SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martin* [2015] QCA 257
PARTIES:	**R** **v** **MARTIN, Julie Christine** (applicant)
FILE NO/S:	CA No 17 of 2015 DC No 190 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh – Unreported, 12 December 2014
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2015
JUDGES:	Fraser and Philippides JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The order of the court is:** **The 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 OR INADEQUATE – where the applicant was convicted upon her own plea of guilty for fraud – where the sentencing judge ordered that the applicant be imprisoned for six years with a parole eligibility date of 20 months from the date of the sentence – where the applicant had a moderate gambling disorder and adjustment disorder with depressed mood – whether the sentence was manifestly excessive *Criminal Code* (Qld), s 408C *R v Adams; ex parte Attorney-General (Qld)* [2006] QCA 312, cited *R v Cox* [2010] QCA 262, cited *R v Gourley* [2003] QCA 307, cited *R v Hancox* [2006] QCA 333, cited *R v Lim* [2004] QCA 172, cited *R v Reischl* [2000] QCA 215, cited *R v Shiels* [2011] QCA 115, followed

R v Spalding [2002] QCA 538, cited
R v Tindale [2008] QCA 24, cited
R v Williams [2014] QCA 154, cited
R v Wilson [2013] QCA 260, cited

COUNSEL: The applicant appeared on her own behalf
S J Farnden for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the order proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree, for the reasons given by Jackson J, that the application for leave to appeal against sentence should be refused.

[3] **JACKSON J:** The applicant pleaded guilty on 12 December 2014 to a single count of fraud as an employee under s 408C(1)(b) and (2)(b) of the *Criminal Code*. It was ordered that she be imprisoned for six years and the date of eligibility for parole was fixed at 11 August 2016.

Antecedents

[4] The applicant was aged between 45 to 49 years at the time of the offending and 52 at sentence. She had no prior criminal history.

Offending conduct

[5] The offending occurred between 13 June 2007 and 1 July 2011. The applicant was employed by Conmat Nominees Pty Ltd. Conmat carried on business under the name "Action Powder Coaters" from 2003. Conmat operated as a small family business under the control of Mr Perrin and his wife.

[6] The applicant was employed as the company bookkeeper. She was required to record income and expenses. She attended to the payment of staff and suppliers' invoices. She entered transactions in the books through the MYOB accounting software package. She was responsible for making payments by electronic instructions given to Conmat's bank.

[7] On 579 separate occasions, over a period of four years and two months, the applicant transferred money to her own bank account, or that of her partner, to which neither was entitled. The total amount was $373,131.54. The fraud was undetected because there were no checks in place to monitor the applicant and no audit of Conmat's accounts. The applicant had sole responsibility for making the relevant payments, although Mr Perrin had access to the accounting software package and bank accounts.

[8] On 19 September 2011, the applicant resigned her employment. Mr Perrin and his wife took over the company bookkeeping. The books were in disarray. In the process of reconstituting them they became aware of suspicious transfers. The transfers into the applicant's bank account and the bank account of her partner were discovered.

[9] In the last quarter of 2011, the applicant admitted her guilt to Mr Perrin and commenced small payments by way of restitution. The payments were made between 23 December 2011 and 23 September 2014. The total amount repaid was $24,770.

[10] On a date that is not clear, the applicant sent an email to Mr Perrin apologising for what she had done and promising to pay the money back. From the text of the email, it is apparent that the applicant was then aware that the police would charge her with fraud. She requested that Mr Perrin delay the charge so she could accomplish the goal of paying him back.

[11] Following complaint to the police and execution of production notices directed to the applicant's bank accounts, analysis showed the extent of the deposits to her account and the account of her partner. On 15 February 2013 the applicant was arrested and charged.

[12] Despite her clear admission, the matter proceeded through committal and was set down for trial. The indictment was presented on 17 April 2014 but after three mentions the matter was listed for sentence on 1 August 2014. The ultimate date of sentence of 12 December 2014 was delayed to permit the applicant to complete a nursing degree which she had been undertaking over the intervening years.

Prosecutor's submissions at sentence

[13] The prosecutor at sentence submitted that the applicant's offending was over a significant period of time and was selfish. It had caused significant financial and emotional damage to the Perrins. Notwithstanding the applicant's remorse, which was evident, it was unlikely that the damage she had caused could be repaired by repayment. The repayments she had made to the date of sentence were relatively small. He submitted that aggravating features were the significant period of time during which the offending occurred and the breach of trust as the sole bookkeeper.

Applicant's submissions at sentence

[14] Counsel for the applicant submitted that the applicant had made significant withdrawals from her bank account to fund what appeared to have been a significant gambling problem. Between 1 July 2007 and 30 June 2011 a total amount of $134,558 was withdrawn from the applicant's bank accounts at a single ATM located at the Logan Diggers Club.

[15] Counsel submitted that she had voluntarily desisted from her offending conduct and left her employment because she knew eventually she would be detected but she did not have the courage to face up to her employer.

[16] A report by Dr Shelley Keane dated 7 October 2014 assessed the applicant as of average intellectual ability who had a long history of working as a bookkeeper. At the time of the offences, the applicant reported that she had many situational stressors. Dr Keane thought at the time of the offences she would have fulfilled the criteria for DSM5 diagnosis of a moderate gambling disorder and adjustment disorder with depressed mood.

[17] The applicant reported two significant stressors to Dr Keane: first in approximately 2006, one of her daughters became sick with an auto immune disease; second, at the same time or afterwards, her mother was diagnosed with cancer. Her mother's disease progressed through periods of treatment and hospitalisation, including surgery, and she eventually died. The applicant supported and cared for both her daughter and mother during these periods.

[18] Counsel submitted that the applicant did not lead an extravagant lifestyle as a result of her offending, and the frequent withdrawals at the Logan Diggers Club probably explained where the money went. The applicant lived with her partner in a small three bedroom, one bathroom house which was not elaborate. She had no holidays between 2000 and 2012. She drove an old Honda Civic. She submitted that although the applicant had hoped to make further restitution she had not been able to do so.

[19] The applicant is the mother of three adult children. In support of her plea of mitigation references were tendered from two of her children. Counsel submitted it was clear that the applicant is a kind and caring person and had been a good mother.

[20] Counsel submitted that the applicant's gambling addiction and the emotional problems behind it were things that she had taken steps to deal with by attending counselling. It was submitted the applicant was no longer gambling. During the offending she knew what she was doing was wrong but was under a compulsion to continue gambling and therefore continued to offend.

Sentencing Judge's remarks

[21] In sentencing the applicant, the judge accurately summarised the offending, the applicant's early voluntary admission and offer to make restitution, followed by the small amount of payments.

[22] His Honour referred to the stressors of the illness of the applicant's child and her mother's terminal illness and Dr Keane's opinion that they had had a significant psychological effect on her. His Honour identified the applicant as suffering from a gambling addiction which he described as something used as a form of self-medication, when the applicant was suffering from an adjustment disorder with depressed mood.

[23] The judge referred to the applicant not having lived an extravagant lifestyle but literally throwing away most of the proceeds of the fraud on poker machines.

[24] His Honour referred to the references provided by the applicant's children and to the applicant completing a nursing degree not long before the time of the sentence.

[25] His Honour noted that the applicant had no criminal history and was previously of excellent character, so that in every respect other than this offending she would be considered a positive contributing member of the community.

[26] The judge was of the view that the period of time over which the offending occurred was very important, the significant breach of trust was very important and the large number of occasions on which the frauds occurred was very important. Those matters were to be balanced against the applicant's lack of criminal history, the expressed remorse, the contents of Dr Keane's report and the attempts at repayment.

[27] To reflect the serious nature of the offending his Honour concluded that in all of those circumstances the head sentence should be six years imprisonment.

[28] As to the matters in mitigation his Honour concluded that a parole release date of 20 months from the day of sentence would reflect the positive matters in the applicant's favour. As the judge expressed it, that would see her released earlier than the "normal" period of serving one third of the sentence, but still put into effect what his Honour viewed was clear from the decisions, that not only must there be a substantial head sentence but there must be a substantial period of actual custody.

Applicant's submissions on appeal

[29] The applicant contended that the sentence was manifestly excessive because the sentencing judge gave insufficient weight to the applicant's psychological condition and state of mind during the time of the offending and the impact of a lengthy incarceration on her condition. She also submitted that the sentence handed down did not adequately reflect the mitigating factors before, during and after the cessation of her offending.

[30] She relied on *R v Shiels*,[1] *R v Tindale*,[2] *R v Hancox*,[3] *R v Williams*,[4] *R v Lim*,[5] *R v Reischl*,[6] *R v Cox*[7] and *R v Adams; ex parte Attorney-General (Qld)*.[8]

Respondent's submissions on appeal

[31] The respondent submitted that the sentencing remarks show that the judge took into account the contents of Dr Keane's report and the matters that his Honour described as matters in mitigation that had been outlined with enormous care and attention to detail by the applicant's counsel. There was no error in failing to take those matters into account.

[32] The respondent also submitted that the applicant's co-operation in the sense of her admission to her former employer should be viewed in the context that it was made when the applicant was aware that investigations were at least generally underway. The judge referred to the applicant not having lived an extravagant lifestyle but literally throwing away most of the proceeds of the fraud on poker machines.

[33] The respondent relied on *R v Shiels*,[9] *R v Spalding*,[10] *R v Gourley*,[11] *R v Tindale*[12] and *R v Wilson*.[13]

Decision

[34] In my view, there is no substance in the contention that the sentencing judge did not take into account the applicant's remorse or her psychological condition during the offending. There is also no substance in the suggestion that he did not take into account her psychological condition during the possible lengthy incarceration. His Honour's sentencing remarks included that: "I accept that is going to be difficult" and his Honour also ordered that Dr Keane's report be provided to the Corrective Services Department to assist in their supervision of the applicant.

[35] As to the comparable cases, in *R v Shiels*,[14] Chesterman JA said:

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1 [2011] QCA 115.
2 [2008] QCA 24.
3 [2006] QCA 333.
4 [2014] QCA 154.
5 [2004] QCA 172.
6 [2000] QCA 215.
7 [2010] QCA 262.
8 [2006] QCA 312.
9 [2011] QCA 115.
10 [2002] QCA 538.
11 [2003] QCA 307.
12 [2008] QCA 24.
13 [2013] QCA 260.
14 [2011] QCA 115.

> "The factors most relevant to the exercise of the sentencing discretion in these cases are the amount of money taken; the length of time over which the offending occurred; the number of offences in the period; and remorse or lack thereof as indicated by whether the sentence was imposed on a plea or after trial and as indicting the likelihood of re-offending …
>
> It is not enough for an applicant to point to similar cases in which a lesser penalty was imposed. If there are cases in which the same or a more severe penalty was imposed the court can conclude that the penalty was within the appropriate range."[15]

[36] That statement applies to the circumstances of the present case. There is nothing in the cases relied on to support the contention that the head sentence was excessive. Fairly, the applicant acknowledged that it was within range during her oral submissions. By fixing the parole eligibility date at substantially less than one third of the head sentence, the sentencing judge took into account fully the substantial mitigating factors in favour of the applicant at sentence.

[37] In my view, the application for leave to appeal against sentence must be refused.

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15 [2011] QCA 115, [40]-[41].