

SUPREME COURT OF QUEENSLAND

CITATION: *R v Thacker* [2010] QCA 168

PARTIES: **R**
v
THACKER, Sheryl Lyn
(applicant/appellant)

FILE NO/S: CA No 298 of 2009
DC No 15 of 2009

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 2 July 2010

DELIVERED AT: Townsville

HEARING DATE: 27 May 2010

JUDGES: McMurdo P, Cullinane and McMeekin JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The appeal against conviction should be refused**
2. The application for leave to appeal against sentence
should be refused

CATCHWORDS: CRIMINAL MATTERS – APPEAL AND NEW TRIAL –
APPEAL AGAINST CONVICTION – MISCARRIAGE OF
JUSTICE – GENERALLY – where the appellant was
charged with stealing as a servant – where the appellant did
not give evidence at trial – where the case against the
appellant was a circumstantial one – where the appellant
claims her conviction was unsafe and unsatisfactory – where
the appellant advanced further grounds on appeal – where
there was complaint the jury were misled – where there was
complaint prejudicial evidence was before the jury – whether
a conviction constitutes a miscarriage of justice

CRIMINAL MATTERS – APPEAL AND NEW TRIAL –
APPEAL AGAINST SENTENCE – GROUNDS FOR
INTERFERENCE – GENERALLY – where the learned trial
Judge took the verdict of guilty as one against all transactions
subject of the charge against the appellant – where the
appellant has prior convictions – where the learned trial
Judge fixed a parole release date at the half way mark –
whether the sentence was manifestly excessive

Evidence Act 1977 (Qld)

R v Adams [1999] QCA 326, considered
R v Goodger [2009] QCA 377, considered
R v Ward [2008] QCA 222, considered

COUNSEL: The applicant/appellant appeared on her own behalf
 M B Lehane for the respondent

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

- [1] **McMURDO P:** The appeal against conviction should be dismissed and the application for leave to appeal against sentence refused for the reasons given by Cullinane J.
- [2] **CULLINANE J:** The appellant was convicted in the District Court at Townsville after trial of stealing as a servant. She was sentenced to four years' imprisonment.
- [3] She appeals against her conviction and seeks leave to appeal against the sentence imposed.
- [4] The appellant was unrepresented at the hearing of the appeal.
- [5] She was at all relevant times employed by the Bank of Queensland. The allegation was that between 3 January 2005 and 10 December 2005 as a servant of the bank, she stole a sum of money.
- [6] The total sum involved was some \$70,743.81 and it is alleged that this sum was stolen over some eleven months in 2005.
- [7] Seven transactions were involved. The first six occurred at the Townsville branch of the bank and the seventh occurred at the Aitkenvale branch. The applicant was employed as a teller at the Townsville branch during the relevant period and was employed as a head teller at the Aitkenvale branch when the last transaction took place.
- [8] The relevant sums involved in each transaction and the dates thereof are as follows:
- | | | |
|-------|--------------------|-------------|
| (i) | 4 January, 2005: | \$6,452.50 |
| (ii) | 20 January, 2005: | \$7,067.50 |
| (iii) | 11 February, 2005: | \$2,415.00 |
| (iv) | 8 March, 2005: | \$5,050.00 |
| (v) | 8 April, 2005: | \$2,000.00 |
| (vi) | 18 April, 2005: | \$7,200.00 |
| (vii) | 9 December, 2005: | \$40,549.48 |

- [9] The case against the appellant was a circumstantial one and it was based upon the proposition that the accused alone had the opportunity, access and training to make the transactions and manipulate the relevant banking documents and that she took the money and covered her trail.
- [10] The defence was conducted upon the basis that the prosecution was unable to establish that it was the appellant as opposed to some other employee who had stolen the monies. In the course of his final address counsel who appeared for the appellant told the jury: "*--- but the element that is in contention here is whether or not she was the one who stole.*" (R 247).
- [11] The appellant did not give evidence.
- [12] The appellant by her notice of appeal claims that the conviction was unsafe and unsatisfactory. Before us she advanced some further grounds.
- [13] In the course of her submissions she was inclined to raise issues about the bank's system and in particular whether the alleged discrepancies relied upon by the prosecution had in fact been established and whether the explanation might have been not defalcation but a result of the bank's inadequate system of record keeping.
- [14] The primary evidence against the appellant was given by one Russell Cornish. Mr Cornish held the position at the time he gave evidence of manager in fraud investigations for the Bank of Queensland. His evidence was based upon his experience as an employee of the Bank of Queensland and before that for many years with the Bank of New South Wales including some eleven years as a senior investigator in the financial crimes unit.
- [15] In summary the evidence which Cornish gave consisted of taking the Court through the relevant documentation relating to the various transactions. From those documents he identified where and how an irregularity arose and explained why that was the case. The learned trial judge informed the jury that Cornish was not an expert but was called as an employee who, by virtue of his employment in the banking industry, had the necessary skills to follow the trail of documents and identify from them the relevant discrepancies.
- [16] Some criticism is advanced by the appellant and was advanced by her counsel about the failure of the police to investigate the complaint and their reliance upon Cornish's investigations as the basis for the laying of the charge. There can be no question about the admissibility of the evidence which Cornish gave.
- [17] In the case of transactions 1, 2, 3, 4 and 6, the transaction involved was a settlement of a contract for the sale of land. In each case the amount involved coincided with the amount payable to a real estate agent for commission. In the case of transaction 5, the defalcation is said to have occurred through the drawing of a bank cheque and in the final transaction, a sum of money held in a term deposit was withdrawn in cash without the consent of the owner (one Keiller) of those funds.
- [18] Before he was asked about the specific transactions involving property settlements, Cornish gave evidence of the bank's processes when such a settlement

took place. In each case he gave evidence that the moneys payable to the real estate agent, in a sum which coincided with the stolen amount, had been paid. He did so by taking the Court to the relevant documents.

- [19] I turn now to a brief summary of his evidence in respect of each of the transactions.
- [20] In relation to transaction 1 (the documents are exhibit 2) the relevant documents appear at R 343 (a debit form signed by the appellant) and R 344 (a screen dump showing a drawing from a disbursement account with the appellant's identification number (7) shown on it). The amount involved \$6,452.50. No explanation could be found in the bank's records for this withdrawal and it exceeded what was required for the purposes of the settlement as Cornish demonstrated.
- [21] The documents in relation to the second transaction are found in exhibit 4. Cornish identified the dump drop which appears at page 378 as evidencing a withdrawal of \$7,065.50 which he identified as an irregularity for which no corresponding credit could be found in the bank's records. A surplus in this amount should have existed but does not appear in the cash balance compare sheet (R 379). The appellant's signature or identifying number appears on these documents.
- [22] The third transaction concerns an amount of \$2,415 (exhibit 5). Cornish identifies the bank cheque at R 390 as not having been processed in the usual way. It is not accounted for and no surplus appears on the bank's records. The appellant's signature or number appears on all relevant documents.
- [23] The bank documents relevant to transaction 4 appear in exhibit 6. The amount involved is \$5,050. Cornish identifies an irregularity in the withdrawal evidenced on the dump screen which appears at R 449 in the sum of \$5,050 for which no corresponding credit can be found in the bank's records. The appellant's identifying number appears on the dump screen.
- [24] The last of the transactions which coincide with bank settlements is transaction 6 and the amount is \$7,200 (the documents make up exhibit 8). The dump sheet (R 482) shows a withdrawal in this sum but there is no corresponding credit in the teller transaction log (R 520) and no cash surplus. Cash balance compare sheet (R 525) balances. This document has the appellant's logon.
- [25] Transaction 5 falls into a somewhat different category. The teller's transaction log which appears at R 465 (bearing the appellant's number) shows a withdrawal of \$2,000 on the bank's cheque account. The cheque was cashed on 8 August 2005. The reconciliation (R 468) shows that this cheque was presented. The cheque number is a false one. Another cheque with the same number was issued later. According to Cornish it seems that the bank cashed a cheque that did not exist (R 531l 1-10).
- [26] Count 7 was the subject of certain admissions. These were read by the learned trial judge to the jury and appear at R 274:

“(1) On 7th December 2005 Mr Keiller phoned the Aitkenvale branch and told staff that the deposit of \$40,000 plus interest was to be renewed for

five months. (2) In late April 2006 Mr Keiller went to the Aitkenvale branch to withdraw \$10,000 of his \$40,000. (3) He was told that the account was closed and the money had been withdrawn. (4) At no time did Mr Keiller provide any person or employee of the Bank of Queensland with permission, authority or instructions to close his account. (5) Mr Keiller did not benefit from the closure of the account and he was later compensated for the money lost."

- [27] None of the usual bank documents which are required when a customer wishes to close an account with a substantial sum in it were found. That amount was taken in cash. At the time the appellant was the person who had the control of the treasury cash. Apart from the teller's transaction log indicating that the whole sum was drawn out in cash, none of the documentation which should have existed was found.
- [28] This transaction occurred at the Aitkenvale Branch where the applicant had moved to from the Townsville branch. The applicant's log on appears on the cash balance compare sheet 9th December. She was the primary teller for that day.
- [29] Whilst it is true that the case against the appellant was a circumstantial one it was in my view a strong circumstantial case. With respect to all of the transactions the appellant was the person who had the necessary access and thus the opportunity to commit the offences and she had the necessary training to effect the transactions and to manipulate the relevant banking documents.
- [30] The appellant also admitted that her signature appeared next to her name on exhibit 3, a Register of Attendances. It was admitted that the same form of signature that appears in the other documents tendered as exhibits is her signature and that she made the signatures on each of those documents.
- [31] There was evidence that in respect of some of the transactions, other employees would have had the necessary opportunity but these were called and denied any wrongdoing. It is clear their evidence was accepted by the jury.
- [32] I am satisfied that there was ample evidence to support the verdict of the jury and the appellant's claim that the verdict was unsafe and unsatisfactory must be rejected.
- [33] The appellant raised a number of other matters which were not in her notice of appeal.
- [34] The first of these in her outline was that she now realises that she had attended a funeral on 9 February 2005 and on 11 February 2005 took the day off work as bereavement leave. This amounts to little more than bare assertion from the Bar table and there was no argument advanced nor any basis identified which would allow fresh evidence on this subject to be adduced.
- [35] The appellant claimed that the prosecutor in his closing address misled the jury by giving them wrong information as to when the co-employee Brookes was at work so far as the various transactions are concerned. Counsel for the respondent was able to demonstrate to us from the record that this complaint is wrong. The relevant passage appears at R 24 11 10-20.

- [36] There is also a complaint that evidence which was prejudicial to the appellant was placed before the jury. This relates to evidence of the bank statements of the appellant and her husband and in particular that some of the transactions recorded on it took place at a hotel where there were gaming machines. However the learned trial Judge directed the jury to put the relatively brief evidence on the subject out of their mind and there is no reason to doubt that this direction was acted upon.
- [37] The appellant sought to make something of what was said to be a discrepancy in relation to a sum of \$255,622. Her argument in this regard I take to be in support of her claim that the discrepancies which were the subject of the charge may have been explained by the poor state of the bank's records of which this substantial amount was an example.
- [38] However the matter was never raised at the trial and Cornish was not given the opportunity to give an explanation in relation to it. There is no substance in this complaint.
- [39] A certificate under s.95 of the *Evidence Act 1977* (Qld) signed by Cornish was placed before the Court to enable the computer based records to be received.
- [40] It is not clear whether the certificate went before the jury given its marking. However it is clear that the certificate related to a period from December 2005 to August 2007 whereas the dates of the relevant transactions are between January 2005 and December 2005.
- [41] Since all of the relevant documents were those of a major bank and were dated between January and December 2005 it must have been apparent that there was some mistake in the certificate. No objections were taken to them and indeed counsel for the accused cross-examined on them seeking to make use of them for the purposes of the defence. In these circumstances there is no basis now on which to object to them.
- [42] The appeal against conviction should be refused.
- [43] The appellant also seeks leave to appeal against sentence. She was born on 8 November 1970.
- [44] The learned trial Judge concluded, as he was entitled to, that the jury's verdict was to be understood as a verdict against the appellant in respect of all of the transactions.
- [45] The appellant was convicted on 13 August 2009 of the offence of stealing as a servant. No conviction was recorded and she was fined \$750. The information before the learned sentencing judge on this subject was that some \$1,200 was taken home and disposed of by her in a way that he said had not been explained to him. She had claimed to her employer that she had inadvertently taken the money home.
- [46] The appellant had pleaded guilty in the Northern Territory to an offence of obtaining property by deception involving the passing of a valueless cheque. She pleaded guilty but it appears that she failed to appear and had not been dealt with at the time that she was convicted of this offence.

- [47] His Honour fixed the parole eligibility date at 28 October 2011, which is the half way mark.
- [48] The appellant has been convicted of stealing some \$70,000 and there is no explanation as to how those monies have been applied as His Honour mentioned in passing sentence.
- [49] The cases to which His Honour was referred and which have been relied upon by the respondent before us demonstrate in my view that the appellant's sentence falls well within the range. See *R v Adams* [1999] QCA 326, *R v Goodger* [2009] QCA 377 and *R v Ward* [2008] QCA 222. Those cases all involved pleas of guilty.
- [50] The application for leave to appeal against sentence should be refused.
- [51] **McMEEKIN J:** I agree with the reasons of Cullinane J and the orders he proposes.