SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shiels* [2011] QCA 115
PARTIES:	**R** **v** **SHIELS, Karen Louise** (applicant/appellant)
FILE NO/S:	CA No 295 of 2010 CA No 61 of 2011 DC No 985 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2011
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction is dismissed.** **2. Application for an extension of time within which to apply for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted following a trial of 20 counts of fraud against her employer but was acquitted of one further count of the same offence – where the prosecution took the view that there was nothing to distinguish the circumstances of one count from any of the others and the jury should therefore convict of all or none of the offences – where it was not clear on the evidence what date the appellant ceased work for the employer – where the trial judge directed the jury to consider each count separately and drew attention to the uncertainty of the date of cessation of the appellant's employment in relation to the last count – whether the verdicts of guilty were inconsistent with the acquittal on the final count CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR

APPEAL AND EXTENSION THEREOF – where the applicant received a head sentence of six years' imprisonment for the fraud offences involving over $30,000 and lesser, concurrent terms for the remaining offences – where the applicant alleged she "only recently" received advice to seek leave to appeal against sentence – where the applicant's prospects of success in the application are poor – whether the extension of time should be granted

Jones v The Queen (1997) 191 CLR 439; [1997] HCA 12, considered
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, considered
R v Cox [2010] QCA 262, considered
R v CX [2006] QCA 409, cited
R v Fuller [2009] QCA 195, considered
R v Goodger [2009] QCA 377, considered
R v Lebler [2003] NSWCCA 362, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
R v SBL [2009] QCA 130, considered
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited
R v Taylor [1994] QCA 574, considered
R v Tindale [2008] QCA 24, considered

COUNSEL: P E Smith for the applicant/appellant
V A Loury for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the appeal against conviction should be dismissed and that the application for an extension of time within which to apply for leave to appeal against sentence should be refused for the reasons given by Chesterman JA.

[2] **FRASER JA:** I agree with the reasons for judgment of Chesterman JA and the orders proposed by his Honour.

[3] **CHESTERMAN JA:** The appellant stood trial on an indictment which charged her with 21 counts of fraud in that she dishonestly applied the property of her employer to her own use. Four of the counts alleged that the value of the property exceeded $30,000. After a four day trial the appellant was, on 18 November 2010, convicted of counts 1 to 20. She was acquitted of count 21. She was sentenced the next day, 19 November, to concurrent terms of six years' imprisonment on the four counts of dishonestly applying property worth more than $30,000. On all other counts she was sentenced to four years' imprisonment, all to be served concurrently.

[4] The counts were presented chronologically. The first count alleged that on 30 January 2007 she defrauded her employer. The last count, 21, alleged that on 25 October 2007 she dishonestly applied her employer's property to her own use.

[5] The appellant was employed by the complainant company Weber South Pacific Pty Ltd ("Weber") as a bookkeeper in September 2006. She ceased her employment in

October or November the following year. The imprecision of the ascertainment of the date she ceased work is relevant to her acquittal on count 21, and to the ground of her appeal. Mr Fairman at all relevant times was a director of Weber and one of its two shareholders.

[6] The appellant's duties included preparing Weber's creditor's invoices for payment, and paying them on a monthly basis, by the electronic transfer of funds from Weber's bank account to the accounts of the creditors. On each of the occasions the subject of the counts in the indictment on which the appellant was convicted she made the transfer from Weber's bank account to her own account, or to an account operated by her daughter, or to one operated by her own business or, in one case, to a car dealer to pay for a car she had bought. The appellant formally admitted each of the transfers from Weber's bank account to one or other of the accounts just described.

[7] The appellant created records in Weber's accounts to suggest that the payments which she transferred into her account or her daughter's or her business' were in fact made in payment of Weber's creditors.

[8] The total amount transferred, the subject of counts 1-20, was $308,903.75.

[9] Mr Fairman gave evidence that he was ignorant of the appellant's activities in making the transfers which Weber did not authorise or approve.

[10] The prosecution case was that each of the transfers was made dishonestly and there was nothing to distinguish the circumstances of one count from any of the others. The prosecutor presented his case on the basis that it was "all or nothing". He said:

> "[Y]ou … have before you 21 separate offences to consider. There are those 21 charges … but in a practical sense, as the trial unfolds, really it's a case where you will either be satisfied that (the appellant) was dishonest throughout this whole period such that she is guilty of all of the offences, or if you're not satisfied of that then you would not find her guilty of any of the offences."

[11] The appellant enthusiastically endorses that assertion and submits that her acquittal on count 21 shows that the convictions on the other counts are inconsistent and illogical and therefore unreasonable.

[12] The appellant did not give evidence but was interviewed by police and gave an account of the payments which would have made them honest. She said she had been the subject of Mr Fairman's unwelcome and persistent sexual advances. He had, she said importuned and touched her. In that context he had told her to make the payments to her own accounts as some sort of recompense or as inducement not to complain.

[13] Mr Fairman adamantly rejected the allegations as bewildering and scurrilous.

[14] The appellant argues that the jury must have entertained a reasonable doubt about whether the transfers, or at least that the subject of count 21, were dishonest because of the acquittal. It is said to be illogical not to entertain the same doubt with respect to the other counts.

[15] At trial the appellant argued that there was some support for her assertions. She did not allege sexual importunity against Mr Fairman until her interview with police on 18 May 2008. In his statement given to police dated 16 May 2008 Mr Fairman

denied that he had "ever inappropriately touched (the appellant)". This was said to show prior guilty knowledge of what the appellant alleged when interviewed.

[16] There was other evidence that the date appearing on the statement 16 May, was the day on which plain clothes senior constable Notaro commenced taking the statement which, however, was not completed until 22 May 2008.

[17] In *MacKenzie v The Queen* (1996) 190 CLR 348 Gaudron, Gummow and Kirby JJ said about the significance of divergent verdicts (366-7):

> "3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:
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> > "He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand."
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> 4. Nevertheless, the respect for the function which the law assigns to juries ... have led courts to express repeatedly ... reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court ... to substitute its opinion of the facts for one which was open to the jury. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count ... . …
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> 5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent … an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. …" (footnotes omitted).

[18] In *Jones v The Queen* (1997) 191 CLR 439 in which a jury convicted the appellant on two counts of a sexual assault upon a girl, but acquitted him of a third, the

convictions were set aside because of inconsistency giving rise to unreasonableness. Gaudron, McHugh and Gummow JJ said (453):

> "It is difficult then to see how it was open to the jury to be convinced beyond a reasonable doubt of the guilt of the appellant with respect to the first and third counts. There is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count."

Their Honours also pointed out (455) that the doubt which the jury entertained about the complainant's evidence with respect to count 2, which was raised by "other reliable evidence", should have been felt with respect to the other counts.

[19] In *R v SBL* [2009] QCA 130 Applegarth J (in a judgment with which Margaret Wilson J and I agreed) reviewed the authorities, *MacKenzie*, *Jones*, *R v CX* [2006] QCA 409, *R v Smillie* (2002) 134 A Crim R 100 and *R v Markuleski* (2001) 52 NSWLR 82 and concluded:

> "[34] … The issue remains one of fact and degree in the circumstances of the particular case as to whether the difference in verdicts is such that, as a matter of logic and reasonableness, the verdict should be regarded as inconsistent. There may be an acceptable explanation for divergent verdicts in a case in which there is not 'an integral connection between the counts' or where there are circumstances present which do not compel the conclusion that the complainant's overall credibility was so diminished that the jury should have acquitted on the other counts. The essential issue is whether the acquittal so affects the credibility or reliability of the complainant that, in combination with other factors, a conviction was not open to the jury on other counts." (footnotes omitted)

[20] There is an explanation for the different verdict in count 21. It is that there was some confusion as to whether or not the appellant was still employed by Weber at the time of the last payment, the subject of count 21, was made. The count alleged the transfer of property from Weber's account to the appellant's on 25 October 2007. Mr Fairman gave evidence, in answer to a leading question from the prosecutor, that the appellant left Weber's employment on 16 October 2007. An attempt to have the witness address what the prosecutor described as his misstatement led to an acerbic objection by counsel for the defence. In cross-examination it was put to Mr Fairman that he had said that the appellant left Weber's employment on 16 October 2007. Mr Fairman equivocated, saying:

> "I don't believe I gave a date."

To which the cross-examiner retorted:

> "Oh, yes, you did."

[21] After a short adjournment defence counsel noted the prosecutor's earlier attempt to clarify the date and sought to obtain Mr Fairman's agreement that the "16th was the important date". Mr Fairman said that was the date she gave notice but said also that she remained in Weber's employment for some time thereafter. It was then put

to him that she was paid wages to 22 October when she left. Mr Fairman was adamant that the appellant made the payment, the subject of count 21, on 25 October.

[22] The evidence that the appellant might not have been an employee of Weber's on 25 October 2007 is a fact which distinguishes the circumstances relevant to count 21 from those relevant to the others. Despite the transfer of monies from Weber's account to the appellant's on 25 October and the evidence of a pattern of offending and the prosecutor's description of the offences as indistinguishable in dishonesty the jury may have set an exacting standard of proof and not have been satisfied that the appellant made the last payment.

[23] The trial judge expressly drew attention to the possibility and directed the jury to consider each of the counts separately and, in particular, to have regard to the evidence of the date of cessation of employment when considering count 21. His Honour said:

> "21 separate charges have been preferred against (the appellant). You must consider each charge separately, evaluating the evidence relating to each particular charge to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved its essential elements.
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> You will return separate verdicts for each charge. If you find you have a reasonable doubt about an essential element of a charge, you must find (the appellant) not guilty of that charge. The evidence in relation to the separate charges is different and so your verdicts need not be the same.
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> Nothing said by either (the prosecutor) or (defence counsel) as to it being a case of all in or all out or all or nothing … changes your obligation to consider each charge separately."

[24] A little later his Honour said:

> "As to the last transaction which you'll know from your list is dated the 25th of October, as (defence counsel) said in his address, well, she couldn't have done it because she wasn't there.
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> Well, (the prosecutor) said that the evidence … shows that she gave her … written resignation on the 16th of October. She was paid up to the 22nd. There is no evidence from anyone to say the specific date she left.
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> (The prosecutor) said … she was still there in November because there are two passages in her record of interview where she spoke about still working in mid-November. (Defence counsel) said … that's clearly in error because she told him about the cancer in October. It's a matter for you, ladies and gentlemen."

[25] The mention of cancer is a reference to evidence that the appellant told Mr Fairman on 16 October 2007 that she had cancer and for that reason was resigning her employment. The appellant admitted that she did not have the disease but gave it as an excuse for resigning.

[26] Given the evidence and the direction to the jury dealing with count 21 it cannot be said that the acquittal on that charge throws any doubt on the reasonableness of the

convictions on the other counts. There was an acceptable logical basis for which the jury could conclude that the prosecution had not proved count 21 beyond reasonable doubt. The ground for that doubt did not exist with respect to the other counts.

[27] There was a subsidiary argument that the trial judge should have directed the jury in terms of the charge given in *R v Lebler* [2003] NSWCCA 362. The terms of the charge in turn come from Spigelman CJ's judgment in *R v Markuleski* (2001) 52 NSWLR 82. The essence of the direction is that if the jury entertained a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more of the counts on the indictment the doubt must be taken into account in assessing the overall truthfulness or reliability of the complainant's evidence.

[28] The essence of that direction was given by the trial judge. His Honour said, after the passage quoted earlier which emphasised the need to examine each charge separately:

> "Of course, if in your deliberations you have a reasonable doubt about the truthfulness or reliability of Mr Fairman's evidence in relation to the last count or any other count or counts, that must be taken into account in assessing the truthfulness or reliability of his evidence generally."

[29] A little later he said:

> "Now as a result of the admissions made of matters not in contention, no issue arises as to the (appellants) obtaining the property, money. The only question for your consideration then is whether that property was obtained dishonestly."

[30] The direction was adequate. No complaint was made about it at the time and no request for redirections was made.

[31] The appeal should be dismissed.

[32] There is separately an application for an extension of time within which to apply for leave to appeal against the sentences imposed which was filed on 8 April 2011, three and a half months out of time. It is to be noted that her appeal against conviction was filed promptly, on 1 December 2010. All that is said by the application in explanation for the late filing of the application is that:

> "… it was only recently I received counsel's advice to seek leave to appeal against the sentence."

[33] This is quite unsatisfactory. It leaves a great deal unsaid. The applicant does not explain why, if it be the case, the question of appealing against sentence was not discussed when she gave instructions to appeal against conviction. Nor does the applicant explain what led to the subsequent advice that an appeal against sentence had prospects of success, or why the advice was not sought earlier.

[34] To obtain an extension of time the applicant must demonstrate some good reason for the delay and that there are discernable prospects that the sentence would be reduced if the leave to appeal against sentence were granted. A strong case on prospects can overcome a lack of explanation for delay, but if the prospects are poor delay assumes more significance.

[35] In passing sentence the trial judge noted the convictions, after trial, on 20 counts of fraud "[a]ll of which have the aggravating feature … that (the applicant was) an employee at the time … ." His Honour went on:

> "…you, in a premeditated manner systematically defrauded your employer of in excess of $300,000 over a period of 10 months.
>
> The aggravating features … are these: you were in a position of trust in a successful company where you were relied upon to process invoices and to arrange for the payment of … those invoices, rather than act in accordance with your duty and that trust, you abused that trust and altered the records of the company in an endeavour to hide your conduct. The vast majority of the money has gone to yourself or into your daughter's account, used for living expenses including the paying off of a mortgage on a property and the purchase of a $45,000 vehicle. … the conduct … was the product of … sub-defuse [sic] and premeditation. There is absolutely no hint of remorse on your part, and … you denied your involvement right to the end. But worse than that … you sought to involve an innocent man … the managing director of your employer … . To avoid detection and to shift the focus and blame … you concocted a demonstrably false story … which sought to implicate Mr Fairman in the following conduct: serious sexual abuse of you … the deliberate defrauding of Weber by him … to facilitate payment to you of money … sought to be explained by you … as hush money … ."

[36] His Honour then noted the facts urged in mitigation: that the applicant had the care of two young daughters, good references, a good work record and suffered from asthma, anxiety and depression. In passing sentence his Honour noted the importance of special and general deterrence.

[37] By reference to a number of comparable sentences counsel for the applicant submitted that "at worst five years ought to have been imposed".

[38] Examination of the cases referred to does not support the submission. They show, in my opinion, that a sentence of six years' imprisonment in the circumstances of the applicant's offending was within range.

[39] A number of similar cases were reviewed in *R v Cox* [2010] QCA 262. I said, with the agreement of the President and Mullins J:

> "[51] In *R v Tindale* [2008] QCA 24, a 42 year old woman without prior criminal history was sentenced to seven years' imprisonment for dishonestly obtaining money. The sum involved was $426,804.87 obtained by a series of frauds perpetrated over four and a half years. Tindale was employed as an accountant in a small family business in which she was regarded as a friend. She pleaded guilty but made no restitution.
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> [52] Her application for leave to appeal against sentence was dismissed. Fraser JA noted that:
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> > "There is no precise sliding scale of head sentences according to the sum involved in the offence …

> [though] the amount taken is … a very relevant circumstance."

[53] In *R v Lim* [2004] QCA 172 I said, with the agreement of Williams and Jerrard JJA:

> "The judgment in that case analysed a number of similar cases, which it is not necessary to mention in more detail. They were summarised as showing that general deterrence is important in these kinds of cases and that sentences of six or seven years' imprisonment are common when large sums of money are involved."

Lim was sentenced after a lengthy trial to six years' imprisonment on several counts of fraud. The dishonest conduct spanned almost two years during which Lim pretended to be a successful developer who induced a number of people to give him money to invest in projects which Lim did not intend to undertake. He obtained money and services to a value of $500,000.

[54] The case I referred to in *Lim* was *R v Wheeler & Sorrensen* [2002] QCA 223. The analysis undertaken in that case was:

> "[25] In *R v Reischl* [2000] QCA 215 an effective sentence of 7 years imprisonment with a recommendation for release on parole after 2 ½ years was imposed for offences of stealing as an agent. Some of these were committed while the applicant was on bail for others, for which 5 years imprisonment was imposed. He had a minor criminal history. He used the moneys received from selling boats (about $600,000) to pay business debts over an 18 month period. He hoped to eventually repay the creditors. There was no evidence of extravagant lifestyle. There was initial cooperation although he absconded for a period before sentence. Leave to appeal was refused.
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> [26] In *R v Baunach*, CA88/99, a Commonwealth DPP appeal, a tax agent had by fraud misappropriated clients' taxation payments or refunds. He received 6 years imprisonment for misappropriation of $800,000 of which $92,000 was restored to the victims. There was a plea of guilty and limited cooperation in other respects. There was some evidence of using money to fund an acceptable lifestyle. The court said that 6 years imprisonment was at the lower end of the appropriate range but since it was a DPP

appeal a conservative approach should be adopted. In the end the appeal was allowed only to the extent of increasing the non-parole period from 1 year to 2 years.

[27] In *Taylor* CA 406 of 1994, 7 years imprisonment without a recommendation for parole was imposed for dishonest application of moneys he had received for investment in insurance company financial products. The amount involved was $650,000. The moneys were spent to keep his business running and were not used for high living. There was a plea of guilty and it was conceded by the prosecution that there was no evidence that his cooperation had been reflected in the sentence. The appeal was allowed only to the extent that a non-parole period of 2 ½ years was added.

[28] In *Anderson* 2000 QCA 257, upon which the applicants particularly relied, the applicant disposed of assets which had the effect of reducing the value of securities available to creditors. The reduction in value was $1.5m but the judgment states that the actual loss was not stated in the record. The Court, however, accepted that it should approach the matter on the basis that $1.5m was involved, irrespective of that. It involved an attempt by a man of otherwise good character to keep a failing business alive. He hoped to be able to repay his creditors, not to enrich himself. The sentence of 6 years with a recommendation for release on parole after 2 years was held to be not manifestly excessive. It was said that lesser sentences than those imposed could perhaps have been defended but it was impossible to conclude that the sentencing judge went beyond the bounds of a proper discretion. The tentative nature of the qualification does not suggest that the sentence imposed was necessarily at the top of the range”.”

[40] The factors most relevant to the exercise of the sentencing discretion in these cases are the amount of money taken; the length of time over which the offending occurred; the number of offences in the period; and remorse or lack thereof as indicated by whether the sentence was imposed on a plea or after trial and as indicating the likelihood of re-offending. Obviously the need for deterrence is greater where there is a lack of remorse and refusal to accept the wrongfulness of the conduct being punished.

[41] It is not enough for an applicant to point to similar cases in which a lesser penalty was imposed. If there are cases in which the same or a more severe penalty was imposed the court can conclude that the penalty was within the appropriate range.

[42] Cox was sentenced effectively to seven years' imprisonment after a trial. There were 11 offences over an 18 month period involving over $300,000. He had no prior convictions but was a mature man who showed no remorse and fled the jurisdiction for a number of years to avoid prosecution. In *Tindale* [2008] QCA 24 a 42 year old woman without prior criminal history who dishonestly obtained over $400,000 in a period of four and a half years was sentenced to seven years' imprisonment after pleading guilty. In *Taylor*, referred to in *Cox*, seven years' imprisonment was imposed for the dishonest application of $650,000 after a plea of guilty. 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, a woman in her mid 30's without previous convictions. She was sentenced to five years' imprisonment after trial. Her case was less serious than the applicant's. The amount taken was considerably less and there was no breach of trust as a employee. *R v Goodger* [2009] QCA 377 was a case in which the applicant, a woman in her 50's, defrauded her employer of almost $95,000 over two years. She was sentenced to four and a half years' imprisonment on a plea of guilty. She had previous convictions for dishonesty. She had been diagnosed as suffering from chronic depression.

[43] *Cox*, in particular, makes the applicant's submissions impossible to accept. The amount involved was very similar, the period of offending was slightly longer but the number of offences was smaller. Cox was sentenced to seven years' effectively. *Tindale* likewise stands in the applicant's path. Although the money involved was more and the period of offending was substantially longer Tindale was sentenced to seven years' imprisonment after a plea of guilty. Those cases show the sentence imposed on the applicant to have been appropriate. The applicant's offending had the aggravating features identified by the trial judge.

[44] An application for leave to appeal against sentence would have insufficient prospects of succeeding to overcome the unexplained delay in filing the application.

[45] The application for an extension of time within which to apply for leave to appeal against sentence should be refused.