SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smallwood* [2014] QCA 70
PARTIES:	**R** **v** **SMALLWOOD, Brett Cameron** (applicant)
FILE NO/S:	CA No 255 of 2013 DC No 167 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	11 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2014
JUDGES:	Chief Justice and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was an accountant practising as a sole practitioner – where the applicant lodged tax returns purportedly on instructions from clients and deposited the refunds into a bank account controlled by him – where the deposits were made without authority – where the amounts involved were more than $30,000 – where the applicant initially provided fraudulent correspondence to police pretending he had authorisation – where the applicant declined to assist police in their investigation – where the applicant changed his plea to guilty to two counts of fraud on the third day of trial – where the applicant was sentenced to five years imprisonment on each count to be served concurrently – where the parole eligibility date was fixed at 5/12^{ths} of the sentence – whether the term of imprisonment was manifestly excessive – whether the sentence should have been suspended rather than a parole eligibility date fixed *Criminal Code* 1899 (Qld), s 408C *Criminal Code and Other Acts Amendment Act* 2008 (Qld), s 71

R v Campbell [2009] QCA 203, cited
R v Lather [2011] QCA 143, applied
R v Ward [2008] QCA 222, cited
R v Whiting [2013] QCA 18, cited

COUNSEL: C F O'Meara for the applicant (pro bono)
C N Marco for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree that the application should be refused, for those reasons.

[2] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[3] **GOTTERSON JA:** On 9 September 2013 and on the third day of his trial in the District Court at Ipswich, the applicant, Brett Cameron Smallwood, changed his plea to guilty to two counts of fraud. Count 1 related to the period between 2 and 14 December 2002 and Count 2 to the period between 17 December 2002 and 18 January 2003. Each count alleged an offence against s 408C(1)(a)(ii) of the *Criminal Code* (Qld) ("Code") by dishonestly applying the property of another to the use of a company, Garden Makers (Qld) Pty Ltd ("Garden Makers"), of which the applicant was the sole director and, in the case of Count 1, to the use of another person also. In the indictment, for each count, the property involved was said to have a value of more than $30,000.

[4] That day the applicant was convicted and sentenced to five years imprisonment on each count, the terms of imprisonment to be served concurrently. A parole eligibility date of 9 October 2015 was fixed. By that date, the applicant will have served 5/12^{ths} of the sentence.

[5] By an application filed on 4 October 2013, the applicant has sought the leave of this Court to appeal against his sentence.

Circumstances of the offending

[6] The applicant was a qualified accountant and member of CPA Australia. During the periods stated in the counts, he carried on professional practice as a sole practitioner under the name Beecham Smallwood at Ipswich.

[7] One of his clients was Mr Allan Jamieson. Acting on the applicant's advice, Mr Jamieson instructed him to incorporate a company to be called Kensington Investments Pty Ltd. The applicant did not register a company with that name with the Australian Securities and Investment Commission. However, without the knowledge of Mr Jamieson, he did lodge tax returns with the Australian Taxation Office ("ATO") "on behalf of" a Kensington Investments Pty Ltd for the financial years ending 30 June 1999 and 2000. He did this on 20 November and 3 December 2002 respectively. Tax refund cheques in the respective amounts of $32,409.36 and $34,884.55 were issued by the ATO and forwarded to the applicant. He received the first cheque on 28 November 2002 and the second on 13 December that year. He deposited both cheques to his trust account.

[8] The applicant used the proceeds of the two cheques to pay the fees of a law firm which had acted for him in relation to a professional disciplinary matter and to make deposits totalling $57,018.67 to the bank account of Garden Makers. The payment to the law firm and the deposits were made without authority. Those dealings were the subject of Count 1.

[9] Count 2 concerned another client, Mr Murray Beanland. On his instructions, the applicant arranged for the incorporation of a company, MGB Maintenance Services Pty Ltd ("MGB"). On 12 December 2002, and after Mr Beanland had ceased to be a client of his, the applicant lodged income tax returns with the ATO on behalf of MGB for the years ending 30 June 1999 and 2000. On 2 January 2003, he received income tax refund cheques payable to MGB in the amounts of $28,321.12 and $26,944.57. The proceeds of these cheques, which totalled $55,265.69, the applicant likewise diverted to the bank account of Garden Makers.

[10] The Count 1 frauds were detected in 2009 by an accountant, Mr Denis Nielsen, who by then had taken over the applicant's practice. The Count 2 frauds were detected in 2011 as a consequence of the investigation of the earlier ones. Initially, the applicant produced fraudulent correspondence to police in an attempt to pretend that his dealings with the monies had been authorised by his former clients.[1] Thereafter, the applicant declined to assist police with their investigations. No restitution has been made by the applicant. No arrangements for the same have been offered by him. The applicant's pleas of guilty were made after each of Mr Jamieson, Mr Beanland and Mr Nielsen had given evidence at the trial.

The applicant's professional history

[11] The applicant did not have a history of criminal offending. In 1997, he was convicted of an offence under the *Taxation Administration Act* 1953 (Cth) and fined $250 for failing to furnish an income tax return. In 2005, he was subject to disciplinary proceedings by CPA Australia for failing to observe a proper standard of professional care, skill or competence. His membership was forfeited as a result and he was required to pay costs of $1,930. In 2006, the applicant was fined $1,000 for an offence under the *Trust Accounts Act* 1973 (Qld) of failing to ensure proper trust account audits between 2004 and 2006.

The applicant's personal circumstances

[12] The applicant was 40 years of age at the time of the offending. He was 51 years old when sentenced. The learned sentencing judge noted that the applicant had had financial difficulties at the time of the offending with personal debts of $600,000. He suffered depression and had sustained a back injury since the offending. His family, including his two children, had suffered stress. Evidence at the sentence hearing revealed that his elder daughter had been bullied at school after press reports of her father's offending and that she had an auto-immune disease. The applicant had continued to benefit from the support of his family.

The proposed ground of appeal

[13] The application for leave states the applicant's proposed ground of appeal to be that the sentence was manifestly excessive in all the circumstances. In written

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1 AB 80-86.

submissions, counsel for the applicant who acted pro bono and had not been counsel at the sentence hearing, identified two aspects to this ground. One is that the period of imprisonment of five years is too long. The other is that the sentence should have been suspended rather than a parole eligibility date fixed. The applicant submits that an appropriate sentence on each count is four years imprisonment, to be served concurrently, with a suspension upon serving 5/12^{ths} of that term. The applicant also submits that there should be a declaration that time served since 9 September 2013 be declared time served under the sentences.

The duration of the imprisonment

[14] At the time of the offending, s 408C(2) set a maximum penalty of 10 years imprisonment for a s 408C(1) offence where one or more of a number of specified circumstances of aggravation were present. One of them was that the value of the property involved was $5,000 or more.[2] From 1 December 2008, s 408C(2) was amended in two relevant respects. The maximum penalty was increased to 12 years imprisonment and paragraph (d) was altered by way of substitution of the amount of $30,000 for the amount of $5,000.[3] Those changes need to be borne in mind in having regard to sentences for comparable offending after that date.

[15] At the sentence hearing, the applicant's counsel had submitted that an appropriate sentence on each count was between three and four years imprisonment. However, in the course of argument, the concession was made that comparable sentences did indicate that five years was "at the upper end of what should be the appropriate sentence range".[4]

[16] In written submissions, counsel for the applicant referred to the sentences in *R v Campbell*[5] and *R v Whiting*[6] as illustrating that a term of five years was manifestly excessive taking into account the applicant's lack of criminal history. Reference was made also to other instances of sentences of less than four years for fraud with a concession that they each involved extensive cooperation by the offender at the investigation stage and prompt pleas of guilty. Those instances do not provide assistance in a case such as this where there was not only a lack of cooperation but also deception by the applicant in the initial stages of the police investigation.

[17] In *Campbell*, the offender was imprisoned for four years suspended after 18 months (for an operational period of four years) for frauds involving $124,000 and attempted frauds involving $140,000 over an 18 month period. His sentence was not disturbed on appeal. Like the applicant, the offender had no criminal history and had made no restitution. He had, however, cooperated extensively with the investigations and pleaded guilty before trial.

[18] In *Whiting*, the offender was a medical practice employee aged between 30 and 35 years old at the time of the offending. At sentence, she was the mother of a three and half year old child. Over a period of about four years and 10 months

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2 *Code*, s 408C(2)(d).
3 *Criminal Code and Other Acts Amendment Act* 2008, s 71.
4 AB 42; Tr 1-29 LL 2-4.
5 [2009] QCA 203.
6 [2013] QCA 18.

commencing in early 2004, the offender had transferred to her own bank accounts more than $47,000 from the practice bank account and more than $91,000 from the doctor's credit card account. The methodology used was rather crude but the doctor trusted her totally. The offender used the money to fund a gambling habit. After a trial, concurrent sentences of four years and six months were imposed with a parole eligibility date after serving one half of the term. An application for leave to appeal against sentence was refused. The applicant submits that this case could be regarded as more serious than the applicant's because about $2,000 more was involved.

[19] However, in oral argument, the applicant's counsel candidly conceded that the sentence in *R v Ward*[7] was an obstacle to his argument. In that case, a sentence of five years imprisonment suspended after 20 months was not disturbed by this Court. It had been imposed on a plea of guilty. The offender worked for his sister and brother-in-law in a security service business. Through an elaborate subterfuge of raising false invoices and work rosters and other deceptions, he dishonestly obtained about $97,810 of his employers' funds for himself over a number of years up to 2005. He did eventually assist with police investigations. The offender was living beyond his means. He made no restitution beyond an amount of $50. He had no criminal record. For his offending, the maximum penalty was 10 years imprisonment.

[20] The circumstances in *Ward* have a striking similarity to the applicant's offending here. Each offender occupied a position of trust. Comparable amounts of money were involved. In each case, financing a lifestyle was the motive for the offending and no significant restitution was made. Neither offender had a criminal record. Whilst Ward's frauds involved many more transactions, he did assist with investigations and his plea was made at an earlier stage in proceedings than when the applicant's plea was made.

[21] A point of contrast with *Ward* is that the applicant's offending involved a gross breach of trust by a professionally qualified accountant in private practice. In *R v Lather*,[8] this Court observed that the public are entitled to expect a very high degree of integrity from solicitors in private practice. Notions of public trust in solicitors demand substantial deterrent sentences for fraud offences committed by them. In my view, these observations apply with equal cogency to accountants in private practice. They serve to remind that any sentence the applicant is to serve for these offences must reflect the community's condemnation of his conduct and must have impact as a general deterrence.

[22] I am unpersuaded that the applicant has established that the sentences of five years imprisonment were manifestly excessive. The cases to which I have referred sufficiently demonstrate that the sentences here did not so depart from sentences for comparable offending as to be excessive in that degree.

Suspension of sentence

[23] The learned sentencing judge made the following observations at the end of his sentencing remarks:

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7 [2008] QCA 222, noted with apparent approval in *R v Sommerfeld* [2009] QCA 333 at [27], [33].

8 [2011] QCA 143 per Margaret Wilson AJA at [27].

> "I have also given detailed consideration to the question of whether or not the jail term which I am about to impose should be suspended after a period of time, or whether you should be given a parole eligibility date. You will be receiving a parole eligibility date. I think that is the most appropriate order in the circumstances."[9]

His Honour then proceeded to sentence the applicant.

[24] It was submitted for the applicant that it was not clear from his Honour's observations why he considered that the applicant needed to be under supervision upon release as would occur with parole. I accept this submission as an accurate one.

[25] However, it does not at all follow that his Honour erred in favouring a parole release date. It is quite possible that he was influenced by the refusal of a partial suspension of a five year sentence in *Lather* to which his Honour was referred. There, the offender was a solicitor who was struck off for his offending. In refusing the partial suspension, Margaret Wilson AJA[10] said:

> "I do not accept that a partial suspension of the sentence would be appropriate in this case. While there seems no real risk of reoffending in the capacity of a solicitor, the risk of reoffending by dishonest conduct in some other capacity cannot be ignored. The applicant should be subject to parole upon his release from actual incarceration..."[11]

[26] It need be borne in mind that the applicant here retains his professional skills. There is a significant possibility, if not probability, that he will seek employment as an accountant when he is at liberty to do so. Having regard to this and also to his attempt to cover the tracks of this offending, I consider that it is in the community interest that he be under parole supervision in the early stages of his return to the workforce.

Disposition

[27] For these reasons, I have concluded that the applicant has not established that the sentences imposed for his offending are manifestly excessive in either of the respects sought to be argued. His application for leave to appeal must be refused.

Order

[28] I would propose the following order:-

1. Application for leave to appeal against sentence refused.

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9 AB 49 LL 13-17.

10 With whom Muir and White JJA agreed.

11 [2011] QCA 143 at [34].