SUPREME COURT OF QUEENSLAND

CITATION:	*R v Miles* [2006] QCA 556
PARTIES:	**R** **v** **MILES, Jane Elizabeth** (applicant/appellant)
FILE NO/S:	CA No 266 of 2006 DC No 335 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	19 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2006; 7 December 2006
JUDGES:	Williams and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
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 REFUSED - GENERALLY - applicant convicted upon verdict of jury of dishonestly applying to her own use property belonging to another of a value of more than $5,000 - on 7 September 2006, applicant sentenced to two years imprisonment with a parole eligibility date of 8 August 2007 - applicant withdrew money totalling $19,373.23 from account of complainant using complainant's telephone banking facility - complainant had lived with applicant for some months while convalescing - possible breach of trust situation - applicant had no prior convictions - applicant was in a "desperate" situation at time the dishonest application of funds began - applicant abandoned appeal against conviction at the hearing, continued with sentence application - whether sentence imposed was manifestly excessive *Criminal Code 1899* (Qld), s 408C

R v Robinson; ex parte A-G (Qld) [2004] QCA 169; CA No 102 of 2004, 20 May 2004, considered
R v Ruddell [2005] QCA 346; [2006] 1 Qd R 361, considered
R v Shultz, [1997] QCA 169; Appeal No 111 of 1997, 27 May 1997, considered

COUNSEL: P E Nolan for the applicant
M J Copley for the respondent

SOLICITORS: Ryan & Bosscher for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I agree with what has been said by Keane JA and there is nothing I wish to add thereto. I agree with the orders proposed.

[2] **KEANE JA:** On 7 September 2006, the applicant was convicted upon the verdict of a jury of dishonestly applying to her own use property belonging to another of a value of more that $5,000 in contravention of s 408C(1)(a)(i) of the *Criminal Code Act 1899* (Qld). For that offence, the applicant was sentenced to two years imprisonment with a parole eligibility date of 8 August 2007.

[3] The applicant appealed against the conviction, and she also sought leave to appeal against her sentence. The appeal against conviction was abandoned at the hearing of the appeal; and the matter proceeded as an application for leave to appeal against sentence.

[4] The only ground for the application for leave to appeal against sentence is that the sentence was manifestly excessive. It was argued in written submissions on the applicant's behalf that the proper sentence was one of imprisonment for 18 months, either fully suspended, or with an order for immediate release on parole, for an operational period of two years. Alternatively, it was said that the applicant's sentence should be suspended after the time she has now served.

The circumstances of the offence

[5] The Crown case was that, between 1 October 2003 and 6 January 2004, the applicant dishonestly applied to her use the property of the complainant, Luke Nye. At trial, the applicant admitted that, on 18 occasions during this period, she withdrew sums of money totalling $19,373.23 from Mr Nye's account with the Berrima District Credit Union Ltd ("the credit union") by using his telephone banking facilities to transfer funds from that account to her Visa credit card account in the name of Jane Elizabeth Priestley. Accordingly, the only issue at the trial was whether the applicant had made these withdrawals dishonestly.

[6] Mr Nye gave evidence that he was working on the farm of the applicant and her husband when, in January 1998, he suffered personal injuries in a motor vehicle accident. He was unable to take care of himself for a period of six to eight months, and, during this period, he lived with the applicant and her husband. The applicant cared for him during his convalescence. After recovering from his injuries, Mr Nye continued with general duties on the farm.

[7] In late 2002, Mr Nye received a payment of $565,000 by way of compensation for his injuries. This sum was deposited to his account with the credit union. He had telephone access to his account by means of his membership number and a secret

Personal Identification Number ("PIN"), the quotation of which enabled him to transfer funds from this account to other accounts.

[8] Mr Nye said that he gave the applicant and her husband $10,000 in recognition of their kindness to him while he was recuperating from his injuries.

[9] He said that he did not give the applicant his credit union membership number or PIN or permission to make withdrawals from his account. Mr Nye said that he suffered from a degree of forgetfulness as a result of his injuries. He only became aware that unauthorised withdrawals from his account were occurring when his uncle chided him for his apparent profligacy.

[10] In cross-examination, it was suggested to Mr Nye that, in gratitude for the assistance the applicant had provided him, he gave her the PIN and told her that she was entitled to use the account "for a period". Mr Nye denied this suggestion.

[11] The Crown tendered a record of an interview between police and the applicant in which the applicant said that Mr Nye gave her his membership number and PIN and gave her permission to use it for her own benefit. It was suggested that he was moved, in this regard, by sympathy for the applicant who was having marital difficulties with her husband. In the course of that interview, the applicant volunteered that she knew that Mr Nye had brain damage.

[12] The applicant did not give evidence.

The applicant's circumstances

[13] The applicant was born on 10 January 1968. She was 35 years of age at the date of the offence, and 38 years old at the date of sentence.

[14] The applicant had no prior criminal history.

[15] The learned sentencing judge evidently accepted that the applicant was in a "fairly desperate situation herself when she began using" the complainant's account. In this regard, the learned primary judge was apparently referring to the applicant's situation resulting from the breakdown of her marriage, and confrontations with persons seeking to recover debts allegedly owed by her husband.

The sentence

[16] The learned sentencing judge concluded that the applicant's conduct:

> "was a breach of trust in a sense, knowing what she knew about him; knowing … that he was a little bit slower mentally since the accident than he had been before. I am satisfied that she expected that he would not notice the sums that she was taking from his account."

[17] On the applicant's behalf, it is said that the judge erred in viewing the case as one of breach of trust because Mr Nye was no longer under the applicant's care. But it is clear that the learned judge was not suggesting that there had been a breach of trust in any strict sense. It is abundantly clear that his Honour was concerned by the predatory conduct of the applicant in taking advantage of Mr Nye who, as she knew, from their previous association in which she had cared for him, was a "bit slower" as a result of his injuries.

[18] On the applicant's behalf, it was also argued that the learned sentencing judge erred in concluding that the applicant "expected that [Mr Nye] would not notice the sums that she was taking from his account". It was said that this inference was not open to his Honour. But as counsel for the applicant conceded, there can be no doubt that by the time of the later withdrawals the applicant must have been confident that Mr Nye had not noticed the withdrawals which had occurred, and would be unlikely to notice further withdrawals. The learned sentencing judge was, therefore, entitled to proceed on the footing that the applicant's conduct did involve the deliberate exploitation of Mr Nye's difficulties and the knowledge of those difficulties obtained during the earlier relationship of carer and patient.

[19] The learned sentencing judge said:

> "Given the period of time this dishonesty continued and, the amount of money, there is only one sentence, I think, that can be imposed and that is one of imprisonment. It is not, in my view, possible to show any particular mercy to [the applicant]; mercy that may have been shown had she pleaded guilty to this matter and acknowledged her guilt and expressed her remorse for what she had done."

[20] It is said on the applicant's behalf that his Honour failed to recognise the applicant's "not inconsiderable cooperation in the administration of justice". But the fact remains that the applicant had not pleaded guilty; and his Honour expressly took into account in the applicant's favour the circumstance that her admissions had shortened the trial.

[21] The respondent initially relied, in written submissions, upon the decision in *R v Ruddell*[1] to support the sentence of imprisonment for two years. That was a case where this Court refused to regard as excessive a sentence of two years imprisonment imposed on an offender who stole between $15,000 and $20,000 from her employer. On the applicant's behalf, it was observed that the criminality of the offending in *R v Ruddell* was significantly worse than in the present case. In that case, there were 1,260 "carefully pre-meditated" separate transactions over a period of 20 months committed by an employee motivated solely by greed who sought to cast blame on others. It must be accepted that the offending in *R v Ruddell* involved more serious criminality than the applicant's misconduct.

[22] That having been said, it would be quite wrong to treat the decision in *R v Ruddell* as fixing the upper end of the range of sentences for this kind of offending. In *R v Robinson; ex parte Attorney-General*,[2] this Court set aside a sentence of six months imprisonment, wholly suspended, and imposed a sentence of two and a half years imprisonment suspended after six months. There can be no doubt that a sentence of two years imprisonment was well within the range which was appropriate in this case. In the end, counsel for the applicant accepted, in his oral submissions, that this was so.

[23] In my respectful opinion, it cannot be said that his Honour erred in failing fully to suspend the sentence because the applicant had no criminal record. The applicant was a mature adult. While her situation may have been described as "fairly desperate", it cannot be said that she was motivated by need rather than greed. Her offending was deliberate and persistent. She withdrew funds belonging to Mr Nye

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1 [2006] 1 Qd R 361.

2 [2004] QCA 169.

on 18 occasions between October 2003 and January 2004. She took over $19,000. Her conduct was, not only persistent, but predatory as well having regard to the circumstances in which she acted. Importantly, the applicant does not have the benefit of a plea of guilty which would have served to demonstrate remorse for her conduct. Her lack of remorse was evident in her record of interview and she remained unrepentant.

[24] In *R v Shultz*,[3] this Court upheld a sentence of two years imprisonment, suspended after six months, imposed on a 50 year old man with no previous convictions who stole equipment valued at $14,000 which required a further $4,945.48 to return it to working order. The offender did not steal from his employer, but took advantage of his employment to steal from a third party. This decision confirms that a sentencing judge cannot be said to err in failing fully to suspend a sentence of imprisonment for this kind of offending in the case of a mature adult first offender.

[25] While it was open to the learned sentencing judge to fix an earlier release date than he did, having regard to the applicant's personal circumstances, it cannot be said that his decision not to do so was affected by any error of fact or principle. Nor can it be said that the sentence imposed was manifestly excessive.

Conclusion and orders

[26] The appeal against conviction was abandoned at the hearing. The appeal against conviction should be dismissed.

[27] The application for leave to appeal against sentence should be refused.

[28] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgment of Keane JA and agree with the orders proposed.

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[3] Unreported, Appeal No 111 of 1997, judgment delivered 27 May 1997.