

SUPREME COURT OF QUEENSLAND

CITATION: *R v Singh* [2005] QCA 403

PARTIES: **R**
v
SINGH, Gregory Thomas
(applicant/appellant)

FILE NO/S: CA No 179 of 2005
DC No 200 of 2005

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 4 November 2005

DELIVERED AT: Brisbane

HEARING DATE: 19 October 2005

JUDGES: Jerrard and Keane JJA and Atkinson J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted**
2. Appeal allowed only to the extent of reducing the sentence on count 3 to 12 months

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERAL PRINCIPLES – applicant convicted by a jury of fraud and attempted fraud – applicant sentenced to two years imprisonment for fraud with 18 months concurrent imprisonment for attempted fraud – amendments to corrective services legislation resulted in the applicant being eligible for both post-prison community based release and conditional release after serving approximately 12 months imprisonment – applicant’s release would depend on two separate administrative decisions – whether sentencing judge foresaw the possibility that post-prison community based release could be frustrated by a refusal of conditional release – whether this situation constituted an error of sentencing discretion – whether the sentence was manifestly excessive

Corrective Services Act 2000 (Qld), s 76(1), s 134(1)(a)(i), s 135(2)(e)

Criminal Code 1899 (Qld), s 408C(1)

R v Blackhall-Cain [2000] QCA 380; CA No 178 of 2000, 15 September 2000, considered

R v Robinson; ex parte A-G (Qld) [2004] QCA 169; CA No 102 of 2004, 20 May 2004, considered

COUNSEL: A J Rafter SC for the applicant/appellant
M J Copley for the respondent

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

- [1] **JERRARD JA:** On 5 July 2005 Mr Singh was convicted after a trial on one count of an offence of fraud in breach of s 408C(1)(a)(i) of the *Criminal Code*, and one count of attempted fraud in contravention of s 408C(1)(b). He was sentenced that day to two years imprisonment on the count of fraud and to 18 months concurrent imprisonment on the count of attempted fraud. He has applied for leave to appeal against those sentences, arguing that each should be suspended for an operational period of two years after he has served six months.
- [2] Mr Singh was 56 years old when sentenced, and aged between 51 and 53 when he offended. He had no prior criminal convictions and the learned sentencing judge described him having a good employment history. The learned judge took what the judge described as Mr Singh's disadvantaged upbringing into account when imposing the sentence, and accepted that he had made a solid commitment to his family, to Aboriginal people, and to the wider general community, in his life to date. However, the judge noted that Mr Singh did not have the capacity to make restitution of the \$43,500 which the jury had found he had dishonestly applied to his own use – the subject of the fraud count – and the learned judge held there was no alternative but to impose a sentence of imprisonment. On this application Mr Singh's experienced counsel accepted that the decisions cited in *R v Mara; ex parte Attorney-General* [1999] QCA 308 at page 5, para 13 thereof, supported the head sentences imposed.
- [3] That sensible concession was well justified by the decisions analysed in the President's judgment in *R v Robinson; ex parte A-G (Qld)* [2004] QCA 169. Those decisions spanned the nine year period from the judgment in *R v Bourke* [1993] QCA 579 to the decision in *R v Vinson* [2002] QCA 379. The eight earlier judgments of this Court which were considered in *Robinson* were cases of misappropriation of sums of money ranging from \$11,000 to \$51,000, often from employers, and all of those applicants (or respondents) had no prior convictions, and all appear to have pleaded guilty. The President's judgment included the statement that:
- “Breaches of trust of this magnitude by an employee ordinarily demand an actual period of imprisonment to 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.”
- [4] The sentences imposed in those eight cases were all head sentences of two or three years, and in the great majority of those the offender was required to serve a period in actual custody, ranging from four months to nine months. As a general

observation, those who had made restitution seemed to do better; the President also stated that:

“The cases to which the respondent has referred where a non-custodial sentence was imposed [all] had special mitigating features...”

- [5] I respectfully observe that last observation was fully justified by reference to those decisions. For example, in *R v Blackhall-Cain* [2000] QCA 380, this Court did not overturn an entirely suspended sentence where that first time offender had pleaded guilty, had made full restitution, was suicidal and on antidepressant medication, and had continued to get psychiatric help after committing the offence; and had always anticipated repaying his employer from commissions owing to that offender which in the result were the source of the funds for repayment. Further, the offence was committed over a relatively short six week period. In *Robinson* itself, the Attorney’s appeal against an entirely suspended sentence imposed on a first offender who dishonestly took \$30,000 from his employer was upheld, and a term of two and a half years imprisonment, suspended after six months, was imposed.
- [6] Returning to this matter, Mr Singh’s offences occurred in the following circumstances. Mr Singh was the chairperson of the Ngwauwi Jowan Aboriginal Corporation incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth), and on 24 October 1999 that Corporation applied for a \$100,000 grant from the Queensland Community Assistance Program, established by the Queensland Government to create legacy items celebrating the Centenary of Federation in 2001. Funding under that program was available for not-for-profit organisations. The stated purpose for which the grant was sought was to develop and produce four one hour documentaries highlighting the progression of Aboriginal people since Federation. A grant of \$87,000 was approved for that stated purpose, with a first payment of \$43,500 to be made when the agreement for the grant was signed by the Corporation and on behalf of Centenary of Federation Queensland. Mr Singh signed that agreement as chairperson of the Corporation on 4 April 2000, and on 28 April 2000, the \$43,500 was deposited into the business account of Mr Singh (and Mrs Janice Singh) trading as “Jama Dreaming”, that being a business they conducted, the activities of which included conducting an art gallery offering Aboriginal art and artefacts for sale in Palm Cove, North Queensland. The agreement specified that the Corporation would use the grant for the stated purpose and not for any other purpose.
- [7] Between 28 April and 3 May 2000 Mr Singh drew 13 cheques on that account totalling \$45,544.50 to pay personal and business expenses, purposes quite unconnected with the project for which the grant had been made, thereby applying those moneys to his own use. The jury’s verdict was that application of that money in that way was dishonest, and Mr Singh has abandoned his appeal against conviction. The second conviction – for attempted fraud – was based on an attempt in late February 2002 to obtain payment of a second instalment of \$21,750 under that grant. The Crown case was that by that latter date very little had been done on the project for which the grant of \$87,000 had been approved, and that the request for a further \$21,750 was an attempt dishonestly to obtain that money. The jury was persuaded beyond reasonable doubt to that view, having heard the evidence, which included evidence from Mr Singh.

- [8] Mr Rafter SC, Mr Singh's counsel on the appeal, submitted that while the head sentences were supported by authority, the learned judge imposing those sentences had not been referred to the fact that the first offence was committed prior to 1 July 2001, with the result that Mr Singh will be eligible (pursuant to the provisions of s 134(1)(a)(i) and s 135(2)(e) of the *Corrective Services Act 2000* (Qld)) for post-prison community based release after he has served 12 months of the two year sentence. However, in respect of the attempted fraud, committed on 24 February 2002, post-prison community based release is not available; and instead Mr Singh will be eligible for conditional release after he has served two-thirds of the 18 month sentence for that offence (by reason of s 76(1) of the *Corrective Services Act*). Mr Rafter SC submitted, and the respondent Director accepted, that accordingly Mr Singh's actual release date will depend upon separate administrative decisions, of which one will be made by a Regional Community Corrections Board, and the other by the Chief Executive, which could result in post-prison community based release being available to Mr Singh in July 2006 but conditional release not being available. Mr Rafter SC argued that this possibility demonstrated an error in exercise of the sentencing discretion, and that left it open to this Court to re-sentence on both counts.
- [9] Mr Copley, counsel for the respondent, accepted as accurate Mr Rafter SC's submission that the learned sentencing judge had intended that Mr Singh's release on the sentence for fraud be entirely the subject of the discretion of the relevant Community Corrections Board, and that the judge's intention was not that that discretion be capable of frustration by a Chief Executive refusing conditional discharge. Mr Copley suggested that this Court allow the appeal to the limited extent of varying the sentence imposed on the attempted fraud count by reducing it from 18 months to 12 months, thereby ensuring that should Mr Singh satisfy the Regional Community Corrections Board that it was appropriate for him to be released on post-prison community based release, then that could be done. Beyond that concession, Mr Copley opposed the application, and the effect of his argument was to confine the assigned error to the sentence on the second count.
- [10] Mr Rafter SC submitted on the hearing that it was appropriate that both sentences be suspended after nine months had been served, particularly because Mr Singh had spent a lifetime working in various ways to better the cause of Aboriginal people, and had an unblemished prior record. The latter submissions are justified, but the review of other decisions of this Court carried out in *R v Robinson* strongly suggests that the sentences for which Mr Rafter SC originally argued (suspension after six months) would have been proper had Mr Singh demonstrated both remorse, and co-operation with the system of criminal justice, by pleas of guilty. Mr Singh exercised his right to a trial and was acquitted on a count alleging attempted fraud in applying for the grant in the first place. However, he cannot get the discounting usually allowed, on an otherwise appropriate sentence, when there is a plea of guilty.
- [11] The sentence Mr Rafter SC now suggests would have been within the range of an appropriate exercise of discretion, but that does not make the sentence imposed a manifestly excessive one. Mr Rafter SC conceded that, and relied on the argument that an error justified re-sentencing, but that error only requires re-sentencing on the count for attempted fraud. The application for leave to appeal against the sentence on count 3 should be allowed, but only to the extent of substituting a sentence of 12

months on that count of attempted fraud; and the appeal should otherwise be dismissed.

- [12] **KEANE JA:** I agree with the reasons for judgment of Jerrard JA and with the orders proposed by his Honour.
- [13] **ATKINSON J:** I agree with the reasons for judgment of Jerrard JA and the orders proposed.