SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hawkins* [2011] QCA 173
PARTIES:	**R** **v** **HAWKINS, Arthur Cyril** (applicant)
FILE NO/S:	CA No 147 of 2011 DC No 575 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	22 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2011
JUDGES:	Muir JA, P D McMurdo and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 22 July 2011:** 1. **The application for leave to appeal be allowed.** 2. **The appeal be allowed.** 3. **The sentence imposed on the applicant on 12 May 2011 be set aside.** 4. **The matter be remitted to the District Court for the applicant to be sentenced according to law by a judge other than the sentencing judge.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the applicant pleaded guilty to the offence of dishonestly causing a pecuniary detriment to his mother-in-law with the circumstance of aggravation that the yield to the applicant was more than $30,000 – where the applicant was sentenced to a three year term of imprisonment suspended after nine months – where the primary judge did not determine the amount of money fraudulently taken – whether there was a miscarriage of justice – whether the sentence should be set aside and the sentencing discretion exercised afresh *R v Alexander* [2004] QCA 11, considered

COUNSEL: A M Nelson for the applicant
D R Kinsella for the respondent

SOLICITORS: TayLAW Solicitors for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA:** The applicant pleaded guilty to the offence of dishonestly causing a pecuniary detriment to the complainant, his mother-in-law with the circumstance of aggravation that the yield to the applicant from his dishonesty was of a value more than $30,000.

[2] He was sentenced to a three year term of imprisonment suspended after nine months, with an operational period of five years. He seeks leave to appeal against his sentence on grounds that:

(a) The sentence was manifestly excessive;
(b) The sentencing Judge erred in failing to determine the amount of the money fraudulently taken; and
(c) The sentencing Judge erred in failing to take into account factors relevant to mitigation.

[3] At the commencement of her submissions, the prosecutor informed the sentencing judge that the quantum of the applicant's fraud was contested. The prosecution's case was that "up to $86,502.21" was involved. The applicant claimed that, "the limit of his culpability [was] $35,000."

[4] The prosecutor explained that the complainant was then 67 years of age, had moved into an aged care facility in December 2004 and appointed her son and daughter jointly and severally attorneys to manage her affairs. The applicant is and was the daughter's husband.

[5] The complainant's son was in Melbourne and travelled frequently. Consequently, the complainant's daughter was left with the conduct of the complainant's affairs, including the operation of her bank account. An arrangement was put in place under which $2,000 was automatically deducted monthly from the complainant's bank account to pay for her nursing home expenses. Apart from payments of $15,000, $10,500 and $25,000 to the applicant or the complainant's daughter, made with the authority of the complainant in 2005, the complainant stated that she authorised no other payments from her account to the applicant or her daughter.

[6] The complainant discovered towards the end of 2005 that her account had been closed for about two months because it was overdrawn to the extent of $2,000. She then found that her nursing home fees were $20,000 in arrears. The complainant spoke to her son about her discovery. He retained solicitors and arranged a meeting with the applicant. In the course of the meeting, the applicant told the complainant's son that he had taken $35,000 which he had lost in gambling. Civil proceedings were commenced to recover the money but were abandoned after an attempt to negotiate a settlement. The applicant and his wife became bankrupt.

[7] After the prosecutor had given that account of the facts, defence counsel said:

> "…our case will be 35 of that we took dishonestly but the balance of it we say were loans and things that [the complainant] gave us. We will be

> alleging she said something to the effect of, 'Look, Sharon [the complainant's daughter], if you need necessities then you can take some money.' That will be our case." Defence counsel had previously stated that the applicant and his wife had received from the complainant, "probably in the range of $80,000 or $90,000."

[8] A discussion took place between counsel and the sentencing judge. The sentencing judge enquired of the prosecutor if she was contending that the penalty for stealing "$80,000 odd" was a lot more than if $30,000 odd had been stolen and whether that was borne out by authorities. The prosecutor responded that there was no precise sliding scale for quantum and that her submission would be that a sentence in the order of three years imprisonment was appropriate. Defence counsel responded:

> "We basically agree with the three years, a fraction more, a fraction less perhaps, maybe two and a-half to three and a-half. Three is around the mark. Our real debate is we would argue for a wholly suspended sentence."

[9] The sentencing judge enquired whether it mattered, for the purpose of sentencing, whether the amount taken was "$35,000 or $80,000." Defence counsel responded:

> "I would say not a lot. My submission to you will be that … to a very small and tiny extent the amount might matter but in this case what he did was really wrong and [that] will play on your Honour's mind."

[10] The primary judge observed that "… a head sentence of about three years seems about right." Defence counsel said that he could not "cavil with that." He said that the sentencing Judge would be:

> "…little persuaded by evidence apart from that [referring to the admission that $35,000 had been taken] because my learned friend will not be able to go through each and every transaction and say, 'Yes, that's Mr Hawkins. That's Mr Hawkins. That's Mr Hawkins.' At the end of the day it probably doesn't matter a great deal."

[11] The prosecutor then tendered a table of the alleged fraudulent withdrawals from the complainant's account. She submitted that the primary judge would make a finding that the sum taken from the complainant's account by the applicant, "… would be more than $35,000 taking into account that the cash withdrawals alone totalled $78,960." She pointed out that the evidence showed frequent persistent withdrawals of relatively large amounts of money, even though the complainant's expenses were covered by her $2,000 a month nursing home fee. She disputed that the applicant or his wife had any authority to withdraw any moneys from the complainant's account for their own use, apart from the three sums mentioned earlier, and informed the sentencing judge that the complainant had asserted this in a statement.

[12] The sentencing judge queried the purpose of determining the precise amount of the fraud if that quantification would have "no effect" on the ultimate head sentence that, "the prosecutor and defence counsel urges being appropriate." The prosecutor responded that she had "called this evidence" because of a difference between her and defence counsel on the appropriate sentence. She said, in effect, that the calling of the evidence was to support her argument. The sentencing judge then said, "Why don't we put this factual dispute to one side for the moment?" He then discussed

with the prosecutor the authorities which she submitted supported a three year term of imprisonment suspended after 12 months.

[13] Defence counsel explained that his clients had become bankrupt in about mid-2008 but were prepared to pay restitution of $125 a week. He submitted that the applicant's sentence should be wholly suspended, but if it was not, "then [a suspension of] three to six months would be about the range." He made no further submission about the head sentence.

[14] In her submissions in reply, the prosecutor submitted that a non-custodial sentence could be justified only in the most exceptional cases where an offender had abused a position of trust in order to steal a substantial amount of money over a lengthy period. The sentencing judge invited defence counsel to make further submissions. He submitted that, strictly speaking, the applicant was not in a position of trust and it was his wife who held the complainant's power of attorney. At the close of defence counsel's further submissions, the primary judge proceeded with his sentencing remarks and pronounced sentence.

[15] Counsel for the applicant argued that as the guilty plea was entered on the basis, not accepted by the prosecution, that the fraud involved no more than $35,000, the primary judge erred in failing to determine the amount fraudulently taken. Counsel for the respondent conceded that there was an issue of fact left undetermined which affected the exercise of the sentencing discretion. It was submitted, however, that as the sentence was within the appropriate range and thus not manifestly excessive, the sentencing discretion had not miscarried.

[16] I am unable to accept counsel for the respondent's submission. The applicant claimed that he fraudulently took no more than $35,000. The prosecution's case was that the amount involved may have exceeded twice that amount. On any view of the matter, the amount involved in a fraud such as that under consideration is relevant to the determination of the appropriate sentence. The amount of money of which the victim has been deprived is, in itself, one measure of the seriousness of the offence. Beyond that, it is relevant to the determination of the harm inflicted on the victim. Williams JA observed, unremarkably, in *R v Alexander* [2004] QCA 11, in respect of the determination of the appropriate sentence in cases involving dishonesty:

> "Each case has to be considered in the light of its own peculiar facts; all one can say is the amount of the money lost and the regularity of offending will always be relevant considerations."

[17] Where there is a factual dispute on a sentencing hearing which can have no material bearing on the determination of the sentence to be imposed, it will be unnecessary, normally at least, for the Court to resolve it. Neither party contends in this case, however, that the factual dispute concerned a matter the resolution of which was immaterial to the sentence to be imposed and nor could that proposition have been argued sensibly.

[18] The exercise of the sentencing discretion having miscarried, it is open to this Court to re-exercise it. The respondent invites the Court to do so and to impose the same sentence as that imposed by the sentencing judge on the basis that such a sentence would be within range of the exercise of a sound sentencing discretion. The invitation cannot be accepted. Pragmatism cannot prevail over principle in the

administration of criminal justice. A sentencing discretion must be exercised properly, taking into account all relevant facts and circumstances. A relevant, and indeed critical, fact is the amount fraudulently taken.

[19] In my view, the sentence should be set aside and the matter remitted to the District Court. It is thus unnecessary to determine the other grounds of appeal and I will content myself with these few additional observations. Defence counsel's submission at first instance that any sentence imposed should be suspended immediately, or after a very short period, in my view, was improbably optimistic, even if the applicant were to be sentenced on the basis that the fraud was limited to $35,000. There were aspects of the applicant's offending which were particularly reprehensible. The victim was entirely reliant on her two children to protect her financial interests. The applicant was well aware that his wife neglected her duty to her mother. He was doubtless aware also that by his conduct he would cause or substantially contribute to the complainant being deprived of her life's savings and being left to spend her remaining years dependant on charity. The offending conduct was protracted. It provided the applicant with ample opportunity to reflect on its likely consequences for the complainant. The applicant, nevertheless, persisted in his offending until there was no money left for him to take.

[20] At first instance there was only limited exploration of the extent of the harm caused to the complainant by the fraud. It is apparent, I think, that such harm is not to be measured merely in terms of dollars and cents, and that it is likely to be found to have increased at least in proportion to any increase in the sum found to have been taken. These considerations further demonstrate the need for careful findings of relevant fact.

[21] Accordingly, I would order that:

(a) The application for leave to appeal be allowed;
(b) The appeal be allowed;
(c) The sentence imposed on the applicant on 12 May 2011 be set aside;
(d) The matter be remitted to the District Court for the applicant to be sentenced according to law by a judge other than the sentencing judge.

[22] It is, I think, undesirable for the sentencing judge to resentence the applicant, having regard to the conclusion reached by him during the sentencing hearing that the sum involved in the fraud did not bear on the determination of the appropriate sentence. Otherwise, the view may be taken that there is an element of prejudgment on the part of the sentencing judge on resentencing.

[23] **P D McMURDO J:** I agree.

[24] **DALTON J:** I agree.