte Attorney-General (Qld)* CA No 430 of 1996, 15 November 1996 was an Attorney-General's

appeal against a three year wholly suspended term of imprisonment imposed on Riesenweber for misappropriating $40,000. She was a dental secretary/receptionist. She began taking money when her husband lost his job and continued taking money over many years. The $40,000 was repaid by raising a loan on her family home. At the time of sentence she had severely injured her right ankle and was in a wheelchair. The injury required medical treatment for at least six weeks and the sentencing Judge was concerned that imprisonment would be too severe at that time. He would otherwise have required her to serve up to six months in actual custody. This Court described the case as marginal as to whether actual imprisonment was required and, observing that it was an Attorney-General's appeal, decided not to disturb the sentence.

In *R v Mara; ex parte Attorney-General (Qld)*[1999] QCA 308; CA No 107 of 1999, 6 August 1999, the Attorney-General appealed against a sentence of two years imprisonment wholly suspended for three years imposed on Mara for misappropriating about $35,000 from FNQEB. That case turns entirely on its unique facts because the respondent was a member of the Injinoo Aboriginal Community in Far Northern Queensland. She had minimal training but was made responsible for bookkeeping, money management and all other aspects of the agency. Cultural considerations and pressures were very relevant to

her offending. The Court observed that such a sentence should not be regarded as a likely one in future cases. The Registrar was directed to distribute copies of the reasons to Aboriginal Community Councils and Community Justice Groups in the expectation of individuals and bodies concerned with such groups will explain the implications of the judgment and likelihood of imprisonment for such offences of dishonesty in the future.

In *R v Sigley* [2002] QCA 11; CA No 297 of 2001, 4 February 2002, Sigley pleaded guilty to one count of fraud and was sentenced to two years imprisonment suspended after six months with an operational period of three years. She claimed the sentence was manifestly excessive. She was an office manager for a masonry business. The offences occurred over a six month period; she misappropriated about $11,000 of which she repaid $2000. She was 49 at sentence and had no prior convictions. She was the sole support of her 13 and 15 year old children. She had had a very sad life. Her second husband was a paedophile who had interfered with her daughter's friend and her best friend's daughter. Her brother had been murdered and his step-son charged with but not convicted of that offence. Her daughter from her first marriage ran away from home at 13 and returned at 15 pregnant. That daughter and the daughter's two children aged 11 and 5 lived with her and her children. The younger grandchild was

severely disabled and she assisted her elder daughter who was studying nursing at Griffith University in caring for the child. The court noted Sigley's significant breach of trust and the need for a deterrent sentence but found the Judge erred in finding the late plea of guilty did not indicate much remorse especially when coupled with the payment of partial compensation. The Court was therefore entitled to exercise its discretion afresh and suspended the sentence forthwith.

In *R v Blackhall-Cain* [2000] QCA 380; CA No 178 of 2000, 15 September 2000, the Attorney-General appealed against the sentence of two years imprisonment wholly suspended with an operational period of three years imposed on the respondent for offences of dishonesty totalling $51,232.60. The respondent was 36 years old and committed the offences over a six week period. He had no criminal history. He was in a position of trust in the employer firm and held a senior position described as a Registered Securities Representative which involved buying and selling shares for clients of the firm. Prior to the commission of the offences he had been receiving psychiatric treatment for depression and heavy drinking. He was suicidal and on antidepressant medication. He continued to get psychiatric help after committing the offences and spent some weeks in a psychiatric hospital following an overdose of sleeping pills. He was diagnosed at the time of the offences as suffering from reactive depression

and alcohol abuse and may have met the criteria for a diagnosis of major depressive order. His high levels of depression and his alcohol abuse were likely to have adversely affected his judgment. Commissions owing to the respondent were used to repay the amounts misappropriated so the employer was not out of pocket, and it seems the respondent always anticipated repaying the employer from these commissions. Because of the respondent's significant psychiatric condition and the anticipation factor, the Court was not persuaded that a non-custodial sentence was outside the discretionary range although a heavier penalty could have been imposed.

The concerning aspect of offences of this kind is the breach of trust. These offences involved a considerable sum of money obtained over a 14 month period. The offending was planned and systemic. Compensation has not been made. Generally in these circumstances an offender will be required to serve a period of actual detention.

There were matters in the respondent's favour. He had pleaded guilty and cooperated with the administration of justice. He had a prior good history and was well thought of by past and current employers who, it is said, knew of his offending. He cared for his elderly ill mother with whom he lived.

The cases to which respondent has referred where a non-

custodial sentence was imposed had special mitigating features well beyond those in this case. They also demonstrate that a sentence of only six months fully suspended in a case such as this was plainly manifestly inadequate, even taking into account the compensation order. The cases relied on by the appellant, which I have set out earlier, confirm that the sentence here was certainly manifestly inadequate.

Breaches of trust of this magnitude by an employee ordinarily demand an actual period of imprisonment be served to show the community's grave disapproval of such conduct and to deter those who might be inclined to act in a similar way. Even taking into account the principles applicable when considering an Attorney-General's appeal, the sentence remains plainly manifestly inadequate. A period of actual custody is required. This may, of course, mean that compensation is not paid and that some hardship will follow for the respondent's unfortunate elderly mother. Sadly, such consequences often flow when offenders are required to be imprisoned because of the seriousness of their offending.

I would substitute a term of two and a half years imprisonment suspended after six months with an operational period of three years for the sentence imposed below.

I propose the following orders:

Allow the appeal and instead of the sentence imposed at first instance, including the order for compensation, substitute a sentence of two and a half years imprisonment suspended after six months with an operational period of three years.

CHESTERMAN J: I agree. In my opinion there is much force in the submissions made by Mr Martin that in cases of this kind if compensation or restitution is to be taken into account as a significant factor in mitigation the restitution should be paid or made before the sentencing process is carried out.

The submissions persuade me that it is undesirable that an accused should bargain, as it were, with the Court with an offer of compensation if he not be sent to gaol. I agree with the order proposed by the President.

ATKINSON J: I agree with both the President and Mr Justice Chesterman and with the orders proposed.

THE PRESIDENT: A warrant is ordered for the arrest of the respondent but it is to lie in the Registry for seven days.

THE PRESIDENT: The orders are as I have set out.