SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ogden* [2014] QCA 89
PARTIES:	**R** **v** **OGDEN, Eric William** (applicant)
FILE NO/S:	CA No 25 of 2014 DC No 1777 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2014
JUDGES:	Fraser, Gotterson and Morrison 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 two counts of defrauding the Commonwealth and three counts of obtaining a financial advantage by deception – where the applicant had claimed benefits in others' names and his own name over 15 years – where the applicant was sentenced to five years imprisonment with a non-parole period of 20 months – whether the sentencing judge properly took into account the applicant's full restitution – whether the sentencing judge gave due weight to the applicant's health problems – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where at sentence the prosecution made submissions about the bounds of permissible sentences – whether, in violation of *Barbaro v The Queen*, those submissions were taken into account by the sentencing judge in formulating a sentence *Barbaro v The Queen; Zirilli v The Queen* (2014) 88 ALJR 372; [2014] HCA 2, discussed

Grenfell v The Queen (2009) 196 A Crim R 145; [2009] NSWCCA 162, discussed
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Jensen; ex parte Attorney-General (Qld) [1998] QCA 275, cited
R v Marshall (2010) 199 A Crim R 331; [2010] QCA 29, cited
R v McMahon [2013] QCA 240, cited
R v Pope; ex parte Attorney-General (Qld) [1996] QCA 318, cited
R v Robertson (2008) 185 A Crim R 441; [2008] QCA 164, distinguished

COUNSEL: R Clutterbuck for the applicant
W S Ferguson (*sol*) for the respondent

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

[1] **FRASER JA:** The applicant pleaded guilty in the District Court of two counts of defrauding the Commonwealth (contrary to the *Crimes Act* 1914 (Cth)) and three counts of obtaining a financial advantage by deception (contrary to the *Criminal Code* 1995 (Cth) s 134.2). On 31 January 2014 the applicant was sentenced to five years imprisonment with a non-parole period of 20 months. He has applied for leave to appeal against that sentence. He contends that the appropriate sentence is three to four years imprisonment with a recognizance release fixed upon a date which is no more than six months after the date of sentence.

Circumstances of the offences and the personal circumstances of the offender

[2] The applicant was aged between 59 and 74 at the time of the offending and he was 76 years old when sentenced. His offending spanned 15 years between May 1997 and May 2012. During that period the applicant claimed benefits in the names of two other persons as well as in his own name. To support his claims in the names of those two other persons he produced documents, including birth certificates, which were referable to those persons. The benefits paid to the applicant upon the claims in those two other names were subsequently transferred, on applications made by the applicant, to age pensions. To support those applications the applicant again provided identity documents referable to those other persons. The total amount taken by the applicant was $406,737.35.

[3] Before the applicant commenced his frauds in May 1997 he owned many separate pieces of land, some of which were improved by a house and all except one of which were unencumbered by any mortgage. He purchased additional real estate after he embarked upon the frauds. A schedule shows that during the whole period of offending the applicant owned a total of 14 different properties. One additional property was purchased by his wife and another additional property was purchased by his son with a mortgage granted to the applicant.

[4] At the time of sentence the applicant, or family members to whom he had transferred properties, remained the owner of 11 properties and he remained the mortgagee of the property bought by his son. By then the applicant had sold the one

property which was subject to a mortgage. He sold that property in May 2004 for $105,000, as against the purchase price in September 1983 of $25,000. In September 2007 and March 2008 the applicant sold another property; there were two sale dates because what the schedule treated as one property, property 13, comprised different lots. The total price for those lots was $172,000, as against valuations in May 1997 of $4,500 and January 2008 of $47,000. The other property which the applicant sold was improved by "small free standing home/shop". He had purchased that property in May 1977. Its value in May 1997 was $65,000 and its value in January 2012 was $225,000. It was not encumbered. The applicant used the sale price of $345,000 achieved at settlement in September 2012 as the main source of funds to repay the Commonwealth the money defrauded.

[5] The applicant was married with one adult child and had no criminal history. At the sentence hearing he tendered a medical report by a general practitioner which described many ailments from which the applicant suffered.

Consideration

[6] I will defer consideration of the first ground of appeal, which contends that the sentence was manifestly excessive, until after I have considered the specific errors in the exercise of the sentencing discretion for the applicant contended.

[7] The applicant's outline of submissions included a submission that the sentencing judge took into account that which a majority in *Barbaro v The Queen; Zirilli v The Queen*[1] subsequently held should not be taken into account. This was a reference to the prosecutor's submission that "a head sentence in the range of between five and five and a half years with approximately three years time to serve would be appropriate in all the circumstances". At the hearing of the application for leave to appeal, the applicant's counsel informed the Court that the applicant did not press that argument. That concession was appropriate. Although the prosecutor at the sentence hearing followed the then common practice of making submissions about the bounds of the permissible sentences which the majority in *Barbaro* has since condemned,[2] the sentencing judge did not take those submissions into account in formulating the sentence. Instead, the sentencing judge took into account the comparable sentencing decisions which the prosecutor and defence counsel had helpfully provided to the sentencing judge and analysed in submissions. The prosecutor and defence counsel plainly did not contravene any practice which is now proscribed by *Barbaro* merely by supplying comparable sentencing decisions to the sentencing judge and making submissions about the similarities and differences between the circumstances and seriousness of those cases and those of the present matter.[3] Indeed, it was part of the prosecutor's duty to assist the sentencing judge by supplying those comparable sentencing decisions.[4] More relevantly for present purposes, the sentencing judge was right to take the comparable sentencing decisions into account for guidance or as a "yardstick" against which to examine the proposed sentence.[5] That is what the sentencing judge did.

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1 (2014) 88 ALJR 372.

2 (2014) 88 ALJR 372 at 374 – 375 [6] – [7], 379 [39], and 380 [49].

3 (2014) 88 ALJR 372 at 379 [38].

4 (2014) 88 ALJR 372 at 379 [39]. It is not necessary here to consider sentencing judges' powers to limit the parties' submissions.

5 *Hili v The Queen* (2010) 242 CLR 520 at 537 [54].

[8] The second ground of appeal contends that the sentencing judge failed to properly take into account the extent of the mitigating feature of restitution. The applicant cited authorities,[6] for the proposition that restitution may be relevant in mitigation of sentence, both as evidence of remorse and contrition and as evidence of the extent of the harm caused by the offence. The sentencing judge recognised as much in remarks that the applicant had repaid the defrauded money in full after police searched his property but before charges were laid, "that the money has been repaid in full is a relevant consideration to sentence", and the courts had "long recognised that fact". The applicant referred to the sentencing judge's observation that "it must also be recognised that one cannot buy one's way out when it might…otherwise be considered appropriate to impose a term of imprisonment". The sentencing judge added that it was nevertheless a relevant consideration in determining the degree of leniency that should be applied. Those remarks are consistent with the decisions cited for the applicant.

[9] The third ground of appeal contends that the sentencing judge did not give "due weight" to the applicant's physical and mental health, as required by s 16A(2)(m) of the *Crimes Act* 1914. The applicant referred to a decision in which the advancing age, health problems, and limited means of an offender suggested that imprisonment for her might have had a more severe effect than for many others[7] and a decision in which the psychiatric condition and consequential suicide risk of an offender was taken into account in the suspension of imprisonment for indecent assault offences.[8] On the medical evidence, essentially a report by a general practitioner, the applicant suffered many medical conditions. The applicant summarised this evidence in his outline of submissions in this application:

> "(a) The applicant suffers with chronic asthma and has done so since five years of age…;
> (b) The applicant has low bone density;
> (c) The applicant has abnormal heart beats (bradycardia);
> (d) The applicant has an enlarged heart and existing heart disease, as well as hypertension;
> (e) The applicant suffers confusion associated with an inability to walk properly, causing a collapse and treated at the Wesley Hospital;
> (f) The applicant has failing vision;
> (g) The applicant has two operations for right inguinal hernia which has recurred;
> (h) The applicant has arthritis in the right knee, hips, back and other joints, difficulty getting out the car, arthritic pain in his hands with herperden's nodules and disability using his hand for work;
> (i) The applicant has spinal weakness, instability getting up, worsening lower lumbar pain, right sciatica extending to the right leg;
> (j) He has abnormal rhythm of his heart which is enlarged and possible heart failure;
> (k) A recent EEG has shown marked sinus bradycardia with occasional upper ventricular complexes;
> (l) The applicant cannot afford respiratory or cardiac specialists;

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6 *R v McMahon* [2013] QCA 240 and *R v Jensen*; *ex parte Attorney-General (Qld)* [1998] QCA 275.
7 *R v Robertson* (2008) 185 A Crim R 441 at 447 [20], 449 [31].
8 *R v Bazley; ex parte Attorney-General (Qld)* [1997] QCA 235.

(m) He has swollen legs with heart failure;
(n) He suffers migraines including strong analgesics;
(o) Regarding his brain condition, he "sometimes loses the plot";
(p) He is deaf more on the left side than the right;
(q) MRI shows he has cerebrovascular disease which can contribute to his unsteadiness, memory problems, comprehension;
(r) Combination multiple medical and geriatric conditions, existing disabilities, suicidal ideation, anxiety and depression about his wife and son's future all combined to give a bleak future;
(s) 22 January 2014, has been getting chest pains for about nine months;
(t) 15th January 2014, went out – blacked out, and fell down onto his knee;
(u) There is evidence of cerebral vascular disease as shown on the MRI;
(v) The presence of small vessel disease in his brain and significant bone disease causes him to fall without warning or blackouts or heart attacks, he is at risk;
(w) Added to the list, angina fatigue, depression and anxiety and financial distress;
(x) He may have premature pre-senile dementia."

[10] Suicide ideation and suicidal tendencies are referred to in the report without further detail or supporting psychiatric evidence. The doctor concluded that incarceration of the applicant with his list of disabilities "including asthma, allergies to hydrocarbons and nasal and sinus allergies and bad odours and atmosphere; and suicidal tendencies would aggravate his conditions adversely… [h]e may never recover from emotional trauma."

[11] The applicant argued that the sentencing judge did not take into account the true difficulties which would be experienced by the applicant in prison, particularly the mental condition identified in the general practitioner's report. The applicant relied upon authorities, such as *R v Pope; ex parte Attorney-General (Qld)*[9] and *R v Marshall*[10] for the proposition that ill health which makes imprisonment a greater burden for an offender or which places the offender at greater risk than otherwise would be the case tends to mitigate punishment. However, so much was recognised in the sentencing judge's remarks that, although there was nothing in the general practitioner's report which suggested that the Corrective Services personnel would not be able to adequately care for the applicant, it might be that his incarceration "may be a more difficult task to perform than for an able bodied younger man, and I will take that into account". Similarly, the sentencing judge accepted in terms that the applicant's ill health was "no doubt a relevant consideration to the determination of the appropriate degree of leniency". The sentencing judge added that ill health could not be allowed to be a licence to commit crime. That was correct: see *Grenfell v The Queen*,[11] to which the sentencing judge referred. As the respondent pointed out, whilst some leniency might be afforded to take account of the additional hardship caused to a prisoner by ill health, any such adjustment was limited by "the necessity of maintaining proper standards of punishment."[12]

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9 [1996] QCA 318.
10 (2010) 199 A Crim R 331.
11 (2009) 196 A Crim R 145 at 154, quoting from King CJ in *R v Smith* (1987) 44 SASR 587 at 589.
12 *Grenfell v The Queen* (2009) 196 A Crim R 145 at 154, quoting from King CJ in *R v De Vroome* (1988) 38 A Crim R 146 at 147.

[12] The sentencing judge did not expressly refer to the general practitioner's brief and non-specific remarks about suicide ideation and suicidal tendencies, but it should not be inferred that those remarks were not taken into account. There was no reason to doubt that the applicant's medical conditions referred to in the general practitioner's report could adequately be cared for by the prison authorities. There is no real basis for a conclusion that the sentencing judge gave insufficient weight to the state of the applicant's health.

[13] The fourth ground of the appeal contends that the sentencing discretion miscarried because of the sentencing judge's "finding on one hand the evidence was consistent with acquiring payment for support, and on the other greed." The applicant abandoned this ground of appeal, but something should be said about it because it is relevant to the contention that the sentence was manifestly excessive. The sentencing judge referred to the properties owned by the applicant and the properties held in the name of his wife and his son. His Honour found that the applicant's frauds were premeditated, that he transferred property to or from the names of other persons to assist with his frauds, that this was a reasonably sophisticated course of dishonesty which required his attention as time passed, that his acquisition of nine investment properties subsequent to his retirement was not consistent with a man who was financially struggling, that the money obtained by his frauds was used for day to day living expenses, and that the offending was motivated by greed rather than by need. It was the last of those findings which was the subject of the now abandoned challenge in the fourth ground of appeal. The inference that it was greed which motivated the offending was plainly justified by the applicant's extensive property portfolio, the extent of his offending over a period of some 15 years, and his use of two other persons' identities as well as his own name.

[14] The applicant by his counsel abandoned the fifth ground of appeal, which contended that the sentencing judge failed to comply with s 16F of the *Crimes Act* 1914 (Cth) in sentencing the applicant. It is not necessary to say anything further about that ground.

[15] It is necessary then to consider the remaining ground of appeal, that the sentence was manifestly excessive. The question under this ground is whether the sentence is "unreasonable or plainly unjust", such that it may be inferred "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance".[13]

[16] The applicant relied upon the sentence imposed on appeal in *R v Robertson*.[14] In that case the Court varied a sentence of three years imprisonment with release upon recognisance after fifteen months by reducing the time upon which the applicant could be released upon recognisance to twelve months. That offender had received Commonwealth benefits exceeding $120,000 in excess of her entitlements over a 26 year period. Her sentence is immediately distinguishable on the basis that the amount taken by the applicant was some three times greater. Furthermore, there was no finding that her offending was motivated by greed or that she held any substantial property. Philippides J emphasised that Robertson's conduct concerned a failure to disclose changes in her circumstances affecting her entitlements rather

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13 *House v The King* (1936) 55 CLR 499 at 505, quoted in *Barbaro v The Queen; Zirilli v The Queen* (2014) 88 ALJR 372 at 380 [43].

14 (2008) 185 A Crim R 441.

than the greater criminality of obtaining a benefit by use of a false name.[15] And whilst the amount of reparation that Robertson made was only about $4,500, she made that reparation by fortnightly withholdings from her aged pension payments.[16] *R v Robertson* supplies no support for a contention that the applicant's sentence is manifestly excessive.

[17] The respondent submitted that support for the sentence could be found in sentences imposed in two New South Wales cases, *Grenfell v The Queen* and *Bick v The Queen*,[17] and one Victorian decision, *R v Anderson*.[18] It is necessary here to refer only to *Grenfell*. That offender committed frauds over a period of about 28 years in which the total sum taken was $203,000. His offending also involved a premeditated scheme and the use of another person's identity. At the date of sentencing he was 75 years old and in ill health. He was given an effective head sentence of four years and six months imprisonment with a non-parole period of two years and eight months. Grenfell did not make any reparation but his non-parole period was substantially longer than the non-parole period of 20 months fixed by the sentencing judge in this matter. The sentence in *Grenfell* makes it difficult to contend that the applicant's sentence in this broadly similar case is manifestly excessive.

[18] The need for a sentence which might deter others from committing similar offences was a very material consideration for the sentencing judge in formulating the applicant's sentence. Having regard to the objective seriousness of the applicant's offending and giving full weight to the mitigating circumstances upon which the applicant relied, the sentence imposed upon the applicant was clearly not outside the sentencing judge's discretion.

Proposed Order

[19] I would refuse the application for leave to appeal against sentence.

[20] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[21] **MORRISON JA:** I have read the reasons of Fraser JA and agree with his Honour and the order he proposes.

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15 (2008) 185 A Crim R 441 at 447 [24].
16 (2008) 185 A Crim R 441 at 449 [30].
17 [2006] NSWCCA 408.
18 [2007] VSCA 80.