

38/93

SUPREME COURT OF QUEENSLAND — COURT OF APPEAL

Dwyer v Penton

The Chief Justice, The President and Cullinane J

14 September, 18 October 1993

SENTENCING – SOCIAL SECURITY FRAUD – \$10,561 IMPROPERLY OBTAINED OVER EXTENDED PERIOD – NO PRIORS – PLEA OF GUILTY – FINE IMPOSED – WHETHER APPROPRIATE: SOCIAL SECURITY ACT 1991, S1347.

Having regard to the extended period over which the offences were committed and the substantial amount of money involved, a sentence of imprisonment with immediate release upon a recognizance was necessary because of the importance of deterrence.

THE COURT: [1] This is an appeal against sentence by the Commonwealth Director of Public Prosecutions. On 14 July 1993, the respondent, Andrew Robert Penton, appeared in the Ipswich Magistrates' Court and pleaded guilty to four charges, two in respect of offences against the *Social Security Act* 1947 (Commonwealth) and two in respect of offences against the *Social Security Act* 1991 (Commonwealth). Three of the charges involved summary offences and an appeal against sentence has been taken to the District Court. The fourth charge, which is the subject of the present appeal, involved an indictable offence which was determined summarily; namely, that between 13 December 1991 and 4 September 1992 the respondent contravened section 1347 of the *Social Security Act* 1991 in that he knowingly obtained payment of an allowance totalling \$10,561.90 which was not payable.

The Magistrate imposed a single sentence in respect of all offences. (It was common ground before this Court that that was impermissible because not all charges were the subject of a [2] single complaint: 1991 Act, section 4K). The respondent was convicted and fined \$1,500.00 and ordered to pay \$48.75 costs of court within six months, with fifty days' imprisonment in default. Further, an order was made for the respondent to make reparation to the Department of Social Security in the sum of \$16,944.25. (Part reparation had already been made). The respondent, who is now 43 years of age and was 42 years of age when he was sentenced, has no previous criminal convictions. Further, he was in regular employment during the period in which the offences were committed. He was a self-employed taxi driver who hired a taxi at a fee per shift, paid expenses such as petrol, and retained the balance of the takings.

In all, the respondent received Unemployment Benefit/New Start Allowance/Job Search Allowance from the Department of Social Security from 7 August 1990 to 4 September 1992 except for the period between 1 February 1991 and 25 March 1991. However, he was only unemployed from 7 August 1990 to 30 November 1990. He commenced employment on 1 December 1990 and initially worked on a part time basis until 1 August 1991 when he commenced full time work. In total, he received from the Department the sum of \$17,385.87 to which he was not entitled by reason of his employment. The respondent was interviewed at the Brisbane Office of the Department of Social Security on 8 February 1993. He admitted his offences and co-operated fully with the Department, supplying it with all records relating to income which he received from his work as a taxi driver. He also admitted completing fortnightly forms falsely stating that he had not worked during the relevant periods, knowing that he was not entitled to receive benefit in the circumstances. He has a wife and two children, and explained the offences by saying that he had heavy financial commitments including mortgage payments and that he was in fear of losing his family's home due to arrears owing on the mortgage and his other commitments.

Before this Court, and earlier before the Magistrate, the respondent relied upon the following matters:

"(a) The Defendant had no previous convictions whatsoever;

- (b) The Defendant had co-operated fully with the [3] Department of Social Security when the matter was initially investigated;
- (c) The Defendant had an excellent employment history as a maintenance electrician and had been the sole provider for his family;
- (d) The Defendant had entered pleas of guilty to all of the charges at the earliest possible opportunity;
- (e) The Defendant had been unable to secure employment as a maintenance electrician since being laid off from his previous employment in mid 1990 and had commenced part time taxi driving in December, 1990, working mainly on the weekends as a means of supplementing his Social Security payments and he had initially not declared these payments to the Social Security Department, firstly, because he had not considered the part time Taxi driving as "real" work and secondly, he and his wife had two mortgages over their house property, both of which were substantially in arrears and those debts together with other financial commitments meant that he was in danger of losing his family home. The Defendant, accordingly, became caught in what has been commonly termed a "poverty trap".
- (f) The Defendant had now re-financed the family home so that payments were manageable and he was currently self employed as a Taxi driver working long hours to maintain his family;
- (g) The Defendant would not be likely to re-offend;
- (h) Given that the Defendant currently was in full time employment and the sole provider for his family a term of imprisonment would not serve any useful purpose save and except to detrimentally affect and impact on the Defendant's Wife and Children;
- (i) The Defendant was remorseful and had been severely embarrassed by the Department of Social Security investigations and these Court proceedings and he would carry the burden on his conscience of these offences and the subsequent convictions for the rest of his life and that would constitute a penalty greater than all others;
- (j) The Defendant was essentially a man of good character as evidenced by two letters of reference tendered on his behalf;
- (k) A sentence involving a term of imprisonment would not be appropriate in the circumstances;
- (l) The Defendant in his current employment is the holder of Hire Drivers' Licence which may well not be renewed as a result of declaring any convictions in respect of these charges and in that regard the Magistrate may consider using his discretion to not record a conviction in this instance."

The basic submission of the respondent, succinctly emphasised by his Counsel, was that, having regard to the extended period over which the offences were committed and the (4) substantial amount of money involved, a sentence of imprisonment was necessary because of the importance of deterrence. That submission seems to us correct as has previously been recognised by this Court. In *R v Oag* (CA No. 73 of 1993; [1993] QCA 225, judgment delivered 17.06.93) the Court said:

"The major factor in favour of a custodial sentence is the need for deterrence, especially since the effective operation of the social security system is largely dependent upon the honesty of those who benefit. The Court was told on behalf of the respondent that offences such as those committed by the applicant are prevalent and are difficult and costly to detect."

See also *R v Holdsworth* (CA No. 94 of 1993; [1993] QCA 242, judgment delivered 22 June 1993). Accordingly, the sentencing Magistrate should have imposed a term of imprisonment in this case although it would have been appropriate that the respondent be released upon his giving security to be of good behaviour after a relatively brief period, such as the three months fixed in *Holdsworth*.

Different considerations apply when an appeal against sentence is brought by the prosecutor and the offender has been released into the community by the sentencing judge or magistrate and allowed to continue uninterrupted with his domestic and business affairs. In such circumstances, especially where the offender's personal circumstances are strongly in his favour, the Court is more ready to follow the course adopted in *Oag*; that is, to impose a sentence of imprisonment but order that it be suspended immediately upon satisfactory conditions. In this instance, a period of twelve months' imprisonment is considered appropriate.

Accordingly, the appeal is allowed and the sentence imposed below in respect of the respondent's conviction upon the fourth charge against him, that is to say the charge that, between 13 December 1991 and 4 September 1992 in contravention of section 1347 of the *Social Security Act 1991* he knowingly obtained payment of an allowance of \$10,561.90 which was not payable, is set aside. In lieu of that sentence imposed below, the respondent is sentenced to 12 months' imprisonment with an order that he be released forthwith upon his giving security by recognisance in [5] the sum of \$1,000 to be of good behaviour for three years on condition that:

1. He report to an authorised Commission Officer at Brisbane within 48 hours;
2. He report to, and receive visits from, an authorised Commission Officer as directed by that officer;
3. He advise an authorised Commission Officer of every change in his place of residence and employment within two business days of that change; and
4. He comply with every reasonable direction of an authorised Commission Officer.

It is further ordered that the respondent make reparation in the sum of \$16,944.25 to the Department of Social Security within three years.
