SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2006] QCA 563
PARTIES:	**R** **v** **ANDERSON, Angus** (applicant/appellant)
FILE NO/S:	CA No 152 of 2006 DC No 3573 of 2005 DC No 2656 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2006
JUDGES:	McMurdo P, Helman and Philippides JJ 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 granted** **2. Appeal allowed** **3. Sentence imposed on 27 April 2006 for the offences alleged in indictment no. 3573 of 2005 be set aside and the following sentences substituted:** **(a) on each of counts 1 and 12 imprisonment for three months** **(b) on each of counts 2, 3 and 4 imprisonment for six months** **(c) on each of counts 5, 7, 9, 10 and 13 imprisonment for twelve months** **(d) on count 6 imprisonment for fifteen months** **(e) on each of counts 8 and 11 imprisonment for eighteen months** **4. Direct that the imprisonment for those offences start from the end of the period of the suspended imprisonment the applicant was ordered to serve on 27 April 2006. The applicant's parole release date for the substituted sentences be set at 29 April 2007** **5. From 14 April 2003 to 19 August 2003 and from 3 May 2005 to 27 April 2006 a total of 488 days, the applicant was held in pre-sentence custody. Declare that**

no part of the period of 488 days is taken to be time already served under the substituted sentences
6. Confirm the order made on 27 April 2006 that the applicant serve twelve months of the suspended imprisonment the subject of orders made on 29 September 2000

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 – whether sentences imposed manifestly excessive – offences of dishonesty – where single sentence of imprisonment for all counts imposed – power to impose single sentence of imprisonment for multiple counts – pre-sentence custody declaration – where court omitted to make such a declaration

Penalties and Sentences Act 1992 (Qld) s 144, s 147, s 155, s 157, s 161, s 213

R v Crofts [1999] 1 Qd R 386, followed
R v Grant-Watson [2004] QCA 77; CA No 360 of 2003, 16 March 2004, considered
R v Rees [2002] QCA 469; CA 237 of 2002, 4 November 2002, cited
R v Ruddell [2005] QCA 346; CA 117 of 2005, 23 September 2005, [2006] 1 Qd R 361, cited

COUNSEL: The applicant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The applicant on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P**: I agree with Helman J.

[2] **HELMAN J:** The applicant seeks leave to appeal against sentences imposed on him in the Brisbane District Court on 27 April 2006. He, then forty-six years old, came before the court to answer an indictment (no. 3573 of 2005) in which it was alleged he had committed thirteen offences of dishonesty in 2002, beginning in January and ending in October.

[3] The charges and any sums of money involved were: two counts of fraud, dishonestly obtaining a sum of money ($876.36) and dishonestly applying a credit card facility to his own use ($353.62) (counts 1 and 4); two counts of forgery - one of a telephone bill, a letter, a learner-driver's permit, and a copy of an Australian Taxation Office group certificate, and the other of letters from a bank (counts 2 and 9); four counts of uttering forged documents (counts 3, 5, 7, and 10); one count of attempted fraud (about $26,283.10) (count 6); two counts of fraud with a circumstance of aggravation – one, that the property was of a value of more than

$5,000 ($26,006.27), and the other that the yield was of a value of more than $5,000 (an exact sum was not alleged, but it was said not to be greater than $8,607.75) (counts 8 and 13); one count of stealing with a circumstance of aggravation, a quantity of scrap metal of a value of more than $5,000 ($17,679.46) (count 11); and one count of stealing, a mobile telephone (count 12). The applicant pleaded guilty to all counts. He had pleaded guilty at the committal hearing on 27 June 2005.

[4] There was a number of episodes of dishonesty that gave rise to the charges. On 7 January 2002 the applicant obtained cash from a moneylender by fraud: count 1. In June 2002, using documents he had forged, he applied, successfully, to a finance company for a credit card account, and then used the credit card account: counts 2 to 4. In July 2002 he used forged documents in applying, unsuccessfully, for a loan to buy a car: counts 5 and 6. Also in July 2002, using a forged document, he applied, successfully, for another credit card account and then used it in July and August 2002: counts 7 and 8. In August 2002 he used letters he had forged in an unsuccessful attempt to have the credit card account referred to in counts 7 and 8 reopened: counts 9 and 10. In September and October 2002 he stole things and dishonestly obtained sums of money from his employer: counts 11 to 13.

[5] The offences alleged in counts 11 to 13 were committed when the applicant was at large with bail, and, later, having been admitted to bail again on condition that he attend a drug rehabilitation centre, he absconded. He was in pre-sentence custody in respect of the thirteen offences for 488 days in two periods: 128 days from 14 April 2003 to 19 August 2003, and 360 days from 3 May 2005 to 27 April 2006. He committed all thirteen offences during the operational period of fourteen sentences of imprisonment, each wholly suspended under s 144 of the *Penalties and Sentences Act* 1992 (Qld) for an operational period of three years. Each of thirteen of the fourteen sentences was of imprisonment for three years and one sentence was of imprisonment for two years. They were imposed in the Brisbane District Court on 29 September 2000 for offences of dishonesty committed in 1999 and alleged in indictment no. 2656 of 2000. There were nine counts of fraud, three of fraud with a circumstance of aggravation, one of attempted fraud, and one of attempted fraud with a circumstance of aggravation. Ten of the offences committed in 1999 were committed in breach of a two-year probation order made against the applicant in the Brisbane District Court on 17 June 1999 for offences committed in March 1999 of threatening violence and wilfully obstructing a police officer. Apart from the offences I have mentioned the applicant's criminal history showed only two minor property offences committed in December 1999 and for which he was fined $250 in the Cleveland Magistrates Court on 11 October 2000, an offence of contravening a direction or requirement committed in April 2003 for which he was convicted but not further punished in the Southport Magistrates Court on 27 June 2005, and two offences under the *Bail Act* 1980 (Qld) committed in November 2002 and September 2003 for which he was convicted and not further punished in the Brisbane Magistrates Court on 27 September 2005.

[6] The applicant co-operated with the investigating police officers, making admissions as to what he had done.

[7] The applicant was born in Scotland and had a deprived childhood there. When he was very young his father died, and he and his brother were placed with foster parents who subjected them to abuse both physical and sexual. The applicant joined the British Army when he was fifteen but soon fell victim to alcohol abuse. He

emigrated to Australia in about 1993. He has suffered from depression and the effects of alcohol and drug abuse (cocaine), and was admitted to a psychiatric unit at the Princess Alexandra hospital. His offending, as can be seen from the account I have given of it, was largely confined to 1999 and 2002, at times when he was badly affected by the effects of depression, alcohol and drug abuse, and mounting drug debts. He used his time in pre-sentence custody productively, working as a leading hand in a furniture workshop, where his competence and attitude were found to be very good, and taking Technical and Further Education courses in word processing, creating and using spreadsheets, following workplace safety procedures, and cognitive thinking skills. The latter course concerned self-control, critical reasoning, problem solving, and 'Perspective Taking'. A letter dated 27 April 2006 from him addressed to the presiding judge was put before her Honour. In it he emphasized, among other things, his firm intention to make amends to those who had been the victims of his offences and his sincere attempts at rehabilitation. He also referred to his being 'on the street' for almost two years when he committed no further offences. That is no doubt a reference to the period when he was at large between the commission of his last offence and his being sentenced. With his letter was a facsimile transmission dated 1 February 2006 from a furniture manufacturer confirming that it had a full-time permanent position available 'on a trial basis' for the applicant.

[8] Her Honour heard detailed submissions from counsel for the applicant concerning the proper disposition of the case, she ultimately submitting that his punishment should be imprisonment for five years, which would include the period of pre-sentence custody, and that his actual time in prison should be two years and six months – or, as she put it, another fourteen months of 'actual time': fourteen months because his counsel assessed the 488 days of pre-sentence custody at sixteen months. On behalf of the Crown it was submitted that the court should activate the whole of the suspended imprisonment and impose the cumulative sentences for the offences to which the applicant pleaded guilty before her Honour. The sentences for the latter offences should be in the range of imprisonment for three to four years, the Crown prosecutor submitted, to be suspended after a period equal to the time in pre-sentence custody, which should be declared as having been served. The result would have been, had the Crown's submissions been accepted, that the applicant would have served another three years of actual imprisonment from the time he was sentenced by her Honour. It will be seen that in the result the penalty imposed by her Honour was more lenient than that suggested by either counsel before her.

[9] The learned sentencing judge made one order that the applicant be imprisoned for eighteen months for the thirteen offences, but recommended, under s. 157 of the *Penalties and Sentences Act* 1992, since 28 August 2006 omitted from the Act by operation of s. 494 of the *Corrective Services Act* 2006, that he be considered eligible for post-prison community-based release on 29 April 2007, or just over a year from the day he was sentenced. Her Honour further ordered that the sentence of imprisonment for eighteen months be served cumulatively upon an order she made under s. 147 of the *Penalties and Sentences Act* that the applicant serve twelve months of the suspended imprisonment the subject of the orders made on 29 September 2000. Under s. 147(1)(b), a court dealing with an offender for suspended imprisonment when it is satisfied, as her Honour was, that offences for which imprisonment may be imposed were committed during the operational period of orders made under s. 144, may order the offender to serve the whole of the suspended imprisonment; and s. 147(2) provides that a court must make an order

under subsection 1(b) unless it is of the opinion that it would be unjust to do so. Her Honour concluded that it would be unjust to order that the applicant serve the whole of the suspended imprisonment, because, for approximately seventeen months - as she assessed the 488 days - he had been in pre-sentence custody. She determined, then, that he should serve only twelve months of the suspended imprisonment. Her Honour did not make a declaration under s. 161 of the *Penalties and Sentences Act* (now renumbered as s. 159A by s. 496 of the *Corrective Services Act* 2006) because the pre-sentence custody could not be the subject of a declaration in respect of the suspended imprisonment. As her Honour explained, she sought to fashion a sentence that 'globally' would reflect the applicant's wrongdoing – 'the criminality of the two frauds' - but would provide for his eligibility for parole after he had served just over another year in prison, so that, as she put it, he was not 'facing a crushing sentence which would be the effect of just imposing the suspended sentence and then another sentence on top'. In the result the applicant was to be required to serve two years and four and a quarter months of actual imprisonment until the recommended parole date, which, by operation of s. 213 of the *Penalties and Sentences Act*, the transitional provision for the former s. 157 inserted by s. 504 of the *Corrective Services Act* 2006, is now taken to be his parole-eligibility date to have been fixed under part 9 division 3 of the former Act, which provides for parole. Without parole, the applicant would of course be required to serve three years and ten and a quarter months.

[10] In making his application, the applicant relies on eight grounds.

[11] First, the applicant complains that her Honour did not take into account his pre-sentence custody, but clearly her Honour did take it into account because that was the reason for her not ordering that the applicant serve the whole of the terms of suspended imprisonment. Her Honour did not make a declaration under s. 161, but she could not have done so in respect of the suspended imprisonment the applicant is required to serve, and it would not have been appropriate for her to do so in respect of the sentences for the offences alleged in the 2005 indictment since her Honour had modified her order under s. 147 by taking into account the pre-sentence custody.

[12] Secondly, the applicant asserts that the sentence did not take into account twenty months of 'STREET TIME WITH NO FURTHER CHARGES'. There is no reason to conclude that her Honour overlooked the period during which the applicant did not offend, but her Honour's attention naturally was focussed on his periods of wrongdoing and of pre-sentence custody. The period during which he did not offend was so obvious as not to require specific mention.

[13] Thirdly, the applicant asserts that 'COMPARATIVE' sentences were not taken into consideration. There is no reason to assume that her Honour was unaware of sentences in comparable cases. The overall result indicates that. On the hearing of the application Mr Copley, for the Crown, referred us to three cases in which offenders were sentenced to imprisonment for offences of dishonesty involving sums in the range of approximately $15,000 to approximately $55,000: *R. v. Rees* [2002] Q.C.A. 469, *R. v. Grant-Watson* [2004] Q.C.A. 77, and *R. v Ruddell* [2006] 1 Qd. R. 361. Head sentences in the range of imprisonment for two years to imprisonment for four years were imposed in those cases. In none of them, however, had there been re-offending in the operational period of a suspended sentence, which is an important feature of this case.

[14] In *R. v. Rees* an employee of the complainants had pleaded guilty to one count of fraud where the sum in question was in excess of $5,000. She was sentenced to imprisonment for three and a half years suspended after fifteen months for an operational period of three and a half years. She had taken $51,063.87 but by the time the application for leave to appeal against her sentence was heard she had made full restitution, $23,852.09 on the day she was sentenced, the remainder before. Rees had no prior convictions. The Court of Appeal granted her application for leave to appeal against her sentence and allowed the appeal by reducing the head sentence to imprisonment for three years suspended after imprisonment for nine months with an operational period of three years.

[15] *R. v. Grant-Watson* was the case of a woman who had pleaded guilty to two counts of fraud each involving sums of more than $5,000. She was sentenced on each charge to imprisonment for four years to be served concurrently and suspended after eighteen months. The operational period of the sentences was four and a half years. She had a 'not inconsiderable' criminal record of offences of dishonesty. She had repaid $23,500 to one complainant and $11,800 to another and at the time of her being sentenced there was a balance outstanding of $19,000. Her application for leave to appeal against her sentences was dismissed by the Court of Appeal.

[16] *R. v. Ruddell* was a case in which an employee stole sums of money of between $15,000 and $20,000 from her employer. She pleaded not guilty and was found guilty after a trial and sentenced to imprisonment for two years. She had no prior convictions and had made no offer of restitution. She showed no remorse for her actions. Her application for leave to appeal against her sentence was dismissed.

[17] The case most closely comparable with the applicant's is that of Grant-Watson, who had, as the applicant does, a criminal record of offences of dishonesty, but in her case without the feature of having committed offences during the operational period of suspended imprisonment for such offences. In view of that fact, and the applicant's persistence in offending even while at large on bail, I am not persuaded, subject to what appears below, that the penalty imposed upon him calls for the intervention of this court notwithstanding the mitigating factors of some moment: his early acceptance of guilt, his offer of restitution, and his apparently sustained efforts at rehabilitation.

[18] The applicant's fourth complaint is that the recommendation for parole is unlikely to be successful because of his past personal history and record of breaching supervision orders. He asserts that his sentence should have been suspended. The recommendation that her Honour made was quite justified in the light of the applicant's failure to take advantage of the orders suspending the sentences made in September 2000. In any event he will now have the benefit of a parole-release date, as I shall explain later.

[19] Fifthly, the applicant complains that the sentence did not reflect his addressing his offending behaviour while on remand, his work, and good behaviour reports. There is no reason to conclude that her Honour failed to consider those matters, particularly as the result could be regarded as somewhat lenient.

[20] Sixthly, the applicant complains that her Honour did not take into account current work opportunities and the offer of restitution. That ground fails for the same reason as the last one.

[21] Seventhly, the applicant complains that the sentence proceedings focussed solely on appropriate punishment after only fifteen minutes in court. The proceedings before her Honour were not unduly prolonged, but all relevant matters were mentioned and considered.

[22] Eighthly, the applicant complains that the 'DEFENCE PSYCH REPORT' was six years out of date. There was no psychologist's report before her Honour and there is no substance in that ground.

[23] There is a further matter raised at the hearing of the application that I should mention. Her Honour purported to impose a single sentence of imprisonment for all thirteen offences. A sentencing court has no power to impose such a sentence: *R v. Crofts* [1999] 1 Qd. R. 386. In my view the proper course will be for this court to set aside the orders made by her Honour on the 2005 indictment and to substitute the following thirteen sentences, which properly reflect the gravity of the offences, for the one imposed by her Honour: imprisonment for three months on each of counts 1 and 12; imprisonment for six months on each of counts 2, 3, and 4; imprisonment for twelve months on each of counts 5, 7, 9, 10, and 13; imprisonment for fifteen months on count 6; and imprisonment for eighteen months on each of counts 8 and 11. Those sentences will, by operation of s. 155 of the *Penalties and Sentences Act*, be served concurrently with each other, but it should be directed under s. 156 that the imprisonment for those offences start from the end of the period of suspended imprisonment the applicant is serving. The applicant's parole-release date should be fixed at 29 April 2007.

[24] Since the applicant was held in pre-sentence custody in respect of the offences alleged in the 2005 indictment, the effect of s. 161(3A) and (3B) of the *Penalties and Sentences Act* was to require the court to state the dates between which the applicant was held in pre-sentence custody, to calculate the time that he was held in pre-sentence custody, and to declare that no time was taken to be imprisonment already served under the sentence. It was appropriate to conclude that no time was to be taken to be imprisonment already served under the sentence imposed on the 2005 indictment because the time the applicant was held in pre-sentence custody had already been taken into account in arriving at the order her Honour made that the applicant serve only twelve months of the suspended imprisonment. Her Honour omitted to make the formal declaration which, as I have indicated, was required by s. 161, and is now required by s. 159A, so that that declaration should be added to the orders made by this court.

[25] Apart from the matters to which I have just referred, the application has no merit, so the orders of this court should be confined to those I have mentioned. To summarize: the application for leave to appeal should be granted. The applicant's appeal should be allowed, the sentence imposed on 27 April 2006 for the offences alleged in indictment no. 3573 of 2005 set aside, and the following sentences substituted: on each of counts 1 and 12 imprisonment for three months; on each of counts 2, 3 and 4 imprisonment for six months; on each of counts 5, 7, 9, 10, and 13 imprisonment for twelve months; on count 6 imprisonment for fifteen months; and on each of counts 8 and 11 imprisonment for eighteen months. It should be directed that the imprisonment for those offences start from the end of the period of suspended imprisonment the applicant was ordered to serve on 27 April 2006. The applicant's parole-release date for the substituted sentences should be set at 29 April 2007. It should be stated that from 14 April 2003 to 19 August 2003 and

from 3 May 2005 to 27 April 2006, 488 days, the applicant was held in pre-sentence custody. It should be declared that no part of the period of 488 days is taken to be imprisonment already served under the substituted sentences. The order made on 27 April 2006 that the applicant serve twelve months of the suspended imprisonment the subject of orders made on 29 September 2000 should be confirmed.

[26] **PHILIPPIDES J:** I agree with the reasons of Helman J and the orders proposed.