SUPREME COURT OF QUEENSLAND

CITATION:	*R v McGrath* [2012] QCA 45
PARTIES:	**R** **v** **McGRATH, Paul Anthony** (applicant)
FILE NO/S:	CA No 20 of 2012 DC No 2659 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	29 February 2012
JUDGES:	Margaret McMurdo P, Margaret Wilson AJA and Daubney J Separate reasons for judgment of each member of the Court, Margaret Wilson AJA and Daubney J concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**Application for extension of time refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted of one count of stealing as a servant and one count of attempted stealing as a servant – where the applicant was sentenced to concurrent terms of two years imprisonment and 12 months imprisonment with the parole release date being fixed at the half-way point of the head sentence – where the applicant wished to appeal against the sentence on the grounds that it was manifestly excessive and that there was a lack of parity with the co-accused – whether the proposed appeal had prospects of success – whether the sentence imposed was manifestly excessive – whether the application for extension of time should be granted *Criminal Code* 1899 (Qld), s 7 *R v Robinson; ex parte A-G (Qld)* [2004] QCA 169, cited *R v Symes* [1999] QCA 200, cited
COUNSEL:	A Hoare for the applicant S P Vasta for the respondent

SOLICITORS: Colavitti Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I would grant the applicant's application to extend time; grant the application for leave to appeal against sentence; allow the appeal against sentence; set aside the sentence of two years imprisonment imposed on count 1 and substitute a term of 21 months imprisonment.

[2] I am grateful to Margaret Wilson AJA whose comprehensive reasons mean that my own reasons for reaching a different conclusion can be briefly stated.

[3] The applicant's explanation for the delay is convincing. But the question in this application is whether, if time were extended, there would be any prospect of success in his proposed application for leave to appeal against sentence.

[4] The applicant and his co-offender, Clissold, were sentenced to two years imprisonment on count 1. A third co-offender, Renwick, was sentenced to 18 months imprisonment. Ultimately, the applicant's principal contention was that his sentence should have been slightly less than that imposed on his co-offender, Clissold, because of Clissold's position of trust as a manager in the complainant company.

[5] In dealing with that issue, I gratefully adopt Margaret Wilson AJA's statement of facts. Neither the applicant nor any companies with which he was involved had any business association with the complainant company. I consider this a significant distinction between his offending and that of Clissold. As the applicant's counsel submitted, Clissold's offending as a manager in the complainant company constituted a serious breach of trust. It is true that the applicant knew of Clissold's position of trust and that the applicant played a principal role in the offending by providing and driving the truck used to steal the pallets. It is also true that he had some relevant but old criminal history, whereas Clissold had no prior convictions. Both Clissold and the applicant were mature men without the benefit of remorse, cooperation with the authorities or a timely plea of guilty. Their calculated offending warranted a significant period of actual imprisonment as a personal deterrent and to deter others who might contemplate such conduct. But Clissold's breach of trust as a manager in the complainant company in my view made his offending even more serious than that of the applicant. I consider the judge erred in treating Clissold and the applicant as equally culpable. The applicant is entitled to have a justifiable sense of grievance in not receiving a slightly lesser penalty than Clissold. I consider the seriousness of the applicant's offending lay midway between that of Clissold and Renwick; so should his punishment.

[6] For those reasons, I would extend time, grant the application for leave to appeal and the appeal, set aside the sentence of two years imprisonment and substitute a sentence of 21 months imprisonment.

[7] **MARGARET WILSON AJA**: This is an application for an extension of time in which to apply for leave to appeal against sentence.

[8] The applicant and two co-offenders Clissold and Renwick were charged with two offences – (1) stealing as a servant on divers dates between 4 May 2006 and

10 August 2006 and (2) attempted stealing as a servant on 12 August 2006. At the conclusion of a trial lasting eight days, they were all found guilty of both charges.

[9] They were sentenced immediately after the return of the verdicts on 20 July 2011. The applicant and Clissold were each sentenced to concurrent terms of two years imprisonment on count 1 and 12 months imprisonment on count 2, the parole release date for each being fixed at the half-way point of the head sentence (19 July 2012). Renwick was sentenced to concurrent terms of 18 months imprisonment on count 1 and nine months imprisonment on count 2, his parole release date being fixed at the half-way point of his head sentence (19 April 2012).

[10] The applicant wishes to appeal against his sentence on the following grounds –

(a) that the sentencing judge erred in finding that the loss to the complainant was at least $30,000;

(b) that his Honour erred in failing properly to distinguish the applicant's role from that of Clissold; and

(c) that the sentence was manifestly excessive in all the circumstances.

Extension of time

[11] The applicant was self-represented at trial and sentence. In August 2011 he instructed solicitors to file an appeal against conviction and sentence. They filed a notice of appeal against conviction on 18 August 2011, but through some misunderstanding did not also apply for leave to appeal against sentence.

[12] On 2 February 2012 the applicant instructed his solicitors to abandon the appeal against conviction, but to proceed with his appeal against sentence.

[13] The application for an extension of time was filed on 7 February 2012.

[14] The respondent opposed the application because, its counsel submitted, the proposed appeal against sentence could not succeed. In the circumstances it took no issue with the length of the delay or the explanation proffered for it.

The offending conduct

[15] Booth Transport Pty Ltd had possession and control of pallets which it hired from CHEP. For the purposes of the offences charged, the pallets were deemed to be the property of Booth Transport.

[16] The applicant and his de facto partner were the owners of two companies, Pallets Plus and Pallets Plus Transport.

[17] On eight occasions over about three months truckloads of pallets were stolen from Booth Transport's premises.

[18] Clissold and Renwick were employees of Booth Transport Pty Ltd. Clissold had a management role, with access to alarm codes. Renwick was his subordinate. Out of hours, Clissold and Renwick attended their employer's premises, and Clissold disarmed the security alarm. The sentencing judge was not satisfied Renwick was present on two of those occasions. The applicant drove his empty truck on to the grounds, and left with the truck laden with pallets.

[19] On a ninth occasion, police arrived before a truckload of pallets was removed.

[20] The applicant was guilty of the offences pursuant to the party provisions in s 7 of the *Criminal Code* 1899 (Qld).

[21] The sentencing judge described the offences and the respective roles of the three co-offenders in this way –

> "The stealing offence involved a significant breach of trust in that it involved two of the employees of Booth Transport, one of whom was in a management role and had possession of the alarm codes and could deactivate the alarms.
>
> The offences were planned, they were repetitive and in my view they were brazen, particularly towards the end when it must have been clear Booth Transport was investigating the loss of pallets. There is clearly a commercial flavour to these offences.
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> It seems to me there is no reason to distinguish between the roles played by Mr Clissold and Mr McGrath. Mr Clissold was in that management role and had access to the alarm codes. Mr McGrath must well have been aware of the breach of trust that was involved, and it was his truck that was used so that there is a principal role that he played in the commission of these offences.
>
> In my view there is a reason to distinguish between those roles and the role of Mr Renwick. He was in a lesser general position in the firm. He was actually a subordinate to Mr Clissold, and on my appreciation of the evidence there may well be doubt that he was present for all of those eight occasions. I say that because in relation to two of them there is no clock-on time in relation to Mr Clissold. It seems to me then that there is a reason to distinguish in terms of the sentence to be imposed on him as opposed to the other two."

His Honour said that the case against each of the co-offenders was overwhelming.

Antecedents

[22] The three co-offenders were mature men: at sentence the applicant was aged 54 years, Clissold 53 years and Renwick 50 years. Each had been employed for years in the trucking industry. Each had family responsibilities.

[23] Only the applicant had a criminal history. He had been imprisoned for drug offences, but those offences were somewhat dated. He had also committed a number of minor dishonesty offences.

The extent of the loss

[24] In his sentencing remarks his Honour said –

> "There's been evidence presented on the trial about a black market in pallets, although it is unclear on the evidence just what happened to the stolen pallets. Conservatively some 1200 pallets were taken in that eight occasions. The loss is somewhat hard to estimate. The cost to a hirer of those pallets to pay them off when lost or damaged is $26.50 a pallet. However, there's also an ongoing hiring fee to the person having possession of the pallet of 7 cents per day.

> Booth Transport were clearly out of pocket as a result of the taking of these pallets and in my view it's a significant loss to them in the vicinity of at least $30,000, and it could even be higher."

[25] In the written submissions filed on behalf of the applicant it was submitted that the applicant should have been sentenced on the basis of only 100 pallets per truckload and a loss of $21,200. Those submissions were not prepared by the counsel who appeared for him on the hearing of the application. On the hearing of the application this submission was not pursued.

Comparison between the applicant's conduct and that of Clissold

[26] Counsel for the applicant submitted that his client's culpability fell between that of Clissold and that of Renwick, and that this should have been reflected in his sentence. He stressed Clissold's position of trust as a manager and that the offence could not have been committed without the deactivation of the alarms. In his submission another truck driver could have been used to transport the pellets from Booth Transport's premises.

[27] Counsel for the respondent submitted that the sentencing judge was correct to treat the applicant as just as culpable as Clissold. It was essentially a joint enterprise. Further, he pointed to evidence led before the jury, from which it appeared that the applicant had personally gained from the theft. Finally, the applicant had some criminal history, while Clissold had none.

[28] In my view the sentencing judge did not err in concluding that the applicant was just as culpable as Clissold. Clissold's conduct involved a serious breach of trust, deserving of condign punishment. His Honour relied on two factors in reaching his conclusion about the degree of the applicant's culpability – that the applicant must have known of Clissold's breach of trust and that the applicant's own role was a principal one in that his truck was used. It was essentially a joint enterprise, and those two factors were an adequate basis for his Honour's conclusion. The applicant's (albeit dated) criminal history afforded further support for that conclusion.

[29] It is not possible to know whether the jury was satisfied that the applicant personally profited from the thefts. The sentencing judge did not make any finding about the extent (if any) to which he did so. His Honour simply described the thefts as having a commercial flavour. In my view personal profit to the applicant cannot be called in aid as a factor supporting his Honour's conclusion.

Comparable sentences

[30] In considering the appropriate penalty for offences of stealing as a servant, the Court of Appeal has consistently focussed on the offender's breach of trust, as well as the value of the property taken.

[31] In *R v Symes*[1] the offender was a ganger employed by the Townsville Port Authority. He was apprehended whilst stealing a quantity of steel from his employer, and subsequently pleaded guilty to stealing as a servant on 18 occasions. The total quantity of steel stolen was 86 tonnes; it was valued at almost $20,000, although the applicant received only $7,168 from a scrap metal dealer. He was

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1 [1999] QCA 200.

a mature man with family responsibilities. The prospects of his reoffending were very low. Derrington J described the worst feature of the case as the serious breach of trust involved in the offences. While it was not of the higher level of breach of trust, the quantity of steel stolen was substantial and the number of occasions on which theft occurred was many. His Honour also took account of the fact that the offender had not desisted of his own accord but been apprehended in the course of the last offence. There were some mitigating factors, including factors personal to the offender and that the employer would probably not suffer ultimate financial loss after restitution and forfeited superannuation contributions. On appeal, the sentence of two years imprisonment with a recommendation for parole eligibility after nine months was varied by setting aside the parole recommendation and ordering in lieu that the sentence be suspended after four months.

[32] *R v Robinson; ex parte Attorney-General (Qld)*[2] involved a different type of offending. The offender was employed as an insurance consultant with the Queensland Police Credit Union for two years. He used his position over 14 months in 101 transactions to fraudulently transfer over $33,000 of members' funds on their home loan policies into his own bank account. His fraud was detected during an external audit. He pleaded guilty to dishonestly obtaining the money from the credit union, and was sentenced to six months imprisonment suspended forthwith with an operational period of two years and ordered to pay compensation of almost $29,000. On an Attorney's appeal against sentence, the Court of Appeal substituted a sentence of two and a half years imprisonment suspended after six months for an operational period of three years.

Whether manifestly excessive

[33] The maximum penalty which might have been imposed for stealing as a servant was 10 years imprisonment, and the maximum which might have been imposed for attempted stealing as a servant was five years. Before the sentencing judge the prosecutor submitted that the head sentence which should be imposed on the applicant and Clissold was in the range of two to three years. The applicant asked his Honour to impose a wholly suspended sentence.

[34] The applicant was a principal player in the theft of the pallets. His offending conduct occurred over a four month period, and came to an end only when police arrived on the scene before another truckload of pallets was removed. It caused loss to Booth Transport in the vicinity of $30,000.

[35] The applicant showed no remorse, and was found guilty at the end of a trial that lasted eight days.

[36] In all the circumstances the head sentence was not manifestly excessive.

Conclusion

[37] I am satisfied that the applicant has no prospects of success in his proposed appeal against sentence.

[38] I would refuse the application for an extension of time.

[39] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Margaret Wilson AJA, and would also refuse the application for an extension of time.

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2 [2004] QCA 169.