# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v McMahon* [2013] QCA 240 |
| PARTIES: | **R**<br>**v**<br>**McMAHON**, **Patrick Scott**<br>(applicant) |
| FILE NO/S: | CA No 72 of 2013<br>DC No 372 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Beenleigh |
| DELIVERED ON: | 30 August 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 August 2013 |
| JUDGES: | Margaret McMurdo P and Muir and Fraser JJA<br>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.**<br>**2. Appeal against sentence allowed to the limited extent of substituting a parole eligibility date of 1 September 2014 for the existing parole eligibility date of 28 February 2015.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to six counts of fraud as an employee on one indictment and to one count of fraud as an employee to the value of $30,000 or more on a later indictment – where the applicant was sentenced to two years imprisonment for each offence charged on the earlier indictment and five years imprisonment for the offence on the later indictment – where all sentences were ordered to be served concurrently and a parole eligibility date of 28 February 2015 was fixed – where the offence the subject of the later indictment was committed when the applicant was on bail for the offences the subject of the earlier indictment – where the applicant subsequently committed stealing and fraud offences while on bail for the offence the subject of the later indictment – where the applicant's father effected restitution of the balance of the |

money the subject of the later indictment – where the applicant submits that an earlier parole eligibility date should have been imposed – where the applicant contends that the sentencing judge failed to give sufficient consideration to the payment of restitution, the applicant's guilty pleas, limited criminal history and demonstrated contrition and remorse – whether the sentence was manifestly excessive

*R v Alexander* [2004] QCA 11, cited
*R v Allen* [2005] QCA 73, cited
*R v Amituanai* (1995) 78 A Crim R 588; [1995] QCA 80, cited
*R v Elliott* [2000] QCA 267, cited
*R v Grant-Watson* [2004] QCA 77, cited
*R v Jensen; ex parte A-G (Qld)* [1998] QCA 275, cited
*R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, cited
*R v Matauaina* [2011] QCA 344, cited
*R v O'Keefe* [1959] Qd R 395, cited
*R v Power* [1998] QCA 32, cited
*R v Scott* [1997] QCA 300, cited
*R v Sommerfeld* [2009] QCA 333, cited
*R v Ward* [2008] QCA 222, cited

COUNSEL: R J Clutterbuck for the applicant
P McCarthy for the respondent

SOLICITORS: Ian W Bartels & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for granting this application for leave to appeal against sentence and allowing the appeal to the limited extent of substituting a parole eligibility date of 1 September 2014 for the existing parole eligibility date of 28 February 2015.

[2] The comparable cases discussed by Muir JA demonstrate that the sentence imposed here was manifestly excessive, after taking into account the applicant's plea of guilty (albeit initially a partially contested guilty plea), the payment of restitution and the circumstances of the offending. It is true that courts do not allow wealthy offenders or those from wealthy families with the capacity to pay compensation to buy their way out of an appropriate custodial sentence. Restitution, however, remains a relevant mitigating factor in that it benefits the community through compensating the victim. It usually demonstrates that the offender has, in the end, not profited from his crime. It is often a tangible demonstration of genuine remorse. See *R v Allen*.[1] Although only the first factor is of primary relevance here, the payment of restitution remained an important mitigating feature in this case. The applicant has a concerning criminal history but this was his first sentence to a term of imprisonment. The five year sentence is a heavy one, although within range. The facts of the present offending and his criminal history strongly suggest that his anti-social behaviour is drug-related. He is a relatively young man and is fortunate

[1] [2005] QCA 73, Jerrard JA, 11; Margaret McMurdo P, 12; Jones J agreeing with both.

to have the support of his family. If he is to rehabilitate, he will benefit from a lengthy period of parole supervision in the community.

[3] I agree with the orders proposed by Muir JA.

[4] **MUIR JA: Introduction** The applicant pleaded guilty to six counts of fraud as an employee on one indictment and to one count of fraud as an employee to the value of $30,000 or more on a later indictment. He was sentenced on 1 March 2013 to two years imprisonment for each offence charged on the earlier indictment and to five years imprisonment for the offence on the later indictment. All sentences were ordered to be served concurrently and a parole eligibility date of 28 February 2015 was fixed. The applicant seeks leave to appeal against the five year sentence.

**The offending conduct**

[5] The offending the subject of the earlier indictment occurred between 27 February and 8 April 2008, when the applicant was employed as a hotel manager at the Parkwood Tavern. On six separate occasions, he created bogus invoices for non-existent design and printing services for which he procured payment by his employer. The total amount paid to the applicant was $9,139. When interviewed by police, the applicant claimed that he had in fact provided the services.

[6] The offending the subject of the later indictment occurred between 22 September and 26 October 2010 when the applicant was the night manager of the Park Ridge Tavern. In that capacity, it was the applicant's responsibility to record the daily takings for three areas of the Tavern's operations, sign deposit slips for each lot of takings and place them in separate tamper proof bags. The bags were then placed in a drop safe from which they were collected three days a week by a security company.

[7] After noticing accounting discrepancies, the general manager of the Tavern conducted investigations which disclosed that $31,994.25, the takings of one of the three operational areas, was missing. CCTV footage showed the applicant placing the money in question in a tamper proof bag but failing to seal the bag, which he placed on top of the drop safe rather than in it. Confronted by the general manager, the applicant admitted taking the money and offered to retrieve it that night. Due to the involvement of the police, he did not do so.

[8] Police found $8,249.20 of the missing money in the applicant's wallet and in a backpack in the applicant's car. The balance of $23,745.05 was later repaid by the applicant's father. On 11 occasions, the applicant used the takings money as a form of credit by misappropriating it, spending it and replacing the money taken with other takings. The total amount misused in this way was $151,195.74.

**The applicant's antecedents**

[9] The applicant was 31 years old when sentenced. The later offence was committed when the applicant was on bail for the earlier offences. He also committed a series of stealing and fraud offences between January and April 2012 whilst on bail for the later offence. He was fined $1,500 for those offences and ordered to make restitution. The applicant was also convicted of stealing as a servant on 3 March 2011. The offence occurred on 11 June 2010 when he was employed as the night manager of the Port Office Hotel. He was subjected to a 12 month probation order and ordered to pay $1,800 restitution.

**The applicant's argument**

[10] Counsel for the applicant submitted that, although the head sentence imposed was within range, it should have been "toward the lesser end of the scale" and accompanied by an earlier parole eligibility date. It was contended, at least by inference, that the exercise of the sentencing discretion miscarried in consequence of the sentencing judge's failure to give any, or any sufficient, consideration to: the early plea of guilty in respect of the earlier indictment; the restitution and recovery of all the money the subject of the later indictment; the guilty plea in respect of that indictment; the applicant's limited criminal history; and the applicant's demonstrated contrition and remorse. The "contrition and remorse" was said to be inferred from the applicant's plea of guilty in respect of the later indictment thus limiting the contested sentence to the challenge of only one witness.

[11] In oral submissions, counsel for the applicant did not submit that the head sentence should be disturbed.

**Consideration**

[12] There was no finding by the sentencing judge that the applicant had shown contrition or remorse. Such a finding would have been unlikely having regard to the stealing offences committed by the applicant whilst on bail for the Park Ridge Tavern fraud.

[13] There was an early plea of guilty in respect of the earlier indictment and an early admission in respect of the later indictment which was limited to the misappropriation of the $31,994.25 of which the prosecution had overwhelming proof. It was only on the morning of the second day of a contested sentence hearing in respect of the balance of the misappropriated sum of $151,195.74 that the applicant accepted the prosecution's particularised allegations.

[14] The reliance on the applicant's limited criminal history is misplaced. The applicant, whilst on bail for the offences on the earlier indictment, committed the offence of stealing as a servant on 11 June 2010. He committed the Park Ridge Tavern fraud whilst on bail for offences the subject of the earlier indictment and he committed other dishonesty offences between 30 January and 20 April 2012 whilst on bail. This conduct demonstrated a marked disregard by the applicant for his legal obligations as well as for the property rights of his fellow citizens and called into question his prospects of rehabilitation.

[15] In relation to the applicant's argument based on full recovery and restitution, counsel for the respondent referred to the following observation of the Court in *R v Jensen; ex parte A-G (Qld)*:[2]

> "Although the restitution came substantially from money belonging to Mr Jensen's wife, it should be taken into account in his favour. This is not to say, however, that the source of the funds should be ignored; it cannot be the law that a thief will necessarily escape punishment or receive substantially reduced punishment because he can obtain funds from a member of his family, to make restitution."

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[2] [1998] QCA 275 at [18].

[16] Reference was made also to Stanley J's statement in *R v O'Keefe*:[3]

> "Offenders cannot bargain with the court, and, in effect, buy themselves out of sentences."

[17] It was conceded, however, that Stanley J recognised that the offer or payment of restitution, genuinely made, may be relevant to mitigation as demonstrative of remorse. Restitution, however, has a broader significance even if effected by a third party on the offender's behalf.

[18] In *R v Elliott*,[4] Davies and Thomas JJA, McPherson JA agreeing, referring to *R v Amituanai*,[5] said:

> "The actual harm caused is an important factor in the sentencing process and of course the relative lack of harm is a factor that must be reflected in the sentence." (citations omitted)

[19] Their Honours were referring to physical harm resulting from an offence of violence but the principle also has application to dishonesty offences. In *R v La Rosa; ex parte A-G (Qld)*,[6] Keane JA, the Chief Justice and Williams JA agreeing, approved the following statement of Williams JA in *R v Alexander*:[7]

> "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."

[20] There is support in decisions of this Court for the view that restitution will tend to be a significant mitigating factor. In *R v Allen*,[8] Jerrard JA, with whose reasons the other members of the Court agreed, after observing that the cases reviewed by him demonstrated a consistent recognition "of the significant benefit that restitution in full actually gives to victims of dishonest behaviour and to the community", observed:[9]

> "… restitution can also be evidence of remorse quite independently from the benefit that it gives to the victim. That benefit is appropriately extended to the person being sentenced usually by significant reduction in any actual term of imprisonment imposed."

[21] The respondent contended that a sentence of at least four years for the Park Ridge Tavern fraud alone was supported by comparable authority for the offence

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3 [1959] Qd R 395 at 400.
4 [2000] QCA 267 at [10].
5 (1995) 78 A Crim R 588 at 596–597.
6 [2006] QCA 19 at [30].
7 [2004] QCA 11 at [24].
8 [2005] QCA 73.
9 *R v Allen* [2005] QCA 73 at 11.

of fraud as an employee to the value of $30,000 or more. Reference was made to *R v Matauaina*,[10] *R v Grant-Watson*,[11] *R v Jensen; ex parte A-G (Qld)*[12] and *R v Sommerfeld*.[13]

[22] In *Matauaina*, where the fraud involved $27,080, a sentence of three and a half years imprisonment with a parole eligibility date at the halfway point was left undisturbed on appeal, except for the setting aside of a compensation order. The offender had a significant criminal history.

[23] Fraser JA's review of comparable sentences in *Matauaina* is of particular use for present purposes. After an extensive review of authorities, his Honour concluded that the range in the instant case "extended at least as high as four years when regard was had to cases such as *R v Grant-Watson* and *R v Scott*".[14]

[24] In *Scott*,[15] the offender was convicted after a trial of misappropriating in excess of $48,000. He was 48 years of age with a criminal history which included convictions for dishonesty. The sentence of four years imprisonment was held not to be manifestly excessive.

[25] In *Grant-Watson*, the total amount misappropriated was some $50,000 of which $19,000 was unrecovered. The applicant had a "not inconsiderable criminal record of offences of dishonesty"[16] and a sentence of four years imprisonment suspended after 18 months for a period of four and a half years was not disturbed on appeal.

[26] The applicant in *Jensen* was sentenced to three years imprisonment, wholly suspended, for misappropriating over $200,000 from the accounts of two senile women from whom he held a power of attorney. The circumstances of the case were unusual. The women who were defrauded died and, by the time of trial, the beneficiaries of their estates were the three nieces of one of the women, one of whom was the applicant's wife. All but $35,000 of the misappropriated monies had been effectively repaid from the applicant's wife's share of the estate monies and by means of the sale of the applicant's family home. The two nieces, who were the victims of the crime, did not want the applicant punished. The Court set aside the sentence imposed at first instance and imposed a sentence of four years imprisonment with a recommendation that the applicant be considered for parole after one year.

[27] In *Sommerfeld*, the 31 year old applicant was sentenced to four years imprisonment to be served cumulatively with an activated two and half year suspended sentence with a parole eligibility date after two years and one month. The applicant had misappropriated in excess of $125,000 by means of "a systematic and complex transferral of funds on 20 different occasions, involving falsification of documents".[17] The suspended sentence had been imposed in respect of a similar fraud offence, which involved a lesser sum of money. In her reasons, Ann Lyons J

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10 [2011] QCA 344.
11 [2004] QCA 77.
12 [1998] QCA 275.
13 [2009] QCA 333.
14 *R v Matauaina* [2011] QCA 344 at [21].
15 [1997] QCA 300.
16 *R v Grant-Watson* [2004] QCA 77 at 3.
17 *R v Sommerfeld* [2009] QCA 333 at [36].

remarked that a range of between four and six years imprisonment was agreed by both counsel and that the range was supported by *R v Power*[18] and *R v Ward*.[19]

[28] In his sentencing remarks, the sentencing judge emphasised both general and personal deterrence. He was right to do so. It does not appear to me, however, that the sentencing judge made proper allowance for: the early plea of guilty in the case of the earlier indictment; the plea of guilty following the abandonment of the contested sentence hearing in respect of the later indictment; and the full restitution in respect of the Park Ridge Tavern frauds. It should be appreciated of course that here, as is normally the case, repayment of monies misappropriated by an offender does not recompense the victim for interest foregone or the cost and inconvenience involved in uncovering the fraud, cooperating with authorities and adopting systems to guard against any future dishonesty.

[29] The sentencing judge concluded that the appropriate sentencing range was "in the order of five to six years". In determining that range, the sentencing judge took into account the applicant's criminal history. In respect of the Park Ridge Tavern offending, his Honour observed:

> "In my view, it really makes little difference whether you secreted those other ten transactions off the premises, or on the premises. The reality is that the fraud is still a fraud of $151,195.74, of which at least $31,000, we know for sure was removed from the premises and some $22,000 of that, on your own instructions and consistently with the amount that's been located, was handed to someone else, presumably as you say, the outlaw motorcycle gang.
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> The rest of it, it seems, your instructions were that you had it in case – to have access to it in case you were visited and if that is accepted [at] face value, quite frankly it doesn't matter where it was secreted, because you were dealing with it [in a manner that was] inconsistent with the rights of the true owner who were your employers, Karamere Proprietary Limited. You will then be dealt with, of course, on the basis that you committed a fraud in the order of $151,000, although it has ultimately all been recovered."

[30] The sentencing judge accurately stated that the applicant had "committed a fraud in the order of $151,000" but, in my respectful opinion, his Honour failed to take into account sufficiently the fact that the victim company had been deprived of only a fifth or so of that sum at any given time and, ultimately, had suffered no direct financial loss. The principles in relation to the significance of the extent of the harm suffered by the victim and the making of restitution were not sufficiently addressed.

[31] The sentencing discretion thus miscarried and this Court, being in a position to re-sentence, should do so. I would order that leave to appeal be granted and that the appeal be allowed.

[32] Having regard to the applicant's prior criminal history and the offending the subject of the earlier indictment for which no restitution was made, I would not interfere with the head sentence of five years in respect of the offending the subject of the

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18 [1998] QCA 32.

19 [2008] QCA 222.

later indictment which, in any event, was unchallenged. I would, however, substitute a parole eligibility date of 1 September 2014, being the date 18 months from 1 March 2013, the date of sentence, for the existing parole eligibility date of 28 February 2015.

[33] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.