COURT: SUPREME COURT OF TASMANIA

CITATION: *Rodgers v Robinson* [2021] TASSC 45

PARTIES: RODGERS, Olivia Rose
v
ROBINSON, Angela

FILE NO: 1701/2021

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HEARING DATE: 3 September 2021

JUDGMENT OF: Blow CJ

CATCHWORDS:

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Aust Dig Magistrates [1349]

REPRESENTATION:

***Counsel*:**
Applicant: F Cangelosi
Respondent: S Nicholson
Solicitors:
Applicant: D Loganathan
Respondent: Director of Public Prosecutions

Judgment Number: [2021] TASSC 45
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OLIVIA ROSE RODGERS v ANGELA ROBINSON

REASONS FOR JUDGMENT **BLOW CJ**
13 September 2021

1 This is a motion for the review of sentencing orders made by the Chief Magistrate, Ms C Geason. The applicant pleaded guilty to 62 charges of dishonestly acquiring a financial advantage. She was sentenced to nine months' imprisonment, with seven months of that sentence suspended on condition that she commit no offence punishable by imprisonment for a period of two years. She contends that her sentence was manifestly excessive. She also contends that the learned Chief Magistrate erred in attaching insufficient weight to mitigating circumstances relating to restitution, delay, and her pleas of guilty.

2 The crimes in question were committed over a period of about 18 months, from 4 January 2016 to 13 July 2017. During that period the applicant was employed as a sales consultant and claims processor by a health insurance company named Bupa. She had been with the company since September 2011. During the period of offending she processed 62 fraudulent claims against the health insurance policies of nine customers of Bupa, and received payments totalling $65,512.75 as a result. The customers were all friends or relatives of hers. She took advantage of their trust in her to obtain their bank details. On 62 occasions she made up false invoices, giving details of known providers and false item numbers. She arranged for Bupa to make payments to the bank accounts of her friends and relatives, and then arranged transfers from their accounts to hers. She asked each of these people for permission to have payments in her favour deposited into their bank accounts, giving them various dishonest explanations for her request. When her offending came to light, at least four of these people were charged with offences. Some of them were committed for trial and indicted. All of those charged were later discharged.

3 Throughout the period of offending the applicant received wages from Bupa and also carried on a very successful make-up and beauty business. She received over $55,000 in net wages receiving from Bupa, together with $83,846 by way of takings (not profit) from her business.

Restitution

4 I will deal with the grounds of appeal relating to specific mitigating factors before addressing the question whether the sentence was manifestly excessive. Ground 2 of the notice to review relates to restitution. The applicant made full restitution to Bupa. Ground 2 asserts that the learned Chief Magistrate failed to give adequate mitigatory weight to that fact.

5 In her sentencing comments, the learned Chief Magistrate said the following in relation to restitution:

> "I'm also asked to take into account that you've repaid the debt to Bupa. The fact that you have done that should be taken into account in your favour, but it should also be borne in mind that you can't buy a reduction in your sentence, but your preparedness to make restitution is a factor that should be taken into account."

6 Later, after saying that a sentence of imprisonment seemed to be inevitable, her Honour referred to the applicant's "considerable effort to make restitution". She said that she accepted that the applicant had developed remorse for her conduct, and that that remorse was evidenced by various things, including the effort to make restitution.

7 The material before the learned Chief Magistrate established that the applicant had been living beyond her means during the period of her offending, which ended in July 2017. Her employment with Bupa ceased in September 2017. It was not until late 2020 that agreement was reached between the applicant's solicitor and Tasmania Police as to the total amount that she had unlawfully obtained. In the meantime she had obtained professional help for psychological problems, changed her habits so that she was living within her means, operated her business successfully, and got herself into a position where she could make full restitution. As soon as quantum was agreed, full restitution was made.

8 Counsel for the applicant referred me to a number of authorities that support the following propositions in relation to restitution:

- Restitution always mitigates.
- Restitution must be encouraged.
- The primary way in which a sentencing court can encourage restitution is by giving it appropriate weight in all the circumstances of the case.
- Full restitution is particularly significant if it is indicative of remorse.
- Going to considerable efforts to make restitution is a matter to be given weight.

9 None of that is controversial. I need not refer to the relevant authorities. However nothing said by the learned Chief Magistrate at the time of sentencing indicates any mistake or error of principle in relation to restitution. Essentially the argument advanced for the applicant was that her Honour must have attached too little weight to restitution because the sentence she imposed was manifestly excessive. Ground 2 therefore cannot succeed independently of the ground asserting manifest excess.

Delay

10 Ground 4 of the notice to review asserts that the learned Chief Magistrate "failed to give adequate mitigatory weight to the delay experienced by the defendant before and during the judicial process".

11 The sequence of events, as outlined to her Honour, was as follows:

- The last fraudulent claim was processed on 13 July 2017.
- On 8 August 2017 a friend of the appellant named Ellen Osborne submitted a claim for dentistry work to Bupa, but was informed that she had reached her limit for dental work. She contacted Bupa and informed the company that she had not submitted any dental claims in the previous calendar year. That led to Bupa commencing an investigation. Ms Osborne also reported the matter to the police.
- The applicant's employment by Bupa ended on 13 September 2017.
- She was interviewed by police officers on 13 February 2018.
- On 13 March 2018 she appeared before a magistrate for the first time. The matter was adjourned.
- Her second appearance was on 10 May 2018. The original charges were adjourned sine die at that time.
- In about August 2018 police officers provided a brief of evidence to her solicitor.
- On 3 September 2018 she appeared before a magistrate for the third time. There was a discussion as to whether the matter was to go the Supreme Court or be dealt with in the Magistrates Court. The prosecutor indicated that the charges would be re-pleaded. The case was adjourned to 1 October 2018.

- On 24 September 2018 the applicant's solicitor sent an email to a police prosecutor asking for details of any proposed amendments. There was no reply.
- On 1 October 2018 the applicant made her fourth appearance. The prosecutor advised that the police were still considering their position, and awaiting advice from the Director of Public Prosecutions ("the DPP"). The case was adjourned to 26 October 2018.
- On 22 October 2018 Sgt Robinson emailed the applicant's solicitor, proposing that the complaint be adjourned sine die. Counsel for the applicant responded that an adjournment sine die would not be opposed if the police undertook to file a fresh complaint within 21 days.
- On 26 October 2018 the applicant made her fifth appearance. The prosecutor told the magistrate that the matter was to be reviewed, and the charges re-pleaded. The case was adjourned sine die.
- On 11 January 2019 the applicant's solicitor wrote to the DPP seeking advice as to how long it would take for the replacement complaint to be filed.
- On 14 January 2019, Ms Norton from the Office of the DPP responded that the DPP had no file, and that correspondence should be directed to Tasmania Police.
- On 27 February 2019 Tasmania Police made disclosure of further evidence including some 800 pages of financial records.
- On 27 September 2019 the applicant's solicitor wrote to the police seeking advice as to how long it would take for the replacement complaint to be filed. Sgt Robinson responded that the complaint was being drawn up, with an intended first appearance on 15 November 2019. She forwarded a copy.
- On 12 November 2019 the applicant's legal representatives wrote to the police putting a proposal to resolve the matter, and seeking particulars in respect of most of the counts on the new complaint.
- On 15 November 2019 the applicant made her first appearance on the new complaint. It was adjourned without plea to 12 December 2019.
- On 4 December 2019 the applicant's solicitor wrote to both the DPP and the police seeking a response to the proposal for resolution of the matter and the request for particulars. Ms Norton responded that the DPP's office was not in a position to review the proposal until the matter had been committed to the Supreme Court; that that course triggers the transfer of the police file and allocation to counsel within the DPP's office; and that pleas would have to be entered before committal. She said that it would not be disputed at a later date that an indication that the matter was capable of resolving had been provided at a very early stage.
- On 6 December 2019 Sgt Franklin advised the applicant's solicitor that the police were awaiting advice from the DPP.
- On 12 December 2019 the applicant appeared for the seventh time. She pleaded not guilty. It was apparent that the matter could remain in the Magistrates Court. It was adjourned to 3 February 2020 with a view to the proposal for resolution being considered.
- On 18 December 2019 the applicant's solicitor wrote to the DPP and the police seeking a response to the proposal. There was no response from the police. There was a response from the DPP's office, saying that the DPP would not be involved.
- On 3 February 2020 the applicant made her eighth appearance. The prosecutor advised that the police had still not determined their position on the proposal. The matter was adjourned to 2 April.
- On 4 March 2020 the applicant's solicitor wrote to the police seeking a response.
- On 30 March 2020 Ms Sundram responded that she had reviewed the file, that the proposal was not accepted, and that they intended to proceed with all charges.

- On 2 April 2020 the applicant made her ninth appearance. Her counsel pointed out that the particulars requested in November 2019 had not been provided. Ms Sundram said they would not be provided. The matter was adjourned for mention on 3 August.
- On 14 July 2020 Ms Sundram wrote to the applicant's solicitor advising that she no longer intended to file trial papers, but would seek to amend the complaint in order to provide clarity. She enclosed a document giving notice of the intended re-pleading of each count.
- On 22 July 2020 a prosecutor advised the court that the matter would require five days of hearing time.
- On 31 July 2020 the applicant's solicitor put a second proposal for resolution of the matter to the police. There is no suggestion of inappropriate delay after that date. Productive discussions followed.
- On 23 October 2020 pleas of guilty were entered.

12 In her sentencing comments, the learned Chief Magistrate observed that there had been a significant period of delay in the matters being dealt with by the court. She summarised the history of the proceedings, more briefly than I have, and continued as follows:

> "Prosecution's position is that whilst there has been a delay, the delay was not unreasonable given the nature of the offences. It took some time to investigate the nature and complexity of your conduct which is running alongside investigating others. Prosecution's position is that there are a number of complexities about the case and its significant amount of documents that needed to be considered and it wasn't a situation where the prosecution took a leisurely approach to considering an extremely complicated matter. It's acknowledged though that negotiations with prosecution did take some time, but it needs to be balanced against the matter being quite complex.
>
> Delay between the commission of an offence and final disposition of the case is not *per se* mitigating but it may work in favour of an accused person if the delay is not attributed to the fault of the accused. Investigation of prosecution of criminal conduct should be conducted as quickly and reasonably as practical and a legitimate sense of unfairness can develop if the criminal justice system is perceived to be too leisurely. Prosecution's position is that whilst there was delay, it's not to such an extent that it should be attributed any significant mitigation.
>
> It is apparent that this matter had complexities in investigating and analysing the extent of your conduct and others. In my view, some weight should be given to acknowledging that the matter has taken some time to finalise and that inevitably has exacerbated your anxiety."

13 In her outline of the history of the proceedings, her Honour did not refer to the following things:

- The fact that the proceedings were twice adjourned sine die because of a perception that the charges needed to be re-pleaded.
- The efforts made by the applicant and her legal representatives to work with the prosecuting authorities to settle the charges prior to July 2020.
- The refusal on the part of the prosecuting authorities to engage in discussions as to resolution of the matter until pleas of not guilty were entered to charges that could be disposed of in the Magistrates Court.
- The refusal to supply particulars that had been requested.
- The insistence that the matter be listed for a five day trial when there was an outstanding proposal for its resolution.

14 However these were matters of detail. The significant fact is that, despite the complexity of the matter, it should not have taken from March 2018 to July 2020 for the prosecuting authorities to decide what the appropriate charges were, and to begin to engage in discussions with defence lawyers. Her Honour's comment that "some weight should be given to acknowledging that the matter has taken some time to finalise" is consistent with her accepting that, to some degree, the delay was inappropriate to the extent of warranting some leniency in sentencing.

15 A period of delay between the commission of an offence and the final disposition of a case may be taken into account in mitigation of penalty if it is not attributable to fault on the part of the offender: *R v Schwabegger* [1998] 4 VR 649 at 659; *Prehn v The Queen* [2003] TASSC 55 at [21]. An offender's rehabilitation during a period of delay may also be taken into account in mitigation of penalty: *R v Miceli* [1998] 4 VR 588. The applicant was entitled to have both the inordinate delay and her rehabilitation during the period of delay taken into account in her favour. The learned Chief Magistrate referred to both of those factors and took them into account.

16 There is nothing in her Honour's sentencing comments to indicate that she gave these factors undue weight unless it can be said that the sentence was manifestly excessive. Ground 4, like ground 2, cannot succeed independently of the ground asserting manifest excess.

17 It is worth observing that, but for the delay in resolving the matter, the applicant might have found it far more difficult to make full restitution at the time of its resolution.

The pleas of guilty

18 Ground 3 of the notice to review asserts that the learned Chief Magistrate "failed to give adequate mitigatory weight to the defendant's early plea of guilty".

19 Her Honour began her sentencing comments by acknowledging that the applicant had pleaded guilty to the 62 charges. In the course of her comments she observed that credit should be given to the applicant for ultimately pleading guilty to the charges. Later she said that she accepted that with the passage of time the applicant had developed remorse for her conduct, and that that remorse was evidenced by her plea of guilty. However she did not go into any greater detail as to matters relevant to the weight to be attached to the pleas of guilty.

20 Counsel for the applicant has drawn my attention to various matters relevant to the weight to be attached to her guilty pleas:

- The case was a complex one. There were 62 fraudulent transactions. Documents were generated in relation to each of them. They involved nine friends and family members of the applicant. One of those people, the applicant's mother, had died. There was a significant risk that a hearing would not run smoothly to a conclusion within the predicted five days. It might have taken longer. There was a risk that something might have gone wrong, necessitating an adjournment. The potential burden of the hearing on the Magistrates Court was extreme. The utilitarian benefit of the pleas of guilty was therefore far more significant than usual. The economic advantage to the community when a person pleads guilty includes savings of judicial, prosecutorial and legal aid resources and witness fees. Victims and witnesses are saved the inconvenience and trauma of a trial.
- As I have said, it was indicated at a very early stage that the matter was capable of resolving without a hearing, but resolution was delayed pending revision of the charges.
- The applicant, through her legal representatives, made repeated efforts to resolve the matters, despite the prosecution's desire to proceed to a hearing.

21 Unless the sentence was manifestly excessive, there is nothing to indicate that the learned Chief Magistrate overlooked or gave undue weight to these factors. Even though her sentencing

comments were long, detailed and obviously carefully prepared, it does not follow that she did not take these matters into account. A magistrate's reasons should not be examined in a nit-picking way: *O'Hare v Director of Public Prosecutions (NSW)* [2000] NSWSC 438 at [70]; *Acheson v Hibble* [2008] TASSC 42, 18 Tas R 83 at [33]. Ground 3 is another ground that cannot succeed independently of the ground asserting manifest excess.

A manifestly excessive sentence?

22 Ground 1 of the notice to review asserts that the sentence of nine months' imprisonment, with seven months thereof suspended, was manifestly excessive in all the circumstances.

23 This case has some unusual aggravating features. The aggravating factors, and my comments in relation to them, are as follows:

- The applicant engaged in a course of fraudulent conduct over some 18 months, receiving payments totalling over $65,000.
- She processed a total of 62 fraudulent claims against her employer.
- She abused the trust that had been placed in her by her employer after several years of satisfactory service.
- She breached the trust that had been placed in her by various friends and family members. She got them to give their bank account details to her. The learned Chief Magistrate was told that four of them were charged with dishonestly obtaining a financial advantage, and committed for trial, before being discharged. These facts take this case outside the usual run of cases of frauds by employees, and make it much worse.

24 One common mitigating factor was absent in this case. The applicant did not commit these crimes because of impecuniosity, but because of a wish to live in greater comfort than was possible on what she could earn.

25 The mitigating factors, and my comments in relation to them, are as follows:

- The applicant had no prior convictions. However the significance of that factor is diminished by the fact that she engaged in a course of dishonest conduct over some 18 months. Also, a lack of prior convictions is common amongst those who abuse the trust of their employers.
- During the period of her offending, the applicant was suffering from a generalised anxiety disorder and a body dysmorphic disorder. These conditions were not diagnosed until she sought help from a clinical psychologist in May 2018, and subsequently from a forensic psychiatrist. Her symptoms included social anxiety, generalised anxiety and rumination, a preoccupation with how others judged her in the light of her body shape, she being overweight, low self-esteem and lack of confidence. She spent excessively on items for the purposes of physically concealing her body shape and providing inner confidence, and that expenditure was associated with her body dysmorphic disorder. She had undergone treatment that had alleviated her symptoms, but remained psychologically fragile. It was likely that imprisonment would have some adverse effect on her mental health.
- She was genuinely remorseful. The psychologist reported that she was horrified about her actions and had great difficulty reconciling her behaviour with what she regarded as her core values.
- She co-operated with the police and made admissions when interviewed in February 2018.
- There had been an inordinate delay in bringing her case to a conclusion. That was no fault of hers. She had rehabilitated herself during that period. The delay exacerbated her anxiety condition.

- She had not re-offended whilst the charges were pending. However it appeared that she had told some lies to the probation officer who prepared a home detention assessment report in relation to her.
- She had made full restitution, as I have said.
- She pleaded guilty. I have already summarised the factors relating to the weight to be attached to her pleas.
- There was a likelihood that imprisonment would destroy or seriously damage her business, and seriously damage her reputation.
- She had been assessed as suitable for a home detention order.

26 The applicant was 32 years old when she was sentenced. She was aged 26 to 28 during the period of her offending.

27 Counsel for the applicant submitted to me that the learned Chief Magistrate should have imposed a home detention order rather than a sentence of imprisonment. He referred me to authorities to the effect that sending an offender to prison is a punishment of last resort that should not be imposed unless no other punishment is appropriate: *Underwood v Schiwy* [1989] Tas R 269; *James v Turner* [2006] TASSC 54, 15 Tas R 375 at [6]; *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 296; *Director of Public Prosecutions v King* [2020] TASCCA 8 at [60].

28 As Porter AJ once said, "Home detention is imprisonment, but is to be regarded as less onerous than being in gaol." See *Director of Public Prosecutions v King* (above) at [27]. It is true that in the applicant's case it is likely that a home detention order would not prevent her from continuing to carry on her business. She would be able to continue living with her partner. It is likely that he would have to do the shopping, and he might have to buy petrol for her vehicle. However, given that the applicant has suffered for years from a generalised anxiety disorder, it is highly likely that she would find it very oppressive to have to wear an electronic monitoring device at all times, and not be able to leave home to meet friends or relatives or to go shopping. I accept that a home detention order would have been a very substantial punishment for her. Unless the period of home detention had been unreasonably short, a home detention order would not have been a manifestly inadequate penalty in all the circumstances of this case.

29 However a judge or magistrate sentencing an offender has a very wide discretion as to what sentence, or form of sentence, is appropriate is a particular case. When a sentence is challenged on the basis that it is said to be manifestly excessive or manifestly inadequate, the critical question is whether it is "unreasonable or plainly unjust" having regard to all the circumstances: *House v The King* (1936) 55 CLR 499 at 510.

30 But for the various mitigating circumstances in this case, it would have been open to the learned Chief Magistrate to impose a sentence of imprisonment significantly longer than the head sentence of nine months. It is clear that her Honour took the mitigating circumstances into account in fixing a head sentence of nine months, and in suspending all but two months of that sentence. There was little or no need for personal deterrence in this case, but it was appropriate for her Honour to impose a significant sentence of imprisonment, albeit partly suspended, for the purpose of deterring others who might be minded to abuse positions of trust and defraud their employers over an extended period. It was reasonably open to her Honour to conclude that this case was too serious for a home detention order. Despite the significant mitigating circumstances, it cannot be said that the sentence in this case was unreasonable or plainly unjust. It was within the bounds of the learned Chief Magistrate's discretion.

Conclusion

31 For these reasons, the motion to review is dismissed. I direct that the applicant be taken into custody to commence serving her sentence.