SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gasenzer* [2013] QCA 9
PARTIES:	**R** **v** **GASENZER, Sylvia** (applicant)
FILE NO/S:	CA No 194 of 2012 DC No 2073 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2013
JUDGES:	Margaret McMurdo P, Muir and Gotterson 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 the applicant pleaded guilty to one count of fraud as an employee in excess of $5,000 – where the applicant attempted to conceal the offending through further dishonesty – where the applicant failed to make restitution – where there was an absence of evidence that the applicant suffered from a psychiatric condition at the time of offending – where the applicant was sentenced to four years imprisonment suspended after 15 months – whether the sentence was manifestly excessive *R v Adams* [1999] QCA 326, considered *R v Allen* [2005] QCA 73, considered *R v Dwyer* [2008] QCA 117, considered *R v Fisher* [2002] QCA 259, distinguished *R v Hearnden* [2002] QCA 258, distinguished *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, considered *R v Lawrie* [2008] QCA 97, distinguished *R v Ma'afu* unreported, Court of Criminal Appeal, Qld, CA No 269 of 1990, 28 February 1991, considered *R v Parish* [2012] QCA 112, distinguished *R v Viola* [1996] QCA 214, considered *R v Ward* [2008] QCA 222, considered

COUNSEL: J R Jones for the applicant
B Merrin for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for refusing leave to appeal against sentence.

[2] **MUIR JA**: The applicant was convicted on 28 June 2012 after a plea of guilty of one count of fraud as an employee in excess of $5,000 and sentenced to four years imprisonment suspended after 15 months. She appeals on the ground that the sentence was manifestly excessive.

[3] Over a period of about three and a half years concluding on 4 December 2009 the applicant, who did bookkeeping and managerial work for her employer, overpaid herself some $57,662. She and the complainant were the only signatories of the complainant's business account. The applicant had been employed in the complainant's transport business for approximately 20 years. She was trusted implicitly by the complainant and was the recipient of generous financial and other assistance from him.

[4] The applicant took steps to hide her fraud from the firm's accountants, but it came to light when the complainant sought to purchase another vehicle and discovered that there was far less money available for that purpose than there should have been. When confronted with her fraud, the applicant said that she had borrowed some of the money and would pay it back. She also falsely claimed to have made payments into the business' superannuation account. She claimed to have documented the asserted loan and superannuation payments, but never produced any such documentation. Nor did she make any of the promised repayments.

[5] The sentencing judge found that there was never an intention that the money be repaid. He found also, by necessary implication, that the loan and superannuation claims were made with a view to obscuring the complainant's theft. The sentencing judge implicitly accepted that much of the stolen money was used to support a gambling habit, but found that there was no medical evidence to warrant the conclusion that the applicant had a significant gambling addiction related to a psychiatric condition.

[6] The applicant had no relevant criminal history and had a child who was one year old at the time of sentencing. The sentencing judge recognised that this would make any period of imprisonment more difficult for her. He also recognised the applicant's early plea of guilty.

[7] Although counsel for the applicant did not challenge the findings in relation to the absence of evidence of a psychiatric condition which might reduce the applicant's moral culpability, it was submitted that the sentencing judge gave insufficient weight to steps undertaken by the applicant to address her gambling addiction and thus her rehabilitation. This submission had scant evidentiary support. The sentencing judge was told that the applicant had "seen some psychologists in the past", but no psychologist's report was produced or relied on and the times at which

the applicant had allegedly seen a psychologist or psychologists were not identified. There was however documentary evidence that the applicant had attended Gambling Help Counselling sessions on 14 August 2009 and 15 and 26 October 2009. The evidence relied on by the applicant was thus of little significance in the scheme of things and the fact that the judge did not refer to it does not necessitate the conclusion that he failed to have regard to it. His discussion of the lack of evidence of a relevant psychiatric condition suggests a contrary conclusion.

[8] In his sentencing remarks, the primary judge said:

> "In making such an order I'm particularly cognisant of your mature years, the position of significant trust you have had, the aggravating circumstances, as I believe, in respect of the alleged loan documentations and the assertions of moneys being paid into the superannuation account, and the fact that no restitution whatsoever has been made."

[9] The applicant's failure to make restitution was not, as counsel for the applicant contended, a circumstance of aggravation but it is doubtful that the sentencing judge treated it as such. When the sentencing remarks are read as a whole, it appears that the sentencing judge's concern with the loan and superannuation payment claims and the offer of restitution was not so much that there was no loan or superannuation payments and no restitution, but that the claims were made and restitution was offered merely as stratagems to avoid or delay prosecution.

[10] Counsel for the applicant submitted that taking into account all mitigating and aggravating circumstances the appropriate sentencing range was between three and three and a half years imprisonment suspended after nine to 12 months. Counsel for the respondent submitted that the appropriate sentencing range was four to five years imprisonment and that suspension at the one third point of such term would provide appropriate recognition of mitigating circumstances. Comparable sentences relied on by counsel for the respondent were *R v Ward*,[1] *R v Allen*,[2] *R v La Rosa; ex parte A-G (Qld)*,[3] and *R v Adams*.[4]

[11] The offender in *Ward* was refused leave to appeal against a sentence of five years imprisonment suspended after 20 months for dishonestly obtaining some $97,810 from his employer over a 20 month period. The offender was the general manager of the company owned by his sister and brother-in-law and the offending involved, what was described as, a "gross breach of trust". The offender had no prior criminal history and was 32 to 33 years of age at the time of offending.

[12] *Allen*, who was his employer's general manager, dishonestly obtained some $66,146 from his employer over a four year period. He pleaded guilty at an early stage and had no criminal history. His sentence of four years imprisonment suspended after 15 months was varied by commencing the suspension after nine months to recognise, what the President described as, a "unique combination of mitigating circumstances". They included: a plea of guilty at an early stage; the making of full restitution through the sale of the offender's family home; the offender's remorse;

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1 [2008] QCA 222.
2 [2005] QCA 73.
3 [2006] QCA 19.
4 [1999] QCA 326.

and the suicide of the offender's father subsequent to his being charged. In his reasons, Jerrard JA referred, with apparent approval, to the reasons of Cooper J in *R v Ma'afu*,[5] in which his Honour referred to a range appropriate for "this type of offence where there is a serious breach of trust over a considerable period of time and where no restitution is made and where the offender has no previous convictions"[6] of from three to five years imprisonment.

[13] *La Rosa* was an Attorney-General's appeal against a wholly suspended sentence of three years coupled with an order for partial restitution over a three year period imposed after a plea of guilty for an offence of stealing some $51,214 from the respondent's employer over approximately 19 months. The respondent had no criminal history and was between 20 and 21 years of age at the time of offending. The sentencing judge placed considerable emphasis on the respondent's bulimic condition. The sentence at first instance was set aside and a sentence of three years imprisonment with a recommendation for post-prison community based release after nine months was substituted. Keane JA, the Chief Justice and Williams JA concurring, considered that even allowing for the respondent's youth and bulimia, a substantial period of actual custody was appropriate "having regard to the strong claims of general deterrence in relation to this kind of offence".[7]

[14] *Adams* was aged between 23 and 25 at the time of offending and had no prior criminal history. Holding a position of "considerable trust"[8] as the complainant's bookkeeper, she dishonestly took some $60,376 of the complainant's money over a period of about two years. She was refused leave to appeal against a sentence of four years imprisonment with a recommendation for parole eligibility after 15 months. In the reasons of the Court, it was observed that the sentence was supported by *R v Viola*,[9] in which a four year term of imprisonment with a recommendation after one year had been imposed on a 21 year old woman who had stolen $65,000 from her employer mainly to provide money to a young man with whom she was infatuated.

[15] Counsel for the applicant relied principally on *R v Parish*;[10] *R v Fisher*;[11] *R v Hearnden*;[12] and *R v Lawrie*.[13]

[16] In *Parish* the applicant's sentence of three years imprisonment with a fixed parole release date after 12 months imposed for frauds involving some $78,000 was varied by altering the parole release so that the applicant was required to serve eight months in custody instead of 12. That was because the sentence "did not give sufficient recognition to the applicant's psychiatric condition"[14] which reduced her capacity to understand the consequences of her offending conduct.

[17] The most serious offending addressed in *Fisher* was stealing as a clerk for which the applicant was sentenced to three years imprisonment suspended after six months.

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5 Unreported, Court of Criminal Appeal, Qld, CA No 269 of 1990, 28 February 1991.
6 *R v Allen* [2005] QCA 73 at 6.
7 *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19 at [32].
8 *R v Adams* [1999] QCA 326 at [14].
9 [1996] QCA 214.
10 [2012] QCA 112.
11 [2002] QCA 259.
12 [2002] QCA 258.
13 [2008] QCA 97.
14 *R v Parish* [2012] QCA 112 at [38].

The applicant had repaid a "significant portion of the amount fraudulently obtained"[15] within one month. The sentence was said to be "towards the lower end of the range for an offence of this type"[16] and the application for leave to appeal against sentence was refused.

[18] *Hearnden* was another case in which the applicant was ordered to make substantial restitution and had complied with the order before the hearing of the appeal. The appeal in *Hearnden* was heard immediately after the appeal in *Fisher*. Williams JA observed that "Bearing in mind the sentence in Fisher [which also involved substantial repayment of the moneys taken] it is difficult to justify a sentence in Hearnden which was greater".[17]

[19] The applicant in *Lawrie* misappropriated $50,974 over a 20 month period. She was refused leave to appeal against her sentence of three and a half years, suspended after 12 months. The applicant had been ordered to pay substantial sums by way of restitution and had cooperated with police.

[20] Each of these four decisions has facts which make it readily distinguishable from the case under consideration. *Lawrie* is of limited use for present purposes as this Court found merely, in effect, that the sentence was not manifestly excessive.

[21] In making use of sentences said to be comparable, it is as well to heed the following warning of Keane JA in *R v Dwyer*:[18]

> "An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process."

[22] The sentences relied on by the respondent provide ample support for the sentence imposed by the sentencing judge. The applicant was aged between 38 and 41 at the time of her offending. She betrayed the considerable trust reposed in her over a lengthy period. When her fraud was finally detected, she resorted to more dishonesty in an attempt to avoid the consequences of her wrongdoing. The applicant's sentence was not shown to be manifestly excessive. Accordingly, I would refuse leave to appeal against sentence.

[23] **GOTTERSON JA:** I agree with Muir JA that the application should be refused and with his Honour's reasons for refusal.

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15 *R v Fisher* [2002] QCA 259 at 4.
16 At 4.
17 *R v Hearnden* [2002] QCA 258 at 3.
18 [2008] QCA 117 at [37].