SUPREME COURT OF QUEENSLAND

CITATION:	*R v Whiting* [2013] QCA 18
PARTIES:	**R** **v** **WHITING, Debra Maree** (applicant)
FILE NO/S:	CA No 204 of 2012 DC No 281 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	15 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2013
JUDGES:	Margaret McMurdo P and Fraser JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted of one count of fraud as an employee to the value of more than $30,000, one count of fraud to the value of more than $30,000 and a further count of fraud – where applicant transferred a total of more than $138,750 over a period of four years and ten months – where applicant was given concurrent sentences of four years and six months imprisonment for counts 1 and 2 and six months for count 3, with eligibility for parole after serving half the sentence – where applicant argued that the sentencing judge failed to take into account her anxiety and depression and the impact of the sentence on her child – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 9(2)(g) *R v D'Arrigo; ex parte A-G (Qld)* [2004] QCA 399, cited *R v Eveleigh* [2009] QCA 257, considered *R v Freeman* [2012] QCA 192, considered *R v Goodger* [2009] QCA 377, distinguished *R v Gourley* [2003] QCA 307, considered

R v Haddad [2009] QCA 143, cited
R v Hearnden [2002] QCA 258, considered
R v Lawrie [2008] QCA 97, considered
R v MP [2004] QCA 170, cited
R v Parish [2012] QCA 112, considered
R v Tilley (1991) 53 A Crim R 1, cited
R v Tsiaras [1996] 1 VR 398; [1996] Vic Rp 26, cited
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, cited
R v Ward [2008] QCA 222, considered
R v Wirth (1976) 14 SASR 291, cited
R v Yarwood [2011] QCA 367, considered

COUNSEL: G J Watson for the applicant
M R Byrne SC for the respondent

SOLICITORS: Cranston McEachern Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for refusing the application for leave to appeal against sentence.

[2] **FRASER JA:** After a trial in the District Court the applicant was convicted of one count of fraud as an employee in which the yield to her was of the value of more than $30,000, one count of fraud in which the yield to her was of a value of more than $30,000, and one count of fraud. On 19 July 2012 the applicant was given concurrent sentences of four years and six months imprisonment on the first two counts and six months imprisonment on the third count, with eligibility for parole fixed at 18 October 2014 (after serving one half of the term of imprisonment). She has applied for leave to appeal against sentence on the ground that it is "manifestly unjust in all the circumstances". The contentions made by counsel on her behalf are that the sentence is manifestly excessive and that the appropriate sentence is three and a half years imprisonment with parole eligibility after 12 months.

[3] The applicant was aged between 30 and 35 years old at the time of the offences. She was employed by a doctor's company as the medical practice manager or in some similar capacity. Over a period of about four years and ten months she transferred to her own accounts more than $47,000 from the company's business account and more than $91,000 from the doctor's credit card account (counts 1 and 2), and on a separate occasion she transferred $750 from one of the doctor's accounts to her own account (count 3). The sentencing judge, who was the trial judge, found that the doctor trusted the applicant totally throughout the relevant period and that the applicant "very cruelly abused that trust in a way that just showed how cold and calculating you could be". The applicant started taking the money in 2004, the amounts she was taking gradually increased, and from about 2007 onwards she did not enter any descriptions of the withdrawals other than to describe them as "transfer". Although the applicant's conduct was fairly crude and simple, in the sense that the transfers could easily be traced to the applicant, she had some confidence because of the trust the doctor placed in her. The sentencing judge found that the applicant took the money to fund a substantial gambling habit.

[4] It appears from the sentencing remarks that the applicant's case was that she was authorised to take the money. The sentencing judge considered that the jury rejected that case as a "nonsense argument". His Honour characterised the applicant's conduct as persistent dishonest behaviour over a long period of time and found that the applicant had not shown any remorse. The sentencing judge considered that both general deterrence and personal deterrence were relevant factors in the sentence.

[5] The applicant had a criminal history of offences which were largely irrelevant to the present sentence. Her history included a conviction of one offence of dishonesty (unauthorised dealing with shop goods) for which no conviction was recorded and she was given a relatively small fine. That offence had been committed many years earlier and the sentencing judge accepted that it was "very minor". The sentencing judge took into account in the applicant's favour that she was always capable of obtaining employment and that her current employer let her remain in the employment despite learning of these offences.

[6] The applicant's counsel referred the sentencing judge to *R v Yarwood* [2011] QCA 367, in which the offender was sentenced to four and a half years imprisonment. The sentencing judge observed of that case that it concerned a solicitor who got into financial difficulties and presented false documents to the Office of the State Revenue so that it was out of pocket for $207,000.

[7] The prosecution referred the sentencing judge to *R v Gourley* [2003] QCA 307, *R v Ward* [2008] QCA 222, and *R v Goodger* [2009] QCA 377. In *Gourley* the effective sentence of six years imprisonment was imposed for an offence in which the amount taken was $213,000. The sentencing judge remarked that such an amount was worth a lot more in 2002 than it would have been worth by the end of the applicant's offending in 2008. In *Ward* a sentence of imprisonment of five years was imposed. The sentencing judge remarked that Ward used a system which was far more elaborate than was adopted by the applicant and that, although the Court in dismissing that offender's appeal observed that five years was towards the top of the range, it did not interfere with the sentence.

[8] The sentencing judge said that the decision that he derived most use from was *Goodger*. The sentencing judge noted that the applicant took almost $50,000 more than in *Goodger* and that the applicant offended over a lengthier period. His Honour considered that the fact that *Goodger* had previous convictions for dishonesty which were far more serious than the applicant's single conviction of an offence of dishonesty should be balanced against the fact that the applicant took more money and over a more prolonged period of offending than in *Goodger*.

[9] The sentencing judge did not accept a submission by the applicant's counsel that parole eligibility might be set at slightly less than one half of the term because of the applicant's commitment to her three and a half year old child. The applicant did not live with the child's father. The sentencing judge adverted to the difficulty that the child's father would now have to care for her whilst the applicant was in custody but held that these circumstances did not justify setting an early parole eligibility date. His Honour observed that although this involved a massive inconvenience for the child's father and it was incredibly difficult for the applicant, she had committed the offending over a four year and ten month period from early 2004 to late 2008, it wasn't until the very end of the offending period that she chose to have the child, so it seemed to his Honour that there was nothing exceptional in her case.

Consideration of the applicant's arguments

[10] The applicant contended that *Yarwood* ought not to have been taken into account because of the significant difference between an offence of fraud perpetrated by a solicitor and fraud perpetrated by an employee. Emphasis was placed upon the grossness of a breach of trust by a solicitor. The respondent accepted that *Yarwood* was of limited assistance and referred to the significance in that decision of the influence of the offender's psychiatric illness in relation to his offending conduct. *Yarwood* is not of much assistance for those reasons. It does not seem that the sentencing judge placed any weight upon *Yarwood*. His Honour merely gave a brief summary of the case in response to the citation of it by the applicant's counsel. The sentencing judge made it clear that the sentence of most relevance was *Goodger*. No error has been shown in the sentencing judge's reference to *Yarwood*.

[11] The applicant contended that the sentencing judge failed to take proper account of the hardship that would be visited upon the applicant's daughter by the imposition of the term of imprisonment and the length of the period before eligibility for parole. The applicant argued that the sentencing judge erred by holding that the fact that the applicant had her child towards the end of her period of offending negatived the hardship that would flow from her incarceration. It was submitted that the existence of the child and the associated hardship which inevitably would follow upon the applicant's incarceration were factors which the court was obliged to take into consideration in the formulation of a just sentence by s 9(2)(g) of the *Penalties and Sentences Act* 1992 (Qld) and that the sentencing judge failed properly to take those matters into consideration.

[12] These submissions should not be accepted. Section 9(2)(g) provides that "In sentencing an offender, a court must have regard to— … the presence of any aggravating or mitigating factor concerning the offender …" The Act does not provide that the parole eligibility period must be reduced to take into account the adverse effects of a custodial sentence upon the offender's child or anyone else. Whilst the particular time at which the applicant had her child is not significant, it cannot be said that the sentencing judge failed to take the matters concerning the child into account in formulating the sentence. His Honour discussed those matters and held that they did not justify the fixing of a parole eligibility date at a point earlier than the mid point of the term of imprisonment. It is a rare case in which hardship to spouse, family and friends justifies substantial mitigation in a sentence for a serious offence: see *R v Tilley* (1991) 53 A Crim R 1 at 3-4, 6; *R v MP* [2004] QCA 170 at 3; *R v Wirth* (1976) 14 SASR 291 at 296; *R v D'Arrigo; ex parte Attorney-General of Queensland* [2004] QCA 399 at 5-6; *R v Haddad* [2009] QCA 143. It was inevitable that the applicant would be imprisoned for a substantial period for her offence, so that the child's father would necessarily suffer disruption and inconvenience of the kind to which the sentencing judge referred. In light of the seriousness of the applicant's offending and the finding that she was not remorseful, it was within the sentencing judge's discretion not to fix an earlier parole eligibility date.

[13] The applicant contended that the sentencing judge did not properly take into account the evidence of a psychologist that the applicant suffered anxiety and depression. The psychologist's report recorded that the applicant had attended regular counselling appointments with her for treatment for anxiety and depression after being referred in April 2012, and that the psychologist had earlier provided

counselling to the applicant from December 2010 to May 2011. The applicant had been taking anti-depressant medication prescribed by her doctor since 2008. The applicant's anxiety had increased after a trial date was set and she was worried about how her four year old daughter would cope should the applicant receive a long prison sentence. The psychologist observed that any separation from her daughter was likely to further increase the applicant's anxiety and depression. Counsel for the applicant at trial, and again counsel who appeared for the applicant in this Court, acknowledged that the evidence of the psychologist did not bear upon the applicant's moral culpability for the offence. It appears that the applicant's psychological condition took effect only after her offences came to light. There was no suggestion that the applicant's offending was influenced by any anxiety or depression. The submission for the applicant was that the applicant's psychological condition was nonetheless relevant as a mitigating factor which should have led to an earlier parole eligibility date. *R v Tsiaras* [1996] 1 VR 398 was cited for the proposition that a psychiatric illness short of insanity might be relevant in relation to the kind of sentence imposed and the conditions upon which it should be served because the illness might mean that certain sentences would weigh more heavily on the offender than they would on a person of unimpaired health. The principle was submitted to apply also to any mental disorder or abnormality and any impairment of mental function: *R v Verdins* (2007) 16 VR 269. The respondent submitted that some level of depression might be likely in the case of most, if not all, persons who are incarcerated, the psychologist's report did not suggest that her psychological issues could not be managed by her current medications whilst incarcerated, and the evidence did not reach the threshold levels in the principles formulated in *Verdins*.

[14] As to the effect of the applicant's anxiety and depression upon her in a prison setting, the psychologist reported only that, should the applicant be sentenced to imprisonment, "Any separation from her young daughter is likely to further increase Ms Whiting's anxiety and depression. Should she receive a prison sentence it will be important to ensure that she is able to continue taking her prescribed medication, until her ongoing needs for anti-depressant medication and psychological treatment are assessed." There was no evidence to suggest that her condition could not appropriately and effectively be treated whilst in prison. The sentencing judge noted that the applicant's counsel had asked for parole eligibility of slightly less than half because of the applicant's commitment to the child and accepted that it was "incredibly difficult for you". It has not been demonstrated that the sentencing judge did not take this matter into account.

[15] The applicant submitted that reference to comparable sentencing decisions demonstrated that the sentence was made manifestly excessive by the imposition of a parole eligibility date after the applicant served two years and three months of a sentence of imprisonment of four and a half years.

[16] In *Goodger*, to which the sentencing judge referred, the offender pleaded guilty to one count of dishonestly obtaining property in contravention of s 408C(1)(b) of the *Criminal Code* 1899 (Qld) and was sentenced to four and a half years imprisonment with eligibility for parole after 18 months. The amount she took from her employer was substantially less than that taken by the applicant, $94,744.46, and the period of her offending was also much shorter, occupying about two years, rather than the five year period during which the applicant offended. As the sentencing judge noted, that offender had a relevant criminal history. That may have been significant in fixing the four and a half years term of imprisonment, but the decision in *Goodger* that the sentence was not manifestly excessive does supply some support

for the term of imprisonment imposed in this case in light of the more serious aspects of the applicant's offending.

[17] If further support for the sentence is thought to be required, it may be derived from cases such as *R v Eveleigh* [2009] QCA 257 (four years imprisonment with parole eligibility after 14 months on a plea of guilty by a 22 year old woman with a gambling addiction who stole $87,900 from her employer over a period of two months and five days) and *R v Freeman* [2012] QCA 192 (four years imprisonment suspended after 16 months on a plea of guilty by a 31 year old man with no prior criminal history who pleaded guilty to one count of fraud as an employee to the value of $30,000 or more and who fraudulently caused financial loss to his employer of $69,529.49 with a yield to the offender of $45,137.20). Counsel for the applicant pointed out that in *Freeman* Mullins J observed that the sentencing judge had adopted an orthodox approach in imposing a sentence for the fraud offence that was "not at the lowest end of the range" in order to reflect other offences to which that offender pleaded guilty. Nevertheless, the Court's conclusion that a term of imprisonment of four years for that much less serious offence was within the sentencing range makes it difficult for the applicant here to argue that her sentence was manifestly excessive.

[18] Other decisions relied upon by the applicant do not support the contention that her sentence was manifestly excessive. In *R v Parish* [2012] QCA 112 (three years imprisonment with a parole release date after 12 months) the offender pleaded guilty and the total amount of the loss was only a little more than half the amount taken by the applicant. In *R v Hearnden* [2002] QCA 258 (three years imprisonment suspended after six months) the offender pleaded guilty, had no prior convictions, took half the amount taken by the applicant, and offended for only seven months. In *R v Lawrie* [2008] QCA 97 (three and a half years suspended after 12 months) the offender pleaded guilty, he took much less than half the amount taken by the applicant and over a much shorter period. Counsel for the applicant referred to what were submitted to be aggravating features of the offences in some of those cases; for example *Hearnden* entered more than 507 separate transactions and his offending conduct was very complex, in *Lawrie* the offending had a terrible impact on the business and was complicated and subtle, and in *Eveleigh* the offending conduct involved a highly elaborate system and the falsification of records to conceal the crime. It might be said, on the other hand, that the applicant's ability to defraud her employers of so much money over such a long period without any serious attempt to conceal her frauds tends to illustrate the gross nature of her breach of the total trust which her employer reposed in her. More fundamentally, however, the sentencing decisions upon which the applicant relied are so factually different from the present case as to provide no support for the proposition that the applicant's sentence is manifestly excessive.

[19] Contrary to a further submission for the applicant the order for eligibility for parole after 18 months in *Goodger* does not support the applicant's contention that the period fixed before parole eligibility in her case is excessive. Again, the facts are so different as to render *Goodger* of no assistance to the applicant in this respect. Most notably that offender entered an early plea of guilty, made admissions to the police as to her offending, and was genuinely remorseful.

[20] The sentence imposed upon the applicant was in a conventional form and was within the sentencing discretion. I would refuse the application.

[21] **DALTON J:** I agree with the reasons of Fraser JA and the order proposed.