SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2004] QCA 417
PARTIES:	**R** **v** **SMITH, Paul Scott** (applicant)
FILE NO/S:	CA No 358 of 2004 DC No 2041 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2004
JUDGES:	McMurdo P, Jerrard JA and Chesterman 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 – JUDGMENT AND PUNISHMENT – SENTENCE – RECOGNISANCES, PROBATION AND OTHER NON-CUSTODIAL ORDERS – RECOGNISANCES – GENERALLY – applicant pleaded guilty to one count of defrauding the Commonwealth and one count of dishonestly obtaining a financial advantage – sentenced to imprisonment for two years, to be released after three months on a recognisance for three years in the amount of $3000 under s 20 *Crimes Act* 1914 (Cth) – whether learned sentencing Judge empowered to order that the period of the recognisance be longer than the period of the sentence to be served in the community CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – applicant fraudulently claimed social security payments amounting to $30,195.43 at the behest of and for the sole benefit of another – offending occurred over three year period – applicant suffering from depressive illness at time of offences – applicant repaying moneys to Centrelink – applicant had no prior criminal convictions – whether sentence imposed was manifestly excessive

Crimes Act 1914 (Cth), s 16F, s 20, s 20A

Edwards v Pregnell (1994) 74 A Crim R 509, considered
O'Brien v R (1991) 57 A Crim R 80, considered
Selimoski v Picknoll, unreported, Full Court of the Supreme Court of WA, No 1088 of 1992, 6 August 1992, distinguished
Walsh v R (1993) 69 A Crim R 579, considered

COUNSEL: C J Callaghan (*sol*) for the applicant
D R Kent for the respondent

SOLICITORS: Callaghan Lawyers for the applicant
Commonwealth Director of Public Prosecutions for the respondent

[1] **McMURDO P:** Mr Smith pleaded guilty on 8 October 2004 to one count of defrauding the Commonwealth and one count of dishonestly obtaining a financial advantage. He was sentenced on each count to "imprisonment for two years, but to be released after three months on a recognisance for three years in the amount of $3,000". He contends that the sentence imposed was unlawful and, if lawful, that it was manifestly excessive.

[2] I will deal first with Mr Smith's contention that the learned sentencing judge erred in law by imposing a sentence that he was not empowered to impose. The sentence was imposed under s 20(1)(b) *Crimes Act* 1914 (Cth) ("the Act"). Section 20(1) provides:

> "20. (1) Where a person is convicted of a federal offence or federal offences, the court before which he is convicted may, if it thinks fit:
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> (a) by order, release the person, without passing sentence on him, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he will comply with the following conditions:
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> (i) that he will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order;
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> (ii) that he will make such reparation or restitution, or pay such compensation, in respect of the offence or offences (if any), or pay such costs in respect of his prosecution for the offence or offences (if any), as the court specifies in the order (being reparation, restitution, compensation or costs that the court is empowered to require the person to make or pay):
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> (A) on or before a date specified in the order; or
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> (B) in the case of reparation or restitution by way of money payment or in the case of the payment of compensation or an amount of costs – by specified instalments as provided in the order;
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> (iii) that he will pay to the Commonwealth such pecuniary penalty (if any) as the court specifies in the order (being a penalty not exceeding the maximum amount of the penalty that, in accordance with subsection (5), the court may specify in respect

of the offence or offences) on or before a date specified in the order or by specified instalments as provided in the order; and

(iv) that he will, during a period, not exceeding 2 years, that is specified in the order, comply with such other conditions (if any) as the court thinks fit to specify in the order, which conditions may include the condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed; or

(b) sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in paragraph (a) either forthwith or after he or she has served a specified period of imprisonment in respect of that offence or those offences that is calculated in accordance with subsection 19AF(1)."[1]

[3] Section 20(1)(a)(i) and (b) of the Act allows a court to impose a sentence for a federal offence of a period of imprisonment, but to suspend all or some of the period of imprisonment, after the offender gives security by recognizance that the offender will be of good behaviour for up to five years.

[4] Mr Smith contends, through his lawyer, Mr Callaghan, that the effect of s 16F of the Act is that s 20(1)(b) allows the primary judge to make an order that Mr Smith be released upon a recognizance release order for a period of 21 months, not a longer period than the period of imprisonment ordered to be served in the community. Mr Callaghan's argument gains some support from the decision of the Full Court of the Supreme Court of Western Australia in *Selimoski v Picknoll*,[2] although s 16F of the Act was not considered. *Selimoski* held that proceedings under s 20A(1) of the Act for breach of an order under s 20(1)(b) can only be initiated during the period of the sentence of imprisonment imposed under the original order, not during any longer period specified in the good behaviour bond. This decision turned on the wording of s 20A(1) as it then was[3] and because of the court's concern that an offender might not be released on recognizance, (for example, if serving other concurrent terms of imprisonment), so that the offender may have served his full sentence of imprisonment before the expiry of the good behaviour bond. The court therefore concluded that it would be unlawful to order further imprisonment for breach of the good behaviour bond after the expiry of the term of ordered imprisonment.

[5] In *Walsh*[4] the Victorian Court of Criminal Appeal declined to follow *Selimoski*, applying its earlier decision in *O'Brien*[5] and holding that breach proceedings under s

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1 Section 19AF(1) provides that where a court is required to fix a non-parole period or make a recognizance release order, the court must fix a non-parole or pre-release period not later than the end of the sentence as reduced by any remissions or reductions under s 19AA of the Act.

2 Unreported, No 1088 of 1992, 6 August 1992, Malcolm CJ, Murray and White JJ.

3 Section 20A(1) was amended by Amending Act No 182 of 1994 which amended sub-s (1), by adding sub-s (1A), amending sub-s (5) and adding sub-s (5A) and s (5B).

4 (1993) 69 ACrimR 579, 580-581.

5 (1991) 57 ACrimR 80, 98-99.

20A(1) of the Act could be brought after the completion of the period of the suspended sentence imposed but before the end of the good behaviour period specified in an order under s 20(1). The court in *Walsh* accepted that the sentencing power given by s 20(1)(b) of the Act was not to replace what has long been known as release from prison on parole but to allow the suspension of a sentence of a period of imprisonment, wholly or partially, by release on entering into a recognizance that the offender be of good behaviour for a period which could exceed the period of suspended imprisonment imposed, as long as it did not exceed five years. The interpretation given to s 20(1) in *Walsh* was also followed in Tasmania by Crawford J in *Edwards v Pregnell*.[6]

[6] The present relevance of those decisions has been diluted by subsequent amendments to the Act. In determining the extent of the power now given to a sentencing court by s 20(1) of the Act it is useful to review Part 1B of the Act which deals with the sentencing, imprisonment and release of federal offenders. Division 1 of that Part contains definitions. Division 2 contains general sentencing principles, for example, it sets out matters a court must take into account when determining sentence,[7] and that a court must not impose any form of corporal punishment for a federal offence.[8] Division 3 concerns the imposition of sentences of imprisonment. A sentence of imprisonment is only to be imposed if the court, after having considered all available sentences, is satisfied no other sentence is appropriate in all the circumstances;[9] cumulative sentences may be imposed;[10] some provision is made for the remission and reduction of sentences;[11] and under s 16F, emphasised by Mr Callaghan, a sentence of imprisonment must be explained to an offender.[12] Section 16F(2) provides:

> "Where a court imposes a federal sentence on a person and makes a recognizance release order in respect of that sentence,[13] it must explain or cause to be explained to the person, in language likely to be readily understood by the person, the purpose and consequences of making the recognizance release order including, in particular, an explanation:
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> (a) that service of the sentence will entail a period of imprisonment equal to the pre-release period (if any) specified in the order and a period of service in the community equal to the balance of the sentence; and
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> (b) of the conditions to which the order is subject; and
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> (c) of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions; and
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> (d) that any recognizance given in accordance with the order may be discharged or varied under section 20AA."

[7] The use of "and" between the paragraphs of sub-section (2) required the judge here to include in his explanation to Mr Smith that the period of the sentence served in the community was 21 months and that he would be subject to a recognizance order

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6 (1994) 74 ACrimR 509, 511-513.
7 Section 16A.
8 Section 16D.
9 Section 17A(1).
10 Section 19.
11 Section 19AA.
12 Section 16F.
13 Under s 20(1).

upon him giving security to be of good behaviour for three years and that if he breached that order during the three years without reasonable excuse he could be dealt with in the manner set out in s 20A(5)(c)(ia)-(ii) of the Act.

[8] Under Div 4 of the Act, a court may sentence an offender to a term of imprisonment and fix non-parole periods[14] or make a recognizance release order.[15] Where a court imposes on an offender a sentence that does not exceed in aggregate three years, the court must make a recognizance release order in respect of that sentence and must fix a non-parole period.[16] Where a court fails to fix or properly fix a non-parole period or to make or properly make a recognizance release order, the validity of the sentence is not affected and the court must at any time on application set aside the order and fix a non-parole period or a recognizance release order under the Act.[17] Division 5 of the Act concerns the conditional release of offenders on parole or licence. It provides that offenders may be released on parole or licence.[18] Offenders may be discharged without conviction[19] or, under s 20, released conditionally after conviction. Section 20A of the Act, amended since *Selimoski*, *Walsh* and the other decisions discussed above, provides for punishing or dealing with those who breach a conditional discharge or release.[20] The Act also empowers a court to discharge or vary conditions of the recognizance on application.[21]

[9] The sentencing scheme established under the Act draws a clear distinction between the power given to a sentencing court to sentence an offender to a period of imprisonment with release on parole or licence[22] and the suspension of a period of imprisonment after giving security by recognizance that the offender will be of good behaviour for a period not exceeding five years.[23] The clear legislative intent demonstrated by the plain words of s 20(1) and by the sentencing scheme imposed under the Act is to allow a sentencing court to impose a term of imprisonment for a federal offence but to suspend it, wholly or partially, upon the offender giving security by recognizance under s 20(1)(a), including the giving of security by recognizance to be of good behaviour for a period not exceeding five years under s 20(1)(a)(i). There is nothing in the Act that prohibits a judge from imposing a good behaviour bond under an order pursuant to s 20(1)(a)(i) and (2) which extends beyond the period of imprisonment imposed under that order. Whilst s 16F(2)(a) requires the sentencing judicial officer to explain that part of the sentence will be served in the community, s 16F(2)(b) and (c) also requires an explanation of the conditions of the order and the consequences of not fulfilling those conditions without reasonable excuse. Section 16F does not make unlawful an order under s 20(1)(b) releasing an offender upon giving security by recognizance to be of good behaviour for a period less than five years but longer than the period of imprisonment imposed under that order. If an offender breaches the good behaviour recognizance after the expiry of the period of imprisonment, the offender may be dealt with under s 20A(5)(c). It is unnecessary to determine in this case whether s

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14 Defined in s 16(1) as that part of the period of imprisonment during which the person is not to be released on parole.

15 Defined in s 16(1) as an order under para s 20(1)(b), set out at [2] of these Reasons.

16 Section 19AC.

17 Section 19AH(1).

18 See ss 19AL-19AZC.

19 Section 19B

20 Cf *Penalties and Sentences Act* 1992 (Qld), ss 146-149.

21 Section 20AA.

22 Section 19AB.

23 See s 20(1)(a)(i) and (b).

20A(5)(c)(i) could then be invoked. The sentence imposed complied with s 20(1) of the Act. The judge should have explained the sentence as required by s 16F(2) but Mr Smith is competently legally represented and there can be no question that he now well understands the effect of the sentence imposed; Mr Callaghan has not contended that this minor shortcoming in the sentencing process has any consequences.

[10] I turn now to Mr Smith's second contention that the sentence is manifestly excessive. The first count of defrauding the Commonwealth, punishable by a maximum sentence of ten years imprisonment, occurred between 27 July 1999 and 23 May 2001. The second, of dishonestly obtaining a financial advantage from a Commonwealth entity under s 134.2 *Criminal Code* (Cth), also punishable by ten years imprisonment, occurred between 24 May 2001 and 2 September 2002. The two charges reflected a change in legislation during the lengthy period of the offending, over three years.

[11] Mr Smith was aged between 24 and 27 at the time of the offences and was 29 years old at sentence. He pleaded guilty at an early stage. He had no criminal history.

[12] Both Mr Smith and his accomplice, Mr Waller, gave evidence at sentence. Waller had already been sentenced, (for related and more serious offending), to four years imprisonment with an order that he be released on a recognizance after serving eight months; he had also served a further eight months pre-sentence custody and was subject to a reparation order for almost $150,000. It is not contended that questions of parity are apposite here.

[13] The circumstances of the offences accepted by the primary judge were as follows. Mr Smith was receiving a New Start allowance from 29 January 1999, sickness benefits until 7 May 2002 and then Austudy. He was entitled to these benefits. In July 1999, at the request of Waller, Mr Smith made a fraudulent application for a New Start allowance in the name of Scott Paul Baker. The allowance was paid into an ANZ bank account until February 2002 when Mr Smith successfully applied, again fraudulently, to have the New Start allowance converted into an Austudy payment. The Austudy payments were paid into that account until 31 August 2002. Waller instigated the offences and profited from them; Mr Smith gained no tangible financial benefit. Waller initially obtained an identification card belonging to Shane Patrick Baker, a relation of Mr Smith's partner, in whose Caloundra apartment Waller, Mr Smith and his partner had holidayed. Waller used this card and a Bank of Queensland card he took without permission from Mr Smith to obtain a Queensland driver's licence in the name of Scott Paul Baker. Waller persuaded Mr Smith to pose as Scott Paul Baker to obtain a Victorian learner's permit bearing his photograph by threatening to tell Mr Smith's boyfriend that Mr Smith had been unfaithful. Because Mr Smith felt he was already involved through Waller's use of his Bank of Queensland card, he agreed to assist Waller and used the learner's licence as identity to apply for the New Start allowance in the false name. He later helped Waller convert the New Start allowance into an Austudy allowance, again reluctantly, because he thought that, as he was already implicated in dishonest behaviour, he might as well continue. Mr Smith enrolled in a TAFE course as Baker and obtained a student identification card in that name which was used to convert the New Start allowance to Austudy. Waller received all of the $30,195.43 dishonestly obtained.

[14] The learned sentencing judge took a view of the facts sympathetic to Mr Smith and accepted the psychiatric report of Dr Greig Richardson that, prior to committing these offences, Mr Smith developed a depressive illness when he lost his employment as a manager after about 11 years because of the activities of a homophobic co-worker. Mr Smith brought successful proceedings in respect of this incident against his employer in the Anti-Discrimination Tribunal.

[15] His Honour noted the benefit in offenders working to repay debts to Centrelink and that since June 2003 Mr Smith was in employment as a shift manager and was repaying Centrelink at the rate of $51 per week. The amount owing at sentence had been reduced to $28,755.32. After careful consideration, the learned and experienced judge finally decided that, despite the mitigating factors, considerations of general deterrence made a period of actual custody inevitable in the circumstances.

[16] Mr Smith's lawyer, Mr Callaghan, concedes that ordinarily a person who defrauds the Commonwealth by falsely claiming about $30,000 social security benefits over an extended period must expect a period of actual imprisonment, even if the offender has no previous criminal convictions. He emphasizes, rightly, that this case has the unusual factors that Mr Smith was cajoled into assisting his friend, Waller, commit the offence by Waller's threat to betray him to his partner and that Mr Smith made no personal gain from the offences.

[17] The offences were, nevertheless, committed with deliberation and deceit and planned over a lengthy period. Mr Smith was an essential part of that deceit. It is not unusual that those committing offences of this type have no previous convictions. Sometimes the catalyst for the offending behaviour is desperate financial pressure. That was not the case here. The serious aspect of these offences is that they constitute an abuse of a system which provides community support to the genuinely needy and which necessarily operates on the assumption of the honesty of those applying for the support. Offences of this type are often hard to detect. General deterrence is an important feature in the sentencing of those who, like this offender, abuse our community's social security scheme, even where the financial gain goes to another.

[18] Mr Smith's circumstances, like those of many who commit offences of this kind, are deserving of sympathy. He has pleaded guilty at an early stage and demonstrated remorse. He became involved when he was depressed and in an effort to protect his relationship with his partner, not for personal financial gain. His offending continued, however, after his mental health recovered. The offences were not exposed through his own confession. He has repaid a portion, but only a small portion, of the amount misappropriated. He was a relatively mature man who, over a lengthy period of time, assisted another to commit and profit from a serious fraud on the social security system. In assisting in the perpetration of the fraud, he acted with deliberation and a degree of sophistication. It cannot be said that the sentence imposed, necessitating a short period of actual detention, did not adequately reflect the mitigating factors. It was well within a sound sentencing discretion.

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

[20] **JERRARD JA:** I agree with the reasons for judgment that the President has given, and with the refusal of the sentence application.

[21] **CHESTERMAN J:** I agree, for the reasons given by the President, that the application for leave to appeal against sentence should be refused.