SUPREME COURT OF QUEENSLAND

CITATION:	*Skorka v Hartley; Skorka v Kurtz* [2011] QCA 116
PARTIES:	**SKORKA, Witold Zenon** (applicant) **v** **HARTLEY, Adam** (respondent) **SKORKA, Dominik Pawel** (applicant) **v** **KURTZ, Renee Susan** (respondent)
FILE NO/S:	CA No 222 of 2010 CA No 223 of 2010 DC No 3610 of 2009 DC No 3611 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2011
JUDGES:	Margaret McMurdo P, Muir JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**In each application, leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicants pleaded guilty to stealing from the Brisbane City Council – where Dominik Skorka pleaded guilty to possessing tainted property – where the applicants were sentenced in the magistrates court to perform 240 hours of community service without convictions recorded – where the applicants were ordered to pay restitution – where the respondents appealed to the District Court – where the District Court judge allowed both appeals, set aside the magistrate's sentence in each case and instead ordered the applicants be sentenced to nine months imprisonment, wholly suspended for an operational period of three years with convictions recorded – where the

restitution orders were not disturbed – where the applicants argued the District Court judge erred in finding each applicant more culpable than his co-offenders, applying an incorrect onus of proof of facts material to the imposition of punishment, placed undue emphasis on the applicants' prior convictions, erred in the weight placed on references and erred in using social security fraud cases as comparable to the applicants' offending – whether the sentence imposed by the District Court judge was manifestly excessive

District Court of Queensland Act 1967 (Qld), s 118(3)
Justices Act 1886 (Qld), s 222, s 223(1)
Penalties and Sentences Act 1992 (Qld), s 9, s 9(2), s 9(2)(a)

Hartley & Anor v Skorka & Anor [2010] QDC 319, considered
R v Briese, ex parte Attorney-General [1998] 1 Qd R 487; [1997] QCA 10, cited
R v Holdsworth [1993] QCA 242, cited

COUNSEL: A Boe, with A I O'Brien, for the applicants
D R Kinsella for the respondents

SOLICITORS: Boe Williams for the applicants
Director of Public Prosecutions (Queensland) for the respondents

[1] **MARGARET McMURDO P:** On 27 November 2009, the applicants who are brothers, Dominik Skorka and Witold Skorka, both pleaded guilty to stealing from the Brisbane City Council. Dominik also pleaded guilty to possessing tainted property. Both applicants were sentenced by way of an order to perform 240 hours community service without convictions recorded. Dominik was ordered to pay restitution of $15,500, and Witold was ordered to pay restitution of $9,000. The respondent in each case appealed to the District Court under s 222 *Justices Act* 1886 (Qld), contending that each sentence was inadequate. On 26 August 2010, a District Court judge allowed both appeals, set aside the magistrate's sentences in each case, and instead ordered that each applicant be sentenced to nine months imprisonment, wholly suspended for an operational period of three years. Convictions were recorded. The orders for restitution were not disturbed. Each applicant has applied for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) contending that leave to appeal should be granted to correct a substantial injustice.

[2] They each contend in their proposed grounds of appeal that the District Court judge:

- erred in finding that the sentencing magistrate fell into error in imposing sentence;
- erred in finding that the applicants' co-offenders were "considerably less culpable" than each applicant;
- incorrectly applied the onus of proof of facts material to the imposition of punishment;
- placed undue emphasis on the applicants' prior convictions;

- erred in the weight his Honour attached to the references placed before the magistrate;
- erred in his Honour's use of social security fraud cases as being comparable to each applicant's offending;
- The sentence imposed by the District Court judge was manifestly excessive.

The Magistrates Court proceedings

[3] All parties agreed that the applicants' sentence should proceed summarily in the Magistrates Court. It followed that the maximum penalty which could be imposed was three years imprisonment. Dominik was 22 at sentence and 21 at the time of his offending. His criminal history included stealing in 2005 when he was 17 years old for which he was discharged absolutely without conviction. Of more relevance, on 20 March 2007 he was fined $600 without conviction for possessing tainted property on 31 January 2007, namely, possession of keys of a similar nature to those used in the present offending.

[4] Witold was 30 at sentence and 29 at the time of his offending. His sole criminal history was for possessing tainted property on 31 January 2007, namely, keys of a similar nature to those used in the present offending. On 20 March 2007, he was fined $600 without conviction.

[5] In addition to the present stealing charges, Dominik (but not Witold) was charged with the possession of tainted property on 31 March 2009, namely, $485, one fibreglass length, one Nokia mobile phone, one SIM card, and four calico bags.

The summary of facts

[6] A tendered summary of facts[1] set out the circumstances of the stealing offences. Dominik committed his offences over a 12 month period, and Witold over an eight month period. The applicants were involved with others in stealing money from Council-owned parking meters in the Brisbane central business district. The revenue from the meters was collected in "runs". During August 2008, the Council realised that parking meter revenue was consistently short on particular runs. For that reason, on 1 October 2008, the Council re-keyed the meters in the Wickham Terrace area (B run) so that new keys were required to open them. The revenue from B run immediately increased. On 13 November 2008, an entire parking meter head was stolen from Wickham Terrace. Subsequent collections of revenue from B run immediately dropped substantially.

[7] The Council employed external security contractors to conduct video surveillance of some meters. On 16 December 2008, people were filmed stealing from the meters at about 1.40 am. The Council referred the matter to the police on 21 January 2009. Fingerprints were taken from internal coin canisters of meters in the targeted runs. Video surveillance produced clear and relevant footage of both Dominik and Witold stealing from meters in the early hours of the morning during the period between December 2008 and March 2009. Witold and others were also seen in the vicinity of and approaching the targeted meters in the early hours of one morning. Dominik's fingerprints were found on the internal coin canister of a meter on 6 and 17 March 2009.

---

1 Ex 1.

[8] Police executed search warrants on 31 March 2009 including at the home of Witold and his girlfriend, Tea Strekozov. Tea and Witold were arrested. Witold declined to participate in a police record of interview. Tea participated in a police record of interview and gave a statement to police.

[9] At about 3 am on 31 March 2009, police also executed a search warrant at the home of Dominik and his girlfriend, Fiona Reid. They were arrested. Dominik participated in a police record of interview and made limited admissions. Fiona Reid participated in a police record of interview and gave a statement.

[10] At about 3 am on 31 March 2009, police also executed a search warrant on the home of Nelson Ball, a co-accused and associate of Witold and Dominik. Ball was arrested. He participated in a police record of interview. During the search of Ball's home, police found keys which allowed access to parking meters. They also found locks and manufacturing equipment which, inferentially, enabled keys to be cut from portions of meters by "reverse engineering". Ball told police that the keys and equipment belonged to Dominik and Witold.

[11] By their pleas of guilty, Dominik and Witold accepted that they owned the equipment and they had used it to manufacture keys to steal money from Council meters. Dominik admitted stealing meter money over a one year period. He declined to discuss the quantum of his theft or the names of those who helped him.

[12] Tea Strekozov told police she was a lookout for Witold when he stole money from Council meters over seven or eight months. She also assisted Witold and others by travelling with them to banks where the large quantities of coins were changed into notes. She used the money to pay for general living expenses and clothes, as well as purchasing a $6,000 car which was seized by police.

[13] Fiona Reid told police that she had assisted Dominik by keeping a lookout on a couple of occasions. She also received a small amount of money for her involvement.

[14] The prosecution contended that Witold and Dominik were the primary offenders. The money was distributed amongst those involved, largely on an equal basis. Because of their 2007 charge, Dominik and Witold were reluctant to physically possess the illicit keys and equipment and persuaded Ball to store them at his home.

[15] Only two of the co-offenders had been sentenced. On 28 May 2009, Fiona Reid pleaded guilty to three counts of stealing a total of $600 worth of meter money. She was placed on a nine month good behaviour bond subject to a recognisance of $300. No convictions were recorded. On 14 September 2009, Tea Strekozov pleaded guilty to 13 counts of stealing and one count of receiving tainted property with a circumstance of aggravation. She was placed on two years probation with a special condition that she receive treatment for anxiety management and self-assertiveness as well as medical, psychiatric or psychological treatment and ordered to perform 100 hours community service. No convictions were recorded. The car purchased with stolen meter money was forfeited. Her sentence proceeded on the basis that she participated in the theft of $6,800 from the Council over a seven month period from September 2008 to 31 March 2009 and that she personally received about one-third, or $2,200.

[16] It was impossible to precisely quantify the money stolen from the Council. CCTV footage recorded the applicants and others participating in thefts from meters between November 2008 and March 2009 resulting in a loss to the Council of about $35,000.

[17] Dominik accepted he was involved in thefts over a 12 month period but the prosecution could not say how much of the loss was attributable to him. Witold was involved in thefts over an eight month period but the prosecution could not say how much of its loss was attributable to him. The prosecution could not dispute the claim that the amount of money actually gained by Dominik was $18,000 and by Witold $12,000.

[18] Of the 1,800 targeted meters, 1,700 have now been replaced with more sophisticated meters, making it more difficult to repeat such offending in the future.

The prosecutor's submissions at sentence

[19] The prosecutor made the following additional submissions. Ultimately, surveillance was conducted in various areas over a four month period. Dominik, with others, was seen taking money from parking meters. On other occasions, Witold, again with others, was seen taking money from parking meters. They were not recorded as present together at the same time. The keys used to commit the thefts were cut by means of reverse engineering from parking meter parts. If Witold and Dominik had not manufactured the keys, they were very closely connected with those who did.

[20] There was an additional loss over and above the $18,000 and $12,000 to which Dominik and Witold had admitted their guilt, although it was not possible to quantify this loss beyond the figure of $35,000. Neither applicant had relevant substantial prior convictions. But their present offending was persistent and systematic. It was committed in the middle of the night to avoid detection. Although the applicants received only a small amount of the proceeds they stole, as a consequence of their criminality the Council suffered a significant loss. This was not mere opportunistic offending by youths. A significant deterrent sentence should be imposed on each applicant, with a period of time in actual custody. An appropriate sentence was between two and three years imprisonment. The early pleas of guilty and other mitigating features warranted a suspension of their imprisonment at the one-third mark.

Defence counsel's submissions at sentence

[21] The applicants' counsel made the following submissions. The authorities did not support the imposition of a term of imprisonment. A three year term of imprisonment was the maximum penalty that could be imposed by the Magistrates Court and these cases were not in the worst category. The applicants' co-offenders were sentenced to bonds and community service. Dominik had saved $10,000 and offered that immediately towards restitution. A further $2,000 was taken from him when he was arrested by police and he had another $485 in his possession when charged. He could add these sums towards a payment of restitution. Of the $12,000 taken by Witold, a co-offender had purchased a car for $6,200 which had been forfeited. Witold was immediately able to pay $4,000 and was prepared to undertake to pay any remaining restitution over time.

[22] Both offenders were young, from solid backgrounds and had sound prospects of rehabilitation. References tendered attested to Dominik's capacity for hard work and his promising career in architecture. Others spoke warmly of Witold and were encouraging of his plans to join the navy as a helicopter pilot. Some references

made mention of the present stealing offences. The applicants had another brother who was a government lawyer. Dominik was suspended from his employment as a consequence of adverse publicity about this offending, but quickly obtained another position.

[23] The applicants initially looked at their offending as "a bit of a game … just to supplement … pizzas and things like that. It was not something they thought was terribly wrong." Nor were they in a sophisticated crime syndicate. Only when they were apprehended did they understand how seriously their conduct was viewed. Dominik had developed insight into the seriousness of his actions. He had self-funded his legal representation at considerable expense. He had also assisted his brother, Witold, in meeting his legal expenses. Whilst a probation order was well open, its utility might be questionable. Recently, Witold had been seriously injured in an accident but he was recovering and would be able to complete community service in the future. They should receive sentences of the kind imposed on their co-offenders.

The prosecutor's reply

[24] In reply, the prosecutor emphasised that the applicants' offending was not a mere error of judgment. It continued over a long period of time. They had keys of a similar nature in their possession in 2007. The comparable cases to which defence counsel had referred did not have the element of sophistication present in this case. The substantial nature of the applicants' dishonesty meant that convictions should be recorded: future employers should be aware of such substantial dishonesty.

The magistrate's decision

[25] After rehearsing the facts of the offending, the magistrate made the following observations and findings. She considered:

> "these offences are indeed an aberration from the ordinary and normal lives of the principal offenders because ordinarily both appear to have, in varying degrees and manner, conducted hard-working lives, particularly in the case of Dominik Skorka, however the offending was persistent and required, as I have said, a degree of preparation and skill."

[26] The offences continued over a substantial period of time. They were each convicted in 2007 of possession of tainted property including keys of the type used in the present offending. The applicants were primary offenders who should be sentenced to more significant penalties than their co-offenders who were their girlfriends.

[27] Section 9 *Penalties and Sentences Act* 1992 (Qld) was relevant, including the principle in s 9(2)(a) that a sentence of imprisonment should only be imposed as a last resort and a sentence which allows the offender to stay in the community is preferable.

[28] The serious aspects of the applicants' offending were the manufacture of the keys and the lengthy period of time over which it occurred. By way of mitigation, both applicants had pleaded guilty, cooperated with the authorities and agreed to pay compensation. Dominik was 21 and Witold 29 at the time of their offending. Tendered references spoke of their good natures and suggested the present offending was an aberration. But they had both "made serious errors of judgment

and apart from the unlawfulness of the behaviour, there [was] a serious moral lapse in each case and use of their abilities and skill for very wrong purposes."

[29] They came from a hard working supportive family background. They had little relevant criminal history. The most appropriate sentence was one which allowed them to remain in the community and make restitution to the Council. A sentence of 240 hours community service was appropriate. But for the plea of guilty, the magistrate would have also imposed a two year probation order. No separate penalty was imposed on Dominik for the count of possessing tainted property.

[30] Whilst the offending was serious, neither applicant had significant criminal history and was otherwise of good character (inferentially, apart from this and their previous offending). They had each "made a serious mistake" and their offending was out of character. Recording a conviction would impact on their chances of finding employment and their economic or social wellbeing. At least, Dominik had lost his employment because of the adverse publicity. The recording of a conviction would have such an adverse effect that no conviction should be recorded against either applicant.

[31] The magistrate further ordered that Dominik pay $10,000 compensation within 30 days and $5,500 within six months. The magistrate ordered that Witold pay $4,000 within 30 days and a further $5,000 within six months.

The appeal to the District Court

[32] The District Court judge gave the following reasons for allowing this appeal.[2] The prosecution contended the sentences were manifestly inadequate. After referring to the magistrate's statement set out at [25] of these reasons, the judge stated that he considered the offending was serious. This was not only for the reasons mentioned by the magistrate, but also because it involved $30,000 shared between the applicants and their assistants. The judge continued:

> "It was said by the learned magistrate that these offences of dishonesty were “an aberration from [the applicants'] ordinary and normal lives”. I have some difficulty with accepting that view because of the sophistication and duration of their criminality – over 12 months in Dominik's case, and eight months in Witold's – and the fact of their both having earlier entered pleas of guilty to a related offence in early 2007. In Dominik's case, there was also a relatively minor stealing offence in February 2005 when he was only 17. If the magistrate meant that this sustained criminality was an aberration from the way they presented at work and at home, then one could not quibble with it, but if she meant that the whole of this conduct was somehow inconsistent with the normal course of their life, then I do have significant disagreement. The duration of the offences, the degree of sophistication and the earlier related offence argue strongly against such a view and inclines one's mind to the view that their engagement in criminal conduct was very much part of their lives over the lengthy period of the charges, no matter how they presented to others at home and at work."[3]

---

2 See *Hartley & Anor v Skorka & Anor* [2010] QDC 319.

3 Above, [14].

[33] The co-offenders were considerably less culpable. They received less money from the offending and the idea and drive for the criminal enterprise came from the applicants. The co-offenders acted principally as lookouts and to exchange coins for notes. The applicants were the primary offenders, having manufactured keys and taken the primary role in the stealing. Whilst the keys were at the co-offender Ball's house, this was because the applicants, conscious of their earlier involvement with police, persuaded Ball to allow them to store the property at his house. The applicants, unlike their co-offenders, had prior convictions in 2007 for similar conduct.[4]

[34] In the appeal to the District Court, the prosecution maintained its position that the sentence imposed on each applicant was inadequate and that the appropriate sentence was two to three years imprisonment with parole release after about one-third of that period.

[35] Although there were favourable references for the applicants, the referees were not necessarily aware of the applicants' criminal history which pre-dated the present offending. The judge had not been referred to directly comparable sentences and was unable to find any himself. The theft was of public money so that some comparison could be drawn with social security and other fraud upon governmental instrumentalities. A review of the cases showed that periods of imprisonment, including actual imprisonment, could be expected to be imposed for social security frauds involving moderate sums of money. As in those cases, deterrence was important in the present case and there must be a general expectation of custodial punishment if offenders like them are caught.[5]

[36] The judge concluded that a term of actual imprisonment should have been imposed on the applicants; a sentence of about nine to 15 months with parole release after about one-third of that period was appropriate. The applicants, however, had served their 240 hours of community service. That factor, and the fact that this was a prosecution appeal, warranted the allowing of the appeal and the substitution of sentences of nine months imprisonment wholly suspended with an operational period of three years. Convictions must be recorded with the imposition of a suspended sentence, but in any case convictions should have been recorded.

Conclusion

[37] It is clear from the District Court judge's reasons that his Honour accepted the prosecution contention in the appeals before him that the sentence imposed on the applicants (240 hours community service, substantial compensation, but with no conviction recorded) was manifestly inadequate.

[38] The applicants' primary contention (that the judge erred in finding the sentencing magistrate erred in imposing manifestly inadequate sentences) is not made out. The decision whether or not to record a conviction under s 12 *Penalties and Sentences Act* is part of a sentence. The failure to record a conviction can make a sentence manifestly inadequate just as a decision to record a conviction can make a sentence manifestly excessive: see *R v Briese, ex parte Attorney-General*.[6] It was true that the recording of convictions in this case may have an impact on each of the

---

4 Above, [19]-[22].

5 Above, [51] citing *R v Holdsworth* [1993] QCA 242.

6 [1998] 1 Qd R 487; [1997] QCA 10.

applicant's economic or social wellbeing and his chance of finding employment. Witold aspired to employment as a helicopter pilot in the navy, and Dominik as an architect. But neither applicant was a teenager; Witold was 29 when he offended and Dominik 21. It was significant that each had a relevant criminal history in 2007 when he was given the benefit of not having a conviction recorded. The younger Dominik had the double good fortune of not having a conviction recorded for a stealing offence in 2005. The serious and persistent nature of the present offending, especially at their age and with their criminal history, militated strongly in favour of recording convictions. Convictions should have been recorded in both cases. The judge was right to conclude that the magistrate's sentence in each case was manifestly inadequate, solely on the basis of the non-recording of a conviction.

[39] Mr Boe for the applicants submitted to this Court that, if the magistrate's sentences were manifestly inadequate only on the basis that convictions were not recorded, the judge should merely have re-exercised the discretion as to the recording of convictions and not altered any other part of the sentences. Whilst this is a course often taken, especially where, as in *Briese*, the prosecution does not allege the sentence is otherwise manifestly inadequate, I cannot accept that proposition as a legal principle. The appeal to the judge was by way of re-hearing under s 223(1) *Justices Act*. Once the prosecution satisfied the judge that the sentence in each case was manifestly inadequate, the judge was entitled to re-exercise his discretion as to the entire sentence imposed in each case. His Honour was not limited merely to the question of whether a conviction should have been recorded.

[40] The applicants have not demonstrated that the judge erred in finding each applicant considerably more culpable than his co-offenders in applying an incorrect onus or standard of proof as to facts material to the imposition of punishment; in placing undue emphasis on the applicants' prior convictions; or in the weight his Honour attached to tendered references on behalf of the applicants.

[41] In determining the appropriate penalty in re-sentencing, his Honour gained assistance from cases concerning social security fraud. It is true that these cases are not directly analogous. The community, through the courts, understandably imposes significant deterrent penalties on those who steal from community funds established to assist the needy. Such conduct is especially deserving of denunciation and is even more serious than the present offending. But his Honour rightly identified that social security fraud and the present offending both involve the stealing or fraudulent taking of public money. In circumstances where it was common ground that there were no comparable sentences, the judge did not err in seeking some general guidance from social security fraud cases.

[42] A sentencing principle applicable in this case was identified by both the magistrate and the judge, namely, that a sentence of imprisonment should be imposed only as a last resort and a sentence that allows an offender to stay in the community is preferable (s 9(2) *Penalties and Sentences Act*). Mr Boe contended that it followed from s 9(2) that unless no magistrate could have sentenced the applicants to 240 hours community service with substantial compensation, rather than a term of imprisonment, then the judge was not entitled to impose a sentence of imprisonment, even fully suspended imprisonment.

[43] I cannot accept that contention. In cases where s 9(2) applies, reasonable judicial minds may differ in determining whether a sentence of imprisonment is required as

a last resort. There is seldom just one appropriate sentence in any particular case. In borderline cases like the present, a sound exercise of the sentencing discretion may range from custodial to non-custodial options. One judicial officer may consider that a significant community based order can be imposed (for example, three years probation with significant compensation, appropriate special conditions and 240 hours community service with a conviction recorded). Another, like the District Court judge in the present case, may conclude that it is ordinarily necessary to impose a sentence of imprisonment with some short period of actual custody before suspension or parole. If the custodial sentence imposed is within the sentencing range, and the judicial officer has considered s 9(2) and determined that, as a last resort, a sentence of imprisonment should be imposed, there has been no error. For these reasons, the applicants' contention is without merit.

[44] I have earlier set out the views of the magistrate and the District Court judge as to the serious aspects of the applicants' offending. It involved the theft of a substantial amount of money over a significant period of time. It was premeditated and involved a degree of sophistication. Although the offending was against property and did not involve personal violence, it was not a victimless crime. The thefts were from the Brisbane community and ratepayers, some of whom struggle under the burden of Council rates and charges, inflated by crimes like these. The offending was difficult and costly to detect. It is true that the provision of more sophisticated meters has meant that offences of this kind are not likely to become prevalent. But the community expects those who steal from it in such a brazen and calculated way will be significantly punished. As in the cases of tax and social security fraud, the sentencing principles of denunciation and general deterrence were important in this case. Further, the applicants were not callow, naïve youths when they offended. Dominik had twice received lenient sentences without a recorded conviction for relevant offending and Witold had a like benefit in 2007.

[45] On the other hand, there were mitigating features. They each pleaded guilty at an early stage and were cooperative with the authorities. They were not hardened or professional criminals. They were young enough to still have promising rehabilitative prospects, which were supported by favourable references. To their credit, they had saved substantial sums to offer compensation to the community. The imposition of a sentence which did not require them to serve actual custody meant that they could continue in their employment and pay further compensation to the community.

[46] Whilst I do not agree with the District Court judge's statement that a sentence involving actual custody *had* to be imposed in this case, the magistrate's sentences were manifestly inadequate insofar as they did not record a conviction. The judge was right to allow the appeal and to re-exercise the sentencing discretion. The sentences in fact imposed by the judge (nine months imprisonment wholly suspended for an operational period of three years with orders for restitution) were appropriate, within range and not manifestly excessive. It follows that the applicants have not demonstrated any judicial error requiring the intervention of this Court to remedy an injustice.

[47] For these reasons, each application for leave to appeal should be refused.

ORDER:

In each application, leave to appeal is refused.

[48] **MUIR JA:** I agree with the reasons of McMurdo P, and with the order proposed by her Honour.

[49] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of McMurdo P, with which I agree. I also agree with the order proposed by her Honour.