SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ruddell* [2005] QCA 346
PARTIES:	**R** **v** **RUDDELL, Sara Jane** (applicant)
FILE NO/S:	CA No 117 of 2005 DC No 36 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2005
JUDGES:	McPherson JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – applicant convicted of a series of separate instances of stealing sums of money aggregated into one count – no single amount exceeded $5,000, but total amount stolen exceeded $5,000 – whether sentencing judge inappropriately relied on a matter which was not charged as a circumstance of aggravation – whether special case 9 of s 398 *Criminal Code* 1889 (Qld) applied – whether sentence imposed excessive *Criminal Code* 1899 (Qld), s 1, s 398, s 564, s 568 *R v De Simoni* (1981) 147 CLR 383, considered *R v Lindsay* [1963] Qd R 386, cited *R v Tommekand* [1996] 1 Qd R 564, distinguished *Walsh v Tattersall* (1996) 188 CLR 77, cited
COUNSEL:	P J Callaghan SC for the applicant S G Bain for the respondent
SOLICITORS:	Robertson O'Gorman for the applicant Director of Public Prosecutions (Queensland) for the

respondent

[1] **McPHERSON JA:** The appellant was tried in the District Court at Gladstone on an indictment charging that between 17 July 2001 and 5 March 2003 she stole sums of money and a quantity of hairdressing products the property of Avron Investments Pty Ltd. Because she was an employee of that company, becoming in time co-manager of it in Gladstone, the indictment charged that she stole in the capacity of a servant of Avron Investments. The jury were unable to agree on a verdict in relation to her guilt of stealing the hairdressing products, but found her guilty of stealing the sums of money in question as a servant of Avron. The learned judge sentenced the appellant to imprisonment for two years.

[2] The matter now comes to this Court as an application to appeal against sentence, the appeal against conviction having now been abandoned and dismissed. The principal submission advanced by Mr Callaghan SC for the appellant, or applicant as she now becomes, is superficially a simple one. It is this. Section 1 of the Criminal Code provides that "circumstance of aggravation" means any circumstance by reason of which an offender is liable to greater punishment than that to which she would be liable if the offence were committed without the existence of that circumstance. The Code commences in s 398(1) by providing that anyone who steals is liable to imprisonment for five years "if no other punishment is provided". Section 398 then proceeds under the heading "Punishment in special cases" to provide for various special cases of which two are relevant here. One in para 6 is that of stealing by a servant, for which a maximum penalty of 10 years is prescribed. The other relevant special case is contained in para 9, which is:

> "9. If the thing stolen is property, including an animal that is stock, and its value is more than $5000, the offender is liable to imprisonment for 10 years."

[3] Because the applicant was found guilty and convicted of an offence in terms that brought her within the ambit of special case 6 of stealing her employer's property, the maximum of 10 years imprisonment was applicable in any event. In imposing a term of imprisonment for two years, there is therefore no question of his Honour's having exceeded the applicable statutory maximum penalty; indeed, a term of two years is well within the limit of five years prescribed in s 398(1) for stealing where no other or special punishment is provided. Mr Callaghan's point is, however, different from this. It is that, in arriving at the sentence to be imposed on the applicant, the learned sentencing judge determined that property in the form of sums of money in "a range of at least $15,000 to $20,000" had been stolen by the applicant. It followed, or so it was submitted, that in arriving at the sentence to be imposed, his Honour had relied on a matter which under special case 9 ought to have been, but was not, charged in the indictment as a circumstance of aggravation. In so doing so, he therefore had failed to conform to s 564(2) of the Code, which provides:

> "(2) If any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment."

[4] Section 564(2), or its equivalent s 582 of the Criminal Code in Western Australia, was considered by the High Court in *R v De Simoni* (1981) 147 CLR 383, in which the offender had been sentenced for robbery by stealing with actual violence a sum of money from the complainant. He also struck her a heavy blow on the back of the head inflicting a wound to the scalp which required suturing. It was

held that, in sentencing, the judge would not have been justified in taking into account the wounding so as to increase the sentence because wounding was specifically declared by the Code to be a circumstance of aggravation and it had not been charged as such in the indictment. The effect of those provisions, said Gibbs CJ (147 CLR 383, 389) is that, unless charged as such,

> "… a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

Wilson and Brennan JJ took a slightly different view of the matter, but Mason and Murphy JJ agreed with Gibbs CJ. See also *Kingswell v The Queen* (1985) 159 CLR 264.

[5] In reaching that conclusion, the Chief Justice held that the crucial question, which his Honour answered affirmatively, was whether a judge could be said to "rely upon" a circumstance of aggravation within the meaning of s 564(2) "when he takes that circumstance into consideration in imposing a sentence, and by reason of it inflicts a penalty more severe than he would otherwise have imposed". The first issue here therefore is whether the sentencing judge did so in imposing the two year sentence on the applicant. As to that, I think it is plain that he did. That is, however, not quite the end of the matter, because Ms Bain of counsel for the Crown submits that that this was not an instance to which special case 9 in s 398 of the Code applied in any event. It was one in which the applicant was convicted of a series of separate offences of stealing sums of money which, only when aggregated over a period of nearly two years into one count in the indictment, amounted together to more than $5,000.

[6] This calls for closer examination of the facts of the offence or offences committed here. The complainant Avron Investments conducted a hairdressing business, with two salons in Mackay, two in Rockhampton and one in Gladstone. The applicant was employed first at Rockhampton, and then at Gladstone from 17 April 2001 to 28 March 2003. After some months she was appointed as co-manager in Gladstone, which gave her increased access, denied to the other employees, to all computer transactions by which the income of the business was recorded there. The practice was for each employee to enter her Pin number before recording a transaction involving receipt by her of a payment for hairdressing services provided by the salon. In March 2003, the managing director noticed on the master computer held in Mackay a very large number of transactions in which deletions had been entered under the applicant's Pin number at the Gladstone salon after payment had been received from customers there. Later the Pin number of another employee was used for this purpose, but this was done on days when that particular employee was proved to have been absent from the salon, whereas the applicant herself was there. The jury by their verdict drew the inference that the applicant had deleted the computer record of the transaction so as to make it appear as if no service had in fact taken place and that no payment had been received for it.

[7] The further inference, which the jury also drew, was that the applicant had taken and kept the money paid. It was in relatively small sums or amounts varying from as little as $6.00 to as much as $140.00 in one instance; but there were many such transactions in the period of 20 months or more during which the applicant

acted in this way. Evidence before the jury was that over that period there were some 1,260 individual occasions on which the applicant had deleted the computer record of a transaction aggregating a total amount of $28,228.30. To be on the safe side, for sentencing purposes his Honour adopted a total of at least $15,000 to $20,000 as the aggregate amount stolen by the applicant on those many occasions.

[8] The competing submissions on either side may now be considered in this context. For the applicant, it is said that the "thing" stolen is property (which by definition includes money) and that "its value" in terms of special case 9 in s 398 is more than $5,000. For the Crown, Ms Bain submits that this is a case in which the prosecution charged in one indictment or count 1,260 different acts of stealing distinct sums of money; and that, because none of those sums was of the value of more than $5,000, the maximum of $5,000 in special case 9 under s 398 was in no instance exceeded. Section 564(2) therefore did not require that the excess in value over $5,000 be averred in the indictment as a circumstance of aggravation before it could be relied on by the judge in sentencing.

[9] Charging in a single count the stealing of separate sums has long been the practice in Queensland. When it is done, it is sufficient for the prosecution to prove the stealing of any one of them in order to sustain the charge, without proving all or more than one of them: *R v Lindsay* [1963] Qd R 386, 400-401. His Honour explained this to the jury. It might on one view perhaps be thought to offend against the decision or some of what is said by the High Court in *Walsh v Tattersall* (1996) 188 CLR 77. But, as was also submitted by Ms Bain, such a course is expressly authorised by s 568(1) of the Code. It says:

> "(1) In an indictment against a person for stealing property the person may be charged and proceeded against on 1 charge even though –
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> (a) the property belongs to the same person or to different persons; or
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> (b) the property was stolen over a space of time; or
>
> (c) different acts of stealing took place at different times, whether or not the different acts can be identified."

Here Ms Bain placed particular reliance on para (c) of s 568(1), which she contrasted with s 408C(2)(d) (fraud) in speaking of "the yield to the offender from the dishonesty".

[10] In my opinion, this view of s 568(1) of the Code is correct. Indeed, no objection has at any stage been made to the form of indictment in this case. The question is whether the indictment in this form had the effect through the operation of special case 9 in s 398 of attracting the application of s 564(1) of the Code requiring the averment of a special circumstance. In my view, it did not. To hold that it did in the present instance would involve reading special case 9 in plural form, as if it said "If the things stolen are property … and their values are [or aggregate more than] $5,000, the offender is liable to imprisonment for 10 years". Even with the assistance of the *Acts Interpretation Act 1954* in substituting the plural form throughout, it seems improbable that this was the legislative intention in enacting special case 9 of s 398. It is much more likely that the intention was (because of its greater value) to impose a special penalty for stealing a single item of property (or sum of money) worth more than $5,000. In other words, the expression "value" was deliberately adopted in its singular form. That is suggested by the

reference in special case 9 to "an animal that is stock". As Ms Bain pointed out, it would have been open to the prosecution in the present case to have charged each of the acts of stealing in 1,260 separate counts in the same indictment. In terms of length of the indictment and duration occupied in arraigning the applicant, this would have been, to say the least, a highly inconvenient and time-consuming course to have followed.

[11] The present case is not like *R v Tommekand* [1996] 1 Qd R 564, 568, 570-571, one in which the appellant was convicted and sentenced for stealing a boat said to be valued at $60,000 without the necessary averment that it was worth more than $5,000. Nor is it an instance in which any single item stolen is said to have exceeded that value. It may be added, although it is not relevant to the application of s 564(2) of the Code as distinct from the general requirements of natural justice, that the applicant and her counsel here were at all times well aware of the fact that the combined total amount or value of the applicant's separate sets of stealing aggregated more than the single sum of $5,000. The schedule of deletions shown in ex 1 tendered at trial makes it clear that this was so.

[12] In the result, I see no reason for regarding the sentence imposed by the learned judge as excessive. The applicant was a woman aged 28 to 30 at the time, admittedly with no prior convictions but with no self-evident undue demands upon the salary she was paid. She has no obvious dependants and was living with her parents throughout the period in question. The reason for her offending remains unexplained except in the sense that it was characterised by his Honour as motivated not by need but by greed. She appears, so far as the evidence goes, to have expended on unidentified purposes the receipts of the income from her salary as well as the proceeds of her stealing, and to have done so as soon as they came to hand. She made no offer of restitution and does not have the benefit of a guilty plea at a trial which occupied seven days. She showed no remorse for her actions. What she did was a carefully pre-meditated series of separate acts of stealing continued over a period of some 20 months or more. Both at the trial (at which she gave evidence) and before it, she allowed it to be suggested, if not herself actively encouraging the suspicion, that one of her fellow employees was or might have been the perpetrator of these offences. In the circumstances, the sentence of imprisonment for two years imposed by his Honour involved no error in the exercise of his discretion or any error of law. She betrayed her senior position and the opportunities with which it provided her to defraud the employer who trusted her, and to throw suspicion on her fellow workers. Even had the sentence been limited to the 10 year maximum applicable under special case 6 under s 398 for stealing as a servant, I am not persuaded that a sentence of two years would have been excessive. At sentencing, the applicant's counsel himself suggested a range of not more than 18 months to two years imprisonment.

[13] I would dismiss the application for leave to appeal against sentence.

[14] **CULLINANE J:** I agree with the reasons of McPherson JA and the orders he proposes in this matter.

[15] **JONES J:** I have had the advantage of reading the reasons of McPherson JA. I agree that the application for leave to appeal against sentence should be dismissed.