SUPREME COURT OF QUEENSLAND

CITATION:	*R v Illguth* [2014] QCA 222
PARTIES:	**R** **v** **ILLGUTH, Prudence** (applicant)
FILE NO/S:	CA No 319 of 2013 DC No 1 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Roma
DELIVERED ON:	5 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2014
JUDGES:	Holmes and Morrison 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 is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted after a six day trial of one count of stealing, as a clerk, property valued over $5,000 – where the applicant was sentenced to five years imprisonment – where the precise amount taken by the applicant was uncertain – where the applicant had admitted to taking about $100,000, although the total shortfall was $467,744 – where the trial judge sentenced the applicant on the basis she took somewhere between $200,000 and $250,000 – whether the sentence imposed was manifestly excessive *R v Adams* [1999] QCA 326, cited *R v Allen* [2005] QCA 73, cited *R v Gasenzer* [2013] QCA 9, considered *R v Gourley* [2003] QCA 307, considered *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, cited *R v Tindale* [2008] QCA 24, considered *R v Ward* [2008] QCA 222, considered
COUNSEL:	A S Colavitti (*sol*) for the applicant B J Power for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Atkinson J and the order she proposes.

[2] **MORRISON JA:** I have read the reasons of Atkinson J and agree with those reasons and the order her Honour proposes.

[3] **ATKINSON J:** Prudence Illguth was convicted on 20 November 2013 in the District Court in Roma after a six day trial on one count of stealing, as a clerk, property valued over $5,000. On 21 November 2013 she was sentenced to a term of five years imprisonment. She has sought leave to appeal against the sentence on the grounds that it was manifestly excessive in all the circumstances and that "a Five year head sentence without recommendations where the accused had no previous history nor was any exact quantum ever proven in evidence."

[4] The full charge on the indictment was "That on divers dates between the 1st day of July, 2009 and the seventeenth day of September, 2010 at Charleville in the State of Queensland, Prudence Illguth being the clerk of Charleville Memorial Clubs Association Incorporated stole money the property of Charleville Memorial Clubs Association Incorporated, the value of which was more than $5,000." The Memorial Clubs Association is commonly known as the RSL.

[5] The circumstances of the applicant's offending as found by the learned sentencing judge were that she took money from her employer over a 14 and a half month period. She was then employed as assistant manager and her husband was the manager at the RSL in Charleville. She was also the gaming nominee which gave her special authority with regard to the poker machines. Because of her job she was also appointed treasurer of the club which gave her specific financial responsibility.

[6] The evidence demonstrated that the cash proceeds from three separate forms of gambling were under-banked: proceeds from the Keno, poker machines and TAB. With regard to the poker machines it was her responsibility to certify that the amount collected from the machines each month was banked. The applicant sought to hide her theft by delaying the banking between when the monies were received and when they were banked. On one occasion there was a 61 day delay. Her offending was detected when the balance in one of the bank accounts was so low that a payment could not be made out of it. In early September 2010 the bank notified the club's accountant. At that time the applicant and her husband were on leave.

[7] The applicant was confronted on 25 September 2010 by other persons associated with the club and she admitted to them taking money from the club although she admitted to taking only about $100,000. However there was a $467,744 shortfall being a shortfall of $243,341 from the poker machines, $181,143 from Keno and $43,260 from the TAB.

[8] The learned sentencing judge said he was not satisfied that she took the whole of the $467,000 but sentenced her on the basis that she took somewhere between $200,000 and $250,000. He based that on her admissions and also the evidence that about $10,000 a month more than usual was spent on the Keno machines during the period of the offending. The Keno spending at the particular club was the third

highest in the State being second only to the two casinos. In his sentencing remarks with regard to the amount stolen his Honour said:

> "Now, there was some evidence during the trial or some concessions made by witnesses that the monetary controls within the organisation were loose and it seems to me that the prosecution case, although successfully proving that you took money, did not exclude, as it was not required to, the prospect that others took money. There is no evidence of any particular enrichment of you and your family, but there is evidence which was presented to me today of unusually high Keno gambling during the relevant period. So quantifying your stealing is a difficult exercise and I confess, to some degree, a rather speculative exercise, but I have to do what I can because the quantum is relevant to the sentence.
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> It's possible you took $467,000, but I can't be satisfied of that to the degree that I would need to be because it's a matter that would affect sentence. You admitted at one stage taking $100,000. Broadly speaking, I think you should be sentenced on the basis of taking of somewhere between $200,000 and $250,000. The reason I say that is you admitted a gambling problem, there's some evidence which shows that broadly about $10,000 a month more than usual was spent on the Keno machines during the period of the offending and that's demonstrated by what happened before and after that period and Mr Copley has told me that the Keno spending in the club was the third highest in the State, second only to the two casinos.
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> Now, I'm aware of course that other people would be betting on the Keno, and if somebody else was stealing money, they might be putting it on the Keno too, but it's just one factor that indicates, broadly speaking, how I might go about quantifying. So I certainly don't sentence you on the basis that you stole $467,000, but I think it's very safe to sentence you on the basis that you stole at least $200,000 because you admitted $100,000 and I think it's safe to infer that that would just be the starting point."

[9] As well as the amount of money which his Honour found she stole, he said that other circumstances of the offence were relevant to the sentence to be imposed including the period over which the stealing was conducted, the position of trust she occupied in the organisation, the effect on the organisation as well as her personal circumstances.

[10] With regard to her personal circumstances his Honour referred to the evidence that she was under a lot of stress over the time when she was taking the money and that she and her husband worked very long hours at the RSL. She reacted to the stressors in her life by drinking and gambling. She was between 40 and 41 years old at the time of offending and 44 years old at the time of sentencing. She had no relevant criminal history. His Honour referred to the maximum sentence being 10 years imprisonment and that it was necessary for the courts to have regard to general deterrence in sentencing people who steal from companies or community organisations.

[11] His Honour referred to the fact that there was limited evidence of co-operation so she would not have the benefit of an ameliorating order. His Honour also took into

account that there had been an offer of restitution from Mr Illguth although restitution had not been made.

[12] In fixing a sentence of five years imprisonment his Honour found that her share of the club's loss was in the $200,000 range, he took into account the position she occupied, the period over which the offending occurred and her personal circumstances which led to the offending and her reasonably good prospects of rehabilitation.

Applicant's submission

[13] The applicant submitted that the learned sentencing judge had failed to give due weight to the applicant's gambling problem, personal and professional situation as to the amount of stress placed upon her at home and at work and to an attempt by her to take her own life. She submitted that the club was "like a sieve leaking" and that the sentencing judge should have taken into account the amount of money others at the club may have taken when quantifying the amount upon which she should be sentenced. She also submitted that his Honour failed to take account of the evidence of admissions if accepted by the jury which limited the amount taken to $100,000. It was submitted that the learned sentencing judge's discretion miscarried because he quantified the amount that the applicant stole on a speculative basis. It was also submitted that it was unclear whether the applicant was the only person who was taking money. The applicant referred to the concession made by the prosecution on sentencing that although the amount of $470,000 was the gross loss, monetary control of the RSL club was poor and some others may have taken money as well. The applicant submitted that the appropriate starting point would be on the evidence of admissions of $100,000 decreasing to $5,000 for sentence. There was no sophisticated process to evade detection, no false accounting, no complex fraud, no self-enrichment or that of the applicant's family and friends.

[14] It was submitted that the applicant's sentence was manifestly excessive in that no recommendation by way of order for early release was made. It was submitted that a recommendation should have been ordered for her release after serving nine to 12 months imprisonment.

[15] It would appear that the most relevant comparative cases which deal with similar offending are *R v Gasenzer*;[1] *R v Ward*;[2] *R v Gourley*;[3] and *R v Tindale*.[4]

[16] In *R v Gasenzer* the applicant had been sentenced to four years imprisonment suspended after 15 months. She overpaid herself for about three and a half years but the amount was only $57,662. She pleaded guilty. Although she had promised restitution she had not made it. She stole the money to support her gambling habit. The applicant had no criminal history and had a one year old child. In dismissing her application for leave to appeal against sentence Muir JA referred to a number of other appeals which dealt with comparable sentences including *R v Ward*,[5] *R v Allen*,[6] *R v La Rosa; ex parte A-G (Qld)*[7] and *R v Adams*.[8]

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1 [2013] QCA 9.
2 [2008] QCA 222.
3 [2003] QCA 307.
4 [2008] QCA 24.
5 [2008] QCA 222.
6 [2005] QCA 73.
7 [2006] QCA 19.
8 [1999] QCA 326.

[17] The case which appears to have most relevance for this applicant was the case of *R v Ward*. Ward was refused leave to appeal against a sentence of five years imprisonment suspended after 20 months for dishonestly obtaining $97,810 from his employer over a 20 month period. He was the General Manager of the company owned by his sister and brother-in-law and the offending involved what was described as a "gross breach of trust". The offender had no prior criminal history and was 32 to 33 years of age at the time of offending. He pleaded guilty at the end of a committal which was a full hand up committal without cross-examination.

[18] In *R v Gourley* the applicant was refused an extension of time because she had no prospect of successfully appealing her sentence. She was sentenced to six years imprisonment with a recommendation that she be considered eligible for parole after serving two years and three months of that imprisonment after she pleaded guilty to dishonestly obtaining money in excess of $5,000 from her employer. The offending occurred over a four and a half year period when she was between 42 and 46 years of age. Most of the monies were spent on gambling. Eventually she went to the police and confessed her behaviour. The total loss to her employer was over $213,000. She had no previous convictions. The offending in that case occurred over a longer period of time but importantly the applicant in that case cooperated by voluntarily desisting from her conduct, reporting her conduct to the police and making full admissions and entering an early plea of guilty.

[19] In *R v Tindale* a number of Court of Appeal decisions dealing with substantial frauds by employees were considered. In each of them the offender had no prior relevant convictions. The applicant in *Tindale* had misappropriated $426,804 over the four and a half years where she had worked for a small family business. She however pleaded guilty and cooperated in the administration of justice. She was sentenced to seven years imprisonment with a parole eligibility date after she had served two years four months. The application for leave to appeal against sentence on the grounds that the sentence was manifestly excessive was refused.

Conclusion

[20] The learned sentencing judge sentenced the applicant on the basis that she was responsible for only about half of the monies that went missing during the period when she was employed at the RSL and her offending occurred. This was of great advantage to the applicant and she has been unable to demonstrate any error in that approach.

[21] When consideration is given to comparative sentences dealt with by the Court of Appeal, the sentence imposed does not appear to be manifestly excessive. There was no remorse or plea of guilty which could have justified an ameliorating order to be given in addition to the head sentence.

[22] In all of the circumstances the application for leave to appeal against sentence should be refused.