SUPREME COURT OF QUEENSLAND

CITATION:	*R v Docherty* [2009] QCA 379
PARTIES:	**R** **v** **DOCHERTY, Gail Ann** (applicant/appellant)
FILE NO/S:	CA No 203 of 2009 DC No 158 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	11 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2009
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted;** **2. Appeal allowed;** **3. Sentences imposed in District Court set aside;** **4. Sentences of two years imprisonment on each count substituted;** **5. Parole release date fixed at 4 February 2010;** **6. Period of 131 days between 4 August 2009 and 11 December 2009 declared to be imprisonment served under those sentences.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of stealing property, a diamond ring, valued at over $5,000 and one count of fraud to the value of $5,000 or more – where applicant sentenced to three years imprisonment with parole release after 12 months – where applicant stole ring on spur of the moment while working as complainant's husband's carer – where applicant sold it one month later for $33,500, unaware of its true value of $292,110 – where applicant 59 years old, remorseful, had no criminal history and suffered health problems, including depression and anxiety and cancer – whether sentence manifestly excessive

R v Bulloch [2003] QCA 578, cited
R v Haugland [2009] QCA 46, cited
R v La Rosa; ex parte A-G (Qld) [2006] QCA 19, cited
R v Rees [2002] QCA 469, cited
R v Robinson; ex parte A-G (Qld) [2004] QCA 169, cited
R v Shultz [1997] QCA 169, cited

COUNSEL: N V Weston for the applicant/appellant
V A Loury for the respondent

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

[1] **HOLMES JA:** The applicant seeks leave to appeal against sentences of three years imprisonment with a parole release date fixed after 12 months, imposed on her in respect of one count of stealing property valued at over $5,000, and one count of fraud to a value of $5,000 or more. The property in question was a diamond ring subsequently valued at $292,110, although the Crown accepted that the applicant was unaware that its value was so great. The proposed ground of appeal is that the sentence is manifestly excessive.

The offences

[2] The theft occurred when the applicant, a registered nurse employed by a nursing agency, was working as a carer for the complainant's husband. She had been in that position for about two or three months at the time of the offence, and was on good terms with the complainant and her husband. Her unchallenged account of how she came to steal the ring was that she came upon the complainant's handbag with its contents lying loose in a drawer. She replaced them, apart from the ring, which she took on the spur of the moment. According to what she told a psychologist, and as appears to have been accepted by the learned sentencing judge, she later had thoughts of replacing the ring, but its loss was discovered and she was afraid to do so.

[3] After about a month, the applicant took the ring to a jewellery dealer and sold it for $33,500, producing her driver's licence as proof of identity. Seven or eight months later she was interviewed by police in relation to the matter. After initially claiming that the complainant was given to losing her jewellery and blaming others, she admitted that she had stolen the ring and taken it to the jewellery dealer. The ring was recovered, but the dealer was left out of pocket for the sum of $33,500. The applicant used the money she received from the sale of the ring to pay off credit card debts, pay general living expenses, and pay $10,000 of drug debts of a person who was said to be in danger from the bikie gang to whom they were owed. She was not able to make any restitution.

The applicant's antecedents

[4] The applicant was 58 years old when she committed the theft and was 59 at the time of sentence. She had no previous convictions. She was the mother of two adult sons and had worked for many years in various capacities in the health industry. Between 2004 and 2006 she ran a weight loss business. Over this time, a de facto relationship of some 16 years was coming to an end. The applicant's de facto husband was a drug user and a gambler and ran through what money they had. The

applicant was forced into a disadvantageous sale of her business. She spent the next year nursing her terminally ill aunt, before, in mid-2007, beginning employment with the nursing agency. Soon after, she was assigned the job in which she committed the theft. She was dismissed, not surprisingly, when the nursing agency became aware of it. Two days after she was interviewed by the police, the applicant made an attempt at suicide, using a large quantity of anxiolytic medication, and spent a number of days in hospital.

[5] The applicant had a number of health problems. In 2005, she had radiation treatment for a soft tissue sarcoma in her shoulder. At the time of sentence she had recently undergone surgery to remove more cancerous tissue from her neck. Her counsel said that he would tender a report with more detail about that condition. Either he failed to do so or it was not formally received, because it did not become an exhibit. The learned sentencing judge, however, recommended in the course of his sentencing remarks that the applicant be given the opportunity to attend the Gold Coast Hospital on the day after sentence to continue treatment for the cancer.

[6] The applicant also suffered from hyperparathyroidism syndrome, which, according to the psychologist whose report was tendered on her behalf, caused weight loss, headaches, depression, insomnia, nausea and vomiting, and might have contributed to poor judgment at the time of the offence. That psychologist described a history of violence by the applicant's father to her as a child, and one instance of sexual abuse, which had caused her to enter an unfortunate marriage very young in order to escape. He suggested that a combination of factors – depression, anxiety, the loss of the de facto relationship, the death of the aunt for whom the applicant had cared, the hyperparathyroidism which might have affected her judgment, and her exposure to childhood trauma, which rendered her more susceptible to depression in adult life – might have contributed to the offending.

[7] A friend of the applicant, and of the aunt for whom she had cared, provided a reference in her favour saying that she was a caring, honest person who had been through a great deal of mental anxiety.

The sentencing remarks

[8] The learned sentencing judge accepted that the plea of guilty was an early one. There was, he said, a degree of deliberation involved in selling the ring one month after it had been taken. He was satisfied that the applicant knew the ring was of a significant value, although she did not know its true worth. He took into account what the psychologist had said about her de facto relationship and its consequences, and the threat which had caused her to pay drug debts. The learned judge accepted that the applicant was remorseful and was under great emotional strain at the time of the offence; that she was suffering anxiety and depression and had attempted to take her own life. He did not accept that the last was necessarily connected with the present state of affairs, because the psychologist indicated that she had been experiencing suicidal ideation over some years. He noted the applicant's previously good character and lack of any criminal history, which suggested that the offence was out of character.

[9] Those matters were, his Honour said, reflected in mitigation of the sentence he proposed to pass. He rejected a submission that a sentence should be imposed which involved no actual time in custody, because, he said, such a sentence would

not generally be accepted, especially in circumstances where the money was not recoverable. He imposed the sentence of three years with parole release after 12 months, recommending that the applicant undergo monitoring to counter the risk of suicide, be treated for depression and anxiety, and continue treatment for her cancer. He closed his remarks by telling the applicant that age was not to be regarded as a reason for regarding offending as risk-free.

Comparable cases

[10] Here, the Crown relies on three authorities: *R v Robinson; ex parte A-G (Qld)* [2004] QCA 169, *R v Bulloch* [2003] QCA 578, and *R v Shultz* [1997] QCA 169 (the last also relied on at first instance). The applicant also relied on *Robinson* and, in addition, on *R v Haugland* [2009] QCA 46, *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, and *R v Rees* [2002] QCA 469. All of those cases, with the exception of *Bulloch*, involved timely pleas of guilty, and all involved offenders without previous convictions.

[11] In *Robinson*, the respondent had used his position as an insurance consultant with a union to transfer members' funds into his own bank account, using another employee's computer, and had opened a bank account in his mother's name to facilitate the fraud. It involved 101 transactions over a 14 month period and the re-creation of false records in paper and electronic form; $33,239 was stolen. He had used the money in gambling. The respondent had, by way of mitigation, favourable references from former employers; a history of depression; and the fact that he was the carer for his ill, elderly mother. This Court observed that an employee's breach of trust of such magnitude ordinarily demanded an actual period of imprisonment to show the community's disapproval of such conduct and to provide deterrence. The sentence imposed at first instance, of six months imprisonment, wholly suspended, with an order for compensation, was set aside and a sentence of two and a half years imprisonment, suspended after six months with an operational period of three years, was substituted.

[12] In *Haugland*, the applicant sought leave to appeal against a sentence of four months imprisonment and two years probation for stealing, and two years imprisonment, suspended after four months, for fraud. She was employed as an assistant store manager with a company which sold mobile telephones. Over a period of time, she stole 14 mobile phones and produced telephone contracts in false names in respect of them. The combined value of the stolen phones and the charges that the applicant had accrued in using them was approximately $26,000. The applicant was 21 years old; was the carer for her three year old child; and had had previous surgery for ovarian cancer and needed further operations. The Court rejected the submission that a non-custodial sentence should have been imposed. Although such a sentence was open, in light of the applicant's status as a young, first-time offender with a good work history and allowing for her illness and maternal role, the sentence actually imposed was not outside a proper exercise of sentencing discretion.

[13] In *La Rosa*, the applicant was sentenced to three years imprisonment, wholly suspended for an operational period of three years, on a charge of stealing $51,214 from her employer. She had worked as a supervisor at a plant nursery and used a variety of methods, some quite sophisticated, in order to take money from the cash register. She pleaded guilty to an ex officio indictment. That respondent was

between 20 and 21 years old when she offended, and suffered from bulimia which was said to have contributed to her offending. The Court expressed the view that where an offender had abused a position of trust to steal a substantial amount of money over a long period of time, a non-custodial sentence could only be justified in the most exceptional case. The sentence was set aside and a sentence of three years imprisonment with a recommendation for parole after nine months was substituted. However, the Court observed, a period of actual imprisonment of twelve months would have been justified, if it were not that the respondent had been paying restitution, and it was an Attorney-General's appeal where the prosecution below had sought a sentence involving actual imprisonment of only nine months.

[14] In *Rees,* the applicant, who had worked as a property manager in a real estate business, was charged with embezzling $51,000 in what was described as "systematic… misappropriation" over a four year period. Some of the money was replaced; the balance was repaid in accordance with an order made at sentence. The applicant was 49 years old. She had a child who suffered from a congenital, possibly terminal, heart condition, for whose benefit she had spent some of the money. At first instance, a sentence of three and a half years imprisonment was imposed, suspended after 15 months for an operational period of three and a half years. On appeal, that sentence was set aside as excessive, judged by the level of sentences imposed in similar cases. A sentence of three years imprisonment suspended after nine months was substituted.

[15] *R v Bulloch* concerned an applicant employed as a security officer to collect and deliver cash by armoured vehicle. A bag containing $40,000 for replenishing automatic teller machines was kept in the vehicle. It was sealed when the cash was placed in it from time to time and was used only intermittently; the seal was checked at the end of each shift to ensure it was intact. The applicant stole the $40,000, filled the bag with bank books of about the same substance as the bundles of cash, and mended the broken seal with glue. The theft could have occurred at any time over a seven week period, and suspicion fell on a number of employees. The applicant was convicted of stealing the money after a trial, largely on the basis of boasts he had made about the theft to a fellow employee, who recorded their conversations. He was 40 when he committed the offence, which the majority in dismissing his application for leave to appeal against sentence described as "carefully planned" and a "shocking breach of trust". The offence was, they said, not easy to prove, and deterrence was important. A sentence of three years imprisonment was upheld.

[16] In *Shultz,* the applicant, who worked as a cleaner at police headquarters, pleaded guilty to the theft of a computer server valued at $14,000. It was recovered, but not before the applicant had dismantled it in an attempt to connect it to his computer, leading to a wilful damage charge. Video cameras (which he believed to be inoperative) had recorded him looking at the box containing the server on a number of occasions before he finally removed it, leaving the box behind. When questioned, he made full admissions. He was 50 years old, without previous convictions, and entered a timely plea of guilty. His application for leave to appeal against a sentence of two years imprisonment, suspended after six months for an operational period of four years, was dismissed.

[17] In *La Rosa*, *Bulloch,* and *Rees*, the head sentence of three years was the same as that imposed in this case; in all the other cases cited a lower head sentence was given.

La Rosa and *Rees* are, plainly enough, instances where this Court in re-sentencing imposed shorter periods of actual imprisonment than was involved here; but the fact that it was an Attorney-General's appeal expressly influenced the result in *La Rosa*, and probably also had some bearing in *Robinson.* *Haugland* may assist the applicant to the extent that, although the application was dismissed, the possibility of a non-custodial sentence was not ruled out in the strong mitigating circumstances of that case. What is more important is that in all of the cases cited, with the exception of *Shultz*, the stealing was as a servant; an additional circumstance of aggravation. That is not a feature of the present case, and the applicant was not in any formal position of trust, although it seems clear enough that she was in fact trusted and given the unsupervised run of the house in which she was working.

[18] The other striking feature of distinction is the lack of planning and premeditation in the present case. *Robinson*, *Haugland* and *La Rosa* each involved an elaborate and sustained fraud, with steps taken to conceal the activity, carried out over a period of time. In *Rees*, the embezzlement was "systematic" and took place over four years. In *Bulloch*, the theft of the cash was carefully planned and was carried out in such a way as to make it very difficult to establish who among a number of candidates was the thief. *Shultz*, which did not involve stealing as a servant, and entailed a single theft, is probably the closest on its facts to the present case. It was not accepted there that the theft was a spur of the moment event, as it was here; on the other hand, the applicant here was in possession of the ring for a month before selling it. But in *Shultz*, in contrast to the present case, there appear to have been no unusual mitigating circumstances beyond co-operation and a lack of previous convictions.

Conclusion

[19] In my view, those authorities taken together suggest that the head sentence here was too high and that the exercise of the sentencing discretion has miscarried. A proper head sentence would be one of two years imprisonment. The strong mitigating features – not merely the applicant's co-operation and previous unblemished history, but also her poor health, and the personal circumstances in which she committed the offence – should be recognised by fixing a parole release date after six months.

[20] I would give leave to appeal, allow the appeal, set aside the sentences imposed in the District Court and substitute sentences of two years imprisonment on each count. I would fix 4 February 2010 as the date on which the applicant is to be released on parole. To avoid any confusion, I would declare that the applicant has already served 131 days, between 4 August 2009 and 11 December 2009, of those sentences.

[21] **FRASER JA:** I agree with the orders proposed by Holmes JA and her Honour's reasons for those orders.

[22] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Holmes JA and with the orders proposed.