SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fidler* [2010] QCA 25
PARTIES:	**R** **v** **FIDLER, Jodie Maree** (applicant)
FILE NO/S:	CA No 189 of 2009 DC No 255 of 2006 DC No 309 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	23 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2010
JUDGE:	Holmes, Muir and Chesterman JJA Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal allowed;** **2. Appeal allowed;** **3. Sentences imposed by the sentencing judge set aside;** **4. For count 1 on each indictment the applicant be sentenced to three years imprisonment to be released after serving 12 months imprisonment, upon her entering into one recognizance in the sum of $500, to be of good behaviour for a period of five years, and declare that the applicant had served 13 days pre-sentence custody between 7 July 2009 and 20 July 2009;** **5. The terms of imprisonment be concurrent;** **6. Convictions recorded but no further penalty imposed in respect of the other counts on the indictments.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant pleaded guilty to 12 counts (on two indictments) of dishonestly obtaining, and one count of attempting to obtain, a financial advantage by deception – where applicant sentenced to 36 months imprisonment "on each indictment", with an order for release on recognizance after serving 18 months, conditional on the applicant being of good behaviour for a period of five years – where applicant submitted the sentence was

manifestly excessive – where the applicant submitted early guilty pleas and demonstrated remorse – where the applicant had physical and psychiatric disabilities – whether the sentencing judge erred in accepting she was bound to order the applicant's release on recognizance after serving 60 to 66 per cent of the head sentence – whether the sentencing judge erred in imposing one sentence for all offences on each indictment – whether sentence manifestly excessive

Crimes Act 1914 (Cth), s 16A, s 16F
Criminal Code 1995 (Cth), s 134.2

Bertilone v The Queen (2009) 231 FLR 383; [2009] WASCA 149, cited
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
R v Beesley [2008] QCA 240, cited
R v CAK & CAL; ex parte Cth DPP [2009] QCA 23, disapproved
R v Elliott [2000] QCA 267, cited
R v Engert (1995) 84 A Crim R 67, cited
R v Harkness [2001] VSCA 87, cited
R v Moffat & Attorney-General of Queensland, unreported, Court of Appeal, Qld, No 291 of 1998, 8 October 1998, discussed
R v Moffat & Commonwealth Director of Public Prosecutions [1998] QCA 383, discussed
R v Mokoena [2009] QCA 36, cited
R v Ngui and Tiong (2000) 1 VR 579; [2000] VSCA 78, cited
R v Nguyen and Tran [1998] 4 VR 394, cited
R v Robertson (2008) 185 A Crim R 441, [2008] QCA 164, cited
R v Ruha, Ruha & Harris; ex parte Cth DPP [2010] QCA 10, cited
R v To & Do; ex parte DPP (Cth) [1999] 2 Qd R 166; [1998] QCA 106, discussed
R v Tran (2007) 172 A Crim R 436; [2007] QCA 221, cited
R v Woods (2009) 24 NTLR 77; [2009] NTCCA 2, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: The applicant appeared on her own behalf
D N Adsett for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA:** The applicant was convicted on her own pleas of guilty in the District Court on 30 March 2009 of 12 counts (on two indictments) of dishonestly obtaining, and one count of attempting to obtain, a financial advantage by deception.

[3] All of the offences concerned breaching s 134.2(1) of the *Criminal Code* 1995 (Cth) by fraudulently obtaining or attempting to obtain fuel grant monies under the Energy Grants Credit Scheme through the lodgement of false claims. The maximum penalty for an offence under s 134.2 of the *Criminal Code* 1995 (Cth) is 10 years imprisonment.

[4] The applicant was sentenced on 20 July 2009 to imprisonment for 36 months "on each indictment" to be released after serving 18 months upon her entering into a recognizance in the sum of $500 to be of good behaviour for a period of five years. It was declared that the applicant had already served 13 days pre-sentence custody between 7 July and 20 July 2009 and a reparation order in the sum of $174,609.47 was made in favour of the Commonwealth of Australia.

[5] The applicant appeals on grounds that the sentences were manifestly excessive.

The offending conduct

[6] The applicant's de facto husband, Mr Fennell, was registered for the Energy Grants Credit Scheme in relation to fishing operations. The applicant was his authorised contact person and her bank account was nominated as the account into which monies claimed by Fennell were to be paid.

[7] Counts 1 to 5 inclusive on Indictment 255/06 concerned a total sum of $129,500 obtained through the lodgement of the claims made in Mr Fennell's name. Count 6 on that Indictment concerned a fraudulent attempt to obtain $7,170.88 by means of such a claim.

[8] The counts on Indictment 309/07 were in respect of seven fraudulent claims for fuel rebates made by the applicant on behalf of an enterprise described as "the Luke Partnership" between 3 November 2003 and 29 July 2005. The applicant obtained $53,688.98 by means of these claims. Some of the rebate monies were paid into the partnership account and transferred by the applicant to her own account. Other such monies were paid directly into her own account. The conduct the subject of counts 5, 6 and 7 on this indictment occurred after 3 November 2004, on which date the applicant had participated in a formal record of interview concerning the offences alleged in Indictment 255/06.

[9] The monies unlawfully obtained by the applicant were expended on the acquisition of a motor vehicle, personal expenditure and payments to family members. The applicant repaid $9,575 of the fraudulently obtained money.

[10] On 3 November 2004 the applicant participated in a record of interview in which she admitted that:

(a) All diesel fuel claims lodged by her were false, to her knowledge;

(b) Mr Fennell had no knowledge of her submission of the false claims or of the receipt of monies in respect of them; and

(c) As far as she was aware, Mr Fennell was not entitled to any rebate.

The applicant's antecedents

[11] The applicant was 36 years of age at the time of sentencing. She had no criminal history and was in receipt of a disability support pension. She had one child aged about 17 and two adult step-children.

[12] The applicant suffers from chronic lymphocytic leukaemia and is prone to recurrent chest infections. She also has a history of asthma and arthritis. At the time of sentencing she was undergoing chemotherapy for her leukaemia.

[13] Dr Kenny, a consultant psychiatrist who saw the applicant with a view to providing a report to the applicant's solicitors in connection with her impending trial or sentencing, was of the opinion that the applicant suffered from "a moderately severe depressive illness with Post-Traumatic Stress Disorder … [and] Obsessive Compulsive symptoms …". This condition was said to be "basically a reaction to the disastrous circumstances" that had befallen the applicant. One such circumstance was identified as horrific assaults, including sexual assaults, perpetrated on the applicant when held captive by a psychotic patient for approximately two days.

[14] In another report, dated 26 June 2008, Dr Kenny gave the opinion that a custodial sentence "would add considerably to [the applicant's] distress, depression and aggravate her underlying psychiatric condition" and would "massively" complicate her major problems. In his opinion, at the time of the applicant's offending "her judgment [was] distorted by her Post-Traumatic Stress Disorder, depression [and] grief". The grief was the result of a miscarriage suffered by the applicant when 18 weeks pregnant with twins. In Dr Kenny's view the applicant is in need of long term psychiatric treatment.

[15] The evidence reveals that for about 12 months preceding June 2008, the applicant had been looking after up to seven homeless children without seeking reimbursement. A number of them provided references testifying to the extremely beneficial impact on their lives of the applicant's selfless conduct.

The sentencing remarks

[16] The learned sentencing judge referred to the applicant's physical and psychiatric disabilities and to: Dr Kenny's opinion to the effect that the applicant's "judgment was grossly impaired" at the time of offending; her contributions to the community by assisting homeless youths; the hardship likely to be suffered by her family as a result of her incarceration and to the unlikelihood that the applicant would re-offend.

[17] In addressing the criminality of the applicant's conduct the sentencing judge referred to the substantial sum involved in the frauds, the deliberate nature of her offending, the applicant's persistence, including her creation of false invoices when claims were queried by the Taxation Office and to the continuation of her offending after she had been interviewed by police officers. Her Honour noted the importance of general deterrence. She mentioned the prosecution's submission that an appropriate sentence would be between three and a half to four years with a non-parole period of two and a half years and defence counsel's submission that an appropriate head sentence was three years.

[18] The sentencing judge, in her carefully considered reasons, appreciated that her discretion was required to be exercised by reference to all relevant circumstances. She referred to the applicant's psychiatric and medical conditions including her impaired judgment and her partial reparation and set a non-parole period of 18 months.

[19] In relation to a parole release date, the sentencing judge quoted the following passage from the reasons in *R v CAK & CAL; ex parte Cth DPP* that:[1]

> "The norm for non-parole periods … for Commonwealth offences is generally considered to be after the offender has served 60 to 66 per cent of the head sentence. The precise figure may be outside this range as it is a matter of judicial discretion … but that is the usual percentage of the sentence. A sentence that was well outside that range would have to have most unusual factors to justify it."

The respondent's contentions

[20] Counsel for the respondent referred to a decision which affirmed the importance of deterrence as a factor in sentences imposed for social security fraud. He submitted, by reference to authority,[2] that health and personal factors should not override the importance of general deterrence in cases such as this and that even extreme ill health would not normally overshadow the requirement for appropriate deterrent sentencing.

[21] In *R v Gourley*,[3] *R v Adams; ex parte A-G (Qld)*[4] and *R v Parker*[5], cases of an employee's misappropriation of employer's money in amounts of $213,000, $239,617.29, and $229,566.10 respectively, the sentences imposed were, respectively, six years imprisonment with a parole eligibility recommendation after two years and three months, four months imprisonment suspended after fifteen months with an operational period of five years (on an Attorney's appeal), and five years suspended after twenty months with an operational period of five years.

[22] In *R v To & Do; ex parte DPP (Cth)*,[6] the respondent to a Director's appeal had his sentence increased to four years with a non-parole period of eighteen months. To was 44 years of age; his wife Do was 43. The couple, who were migrants from Vietnam, had a 12 year old dependent child. To, who pleaded guilty to fraudulently obtaining $158,458.52, had no criminal history.

[23] In *R v Moffat & Commonwealth Director of Public Prosecutions*[7] and *R v Moffat and Attorney-General of Queensland*,[8] the respondent was convicted of State charges of fraud, forging and uttering and of Commonwealth charges of forging and uttering. The amounts involved were $20,680 and $104,953 respectively. The 50 year old respondent was a chartered accountant with no criminal history and a record of community service whose offending resulted from his gambling addiction. He informed the police that he had committed the offences and pleaded guilty. His sentences for the most serious State offence and for the most serious Commonwealth offence were increased to three years with an order that he be released after serving seven months. He had already served two months of an intensive correction order.

Consideration

[24] The authorities relied on by counsel for the respondent demonstrate that the head sentences under appeal were not excessive.

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1 [2009] QCA 23 at [18].
2 *R v Banauch* [1999] QCA 207; *R v Adams; ex parte A-G (Qld)* [2006] QCA 312 and *R v Tacey* [1994] QCA 367.
3 [2003] QCA 307.
4 [2006] QCA 312.
5 [2007] QCA 22.
6 [1999] 2 Qd R 166.
7 [1998] QCA 383.
8 Unreported, Court of Appeal, Qld, No 291 of 1998, 8 October 1998.

[25] The applicant, who was self represented, did not challenge the appropriateness of the head sentences. She argued that an earlier recognizance release date should have been fixed.

[26] It is now plain that the observations in *R v CAK & CAL* quoted above were based on a false premise. In argument, reference was made to a 45 page comparative sentencing schedule relied on by the Commonwealth DPP in submissions made in a matter which has not yet been decided, *R v Marshall*.[9] Counsel for the respondent did not contest that it revealed that:

- in not one of the 13 Queensland cases listed was the release date later than the halfway point of the term of imprisonment;
- in two of the Queensland cases, immediate release was ordered and in six other instances the release date was at or before the one-third point;
- of the eight Victorian decisions summarised, two had non-parole periods equal to 66 per cent or more of the term of the sentence; two had recognizance release dates at the mid-point and four had recognizance release dates at or prior to one-third of the sentence; and
- of the 25 decisions from New South Wales, 11 had immediate release orders, community service or periodic detention orders, or recognizance release dates set at half or less of the sentence. In three cases, the non-parole period was greater than 66 per cent of the term.

[27] Reference to recent decisions also leads to the conclusion that the general uniformity of approach referred to in *R v CAK & CAL* does not exist except in relation to drug offences, or, at least, some such offences.[10]

[28] But, regardless of the existence of any general approach to the fixing of a non-parole period or the making of a recognizance release order, a court exercising its discretion must have regard to all relevant circumstances and not, in effect, abdicate its responsibilities by the mechanical application of a pre-determined formula.[11] The proper approach to the setting of pre-release periods under recognizance release orders is discussed at length in *R v Ruha, Ruha & Harris*. Neither counsel for the respondent nor the applicant sought to cast doubt on or to distinguish the principles articulated in that decision.

[29] In the circumstances, I will content myself with the following further observations. In the exercise of the sentencing discretion reasonable consistency in sentencing is an important consideration.[12] Where Commonwealth offences are concerned, the achievement of reasonable consistency "will usually require recognition of decisions of other States where those decisions concern like cases".[13] However,

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9 Heard in the Queensland Court of Appeal on 3 December 2009, McMurdo P, Muir JA and Atkinson J sitting (CA 230 of 2009).

10 See e.g. *R v Ruha, Ruha & Harris; ex parte Commonwealth DPP* [2010] QCA 10; *R v Robertson* [2008] QCA 164; *R v Mokoena* [2009] QCA 36; *Bertilone v The Queen* (2009) 231 FLR 383; *R v Nguyen and Tran* [1998] VR 394 and *R v Woods* (2009) 24 NTLR 77.

11 See e.g., *R v Ngui and Tiong* [2000] 1 VR 579 at 583; *R v Harkness* [2001] VSCA 87 and *Bertilone v The Queen* (2009) 231 FLR 383.

12 *Wong v The Queen* (2001) 207 CLR 584 at [6] – [8] per Gleeson CJ and *Lowe v The Queen* (1984) 154 CLR 606 at 610 - 611.

13 *R v Tran* (2007) 172 A Crim R 436; [2007] QCA 221 at [8].

practices which may arise in some jurisdictions should not be permitted to operate as a practical fetter on the exercise of a sentencing court's discretion or to erode the obligation to comply with the requirements of s 16A of the *Crimes Act* 1914 (Cth). Attempts to prescribe the circumstances in which departure from a perceived sentencing norm or practice is justified may assist in improving consistency of sentencing but are likely to discourage the proper exercise of the sentencing discretion by reference to all relevant considerations.

[30] It is arguable that the primary judge erred by working from a perceived recognizance release date norm of 60 to 66 per cent of the term of the head sentence in determining the recognizance release date. However, it is unnecessary to decide that question. She failed to impose a separate sentence for each offence on each indictment or to impose a head sentence for one offence on each indictment which reflected the applicant's overall criminality. Her Honour imposed one sentence for all offences on each indictment. Counsel for the respondent accepted that this was impermissible[14] and that it was thus necessary for this Court to exercise the sentencing discretion afresh.

[31] Despite the sentencing judge's careful sentencing approach, it does appear that in determining the time the applicant would be required to spend in actual custody prior to her release she failed to have sufficient regard to s 16A of the *Crimes Act* 1914 (Cth) which provides that in determining the sentence to be passed "or the order to be made … a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". Section 16A(2) requires a sentencing court to take into account the matters listed in paragraphs (a) to (p) inclusive. The more relevant of these provisions are:

> "(a) the nature and circumstances of the offence;
>
> …
>
> (d) the personal circumstances of any victim of the offence;
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> …
>
> (f) the degree to which the person has shown contrition for the offence:
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> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;
>
> (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
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> …
>
> (m) the character, antecedents, age, means and physical or mental condition of the person;
>
> (n) the prospect of rehabilitation of the person;
>
> …"

[32] The applicant's pleas of guilty were early. She is in very bad health and has pronounced psychiatric disabilities which partially explain her aberrant behaviour: that is a highly pertinent consideration. Gleeson CJ explained the relevance to sentencing of the offender's mental condition in *R v Engert*:[15]

> "One of those respects depending upon the facts and circumstances of the individual case, may relate to the matter referred by this Court in the case of *Scognamiglio* (1991) 56 A Crim R 81. At 86 the

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14 *R v Beesley* [2008] QCA 240.

15 (1995) 84 A Crim R 67 at 71.

passage in a judgment of the then Chief Justice of Victoria was cited with approval. That passage was in the following terms:

> 'In sentencing generally, it is necessary to balance personal and general deterrence on the one hand with rehabilitation on the other, but in the case of an offender suffering from a mental disorder or abnormality, general deterrence is a factor which should often be given little weight.
>
> …
>
> General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder [o]r abnormality because such an offender is not an appropriate medium for making an example to others.'

Similarly, in *Letteri* (unreported, Court of Criminal Appeal, NSW, 18 March 1992) Badgery-Parker J said:

> 'The principle then is clear enough. It is correctly stated as follows; that whereas general deterrence is a relevant consideration in every sentencing exercise, it is a consideration to which less weight should be given in the case of an offender suffering from a mental disorder or severe intellectual handicap. In an extreme case, the proper application of this principle may produce the result that considerations of general deterrence are totally outweighed by other factors. In every case it is a matter of balancing the relevant factors in a manner no different from that which is involved in every sentencing exercise.'

I emphasise the concluding sentence in that passage."

[33] An offender's mental abnormality or psychiatric impairment may also be relevant to the assessment of his or her culpability[16] and may well be "important to considerations of rehabilitation".[17] As I have said, the applicant's psychiatric disabilities partly explain her offending behaviour.

[34] The applicant has demonstrated remorse and the sentencing judge found that she is very unlikely to re-offend. Plainly, her physical and psychiatric conditions will cause her much greater than usual hardship when serving a term of imprisonment.

[35] For the above reasons, I would order that:

The application for leave to appeal be allowed;

The appeal be allowed;

The sentences imposed by the sentencing judge be set aside;

For count 1 on each indictment the applicant be sentenced to three years imprisonment to be released after serving 12 months imprisonment upon her entering into one recognizance in the sum of $500 to be of good behaviour for a period of five years and declare that the applicant had served 13 days pre-sentence custody between 7 July 2009 and 20 July 2009;

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16 *R v Elliott* [2000] QCA 267 at para [11].

17 *R v Engert (Supra)* at 71.

The terms of imprisonment be concurrent;

Convictions are recorded but no further penalty is imposed in respect of the other counts on the indictments.

The following explanatory remarks are made in order to satisfy the requirements of s 16F of the *Crimes Act* 1914 (Cth):

a) the applicant has been sentenced to three years imprisonment but the Court has ordered that she be released after serving 12 months upon her entering into a bond of $500;
b) the purpose of that order is to enable her to be released earlier than the full term of her sentence and to provide her with the opportunity to carry out the balance of her punishment in the community;
c) the bond is conditional upon her being of good behaviour, if she does not comply with its conditions, she may be brought back to Court and dealt with and depending on the nature of the breach, she may be required to serve the balance of her unserved period of imprisonment in prison; and
d) the terms of the bond may be varied or discharged, in appropriate circumstances, at any time during the period of the bond.

[36] **CHESTERMAN JA:** I agree with the orders proposed by Muir JA for the reasons given by his Honour.