SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mudgway* [2014] QCA 268
PARTIES:	**R** **v** **MUDGWAY, Beryl Kay** (applicant)
FILE NOS:	CA No 120 of 2014 DC No 100 of 2014 DC No 310 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2014
JUDGES:	Holmes, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave granted to appeal against sentence.** **2. Appeal allowed.** **3. Set aside the sentence on count 1 and substitute a sentence of twelve months imprisonment, fixing the applicant's parole eligibility date at 27 September 2015.**
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 fraud – where she was sentenced to concurrent sentences of 21 months imprisonment and six months imprisonment, to be served cumulatively on the unserved 26 month portion of a suspended sentence – where the applicant forged cheques and withdrawals on the account of her employer, an elderly woman in poor health – where the applicant had a relevant criminal history – where the applicant suffered from a gambling addiction – where the applicant's offending did not involve any circumstance of aggravation, so that the maximum penalty was five years imprisonment – whether the head sentence imposed was manifestly excessive *Criminal Code and Other Acts Amendment Act* 2008 (Qld), s 71 *Penalties and Sentences Act* 1992 (Qld), s 9(2)(k)

R v Baxter [2012] QCA 125, cited
R v Gasenzer [2013] QCA 9, cited
R v Jeffree [2010] QCA 47, cited
R v Miles [2006] QCA 556, considered
R v Sigley [2002] QCA 11, considered
R v Vinson [2002] QCA 379, considered

COUNSEL: N V Weston for the applicant
J A Wooldridge for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The applicant pleaded guilty to two counts of fraud. In respect of the first, she was sentenced to 21 months imprisonment, and the second, six months imprisonment. Those sentences were to be served concurrently, but cumulatively upon the unserved 26 month portion of a suspended sentence which the sentencing judge activated. He set a parole eligibility date of 27 October 2015, requiring the applicant to serve 18 months before she could seek parole. The applicant seeks leave to appeal the 21 month sentence.

The offences for which the applicant was sentenced

[2] Born in New Zealand, the applicant was 57 years old when she committed the offences. She was employed to assist an elderly woman in poor health from mid-2010 to mid-2011, having previously worked as carer for other members of her client's family. On 12 occasions she took and forged cheques from the woman's cheque book, usually removing the cheque butt, but on one occasion making a false entry suggesting a donation to a charity. The cheques were drawn on the Commonwealth Bank, which ultimately bore the loss. On three occasions the applicant was recorded on CCTV footage cashing a cheque. The total value of the forged cheques was $15,058. That was the subject of the first count of fraud, in respect of which the applicant was sentenced to 21 months imprisonment. The applicant also forged three withdrawal slips and presented them at different times to draw money from the same Commonwealth Bank account, receiving $2,000 in that way. That gave rise to the second fraud count, resulting in the six month sentence.

[3] The offending occurred over dates between 3 February 2011 and 29 June 2011, a period over which the victim of the fraud was often in hospital or an aged care home. It was detected when the woman's nephew was given power of attorney over her affairs and realised that money had been taken from her account. The applicant was interviewed by police. She first claimed that another elderly relative who was in charge of her client's finances had a practice of having the latter sign blank cheques. Subsequently in the same interview, the applicant said that her client signed blank cheques which she asked the applicant to cash for her.

Other offending

[4] At about the same time, the applicant stole and forged three cheques belonging to the same elderly relative of her client to whom she had referred in the interview. In respect of that activity, she was charged with fraud, three counts of forgery and three counts of uttering. The amount taken was $1,695. She was dealt with in the

Magistrates Court in respect of those charges and was placed on probation for 30 months, ordered to perform 100 hours community service and ordered to pay restitution.

[5] The current offences breached a suspended sentence which a District Court judge imposed in 2009 when the applicant was dealt with for fraud as an employee, with the aggravating circumstance that the property taken was of a value of more than $5,000. Working as a travel agent, she had stolen $52,000 from her employer over an 18 month period. She was sentenced to three years imprisonment, suspended after ten months, with an operational period of three years.

[6] The applicant also had some older criminal history. In 1981 she had been dealt with by way of probation and community service orders for social security fraud in New Zealand. She moved to Australia in the early 1990s. In 2009, she was fined in the Magistrates Court for shop-lifting, not long before the District Court sentence for fraud was imposed.

The prosecutor's submissions at first instance

[7] The prosecutor, in his submissions, pointed out that there had been no assistance given to law enforcement agencies. The applicant had pleaded guilty, although that was after a pre-trial hearing concerning the admissibility of a witness' evidence. He relied on three decisions of this Court by way of comparatives: *R v Sigley*;[1] *R v Miles*,[2] and *R v Vinson*.[3]

[8] In *Sigley*, the applicant had pleaded to one count of fraud and was sentenced to two years imprisonment, suspended after six months. She had stolen some $11,000 from her employer, of which $2,000 had been repaid. She had no previous convictions and had a difficult background, with the breakdown of relationships and the murder of a close relative. She assisted in the care of a severely disabled grandchild and suffered from depression. McMurdo P, delivering the leading judgment, observed that had she been sentencing the applicant at first instance, she would have fully suspended the two year term of imprisonment; but since the applicant had already served over three months imprisonment, the appeal was allowed and the sentence suspended as at the date of the decision.

[9] *R v Miles* concerned an applicant who was convicted after a trial of stealing almost $20,000 from a man with severe injuries, who had previously been in her care. She was 35 years old and had no previous criminal history. She was sentenced on the basis that she had exploited her knowledge of the victim's brain injury, which made him forgetful and less able to recognise the defalcations. It was a significant feature in the sentencing that the applicant had shown no remorse. The applicant was refused leave to appeal the sentence imposed, of two years imprisonment with parole eligibility after 11 months.

[10] The applicant in *R v Vinson* pleaded guilty on an ex-officio indictment to fraud, having stolen about $25,000 belonging to his employer over a ten month period, and was sentenced to two years imprisonment, suspended after six months. He had misappropriated the funds by forging cheques and creating fictitious leave entitlements. Some of the offences were suspected by his employers and reported to the police; he

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1 [2002] QCA 11.
2 [2006] QCA 556.
3 [2002] QCA 379.

admitted to them and then voluntarily acknowledged several further offences. The money stolen had been spent on expenses associated with his intended wedding. The applicant had not made restitution at the date of sentence, although he expressed willingness to do so. He was 25 years old, with no previous convictions. This court refused leave to appeal against sentence.

[11] The prosecutor pointed out that all of those cases concerned a circumstance of aggravation, that the amount taken was more than $5,000. (In *Sigley* and *Vinson* there would have been a further aggravating circumstance, that the fraud was committed as an employee.). All involved a maximum penalty of ten years imprisonment. The statutory aggravating circumstance had been altered by an amendment to the *Criminal Code*:[4] now, if the value of the property exceeded $30,000, the maximum penalty was 12 years imprisonment. In the present case, however, there was no such aggravating circumstance, and the maximum penalty was five years imprisonment.

The applicant's submissions at first instance

[12] At first instance, the applicant's solicitor submitted that the plea of guilty was a timely one; it had resulted from negotiations with the Crown after the pre-trial hearing. His client had a gambling addiction, persisting over several years. He tendered a psychologist's report which indicated that the applicant's gambling was an "impulse control disorder" emerging "in the background of a history of violent and sexually abusive relationships". (The applicant's first marriage, in the early 1970's, had been of that kind). The applicant suffered from persistent depression and low self-esteem. She was described as "overwhelmed by guilt regarding her own behaviour". The psychologist advanced, as factors pointing to good prospects of rehabilitation, the applicant's intellectual capacity to benefit from treatment; the absence of adverse factors such as anti-social personality disorder or psychopathy; and her remorse and acceptance of responsibility.

[13] A psychologist's report prepared in 2008, for the purposes of the applicant's previous sentence, had also spoken of the applicant's gambling problem, which was described as her escape from work stress. The applicant's solicitor said that after release from custody on that occasion, she had had some psychological treatment but had not continued with it because of her self-isolation for reasons of guilt and shame. She had performed the community service imposed for the related offences with Lifeline; a store manager for whom she had worked said that she had not only completed her assigned hours but had continued to work as a volunteer for one or two days a week thereafter and was regarded as dependable, hard-working and trustworthy. The applicant had almost completed the two year period of probation pursuant to the magistrate's order.

The sentencing remarks

[14] The sentencing judge acknowledged that it was reported that the applicant had performed her tasks as an employee, apart from the offending behaviour, in an exemplary way and she had similarly performed her community service to a high standard. The District Court judge who had imposed the three year sentence for the earlier fraud had noted her real efforts towards rehabilitation and the fact that she had taken steps to deal with her gambling problem. Notwithstanding those indications, the applicant had returned to gambling and ceased her contact with the

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4 *Criminal Code and Other Acts Amendment Act* 2008, s 71.

psychologist from whom she was obtaining treatment. The conduct towards the victim of the current offences was callous. The applicant had denied her involvement in the offence when interviewed, but had given some indication of remorse by pleading guilty subsequently.

[15] Although the psychologist who had reported for the purposes of the sentence suggested that the applicant's best prospects of rehabilitation lay with employment and mental health treatment, the applicant's history of criminal conduct and her offending on the suspended sentence made it necessary that actual imprisonment be imposed. The comparative authorities provided by the prosecutor involved a circumstance of aggravation not present in the applicant's case, but that was balanced out by the fact that she, unlike the applicants in those cases, had a prior criminal history. The sentencing judge accepted that totality issues arose in respect of the penalty imposed in the Magistrates Court. In sentencing the applicant to 21 months imprisonment, he had regard to his intention to activate the whole of the remaining sentence previously imposed; without that factor, he said, he would have imposed a heavier sentence. Instead, he had "significantly reduced" the period of imprisonment.

[16] His Honour found the breach of the suspended sentence proved, activating it and ordering that it be served cumulatively on the 21 month and six month sentences. The period of 18 months before parole eligibility factored in a requirement that the applicant serve half of the 26 months of the suspended sentence. The sentence imposed, he said in conclusion, was necessitated by the applicant's continued fraudulent conduct and the significant breach of trust it involved.

The submissions on appeal

[17] The applicant submitted that the head sentence of 21 months, cumulative as it was with the 26 month term, was disproportionate having regard to the relatively small amount of money involved; the applicant's prospects of rehabilitation; the fact that she had successfully completed the community service and probation orders imposed in the Magistrates Court; and the fact that her offending was caused by her gambling addiction.

[18] It was suggested that the sentence should have been imposed having regard to the entire period that the applicant would have served, taking into account the three years of the earlier sentence added to the 21 months, resulting in an aggregate sentence of four years and nine months, 28 months of which would have been served before eligibility for release on parole. However, I do not consider that the totality principle had that application: his Honour was not sentencing for the earlier offence but instead activating an existing sentence.

[19] On the other hand, the effect of imposing a sentence on which the unserved part of the suspended sentence was to be made cumulative was certainly to be taken into account: Section 9(2)(k) of the *Penalties and Sentences Act* 1992 specifically required the sentencing court to have regard to "sentences already imposed on the offender that have not been served". The applicant's punishment by way of probation and community service order, in respect of closely related offences committed at the same time, was properly described by his Honour as attracting the totality principle.

[20] The respondent submitted that regard should be had to the whole of the sentence imposed by the sentencing judge, including the ameliorating effect of setting a parole eligibility date which would effectively operate after the applicant had served only five months of that sentence. His Honour had properly recognised the

need to temper the sentence in light of the cumulative aspect, indicating that he had reduced the sentence accordingly.

[21] The respondent relied on the decisions put to the court below as well as a further three, more recent decisions: *R v Jeffree*;[5] *R v Baxter*;[6] and *R v Gasenzer*.[7] All three involved considerably more sophisticated frauds than the applicant's, committed by employees of businesses and involving amounts between $43,000 and $58,000. Each of the applicants in those cases had a gambling problem. Only Baxter had a criminal history, which was minor and of some age. Significantly, all three had committed the offences when the aggravating circumstance for fraud was that the amount taken was more than $5,000; in all cases there was a further aggravating circumstance that the fraud was committed as an employee; and all faced a maximum penalty of ten years imprisonment. The sentences imposed ranged from three years imprisonment, suspended after nine months, to four years imprisonment, suspended after 15 months; in the latter case the fraud had continued over about three and a half years.

Conclusion

[22] None of the sentences referred to below or in this Court offered much direct assistance, because this applicant's offending did not involve any circumstance of aggravation and, importantly, the maximum penalty applicable was half what was faced by the applicants in those cases. In my view, the 21 month sentence imposed on her was manifestly excessive, having regard particularly to its cumulative aspect, the proportions of the offence and the fact that the maximum penalty was five years imprisonment.

[23] The amount taken, although no doubt significant to the applicant's client, was not, objectively speaking, large; it was spent on a gambling addiction, rather than luxurious living; and there was a component of other punishment for associated offending to be recognised, in the form of the community service and probation orders. For someone with the applicant's adverse criminal history for similar offending, a sentence of imprisonment involving actual custody was inevitable, but it is impossible to accept that, against the background of the five year maximum penalty, a sentence of such a length that its reduction to 21 months could be described as significant was warranted. That the non-parole period was relatively moderate does not serve to neutralise the sentence's having been set too high for the offence in the circumstances I have identified.

[24] Having regard to those circumstances, a sentence of 12 months imprisonment would appropriately have recognised the criminality of the applicant's offending as exacerbated by her prior criminal history. Having said that, however, I would adjust the parole eligibility date by only one month, so as to preserve the sentencing judge's approach of allowing for parole eligibility half way through the activated balance of the suspended sentence; then providing for eligibility after a third of the sentence for the current offences to recognise the guilty plea.

Orders

[25] I would grant the application for leave to appeal against sentence, allow the appeal, set aside the sentence on count 1 and substitute a sentence of twelve months imprisonment, fixing the applicant's parole eligibility date at 27 September 2015.

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5 [2010] QCA 47.
6 [2012] QCA 125.
7 [2013] QCA 9.

[26] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.

[27] **MORRISON JA:** I have read the reasons of Holmes JA and agree with those reasons and the orders her Honour proposes.