

SUPREME COURT OF QUEENSLAND

CITATION: *R v Hayes* [2010] QCA 96

PARTIES: **R**
v
HAYES, Wendy Louise
(applicant)

FILE NO/S: CA No 1 of 2010
DC No 3548 of 2009
DC No 3547 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 30 April 2010

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2010

JUDGES: Holmes and Chesterman JJA and Ann Lyons J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Applications refused**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to 10 offences, each involving a form of dishonesty – where the offending involved persistent and sophisticated fraud – where all sentences were to be served concurrently such that the applicant would be eligible for parole after having served 18 months – where applicant cooperated extensively with authorities – where applicant suffers from a personality disorder – whether sentence was manifestly excessive in comparison to other like offenders, and considering the applicant’s cooperation and disorder

Crimes Act 1914 (Cth), s 19AC(4)
Criminal Code 1995 (Cth), s 134.2(1)

R v Fuller [2009] QCA 195, cited
R v Goodger [2009] QCA 377, cited

COUNSEL: The applicant appeared on her own behalf
M B Lehane for the first respondent
M Nicolson for the second respondent

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

- [1] **HOLMES JA:** I agree with the order Chesterman JA proposes, and with his reasons, with a single qualification. Although I agree that in this case the applicant's personality disorder was not such as to amount to a mitigating factor, I prefer not to express any more general conclusion on the topic of whether personality disorders can constitute mitigating circumstances.
- [2] **CHESTERMAN JA:** On 21 December 2009 the applicant pleaded guilty to 10 offences each involving a form of dishonesty. Nine of the charges, contained in one indictment ("state indictment"), were offences against various sections of the *Criminal Code* 1899 (Qld). The tenth charge, contained in a separate indictment ("commonwealth indictment") presented by the Commonwealth Director of Public Prosecutions, charged the applicant with dishonestly obtaining a financial advantage from the Commonwealth by deception contrary to s 134.2(1) of the *Criminal Code* 1995 (Cth).
- [3] The applicant was sentenced to four and a half years' imprisonment for the offence set out in count 7 of the state indictment. Her parole eligibility date was set for 12 November 2010 which, taking into account 224 days spent in pre-sentence custody, meant that the applicant would be eligible for parole after having served 18 months.
- [4] On each of the other counts in the state indictment, and on the one count on the commonwealth indictment, she was sentenced to 18 months' imprisonment. All sentences were to be served concurrently.
- [5] The sentencing judge did not make a recognizance release order in respect of the sentence of 18 months' imprisonment for deceiving the Commonwealth. His Honour instead exercised the power contained in s 19AC(4) of the *Crimes Act* 1914 (Cth), giving reasons for so doing, as the subsection requires. The reason was that the applicant would be in prison for the state offences for at least 18 months, the duration of the sentence for the commonwealth offence, and when released would be on parole which would afford a degree of supervision and control over the applicant's behaviour which could not be achieved by a recognizance release order.
- [6] Counts 1 and 2 on the state indictment related to obtaining \$390 from a Cash Converters franchise. The applicant falsely represented herself to be her sister and by use of some her sister's means of identification which she had stolen, induced the franchisee to make her a loan which was never repaid.
- [7] Counts 3, 4, 5 and 6 relate to the defrauding of an electrical goods retailer on the Sunshine Coast. In July 2006 the applicant had stayed briefly with a friend at her home on Hervey Bay. Abusing the hospitality the applicant stole her friend's birth certificate and electricity account, a pension card and a Medicare card. Using these documents she obtained a driver licence in her friend's name. Equipped with the new licence issued in the false name but, of course, bearing her photograph, the

applicant bought over \$6,000 worth of electrical goods on credit from a “Good Guys” retailer. She made none of the payments required by the credit agreement.

- [8] Counts 7 and 8 relate to an elaborate, sophisticated and determined fraud which paid the applicant over \$340,000. She made false claims upon an insurance company with which she had taken out a personal accident policy covering her and her husband against injury and lost income following an injury. On 30 March 2007 the applicant informed the insurer she had accidentally fractured her left ankle and a bone in her foot and broken her collar bone. She named her husband as a witness to the accident. She supported her claim by certificates purportedly signed by a doctor who practised in Caloundra. She claimed indemnity for two months’ loss of wages.
- [9] At the end of that period the applicant told the insurer that her injury had deteriorated and that three toes on her left foot required amputation. Again her claim was supported by a letter apparently signed by the doctor confirming the need for surgery. Further documents purportedly signed by a surgeon and staff of the Nambour General Hospital were provided corroborating the claim the toes had been amputated. The doctor’s signature was apparently witnessed by a Justice of the Peace.
- [10] Further documents were submitted by the applicant to the insurer purportedly signed by the doctor advising that the applicant would be unable to work for another month. At the end of that month the applicant made a further claim, this time that the remaining toes would have to come off. Again the claim was supported by documents purportedly signed by the surgeon. As well there were certificates reporting on the applicant’s progress apparently signed by the doctor.
- [11] After three months, in September 2007, the applicant told the insurer that the whole of her left foot required amputation. Again she supplied copious documentation containing forged signatures from the doctor and surgeon setting out details of the amputation and her hospitalisation. She subsequently sent forged progress certificates from the doctor.
- [12] The applicant is sound of limb. Her left foot, with all five toes, remains attached to her leg.
- [13] Finding the insurer such an easy mark the applicant returned to the plunder. In January 2008 she claimed that her husband had suffered a debilitating injury to his right eye. The claim, which was quite false, was supported by a forged report from an eye specialist in Brisbane who provided:
 “a detailed medical report regarding the ... removal of the eye ...”.

The insurer paid out \$110,000.

- [14] The applicant went once too often to the well. In March 2008 she made a further claim, again supported by a forged letter from an ophthalmologist, that the husband’s left eye had become damaged as a consequence of the surgical removal of the right eye. This claim was eventually investigated which led to the detection of the applicant’s fraud, but not before the insurer had paid out a further \$3,740.
- [15] The ninth count, passing a valueless cheque for \$2,600, was the duping of another money lender. The applicant drew a cheque for \$2,800 on an account which was not hers but bore a name similar to her maiden name. She cashed the cheque at the

money lender receiving \$2,600. The account was overdrawn, and the bank dishonoured the cheque, so transferring the loss from the bank to the money lender.

- [16] The commonwealth offence consisted of two separate deceptions. The first, which gained the applicant a trifle under \$16,000, was the result of the applicant not informing Centrelink that she was employed while in receipt of a Newstart Allowance. She applied for the allowance on 2 August 2004 and was paid the allowance from 4 August 2004. A condition of its payment was that she lodge fortnightly reviews detailing any changes in her circumstances, including the receipt of income from employment. Between 7 July 2004 and 16 October 2006 the applicant was employed as a casual employee by three different employers. She completed the fortnightly reviews falsely, not revealing her wages.
- [17] Separately the applicant obtained further moneys from Newstart by misappropriating her sister's identity and circumstances. The sister was also in receipt of a Newstart Allowance but when she obtained employment the applicant lodged false fortnightly reviews in her sister's name asserting that she remained unemployed. The sister was ignorant of the misappropriation and deception. As part of the fraud the applicant forged her sister's signature on each of the fortnightly forms. By this means she obtained a little under \$23,000.
- [18] The applicant is a 32 year old woman who was between 26 and 31 years of age when she committed the serial frauds. She has a relatively minor criminal history. In 2004 she was convicted of stealing in the Bundaberg Magistrates Court and was released, without conviction, on a recognisance of \$400 to be of good behaviour for four months. Restitution of \$250 was ordered. In December 2006 she was dealt with in the Caloundra Magistrates Court for shoplifting and fined \$120, again without the recording of a conviction. In May 2009 in the Brisbane Magistrates Court she was convicted of breaching her bail conditions and fined \$1,000.
- [19] The applicant is married but has no children. She has a TAFE Diploma in child care and has worked in that field and in aged care. She has never been in permanent employment but has worked casually.
- [20] A psychiatrist, Dr Ian Curtis, examined the applicant for the purposes of her sentencing. His largely unhelpful report diagnoses Ms Hayes with a borderline personality disorder which he thought was likely to make her "reckless and dangerously impulsive", and to act "without thinking first about the consequences".

Dr Curtis also diagnosed the applicant as suffering from a:

"mixed anxiety depression ... now ... best ... described as a chronic and entrenched Adjustment Disorder with anxiously depressed features, entrenched and chronic".

- [21] The applicant, who appeared for herself, advanced a number of arguments. The first is that by reference to the case of another offender, *Lake*, sentenced in the District Court on 12 June 2008, her sentence is excessive. Her second point is that because of her "severe psychological illness" her sentence should have allowed her release after 12 months and, to ensure that, the head sentence should be reduced from four and a half years to " 'three year top (sic) to be eligible for court ordered parole after serving one year' ". The applicant complains also that there should have been a greater discount given for her early plea of guilty and her full cooperation with both commonwealth and state investigators. She asserted that she:

“was ordered to serve the ex officio ‘standard’ one third and received no further discount”.

Her fourth point is that she was sentenced to

“4 ½ years to serve 18 months for the Commonwealth fraud”

which is excessive given the large difference in amount involved in the state offending and the commonwealth offending.

- [22] This last point, obviously, involves a misunderstanding on the part of the applicant. She was sentenced to 18 months’ imprisonment for the commonwealth offence. The sentences were structured so that the sentence for the commonwealth offence would expire exactly when she became eligible for parole with respect to the state offences.
- [23] The applicant mentions also that her parents have separately been diagnosed with cancer. If one accepts her assertion, which is problematic given her recent history of gross dishonesty and the lack of corroboration from an undoubtedly authentic source, it is not relevant to the application. While one feels natural sympathy for anyone facing such a diagnosis her parents’ illness is not relevant to the applicant’s sentence. There is no evidence that they depend upon her emotionally or financially.
- [24] The applicant’s submissions come down to a plea that her sentence is disproportionate to her offending by reference to other like offenders, her personality disorder and her cooperation.
- [25] It is true that her cooperation was extensive. She pleaded guilty to ex-officio indictments, and as well took part in interviews with both Queensland Police and Commonwealth officers. She frankly admitted her offending and cooperated fully. However, reference to other similar cases show that her sentence is far from excessive.
- [26] In *R v Fuller* [2009] QCA 195, the appellant dishonestly took \$217,000 from a 90 year old man who was vulnerable and gave his trust to Fuller who was a woman in her mid 30s without previous convictions. She was sentenced to five years’ imprisonment half of which had to be served before she became eligible for parole. The sentence, imposed after trial, was not disturbed.
- [27] In *R v Goodger* [2009] QCA 377, the applicant, a woman in her 50s, defrauded her employer of almost \$95,000 over a two year period. She pleaded guilty and was sentenced to four and a half years imprisonment being eligible for parole after serving 18 months. She had previous convictions for dishonesty. A psychiatric report showed her to be chronically depressed. The application was refused.
- [28] There is no substance in the submission the applicant’s borderline personality was not taken into account in determining the appropriate sentence. It was irrelevant. A prisoner’s mental illness which reduces her capacity for judgment or understanding, or ability to control behaviour, and therefore reduces the moral blameworthiness in the offending is rightly regarded as an important mitigating factor in the sentencing process. It is my understanding that the law has never regarded personality disorders as having this effect. This is for the reason that they are not illnesses which impact upon the capacity of the sufferer to perceive the world around her and

respond to it. A personality disorder is a description of a personality type, or the traits which define the person and the person's predominant modes of behaviour. The personality type becomes a disorder when the traits become manifest in behaviour which "deviates markedly from the expectations of the (person's) culture", and leads to "distress or impairment". The passages are from DSM IV (p 629).

- [29] As to the diagnosis that the applicant was chronically depressed one notes that the frauds were carried out over several years with a degree of energy, planning, application and determination.
- [30] The applicant's offending was rightly described as "systematic and persistent". It showed a considerable degree of sophistication. She obtained a very substantial sum of money most of which will never be recovered. The Commonwealth had the benefit of a reparation order and will receive its money, or some of it, but the victims of the state offences will not. The offending was cynical and calculated. The only appropriate penalty was a substantial term of imprisonment.
- [31] It cannot be said that the applicant did not receive an appropriate discount for her plea and cooperation. The sentence ultimately imposed was modest given the scale of offending and the manner in which the frauds were perpetrated. Making the sentence for the commonwealth offence concurrent with the state offences was an act of leniency which had the further effect of ameliorating the sentences.
- [32] The applications should be refused.
- [33] **ANN LYONS J:** I agree with the reasons of Chesterman JA and with the order proposed.