3 Davida Sentenced

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Williams* [2005] QCA 14
PARTIES:	**R v WILLIAMS, Davida Ellen** (applicant)
FILE NO/S:	CA No 429 of 2004 DC No 1972 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	9 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2005
JUDGES:	de Jersey CJ, McPherson JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Application for leave to adduce additional evidence refused** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FRESH EVIDENCE – EVIDENCE NOT AVAILABLE AT HEARING – WHEN NOT ADMISSIBLE – where sentencing and appeal courts adequately seized of subject considered in further material – where case not sufficiently exceptional to warrant receiving material going to detail, albeit matters of considerable importance to the applicant – whether applicant entitled to adduce further material on appeal CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTUAL BASIS FOR SENTENCE – CIRCUMSTANCES OF OFFENDER – where applicant relied on deteriorating health and the availability of medication in jail to reduce sentence – whether sentence should be reduced

R v Benham (2000) 111 A Crim R 302, considered
R v Hughes [2003] QCA 460, followed
R v Irlam; ex parte A-G [2002] QCA 235, considered

COUNSEL: The applicant appeared on her own behalf S G Bain for the respondent

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

THE CHIEF JUSTICE: The applicant pleaded guilty to one count of fraud and five counts of attempted fraud, in each case with a circumstance of aggravation because the property involved was worth more than $5,000.

On each count she was sentenced on 19th November 2004 to three years imprisonment to be suspended after six months for an operational period of four years. As at today's date she has served two days short of three months. She was 42 to 43 years old at the time of the offending, which occurred between May 2001 and February 2002, and she had no prior criminal convictions.

The applicant submits that she should be released forthwith. She has not submitted that the head sentence of three years was inappropriate - it clearly was within range. The applicant was a qualified lawyer. Her method was to enter into contracts for the purchase of residential properties, generally valued at the order of $140,000. Then she would make loan applications to various financial institutions, but for amounts substantially greater than the contract prices.

2
On occasions she also produced false records suggesting she had term deposits in substantial amounts - $60,000 for example - as well as employment, which was in fact not the case. Only one of her applications succeeded and that was the first one. In that case she applied to Westpac in relation to the purchase of a property at New Farm. The purchase contract supplied to Westpac recorded the purchase price as $248,000.

The applicant obtained $198,000 towards the purchase. The true contract price was $138,000, the presentation of the $248,000 contract to Westpac being the result of forgery.

As things turned out, by the time that property came to be sold - with rising property values - the applicant was only approximately $20,000 short of the amount repayable to Westpac, which amount she in fact paid.

Overall, however, through these stratagems she attempted to raise of the order of $1.3 million. The loans would have been secured against property to the value - when purchased - of some $900,000. Accordingly, the maximum financial exposure of the lending institutions was approximately $400,000.

3
The applicant has in fact made restitution - full restitution was made in 2003. As the matter was debated here this morning, there was - in my view - a somewhat unattractive subtlety about the applicant's approach to the question of her responsibility for the offences. She carries a degree of burden here, as she did before

the learned sentencing judge, because of her status as a barrister at the time of the offending. That office presupposes the most exacting ethical standards and high levels of moral acuity.

Before us, the applicant acknowledged that she was aware of the wrongfulness and unlawfulness of her conduct and that, of course, is consistent with her pleas of guilty. For present purposes, I did not find persuasive the applicant's reference to the concurrent criminal responsibility of another or others in the commission of these offences.

The learned sentencing judge took account of the applicant's timely pleas of guilty, that the frauds appeared to be directed towards establishing homes for the applicant's estranged and bankrupted husband and the child then living with him and the applicant and the other child, and that the applicant had effectively lost her legal career.

As to the pleas of guilty, in particular, the learned judge said she was proceeding from the prosecution’s suggestion that a discount of about one third would be appropriate for the plea. It was the applicant's condition of health, in particular, which lead to the further suspension which her Honour allowed.

4
The judge described the applicant as suffering from,

> "Very, very severe health problems"

which had been debilitating, and referred as well to the traumatic breakdown of the applicant's marriage. As her Honour put it,

> "You have for the last 12 or more years suffered with a health problem which has meant that you have had to give up work. It causes you daily pain, discomfort and distress. It has also - the doctors tell me - had the possible side effect that you have been distracted from your otherwise good judgment. I am also told from the medical reports that it is going to be difficult for Corrective Services to house you and I have no doubt that a period in custody would be more difficult for you than for the ordinary prisoner because of what will be your special needs."

It is her health and associated problems upon which the applicant has concentrated in advancing this application today. Her contention is that the learned judge failed to give sufficient weight to those issues, including the likelihood which she asserted that it would be difficult to obtain the requisite medication in gaol.

Comparatively recently in *Irlam*, [2002] QCA 235; CA No 157 of 2002 and CA No 173 of 2002, this Court observed that,

> "While an offender's ill health is a mitigating factor in circumstances where imprisonment will lead to additional burdens beyond those experienced by others, that feature must not be allowed to overwhelm appropriate reflection of the grave nature of offences like these."

See also *Benham* (2000) 111 A Crim R 302.

5
In my view the learned judge adequately took account of the poor health of the applicant when her Honour moderated the sentence and reduced the appropriate term of actual incarceration to six months. There can be no issue that her Honour took a careful and comprehensive approach when considering all relevant material.

This is a case where the serious nature of the offending must be balanced against the personal circumstances of the applicant. The applicant has been required to serve, in actual custody, imprisonment of only a comparatively short term for offending of this character and that reflects a very compassionate approach on the part of the sentencing judge. Frankly, I would - for my part - think that the applicant was treated rather generously.

The applicant has sought leave to adduce evidence concerning the availability of medication and the like to her in the gaol. The Crown objected to the reception of that material. The principles covering the reception of further material in these circumstances were covered in *Hughes* [2003] QCA 460. I accept the point taken in writing for the Crown that it was accepted at the hearing that the imprisonment of the applicant would be especially burdensome for her because of her condition.

6
The additional material now presented does not introduce any relevantly fresh element and the case is not sufficiently exceptional on my assessment to warrant our receiving this further material, which essentially goes to matters of detail - albeit matters of great importance to the applicant. The point is that the sentencing Court was, and this Court is, seized adequately of the burden being endured and to be endured by the applicant during her incarceration.
I would refuse the application for leave to adduce additional evidence. I would also refuse the application for leave to appeal against sentence.
McPHERSON JA: I agree.
CHESTERMAN J: I agree.
THE CHIEF JUSTICE: Those are the orders.
