SUPREME COURT OF QUEENSLAND

CITATION:	*R v Parish* [2012] QCA 112
PARTIES:	**R** **v** **PARISH, Jemima Elizabeth** (applicant)
FILE NO/S:	CA No 320 of 2011 DC No 1284 of 2011 DC No 1285 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2012
JUDGES:	Margaret McMurdo P, Mullins and Ann Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Sentence varied by deleting "27 October 2012" and substituting "27 June 2012" as the date fixed for the applicant's release on parole.** **4. The sentence imposed at first instance is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of fraud, and two counts of passing valueless cheques – where the applicant was sentenced on each of the fraud counts to three years' imprisonment with a parole release date fixed after serving 12 months – where the applicant suffered from a psychiatric condition at the time of offending – where the applicant's ability to understand the consequences of the offending conduct was mildly impaired – whether the sentence was manifestly excessive – whether the length and structure of the sentence took account of the applicant's psychiatric condition *R v Eveleigh* [2009] QCA 257, considered *R v Hearnden* [2002] QCA 258, considered

R v Jeffree [2010] QCA 47, considered
R v Lawrie [2008] QCA 97, 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
R v Yarwood [2011] QCA 367, considered

COUNSEL: G M McGuire for the applicant
B J Merrin for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Mullins J's reasons for granting the application for leave to appeal against sentence and allowing the appeal. I agree with her Honour's proposed orders.

[2] **MULLINS J:** On 28 October 2011 the applicant pleaded guilty to one count of fraud to the value of $30,000 or more and one count of fraud as a director, of property subject to a direction, to the value of $30,000 or more in the District Court. At the same time the applicant pleaded guilty to two counts of passing valueless cheques that were on a separate indictment. On each of the fraud charges the applicant was sentenced to three years' imprisonment and given a fixed parole release date of 27 October 2012, after serving 12 months in prison. On each of the passing valueless cheques offences, the applicant was sentenced to a concurrent term of imprisonment of two months.

[3] The applicant applies for leave to appeal against the sentences imposed on the basis that the sentences were manifestly excessive and, in particular, the applicant should have been given an earlier parole release date.

The offending

[4] The applicant and Mr Palm set up and were directors of Fuse Coating Systems Pty Ltd (Fuse). The applicant had the operational control of the business that commenced in December 2008 and Mr Palm provided the capital. The nature of Fuse's business was applying an anti-graffiti protective coating to residential, commercial and government buildings.

[5] The arrangement between the applicant and Mr Palm was during the build up of the business, the applicant would not draw a salary. The applicant had incurred a debt to a previous business partner Ms Callanan of about $70,000. The applicant wished to repay that debt. In February 2009 the applicant told Mr Palm that a scissor lift was required to be purchased by Fuse to perform work in the business at a cost of $65,635.63. The applicant gave Mr Palm an invoice from Refit Pty Ltd for that amount. On 20 February 2009 Mr Palm deposited that amount to Fuse's account. Refit Pty Ltd was a company owned by the applicant's parents, but the invoice that the applicant produced was false. The applicant had included her bank details on the false invoice for an electronic funds transfer. It was on the basis of those facts that count 1 was charged in relation to the dishonest inducement of Mr Palm to pay that sum of money to Fuse.

[6] Although count 2 is a separate charge, it related to the applicant's continuing conduct in relation to the funds deposited to Fuse's account for the scissor lift. On 25 February 2009 the applicant drew a cheque for $20,000 on Fuse's account made out to Ms Callanan's uncle for $20,000 and endorsed "please pay cash". On the same day the applicant signed another cheque for $55,000 made out to Southeast Concrete Coating Systems, which was a deregistered business name previously registered to the applicant for which the applicant still operated a bank account. That cheque was deposited to that account. On 27 February 2009 the sum of $6,000 was transferred from the account of Southeast Concrete Coating Systems to the applicant's bank account and another cheque was drawn on the same date in the amount of $48,500 made out to Ms Callanan. The records of Fuse recorded the two cheques totalling $75,000 as payments on account of the scissor lift in favour of Refit Pty Ltd. Until the applicant resigned as a director of Fuse on 15 June 2009, she continually represented to Mr Palm that the scissor lift existed. It was never acquired by Fuse and did not exist.

[7] The first of the valueless cheques was passed on 10 November 2009. The applicant had ordered $948.41 worth of building materials from the complainant which was in the business of selling building materials. The applicant paid for the building materials using a cheque drawn on a company of which she was a director which was dishonoured.

[8] The second valueless cheque was given by the applicant on 25 January 2010 to the delivery driver of materials to the value of $2,731.88 that had been ordered by the applicant from another complainant. The cheque was drawn by the applicant on an account that had been in the name of one of her companies, but had been closed for some time. When interviewed by the police on 24 June 2010 in relation to this cheque, the applicant wrongly claimed that her receptionist had written the cheque from the wrong cheque book. The receptionist told police that she had never written or signed cheques for the applicant.

The applicant's antecedents

[9] The applicant was 34 years old when she committed the fraud offences and 35 years old when she passed the valueless cheques. She had no prior criminal history. Although born in Australia, the applicant's family relocated to England when she was 10 years old. Her parents separated when she was 13 years old, she felt rejected by her father and her academic performance suffered. She commenced working when she was 17 years old and soon after gave birth to her first child. The father of her child was killed in a motor vehicle accident. At the age of 21 years the applicant returned to Australia with her child and worked consistently in various jobs. She commenced the relationship with her second partner at the age of 24 years. That relationship did not last and the applicant commenced a relationship with her third partner in 1999.

[10] The applicant was diagnosed with bipolar affective disorder in 2001, but she did not accept the diagnosis or its impact on her functioning. Her relationship with her third partner was unhappy, as she claimed he was physically abusive, and eventually terminated in 2003, when the applicant moved to Townsville. She was working as a sales representative and in 2005 commenced a relationship with a new partner. The applicant became pregnant. She was not taking medication for her psychiatric

condition and attempted suicide. She was treated by the Townsville Mental Health Service. Her daughter was born in 2007.

[11] The applicant moved back to Brisbane and commenced work for a business that manufactured pigments for driveways and pathways. This was the applicant's introduction to concreting and coating. In 2008 she formed a business with Ms Callanan called "Concrete Coating Systems" which was her first experience as a business owner. She gained access to a product from the United States which helped remove graffiti from walls and floors. This led to the establishment of the business with Mr Palm. The applicant believed she had a verbal arrangement with Mr Palm that would enable her to pay out the debts of her former business. She agreed not to draw a salary from Fuse due to her ownership interest, but had anticipated that she would start receiving payments from Fuse by January 2009 which did not occur.

[12] Prior to and at the time of the offending involving Fuse, the applicant was not compliant with her medication to treat the symptoms of her bipolar affective disorder.

[13] The applicant's relationship with the father of her daughter ended in September 2009. Arguments with her partner about her involvement in Fuse and the financial strain of not receiving a salary contributed to the breakdown in the relationship.

[14] In the months prior to the sentencing the applicant obtained work in the mining industry. This required her to travel to North Queensland for work for four weeks and return to Brisbane for one week. Her mother assisted with looking after her daughter during her absence from Brisbane.

[15] At the time of sentence the applicant was medicated on Zoloft and Tegretol.

The sentencing

[16] At the sentence hearing, the prosecutor submitted that little remorse had been shown by the applicant and noted that no restitution had been paid to any of the complainants. It was submitted that the appropriate head sentence was between three and one-half years and four years with release from prison after serving one-third of the sentence.

[17] The prosecutor noted that the total amount of loss involved in the four offences was $78,680.29 and no restitution had been paid to any of the complainants. The prosecutor submitted that the applicant had shown little remorse, noting that the applicant did not participate in an interview with the police in relation to the fraud charges and, although she was interviewed in relation to the second valueless cheque, she attempted to shift blame to her receptionist for what the applicant had done, when the receptionist had nothing to do with the writing of the cheque. The prosecutor described as an aggravating feature of the offending that it involved an abuse of trust of the applicant's co-director and that she had falsified the invoice and the records of Fuse in order to cover her fraud which was not "particularly sophisticated".

[18] The applicant was assessed by psychologist Mr Hatzipetrou for the purpose of the sentence and his report dated 28 October 2011 was tendered on behalf of the applicant. Mr McGuire of counsel who appeared for the applicant at sentence and

on this application submitted to the learned sentencing judge that a head sentence of three years was appropriate, but her personal circumstances would justify setting a parole release date after six or nine months in custody.

[19] Mr McGuire pointed, in particular, to Mr Hatzipetrou's opinion that the applicant committed the fraud offences when her capacity to understand the consequence of her actions was "likely to be mildly impaired" as a result of the symptoms of her bipolar affective disorder. He also pointed to the effect that any period of imprisonment would have on both the applicant and her daughter. The applicant's daughter was present at the sentencing in the company of her father. Mr McGuire noted that the money obtained from the fraud was mainly used to meet the applicant's debt to her friend and not lavish living expenses.

[20] In the course of the sentencing remarks, the sentencing judge noted that the fraud offences were committed in the course of a week in February 2009 and that over the next four months the applicant lied to Mr Palm with explanations and excuses that would keep him from discovering the fraud.

[21] Express reference was made to the pleas of guilty which were indicated at an early stage and that they were the applicant's first convictions. The sentencing judge noted the applicant was the mother of two children, with the younger being five years old and the applicant had "a good record of gainful employment." Then followed a summary of the applicant's psychiatric history taken from Mr Hatzipetrou's report and the sentencing judge accepted that the applicant's psychiatric condition was relevant to her offending as:

> "While it seems clear from the facts that you energetically applied yourself to concealing the dishonesty from Mr Palm, Mr Hatzipetrou's opinion is that your capacity to understand the consequences of your actions was mildly impaired by your illness."

[22] The sentencing judge then stated:

> "The worst features of the offending are the amount of money that you misappropriated and the breach of trust, that is, the breach of trust of your position as the director and person with the day-to-day operation of the company. You took a lot of money albeit in a short period of time. There doesn't appear to be any prospects of you repaying that money.
>
> The seriousness of those circumstances, the need to discourage other people who might be similarly tempted to take money that didn't belong to them means that a sentence of imprisonment must be imposed. That is so notwithstanding the factors in your favour including your plea of guilty, the psychological report and your previous good record. The aggravation of those factors warrant moderation. It is not suggested that their combination is so exceptional that you should not go to prison."

Whether the parole release date should have been earlier

[23] Although the written submissions on behalf of the applicant raised the issue of the failure of the sentencing judge to give sufficient weight to the hardship caused by the applicant's separation from her daughter, there had been no evidence before the sentencing judge that there would be problems in arranging for the care of the

applicant's daughter. The child's father was present in court and the child's grandmother had already been caring for her while the applicant worked in North Queensland. The focus of Mr McGuire's oral submissions was on the issue of the effect of the applicant's psychiatric condition on her offending behaviour.

[24] Mr Hatzipetrou identified a number of factors that contributed to the applicant's offending apart from her experiencing clinically significant symptoms from her bipolar affective disorder for which she was not compliant with medication or receiving treatment at the time of the offending. He noted the financial pressures that the applicant was under from the absence of a salary and stated:

> "Under perceived pressured conditions, Ms Parish was likely to decompensate and engage in spontaneous and erratic behaviours inconsistent with her personal history. She felt compelled to repay her former investor and friend, Ms Callanan, who was experiencing her own financial hardships at the time. These behaviours were facilitated by cognitive distortions and justifications which did not focus on exploiting or stealing from the business rather [than] unfulfilled agreements. In light of these findings, Ms Parish's capacity to understand the consequences of these actions at the time of these offences was likely to be mildly impaired and her judgement and reasoning skills were mediated by her perceptions of the agreements."

[25] Mr Hatzipetrou also considered that the applicant's longstanding issues regarding abandonment and family separations may have a bearing on her capacity to adjust to the prison environment.

[26] Both before the sentencing judge and on the hearing of this application, submissions were made by reference to many comparable sentences.

[27] The offender in *R v Hearnden* [2002] QCA 258 pleaded guilty on an *ex officio* indictment to fraud with a circumstance of aggravation committed over a period of seven months. He was 28 years old without prior convictions when he took about $70,000 from his employer Myer while working in the returns area. He used names from the telephone book to fill out return forms and took somewhere between $100 and $200 for each transaction. His offending involved 507 transactions. At the time of sentencing he had $61,479 from selling his motorcycle and obtaining a loan and was ordered to pay restitution in that amount. It was accepted that he was genuinely remorseful for his conduct. After appeal, his sentence of imprisonment of three years was suspended after six months with an operational period of three years. The relatively early suspension of this offender's sentence is explicable by the significant remorse and the steps that he took to make restitution.

[28] On an appeal by the Attorney-General, the sentence for the offender in *R v Robinson*; *ex parte A-G (Qld)* [2004] QCA 169 who pleaded guilty to dishonestly obtaining $33,239 from the Queensland Police Credit Union Ltd over a period of 14 months was increased to imprisonment for two and one-half years suspended after six months, with an operational period of three years. The offender had been ordered at first instance to pay compensation of about $29,000 within three months, in default imprisonment for six months, but had not paid the compensation by the hearing of the appeal. He had been employed as an insurance consultant and transferred a total of $33,239 of members' funds into his own bank account and

then opened an account in his mother's name to further facilitate the fraud. There were 101 transactions. He was 49 years old when sentenced with no prior criminal history. He had a gambling problem. The offending was planned and systematic and involved a breach of trust. He lived with his elderly mother who was ill and reliant on him and his imprisonment would cause her hardship. The sentence that was imposed on appeal took into account the principles applicable on an appeal by the Attorney-General.

[29] The sentence of imprisonment of three and one-half years suspended after 12 months for an operational period of three and one-half years was not successfully appealed in *R v Lawrie* [2008] QCA 97. The offender who was 41 years old with no previous convictions had pleaded guilty to three counts of fraud as an employee with a circumstance of aggravation. The total amount misappropriated from the chiropractic businesses where the offender worked on the front desk was $50,974 over a period of 20 months. The offender took the money in a number of ways, such as banking clients' cheques to her own account or processing the clients' credit card payments through her own account, instead of her employer's account. The offender had made restitution of $10,000 to her employer's bank and was ordered on the sentence to pay restitution for the balance of the misappropriated amount. Although the offender had been stressed by the breakup of her marriage that occurred three years before the commencement of her offending, she did not suffer from any psychiatric condition. The offending had a devastating affect on the employer's business. *Lawrie* involved more serious offending than the applicant's matter.

[30] The offender in *R v Jeffree* [2010] QCA 47 was the fruit and vegetable department manager of his employer's supermarket. He made arrangements with a new local wholesaler to purchase fruit and vegetables for cash. He substituted the supplier's invoices with invoices for amounts in excess of the real invoices and after paying the supplier retained the difference. Over a period of about six months the offender was given $124,019 to pay the supplier of which he paid only $80,333 to the supplier. The offender's fraud was uncovered during a stock take and when the police were called to the supermarket, the offender admitted the fraud and explained that he had used the money for a gambling addiction. He was 45 years old at the time of the offences, had no criminal history and made no restitution. Shortly before the fraud was uncovered, he had voluntarily desisted from further misappropriation. Since committing the fraud he had undertaken counselling and taken positive steps with respect to his gambling addiction. The sentence imposed of three years' imprisonment suspended after nine months with an operational period of three years was held on appeal not to be manifestly excessive.

[31] Ms Merrin of counsel who appeared on behalf of the respondent relied on *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19 and *R v Eveleigh* [2009] QCA 257 to support the submission that the range for the head sentence for the applicant was imprisonment for three to four years.

[32] The offender in *La Rosa* was aged 20 to 21 years during the period of about 18 months over which she stole about $51,000 from her employer. She had no prior criminal history. She had suffered from bulimia from 17 years of age. She had been employed as a supervisor at the complainant's plant nursery and stole from the cash register on almost a daily basis which involved creating false transaction records to mask her theft. When her offending was detected after an audit of

takings, the offender made full admissions to the police. The offender's explanation for stealing was that, because of her bulimia, she stole to buy food. On pleading guilty to an *ex officio* indictment to the offence of stealing money the property of her employer the offender was sentenced to three years' imprisonment which was wholly suspended for an operational period of three years. She was ordered to make partial restitution by payments of $300 per month for three years and was complying with the order for restitution at the time of the hearing of the Attorney-General's appeal. Keane JA held at [28] that, while the offender's bulimia should properly have been taken into account as a mitigating factor, it did not preclude the imposition of a custodial sentence. He had observed at [27]:

> "Importantly, while it may be accepted that the strains of a condition such as bulimia could properly be seen as placing the respondent's offending in a less serious category than that of an offender who steals solely out of greed, it is not as though a compulsion to steal was a symptom of the respondent's condition, or as though her offending was due to a condition such as depression which adversely affected her ability to judge between right and wrong, or as though the stealing which did occur was altruistic in the sense that it was done for the benefit of persons other than the respondent." (*footnotes omitted*)

[33] The sentence was increased in *La Rosa* to three years' imprisonment with a recommendation for post-prison community based release after the offender had served nine months in custody. It was observed by Keane JA at [32]:

> "… a period of actual imprisonment of 12 months would be appropriate were it not for the circumstance that the respondent has been meeting her obligations in relation to restitution and that this is an appeal by the Attorney-General where a period of actual imprisonment of nine months was sought from the learned sentencing judge by the Crown Prosecutor at first instance. In the light of these circumstances, a period of actual imprisonment of nine months is appropriate."

[34] A distinction can be drawn between the applicant and the offender in *La Rosa* in respect of the relevance for the offending of the psychiatric condition. The applicant has the benefit of an opinion that there was at least some mild impairment of her capacity to understand the consequences of her offending conduct which did not apply in *La Rosa*.

[35] The offender's sentence was not disturbed in *R v Eveleigh* [2009] QCA 257. She was 22 years old at the time of the offending and had no criminal convictions. She pleaded guilty to stealing about $88,000 over a period of about two months from the Woolworths supermarket where she was employed as a cash management systems operator. She stole the money by an elaborate system of deception and falsified electronic and paper documents. She lost the entire sum playing poker machines. On two occasions she had stolen amounts of about $14,000 and on average she stole about $9,000 per week. She made full admissions to the police and offered $2,000 which was her severance payment by way of restitution. She was sentenced to four years' imprisonment and the date that she was eligible for release on parole was fixed after serving 14 months in custody. This offending was much more serious than the applicant's offending.

[36] The survey of the comparable authorities supports the head sentence that was imposed on the applicant of three years and would not have supported a sentence of much greater length.

[37] In view of Mr Hatzipetrou's unchallenged opinion about the effect on the applicant's psychiatric condition on her capacity to understand the consequences of her offending conduct at the time she committed the fraud offences, the sentencing judge had to treat the applicant's psychiatric condition as relevant for the purpose of the sentencing in the sense of affecting moral culpability, but also had to take into account the greater burden that custody imposes for the applicant, as a result of her psychiatric issues: *R v Yarwood* [2011] QCA 367 at [32] and [34]. Although the sentencing judge stated that the applicant's condition was taken into account in her favour, it is difficult to discern from the sentencing remarks or the structure of the sentence how the applicant's psychiatric condition was taken into account, when allowance had otherwise to be made for the guilty pleas and lack of prior criminal history.

[38] On the basis that the sentence as imposed did not give sufficient recognition to the applicant's psychiatric condition, the applicant has shown that it was manifestly excessive. That can be addressed, in the circumstances, by reducing the actual custodial component of the sentence by one-third, so that the applicant would be released on parole after serving eight months rather than 12 months. The structure of the sentence then still addresses the need for both general and personal deterrence in respect of this type of offending, but gives proper acknowledgment to all the factors in the applicant's favour.

Orders

[39] I propose the following orders:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. Sentence varied by deleting "27 October 2012" and substituting "27 June 2012" as the date fixed for the applicant's release on parole.
4. The sentence imposed at first instance is otherwise confirmed.

[40] **ANN LYONS J:** I agree with the reasons of Mullins J and with the orders proposed.