SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fuller* [2008] QCA 303
PARTIES:	**R** **v** **FULLER, Katherine** (applicant)
FILE NO/S:	CA No 2 of 2008 DC No 395 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Applications – Criminal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	1 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2008
JUDGES:	Fraser JA, Jones and Daubney JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application and appeal adjourned to a date to be fixed** **2. Application for bail refused**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES – GENERALLY – COURTS – ADJOURNMENT – where applicant applied for adjournment – where applicant sought adjournment to obtain psychiatric reports – where adjournment not opposed – whether adjournment ought be granted CRIMINAL LAW – PROCEDURE – BAIL – BAIL PENDING APPEAL – where applicant convicted and sentenced to imprisonment following a trial by jury – where applicant applied for bail pending appeal – where appeal grounds were not yet fully defined and investigated – where the applicant would have served a significant part of the custodial component of her sentence by the time the appeal was disposed of – where applicant delayed bringing her appeal – whether applicant should be admitted to bail *Bail Act* 1980 (Qld), s 8(1), s 8(5) *Hanson v DPP (Qld)* [2003] QCA 409, followed *Ex parte Maher* [1986] 1 Qd R 303, applied
COUNSEL:	P E Smith for the applicant B W Farr SC for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant

Director of Public Prosecutions (Queensland) for the respondent

FRASER JA: On 29 September 2008 Katherine Fuller filed an application for orders that this Court admit her to bail on five offences of dishonestly gaining a credit balance for herself contrary to Section 408(1)(d) of the *Criminal Code*.

She was convicted of those offences on 13 December 2007 after a four day trial in the District Court. On each count she was sentenced to imprisonment for five years and a parole eligibility date was set at 13 June 2010. On 3 January 2008 she filed a notice of appeal against conviction and an application for leave to appeal against sentence. The application and appeal was set down to be heard today. Despite the substantial period that elapsed between the filing of the notice of appeal and application today, the applicant is not ready to proceed because she is waiting for medical evidence which her legal representatives consider might be relevant to the appeal.

Some material has been obtained, but the applicant now applies for an adjournment on the basis that it is now thought necessary to obtain a psychiatric report to consider whether the applicant was fit to instruct her lawyers at the time of her trial, whether she had a "mental health defence" at the time of the offences which negatived any attempt to defraud, and whether she suffered from an undiagnosed underlying condition which is relevant to her sentence application.

The respondent does not oppose the adjournment, which I would grant.

The respondent does oppose bail. In *Hanson v DPP (Qld)* [2003] QCA 409, this Court confirmed that the principles applicable when considering an application for bail pending appeal are those expounded in the decision of the Full Court in *Ex parte Maher* [1986] 1 Qd R 303. The judgment of Justice Thomas in that decision was referred to with approval in the joint judgment in *United Mexican States v Cabal* (2001) 183 ALR 645 at 656.

Maher establishes that while Sections 8(1) and 8(5) of the *Bail Act* 1980 (Qld) confer jurisdiction on this Court to grant bail to convicted offenders wanting to appeal their conviction or sentence or both, the respect for a jury's verdict which underlines our system of criminal justice requires that a regularly obtained conviction should not be seen as a mere step in the process of appeal: the release on bail of an appellant sentenced to a reasonably long term of imprisonment should occur only in exceptional circumstances: see Hanson at [25].

As Justice Thomas pointed out in *Maher*, in remarks that were quoted with approval in the joint judgment in *United Mexican States v Cabal*, to allow bail pending the hearing of an appeal after a person has been convicted and imprisoned makes the conviction appear contingent until confirmed; it places the Court in the invidious position of having to return to prison a person whose circumstances may have changed dramatically during the period of liberty on bail; it encourages unmeritorious appeals; it undermines respect for the judicial system in having a "recently sentenced person walking free"; and it undermines the public interest in having convicted persons serve their sentences as soon as practicable.

In *Hanson v The Director of Public Prosecutions*, this Court observed that decisions in the High Court which are equally applicable to appeals in this Court show that ordinarily bail will be granted after conviction only if two conditions are satisfied: first, that there are strong grounds for concluding that the appeal will be allowed, and secondly, that the sentence, or in all events the custodial part of it, is likely to have been substantially served before the appeal is determined.

Consideration of the first of those two usual conditions requires reference to the Crown case, which the jury must have accepted, and the grounds of the appeal and application. It is necessary here to give only a brief and broad summary.

In 1999, the applicant, who was then some 31 years old, became friends with the complainant who was then an elderly man whose wife had recently died. They had frequent contact and remained friends over the following years, in which the applicant provided company and some care to the complainant. He appears to have come to regard the applicant rather like a daughter or a granddaughter. The complainant seems to have paid various of the applicant's bills and given her money for things that she required.

The Crown case on counts 1 and 2 of the indictment was that on or about 29 December 2003 and 5 October 2004 respectively, the applicant induced the complainant to make payments to one Snowden, believing those payments to be required as a holding deposit, count 1, of $5000 and for the purchase of the unit in which the applicant lived, count 2, of $123,000, on the footing that the complainant would move into the unit and the applicant would provide care for him until he died. The Crown case was that the complainant was induced to make those payments by the applicant's dishonest and false statements that the unit was for sale and the monies were required to secure and then to complete the purchase of the unit in the joint names of the applicant and the complainant, whereas the applicant did not intend the money to be used for any such purpose. The Crown alleged that banking records reveal that shortly after the complainant paid the money, it, or perhaps most of it, was transferred from Ms Snowden's account to the applicant's account. The applicant gave evidence at the trial. She denied all the allegations of dishonesty. In relation to counts 1 and 2, it is, I think, a fair summary of her evidence that she did not on any occasion tell the complainant that the unit was for sale and she attributed the complainant's payments to his fondness for her: everything the complainant gave her was a gift and she considered herself a lucky person.

The Crown case on counts 3, 4 and 5 was that the applicant dishonestly gained credit balances by using cheques drawn upon the complainant's account which the applicant knew were not authorised by him. A handwriting expert, Mr Lau, gave evidence that what purported to be the complainant's signature on each of the three cheques the subject of

those counts was not in fact the complainant's signature. A second handwriting expert, Mr Heath, gave evidence that what purported to be the complainant's signature on the cheques the subject of counts 3 and 4 the $40,000 and $29,000 respectively was not the complainant's signature but that he could not express an opinion whether or not what purported to be the complainant's signature on the cheque for $20,000 the subject of count 5 was in fact the complainant's signature.

The complainant himself appeared unable to say whether or not he had signed the cheques because at that time his vision was impaired and he would sign documents when requested to do so by the applicant. But the effect of his evidence was that if he signed the cheques he did not intend to do so and did not authorise cheques in those amounts.

The effect of the applicant's evidence was that she saw him sign the three cheques, and that they too were gifts voluntarily made by the complainant to her.

There are four grounds stated in the notice of appeal, but counsel for the applicant indicated that subject to further investigations and obtaining the applicant's final instructions, only the following two grounds of appeal were likely to be argued: (1) hearsay evidence relied on for counts 1 and 2 should not have been led and (2) the jury was not properly directed about the nature of circumstantial evidence.

As earlier indicated, a possible third ground of appeal may relate to the applicant's mental health, depending upon the results of proposed psychiatric investigation. It is put no higher on behalf of the applicant that the provision of a psychiatric report would greatly assist the applicant's sentence appeal and leave open an argument that she should receive a suspended sentence, and it may also give rise to a ground of appeal against conviction. That is plainly an insufficient basis upon which to justify the Court embarking upon the exceptional exercise of its jurisdiction to grant bail to a person who has been convicted.

In relation to the ground concerning hearsay evidence, it is not submitted that the impugned evidence has any bearing upon the convictions for the remaining three counts. This proposed ground of appeal is therefore an unlikely foundation for the grant of bail, particularly bearing in mind that the first two counts concerned only some $128,000 out of a total sum of $217,000 of the complainant's money that was transferred to the applicant's benefit.

In relation to the ground concerning circumstantial evidence, it is not possible for the Court now to assess the strength of this proposed ground of appeal in the absence of more precise identification of the significance of the evidence said to have been wrongly admitted in relation to each of the convictions.

Turning to the second usual condition of a grant of bail in circumstances such as these, that the sentence, or at least the custodial part of it is likely to have been substantially served before the appeal is determined, the evidence shows that in September 2008 contact was made on behalf of the applicant with four psychiatrists, three of whom indicated that they would be able to assess the applicant either in custody or in the community in about January or February 2009.

The evidence adduced on behalf of the applicant does not explain why these inquiries were not made earlier.

As a result of the current inability of the applicant to obtain a psychiatrist's report before about February 2009, a hearing of the appeal and application appears unlikely to proceed until late February 2009, so that the matter may not be finalised until around about the middle of 2009.

As a matter of chronology, it is therefore right to say that the applicant will have served some significant part of her five year sentence and some significant part of the custodial

component of it by the time the appeal has been disposed of, but of course it must be borne in mind that this is very largely the consequence of her delay in seeking to obtain the evidence which is now said to be potentially significant to the disposition of her appeal and application.

In these circumstances, I am not satisfied that either of the usual conditions for the grant of bail following conviction is made out by the evidence which is currently before the Court.

I would order that the application and appeal be adjourned to a date to be fixed and I would refuse the application for bail.

JONES J: I agree with the reasons pronounced by the presiding Judge and the orders proposed.

DAUBNEY J: I concur.

FRASER JA: Those will be the orders of the Court.

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