

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Goodenough* [2010] QCA 238

PARTIES: **R**  
**v**  
**GOODENOUGH, David Kenneth**  
(applicant)

FILE NO/S: CA No 174 of 2010  
DC No 2053 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 3 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 3 September 2010

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

ORDER: **Application for extension of time refused**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant pleaded guilty to one count of fraud – where applicant dishonestly obtained \$610,644.98 – where applicant sentenced to seven years imprisonment with parole eligibility after 28 months – where applicant sought extension of time within which to lodge an application for leave to appeal his sentence – where applicant out of time by seven months – where applicant did not have a compelling or detailed explanation for the delay – where head sentence not outside proper exercise of discretion – where parole eligibility date properly took into account mitigating factors – whether application for extension of time should be granted

*R v Gourley* [\[2003\] QCA 307](#), considered  
*R v Tait* [1999] 2 Qd R 667; [\[1998\] QCA 304](#), applied  
*R v Tindale* [\[2008\] QCA 24](#), considered  
*R v Twidale* [\[2009\] QCA 200](#), considered

COUNSEL: The applicant appeared on his own behalf  
M B Lehane for the respondent

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

**HOLMES JA:** On 11 November 2009, the applicant was convicted, on a plea of guilty, of one count of fraud. It was alleged that over a period of 20 months he had dishonestly obtained \$610,664.98 from a finance company. He was sentenced to seven years imprisonment with a recommendation for parole after 28 months. On 20 July 2010 (a little over seven months out of time), he filed an application for an extension of time within which to seek leave to appeal against that sentence. In determining such an application, the Court will consider the length of the delay, the explanation for it, and whether it is in the interests of justice to grant the extension, the last of which “may involve some assessment of whether the appeal seems to be a viable one”: *R v Tait* [1999] 2 Qd R 667.

As to the explanation for the delay, the applicant says that after he was sentenced he was shocked and depressed and did not turn his mind to the possibility of an appeal until some months had passed. In February 2010, he contacted a family friend who was a barrister, with whom letters were exchanged. By a letter of 24 May, the applicant says, he was advised to contact Legal Aid for assistance. He spent some time, it seems, considering that question and in mid June contacted Legal Aid to seek assistance which, he says, was provided. It is not clear what the nature of that assistance was, but it seems to have been to the usual effect that if an application for an extension were successful, Legal Aid would appear for the applicant on any application to seek leave to appeal. This is not a compelling or detailed explanation of the delay; and it is as well at this point to turn to the question of the prospects of the appeal.

The applicant was the finance manager for his employer, a motor vehicle dealer, and, on behalf of that company’s customers, made finance applications to the finance company. He developed a scheme, which the sentencing judge described as “sophisticated and premeditated”, to create false loan applications in the names of 25 customers without their

knowledge, appropriating the loan moneys advanced to his own use. The finance company was alerted to what had occurred when, apparently weighed down by guilt, the applicant sent an e-mail to some of his customers indicating that he had done something wrong, and that if they did not go to the police, he would “work it out”. The money was spent on various living expenses, a holiday and gambling. The applicant repaid some \$133,000. The loss in respect of the unrecovered balance was borne more or less evenly between the finance company and the applicant’s employer, but an additional consequence for his employer was its severe difficulty thereafter in obtaining finance for its customers.

The sentencing judge acknowledged the applicant’s own role in the detection of his fraud although, as his Honour observed, it was only a question of time before it came to light; and his early guilty plea, co-operation with authorities, lack of criminal history and good references. He noted too that the applicant’s income had almost halved at the relevant time because of the general economic downturn. The applicant had a wife and young daughter who were living in New Zealand. A psychiatrist and general practitioner had given opinions that the applicant now suffered from an adjustment disorder with anxiety, although there was nothing to suggest it pre-dated the exposure of his offences.

The maximum penalty applicable to the applicant’s offending was ten years imprisonment. The Crown relied on three previous decisions of this Court, *R v Gourley* [2003] QCA 307, *R v Tindale* [2008] QCA 24 and *R v Twidale* [2009] QCA 200, the offences in all of which attracted the same maximum penalty. In *R v Gourley*, the applicant had defrauded her employer by a not dissimilar scheme, opening loan accounts in other names and misappropriating \$213,000 over a period of four and a half years. She had voluntarily desisted from her conduct, reported her conduct to the police, made full admissions and entered a plea of guilty. She was without previous convictions and it was said that she had developed a gambling habit after a series of traumatic events including the death of her child and parents. The Court held that she had no reasonable prospect of success in an appeal against a sentence of six years imprisonment with a recommendation for eligibility

for parole after two years and three months, and declined to extend by nine months the time for an application for leave to appeal against sentence.

In *R v Tindale*, the applicant had worked as a bookkeeper for a family business and used her position to misappropriate \$426,000. She did not co-operate with a police investigation, but she did plead guilty. She suffered from depression and some unfortunate personality traits and was living in what was described as a dysfunctional relationship, which had contributed to her offending. She had no previous convictions. The Court noted, after a review of the authorities cited to it, that head sentences of seven years had been imposed for misappropriations of similar proportions only where the offender had a relevant criminal history. Against that, however, the period over which Tindale had committed the misappropriations was much longer than in the cases cited, four and a half years. Her application for leave to appeal against sentence was dismissed.

In *R v Twidale*, the applicant had applied some seven weeks late for leave to appeal against a sentence of seven years imprisonment, with parole eligibility after 28 months, in respect of a fraud of \$646,450 against the bank which employed her. She had created an unauthorised line of credit for herself and loans in fictitious names, as well as withdrawing money from a customer's account. She had no criminal history prior to her offending, which took place over a period of about six years. No restitution had been made, although what the sentencing judge found was her genuine offer to make some restitution had been rejected. This court concluded that the applicant's appeal was most unlikely to succeed and rejected her application for an extension of time.

The applicant here, in his submissions, referred us to two District Court decisions, the first of which, a matter of *Brady*, turned on similar facts and resulted in a sentence of six years imprisonment with a non-parole period of two years. A second matter, *Gabriel*, resulted in a sentence of eight years imprisonment with a recommendation for parole eligibility after 30 months; it concerned a bank manager who had stolen a much greater amount.

Those cases indicate, indeed, that the applicant here might have received a more lenient sentence of similar proportions to that in *Brady*, of six years, but the fact that others have been treated more leniently does not mean the sentence actually imposed here was outside a proper range. I might mention too, that single Judge decisions of the District Court are not authoritative in the way that the cases cited by the Crown are.

Returning to those cases, in the applicant's favour here is that the period of his offending is considerably shorter than those involved in the cases cited and that he was able to repay some \$133,000. There is also this distinction: presumably, because he had not misappropriated the funds directly from his employer, he did not face the additional aggravating circumstance under s 408C that his employer was his victim. However, the applicant's employer was, nonetheless, a real victim of the offence, and he committed the offence in a breach of trust made possible only by the nature of his position. I do not think one could say that a head sentence of seven years imprisonment, although at the high end of what could be properly imposed, was manifestly excessive, given the proportions and sophistication of the fraud involved and the harm caused to both the applicant's employer and the finance company. The setting of a parole eligibility date one third through the sentence was an adequate recognition of the mitigating factors of prior good character and co-operation.

I do not think the applicant's proposed appeal has real prospects of success, and would accordingly refuse the application for an extension of time.

**CHESTERMAN JA:** I agree.

**WHITE JA:** I agree also.

**HOLMES JA:** The application for an extension of time is refused.