SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hawkins* [2011] QCA 322
PARTIES:	**R** **v** **HAWKINS, Arthur Cyril** (applicant)
FILE NO/S:	CA No 256 of 2011 DC No 575 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2011
JUDGES:	Muir, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to the offence of dishonestly causing a pecuniary detriment to his mother-in-law with a circumstance of aggravation that the yield to the applicant was more than $30,000 – where applicant sentenced to two and a half years imprisonment with a parole release date after approximately 10 months – where applicant argues sentence is manifestly excessive, that sentencing judge gave too much weight to the fact that the applicant had not participated in a record of interview with police and gave insufficient weight to applicant's co-operation with law enforcement agencies – whether sentence was manifestly excessive *Criminal Code* 1899 (Qld), s 408C *Penalties and Sentences Act* 1992 (Qld), s 9(2)(c)(i), s 9(2)(e), s 9(2)(i) *R v Docherty* [2009] QCA 379, considered *R v Hawkins* [2011] QCA 173, cited *R v Hyatt* [2011] QCA 55, cited *R v Jeffree* [2010] QCA 47, considered

R v La Rosa; ex parte A-G (Qld) [2006] QCA 19, considered
R v Robinson; ex parte A-G (Qld) [2004] QCA 169, considered

COUNSEL: A M Nelson for the applicant
S P Vasta for the respondent

SOLICITORS: Taylaw Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: I agree that the application should be refused for the reasons given by White JA.

[2] **FRASER JA**: I agree with the reasons for judgment of White JA and the order proposed by her Honour.

[3] **WHITE JA**: On 12 May 2011 the applicant pleaded guilty that between 29 March 2005 and 24 March 2006 he dishonestly caused a pecuniary detriment to Evelyn Jean Powe with the circumstance of aggravation that he obtained more than $30,000.[1] He was sentenced on 12 May 2011 to imprisonment for three years suspended after nine months with an operational period of five years. The applicant sought leave to appeal that sentence on the grounds that it was manifestly excessive; that the sentencing judge erred in failing to determine the amount of the money fraudulently taken; and that he failed to take into account factors relevant to mitigation. At that sentence hearing ("the first sentence") the quantum of the applicant's fraud was contested. The prosecution case was that up to $86,502.21 was misappropriated while the applicant claimed that the limit of his culpability was $35,000. That issue was never resolved, the first sentencing judge being of the view, after canvassing penalty with counsel, that it was unnecessary for him to do so since the sentence would likely be the same whichever amount was selected.

[4] On 8 September 2011 without considering the other grounds of appeal this Court[2] determined[3] that the quantum of the applicant's fraud needed to be resolved before a proper sentence could be imposed. The application for leave to appeal was granted, the appeal allowed, the sentence imposed set aside, and the matter was remitted to the District Court for determination by a judge other than the sentencing judge.

[5] The applicant had gone into custody on 12 May 2011 when sentenced on the first occasion and remained in custody until the sentence came on for hearing. By then the parties had agreed on a schedule of facts (save for one minor matter) including that the amount by which the complainant had been defrauded by the applicant was $44,570. The applicant was sentenced to imprisonment for two and a half years with a parole release date fixed for 9 March 2012 which was, effectively, 10 months after he had gone into custody on 12 May 2011. A period of 119 days from 12 May 2011 to the date of sentence on 8 September 2011 was declared as time served under the sentence.

[6] The applicant seeks leave to appeal that sentence on the ground that it is manifestly excessive; on the further ground that the sentencing judge gave too much weight to

---

1 *Criminal Code*, s 408C(1)(e) and (2)(d).
2 Muir JA, P D McMurdo and Dalton JJ.
3 *R v Hawkins* [2011] QCA 173.

the fact that the applicant had not participated in a record of interview with police; and gave insufficient weight to the applicant's co-operation with law enforcement agencies.

Circumstances of the offence

[7] The complainant, who was about 67 years of age at the commencement of the offending, was a widow with two adult children - a son who resided in Melbourne and her daughter who is married to the applicant. It appears that she was demonstrating some signs of early dementia and in December 2004 moved into an aged care facility. She paid a bond of $130,000 and each month an automatic deduction of $2,000 was taken from her account for her expenses at the facility which included extra care benefits.

[8] The complainant appointed her son and daughter as her joint attorneys over her financial affairs. Because her son travelled extensively for work the power of attorney did not require co-signing by both attorneys. The daughter had possession of the complainant's bankcard and her account statements from the bank were sent to the daughter only. The complainant did not access the account and, according to the statement of facts did not have a bankcard. This latter fact was mildly contested before the sentencing judge by the applicant without him offering any evidence to the contrary.

[9] The complainant's family home was sold in March 2005 and approximately $260,000 was deposited into her bank account. At the request of the daughter the complainant lent her $15,000 on 16 June 2005. On 2 August 2005 the applicant asked for $9,000 to buy a car. The complainant said she wanted to think about it but the next day the applicant said he needed $10,500 for a car. The complainant went with him to the bank and transferred that sum into his Suncorp account on the condition that he pay back the loan. On 8 September 2005 the applicant told the complainant that her daughter needed $25,000 to pay out her ex de facto. The complainant again went with him to the bank and transferred that amount into their Suncorp account. Other than on those occasions the complainant did not access her account and did not give permission for any other money to be withdrawn or spent out of that account. There is some suggestion that the applicant's wife was authorised by her mother to buy "necessities"[4] which might explain other sums taken from the complainant's account. No explanation was offered as to how the applicant's wife overlooked the depredations to the account as she alone received the bank statements.

[10] The complainant told her son about the money she had transferred to the applicant. He became suspicious and asked his sister to send him the power of attorney paperwork which he did not receive.

[11] Towards the end of 2006 the complainant attended at the bank to check the balance of her account. She was advised that her account had been closed two months earlier because it was overdrawn by $2,000. The complainant then made enquiries at the aged care facility where she lived and was informed that her account was $20,000 in arrears. The last payment had been made in February 2006.

[12] The complainant informed her son and after reviewing the bank statements he spoke to the applicant and engaged solicitors. The son met the applicant at a coffee shop

---

4 AR 22.

to discuss the complainant's money. Their conversation was recorded, although it appears that it was of a very poor quality. The applicant admitted to taking about $35,000 and told his brother-in-law that he had lost the money gambling. He asked him not to tell his wife as he was making arrangements to pay the money back and would tell her afterwards.

[13] An analysis of the bank accounts revealed that the withdrawals were in patterns and locations consistent with gambling at or near various locations such as the Treasury Casino and a number of hotels with poker machines. The withdrawals consisted of hundreds of dollars and up to in excess of $1,000, gambled in a day or two consecutive days on a weekend. There were approximately 75 transactions of this kind during the year.

[14] It appears that the loans have been repaid but otherwise none of the money taken, calculated to be $44,570, has been repaid. The son attempted to resolve the matter in civil proceedings without success. He then complained to the police. On 10 August 2010 the applicant declined to be interviewed by police and was charged. The attempted resolution and time taken in investigating the complainant's losses explain the delay in the matter proceeding to a hearing although the indication of a plea of guilty was accepted as timely. At some unspecified date the applicant and his wife became bankrupt. There was no restitution made nor any offer to do so.

Effect of offending on complainant

[15] The impact upon the complainant was serious. The court was told that she and her late husband had worked very hard to put aside money for their future. The husband died early but the complainant felt that her future was secure. When it became necessary for her to move to a care facility it took her some time to recover from the loss of her home for which she had worked so hard. She was devastated by the betrayal by her son-in-law and her daughter who was standing with him. At the time of sentence the complainant was living in the dementia unit at her care facility but had had to move to a smaller room since she could no longer afford extra care facilities. The son had provided her with some money so that she was not completely without funds.

Matters personal to the applicant

[16] Defence counsel told the judge that although a gambling addiction had led to the theft of the complainant's money, the applicant had taken steps during the lengthy delay between the detection of his fraud and sentence to seek assistance from a Lifeline counsellor. No evidence was put before the court to support this submission but his counsel said, "He [the applicant] is of the view that he has dealt with it [the gambling addiction] and that he is no longer addicted to gambling".[5] Some references provided at the first sentence were re-tendered. They were from a former work colleague and friend and his employer. They knew of the charges and spoke well of the applicant. The applicant had been in steady employment as a leading hand/foreman in the construction industry.

[17] The applicant was aged between 33 and 34 at the time of the offences and 39 at sentence. He was still married to the complainant's daughter. They had a four year old child and he supported his wife's three children aged 17, 13 and nine. He had, effectively, no previous convictions.

---

5 AR 25.

The grounds

[18] The applicant makes a number of particular complaints and it is convenient to consider the discrete issues raised before considering whether the sentence imposed was manifestly excessive. The excess is not contended to be the head sentence but the parole eligibility.

(i) Unfair hearing

[19] The applicant contends that the sentence imposed is greater than that first imposed on 12 May 2011 in circumstances where not only was there no warning that the sentencing judge proposed doing so, but where he positively indicated to the contrary so that the applicant was not accorded procedural fairness. Defence counsel explained the earlier sentence to the court:

> "He was sentenced to three years' imprisonment, suspended after nine months. The Court of Appeal, with respect to my learned friend, didn't make any declarations about their position on the sentence itself. They didn't say it was bad, they didn't say it was good or within range."[6]

His Honour responded, "No, if it's any consolation to you it does strike me as a bit high".

[20] The comment that the sentence seemed "a bit high" was said in the course of argument at the outset of defence counsel's submissions. Although not entirely clear, his Honour may have been referring to a head sentence of three years on $35,000. In most cases it is the sentencing reasons which should be examined for error unless something clearly said by the judge in argument misleads counsel into believing it is unnecessary to address a particular matter, which proves to be a misapprehension, and which may have affected the sentence outcome. That is certainly not the situation here. Defence counsel then took his Honour through a number of authorities which he submitted were comparable and supported a sentence of two and a half years with immediate release on parole or a suspended sentence (the applicant had, by then, served 119 days in custody). His Honour made good his earlier observation and imposed a head sentence, as requested, of two and a half years. There is no sustainable complaint on this issue.

(ii) Higher sentence than contended for by prosecutor

[21] The applicant contends that in fixing the sentence his Honour increased the sentence sought by the prosecutor. The prosecutor submitted that the sentence imposed on 12 May 2010 should be imposed but, instead of suspension, a fixed parole release date be made. There is nothing in this complaint. His Honour imposed a lesser head sentence and fixed the parole release date unexceptionally at one-third.

(iii) No record of interview

[22] The applicant contends that the sentencing judge gave too much weight to the fact that the applicant did not participate in a record of interview with police and gave insufficient weight to co-operation in the administration of justice, presumably by his plea of guilty. The applicant has referred to observations made by the

---

6 AR 26.

sentencing judge in the course of submissions that he regarded full confession to investigating police as a significant mitigating factor. There is nothing irregular about that observation. It is, however, of little use to make reference to observations in the course of argument rather than refer to what is said in the sentencing remarks which are the considered conclusions after hearing submissions. Quite often the judge will be testing with counsel the strength of the submission or raising matters which occur to him or her in the course of argument about which the judge would wish to hear more elaborate argument, or which, on later reflection, cease to affect the sentence.[7]

[23] It was appropriate for his Honour to refer to the failure to co-operate to the extent of assisting police in their investigation. Had that occurred there would, at least, have been an understanding of the quantum of the fraud. In mentioning it his Honour was doing nothing more than recording that the applicant would not have the benefit of s 9(2)(i)[8] of the *Penalties and Sentences Act* 1992 (Qld).

[24] His Honour reflected the plea of guilty, accepted as an early plea and an indication of the complainant's resolution to assist the administration of justice, by ordering that he be released on parole after serving one-third of the sentence of two years and six months, that is, at approximately 10 months - an entirely orthodox way to recognise that co-operation.

(iv) Breach of trust

[25] The applicant contends that there was no circumstance of aggravation under s 408C(2)(c), that the property came into possession of the offender subject to a trust which permitted his Honour to say:

> "There was a good deal of persistence in the offending and it involved a breach of trust and it involved taking money from someone who could ill afford it."[9]

His Honour should not be taken to be referring, erroneously, to the circumstance of aggravation in s 408C(2)(c) that the property "came into the possession… of the offender subject to a trust". He had immediately before that passage spoken of the distress of the complainant as:

> "a betrayal within the family, and I was told that she has felt the loss, both in terms of that betrayal and in terms of the quality of care that she had been receiving, keenly."[10]

His Honour regarded that as of some significance in terms of the seriousness of the offending. The effect on the victim is one of the factors that a court must have regard when sentencing, namely, s 9(2)(c)(i) "any … emotional done harm done to a victim …" as well as s 9(2)(e) "any damage … or loss caused by the offender". The complainant had reposed great trust in her daughter and, inferentially, in her son-in-law. The applicant has pleaded guilty to a circumstance of aggravation of his fraud because the yield was more than $30,000, and a maximum penalty of 12 years applies to crimes of fraud which come within any one of s 408C(2)(a), (b), (c) or (d).

---

7 *R v Hyatt* [2011] QCA 55 per Margaret Wilson AJA at [13], Ann Lyons J agreeing at [15].

8 How much assistance the offender gave law enforcement agencies in the investigation of the offence.

9 AR 32-33.

10 AR 32.

(v) Manifestly excessive

[26] The applicant submits that although the head sentence of two and a half years is appropriate the sentencing judge erred in ordering a parole release date after 10 months. He submits that three to six months before release would properly have reflected the mitigating features, and that probation is more onerous than suspension. His Honour noted the gambling addiction and observed that it was merely a factor which may give rise to the risk of further offending of a similar nature in the future, hence the need for parole. His Honour did not regard the gambling as an aggravating feature. His Honour noted the applicant's family responsibilities and the applicant's good employment history. He recorded the need for general deterrence in these circumstances of family arrangements; denunciation of the offending; and personal deterrence which his Honour suggested was very important because the offending only ceased when the money ran out.

[27] Although the head sentence of two and half year years is not challenged, reference to some of the cases which were mentioned by defence counsel below supports his Honour's approach. In *R v La Rosa; ex parte A-G (Qld)*[11] the 23 year old offender pleaded guilty on ex officio indictment to defrauding her employer of $51,214.10. She had no previous convictions. She was in need of psychological treatment. The offender was sentenced to three years imprisonment wholly suspended. This Court required her to serve nine months before suspension but did not otherwise interfere in the sentence. The maximum penalty then was 10 years.

[28] In *R v Docherty*[12] the offender was a registered nurse working for an agency. She stole a diamond ring from the household where she was working valued at $292,000, although she sold it for only $33,500. She was sentenced to three years imprisonment with a non-parole period of 12 months. The offender was aged 59 years and had no previous convictions. The money was to pay off the drug debts of her partner. She had a number of health problems and had made a serious suicide attempt. She had nursed a terminally ill aunt and had suffered emotionally at the break up of her 16 year relationship to a man who spent her savings on drugs. On appeal the sentence was altered to two years imprisonment with a non-parole period of six months.

[29] In *R v Robinson; ex parte A-G (Qld)*[13] the offender pleaded guilty to dishonestly obtaining $33,239 from the police credit union. He was sentenced to six months imprisonment suspended forthwith with an operational period of two years and ordered to pay compensation of $28,928.74 within three months, in default, imprisonment for six months. The offender was employed as an insurance consultant with the Queensland Police Union and used his position fraudulently to transfer members' funds on their home loan policies into his own bank account through another employee's computer. He opened an account in his mother's name to facilitate the fraud. He performed 101 transactions over a 14 month period and falsely created a paper trail to hide his wrong doing. He refunded just over $4,000 into members' accounts when queried. The money was for his gambling habit on poker machines and to buy personal everyday items. He was 49 at sentence with no criminal history and had favourable references. He looked after his mother who had poor health and his incarceration would cause her hardship. He had been in

---

11 [2006] QCA 19.
12 [2009] QCA 379.
13 [2004] QCA 169.

a physical and emotionally abusive seven year relationship which caused him to attempt suicide. He then began to gamble on poker machines and was in financial difficulty. He needed psychological intervention for his problem. At sentence there was some offer of restitution by accessing the offender's superannuation but it had not been put into place. Imprisonment of two and a half years suspended after six months with an operational period of three years was substituted.

[30] Before this Court Mr Vasta for the respondent referred, in addition to *Robinson,* to *R v Jeffree.*[14] That offender, aged 45, pleaded guilty to one count of fraud as an employee involving $43,686. He was sentenced to three years imprisonment suspended after nine months with an operational period of three years. The offender admitted his fraud which was to service his gambling addiction. He had made no restitution; had no criminal history, and was the sole bread winner with three young children. He had taken the money to maintain his family. Shortly before the fraud was uncovered he had voluntarily desisted from further fraudulent activities. He had undertaken counselling and had made positive steps with respect to his addiction. This Court did not consider the sentence manifestly excessive either with respect to the head sentence of the requirement that the offender spend nine months in custody.

[31] A consideration of those authorities indicates that the head sentence imposed by his Honour for a fraud of this magnitude and its consequences for the complainant was moderate. In ordering a parole release date rather than suspension his Honour correctly recognised that in the absence of any actual evidence, apart from a general statement by counsel, there was no confidence that this applicant was cured of his gambling addiction and parole was necessary. To set the parole release date at about one-third of the head sentence gave due recognition to the plea of guilty and that the applicant had no previous relevant convictions. There were no other compelling mitigating features to take into account. There are many families looking after the financial affairs of elderly and/or infirm relatives and it is important, as a matter of general deterrence and denunciation, that misconduct of the kind engaged in here be seen to be punished adequately.

[32] I would refuse the application.

---

[14] [2010] QCA 47.