SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pinnuck* [2014] QCA 189
PARTIES:	**R** **v** **PINNUCK, Christopher Paul** (applicant)
FILE NO/S:	CA No 323 of 2013 DC No 80 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	8 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2014
JUDGES:	Fraser and Morrison JJA and Philippides 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 – where the applicant was convicted on his own plea of guilty of one count of fraud to the value of $30,000 or more and one count of fraud simpliciter – where the applicant was sentenced to imprisonment for five years to be suspended after serving twenty months with an operational period of five years – where the offending involved the forgery of signatures on guarantees to obtain finance – where the applicant had a criminal history for other dishonesty offences – where the applicant received no direct financial gain or profit but the applicant's offending did allow his employer to commence a business and provide him with employment – where there was a lengthy history in bringing the matter to final hearing including four mistrials between July 2012 and April 2013 – where those mistrials could not be attributed to the applicant – where the learned sentencing judge treated the pleas of guilty as timely – where the applicant has pre-existing health conditions – whether the sentence imposed was manifestly excessive *Criminal Code* 1899 (Qld), s 408C(1)(e), s 408C(1)(f), s 408C(2)(d)

R v Fares [2012] QCA 13, cited
R v Goodger [2009] QCA 377, considered
R v McMahon [2013] QCA 240, considered
R v Parker [2007] QCA 22, considered
R v Pinnuck, unreported, District Court of Queensland, 19 May 1995, Noud DCJ, related
R v Smith [2009] QCA 204, considered
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, considered

COUNSEL: The applicant appeared on his own behalf
S J Farnden appeared for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** The applicant seeks leave to appeal against a sentence imposed on him on 27 November 2013. On that day he pleaded guilty to two charges of fraud, namely:

1. a count of fraud involving property in excess of $30,000, contrary to s 408C(1)(f) and (2)(f) of the *Criminal Code*; and
2. fraud contrary to s 408C(1)(e) of the *Criminal Code*.

[3] The sentence imposed on 27 November 2013 was in respect of both counts, and was for a period of imprisonment of five years to be suspended after serving a period of 20 months, for an operational period of three years. On 12 December 2013 the operational period was varied to five years.[1]

Circumstances of the applicant

[4] The applicant was born on 18 April 1947, and was about 57 years old at the time of the commission of the offences. At that time he was married and working on the Gold Coast for a company selling time share interests in boats. The company's trading name was Leisure Boating Club but that name was owned by a registered company, Jorda Pty Ltd ("**Jorda**").

[5] The applicant had worked throughout his adult life, including in life insurance and banking, as a stockbroker and mortgage broker. In 2001 he suffered a stroke and was hospitalised for some weeks. Following that his health deteriorated to some degree.

Circumstances of the offending

[6] The applicant was employed to conduct the administration of Leisure Boating Club on the Gold Coast. A person called Brinson effectively ran the company but could not hold the position of director because of his bankrupt status. Another

[1] The correction of the operational period was because an error had been made when the sentence was first pronounced; it should have been five years, not three years.

person named Davis was appointed a director but he had no active role in the company. A third person by the name of Elder invested in the company but had no active role to play.

[7] The operations of the company were conducted on the basis that Brinson was the face of the company, taking care of public relations and dealing with clients. The applicant ran the administration of the company, being in charge of the books and obtaining finance.

[8] In early 2004 the applicant applied through an agent of Macquarie Leasing, for $275,000 finance for a boat. The application was made on the basis that the finance would be provided pursuant to a hire purchase agreement. In order to secure the loan the applicant forged guarantees in the names of Davis and Elder. The finance was approved and as a consequence the company acquired a vessel which it then used for the purposes of its business for selling time share interests in it. Those matters constituted count one.

[9] In May 2004 the loan was refinanced, at the institution of the applicant. It then became a chattel mortgage, but was still financed by Macquarie Leasing and its agent. Once again Davis and Elder were named as guarantors, but their signatures were forged by the applicant.

[10] In June 2004 the applicant processed an application by the company for finance in respect of a motor vehicle, in the sum of $25,819. The proposed lender was GE Automotive Financial Services. The applicant forged a guarantee by Davis in order to obtain that finance. This conduct was the subject of count 2.

[11] Leisure Boating Club made payments on the loan for the boat and the motor vehicle until about 2007, at which time it encountered financial difficulties. Repayments made to Macquarie Leasing totalled about $76,817.75, and repayments to GE Automotive Financial Services totalled about $7,128.95.

[12] As a consequence of payments not being made Macquarie Leasing commenced recovery steps against Davis, Elder and the applicant. The applicant's fraud was disclosed when Davis and Elder revealed that they had never signed the guarantees. Once the forgeries came to light, the applicant admitted to Davis that he had forged the signatures and he provided a statutory declaration to that effect.

[13] The applicant received no direct financial gain as a result of committing the offences. However, without that finance Jorda would not have been able to commence business and the applicant would have lost his employment.

[14] The loan amount by Macquarie Leasing was $269,019.40. In late 2007 it repossessed the boat and sold it for $76,817.75. That left an amount outstanding in respect of the boat of $114,941.54.

[15] In respect of the motor vehicle, GE Automotive Financial Services did not repossess the vehicle, but rather wrote off the loan, losing $18,690.65.

[16] The total amount of finance obtained as a result of the two counts of fraud was $294,838.46. The total amount lost by the two finance companies was $133,632.19.

The applicant's previous criminal history

[17] In 1995 the applicant was convicted of misappropriation of property,[2] forgery,[3] uttering, false pretences and stealing. He was sentenced to four years and six

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2 Three charges, of which two were in circumstance of aggravation: AB 35.

3 Two charges.

months imprisonment with a recommendation for parole after serving two years. The circumstances of that offending are revealed in the remarks of the sentencing judge on that occasion.[4] Whilst it does not descend to particularity, the offences involved the loss of about $239,000, with a possible recovery of $58,000. The criminal activity extended over two years and involved a breach of trust, perpetrated in a way that involved "activity on your part of a somewhat elaborate and a somewhat sophisticated kind insofar as planning was concerned".[5] The criminality was viewed as of a fairly high order, with evidence of a cover-up.

The approach of the learned sentencing judge

[18] The learned sentencing judge noted that the applicant had not personally profited or gained by the offending in the sense that he did not receive any of the money which had been loaned, nor any of the assets that had been received. Nonetheless, the offending allowed his employer to start a business, and provided a means to retain him employment.

[19] The amount was noted as significant and it was obtained as a result of three occasions of forging signatures on guarantees. The learned sentencing judge also took into account the history of the matter which the prosecutor had characterised as "very unfortunate".[6] This was a reference to the time it took to get to the final hearing in 2013. The applicant had been charged in 2009 and, having not participated in a record of interview, there was a full hand up committal in February 2010. There followed a series of mistrials, in July 2012 (two mistrials), February 2013 and April 2013. None of the delays since July 2012 could be attributed to any conduct on the part of the applicant, which was why the learned sentencing judge treated the applicant's plea of guilty as being a timely one.

[20] It was also noted that the consequence of the fraud was that the credit ratings of Davis and Elder had been affected. The learned sentencing judge seemed to accept a submission from the prosecutor that the fraud was "brazen but unsophisticated", because it was inevitable that if the company went into financial difficulties the fraud would be revealed.

[21] The learned sentencing judge recognised the need for specific deterrence, but also general deterrence because of the capacity of forged guarantees to adversely affect commercial relations. A letter from the applicant's medical practitioner was noted, and a copy directed to be given to Corrective Services.[7]

[22] Having looked at various comparative case, notably *R v Fares*,[8] and cases cited within that authority, the learned sentencing judge imposed five years in respect of each offence "to reflect the totality of your offending".[9]

The applicant's contentions

[23] The applicant contended that the learned sentencing judge fell into error by not properly taking into account four matters, namely:

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4 *R v Pinnuck*, 19 May 1995, Noud DCJ; AB 36-40.

5 AB 38.

6 AB 11.

7 The medical practitioner noted that the applicant had suffered from transient ishaemic attacks as well as a cerebrovascular accident; he had a history of solar skin cancers, gastrointestinal bleeding, and a significant hernia "which may require surgery"; his health was described as being "not good".

8 *R v Fares* [2012] QCA 13.

9 AB 28.

(a) that the matter had been going on for four years "as a result of the Crown needing to improve their case";

(b) the debilitating affect, emotionally and financially, of the aborted trials and the time taken to get to a hearing, all through no fault of the applicant;

(c) the health of the applicant, in assuming that he would receive adequate treatment in custody;

(d) that there was no benefit to the applicant; this involved the submission that the judge was in error to rely on the fact that the applicant benefited by his employment.

[24] Those matters were relied upon to assert that the sentence was manifestly excessive. Reliance was also placed upon *R v Yarwood*[10] and *R v Parker*.[11]

Consideration

[25] The respondent relied on a number of comparative cases to demonstrate that the sentence was not manifestly excessive. They included *R v McMahon*[12], *R v Goodger*[13], and *R v Smith.*[14]

[26] *McMahon* involved six counts of fraud as an employee and one as an employee which was to more than $30,000. He received a sentence of five years for the fraud over $30,000. Parole eligibility was set at two years. McMahon was a younger person (31), and the offence was committed while on bail, but the amount obtained ($151,195.74) was much lower than the applicant's case. Like the applicant, there was no demonstrated remorse, but an early plea. However, the sentence failed to take into account that, unlike the applicant's case, the company had only been deprived of 20 per cent of the total at any one time and ultimately restitution in full was made. This Court did not find that five years imprisonment was excessive and interfered with the sentence only in respect of the parole eligibility date.

[27] *Goodger* involved one count of fraud whereby the loss was $94,744.46, lower than that in the present case. The offending occurred over a long time and involved an abuse of trust. The sentence was four and a half years with parole eligibility after 18 months. The offender was about 54 years old (similar to the applicant) and voluntarily participated in a record of interview where the fraud was admitted. The sentence was not considered manifestly excessive.

[28] *Smith* involved a plea of guilty to one count of fraud and seven of passing cheques. The offending was as a 50 year old director, forging signatures, and lasted over seven months. The amount involved was $184,000, much lower than in this case. The sentence was four years and six months, suspended after 18 months. The Court considered it was "plainly within range".[15]

[29] Those authorities demonstrate that the sentence imposed was not manifestly excessive.

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10 *R v Yarwood* [2011] QCA 367; (2011) 220 A Crim R 457.
11 *R v Parker* [2007] QCA 22.
12 *R v McMahon* [2013] QCA 240.
13 *R v Goodger* [2009] QCA 377.
14 *R v Smith* [2009] QCA 204.
15 *Smith* at page 2, per de Jersey CJ.

[30] The applicant relied upon the authorities of *R v Yarwood*[16], and *R v Parker.*[17] However, neither of those cases advance the contention that the applicant's sentence was manifestly excessive.

[31] *Yarwood* involved a sentence of four and a half years in respect of a solicitor's fraud (three counts spanning three and a half years) which caused a loss of $207,027.24. The solicitor had no previous convictions (unlike the applicant), and there was evidence of a depressive condition which affected him. There were 72 transactions involved, which concerned stamp duty infractions. The Court considered a number of comparable cases which included *Parker*, and found that the head sentence was not excessive – the date when the sentence was to be suspended was adjusted.

[32] *Parker* involved a five year sentence imposed on a 42 year old offender (36 to 38 at the time of the offences), with no prior criminal history, who pleaded guilty to causing a $229,000 loss by (relevantly) 96 separate instances of fraud and stealing as a servant, lasting over 18 months. The offender was in an administrative position, which she abused. She had no relevant prior criminal history. The offending was to fund a gambling addiction resulting from depression. The head sentence was not considered manifestly excessive.

[33] The learned sentencing judge did not mistake the factors raised by the applicant. The history of the matter was expressly referred to[18] and the fact that the history involved aborted trials, not caused by any fault of the applicant's part, was clearly in the learned sentencing judge's mind. The assertion that that there was some "debilitating effect emotionally and financially" because of that history did not need to be spelt out by the sentencing judge.

[34] The doctor's report was referred to specifically with the learned sentencing judge saying that he had taken it into account.[19] It cannot be said that he did not take the applicant's health issues into account. Indeed he took steps to refer the doctor's letter to Corrective Services. There was and is no demonstrated reason to conclude that appropriate treatment cannot be achieved in custody.

[35] As to the benefit from the offending, the learned sentencing judge was clearly well aware of where that fell. The fact that there was no personal direct benefit was acknowledged[20], but in business, and to employ the applicant, the indirect benefit from permitting the employer company to continue was expressly referred to.

Conclusion

[36] In my view the applicant has not demonstrated that any error was made by the learned sentencing judge, or that the sentence was manifestly excessive.

[37] I would refuse the application.

[38] **PHILIPPIDES J:** I agree that the application should be refused for the reasons given by Morrison JA.

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16 [2011] QCA 367.
17 [2007] QCA 22.
18 AB 27.
19 AB 28.
20 AB 27.