

SUPREME COURT OF QUEENSLAND

CITATION: *R v Holzberger* [2007] QCA 258

PARTIES: **R**
v
HOLZBERGER, Scott Bradley
(applicant)

FILE NO/S: CA No 49 of 2007
DC No 311 of 2007
DC No 3246 of 2006

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 10 August 2007

DELIVERED AT: Brisbane

HEARING DATE: 31 July 2007

JUDGES: McMurdo P, Mackenzie J and Atkinson J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Application for leave to appeal 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 – WHEN REFUSED – GENERALLY – where
applicant pleaded guilty to defrauding the Commonwealth,
obtaining and attempting to obtain financial advantage by
deception, use of a forged document and stealing as a servant
– where applicant claimed that insufficient weight was given
to his rehabilitation since April 2006 – where sentencing
judge recognised the positive aspects of the applicant's
rehabilitation yet also acknowledged the seriousness of the
dishonest conduct and the applicant's persistent past
recidivism – whether appropriate weight was given to the
applicant's rehabilitation

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 – WHEN REFUSED – GENERALLY – where
the applicant claimed that the sentence imposed was

manifestly excessive due to full reparation being made – where reparation is a relevant factor under s 16A(2)(f) *Crimes Act 1914* (Cth) – where the maximum penalty for each Commonwealth and State charge was ten years imprisonment – whether the sentence was manifestly excessive

Crimes Act 1914 (Cth), s 16A(2)(f), s 21B

R v Conway (2001) 121 ACrimR 177; [2001] NSW CCA 51, 2 March 2001, considered

R v Kovacevic (2000) 111 ACrimR 131; [2000] SASC106, 20 April 2000, considered

COUNSEL: P E Smith for the applicant
P G Huygens for the Commonwealth Director of Public Prosecutions and M J Copley for the Director of Public Prosecution (Queensland) for the respondent

SOLICITORS: Gilshenan & Luton Lawyers for the applicant
Commonwealth Director of Public Prosecutions and Director of Public Prosecutions (Queensland) for the respondent

- [1] **McMURDO P:** The applicant, Scott Bradley Holzberger, pleaded guilty in the District Court at Brisbane on 9 February 2007 to seven Commonwealth charges contained in one indictment, namely defrauding the Commonwealth (count 1), three counts of obtaining a financial advantage by deception (counts 2, 3 and 6), two counts of attempting to obtain a financial advantage by deception (counts 4 and 7) and one count of using a forged document (count 5). These offences occurred between 12 July 2000 and 6 July 2004. He also pleaded guilty to one count Queensland charge, namely stealing as a servant. This offence was committed between 28 January and 20 April 2006. He was sentenced on counts 1, 2, 3, 5 and 6 on the Commonwealth indictment to three years imprisonment to be released after serving 15 months upon entering into a three year recognisance in the sum of \$1,000 and to two years imprisonment with a similar release order on counts 4 and 7. He was ordered to pay reparation of \$31,020.73 to the Commonwealth. On the Queensland charge, he was sentenced to two years imprisonment with the parole release date set at 8 May 2008 and ordered to pay restitution of \$2,079.98 to the complainant, Woolworths Limited. He now contends that the sentencing judge erred in giving insufficient weight to his rehabilitation since April 2006. Alternatively, he contends that the sentence imposed was manifestly excessive especially as full reparation has been made, reparation being a relevant factor under s 16A(2)(f) *Crimes Act 1914* (Cth): see also *R v Conway*¹ and *R v Kovacevic*.²
- [2] The maximum penalty on each of the Commonwealth charges was 10 years imprisonment, as it was for the Queensland charge.
- [3] Mr Holzberger was born in January 1981 and was aged between 19 and 23 at the time of the Commonwealth offences and 25 when he committed the Queensland offence. He had a significant criminal history for a relatively young man. In April

¹ (2001) 121 ACrimR 177; [2001] NSW CCA 51, 2 March 2001.

² (2000) 111 ACrimR 131; [2000] SASC106, 20 April 2000.

2000 he was placed on a \$2,000 12 month good behaviour bond without conviction for attempted fraud and stealing. In August 2001 he was placed on 12 months probation and ordered to pay compensation of \$4,259.00 for one count of fraud and one count of attempted fraud, again without conviction. In July 2005 he was fined \$400, again without conviction, and ordered to pay \$39.00 restitution for stealing as a servant and fraud. In September 2005 he was fined \$100 without conviction and placed on an 18 month good behaviour bond for entering a dwelling and committing an indictable offence. In December 2005, yet again without conviction, he was placed on two years probation with an order that he pay restitution of \$5,824.00 for one count of fraud. One of the present Commonwealth offences (count 3) was committed during and constituted a breach of the 12 month probation period ordered in August 2001. The present Queensland offence was committed during and therefore a breach of the two year probation period ordered in December 2005.

- [4] The circumstances of the present Commonwealth offences were as follows. Mr Holzberger electronically lodged income tax returns for the five years from 2000 to 2004 inclusive very shortly after the end of each of those financial years. On each occasion the Commonwealth paid Mr Holzberger the refund that was due to him on the basis of those returns (counts 1-5). On another occasion, he submitted a tax return on behalf of his then girlfriend and received the benefits of that return into his account (count 6).
- [5] In early July 2000 an auditor with the Australian Tax Office (ATO) reviewed Mr Holzberger's 2003 income tax return (count 4) because of the substantial refund of \$14,355.49 claimed. He discovered anomalies and made enquiries within the ATO system as to his 2002 income tax return (count 3). He again found anomalies and on 16 July 2003 requested Mr Holzberger to provide proof of his income earned and tax withheld for the 2003 year. The following day Mr Holzberger sent him two payment summaries for 2003. The auditor next requested documentary proof of Mr Holzberger's 2002 income and withheld tax. On 22 July 2003 Mr Holzberger provided what purported to be a faxed copy of his 2002 employee payment summary whilst employed by Domino's Pizza Australia. This document was later proved to be false (count 5). The auditor then established that the documents forwarded in relation to the 2003 income and withheld tax were also false. In 2004 the matter was referred to the fraud section of the ATO. In 2005 search warrants were executed on Mr Holzberger's bank accounts. These revealed that Mr Holzberger had also wrongly received refunds for the 2000 and 2001 financial years based on false returns (counts 1 and 2). Further investigations showed that he had lodged a tax return for the 2004 year fraudulently claiming a refund of \$2,634.08 (count 7) and that he had lodged a fraudulent return on behalf of his former girlfriend and had wrongly received into his bank account a refund of about \$6,700 on her behalf which he had subsequently withdrawn from his bank account (count 6).
- [6] Mr Holzberger, accompanied by his solicitor, was interviewed by an ATO investigator in November 2005. He admitted that his personal tax returns for the financial years 2000 to 2004 were false and that he had wrongly received in his bank account the refunds for 2000, 2001 and 2002 (counts 1-3). He had not received the refunds he claimed for 2003 and 2004 and for that reason counts 4 and 7 were charges only of attempting to obtain a financial advantage. He claimed, however, that he did not personally complete or lodge any of the tax returns; this was done by another person on his behalf and he received only a percentage of the

refund from this person. He also denied both forwarding any false documentation to the ATO auditor and lodging a tax return on behalf of his former girlfriend. The ATO conducted further investigations and was eventually able to prove that these denials were false.

- [7] Mr Holzberger received refunds to which he was not entitled of \$34,412.90 and attempted to fraudulently obtain further refunds of \$16,989.57, in total \$51,402.47. By the time of sentence, a little over \$3,000 had been repaid by way of a Centrelink debt wrongly raised against him on the basis of his false information so that the ATO requested a reparation order under s 21B *Crimes Act* in the amount of \$31,020.73.
- [8] The Commonwealth prosecutor in his submissions at sentence emphasised that Mr Holzberger persisted in his offending even when he knew he was under investigation by the ATO. Count 3 was committed whilst he was subject to a probation order. The tax system is based predominantly on a self-assessment system and the ATO relies heavily on the honesty of citizens who have come to expect refunds to be processed within 14 days. Mr Holzberger's conduct required the ATO to expend considerable time and resources in investigations. He went on to commit a further offence against Queensland law after he committed the Commonwealth offences and when he knew that he was being investigated for them. His conduct warranted a substantial term of imprisonment as a personal and general deterrent. After referring to a number of cases said to be comparable, he submitted that a head sentence of three years imprisonment with release on recognisance after serving 12 months was appropriate because the State prosecutor would submit that an additional cumulative sentence should be imposed on the Queensland offence.
- [9] The Queensland prosecutor emphasised that the offence of stealing as a servant was committed only 55 days into the probation order imposed in December 2005. He tendered a report from Mr Holzberger's probation officer. It recorded that he had reported reliably and maintained stable accommodation and was in current employment. During the early period of the order, he attended counselling for about six months. Apart from his commission of the further offence, he had complied with the general requirements of the order and was considered suitable for further community based supervision.
- [10] The prosecutor then set out the circumstances relevant to the offence. From September 2005 until April 2006 Mr Holzberger was employed as a console operator at a service station owned by Woolworths Limited trading as Woolworths Plus Petrol. He was trained that when he cancelled a transaction he was required to write on the cancelled slip the reason for it. In early 2006 Woolworths' internal auditing system detected an unusually large number of cancelled transactions (134 in all) conducted by Mr Holzberger over the 11 week period between 29 January and 19 April 2006. Most involved a customer purchasing items from within the store and Mr Holzberger then cancelling the legitimate transaction without the customer's knowledge or authorisation and instead performing a change transaction when giving the customers their change. When the customer left the store Mr Holzberger would take from the till and keep the difference between the money tendered and the change given. The store's surveillance cameras recorded that these customers left the store with the items so that the purchases were not in fact cancelled. Further, there had been interference with the video surveillance system

during Mr Holzberger's shifts coinciding with the suspect transactions. If the cancelled transactions had been legitimately made, the surplus cash in the register would have equalled the total amount of cancelled transaction but it did not. The deficit was approximately \$2,078. Woolworths made a complaint to police on 11 May 2006. Mr Holzberger was interviewed by police on 29 June 2006. He denied stealing the money but could not provide any explanation for the large number of cancelled transactions and the missing money. The matter proceeded by way of a full hand up committal in January 2007.

- [11] The Queensland prosecutor submitted that although Mr Holzberger pleaded guilty in a timely manner he was now 26 years old and a mature man with a criminal history. His persistent re-offending was concerning. He committed this offence whilst on probation and betrayed his position of trust as an employee in defrauding his employer. He dishonestly obtained over \$2,000 over many separate transactions. Deterrence and community protection were an important part of the sentencing process in this case. He should be ordered to serve some cumulative term of actual imprisonment beyond the sentence imposed in respect of the Commonwealth offences. Woolworths sought restitution of the stolen money.
- [12] Defence counsel at sentence emphasised the following mitigating features on behalf of Mr Holzberger. He was currently employed at a tertiary institution as an information technology (IT) technician. He had a TAFE diploma. His employer provided the court with an enthusiastic reference which referred to Mr Holzberger as a reliable and diligent employee whose services were valued and who would be extremely hard to replace. He was engaged to be married. His fiancée had recently miscarried with their first child. He had a six year old child from a previous relationship. He had contact with and provided child support for that child. He first left home at 17 years of age when he fell into bad company and drug use. That largely explained his earlier offending. Eventually he freed himself of his drug problems and returned to live with his parents. He was very intelligent, as the reference attested, and he now had insight into his offending behaviour. His offending was unsophisticated in that he was bound to be found out before long.
- [13] His parents, who attended court with him, provided a letter to the judge in which they referred to Mr Holzberger's improved attitude since returning to their home, completing a diploma in IT and obtaining an excellent job in the IT industry. He repaid several debts to them and settled into a stable relationship with a mature young woman who is respected and liked by the family. Whilst they were disappointed when they learned of his commission of the present offences, since April 2006 when he obtained fulltime employment his personal, financial and professional life has stabilised and he was displaying all the attributes of a mature productive young man. By pleading guilty he was demonstrating his preparedness to accept responsibility for his previous unlawful conduct. They asked the judge to consider imposing a non-custodial sentence. They had raised funds to make restitution of the money misappropriated by him and hoped that he would be able to repay them if he continued in his employment.
- [14] Defence counsel provided the court with two bank cheques supplied by Mr Holzberger's parents on his behalf making full reparation in respect of all counts. Whilst accepting that some period of actual imprisonment had to be served, counsel submitted that a cumulative sentence was not warranted and that an effective head

sentence of up to three years with release after nine months appropriately reflected all the circumstances.

- [15] His Honour adjourned to consider the appropriate sentence. Before passing sentence, his Honour referred to the circumstances surrounding the offences and to Mr Holzberger's criminal history. The judge noted that it demonstrated a consistent pattern of offending commencing in 2000 and extending into 2006. His Honour referred to Mr Holzberger's pleas of guilty, that he was still relatively young and to the personal circumstances placed before the court on his behalf. He specifically adverted to Mr Holzberger's TAFE qualification, that he was presently undertaking a degree in IT, that since April 2006 he had been working in an IT position and a very good work reference was tendered on his behalf. His Honour observed that Mr Holzberger was an intelligent young man with potential; he had a network of support and was living in stable circumstances. Restitution funded by his parents had been made on the understanding that he would repay them. His Honour added:

"The argument based on the references placed before the court are that you have demonstrated a high level of actual rehabilitation is to my mind undermined to some extent by the circumstance that your history of committing offences of dishonesty has extended ... to April of 2006."

- [16] His Honour considered that the present offences looked at as a whole represented very serious conduct. The judge determined that, doing the best he could to balance the competing considerations, an effective overall head sentence of three years imprisonment was appropriate with release after serving 15 months of the sentence, that is, in May 2008. In imposing that sentence his Honour took into account the breaches of the non-custodial orders imposed in August 2001 and December 2005 but made no orders in respect of them.
- [17] The submissions made by Mr Holzberger's counsel in the present application for leave to appeal are that a sentence of three years imprisonment with release after nine months should have been imposed had the judge given sufficient weight to the efforts of rehabilitation since April 2006, the reparation made and the mitigating features. In making that submission, he emphasises his Honour's words, which I have quoted above, as demonstrating error by placing insufficient emphasis on rehabilitation after April 2006. He also relies on as comparable and demonstrating that the present sentence is manifestly excessive *R v Von Pearson*,³ *R v Hoffman*,⁴ *R v McIver*⁵ and *R v Edwards; ex parte Commonwealth Director of Public Prosecutions*.⁶
- [18] None of those cases is closely similar to the unusual matrix of circumstances that apply in this case; they are of no particular assistance here.
- [19] Whilst Mr Holzberger must get credit for the fact that he pleaded guilty at a relatively early opportunity, he was by no means entirely cooperative with the investigating authorities. He continued to offend by producing false documentation in an attempt to extricate himself from responsibility. He also lied to the ATO

³ Unreported, Brisbane District Court, DC No 2970 of 2002 and DC No 2969 of 2002, 21 October 2002.

⁴ Unreported, Brisbane District Court, DC No 1669 of 2003, 4 August 2003.

⁵ Unreported, Brisbane District Court, DC No 1664 of 2003, 8 June 2004.

⁶ [2001] QCA 93; CA No 314 of 2000, 14 March 2001.

investigators and was not frank with the Queensland police when interviewed about the State offence. He committed one of the Commonwealth offences whilst on probation and committed the State offence both whilst on probation and whilst under investigation in respect of the Commonwealth offences. The sentence imposed, including the release date after 15 months, took into account all offences and also reflected Mr Holzberger's two breaches of probation orders. He had a significant criminal history, having committed eight offences of dishonesty. Despite the past opportunities presented by many community based orders without conviction, he did not reform but continued to commit serious offences of dishonesty until April 2006. The offences were hard to detect. The present self-assessable tax system is based on the honesty of taxpayers. It can easily be abused by those who are so-minded. Those like Mr Holzberger, who defraud the revenue, must expect salutary deterrent penalties to be imposed on them by the courts. His commission of the Queensland offence, which he committed when he was 25, was perpetrated on his employer and involved 134 separate acts of dishonesty. It also warranted a salutary deterrent penalty, especially as it was committed on probation and when he knew he was under investigation for the Commonwealth offences. The learned primary judge's sentencing remarks, which I have set out earlier, show that his Honour was well cognisant of Mr Holzberger's efforts at rehabilitation since April 2006, in particular his excellent employment at sentence and strong support network through his parents and fiancée. His Honour rightly recognised, however, the seriousness of Mr Holzberger's dishonest conduct over many years in circumstances where he had not embraced the many opportunities to reform. His Honour did not fail to give proper weight to his rehabilitation since April 2006. The judge was entitled to consider that those efforts of rehabilitation must be treated with some circumspection in the light of his persistent past recidivism. The sentence imposed was entirely appropriate and suitably reflected the mitigating factors.

- [20] The application for leave to appeal should be dismissed.
- [21] **MACKENZIE J:** I agree that, for the reasons given by the President, the application for leave to appeal against sentence should be refused.
- [22] **ATKINSON J:** I agree with the President that the application for leave to appeal should be dismissed for the reasons given by Her Honour.