

SUPREME COURT OF QUEENSLAND

CITATION: *R v Desborough* [2010] QCA 297

PARTIES: **R**
v
DESBOROUGH, Sharon Lee
(applicant/appellant)

FILE NO/S: CA No 187 of 2010
DC No 20 of 2010

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Gladstone

DELIVERED ON: 25 October 2010

DELIVERED AT: Brisbane

HEARING DATE: 21 October 2010

JUDGES: McMurdo P, Muir JA and White JA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted.**
2. Appeal against sentence allowed to the limited extent of setting aside that part of the sentence directing that the appellant be released after having served six months imprisonment, and instead directing that she be released after having served three months imprisonment.
3. The sentence imposed at first instance is otherwise confirmed.
4. The application to adduce further evidence is refused.
5. Direct that Mr Cremin explain to the appellant the purpose and consequences of her being released on recognizance, as required by s 16F(2) *Crimes Act 1914* (Cth).

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – appellant pleaded guilty to obtaining financial advantage by deception from the Commonwealth – appellant sentenced to two years imprisonment to be released on recognizance after serving six months and ordered to repay the Commonwealth approximately \$41,000 – prosecution at sentence submitted

two years imprisonment to be released after three or four months was appropriate penalty – offending was of a serious nature, appellant did not disclose conduct and showed no remorse – offending did not involve the use of false identities – appellant is sole carer of her child – appellant has since obtained employment and commenced repaying Commonwealth – whether sentencing judge recognised offending was not of an aggravated type – whether sentencing judge considered importance of relevant mitigating features – whether sentence manifestly excessive

Crimes Act 1914 (Cth), s 16A(2)

Criminal Code Act 1995 (Cth), s 134.2(1)

R v Edwards; ex parte Commonwealth Director of Public Prosecutions [2001] QCA 93, distinguished

R v Newton [2010] QCA 101, followed

R v Smith [1999] QCA 518, distinguished

R v Smith [2004] QCA 417, distinguished

COUNSEL: J Cremin for the applicant/appellant
D J Mayall for the respondent

SOLICITORS: No appearance for the applicant/appellant
Commonwealth Director of Public Prosecutions for the respondent

- [1] **McMURDO P:** The applicant, Sharon Lee Desborough, pleaded guilty under s 134.2(1) *Criminal Code Act 1995 (Cth)* to obtaining a financial advantage by deception from the Commonwealth between 24 May 2001 and 6 September 2006. On 26 July 2010, she was sentenced in the Gladstone District Court to two years imprisonment with release after six months upon giving security by recognizance in the sum of \$3,000, conditioned that she be of good behaviour for three years. She was also ordered to repay the Commonwealth \$41,096.22. She applies for leave to appeal against her sentence. The grounds in her application include that the sentence was excessive; that the prosecution recommended her release after three months; and that she made regular repayments to the Commonwealth.
- [2] She was represented in her application to this Court by Mr Cremin of counsel who appeared pro bono. Mr Cremin also applied for leave to adduce further evidence which was not placed before the sentencing judge.

The sentencing proceedings

- [3] Ms Desborough was 45 years old at sentence and had a minor criminal history. In 1985 in the Parramatta Local Court, she was discharged without conviction upon entering into a \$100 good behaviour recognizance for six months for assault occasioning bodily harm. In the Sarina Magistrates Court on 20 September 2005, she was fined \$100 without conviction for contravening a police direction or requirement; and fined \$450 without conviction and ordered to pay restitution of \$480 for three charges of fraud between December 2004 and June 2005. These offences therefore occurred during the period when Ms Desborough committed the offence the subject of this application. She has not offended since.

- [4] The prosecutor made the following submissions at sentence. The maximum penalty for the offence is 10 years imprisonment. The offending occurred during 139 various fortnights between May 2001 and September 2006 whilst Ms Desborough was receiving Commonwealth benefits. From September 1991, she had been in receipt of a sole pension, which was later known as a "Parenting Payment Single", a payment for those in need living without a partner and raising a child or children. At some point before her offending began, she commenced living with Scott Allman in a marriage-like relationship which continued throughout and beyond the period charged in the indictment, at least intermittently. Ms Desborough failed to contact Centrelink at any time during the period between May 2001 and September 2006 to declare her relationship with Mr Allman, who was employed at periods during this time and at other times was receiving his own Centrelink payments. She also failed to correctly declare her own sporadic employment during this period. She under-declared her income in 26 fortnightly pension payment periods and failed to declare any income at all in 42 fortnightly pension payment periods. On occasions, she misrepresented to Centrelink that she had ceased employment with an employer when, in fact, she had not. Her misrepresentations were not entirely to her advantage: there were other periods where she over-declared her income.
- [5] Ms Desborough gave birth to Mr Allman's child on 30 March 2001. She told Centrelink that the father of her child was unknown when, in fact, she knew the father was Mr Allman. During the period of her offending, she received about \$57,000 from Centrelink when she was entitled only to \$7,600 so that her overpayments totalled \$49,334.55.
- [6] In October 2005, Centrelink received information (a "tip off") about Ms Desborough and investigated her relationship with Mr Allman. The investigation took some time. In September 2006, Ms Desborough rang Centrelink and told them that Mr Allman had recently become her partner. In February 2007, Ms Desborough participated in a record of interview in which she admitted a current relationship with Mr Allman but tried to minimise their relationship during the period of the offending by describing him as "a poor father" and that she had not been "really living with him".
- [7] Mr Allman was subsequently dealt with for receiving a \$12,000 overpayment of Commonwealth moneys and was placed on a community service order.
- [8] As to the appropriate penalty for Ms Desborough, the prosecutor submitted that:
"the Commonwealth believes the appropriate penalty is something like about a two year sentence with her to be released after three or four months. If she'd gone ahead with the disputed facts we probably would have been telling you five or six months."
- [9] He emphasised the seriousness of her offending; that it was an easy offence to commit but difficult to detect; the importance of general and personal deterrence; that it was committed over a lengthy period of time; that it involved a significant amount of money; and the absence of remorse in her police interview. He submitted it was "not a case of greed" as documents obtained by the prosecution showed that she was struggling to make repayments on a mortgage over a modest property in New South Wales. The property was in joint names with her parents who were apparently unable to contribute to the mortgage repayments.

- [10] The prosecutor put forward schedules of single judge District Court sentences to support his contention as to the appropriate sentence, repeating: "I can go on with a few others but realistically two years to serve three or four months is the submission that the Commonwealth would make".
- [11] The judge observed that: "If someone went into a bank and stole \$45,000 you wouldn't get out after three months. ... What's the difference?" His Honour noted that the prosecutor had handed up only single judge decisions and enquired whether there were relevant decisions from the Court of Appeal but the prosecutor was unable to oblige. The judge stated: "I don't understand the leniency. None of these decisions is binding..."
- [12] Defence counsel at sentence (not Mr Cremin) seems to have taken the view that the judge would accept the prosecutor's submission as to the appropriate sentence as his submissions were surprisingly brief. He stated:
- "I don't dispute anything the learned Crown has said and as for penalty, your Honour is minded to the view that three to four months is the right penalty, I don't intend to tax you much further. But I'll say this only about the penalty, my client works full time now. Her son is, I think, nine now.
- She lives in shared accommodation here in town. She has secured full time work from the Gladstone City Council and she is employed in a section to which she has or the leader of that section to whom she has given full information about this and she's been told that if she gets a sentence of three months her employment on a full time basis will be waiting for her when she gets out."
- [13] He did make the following points. The principle of rehabilitation was relevant. For somebody in Ms Desborough's position, even a relatively short period of imprisonment was a heavy penalty and a strong deterrent. Her previous criminal history was minor. She was in fulltime employment with the care of a nine year old child and, at 45 years of age, had otherwise led a "reasonably blameless life". A period of three months in actual custody would be more than enough to adequately punish her for her wrongdoing and would provide a sufficient personal and general deterrent.
- [14] The judge noted that, from the schedule of District Court sentences with which he was provided, it seemed that some offences were done with "criminal intent" where "the conduct was deliberate" where others seemed to relate to overpayments.
- [15] The prosecutor then submitted that Ms Desborough's case was "closer to the greed area" although she was not "living a luxurious lifestyle by any means". He added that the amount still owing to the Commonwealth was \$41,096.72.
- [16] In sentencing Ms Desborough, the primary judge recited the circumstances of the offending and concluded that her conduct was "deliberate, longstanding and calculated, fraudulent conduct". He emphasised its serious nature and the importance of deterrence. She did not voluntarily disclose her conduct and she showed no remorse for it. The judge referred to her antecedents, her employment with the Council and that her nine year old son would be cared for by others if she was imprisoned. There was no alternative but to impose a period of actual imprisonment. Her offending was based upon greed rather than need. Her

offending was different from "welfare overpayment cases ... of inadvertence or cases of momentary, perhaps even prolonged lapses of judgment." For that reason, the judge did not propose to order her early release from imprisonment at the time submitted by the prosecutor.

Conclusion

- [17] The judge sought, but was not provided with, relevant Court of Appeal decisions to assist him in the difficult task of sentencing Ms Desborough. It is regrettable counsel did not assist the judge in this respect. In fact, this Court had, but a few months earlier, given its decision in *R v Newton*¹ which would have provided the assistance his Honour sought. The Commonwealth Director of Public Prosecutions appeared for the respondent in *Newton* so it is especially surprising that the prosecutor was unaware of it.
- [18] Newton pleaded guilty to two counts of obtaining a financial advantage by deception contrary to s 134.2(1) *Criminal Code Act 1995* (Cth). The case had many similarities to the present one. Newton was sentenced to two years imprisonment, to be released on recognizance after serving five months and was ordered to make reparation to the Commonwealth of \$47,293.30. She failed to declare to Centrelink income she received from employment between June 2003 and January 2007 (count 1) and May 2007 and January 2008 (count 2). The total overpayment was about \$50,000. She was paid Newstart Allowance from December 2003 until October 2006, and from then until January 2007 a Carer Allowance to care for her adult daughter who suffered from cystic fibrosis. During those periods she failed to declare income from employment and was in fact entitled to receive only \$5,011.37. At sentence she had repaid \$3,086.32. Atkinson J, with whom Holmes JA agreed, noted that this type of offending was serious and often difficult to detect, although data-matching between records held by the Australian Tax Office and Centrelink now made detection easier where fraudulent identities are not used. Whilst deterrence was important, it must be balanced against mitigating circumstances. Newton had no criminal history, was 53 years old at sentence and pleaded guilty to an *ex officio* indictment. The money she wrongly obtained was not used for a lavish lifestyle but for day to day living expenses. She worked as a support worker in a residential facility for people with wide ranging disabilities and had a glowing work reference. Atkinson J reviewed this Court's earlier decisions in *R v Smith*;² *R v Smith*³ and *R v Edwards*; *ex parte Commonwealth DPP*⁴ and distinguished them from Newton's offending, which was relatively unsophisticated and did not involve exacerbating features such as the receipt of more than one benefit at a time or the assumption of false identities. The Court concluded that Newton's sentence releasing her only after five months imprisonment appeared manifestly excessive, and as she had then served more than three months, she was ordered to be released immediately.
- [19] It is regrettable that counsel at Ms Desborough's sentence did not refer the primary judge to *Newton*. Although some of the factors relevant to Newton's sentence were more serious and others less serious than the present case, *Newton* provided persuasive support for the prosecutor's submission, adopted by defence counsel, that

¹ [2010] QCA 101.

² [1999] QCA 518.

³ [2004] QCA 417.

⁴ [2001] QCA 93.

a sentence of two years imprisonment with release on recognizance after three months, was an appropriate penalty. The judge seems to have wrongly considered the present case to be more akin to cases like *Smith, Smith* and *Edwards* when, in truth, it was much closer to cases like *Newton*. Further, the judge in his sentencing remarks did not refer to or apparently appreciate the significance of a number of mitigating features which supported Ms Desborough's release on recognizance after three months, as in *Newton*. Ms Desborough, in the years since committing these offences, had obtained employment, was making reparation to the Commonwealth and appeared to have rehabilitated. Her employment was open to her if she was released from custody after three months. Inferentially, she would then be in a strong position to continue to meet the reparation order against her in favour of the Commonwealth. She was also the primary care giver for a nine year old child.

- [20] In my opinion, the sentencing remarks demonstrate that the failure to refer the primary judge to *Newton* resulted in his Honour not appreciating that this offending was not of the aggravated type as in *Smith, Smith* or *Edwards*. And nor did his Honour appreciate the importance of the relevant mitigating features set out in the preceding paragraph. The result is that the sentencing discretion has miscarried. This Court should now re-sentence Ms Desborough.
- [21] This Court's observations in *Newton*, distinguishing it from cases like *Smith, Smith* and *Edwards* which involve systematic defrauding of the Commonwealth through false identities and false documents, are apposite in the present case. That is not to say that personal and general deterrence is not an important factor in sentencing Ms Desborough: a term of actual imprisonment was plainly warranted. Her offending was serious but it was a less serious example of such an offence. And as the sentencing principles referred to in s 16A(2) *Crimes Act* 1914 (Cth) recognise, the need for deterrence and the concerning aspects of Ms Desborough's offending must be weighed against the mitigating features: her plea of guilty; that she was the primary care giver for her nine year old child; her efforts at rehabilitation, including the payments of reparation and obtaining fulltime work which remained open to her if she was released from prison within three months, and that this would allow her to meet her reparation commitments to the Commonwealth. After balancing the exacerbating and mitigating features, as in *Newton* the difficult task of sentencing Ms Desborough is best met by ordering her release after three months imprisonment.
- [22] I would grant the application for leave to appeal and allow the appeal to the limited extent of deleting that part of the sentence directing that she be released after serving six months imprisonment, and instead substituting a direction that she be released after having served three months imprisonment.
- [23] It follows that it is unnecessary to deal with the application to adduce further evidence; that application should be refused.

ORDERS:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed to the limited extent of setting aside that part of the sentence directing that the appellant be released after having served six months imprisonment, and instead directing that she be released after having served three months imprisonment.

3. The sentence imposed at first instance is otherwise confirmed.
 4. The application to adduce further evidence is refused.
 5. I direct that Mr Cremin explain to the appellant the purpose and consequences of her being released on recognizance, as required by s 16F(2) *Crimes Act* 1914 (Cth).
- [24] **MUIR JA:** I agree with the reasons of McMurdo P and with the orders she proposes.
- [25] **WHITE JA:** I have read the reasons for judgment of the President and agree with the orders that she proposes for the reasons which she has expressed.