SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rach* [2012] QCA 143
PARTIES:	**R** **v** **RACH, Roslyn Mary** (applicant)
FILE NO/S:	CA No 346 of 2011 DC No 61 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	1 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2012
JUDGES:	Holmes and Gotterson JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**(a) Application for leave to give and produce evidence at the appeal allowed;** **(b) Leave to appeal granted;** **(c) Appeal against sentence allowed;** **(d) In place of the sentence imposed below, order that the applicant be sentenced to four years imprisonment to be suspended after 12 months for an operational period of five years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where applicant was convicted of two offences of stealing as a servant – where the sum stolen was between $57,500 and $82,800 – where applicant tendered a letter from her GP at sentencing stating that she had a large malignancy in her right breast – where applicant seeks leave to give and produce further evidence relating to her medical condition – where respondent did not oppose the admission of further evidence – whether the evidence is properly admissible and relevant to the question of the appropriate level of sentencing in this case CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS

OCCURRING AFTER SENTENCE – where applicant was convicted of two offences of stealing as a servant – where the sum stolen was between $57,500 and $82,800 – where applicant was sentenced to six years imprisonment with parole eligibility after two years – whether the sentence was manifestly excessive considering the fresh evidence admitted

Criminal Code 1899 (Qld), s 398, s 671B(1)

R v La Rosa; ex parte Attorney-General [2006] QCA 19, considered
R v Leith [2000] 1 Qd R 660; [1998] QCA 320, considered
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, applied
R v Power [1998] QCA 32, cited
R v Sommerfeld [2009] QCA 333, considered
R v Thacker [2010] QCA 168, considered
R v Viola [1996] QCA 214, considered
R v Ward [2008] QCA 222, cited
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, considered

COUNSEL: J P Benjamin for the applicant
B J Merrin for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Martin J and the orders he proposes.

[2] **GOTTERSON JA**: I agree with the orders proposed by Martin J and with the reasons given by his Honour.

[3] **MARTIN J:** On 18 November 2011 the applicant was convicted, upon her own pleas of guilty, of two offences of stealing money, the property of her employer. The first offence concerned the period 14 October 2004 to 21 September 2009; the second concerned the period 21 September 2009 to 16 February 2010. The total sum stolen was estimated to be between $57,500 and $82,800.

[4] The maximum penalty for stealing as a servant is ten years imprisonment.[1] On each count she was sentenced to six years imprisonment with a recommendation that she be eligible for parole after two years; that is, 17 November 2013.

[5] The applicant applies for:
(a) Leave to appeal against sentence; and
(b) Leave to give and produce evidence at her appeal.

[6] For the reasons which follow, I would grant leave on each application.

The circumstances of the offences

[7] In October 2004 the applicant was appointed as one of the onsite managers of a Rockhampton motel. On 21 September 2009 the motel was sold and the new owner retained the applicant as the onsite manager. In mid December 2009 the new owner

[1] *Criminal Code* 1899, s 398, Punishment in special cases, cl 6.

noticed an abnormality in the running of the business, in that the linen usage and associated expenses were higher than they should have been given the recorded room occupancy. The new owner spoke to the applicant about this discrepancy and asked that processes be put in place to ensure that the motel was being correctly charged for the linen used.

[8] In early 2010 the motel's owner was told by another employee of the motel that the applicant was stealing money from the business. It was reported to the owner that the applicant was able to steal money by taking the cash for bookings paid in cash which were not correctly checked into the computer system. That resulted in no computer records being created for the occupancy of a motel room for a particular night. When that occurred, the applicant would, on the following day, cancel the reservation which had been paid for in cash and the money for the room was never receipted or banked into the business account.

[9] In order to confirm his suspicions the owner arranged for two persons to book into the motel on separate dates in February 2010. Both of them paid for their rooms and meals with cash. After their respective stays on separate days, the computer system was checked and there was no record of either of them staying at the motel. The spreadsheet which related to the occupancy of the motel for those dates likewise showed no record of either person staying at the motel. At that point, the owner alerted the former owner to these activities. Investigations were then undertaken with respect to the period from 2004 to 2009. This task was made difficult because the process engaged in by the applicant meant that no clear trail was left. Cross checking of reservation forms with computer records confirmed that there were many occasions on which there were no entries for guests who had stayed in the motel. The nature of the offending, that is, creating and then destroying false documents, means that it is not possible to calculate the exact sum of money stolen from each of the persons who owned the motel in the periods covered by the two charges.

[10] With respect to count 1 (covering the period October 2004 to September 2009) the estimate made by the then owner based upon the evidence which could be found was that $48,300 had been stolen. That amount does not include losses for housekeeping, linen and associated costs.

[11] A similar exercise was undertaken for the period covered by the second count, that is, September 2009 to February 2010. That calculation relied on estimates made by another employee based upon her observations of the applicant and entries made in the booking list. The best estimate able to be arrived at was for an amount between $9,200 and $34,500. As with the other calculation that does not include losses for housekeeping, linen and associated costs.

[12] In February 2010 the motel's owner had a meeting with the applicant and confronted her with the allegations of theft. She initially denied the offence but when the owner produced some documents which did demonstrate the fraud, the applicant admitted her involvement. Her employment was then terminated. The applicant declined to be interviewed by the police.

The applicant's circumstances

[13] The applicant was born in 1957. She was aged between 47 and 52 when the offences were committed. At the time of sentencing she was 54, she is now 55 years old.

[14] The applicant has one prior conviction in 1997 for stealing as a servant, for which she was sentenced to 100 hours community service and required to make restitution of $500. No conviction was recorded.

[15] Ms Rach is separated from her second husband. She has six children aged between 27 and 37.

[16] Her schooling finished when she completed grade 10. She was first married when she was 16 and her first four children were born when she was aged between 17 and 21 years old. She divorced her first husband when she was 24.

[17] She started working in a plumbing business in Rockhampton when she was in grade 9. During time she was having her first four children she was not able to work but soon returned to employment, primarily as a dressmaker, before obtaining employment in hotels. She was working at a hotel during the period of separation from her first husband when she committed the first offence of stealing as a servant.

[18] It was submitted on her behalf that the money she took from the complainants in these offences was used by her on poker machines. It was said that she used the poker machines as a means of escaping from her relationship troubles. Immediately before her illegal activities were discovered by her employer, she took some steps with respect to telephone counselling concerning her gambling problem. It was said at the time of sentencing that she had not used poker machines since February 2010.

[19] She obtained new employment in May 2010 when she began work as a housekeeper at another motel in Rockhampton. A reference from her current employer was tendered. He recorded in that reference that he was aware that she was facing charges of theft. He expressed the view that "she has continuously shown herself to be reliable, trustworthy, efficient and very supportive of our business". She was promoted to the position of duty manager in February 2011 and was responsible for running the business when the owners are not present on weekends and when they go on holidays.

The applicant's health

[20] At the hearing before the learned sentencing judge, counsel for the applicant tendered a letter from the applicant's general practitioner which recorded that in November 2011 a large malignancy in her right breast was discovered.

[21] The applicant seeks leave to give and produce evidence with respect to her medical condition.

[22] Section 671B(1) of the *Criminal Code* invests this Court with powers exercisable on the hearing of an appeal against sentence. If the court thinks it necessary or expedient in the interests of justice, it may make one or more of the orders set out in that subsection. The order which is relevant to these proceedings is contained in s 671B(1)(c) and it allows the court to:

> "receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness…"

[23] The evidence which is sought to be admitted consists of an affidavit by a lawyer acting for the applicant. Exhibited to that affidavit is a letter from a medical practitioner at Princess Alexandra Hospital. It contains the following:

> "Ms Rach has Carcinoma of the Breast.
>
> She underwent Right Total Mastectomy and Axillary Clearance on the 3rd January 2012.
>
> She is currently half way through a course of Chemotherapy which will finish in 9 weeks.
>
> She will then undergo Radiotherapy 5 days a week for 6 or 7 weeks.
>
> She will then be prescribed oral medication for some years.
>
> I have discussed her case with Associate Professor Euan Walpole, Medical Director, Division of Cancer Services at Princess Alexandra Hospital and he advises that statistically, Ms Rach has a 65% chance of 10 year survival. Of course statistics don't necessarily apply to an individual.
>
> Ms Rach's treatment may cause tiredness, nausea, anorexia, superficial burning to the skin, possible mood disturbance and temporary slowing of the mentation. It is expected that these symptoms will resolve in the months after her Radiotherapy is completed."

[24] In an affidavit sworn by the applicant she refers to her medical treatment and says:

> "7. I have found receiving treatment for my cancer whilst in custody very difficult because:
>
> (a) The chemotherapy means that my body rejects some types of food and in custody I have no control over what types of food I am given.
>
> (b) My family resides in Rockhampton and is unable to visit me.
>
> (c) I have to spend large amounts of my time in bed.
>
> (d) I am very uncomfortable a lot of the time and it is difficult for the other inmates to understand this."

[25] At the time of sentencing, the only information before the learned sentencing judge was that she had a diagnosis of breast cancer and, importantly, there was no evidence of the applicant's prognosis.

[26] The fundamental principle which applies on an application such as this was considered in *R v Maniadis* [1997] 1 Qd R 593. In the joint judgment of Davies JA and Helman J (with whom Fitzgerald P agreed), their Honours referred to s 668E(3) of the *Criminal Code* which allows "the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, [to] quash the sentence and pass such other sentence in substitution therefor, …"

[27] Their Honours referred to the decision of the High Court in *Ratten v The Queen* (1974) 131 CLR 510 and then said at 596-597:

> "Subject to what we say later about the decision of this Court in *R v Cornale* the power to admit evidence not adduced below appears to be at least as wide in an appeal against sentence as in an appeal against conviction. In an appeal against conviction the grounds of

> unreasonableness, that the evidence did not support the verdict and error of law all appear to relate to a verdict upon the evidence adduced at trial and the law existing at the time of trial. Only the ground of miscarriage of justice appears to allow the admission of evidence not adduced at trial. The sole ground in [s 668(3)] that some other sentence is warranted appears to allow at least the same latitude to an appellate court to admit such evidence.
>
> That is not to say that the discretion to admit new evidence in an appeal pursuant to [s 668(3)] will be commonly exercised by an appellate court. But **a court of appeal will admit new evidence on such an appeal, notwithstanding that it is not fresh in the above sense, if its admission shows that some other sentence, whether more or less severe, is warranted in law; in this case, that the sentence in fact imposed was unwarranted in the sense that it was manifestly excessive.** Evidence of events occurring after the date of sentence is generally unlikely to show this unless it shows what the state of affairs was at the time the sentence was imposed." (emphasis added)

[28] The decision in *Maniadis* was followed in *R v Leith* [2000] 1 Qd R 660 where leave to adduce evidence of a diagnosis of cancer after sentencing was admitted.

[29] The medical circumstances of the applicant, the evidence of her post-sentence operation and treatment, and the fact that the Crown did not oppose the admission of such evidence, has led me to the conclusion that the evidence is properly admissible and relevant to the question of the appropriate level of sentencing in this case.

The sentence

[30] His Honour took into account the circumstances outlined above, except, of course, for the new evidence relating to the applicant's medical condition. On that issue, his only remark was that the applicant "apparently [had] breast cancer".

[31] His Honour noted the fact that the applicant had gained similar employment in another motel. He said:

> "Incredibly you currently work at another motel in Rockhampton. Your work there includes taking bookings and check-ins and handling money, and managing the restaurant and cleaning staff. A reference from the owner/manager of that motel was tendered."

[32] His Honour noted that the applicant had pleaded guilty at an early time, but that was done after she had been confronted with records of what she had done. The learned sentencing judge said that she had betrayed the position of responsibility and trust which she had held and that her offending was of a sophisticated, persistent and prolonged nature. He said that it was a clear case in which deterrence loomed large and that not only should she be punished for her criminal activity but also that others in the community must be deterred by the imposition of an appropriate sentence.

[33] It is difficult to discern in the sentencing remarks what the learned sentencing judge regarded as any mitigating features. Apart from a reference to the applicant's plea

of guilty, there is little to enable an identification of any circumstances regarded as relevant to mitigation.

The submissions on the application for leave to appeal against sentence

[34] The learned sentencing judge was referred to only one decision concerning an offence of a similar nature. That was *R v Sommerfeld* [2009] QCA 333. That case involved an application for an extension of time within which to appeal. The applicant had defrauded the company for which she had worked of almost $126,000 over a period of 14 months. That amount is more than twice as much as the lower estimate of the amount stolen in this case and about 50 per cent more than the higher estimate. There were aggravating circumstances in *Sommerfeld*, in particular that her offences had been committed during the operational period of a suspended sentence imposed for stealing as a servant. In *Sommerfeld*, the suspended sentence of two and a half years was activated in full and a sentence of four years, cumulative upon the suspended sentence, was imposed.

[35] It was contended before the learned sentencing judge that *Sommerfeld* was authority for the proposition that the appropriate range in offences of this nature was four to six years. We were referred to other decisions such as *R v Power* [1998] QCA 32 and *R v Ward* [2008] QCA 222. In both those cases, the sum involved was greater than the sum in this case and in *Power* there was an earlier conviction for a substantial offence of a similar nature. Both involved a greater loss to the relevant complainant than this case.

[36] For the applicant we were referred to other authorities, including *R v La Rosa; ex parte Attorney-General* [2006] QCA 19. That was an Attorney-General's appeal against a sentence imposed for stealing as a servant the sum of $51,214.10. The thefts occurred over a period of 18 months. A head sentence of three years was imposed and it was not disturbed, but the immediate suspension of that sentence was overturned and a recommendation for post-prison community-based release after serving nine months was imposed.

[37] In *R v Thacker* [2010] QCA 168, a sentence of four years imprisonment with eligibility for parole after two years was imposed for the theft of an amount slightly over $70,000 which was taken in a period of 11 months. In that case the applicant was employed by a bank and the conviction came at the end of a trial.

[38] In *R v Viola* [1996] QCA 214, a theft of $65,000 over a period of one month by a 21 year old solicitor's secretary incurred a sentenced reduced on appeal to three years, with a recommendation for parole after 12 months.

[39] An analysis of these decisions demonstrates that the head sentence in this case was manifestly excessive when reference is made to the decisions involving amounts which are closer to those the subject of these convictions.

[40] The admission of the new evidence concerning the medical condition of the applicant militates strongly in favour of a lower sentence, even after taking into account the more comparable sentences to which reference has been made above.

[41] So far as the personal circumstances of the applicant were concerned, it must be acknowledged that his Honour only had before him a very brief letter from a general practitioner and no information as to the applicant's prognosis.

[42] Once one takes into account the evidence which has been admitted before this Court and which was not available to the learned sentencing judge, it is clear that the sentence of six years imposed was manifestly excessive. The sentence which should have been imposed, which would have recognised the broader range applicable for sentences of this type, was one of imprisonment for four years. The personal circumstances of the applicant require that recognition be given to the fact that incarceration weighs more heavily upon the applicant than it would upon a person in ordinary health. That can be achieved by affording the applicant the certainty of a suspended sentence which will take effect earlier than the date on which she would otherwise have become eligible for parole.

[43] For those reasons, I would make the following orders:

(a) Application for leave to give and produce evidence at the appeal allowed;

(b) Leave to appeal granted;

(c) Appeal against sentence allowed;

(d) In place of the sentence imposed below, order that the applicant be sentenced to four years imprisonment to be suspended after 12 months for an operational period of five years.