SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wilson* [2013] QCA 260
PARTIES:	**R** **v** **WILSON, Tania Ann** (applicant)
FILE NO/S:	CA No 126 of 2012 DC No 2233 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2013
JUDGES:	Muir and Gotterson JJA and North J 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 was convicted of three counts of fraud and sentenced to a period of seven years imprisonment for each of counts 1 and 3 and a lesser concurrent term for count 2 – where the applicant contended that the sentence was manifestly excessive – where the applicant conceded no identifiable error of principle but contended that the sentence was impermissibly at the high end of the range – whether the sentence was manifestly excessive in all the circumstances *Criminal Code* 1899 (Qld), s 408 *R v Cox* [2010] QCA 262, cited *R v Shiels* [2011] QCA 115, cited *R v Spalding* [2002] QCA 538, distinguished *R v Tindale* [2008] QCA 24, cited
COUNSEL:	B H P Mumford for the applicant V A Loury for the respondent
SOLICITORS:	Fisher Dore Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application should be refused for the reasons given by Gotterson JA.

[2] **GOTTERSON JA:** After a trial over five days in the District Court at Brisbane, the applicant, Tania Ann Wilson, was convicted on three counts of fraud. Under two of the counts, numerous offences were charged. The applicant dishonestly applied property belonging to her employer. The crimes were committed against ss 408(1)(a)(i) and (2)(b) of the *Criminal Code* (Qld).

[3] The applicant was sentenced on 9 December 2011 to seven years imprisonment on counts 1 and 3 and to three years imprisonment on count 2. All sentences are concurrent. A parole eligibility date of 9 June 2015 was fixed.

Circumstances of the offending

[4] The two complainant companies, Miltcoe Pty Ltd ("Miltcoe") and Jendale Pty Ltd ("Jendale"), conducted a family run business. The directors of each company were a married couple, Robert and Jene Jones. Mr Jones was principally a property developer although he had other interests including owning a motel. The applicant commenced employment with Miltcoe in 2002. She was a personal assistant to Mr Jones who was the managing director. Part of her role involved preparing the wages, paying invoices and banking. For that role she had access to the bank accounts of both Miltcoe and Jendale.

[5] The applicant used two methods to defraud. She would falsify and forge cheques directing payment to her credit card accounts (counts 1 and 2) and she would overpay herself (count 3).

[6] On 24 occasions between 5 October 2007 and 3 September 2008, the applicant made payments to her American Express and David Jones credit card accounts from Miltcoe's funds. She would falsify cheque butts, change payee details and forge the signatures on the cheques. By this method she was able to defraud her employer of $225,327.05. These frauds were the subject of count 1.

[7] On a single occasion on 30 June 2008, the applicant misdirected a cheque for $11,200 into her American Express account. That cheque was drawn on Jendale's bank account. This fraud was the subject of count 2.

[8] With respect to count 3, the applicant was entitled to a salary of $550.00 per week which was deposited into her bank account. In addition to that sum, she made unauthorised withdrawals of $650.00 per week from Miltcoe's funds and deposited them to her National Australia Bank Visa account. She did this between 1 June 2006 and 3 September 2008. On two occasions she deposited in excess of $2,000 into her Visa account in addition to her salary. In all, about 120 fraudulent transactions were involved. By this method she defrauded her employer of $77,647.50.

[9] It was accepted by the applicant during the course of the trial that Mr and Mrs Jones had been generous to her. She was provided with a credit card to make work-related purchases. She was also provided with a vehicle in her second year of employment which she used for almost two years. Mr and Mrs Jones paid her daughter's private school fees. On two occasions she received a holiday at their expense.[1] There was evidence that Mr and Mrs Jones had also paid some legal fees for the applicant and some medical expenses for her daughter.[2]

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1 AB 94 Tr2-29 LL24-44.

2 AB 114 Tr2-49 LL29-30; AB 217 Tr3-51 LL49-50.

[10] Mr Jones described the applicant as a good employee whom he trusted implicitly.[3]

Matters referred to by the sentencing judge

[11] The learned sentencing judge referred to the factual aspects of the offending which I have mentioned. In addition, his Honour referred to the following matters:

(a) that the matter proceeded to trial;
(b) the maximum penalties for each count (10 years for counts 1 and 3 and five years for count 2);
(c) the applicant's age at the time of the offending (between 34 and 36 years) and at sentence (39 years);
(d) the absence of remorse which was aggravated by insinuations made against Mr Jones during the trial. The applicant's counsel put to him in cross-examination that he had propositioned and touched the applicant sexually. Mr Jones denied that.[4] The allegations were repeated by the applicant in her evidence-in-chief.[5] It was also put to Mr Jones that he was paying the applicant in two separate amounts to avoid the payment of income tax.[6] He denied that emphatically;[7]
(e) the breach of trust reposed in her by her employer in circumstances where she had been assisted with her personal expenses, with a custody dispute, and in caring for her ill daughter;
(f) that despite a large amount of money having been taken, there was no prospect of restitution;
(g) that there were no mitigating features;
(h) that the applicant had no previous convictions;
(i) that her 14 year old daughter who had health problems, would have to live with her grandparents during the applicant's imprisonment;
(j) a reference tendered on the applicant's behalf which showed that she could endear herself to others, as she had done to Mr and Mrs Jones;
(k) that the applicant's conduct was not sophisticated; and
(l) that the applicant had abused a friendship.

Ground of appeal

[12] The applicant has advanced one ground of appeal only. It is that the sentence is manifestly excessive. At the hearing of the application, her counsel frankly acknowledged that he could not contend for any identifiable error of principle on the part of the learned sentencing judge. He summarised the argument for the applicant as that a combination of circumstances shows that the sentence is "not only at the high end of the range, but impermissibly so". The appropriate sentence for each of counts 1 and 3, he submitted, was six years imprisonment with eligibility for parole after serving half of that period.

[13] The applicant sought to illustrate the point by reference to three cases, two of which, *R v Tindale*[8] and *R v Spalding*,[9] were referred to at the sentence hearing. The third was *R v Shiels*.[10]

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3 AB 95 Tr2-30 LL38-40.
4 AB 126 Tr2-61 LL30-53.
5 AB 223 Tr 3-57 LL10-25.
6 AB 132 Tr2-67 LL50-51.
7 *Ibid* LL52-56.
8 [2008] QCA 24.
9 [2002] QCA 538.
10 [2011] QCA 115.

[14] In *Tindale*, a sentence of seven years imprisonment with a parole eligibility date after serving 28 months was imposed upon a plea of guilty to having committed 132 fraudulent transactions carried out over a period of four and a half years. The offender misappropriated in excess of $426,000 from her employer, a family business run by a married couple with whom she developed a friendship. She was employed as a bookkeeper. She had a comprehensive understanding of all the bookkeeping and accounting for the business. She could access automated banking. With this and her knowledge of the business she was able to effect the frauds and cover them up for some time. The offender had psychological disorders of depression, obsessive compulsivity and dependant personality traits which in all likelihood had impaired her reasoning and judgment. On appeal, the sentence was held to be within the sentencing discretion.[11]

[15] In *Spalding*, the offender was a pay-roll master and commercial manager with four separate companies. Through a manipulation of the pay-roll system both manual and then computerised, he misdirected a total of $302,873 of which $222,378 went to him and the remainder to the Australian Taxation Office. An adverse consequence for many employees in terms of entitlement to government benefits resulted through overstatement of their income. The offender pleaded guilty. He made full admissions, but no restitution. He was sentenced to six years imprisonment with a recommendation for post-prison community based release after two years. McMurdo P (with whom Helman and Philippides JJ agreed) considered the sentence to be a sound exercise of the sentencing discretion. Her Honour observed:

> "It adequately reflects the applicant's psychological state, which explains but does not excuse his conduct, and his co-operation, remorse, early ex officio plea of guilty, prior good history and other mitigating factors."

[16] In *Shiels*, the offender was sentenced after a trial to concurrent terms of six years imprisonment on four counts of dishonestly appropriating about $308,900 from her employer in 21 transactions over a period of about nine months. She, too, made unfounded allegations of sexual misconduct against her former employer. In affirming the sentence, Chesterman JA (with whom Muir and Fraser JJA agreed) observed:

> "[40] The factors most relevant to the exercise of the sentencing discretion in these cases are the amount of money taken; the length of time over which the offending occurred; the number of offences in the period; and remorse or lack thereof as indicated by whether the sentence was imposed on a plea or after trial and as indicating the likelihood of re-offending. Obviously the need for deterrence is greater where there is a lack of remorse and refusal to accept the wrongfulness of the conduct being punished.
>
> [41] It is not enough for an applicant to point to similar cases in which a lesser penalty was imposed. If there are cases in which the same or a more severe penalty was imposed the court can conclude that the penalty was within the appropriate range."

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11 At [27].

[17] His Honour then mentioned one additional case which was referred to by counsel for the respondent on this application, *R v Cox*.[12] As to that case and *Tindale*, he noted:

> "[42] Cox was sentenced effectively to seven years' imprisonment after a trial. There were 11 offences over an 18 month period involving over $300,000. He had no prior convictions but was a mature man who showed no remorse and fled the jurisdiction for a number of years to avoid prosecution. In *Tindale* [2008] QCA 24 a 42 year old woman without prior criminal history who dishonestly obtained over $400,000 in a period of four and a half years was sentenced to seven years' imprisonment after pleading guilty. …"

[18] Finally, in refusing the application, his Honour observed:

> "[43] *Cox*, in particular, makes the applicant's submissions impossible to accept. The amount involved was very similar, the period of offending was slightly longer but the number of offences was smaller. Cox was sentenced to seven years' effectively. *Tindale* likewise stands in the applicant's path. Although the money involved was more and the period of offending was substantially longer Tindale was sentenced to seven years' imprisonment after a plea of guilty. Those cases show the sentence imposed on the applicant to have been appropriate. …"

[19] These cases confirm that the exercise of the sentencing discretion here was soundly undertaken. *Cox*, where the effective sentence was seven years' imprisonment, is arguably the most comparable of them. In *Tindale*, although the offending was over a longer period and more money was involved, there was a guilty plea. By contrast, in *Spalding*, where a comparable total amount was misappropriated, there was a guilty plea and the additional mitigating circumstances to which McMurdo P referred and in *Shiels*, whilst a comparable total amount was misappropriated, the offending was over a much shorter time and involved markedly fewer transactions.

Disposition

[20] For these reasons, the sole ground of appeal has no prospects of success. The application for leave to appeal against sentence must be refused.

Order

[21] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[22] **NORTH J:** I agree that the application for leave to appeal should be refused for the reasons given by Gotterson JA.

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12 [2010] QCA 262.