

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Gander* [2005] QCA 45

PARTIES: **R**  
**v**  
**GANDER, Ronald Vikash**  
(applicant/appellant)

FILE NO/S: CA No 408 of 2004  
DC No 2558 of 2004  
DC No 1626 of 2004  
DC No 1560 of 2003

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 4 March 2005

DELIVERED AT: Brisbane

HEARING DATE: 16 February 2005

JUDGES: McMurdo P, Jerrard JA and Mackenzie J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Application for leave to appeal against sentence allowed**  
**2. Appeal allowed to the extent of varying the orders made on 29 October 2004 by:**  
**(a) deleting the orders that the applicant serve five years imprisonment concurrently for each of the offences of attempted fraud and substituting instead concurrent sentences of four years imprisonment for those offences**  
**(b) ordering that the concurrent terms of imprisonment totalling in all four years imposed on 29 October 2004 be served cumulatively upon the activated suspended sentence of one year**  
**(c) recommending that the applicant be considered for post-prison community-based release after serving two years of the total period of imprisonment, on 11 August 2006**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE

SENTENCE – WHEN GRANTED – GENERALLY – where applicant pleaded guilty to 13 dishonesty offences and one charge of attempting to pervert the course of justice – where sentencing judge imposed five years imprisonment on attempted fraud counts and lesser concurrent sentences on other counts – where judge activated suspended sentence of one year to be served cumulatively – where recommendation for post-prison community-based release after two and a half years – whether sentence imposed was manifestly excessive

*Penalties and Sentences Act 1992 (Qld)*, s 157, s 161

*R v Chard; ex parte A-G (Qld)* [2004] QCA 372; CA No 277 of 2004, 8 October 2004, applied

*R v Fifita* [2004] QCA 201; (2004) 146 A Crim R 461, applied

*R v Gregory* [2004] QCA 87; CA No 370 of 2003, 26 March 2004, considered

*R v Jones* [1997] QCA 132; [1998] 1 Qd R 672, considered

*R v Kunst* [2002] QCA 400; CA No 120 of 2002, 4 October 2002, distinguished

*R v Lim* [2004] QCA 172; CA No 16 of 2004, 21 May 2004, considered

*R v Smith* [2002] QCA 528; CA No 355 of 2001, 6 December 2002, considered

COUNSEL: D Shepherd for the applicant/appellant  
S G Bain for the respondent

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

- [1] **McMURDO P:** I agree with the orders proposed by Jerrard JA and with his reasons.
- [2] **JERRARD JA:** On 29 October 2004 Ronald Gander pleaded guilty in the District Court to various charges of dishonesty and one of attempting to pervert the course of justice. There were three indictments presented, charging him in total with two counts of fraud with a circumstance of aggravation, two counts of attempted fraud, three counts of forgery with a circumstance of aggravation, one count of forgery simpliciter, four counts of uttering with a circumstance of aggravation, one count of uttering simpliciter, one count of passing a valueless cheque and the count of attempting to pervert the course of justice.
- [3] The learned sentencing judge imposed sentences of five years imprisonment on each of the counts of attempted fraud (the maximum penalty for those offences); sentences of four years imprisonment on each of the forgery and uttering counts with a circumstance of aggravation; sentences of two years imprisonment on each of the counts for fraud, and for forgery and uttering; and of one years imprisonment for passing a valueless cheque, and for attempting to pervert the course of justice. The judge ordered those sentences to be served concurrently with each other, but also ordered that Mr Gander serve in full a previously suspended sentence of one years

imprisonment which the learned judge by order activated, and ordered that that one year sentence be cumulative to the terms totalling five years that the judge had just imposed. The learned judge declared that 79 days of pre-sentence custody be declared time served under the sentence imposed. The judge also recommended that Mr Gander be considered for post-prison community based release after he had served two and a half years of that period of imprisonment. Mr Gander has applied for leave to appeal, arguing the sentence is manifestly excessive.

- [4] Mr Gander had just turned 23 when that effective six year period of imprisonment was imposed, and it accordingly appears a heavy one, particularly because the overall actual losses to the various complainants totalled \$27,353.98, and yet Mr Gander was sentenced to the maximum term for the attempted frauds. Those were, however, both seriously bad examples of that offence; and they were actually committed when Mr Gander was on bail and during the currency of the suspended one year sentence.

### **Prior history**

- [5] Mr Gander was dealt with in the Brisbane District Court on 22 October 1999 on three charges of entering dwellings and committing indictable offences therein, one count of wilful damage, and two of unlawfully using motor vehicles. He was ordered to perform 200 hours of community service and placed on probation for three years. A little over a year later, on 7 December 2000, he appeared again in the Brisbane District Court for breaches of that probation order. The breaches were proven, and he was sentenced to two years probation with a condition that he attend as directed upon a psychologist or psychiatrist. He next appeared in the Brisbane District Court on 30 March 2001, now aged 20, and was dealt with on four counts of fraud and one of attempting to dishonestly obtain property, which offences had actually been committed in 1999 and before his first appearance in the Brisbane District Court. Another two year probation order was imposed.
- [6] On 7 June 2002 he appeared for the fourth time in the District Court, and this time was dealt with on one count of fraud and one of dishonestly obtaining a benefit or advantage. Those offences were committed in August of 2001, and thus only five months after his third appearance in the District Court, and when on probation. On 7 June 2002 he was sentenced to 12 months imprisonment, wholly suspended for two years.

### **His current offences**

- [7] The first indictment on which he was sentenced on 29 October 2004 charged one count of passing a valueless cheque on 21 May 2002 (count one), and one count of dishonestly obtaining a quantity of home entertainment equipment on 23 August 2002 (count two). Mr Gander's pleas of guilty to those counts accordingly admitted one offence committed about a fortnight before he received that suspended sentence, and one offence committed about two and a half months later. The circumstances of count one related to his handing over a \$50,000 personal cheque for the purported purchase of a motor vehicle from a Taiwanese student. The vehicle was taken by Mr Gander but recovered from him some days later, when the cheque was not honoured. Mr Gander gave an exculpatory account to the police. Count two relates to his having obtained home entertainment equipment to the value of \$9,438, and not recovered, by his providing false bank documentation in the

name of another person. He told the police that the other person had collected the equipment. Mr Gander was arrested on that count one on 28 May 2002, and accordingly count two was committed when he was on bail on count one, and under a suspended sentence, as were all the remaining offences he committed.

- [8] The second indictment charged all of the various counts of forgery and uttering, and both counts of attempted fraud. Those offences were all committed between 4 November 2003 and 16 December 2003. They involved the two offences of attempted fraud, and related conduct such as the preparation of false documents. The following description is taken from the outline of submissions prepared by Mr Shepherd, counsel for the applicant.
- [9] Mr Gander had offered to finance some friends and fellow churchgoers, the Hornes, in an online games software business. He apparently “talked up” the prospects of such a venture, and the Hornes became so enthusiastic that they ignored warnings given by others about Mr Gander’s bona fides. Mr Gander was living with the Hornes at that time. In order to meet his promise to finance them in the business he set out in an elaborate, but doomed, scheme to sell an inner city high rise building, the Boeing building in Adelaide Street, for \$27,000,000; or to at least progress far enough to obtain a substantial deposit from the intending purchaser. The target deposit figure was \$5,000,000.
- [10] Mr Gander pretended to be a solicitor acting for a Sandy Og, the Chief Executive of Motorola in the United States, and approached PRD Nationwide at Boondall to market the building. Despite that particular suburban real estate agency having no experience in that area of marketing city high rise buildings, the agency agreed. Mr Gander insisted that all contracts were to be made through him, and the agency had various dealings with him, which were marked by failure, excuses or delays on his part in providing required documents. He would not even disclose his address, giving reasons of personal security. At one point Mr Gander contacted the actual owners of the building and enquired about leasing space in it from them. He was thereby provided with certain information about the building, and he used this information and other publicly available information in his dealings with the real estate agency and others.
- [11] An estate agent from another branch of PRD Nationwide actually found a potential buyer, who made an initial offer of \$22,000,000. The contract named Mr Og as the vendor but that real estate agent’s attempt to contact Mr Og was unsuccessful. Then the solicitors for the prospective purchaser discovered that the real property description on the contract related to a neighbouring building.
- [12] Mr Gander engaged a solicitor to act on the matter on his behalf. The solicitor also lacked experience in contracts of that variety, but also agreed to act. Mr Gander provided an unsigned contract which referred to a sale price of \$24,000,000, and the solicitor endeavoured to obtain a copy of it signed by Mr Og, and to speak with Mr Og. Mr Gander continued to insist that all contact be through him.
- [13] The prospective purchaser required the production of a bill of sale, but Mr Gander required the payment of the deposit, while making excuses for his failure to immediately produce a bill of sale. A purported bill was ultimately faxed to the prospective purchaser, and Mr Gander wanted the deposit paid into his mother’s bank account. The solicitors for the purchaser refused to do this. Around that same

time the actual owners of the building contacted the prospective purchaser, and police were called in. They intercepted a person delivering transfer documents and the bill of sale from Mr Gander to the prospective purchaser. When police searched Mr Gander's residence they found a large number of documents relating to the matter, including land transfer documents, a copy of a contract, property transfer information, a bill of sale, practice signatures of Sandy Og, and computer copies of a Justice of the Peace's signature. The loss suffered by the purchaser was \$5,500 in legal fees.

- [14] Mr Gander's other offence of attempted fraud involved his attending at a car dealership, Lexus at Kedron, with Mr Horne, to inspect and negotiate the purchase of several vehicles. After having contact with that dealership over a number of days, Mr Gander produced a document purporting to be a written guarantee for the transfer of \$9.6 million from the Hong Kong Shanghai Banking Corporation to an Australian bank account supposedly held by Sandy Og. Relying on that document, Mr Gander ordered eight vehicles valued at \$695,000. Mr Horne subsequently signed the purchase contract for those vehicles. However, on subsequent days Mr Gander contacted the car dealer, saying he would produce a bank cheque to pay for them, but he was arrested on 15 December 2003 before anything further could happen. He was charged with the two offences of attempted fraud and the counts of forgery and uttering, and thereafter remained in custody for a total period of 319 days until sentenced on 29 October 2004.
- [15] The third indictment presented against him when sentenced charged one offence of fraud, committed on divers days between 25 November 2003 and 28 November 2003, and one of having attempted to pervert the course of justice on 10 June 2004. The fraud charge related to the sale of six non-existent lap top computers, four to one person and two to another, for \$1000 each. The second count related to the falsification of a document that he intended to use in a bail application made to the Supreme Court. He had inserted the word "cancer" into a typewritten letter from a doctor outlining certain illnesses suffered by his mother, which letter was exhibited to an affidavit he swore in support of his application for bail. His dishonesty thus persisted after arrest and detention.
- [16] The serious and aggravating circumstances of Mr Gander's behaviour are self evident from the description given. He is, as described by the learned sentencing judge, namely a person who has simply not taken any notice of warnings given to him by the District Court on earlier occasions, and accordingly a person who presents as a considerable danger to the rest of the community because of his significant risk of recidivism, unless personally deterred by a substantial sentence of imprisonment. He has been undeterred by either probation, a suspended sentence, or by detection and arrest. In late 2003 he was engaging in a quite astonishing variety of deceptive conduct for financial advantage.
- [17] Acknowledging all that, a maximum term of five years imprisonment for the attempted fraud charges appears a very long one when the Crown conceded that the boldest of those, the attempted sale of the building, was bound ultimately to be revealed as fraudulent, and no later than when the prospective purchaser and true owner came into contact. Further, Mr Gander did not get possession of any of the Lexus motor vehicles. In *R v Gregory* [2004] QCA 87 that applicant, who unsuccessfully appealed against an order for six years imprisonment with post-prison community based release recommended after two years, had misappropriated

\$236,565 from her employer over a nine year period. There was no restitution. That six year term accorded with the six year term with a recommendation after serving two years and three months upheld in *R v Gourley* [2003] QCA 307, in respect of an applicant who had defrauded her employer of sums totalling over \$213,000 over a four and a half year period. There was no restitution there. Likewise a sentence of six years imprisonment with release on parole recommended after two years resulted from an appeal in a matter of *R v Felton*, CA No 16 of 1989, where that offender misappropriated \$210,000 over six years from her employing company. Those offenders succeeded in obtaining six figure amounts by dishonest conduct over a long period and obtained far more than Mr Gander. Admittedly, none of them had any prior convictions.

- [18] In a matter of *R v Lim* [2004] QCA 172, this court upheld a sentence of five years imprisonment imposed after a five week trial upon an offender who had been convicted of 22 counts of fraud and dishonesty, resulting in a net loss of \$500,000 to a number of different complainants. That 55 year old offender also had no prior convictions. In *R v Wheeler & Sorrensen* [2002] QCA 223, where those applicants had dishonestly appropriated amounts totalling about \$600,000 and been sentenced to six years imprisonment with a recommendation of parole after two years, this court upheld those sentences and analysed a number of similar cases. It concluded that general deterrence was important in matters of that kind, and that sentences of six and seven years imprisonment were common when large sums of money were involved.
- [19] Here this determinedly dishonest young man attempted to get a very large sum of money but failed. Mr Shepherd pointed to the sentences totalling six years imposed in the matter of *R v Smith* [2002] QCA 528, where that applicant was convicted after a trial on 22 counts of false pretences (each carrying a maximum penalty of five years), and where the amount actually obtained was approximately \$870,000. In addition, that applicant pleaded guilty to a seven count indictment containing charges under s 408C, which involved a further \$60,000. Mr Smith was sentenced to five years imprisonment on the counts on which the jury convicted him, and to a further one year cumulative on those to which he pleaded guilty. Those sentences were upheld on the appeal, and said to be well within range. On Mr Shepherd's submission, that was so because of the amount actually defrauded from the complainant. He was a 55 year old offender, apparently with no prior convictions, and the judgment on the appeal does not refer to any restitution.
- [20] Mr Shepherd also referred the court to *R v Jones* [1998] 1 Qd R 672, where that applicant pleaded guilty and was sentenced to a maximum of five years on six counts of false pretences. He had been 11 months in custody prior to sentence but that was also attributable to other offences. The amount he obtained by his fraud was \$25,728, and Mr Jones also had a significant criminal history. He had been imprisoned on 11 separate occasions, the last major one being to a sentence of five years imprisonment for misappropriation. His sentence was reduced to four years with a recommendation for parole after one year and nine months. Mr Shepherd contended that four years was also the appropriate head sentence in respect of all the offences to which Mr Gander pleaded guilty on 29 October 2004, while acknowledging that it was appropriate he be ordered to serve all of the suspended sentence as a cumulative term, with the resultant total period of imprisonment being five years instead of six. The Director of Public Prosecutions did not refer the Court to any comparable sentences to support the sentence imposed on Mr Gander.

- [21] Mr Gander has in his favour only his youth, the amount he actually obtained, and that this is the first term of actual imprisonment imposed on him. He has a significant and very relevant recent criminal history, and is a recidivist. However, Mr Shepherd also raised the issue of whether or not the effective term imposed for the offences to which he pleaded on 29 October should be further reduced by reason of the 319 days spent in custody. The learned sentencing judge made a declaration with respect to 79 days only of that period, being the period from 12 August 2004 (the date when Mr Gander was arrested for the offences charged in the third indictment) until 29 October. That was the only period in which he was held in custody in respect of all offences for which he was then being sentenced. The judge declared that the sentences he imposed had already taken into account the remainder of the period of time spent in custody. Mr Shepherd contends that the effective period of imprisonment imposed is one of six years and 240 days (or eight months), the extra eight months being the difference between the 319 days in custody and the 79 days declared.
- [22] I think there is substance in that argument. The facts here differ from those in *R v Kunst* [2002] QCA 400, where that applicant had been in and out of custody on a number of occasions prior to his ultimate sentence, being re-arrested and then sentenced for offences committed while on bail awaiting ultimate sentence. That offender was released more than once after serving short sentences, and before the ultimate imposition of a relatively long term. In this matter it is not easy to understand from the information in the appeal record whether all of the 319 days were available for declaration under s 161(4) of the *Penalties and Sentences Act* 1992 (Qld), or none of them. The Crown did not contest the 79 days declared, although both counsel agreed the position was unclear.
- [23] Whatever the true position be, Mr Gander did spend another eight months in custody not declared as time served. I consider that fact, those few in his favour already mentioned, and the other sentences referred to, make the sentence imposed on the two counts of attempted fraud manifestly excessive, and make it appropriate to reduce those sentences of five years imprisonment to sentences of four years imprisonment. Mr Gander should be ordered to serve the one year activated sentence cumulatively, which will result in a total period of five years imprisonment which will date from 29 October 2004.
- [24] That leaves only the manner in which the court should express the order for the cumulative term. In *R v Chard; ex parte A-G* (Qld) [2004] QCA 372 Williams JA, relevantly giving the judgment of this Court, expressed the opinion that where an activated suspended sentence was to be ordered to be served cumulatively with another term or terms of imprisonment being imposed, the order should require the offender to serve the whole (or the activated part) of the suspended sentence first, to be then followed by service of the sentence imposed for the offence (or offences) which constituted the breach of the suspended sentence. His Honour observed that it might then be ordered that the latest sentence(s) be served concurrently or cumulatively upon the part of the suspended sentence ordered to be served. He added that that was the course which is usually followed, and that it made it easier to calculate release dates and eligibility for post-prison community-based release. His Honour went on to note that any recommendation with respect to that eligibility would apply to the *whole* of the period of imprisonment to be served, and not just the sentence imposed for the substantive offence (*italics mine*).

- [25] The observation, in my respectful opinion, accords with each of the earlier decisions of this Court in *R v Waters* [1998] Qd R 442 and in *R v Fifita* [2004] QCA 201. In *R v Waters* this Court held by majority that in exercising the power under s 147(1)(b) of the *Penalties and Sentences Act* to order that an offender serve the remainder of the term of imprisonment previously suspended under that section, the sentencing judge has no power under either s 157(2) or s 157(3) to attach a recommendation for parole to the sentence or part of it so ordered to be served. In *R v Fifita*, this Court held by majority that s 157(3) only obliges a sentencing judge to make a parole recommendation if a recommendation for parole has been made in the previously imposed sentence of imprisonment. Nothing in the latter decision prohibits a judge, sentencing an offender who is already serving imprisonment for an offence, from making a recommendation for post-prison community-based release relating to the total period of imprisonment that the offender must serve as a result of the further order made by that sentencing judge. That is, it is permissible to read the word “must” in s 157(3) as including “may”. That construction accords with both the result reached in *R v Fifita* and the recommendation of Williams JA in *R v Chard*.
- [26] Accordingly, I would order that the application be allowed and the appeal allowed, to the extent of varying the orders made on 29 October 2004 by deleting the orders that Mr Gander serve five years imprisonment concurrently for each of the offences of attempted fraud, and substituting instead concurrent sentences of four years imprisonment for those offences; ordering that the concurrent terms of imprisonment totalling in all four years imposed on 29 October 2004 be served cumulatively upon the activated suspended sentence of one year; and that Mr Gander be considered eligible for post-prison community-based release after he has served two years of that total period of five years imprisonment, of which 79 days had been served prior to 29 October 2004, that is, on 11 August 2006.
- [27] **MACKENZIE J:** I agree with the reasons given by Jerrard JA for giving leave to appeal and allowing the appeal and with the orders proposed by him.