

SUPREME COURT OF QUEENSLAND

CITATION: *R v Black; R v Sutton* [2004] QCA 369

PARTIES: **R**
v
BLACK, Stephen Glen
(applicant/appellant)

R
v
SUTTON, Suzanne Margaret
(applicant/appellant)

FILE NO/S: CA No 195 of 2004
CA No 196 of 2004
DC No 1760 of 2003

DIVISION: Court of Appeal

PROCEEDING: Sentence Applications

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 8 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 31 August 2004

JUDGES: McPherson and Jerrard JJA and Holmes J
Joint reasons for judgment of McPherson JA and Holmes J;
separate reasons of Jerrard JA, dissenting in part

ORDERS: **1. Grant leave to Stephen Glen Black to appeal against sentence and allow the appeal to the extent only of setting aside the sentence on count 2 of five years imprisonment, suspended after 15 months for an operational period of four years and ordering instead a sentence of three years imprisonment, suspended after 12 months for an operational period of four years;**

2. That a warrant issue for the arrest of Stephen Glen Black, to lie in the Registry for seven days from the date of this order;

3. Grant leave to Suzanne Margaret Sutton to appeal against sentence and allow the appeal, set aside the plea of guilty and conviction on count 19 and on count 1 set aside the sentence of two years imprisonment, suspended after three months for an operational period of three years and order instead a sentence of two years imprisonment, suspended forthwith for an

operational period of two years

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – AMENDMENT – GENERALLY– where applicant Sutton convicted on plea of guilty to a count charging the making of a false statement under s 193 *Criminal Code* - where count pleaded to omitted an element of the offence charged that element being that the applicant had knowledge of the falsity of her statement - where respondent applied to amend indictment to include element of knowledge – where nothing in the recital of facts put before the sentencing judge made it possible to infer that the applicant had the requisite knowledge – whether applicant would suffer injustice as result of amendment – plea of guilty set aside

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant Black convicted on pleas of guilty to one count of fraud, one count of fraudulently falsifying a record, one count of forgery and one count of uttering – where applicant sentenced to five years imprisonment suspended after 15 months for an operational period of four years with respect to the count of fraud and lesser concurrent terms of imprisonment on the other counts – where fraud involved dishonestly inducing the Queensland Building Services Authority to approve a building licence for a company that the applicant had effective control over – where deterrent sentence required having regard to the capacity of the applicant’s conduct to undermine public confidence in the building authority’s ability to regulate operators in the building industry in accordance with its statutory obligations – whether sentence manifestly excessive

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant Sutton convicted on pleas of guilty to one count of fraud and one count of making of a false statement – where sentenced to two years imprisonment suspended after three months for an operational period of three years on both counts – where plea of guilty set aside with respect to count of making false statement – where crown conceded that a fully suspended term appropriate if sentenced only for one count - where applicant sentenced on the basis of playing a minor role in the commission of the fraud count – where applicant sole parent caring for two children one of whom is severely disabled – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 572(3)

GAS v R (2004) 206 ALR 116, cited

R v Sadeed [2004] QCA 32, CA No 190 of 2003, 20 February 2004, cited

COUNSEL: P J Callaghan for the applicant/appellant, Black
A J Rafter SC for the applicant/appellant, Sutton
M J Copley for the respondent

SOLICITORS: Dearden Lawyers for the applicant/appellant, Black
Robert Bax & Associates for the applicant/appellant, Sutton
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McPHERSON JA AND HOLMES J:** We have had the advantage of reading the reasons for judgment of Jerrard JA, which set out more fully the relevant facts and issues. While we concur with his Honour's view that the sentence imposed on the applicant Stephen Glen Black requires adjustment, our examination of the course of dishonesty involved and its implications against the background of the legislative scheme for licensing builders leads us to conclude that a sentence entailing a somewhat higher period of actual custody than that he proposes is warranted.
- [2] Count 1 charged both applicants with committing a fraud under s 408C(1)(f) of the *Criminal Code* on the Queensland Building Services Authority. The fraud was committed in the course of applying to and in 1998 obtaining from the Authority under the *Queensland Building Services Authority Act* 1991 the issue of a building licence in favour of Designer Steel Homes Ltd. Ms Sutton was dishonestly represented to the Authority to be the director of Designer Steel Homes, whereas in fact it was Black who was the effective moving and controlling force behind that company and, as such, the director of it. Black's association with it was concealed because he had been a director of the failed Nu-Steel Homes company, which in 1998 had recently gone into liquidation. Had the Authority known of this, it would before issuing the licence to Designer Steel have investigated the matter much more thoroughly and would probably in the end not have issued a building licence to it.
- [3] The other major charge to which the applicant Black pleaded guilty was one of the fraudulent falsification of records contrary to s 441 of the *Code*. Designer Steel Homes' building licence was due to be renewed in January 2000. For this the Authority required further information in the form of a list of the company's "aged" creditors as at 31 December 1998. It was supplied by Black in March 2000 and supplemented in April of that year. Because of a discrepancy of some \$170,000 in the debts listed as due and those in fact owing to creditors, the Authority eventually cancelled or called in the licence on 12 April 2000. The company went into voluntary administration on 2 May 2003 and then into liquidation, having during its short trading career amassed losses estimated by the liquidator at \$1.3 million.
- [4] It should not be supposed that the interest of the Authority in the history or financial status of an applicant for a building licence or its directors is attributable solely to some form of officious or bureaucratic curiosity. The Act and the Regulations under it, both in their present form and in the form in which they stood at the time when those offences were committed, set up in Part 5 (ss 68-71) a statutory insurance scheme for licenced builders. The information required by the Authority

is therefore not only relevant to the builder's competence as such, but is also material to the risk being incurred by the insurance fund if a licence to build is issued or renewed. The precise monetary consequence of the frauds in counts 1 and 2 are not ascertainable from the material before the learned sentencing judge; but the prospect that losses would be incurred in trading by Designer Steel Homes were in some measure, at least, the kind of risk that the Authority was attempting to guard against when it sought the information which, in relation to count 1, the applicants, and, in relation to count 2, the applicant Black, fraudulently supplied. The integrity of the statutory insurance system is seriously threatened by fraudulent conduct of the kind committed here.

- [5] Nevertheless, we do not consider that the criminal misconduct in the present case attained the level of that committed in *R v Sadeed*¹, where the offender was sentenced to four years imprisonment for a series of forgeries, uttering and frauds committed by the use of false names and addresses in official documents over a lengthy period of time. In consequence, we consider that the head sentence imposed on Black of imprisonment for five years under count 2 erred on the side of being excessive. We would vary that sentence by reducing it to three years, and by reducing the time to be served before it is suspended from 15 months to 12 months.
- [6] As to the applicant Sutton and the proposed amendment of count 19 of the indictment, which concerns her alone, we note that the applicant has filed no material suggesting that she laboured under any illusion as to the effect of that count. The charge was originally drawn under a cognate provision of the *Criminal Code* (s 194: making a false declaration) with all elements including her knowledge of falsity correctly included; the amendment to a charge of making a false statement was made, no doubt somewhat hurriedly, by hand at the sentence, the defence having been advised and having no objection; the section number of the new charge was correctly cited. Where a competently represented accused has pleaded guilty to a charge in circumstances such as those, a knowledge of and acceptance of the content of the entire offence may ordinarily be assumed, notwithstanding an inadvertent admission of an element; so injustice in amendment is unlikely.
- [7] The difficulty here, however, is that an examination of the transcript of the arraignment records Ms Sutton's plea of guilty to count one on the indictment, and then, in respect of count 19, the following
- [8] "ASSOCIATE: Suzanne Margaret Sutton, you are further charged that on the 5th day of April 2000 at Brisbane in the State of Queensland you, being required by law to make a statement on oath, made a statement touching a debt owed to Stephen Ring, which was false in a material particular, namely that no debt was owing, and verified the statement on oath. How do you plead, guilty or not guilty?

ACCUSED SUTTON: Not guilty, your Honour."

- [9] The transcript is probably wrong. Nothing in what follows suggests that anyone present thought there had been anything other than a plea of guilty. Nonetheless, this added feature of doubt disinclines us to robustness on the question of amendment, and we would agree therefore with Jerrard JA that the plea of guilty and the conviction recorded on count 19 ought to be set aside. The Crown conceded that if Ms Sutton were to be sentenced on count one only, a fully suspended

¹ [2004] QCA 23.

sentence was appropriate; that is obviously correct, particularly having regard to her role as sole parent caring for two children, one of whom is severely disabled. We concur with the sentence proposed by Jerrard JA, that is, two years imprisonment suspended forthwith for an operational period of two years.

- [10] The sentences we would impose, then, are as follows: the sentence of five years imprisonment, suspended after 15 months for an operational period of four years imposed on the applicant Stephen Glen Black on count 2 is set aside. He is instead sentenced on that count to three years imprisonment, suspended after 12 months for an operational period of four years. A warrant is to issue for his arrest, to lie in the Registry for seven days from the date of this order. The plea of guilty and conviction of the applicant Suzanne Margaret Sutton on count 19 of the indictment is set aside; on count 1 on the indictment, the sentence of two years imprisonment suspended after three months for an operational period of three years is set aside and she is instead sentenced to two years imprisonment, suspended forthwith, for an operational period of two years.
- [11] **JERRARD JA:** These proceedings are applications for leave to appeal the sentences imposed upon Stephen Black and Suzanne Sutton on 28 June 2004 in the District Court. Mr Black was sentenced to concurrent terms of imprisonment, of which the most severe was one of five years to be suspended after he had served 15 months, with an operational period of four years. Since that operational term was less than the term of imprisonment, that sentence was in breach of s 144(6)(a) of the *Penalties and Sentences Act 1992*, requiring re-sentencing for that offence; Ms Sutton was sentenced to concurrent terms of two years imprisonment to be suspended after three months for an operational period of three years. Both allege that the sentences imposed upon them were manifestly excessive; each was granted bail soon after the sentences were imposed.
- [12] Mr Black pleaded guilty to four counts. The first alleged that between 31 November 1998 and 8 March 2002 he and Ms Sutton dishonestly induced the Queensland Building Services Authority to approve a building licence for Designer Steel Homes Pty Ltd, an action that Authority was lawfully entitled to abstain from doing. That plea was accordingly entered to an offence of fraud, committed contrary to the provision of s 408C(1)(f) of the *Criminal Code*, and it carried a maximum penalty of five years imprisonment. For that offence, count one on the indictment, he was sentenced to three years imprisonment suspended after 12 months for an operational period of three years.
- [13] His next plea, to count 2, was to an offence in breach of s 441 of the *Code*, namely fraudulent falsification of records, carrying a maximum penalty of ten years imprisonment. By that plea he admitted that between January 1999 and 5 May 2000, with intent to defraud, he falsified a record namely the aged creditor listing of Designer Steel Homes Pty Ltd. For that offence he received the five year sentence already described, suspended after 15 months.
- [14] Counts 3 and 4 on the indictment, to which he pleaded guilty, respectively alleged the forging and the uttering between 31 April 1999 (sic) and 1 March 2000 of a document purporting to be one which a Justice of the Peace was required or authorised by the law to make, attest, or issue, and purporting to be made attested, or issued by a Justice of the Peace namely seven statutory declarations “by contractor” (sic). While those two counts exhibit calendar and grammatical

oddities, they are not bad for duplicity, by reason of s 568(5) of the *Criminal Code*. For those, Mr Black was sentenced to two years imprisonment suspended after eight months for an operational period of three years.

[15] Suzanne Sutton pleaded guilty to count 1 on that indictment and to a count 19, which the Director intended to lay under s 193 of the *Code*, which alleged – as amended – that on the 5th day of April 2000 at Brisbane in the State of Queensland Suzanne Margaret Sutton being required by law to make a statement on oath, made a statement touching a debt owed to Stephen Ring, which was false in a material particular, namely that no debt was owing and verified the statement on oath. The difficulties in understanding what was alleged in that charge as drafted were not reduced by the omission from it of any assertion that the statement was false to the knowledge of Suzanne Sutton.

[16] The circumstances giving rise to the commission of those offences were as follows. Mr Black had been a Director of Nu Steel Homes, a building company which in 1998 went into liquidation. Designer Steel Homes Pty Ltd was first registered on 15 April 1998, and Suzanne Sutton was its nominal director. In fact Mr Black at all material times was the person in effective control of that company’s operations, and accordingly a director of it within the meaning of s 9 in part 1.2 of the *Corporations Law*; and in reality the managing director. An application was made by Designer Steel Homes Pty Ltd to the Queensland Building Services Authority for a contractor’s licence pursuant to s 31(2) of the *Queensland Building Services Authority Act* 1991. That section relevantly provides:

“(2) A company is entitled to a contractor’s licence if the authority is satisfied, on application by that company for a licence, that –

- (a) the directors and any other persons who are in a position to control or substantially influence the conduct of the company’s affairs (including, for example, shareholders with a significant share holding, financiers and senior employees), are fit and proper persons to exercise such control or influence over a company that holds a contractor’s licence;”

and the Act provides in s 31(3) that:

“In deciding whether a particular person is a fit and proper person to hold a contractor’s licence or to exercise control or influence over a company that holds a contractor’s licence, the authority may have regard to –

- (a) commercial and other dealings in which that person has been involved and the standard of honesty and integrity demonstrated in those dealings; and
- (b) any failure by that person to carry out commercial or statutory obligations and the reasons for the failure; and
- ...
- (d) any other relevant factor.”

[17] The learned sentencing judge was informed that the Authority made checks on the named directors of applicant companies, which checks included whether those persons had both the financial and technical qualifications to manage a building company. The learned judge was informed by the prosecutor, without objection or

contradiction, that had Mr Black's directorship and effective control of the applicant company been disclosed to the Authority it would certainly have carried out investigations into the company above and beyond those actually carried out prior to the issue by it of a licence to operate as a builder on 13 November 1998, and it might have been that no licence would have been issued at all.

- [18] After that licence was granted the company began trading and secured a number of building contracts, including a contract in Mt Isa and another contract to build six Queensland Housing Commission homes. It made significant losses on the Mt Isa contract, estimated by Mr Black to be "in the order of \$130,000.00 to \$350,000.00," and by September 1999 the company was experiencing genuine difficulty paying its debts.
- [19] A renewal of the licence was due on 25 January 2000 and lodged on 28 January. By that time the Authority had received a number of complaints from subcontractors, and investigations carried out by it revealed that the company had significant debt. This had resulted in the Authority requesting that the company provide it a list of the company's aged creditors, as at 31 December 1999. After the application for renewal was lodged a second request was made. On 3 April 2000 Mr Black supplied the second list. There was a discrepancy of \$170,000.00 on that second list between the total revealed as owing to creditors and what the creditors then claimed as owing. In the event, an investigation of that list itself resulted in the Authority cancelling the company's building licence on 12 April 2000. The company was then placed in voluntary administration on 2 May 2000, and on 29 May 2000 creditors placed the company in liquidation. It then had total losses of 1.3 million dollars.
- [20] The offence constituting count 2, namely the fraudulent submission of that falsified list of creditors, accordingly had little consequences for creditors, which consequences had already been suffered. However, the dishonesty involved in presenting the falsified list of creditors was not the only dishonesty demonstrated during the company's operation and admitted by the pleas of guilty. Counts 3 and 4 involved statutory declarations required by the Queensland Housing Commission in order for the company to receive progress payments. The learned sentencing judge was informed, again without contradiction, that the company had been required to provide statutory declarations confirming that subcontractors had been paid as at the date of the relevant declaration; on seven different occasions between 5 May 1999 and 18 February 2000 Mr Black forged the signature of a Justice of the Peace on those statutory declarations and then presented them to the commission. The learned judge was not told whether the statutory declarations had contained falsehoods or not, and was told that the forged signature had been forged as a matter of convenience, no Justice of the Peace being readily available.
- [21] Count 19, charged against Suzanne Sutton only, related to an affidavit she swore and which was filed in this court. A debt of some \$2,600.00 was owed to a surveying company. It had apparently lodged an application pursuant to Part 5.4 of the *Corporations Act 2001 (Cth)* to have the company wound up for its deemed insolvency resulting from non-payment of the debt after a statutory demand; Suzanne Sutton swore an affidavit declaring that the claimant's work had not been done in a workman-like fashion and that therefore there was no money owing. It appears that was done in proceedings under s 459 J of the *Corporations Act*. The learned sentencing judge was informed that prior to that affidavit being lodged the

company had “effectively accepted the debt and there had been no dispute as to the quality of the work undertaken”. Nothing else was put before the learned judge about that dispute or Suzanne Sutton’s knowledge of the true position, whatever that was.

- [22] It was submitted on Mr Black’s behalf that he had two children for whose support he paid \$1,000.00 per month to their mother from whom he had separated, and he saw the children each second weekend. The learned judge was told Mr Black had a good work history, had never been unemployed, and had paid \$100,000.00 for the opportunity of becoming a Director of Nu Steel three months before that company went into liquidation. The judge was told that Designer Steel Homes had had an inefficient manager in Mt Isa, that the goods and services tax provisions had led to a shortage in the availability of building materials, exacerbated by the demand for those in the construction of stadiums for the Sydney Olympics. The judge was told that by February 2000 Mr Black had arranged that the Queensland Housing Commission would pay subcontractors directly, and had executed authorities to that end. It was not revealed whether that was because of the delivery of notices pursuant to the *Subcontractors’ Charges Act 1974*.
- [23] The prosecutor had suggested that a sentence of between 12 and 18 months imprisonment be imposed on Mr Black, and further submitted that the learned judge could entirely suspend it. The prosecutor likewise submitted that a period of imprisonment be imposed on Ms Sutton, also wholly suspended. She had the full time care of her two children, of whom the youngest, an eight year old daughter, was physically, intellectually and visually disabled and impaired by reason of a neurological disorder. Since 1999 that child had suffered from seizures, and she relied very heavily upon Ms Sutton for her care. Ms Sutton was also described by her counsel as having an excellent work history, and counsel submitted the learned judge would accede to the sentencing submissions of the prosecution.
- [24] The learned sentencing judge did not, and imposed a considerably higher level of penalty. The sentencing remarks included that both applicants had saved the community a considerable cost by their pleas of guilty, in that their trial had been expected to last at least three weeks. The Crown had conceded that the two pleas of guilty could be considered timely. The applicants had been arrested in January 2002, committal proceedings had taken place in October of that year and February 2003, and a submission about the charges was received from Mr Black by the DPP on 2 September 2003. In June 2004 negotiations took place between his lawyers and the Crown, resulting in pleas of guilty to some counts and the entry of a nolle prosequi on a substantial number of others.
- [25] The sentencing judge considered that Mr Black’s criminal history was of no relevance to the matters then before the judge, and that Ms Sutton had no prior convictions at all. He described her as a minor player in respect of count 1, and obviously significant in respect of count 19. The judge referred to Ms Sutton’s support of her children, including the disabled child, and for both applicants to the fact that the offences occurred some time ago.
- [26] The learned judge nevertheless considered that Mr Black had intended to defraud an Authority charged with the responsibility of overseeing the proper conduct of the building industry in Queensland, and considered that the necessary deterrent aspect of the sentences required a sentence of imprisonment to be actually served, for both

applicants. In Ms Sutton's case, the judge considered that the serious aspect of her behaviour was the swearing of a false affidavit for use in Supreme Court proceedings, and that the requirements of those proceedings under the *Corporations Act* were not mere formalities. For Mr Black, the serious aspect was the pervasive dishonesty of his dealings with the Authority and his ongoing intention to defraud it. Those considerations led to the learned judge imposing the penalties described, after balancing the serious aspects of the offending behaviour admitted against the mitigating factors.

- [27] A specific new matter has arisen in the application of Ms Sutton. That is the omission from count 19 in the indictment of an allegation that the statement she swore to was false to her knowledge. The submission now made on her behalf is that nothing in the recital of facts put before the learned sentencing judge would in fact have permitted the conclusion that she did know of the true position surrounding the debt to the surveying company, that the true position was not revealed in any event, and that accordingly it would not be appropriate to permit any amendment of the indictment to reflect the allegation which should have been made. I respectfully agree with that submission. The power to amend given by s 572(3) of the *Code* depends upon the court being satisfied no injustice will be done by that amendment, and there are simply insufficient facts before this court to make that judgment, or what it was her plea was intended to admit. Ms Sutton had pleaded to a count not known to the law, and I would simply set aside the plea of guilty on count 19.
- [28] That means that her application for leave to appeal must succeed, since the sentence of actual imprisonment imposed upon her is manifestly excessive as a penalty for count 1, she having been sentenced on the basis of playing a minor role only. The respondent accepts that a wholly suspended term is appropriate, she being a sole parent caring for a very badly disabled child.
- [29] That leaves the application by Mr Black. In *GAS v R* (2004) 206 ALR 116 the High Court recently restated some fundamental principles on sentencing, including that it is for the prosecutor alone to decide the charges to be preferred, for the accused alone to decide to which charges he or she would plead guilty, and for the judge alone to decide the sentence to be imposed.²
- [30] The learned sentencing judge was correct in considering that a deterrent sentence was required in Mr Black's case, and that a period of imprisonment actually served was appropriate. As Mr Copley put it, Mr Black's conduct was extremely serious because of its capacity to undermine public confidence in the Authority's ability to regulate operators in the building industry in accordance with its statutory obligations. However, the head sentences imposed on him exceed those upheld in *R v Sadeed* [2004] QCA 32, which seems a more serious example of offending. After a trial that offender was sentenced to four years, for four offences of forgery and uttering, and two offences of fraud. He had pursued a course of conduct enabling him to get possession of imported motor cars and to sell those without making modifications which he was by law obliged to make or have made. His application for leave to appeal against sentence was dismissed. McPherson JA described that applicant's conduct as constituted by forging and uttering official documents

² At paragraphs [27]-[32] of the reasons for judgment of the Court, in which some other matters of principle were also restated.

purporting to come from Government instrumentalities, on the integrity and faith of which much commerce is necessarily conducted and depends. That learned judge held that a need for general deterrence in such cases is of great importance.

[31] Mr Black has forged and uttered documents, and falsified records, provided to a regulatory Authority whose effectiveness depends in part on the integrity of its procedures, and it is important that repeated dishonesty in dealings with it, which frustrate those procedures, be seen to be punished. Nevertheless, I consider that the head sentences imposed upon Mr Black were beyond an appropriate range, although no error is shown merely by fact that they were well above those suggested by the prosecution. They were defended by the Director in this court, but the appropriate head sentence should be lower than that imposed on Mr Sadeed; and there has to be considerable allowance for the pleas of guilty, and the matters of mitigation personal to Mr Black.

[32] I would order:

- that the application by Stephen Glen Black be allowed in respect of the sentences imposed on counts 1 and 2 on the indictment dated 21 July 2003, set aside those sentences, and order instead on each of counts 1 and 2 a sentence of three years imprisonment suspended after six months for an operational period of five years, and otherwise dismiss the applications;
- in respect of the applicant Suzanne Margaret Sutton, I would allow the applications and appeals and set aside the plea of guilty and conviction on count 19 on that indictment; and on count 1 set aside the sentence of two years imprisonment suspended after three months for an operational period of three years, and order instead a sentence of two years imprisonment suspended forthwith for an operational period of two years;
- Order that a warrant issue for the arrest of Stephen Glen Black, such warrant not to issue from the Registry until seven days from the date of making this order.