

SUPREME COURT OF QUEENSLAND

CITATION: *R v Goodger* [2009] QCA 377

PARTIES: **R**
v
GOODGER, Marguerite Louise
(applicant)

FILE NO/S: CA No 259 of 2009
DC No 164 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Rockhampton

DELIVERED ON: 8 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 2 December 2009

JUDGES: Keane and Fraser JJA 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 against sentence refused**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted on own plea of one count of dishonestly obtaining property – where applicant fraudulently obtained \$94,744.46 from her employer – where applicant argues sentencing judge failed to give proper consideration to applicant's psychiatric condition – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 408C

Channon v R (1978) 20 ALR 1, cited

R v Adams; ex parte A-G (Qld) [2006] QCA 312, cited

R v Dunn [1994] QCA 147, cited

R v Neumann; ex parte A-G (Qld) [2007] 1 Qd R 53, [2005] QCA 362, cited

R v Sommerfeld [2009] QCA 333, cited

R v Tsiaras [1996] 1 VR 398, considered

R v Verdins (2007) 16 VR 269; [2007] VSCA 102, considered

R v Ward [2008] QCA 222, cited

COUNSEL: S R Lewis for the applicant
V A Loury for the respondent

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

- [1] **KEANE JA:** On 11 September 2009 the applicant pleaded guilty to one count of dishonestly obtaining property in contravention of s 408C(1)(b) of the *Criminal Code* 1899 (Qld) ("the *Criminal Code*"). The applicant was an employee of the complainant. The property she fraudulently obtained was \$94,744.46.
- [2] The applicant was sentenced to four and a half years imprisonment with eligibility for parole after serving 18 months.
- [3] The applicant seeks leave to appeal against her sentence on the ground that it is manifestly excessive. In particular it is said that the learned sentencing judge failed to give proper consideration to the applicant's psychiatric condition and to moderate her sentence accordingly.

The circumstances of the offending

- [4] The applicant was employed by the complainant as a bookkeeper in its fencing business. She was trusted with access to the accounts of the business and with the password necessary to operate on the business' accounts. She had been employed for about four years before she commenced the misappropriations from the complainant. The discovery of the misappropriations led to the termination of her employment.
- [5] Over the period from 10 January 2006 to 25 December 2007, she effected 94 transactions which involved the misappropriation of \$94,744.46. These transactions involved the transfer of sums of money from the complainant's business account to her personal account to that of her daughter. She disguised the transactions by labelling them as transactions with creditors of the complainants. Her depredations contributed to the failure of the business as a result of which 17 other employees of the complainant lost their jobs.
- [6] The applicant's fraud was discovered over the Christmas 2007 holidays. When she returned to work she agreed voluntarily to participate in a record of interview with police. She accepted that she had carried out the frauds although she said that she could not specifically remember the transactions. She said that she had furnished her house and bought a motor vehicle with the money, but otherwise had nothing to show for the frauds. She had no sort of addiction which might account for her offending.

The applicant's personal circumstances

- [7] The applicant was between 54 and 56 years of age during the period of the offending. She has four adult children. Her misconduct is not explicable as a response to indigent circumstances.
- [8] The applicant has a relevant criminal history. On 6 December 1988 she was convicted of 11 incidents of stealing as a servant between 9 February 1987 and 3 June 1988, and 15 incidents of fraudulently false accounting between 9 February 1987 and 2 August 1988. She was employed as a clerk in a hospital where she was

trusted to collect payments for hospital fees and issuing receipts. She made entries in the ledger kept to record these payments which were less than the amounts received, and pocketed the difference. For these offences she was sentenced to 18 months imprisonment.

- [9] On 20 June 1997 the applicant was convicted of misappropriation of property on 21 December 1995 and 19 April 1996. On this occasion she was sentenced to a wholly suspended term of 12 months imprisonment. She was ordered to pay compensation of \$1,561 within six months. It may be that this sentence was so lenient because the offending occurred at about the time the applicant's second husband committed suicide.
- [10] The applicant was examined by a psychiatrist, Dr John Flanagan. Dr Flanagan was of the opinion that because of her emotionally deprived childhood, which was marked by parental abuse and conflict, and her unhappy marriages (including the suicide of her second husband), she has been chronically depressed for many years. The applicant's account to Dr Flanagan was that, while she accepted that she committed the offences of present concern, she had no memory of actually doing so. She said to Dr Flanagan that it is obvious to her in retrospect that her frauds would be easily detected. Dr Flanagan's report proceeded on the assumption that the applicant's account to him was accurate. According to Dr Flanagan the applicant suffers from a major depressive disorder which impaired her ability to know what she was doing and to control the actions of her offending.
- [11] Dr Flanagan's report concluded:
- "Treatment and Prognosis**
- She is badly in need of treatment. The fact that she has little insight into her illness and has neglected to obtain any form of treatment is symptomatic of her disorders.
- I would expect a relatively good response to vigorous chemical treatment in the relatively short term. In the longer term, she needs ongoing psychotherapy which is also likely to be of benefit to her. That being said, she has a quite damaged personality and there are likely to remain considerable residual symptoms.
- Without treatment, were she to have the opportunity, she would be at risk of similar re-offending. With continued treatment her risk of re-offending would become low."

The sentence

- [12] At the sentencing hearing the applicant's Counsel conceded that the appropriate range of punishment was between three and five years imprisonment, and that the applicant should be released after serving a third of the head sentence. The position taken on the applicant's behalf at sentence makes it difficult for her now to argue that the sentence, which reflected the position adopted by her Counsel, was manifestly excessive.
- [13] The learned sentencing judge expressly took into account in the applicant's favour her "early plea of guilty" and the circumstance that the applicant made admissions to the police as to her offending and is genuinely remorseful for her conduct.

[14] His Honour observed that the offending had occurred over a long period of time and that the offending involved the abuse of a position of trust.

[15] As to the applicant's disorder and its relevance to the sentence to be imposed on the applicant, the learned sentencing judge said:

"You have these unresolved conditions from your background which is a sad and unfortunate background. Nevertheless in your case there is a need for personal deterrence and there is also a need for general deterrence to prevent offences of this kind occurring where businesses give people trust and that trust is abused and causes significant loss."

[16] Earlier in his Honour's sentencing remarks he said:

"I have read the psychiatric report which shows that clearly you had unresolved psychiatric disorders that need to be treated. However I consider that they can be appropriately treated in the corrective services environment. There is no reason to think they cannot be treated there."

The application to this Court

[17] On the applicant's behalf it is argued that the sentence imposed on the applicant is manifestly excessive because the learned sentencing judge erred:

- (a) in failing to appreciate that the applicant's moral culpability, and hence claims of general and personal deterrence on the sentencing discretion, was reduced by the applicant's psychiatric condition;
- (b) in failing to recognise that the impact of a custodial term of imprisonment was likely to have an adverse effect upon her mental health.

[18] The applicant relies upon decisions of the Court of Appeal of Victoria which explain the relevance of a psychiatric illness, not amounting to insanity, upon the sentencing of an offender: in *R v Tsiaras* it was said:¹

"First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health."

[19] The applicant also referred the Court to the more recent decision of *R v Verdins*, where the Court of Appeal of Victoria reviewed decisions since *R v Tsiaras* and said:²

¹ [1996] 1 VR 398 at 400.

² (2007) 16 VR 269 at 276 [32] (footnote omitted).

"Impaired mental functioning, whether temporary or permanent ('the condition'), is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."

[20] As to the concept of "impaired mental functioning" the Court in *R v Verdins* said:³

"The sentencing considerations identified in *R v Tsiaras* are not – and were not intended to be – applicable only to cases of 'serious psychiatric illness.' One or more of those considerations may be applicable in any case where the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness."

[21] Thus far there is nothing controversial about the applicant's submissions. This Court has accepted the proposition that, generally speaking, a mental disorder short of insanity may lessen the moral culpability of an offender and so reduce the claims of general or personal deterrence upon the sentencing discretion.⁴ The problems for the applicant in respect of the present application do not lie in the realm of

³ (2007) 16 VR 269 at 271 [5].

⁴ *R v Dunn* [1994] QCA 147; *R v Neumann; ex parte A-G (Qld)* [2007] 1 Qd R 53.

sentencing principle, but in the facts of the case and in the circumstance that the sentence which was imposed was within the range suggested by her counsel to the learned sentencing judge.

- [22] The learned sentencing judge was entitled to treat Dr Flanagan's report as having little claim on his discretion. As to the nature and extent of the role played by the applicant's depression in her offending, Dr Flanagan's report is, if I may say so respectfully, not compelling. Dr Flanagan's report was, of course, based on the applicant's account to Dr Flanagan, and there are obvious gaps in that account. The offending of present concern began only after the applicant had been employed for four years, but there is no explanation as to why that should be so if there was a real connection between the applicant's long-standing depression and her offending conduct. Further, the applicant was sufficiently aware of what she was doing to disguise her fraudulent payments; there is no explanation as to how, as appears to be suggested, she could have exercised a strategic intelligence in this regard without being conscious of what she was doing. The applicant's suggestion to Dr Flanagan that it is obvious to her in retrospect that her frauds would be easily detected is hardly credible, given that her deprecations remained undetected for nearly two years and her criminal history. And finally it is not evident from Dr Flanagan's report how the applicant's depression could have contributed to her fraudulent conduct. As a matter of ordinary human experience one can say that those who suffer depression are not known to be given to defrauding their employers.
- [23] In any event, having regard to the position taken by the applicant's counsel at sentence, Dr Flanagan's report was not apt to persuade the learned sentencing judge to impose a non-custodial sentence. The learned sentencing judge was entitled to take into account the applicant's criminal history, the circumstances of the present offending and the submissions made to his Honour on the applicant's behalf to conclude that Dr Flanagan's report offered no good reason to impose a different sentence than the one he imposed. The sentence which was imposed was clearly within the range of proper sentences.⁵
- [24] Even if it were to be accepted that the applicant's condition was accurately described in Dr Flanagan's report so as to lessen the claims of general and personal deterrence upon the sentencing discretion, and that the applicant's lack of insight into her condition and her failure to seek treatment are truly symptoms of her condition, it cannot seriously be argued that the considerations of general and personal deterrence were of no relevance,⁶ or that any sentence other than a non-custodial sentence would be manifestly excessive.
- [25] In *Channon v R*, Brennan J said:⁷
- "Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct;

⁵ Cf *R v Adams; ex parte A-G (Qld)* [2006] QCA 312; *R v Ward* [2008] QCA 222; *R v Sommerfeld* [2009] QCA 333.

⁶ *R v Adams; ex parte A-G (Qld)* [2006] QCA 312 at [22].

⁷ (1978) 20 ALR 1 at 4 – 5.

yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another."

- [26] The nature of the applicant's psychiatric condition as described by Dr Flanagan is such that a term in custody is apt to advance the prospects of the applicant's rehabilitation no less than a non-custodial sentence. It is said on the applicant's behalf that her condition denies her insight into her problems and this has resulted in her failure to seek treatment notwithstanding her previous convictions for fraud. This unfortunate history suggests that in the absence of strong measures, there is little reason to believe that the applicant will actually seek that treatment voluntarily. A term in actual custody is apt to ensure that the applicant receives treatment, or at the least is brought, finally, to an appreciation of the necessity of treatment of the kind discussed by Dr Flanagan.

Conclusion and order

- [27] The sentence imposed on the applicant is not shown to be manifestly excessive.
- [28] The application for leave to appeal against sentence should be refused.
- [29] **FRASER JA:** I agree with the reasons of Keane JA and the order proposed by his Honour.
- [30] **ATKINSON J:** I agree with the orders proposed by Keane JA and with his Honour's reasons.