SUPREME COURT OF QUEENSLAND

CITATION:	*R v Massey* [2015] QCA 254
PARTIES:	**R** **v** **MASSEY, John Wayne** (applicant)
FILE NO/S:	CA No 62 of 2015 DC No 313 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Unreported, 12 March 2015
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2015
JUDGES:	Margaret McMurdo P and Philippides JA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to 14 counts of obtaining financial advantage by deception and 11 counts of attempting to obtain financial advantage by deception – where whilst he was an undischarged bankrupt, the applicant lodged 25 business activity statements with the Australian Taxation Office (ATO) claiming total refunds of $257,655.45 – where the ATO paid $141,048.22 but refused the remaining claims which totalled $116,607.23 – where the applicant's deception was premeditated and relatively sophisticated – where the applicant was sentenced to three and a half years imprisonment, to be released after serving 14 months, upon him giving security by recognizance in the sum of $5,000 and on condition he be of good behaviour for four years – where counsel for the applicant contends that the sentence is manifestly excessive given the applicant's age; his long-standing chronic back condition and more recent acute pain; his consequent discomfort, lack of mobility and his reliance on various pain relief – whether the sentence is manifestly excessive

Crimes Act 1914 (Cth), s 16A
Criminal Code 1995 (Cth), s 134.2(1)

Cao v R [2010] NSWCCA 109, considered
Edwards v R [2013] NSWCCA 54, considered
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Kertebani [2010] NSWCCA 221, considered

COUNSEL: F Richards for the applicant
M J Woodford for the respondent

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

[1] **MARGARET McMURDO P:** The applicant, John Massey, pleaded guilty on 8 August 2014 to 14 counts of obtaining financial advantage by deception under s 134.2(1) *Criminal Code* 1995 (Cth) and 11 counts of attempting to obtain financial advantage by deception. On 12 March 2015 he was sentenced on each count of obtaining financial advantage by deception to three and a half years imprisonment, to be released after serving 14 months, upon him giving security by recognizance in the sum of $5,000 and on condition he be of good behaviour for four years. He was also to pay reparation to the Commonwealth in the sum of $141,048.22. On each remaining count he was sentenced to a lesser concurrent sentence. He applies for leave to appeal against his sentence contending it was manifestly excessive.

Antecedents

[2] He was aged 61 and 62 at the time of the offending and 67 at sentence. He had a relatively minor criminal history commencing in 1985 for assault and wilful destruction; and in 1992 for stealing for which he was sentenced to non-custodial penalties. In 1999 he was placed on a $1,000 12 month good behaviour bond for failing to keep company records. He was fined for street offences in 2006 and for breaches of bail in 2014. He also had a lengthy traffic history.

The present offending

[3] His present offending occurred between July 2009 and January 2010. Whilst he was an undischarged bankrupt, he lodged 25 business activity statements (BAS) with the Australian Taxation Office (ATO) claiming total refunds of $257,655.45. The ATO paid $141,048.22 but refused the remaining claims which totalled $116,607.23. His deception was premeditated and relatively sophisticated. He arranged for seven companies either to be incorporated or purchased. He then appointed associates as paid directors. There was no suggestion they were involved in his deceit. In two instances he nominated people to be a director without their knowledge. He produced 85 false invoices which he used to claim tax refunds for business expenses which he had not incurred. He used a registered tax agent to lodge the statements, changing to a second tax agent when the first questioned the legitimacy of an invoice. He instructed the tax agents how to disburse the refunds. The proceeds went to pay the fees of his lawyer and his tax agent and $26,194.99 was paid directly to him. He was on a disability support pension and ensured that no large amounts came to him in case authorities such as Austrac or Centrelink found out. The applicant did not repay any of the money received from the ATO.

The prosecutor's submissions at sentence

[4] The prosecutor at sentence made the following submissions. The offending occurred over a six month period. The applicant was the principal offender and was not operating at the direction of anyone else. Most of the directors he appointed were never paid director's fees. Initially he lodged the BAS statements quarterly but later in the offending period he lodged them monthly so as to get more money faster. Some invoices falsely stated that they related to properties which were not owned by the companies. The applicant falsely appointed one person as a director of a company without his knowledge and submitted false invoices in his name. The applicant's offending was a fraud on all taxpayers.

[5] The prosecutor accepted that the applicant's plea of guilty was indicative of a willingness to facilitate the course of justice but pointed out the guilty plea was entered after a trial had been listed in January 2014 and again in August 2014. He pleaded guilty two weeks before his trial was due to commence. He did not co-operate with law enforcement agencies and instead gave them false information.

[6] The prosecutor emphasised that the applicant was not a first offender. Whilst awaiting trial he breached his bail conditions. There was a prospect he could re-offend. His rehabilitation prospects would be enhanced by a recognisance release order on condition that he be of good behaviour for a period of up to five years.

[7] Revenue fraud, the prosecutor contended, is prevalent and serious; the community expectation is that it will be met with condign punishment. Punishment and general deterrence were the primary sentencing considerations in this case. A wholly suspended term of imprisonment would be inappropriate. A term of imprisonment was the only appropriate sentence. The prosecutor handed up a schedule of comparable sentences[1] placing some emphasis on *Cao v R*;[2] *R v Kertebani*[3]; and *Edwards v R*.[4]

[8] She emphasised that each offence carried a maximum penalty of ten years imprisonment and/or a fine of $66,000. General deterrence was an important factor. It was desirable to achieve consistency in sentencing across Australia for federal offences. The notion that the Queensland sentencing practice of ordinarily setting a parole eligibility date after one third of the term of imprisonment for pleas of guilty to Queensland offences did not apply in Commonwealth matters. Sentencing patterns discernable from past comparable decisions do not fix the boundaries within which this sentence should be imposed although they provided guidance: *Hili v The Queen*.[5] The offending was deliberate and persistent. The amount of the fraud was an important factor in assessing the seriousness of the offending and the level of criminality: *R v Hawkins*.[6] As all counts were part of a series of criminal acts of the same or similar character, concurrent sentences were appropriate. The offending also involved identity fraud and on occasions the applicant used the name of real persons without their authority to support his fraudulent claims. The offending was apt to instil a loss of confidence in the efficacy and integrity of the Australian taxation system. The imposition of a custodial sentence would have a deterrent effect on the applicant personally, and

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1 Exhibit 1.
2 [2010] NSWCCA 109.
3 [2010] NSWCCA 221.
4 [2013] NSWCCA 54.
5 [2010] HCA 45 [54].
6 (1989) 45 A Crim R 430, 435.

also more generally. In the absence of exceptional circumstances, a serious fraud case such as this involving breaches of taxation laws warranted a term of imprisonment with actual custody. The applicant was 67 years old with a back injury but his ailments could be dealt with by the Department of Corrective Services. These matters could however be taken into account in deciding the appropriate sentence although that consideration must be limited by the need to maintain proper standards of punishment.

The applicant's submissions at sentence

[9] Counsel for the applicant submitted that the applicant once lived a successful professional life, including managing a residential apartment block and in property development on the Gold Coast. His failure to keep company records related to poor book-keeping, not dishonesty. Counsel tendered documents to support his submissions that the applicant in 1996 and 1997 was a generous supporter of the Collingwood Football Club. He also tendered a 2003 Certificate of Appreciation from the Salvation Army thanking the applicant for his assistance in the Red Shield Appeal.[7] Counsel emphasised that the applicant's conviction for stealing was in 1992 and involved taking cash from a business just before it went into receivership. He had a son from his first marriage who was present in court. His second wife died four years ago from pancreatic cancer. He lost a great deal of money in the late 1990s when the Pyramid Building Society went into receivership. He then attempted to regain his financial prosperity through building projects.

[10] Counsel tendered a psychiatric report from Dr John Wainwright, who began treating the applicant after he had attempted suicide through an overdose in 2004, well before the offending period. Dr Wainwright noted that the applicant had had a previous overdose earlier in 2004 related to business and financial problems whilst the second was in the context of a relationship break-up and financial and legal problems. He had an adjustment disorder with depressed and anxious mood and significant narcissistic personality traits which made his interpersonal relationships difficult and at times he felt overwhelmed and unable to cope. He has been profoundly disappointed that he has not been able to regain his past financial success. He benefited from treatment and he responded well to encouragement and support. The applicant told Dr Wainwright that he did not profit significantly from the offences; others profited more significantly than he. As his treating psychiatrist, Dr Wainwright was inclined to accept this and on that basis considered that the applicant's chance of re-offending was very low.[8]

[11] Counsel emphasised the applicant's two attempted suicides, stating that on the second occasion he was hospitalised for about ten days. He had been on antidepressant and anti-anxiety medication since. Much of the money received in the offending went to accountants and lawyers and the applicant personally received only a little over $26,000. He contended that, on the applicant's instructions, construction had begun on one project. Counsel emphasised that the matter became a guilty plea not long after he was briefed. As to the applicant's breaches of bail, the first related to one occasion when he reported late at the police station. Two months later he missed reporting one day and when he next reported, he was taken into custody. On both occasions non-custodial penalties were imposed and the breaches were "extraordinarily minor".

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7 Exhibit 2.
8 Exhibit 3.

[12] Counsel placed particular emphasis on the applicant's current physical health. He underwent lumbar surgery in 1985 and 1986 and injured his back in 2011. His back has continued to deteriorate as he has aged. He tendered reports from general practitioner, Dr Philip Lever and neurosurgeon Dr Geoff Askin.[9] These recorded that the applicant underwent a microdiscectomy of L4-5 on 11 December 2014. He suffered complications associated with pain relief following the procedure. His level of pain has not improved. He continues to suffer a severe left-sided sciatica 24 hours a day which disturbs his sleep and interferes with his ability to walk and is particularly troublesome when seated. An MRI showed the formation of extensive scar tissue at the operation site which is a potential complication of the operation and explains his continuing pain. He manages his pain with a combination of drugs including Panadeine Forte, Targin, Endone and Lyrica. Dr Askin considers the pain is as a consequence of the surgery and did not recommend further surgery. He suggested a nerve block and, if that failed, a referral to a pain specialist.[10]

[13] Defence counsel stated that the applicant recently underwent the nerve block procedure. It would take between one to six weeks to ascertain whether or not it was successful. He was presently extraordinarily unwell. He walked with a stick because of his severe problems with numbness in his left leg which has a tendency to collapse under him. He was largely bedridden. As a result, whatever time he serves in custody will be a greater burden on him than on someone who was in good health. This factor warranted an amelioration of his sentence. His son had been caring for him since his release from hospital.

[14] Counsel referred the judge to four District Court sentencing decisions where terms of imprisonment were imposed of between two to three years with release after serving from four to nine months. Counsel conceded that though the applicant had to go to prison, because of his guilty plea, his psychiatric history and most importantly his current physical health and age, the sentence ordinarily appropriate should be significantly mitigated.

The judge's sentencing remarks

[15] In sentencing the applicant, the judge, after accurately summarising the offending, observed that although the applicant claimed he was involved in a particular genuine development, he was not entitled to any of the refunds he claimed. He was an experienced businessman. Her Honour referred to the submissions of defence counsel, and in particular Dr Wainwright's opinion, before concluding that, on the evidence, the applicant was the scheme's architect and principal offender. The judge referred to the history of the applicant's back condition, his pain and his limited mobility. It was likely that whilst in prison he would spend time in a secure hospital facility under treatment. The state of his health was a matter to be taken into account but it ought not overwhelm a proper sentence. There was no suggestion that his condition could not be appropriately accommodated in prison. The judge directed the Registrar to forward to the Chief Executive of Corrective Services a copy of the tendered medical reports.

[16] Her Honour noted that the case was listed for trial a year ago but was adjourned when the applicant sacked his lawyers. He indicated he was pleading guilty only ten days before his second trial date. There was some utilitarian value in his guilty plea as the trial was expected to take two to three weeks; the evidence was complicated; and the

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9 Exhibit 4.
10 Exhibit 4.

Commonwealth had been saved the cost of prosecuting the trial. The applicant should be given some credit for co-operation in the administration of justice but this was not a case of overwhelming remorse. The plea was a pragmatic acknowledgement of the compelling evidence and came only after protracted attempts to escape liability. Whilst the applicant's obstruction of the investigation and the listings for trial did not aggravate the sentence, they limited the weight to be given to the guilty plea.

[17] Her Honour considered the applicant's offending was calculated and sophisticated, extending to identity fraud with forged invoices and fraudulently registered directors. It persisted until detection and was committed whilst he was a bankrupt. His motive was a desire for money. The cases cited by counsel were of some assistance but none was exactly apposite. Noting that the maximum penalty was ten years imprisonment, that the sentence must reflect the total criminality and taking into account all the matters listed in s 16A(2) *Crimes Act* 1914 (Cth) her Honour concluded that imprisonment was the only appropriate sentence. Her Honour determined that a sentence of three and a half years imprisonment with release after 14 months was required to impose a just punishment and to reflect general deterrence.

The applicant's contentions in this application

[18] Counsel for the applicant contends the sentence is manifestly excessive when compared to the cases relied upon by the prosecution at sentence, given the factors personal to the applicant. He especially emphasised the applicant's age; his long-standing chronic back condition and more recent acute pain; his consequent discomfort, lack of mobility and his reliance on various pain relief. He also pointed to the applicant's past industriousness and contribution to the community, his long psychiatric history and the unhappy circumstances he was in at the time of his offending. Counsel conceded that the material at sentence did not support the conclusion that the applicant's psychiatric problems had any causal relationship with his offending. Counsel also emphasised the limited extent to which the applicant profited personally and that his goal in the offending was to finance a genuine development.

[19] His age and present physical condition, counsel submitted, meant that his time in custody will be a greater burden for him than for a healthy person and this warranted special mitigation. Counsel contended that although the sentencing judge stated she was taking into account his physical ailments, this was not properly reflected in the sentence.

[20] Counsel referred to the cases cited at sentence, noting that none of those offenders had this applicant's serious health issues. He submitted that leave to appeal should be granted and the appeal against sentence allowed. The sentence imposed should be set aside and instead the applicant should be sentenced to three years imprisonment with recognizance release after nine months for a period of three years.

Conclusion

[21] As the experienced sentencing judge noted, the cases placed before her as comparable, whilst helpful in a general way were not closely comparable to the unusual matrix of circumstances in this case.

[22] In *Cao*, an offender who unsuccessfully applied for refunds of $120,950 who was suffering from depression and anxiety and had no prior history was sentenced to two years imprisonment with a recognizance release after 16 months or two thirds of the sentence.

[23] In *Kertebani*, the offender deceitfully obtained $494,669 and personally received $307,555. He, too, was depressed and anxious with no prior history. He offered to repay the money. He was sentenced to two years imprisonment with release after 14 months or about 58 per cent of the sentence. The court described the sentence as at the bottom of the range.

[24] In *Edwards*, the offender falsely claimed $540,898 of GST refunds and obtained $380,724. He did not cooperate and there was a lengthy investigation during which Edwards suffered considerable stress. He offered to repay the money. He was sentenced to four years and three months imprisonment with a non-parole period of two years and two months or 50 per cent of the sentence.

[25] These cases do not suggest that the sentence imposed on this applicant is manifestly excessive, despite the mitigating features, principally his age and extreme ill health and pain, his psychiatric problems at the time of his offending, and his late guilty plea.

[26] The applicant's offending was a serious example of a fraud on the revenue. He attempted to deceitfully obtain over $250,000 from the Commonwealth. He was successful in obtaining over $140,000. He has repaid nothing. It seems he was once a successful businessman and committed these offences whilst an undischarged bankrupt in a misguided and completely unrealistic attempt to restore his financial prosperity. Nothing before the sentencing court suggests he has any insight into the anti-social nature of his behaviour. Offences of this kind are not victimless crimes. They are crimes against all Australians. The criminal scheme adopted by the applicant was carefully thought out and relatively sophisticated. It continued over a six month period until he was caught. He protested his innocence and did not co-operate with the authorities. He has demonstrated no remorse or contrition. Offences of this kind are costly to detect. The community rightly expects such offenders to be punished in a way which will deter them and others.

[27] The evidence tendered at sentence demonstrated that the applicant has a significant disabling back injury which causes him severe pain. His time in prison will be more difficult than for a healthy person. This is a mitigating factor. But as the sentencing judge noted, there is no evidence that his condition cannot be appropriately accommodated whilst in prison, and his poor health, whilst a matter to be taken into account, ought not in this case overwhelm a proper sentence.

[28] It is desirable to maintain some broad consistency across Australia when sentencing federal offenders. As is demonstrated by the sentences imposed in *Cao*, *Kertebani*, and *Edwards*, the practice adopted in Queensland when sentencing state offenders of commonly setting parole eligibility after about one third of the sentence as mitigation for early guilty pleas is not the practice for sentencing federal offenders. More commonly, when sentencing federal offenders, release dates are set to recognise mitigating factors between the half to two thirds point of the sentence. Once that practice is considered it is clear the sentencing judge gave significant and appropriate weight both to the late guilty plea and to the applicant's poor health in setting his release date after serving one third of his sentence.

[29] The maximum penalty for each of the 25 counts was ten years imprisonment. I am unpersuaded that either the head sentence or the release date makes the sentence manifestly excessive. I would refuse the application for leave to appeal against sentence.

[30] **PHILIPPIDES JA:** I agree with the reasons of McMurdo P for dismissing the application.

[31] **JACKSON J:** I agree with the President's reasons and the order proposed. I would add the following.

[32] Each of the 25 convictions was for an offence committed by the applicant during a course of conduct he engaged in between August and December 2009. The applicant claimed refund payments in respect of Business Activity Statements for companies he controlled. He caused 25 relevant Business Activity Statements to be lodged. They claimed GST refunds on the acquisition of goods or services totalling $257,655.45. The ATO paid $141,048.22 on 14 of the claims. The difference of $116,607.23 was the total of the amounts involved in the convictions for attempting to obtain a financial advantage on the remaining 11 claims. All of the amounts claimed were a deliberate attempt at deception. The companies were not carrying on the represented business undertakings. The alleged payments of GST on acquisitions from suppliers were false. It was a crude fraudulent scheme to obtain money from the Commonwealth by deception.

[33] The President's reasons demonstrate that the head sentences of three years and six months are not shown to be manifestly excessive by comparison with other sentences imposed for offending of the same kind.

[34] A central point urged on the applicant's behalf was that insufficient weight was given by the learned sentencing Judge to "the physical or mental condition" of the applicant as required by s 16A(2)(m) of the *Crimes Act* 1914 (Cth), because of his chronic back condition.

[35] The worsening of that condition led to back surgery in December 2014. The surgery did not improve things much. The applicant continued to experience discomfort and lack of mobility and relied on pain relief. Prison will be harder on him than an offender without those disabilities.

[36] The learned sentencing Judge did not overlook the factor of the applicant's back condition and disability. Her Honour said that the state of the applicant's health was a matter to be taken into account but it ought not overwhelm a proper sentence. I agree.

[37] The date for release set at 14 months from sentence shows that the sentencing Judge took the fact that the applicant had pleaded guilty to the charges (s 16A(2)(g) of the *Crimes Act* 1914 (Cth)) and his character, antecedents, age, means, and physical or mental condition (s 16A(2)(m) of the *Crimes Act* 1914 (Cth)) into account as the applicant is to be imprisoned for a period of one third of the three years and six month head sentences before release.