SUPREME COURT OF QUEENSLAND

CITATION:	*R v Voll* [2014] QCA 170
PARTIES:	**R** **v** **VOLL, Paul Michael** (applicant)
FILE NO/S:	CA No 137 of 2014 DC No 357 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2014
JUDGES:	Holmes and Gotterson JJA and Philip McMurdo J 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 a practising solicitor - where the applicant dishonestly applied to his own use a sum of money amounting to more than $30,000 – where the applicant pleaded guilty to one count of fraud – where the applicant was sentenced to two years and six months imprisonment, suspended after three months with an operational period of 30 months – where the applicant contends that the sentence should have been wholly suspended – whether the sentencing judge erred in the exercise of sentencing discretion by not giving appropriate weight to mitigating factors – whether the sentence was manifestly excessive *R v Blackhall-Cain; ex parte Attorney-General (Qld)* [2000] QCA 380, cited *R v Lather* [2011] QCA 143, cited *R v Yarwood* (2011) 220 A Crim R 497; [2011] QCA 367, cited
COUNSEL:	A S McDougall for the applicant D Barlic for the respondent

SOLICITORS: Lawler Magill for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Philip McMurdo J and the order he proposes.

[2] **GOTTERSON JA:** I agree with the order proposed by Philip McMurdo J and with the reasons given by his Honour.

[3] **PHILIP McMURDO J:** On 29 May 2014, the applicant pleaded guilty to the dishonest application to his own use of a sum of money amounting to more than $30,000. He was then sentenced to a term of two years and six months imprisonment, suspended after three months with an operational period of 30 months. He applies for leave to appeal that sentence, arguing that it should have been wholly suspended.

[4] The offence was committed by the applicant in the course of his practice as a solicitor in a firm of which he was one of the two partners. The offence involved the misapplication of moneys which should have been used for the payment of stamp duty in relevantly four transactions. Instead the applicant caused these funds to be applied for his own purposes. The total misapplied was $77,360.88. The offending occurred over various dates in 2006.

[5] The applicant's firm was authorised by the Office of State Revenue ("OSR") to "self assess" stamp duty on conveyancing transactions carried out by the firm for clients. The firm would send weekly returns to the OSR together with payments of the duty as assessed.

[6] The applicant caused the required stamp duty for each of these transactions to be omitted from the relevant returns. In each case, he then caused the money which had been received from the client for the estimated stamp duty to be applied for his own benefit, sometimes by the fraudulent alteration of a cheque.

[7] The largest of these amounts was $53,218.25 which he obtained from money held by the firm on trust for a company of which he and his partner in the legal practice were the directors and shareholders.

[8] In 2007, the non-payment of stamp duty on these transactions was revealed by an audit conducted by the OSR about unrelated transactions of the firm. Consequently, in November 2007, the applicant caused the outstanding duty on the four transactions to be paid together with interest which had accrued from the due dates for payment. The total then paid to the OSR was $104,261.70. The statement of facts tendered at the sentencing hearing said that this amount was paid by "the firm" to the OSR, but the submissions to the sentencing judge were upon the basis that it was the applicant which paid this sum.

[9] For whatever reason, it was not until February 2010 that the applicant was interviewed by representatives of the Queensland Law Society about these events. He immediately made full admissions and surrendered his practising certificate. Still the Law Society's investigations were not completed until early 2011. There was then a further unexplained delay in his prosecution. He was therefore sentenced

some seven or eight years after the offending and more than four years after he made full admissions to the Law Society.

[10] The applicant also paid a fine imposed by the OSR for the non-payment of the duty, equivalent to the amount unpaid ($77,445). This fine was paid in April 2009.

[11] There were substantial financial consequences for the applicant beyond the payment of that interest and fine. He has been unable to practise as a lawyer since 2010. It is apparently undisputed that he has already lost earnings of the order of some hundreds of thousands of dollars per annum. As a consequence of that loss of income, he says that he has had to sell his house, a holiday house and the real property owned by the legal practice, in each case at a substantial undervalue. The sentencing judge accepted that the overall affect of the offending on the applicant was "catastrophic".

[12] It is submitted for the applicant that his case is unique because of the combination of these mitigating circumstances: the full restitution of the misapplied moneys together with interest, the payment of the fine, the surrender of his practising certificate, the substantial loss of income to date and in the future amounting to millions of dollars, the losses from the forced sales of his properties, the extraordinary delay from his admission of the offending until his sentence, his early plea of guilty and his remorse as found by the sentencing judge. The argument accepts the correctness of the head sentence which was imposed. But it is said that had the sentencing judge given appropriate weight to the combination of those mitigating factors, the whole of the sentence would have been suspended.

[13] Each of those mitigating factors was identified as such in the reasons of the sentencing judge. The applicant's argument does not identify some particular error in that reasoning: rather the argument is that the outcome indicates that there has been a failure to properly exercise the sentencing discretion.

[14] Of course there were other matters referred to by the sentencing judge, not all of which were favourable to the applicant. The offending was by a practising solicitor. The amount which was misappropriated was considered to be an aggravating factor. His Honour characterised the offending as a breach of trust which was "a very serious matter". But he referred also to the fact that the applicant's mother, who was in very poor health, was reliant upon his assistance and that the offending had occurred at a time when the applicant was distressed by the loss of his father. Reference was also made to the lack of any significant criminal history. The applicant was aged 35 when he offended.

[15] The submissions to the sentencing judge and to this court made particular reference to *The Queen v Yarwood*,[1] in which a 34 year old solicitor had pleaded guilty to the fraudulent misappropriation of just over $200,000, involving 72 transactions over a three year period. The offender had for some time prior to the offending been treated for depression and was abusing alcohol and drugs. The original sentence in that case was four and a half years imprisonment, to be suspended after 18 months. This court allowed the appeal, suspending the same sentence after approximately nine months. The critical factor in that case was the court's view that the appellant's mental illness had not been properly brought into account. White JA (with whom the other members of the court agreed) said:[2]

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1 [2011] QCA 367.

2 [2011] QCA 367 at [33].

> "Where a person holds a position of significant trust, such as a solicitor, who abuses that position and offends criminally there is an important public interest in deterring others similarly holding positions of trust. Solicitors are given important privileges which necessarily demand a high standard of conduct in return, both as to professional competence and ethical conduct. Accordingly, where a solicitor departs from those standards in the practise of the profession and in a very public way, the public and fellow practitioners ought not be scandalised by an excessively lenient sentence. However, deterrence in the sense of deterring other practitioners and vindicating the community's need to punish wrongdoing, particularly if the offender is a member of a privileged group, has limited application where the offender suffers from a mental disorder. Such a person is much less able than others not so afflicted to make sound judgments about conduct."

After an extensive reference to other cases, White JA said that they tended to support a head sentence of five to six years before regard was had to the appellant's mental illness. The proper consequence of the appellant's mental illness was to reduce the period in custody to one of about nine months, a result which her Honour said would satisfy the requirement for general deterrence.

[16] It is not suggested that the present case is comparable in that the applicant was suffering from some mental illness which warranted a substantial reduction in his sentence. But it was submitted, at least to the sentencing judge, that the head sentence should be effectively one half of that in *Yarwood* commensurately with the difference between the amounts misapplied in the two cases. I accept that the scale of the offending was greater in *Yarwood*. But I do not accept that this requires the proportional reduction in a head sentence as the applicant's argument suggested. The amount misapplied here, as the sentencing judge found, was substantial.

[17] The applicant referred to *R v Blackhall-Cain*,[3] in which a stockbroker who misappropriated a little over $50,000, over 23 transactions, had been sentenced to a term of two years which was wholly suspended. The Attorney-General's appeal against that sentence was dismissed. It was argued that this case indicates the appropriateness of the head sentence in the present case, before allowance is made for this combination of mitigating circumstances. But in that case, some of those factors were also present, such as the impact on the offender's career. In the reasoning of Pincus JA (with whom the other members of the court agreed) that was one of two critical factors. The other, which is not present here, was the practical inevitability, at the time of the offending, that moneys which were to fall due to the offender from other transactions would be used to make good the funds which had been misapplied. Pincus JA concluded that although "some Judges might have imposed a term of imprisonment, a non-custodial sentence was one which was within the range of a proper exercise of judicial discretion …".

[18] The arguments also referred to this court's judgment in *R v Lather*,[4] in which a solicitor pleaded guilty to two counts of the dishonest application of funds which should have been paid to beneficiaries of a deceased estate. On each count he had been sentenced to six years imprisonment, which was reduced on appeal to five

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3 [2000] QCA 380.
4 [2011] QCA 143.

years. One count involved six payments from the solicitor's trust account, totalling more than $700,000 which was used to fund the solicitor's own investments. The other count involved three payments made from the trust account, again for the solicitor's own investments, totalling $80,000. The original sentence had been complicated by factual disputes about the fate of the investments and the ultimate loss caused by the offending. The sentencing judge had found a loss of the order of $195,000. The Court of Appeal concluded that this was not a loss from the relevant transactions and indeed, on the facts before the sentencing judge, the appellant should have been sentenced upon the basis that no financial loss had been caused by his offending.[5] That offender had been struck off as a solicitor and made bankrupt and his personal life and health had suffered badly. Nevertheless, he ultimately received a sentence of five years with no suspension or early parole. In the principal judgment (Wilson A-JA), it was emphasised that:[6]

> "… [T]he public are entitled to expect a very high degree of integrity from solicitors, and the maintenance of public trust in them demands substantial deterrent sentences for offences of this kind."

[19] It was submitted for the respondent that the head sentence imposed in the present case was less for the allowance of the mitigating factors, although the sentencing judge did not say so in fixing the head sentence. It may be said that a higher head sentence in this case could have been imposed.

[20] In my conclusion, it was open to the sentencing judge to impose a term of imprisonment which was only partially suspended as he ordered, so that no error in the exercise of the sentencing discretion can be inferred. I would dismiss the application.

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5 Ibid [25].

6 Ibid [27].