SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baxter* [2012] QCA 125
PARTIES:	**R** **v** **BAXTER, Kayleen Mae** (applicant)
FILE NO/S:	CA No 7 of 2012 DC No 81 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 May 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 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 – where the applicant pleaded guilty to two counts of stealing as a servant – where the applicant was sentenced to three years and three months imprisonment suspended after ten months with an operational period of four years – whether the sentence imposed was manifestly excessive – where applicant suffers adjustment disorder with depressed mood and pathological gambling – where the sentencing judge specifically considered the disorder and the pathological gambling and considered that her objective criminality should be reduced because of the presence of those diagnoses – where the sentencing judge took the applicant's psychological condition into account and reduced the applicable head sentence *R v Alexander* [2004] QCA 11, cited *R v Carleton*, unreported, Everson DCJ, DC No 184 of 2011, 28 February 2012, cited *R v Glenn*, unreported, Devereaux DCJ, DC No 2056 of 2011, 27 February 2012, cited *R v Jeffree* [2010] QCA 47, cited *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, cited

R v Lawrie [2008] QCA 97, cited
R v McCallum, unreported, Wolfe CJDC, DC No 2000 of 2011, 5 December 2011, cited

COUNSEL: The applicant appeared on her own behalf
D C Boyle for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Ann Lyons J's reasons for refusing this application for leave to appeal against sentence.

[2] **MULLINS J:** I agree with Ann Lyons J.

[3] **ANN LYONS J:** On 30 November 2011 the applicant, Kayleen Mae Baxter, was sentenced in the District Court at Brisbane in relation to two counts of stealing as a servant. Count 1 occurred in a period between 1 August 2007 and 31 January 2008. Count 2 occurred between 27 August 2009 and 12 January 2010. The applicant was sentenced to three years imprisonment in relation to Count 1 and three years and three months imprisonment in relation to Count 2. The sentences were suspended after 10 months for an operational period of four years.

Circumstances of the offences

[4] Count 1 occurred when the applicant was employed by a concrete company and she was responsible for the banking. On or about 21 December 2007 she failed to deposit $7,224.85 in cash and a number of cheques into the company's bank account. When confronted, she said she had banked the money. Her employment was terminated after an audit was conducted. She declined to be interviewed and was arrested. At the time of sentence $755 had been repaid.

[5] Count 2 was committed while the applicant was on bail for Count 1. She was employed by a cab company as a fleet services operator. She had control of a $25,000 cash float and arranged payments of dockets and vouchers to taxi operators from the float or credited their accounts. On 35 separate occasions over a four month period she stole $48,045. She would enter into the computer system a record that an operator had been paid in cash and the applicant then took that money from the float. To disguise the fraud, she would modify the database for the money to be paid into the taxi driver's account.

[6] On another single occasion between 7 and 12 January 2010 the applicant took $10,000 from the cash float. That was after an internal investigation had commenced and after she had been interviewed in relation to the investigation. When spoken to, she denied the offending and sought to cast blame on another employee. When subsequently interviewed she again denied ever logging onto the system. She declined to be further interviewed and no money had been repaid at the time of sentence.

[7] The applicant had a dated criminal history involving a conviction in 1989 of one count of house breaking and one count of false pretences. Both offences occurred on 31 August 1988. She was admitted to probation on the condition that she underwent psychological, psychiatric and other treatment as directed.

This appeal

[8] The applicant submits that there were significant factors in mitigation which should have led to her being given a non-custodial sentence. She states that she is severely depressed and has a significant gambling problem for which she needs assistance. The applicant also argues that her elderly mother has dementia and she needs to care for her.

[9] The applicant initially stated that no counselling or mental health program was available in the prison hospital. In a submission dated 13 April 2012 however the applicant has now advised that she has been in Low Security at the Helana Jones Centre at Albion for three months, having been transferred there on 10 January 2012. She indicates that she is now able to access appointments with her psychologist and doctor in the community. She also states that a Mental Health Program is available to her at the Centre which has been very helpful.

[10] In this appeal she is seeking to have her sentence set aside as it is manifestly excessive and seeks a Community Service Order.

Dr Keane's Report

[11] The applicant essentially relies on Dr Keane's Report to argue that her psychological condition is such that she should not have received a custodial sentence which required that she serve an actual period in detention. The applicant submits that Dr Keane's report indicates that she experienced a disturbing, traumatic event in her past which continues to distress her and produce recurrent episodes of anxiety.

[12] Reliance was placed on the fact that she had an unhappy and abusive first marriage. Dr Keane also indicated that she fulfilled the criteria for the following DSM-IV-TR diagnoses:

> "AXIS I 309.0 Adjustment [Disorder] with Depressed Mood
> 312.31 Pathological Gambling"

[13] Dr Keane also stated that the applicant "would benefit from a referral to a clinical psychologist for treatment for pathological gambling as well as strategies for managing depression". I note that it was not considered necessary that the applicant obtain treatment but rather than it would be of assistance to her.

[14] Dr Keane also considered that, at the time of the offences, the applicant's judgment was impaired by her pathological gambling as well as psychological factors and poor coping strategies.

[15] Dr Keane also considered that the applicant was at 'risk' of depression if she were given a custodial sentence.

Was the sentence imposed manifestly excessive?

[16] The sentencing judge had Dr Keane's report dated 6 May 2011 before him at the time of sentence and specifically noted Dr Keane's concern that if the applicant were given a custodial sentence she would be at risk of depression. The judge also took into account the applicant's plea of guilty and the indication by Dr Keane that she had a gambling addiction and how difficult that was to overcome.

[17] The judge also accepted that at the time of the offences the applicant fulfilled the criteria for two separate DSM-IV-TR diagnoses, namely a diagnosis of adjustment disorder with depressed mood as well as a diagnosis related to pathological gambling. His Honour considered all of those features and took them into account. He therefore regarded her as less culpable than others. He specifically considered that the disorder and the pathological gambling must have had a tremendously significant effect on her behaviour. He considered that her objective criminality should be reduced because of the presence of those diagnoses.

[18] His Honour also recognised that she had good references. His Honour, however, considered that no compensation had in fact been paid to the Black and White Cab Co although there was a payment plan in place. He considered that a period of three years imprisonment was appropriate.

[19] At sentence the Crown prosecutor submitted that a penalty of three to three and a half years to serve one-third was the appropriate range. The defence counsel did not cavil with the range submitted and stated that three to three and a half years was indeed within range. Defence counsel submitted that the sentence imposed should be at the bottom of the range submitted. I note that no comparable cases were referred to his Honour.

What was the appropriate sentence?

[20] There is no doubt that the comparable cases of *R v La Rosa; ex parte A-G (Qld)*,[1] *R v Lawrie*,[2] and *R v Jeffree*[3] all support a head sentence of at least three years.

[21] In *R v Alexander*,[4] Williams JA set out the relevant factors in relation to charges of stealing as a servant:

> "[24] A review of the decisions to which the court was referred indicates that there are a number of factors which have been regarded as relevant in determining the appropriate sentence where dishonesty is involved. On some occasions the critical factor has been the amount of money lost by victims of the fraud, on other occasions the decisive factor has been the persistent and systematic offending. One cannot say that either one of those factors is generally more significant than the other. Each case has to be considered in the light of its own peculiar facts; all one can say is that the amount of money lost and the regularity of offending will always be relevant considerations."

[22] In the present case there is no doubt that the applicant was suffering from some significant psychological factors. However it cannot be ignored that the applicant continued to offend whilst on bail and that she initially denied the offences on occasions when she was interviewed about them. In particular, in relation to Count 2, the offending continued despite an investigation being underway. I note, however, that the sentencing judge considered that the amount of money stolen in Count 2 was taken over a relatively short period of time.

---

1 [2006] QCA 19.
2 [2008] QCA 97.
3 [2010] QCA 47.
4 [2004] QCA 11.

[23] I also note that there was some attempted restitution in relation to Count 1. In the present case it cannot be ignored that there were significant sums involved. In Count 2 an amount of $48,045 was taken on 35 separate occasions over a four-month period and on one occasion she took $10,000.

[24] The applicant relies on three unreported, single-judge decisions, of the District Court to support the submission for a community based order. It is only in unusual circumstances that single-judge decisions of the District Court would be of assistance to this court and, in this case, an analysis of those decisions in fact supports a head sentence of three years. Whilst noting that the applicant specifically relied on those three decisions I do not propose to discuss them further. The three decisions are:

(i) *R v McCallum*, unreported, Wolfe CJDC, DC No 2000 of 2011, 5 December 2011;

(ii) *R v Glenn*, unreported, Devereaux DCJ, DC No 2056 of 2011, 27 February 2012; and

(iii) *R v Carleton*, unreported, Everson DCJ, DC No 184 of 2011, 28 February 2012.

[25] It seems to me that the applicant's real argument is in relation to the period of time she actually must serve in detention, namely 10 months. She argued that when compared to other offenders she is serving a longer period in custody. She also mistakenly believed that because the sentences imposed were suspended after 10 months, but had an operational period of four years, that would prevent her from travelling overseas in 2014 for her son's wedding in Thailand. The applicant advised the Court that, given that was not the case, her major concern had then been alleviated.

[26] In my view the sentence imposed, when compared to other cases, was in fact lenient. I consider that the sentencing judge clearly took into account the applicant's psychological factors when sentencing her to a head sentence for Count 2 of three years and three months. There were very serious offences which included stealing a large amount from the cab company when she was already on bail. The applicant is a mature woman and she abused a position of trust. Furthermore, she persistently lied about it when confronted and tried to blame someone else. Whilst there was some restitution in relation to Count 1 there was none in relation to Count 2.

[27] In my view, given the persistence of the offending whilst on bail, a more serious view could have been taken of her conduct, particularly when her psychological condition in the scheme of things could not be considered to be a 'major' condition. In this regard it must be remembered that just because a person has a psychiatric condition, this does not necessarily mean that a person will necessarily receive a more lenient sentence. In *R v La Rosa, ex parte A-G (Qld)*, Keane JA referred to this issue as follows:[5]

> "It is submitted on behalf of the respondent that it is her bulimic condition that makes her case an extraordinary one. There are several reasons why the fact that the respondent suffered from this condition should not relieve the respondent from a term of actual imprisonment as the consequence of her actions. First, it must be emphasised that even a genuine psychiatric condition is not necessarily a reason to impose a lenient sentence. As Brennan J said in *Channon v R*:

[5] Above 1 at [26].

> 'Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another.' "

[28] I consider that the sentencing judge in the present case did take her psychological condition into account in reducing the applicable head sentence.

[29] Furthermore, in my view, given the head sentence was three years and three months a suspension after just 10 months rather than 13 months meant that her psychological condition was indeed taken into account in determining the actual period in custody. The applicant had a dated criminal history and it contained a prior charge of stealing. Whilst she had some good references, the schedule of facts tendered at the sentencing hearing indicated that she had not in fact co-operated with police in their investigation. Indeed that schedule indicated that she had been difficult and obstructive during her interactions with police.

[30] In my view the sentence imposed was appropriate and could not be considered in any way to be manifestly excessive.

[31] The application for leave to appeal against sentence is refused.