SUPREME COURT OF QUEENSLAND

CITATION:	*R v Currey* [2017] QCA 213
PARTIES:	**R** **v** **CURREY, Troy John** (applicant)
FILE NO/S:	CA No 251 of 2016 DC No 327 of 2016 DC No 502 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 8 September 2016 (Clare SC DCJ)
DELIVERED ON:	26 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2017
JUDGES:	Sofronoff P and Fraser JA and Applegarth J
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his pleas of guilty for counts of dangerous operation of a vehicle with a circumstance of aggravation that he was adversely affected by an intoxicating substance, assaulting a police officer who was acting in the execution of his duty, possessing a weapon with the circumstance of aggravation that he used the firearm to commit an indictable offence, and possessing a dangerous drug – where a period of two hundred and sixty-seven days of pre-sentence custody was declared as time served – where the sentencing judge fixed a parole eligibility date after the applicant will have served two years' imprisonment – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the sentencing judge accepted submissions by the applicant's counsel at trial that credit for the applicant's pleas of guilty should be reflected by a reduction of the head sentence rather than by the usual approach of early parole eligibility – where the sentencing

judge reduced the notional imprisonment of five years for Count 2 by 18 months, resulting in the effective sentence imposed of three years and six months' imprisonment – whether the sentencing judge committed a procedural error in failing to invite submissions concerning the proportion of the sentence to be served before parole eligibility

R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, cited
R v Hess [2002] QCA 184, distinguished
R v Hoad [2005] QCA 92, cited
R v Isaac [2001] QCA 95, distinguished
R v Kitson [2008] QCA 86, distinguished
R v McDougall & Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Norton [2007] QCA 320, cited
R v Rooney; R v Gehringer [2016] QCA 48, cited
R v Staines [2011] QCA 321, distinguished
R v Vogt [1995] QCA 183, distinguished
R v Wing [2007] QCA 138, distinguished

COUNSEL: J McInnes for the applicant
C W Heaton QC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Fraser JA and with the order his Honour proposes.

[2] **FRASER JA:** The applicant was convicted on his pleas of guilty and sentenced to concurrent terms of two years' imprisonment for dangerous operation of a vehicle with a circumstance of aggravation that he was adversely affected by an intoxicating substance (Count 1), three years and six months' imprisonment for assaulting a police officer who was acting in the execution of his duty (Count 2), 20 months' imprisonment for possessing a weapon with the circumstance of aggravation that he used the firearm to commit an indictable offence (Count 3), and six months' imprisonment for possessing a dangerous drug (Count 4). A period of two hundred and sixty-seven days of pre-sentence custody was declared as time served under those sentences. The sentencing judge fixed a parole eligibility date after the applicant will have served two years' imprisonment (including the period of pre-sentence custody). The applicant was also convicted on his pleas of guilty and not further punished for 10 summary offences. Seven of those offences were traffic offences, one was a weapons offence (possessing a restricted item), and two were offences of dishonesty. He was disqualified from holding or obtaining a driver's licence for three years in respect of one of the traffic offences and he was disqualified from driving for two years from the expiration of any existing disqualification for another traffic offence (driving without a licence and when disqualified by court order).

[3] The applicant seeks leave to appeal against the sentence. The grounds of the application are:

1. The sentence was manifestly excessive.

2. The learned judge committed a procedural error in failing to invite submissions concerning the proportion of the sentence to be served before parole eligibility.

3. The learned trial judge erred in failing to give reasons for

    1. Imposing more than the mandatory minimum sentence for Count three;

    2. Settling on the five-year starting point;

    3. Allowing less than a one-third discount;

    4. Setting a parole eligibility date that was:

        4.1 Four months later than one third of the notional sentence;

        4.2 Three months later than one half of the reduced sentence.

[4] Consideration of the first ground of the application, that the sentence is manifestly excessive, requires reference to the circumstances of the offences and the applicant's personal circumstances.

Circumstances of the offences and the applicant's personal circumstances:

[5] At about 6.50 am on 21 September 2015 the applicant drove a car at excessive speed through a red traffic light into an intersection and onto the wrong side of the road. The applicant was seen to continue to travel on the wrong side of the road for at least 15 seconds. At about 7 am police saw the applicant driving on the wrong side of the road, turning onto a street also on the wrong side of the road, and then moving to the correct side of the road and travelling at speed. When police activated lights and sirens and accelerated in an attempt to intercept the car, the car increased its speed. Police gave up the chase after about 10 seconds when they determined it was not safe to continue because of the excessive speed and manner in which the car was being driven. At 7.19 am other police officers saw the car stop behind them in heavy traffic and the car driver's door open. A police officer approached the car. The applicant said to the officer, "I should be in the back of your car". The applicant then shut the driver's door, drove around the police car to the front passenger window where the other officer was seated, and twice said that he should be in the back of the police car. When the applicant drove off the police followed and they subsequently activated their sirens. The applicant did not stop. He continued to drive at a moderate pace through a roundabout, before accelerating. Police saw the applicant's car stop for pedestrians crossing the road. Subsequently police drove alongside the applicant's car, engaged their lights and sounded the horn. The applicant looked over to the police who told him to pull over and briefly activated their siren. The applicant continued to drive within the speed limit. Subsequently the applicant accelerated and drove at about 70 kilometres per hour in a 50 kilometre per hour zone.

[6] At 7.30 am, police officers saw the applicant's car double parked near a driveway to the police station. The police drove their car across the path of the applicant's car. They approached the car. It was travelling backwards but starting to stop. It appeared that the applicant was about to drive forward, putting one police officer in

the path of the car. That officer started to draw his firearm and while doing so told the applicant to stop his car. The officer reached into the car and removed the keys from the ignition. He saw the applicant holding a gun in his right hand and pointing it at the middle of the officer's stomach. The weapon was a semi-automatic handgun. It was about six inches away from the officer. That officer pointed his firearm directly at the applicant and took a step back. The other officer opened the passenger door and pointed his firearm at the applicant. Both officers instructed the applicant to drop his gun. The applicant effectively invited the officers to shoot him. After a period of between five and 10 seconds, the applicant pointed the gun away from the police officer and held it out. The officer took the gun and the car keys. The gun was not loaded.

[7] The applicant was in possession of a small quantity of methylamphetamine. He displayed symptoms that were consistent with methamphetamine use. At the time of the commission of the dangerous driving offence the applicant was disqualified from driving, and his car was unregistered and uninsured. Police found a set of handcuffs in the applicant's car.

[8] The applicant was 27 years old when he committed the offences and when sentenced. He had an extensive and relevant criminal history. In April 2005 he was convicted of various offences which included dangerous operation of a motor vehicle and sentenced to six months' imprisonment suspended for 18 months, with more than three month's time served in pre-sentence custody being taken into account. He was also sentenced to one month's imprisonment for other offences, which included wilfully damaging police property, obstructing police officers, and assaulting police officers. Between then and May 2015 the applicant was convicted of numerous offences involving dishonesty, violence, the unlawful use of motor vehicles, and dangerous drugs. He was given a variety of sentences, including imprisonment and intensive drug rehabilitation orders. In 2009 he was given an effective sentence of two years' imprisonment for unlawful wounding and two counts of assault occasioning bodily harm in company, with an immediate parole release date and a declaration that a period of nearly one year served in pre-sentence custody was time already served under the sentence. The judge who sentenced the applicant for those offences in December 2009 described the wounding as "terrible" (although it appears that the victim was not hurt badly), characterised the applicant's criminal history as "dreadful", and remarked that what saved the applicant from returning to gaol for a considerable time was work he had done and his "evident remorse and maturity".

[9] Further convictions recorded in February 2011 reveal that within three months the applicant embarked upon another spree of offending, including offences of dishonesty, unlawful use of motor vehicles, and assaulting or obstructing a police officer. After attracting additional convictions in subsequent years, in May 2015 the applicant was convicted of two counts of assault, various offences of dishonesty, and four offences involving the unlawful use or attempted unlawful use of motor vehicles. He was given an effective sentence of 18 months' imprisonment, a period of 323 days was declared to be time already served under the sentence, and he was released on parole on the day he was sentenced. The applicant committed the subject offences about four months later.

Sentencing remarks

[10] The sentencing judge summarised the circumstances of the offences and the applicant's personal circumstances, accepted that the applicant had entered early pleas of guilty at a committal hearing and that he should be given credit for that although the evidence against him was strong. The applicant had been on the streets and addicted to drugs as a teenager. The sentencing judge observed that intoxication was no excuse. The applicant had utilised his period in custody before sentence as best he could. Encouraging references suggested "sensitivity, genuine insight and remorse". The applicant recognised that his problems came from a long-standing addiction. He had acknowledged the likely impact of his crimes upon the police officer at whom he had pointed the gun. The applicant had shown some gratitude for the officer's steady nerves and safe resolution of the situation the applicant created. The applicant had written a relapse prevention plan which was perhaps the most detailed the sentencing judge had seen. The applicant had taken a positive step forward of looking for a rehabilitation facility to take him in on his release from prison.

[11] The sentencing judge referred to the applicant's 10 year history of substantial criminal behaviour, which attracted repeated sentences of imprisonment for similar offending, although that offending was not as serious as the subject offending. The applicant's criminal history and the nature of the indictable offences he had committed made protection of the community of fundamental importance. His assault upon the police officer in the course of that officer's duty was a "very bad assault". A stern sentence was required to support general and individual deterrence.

[12] The sentencing judge did not accept the submission by both counsel that an appropriate starting point was three to four years' imprisonment. In her Honour's view such a sentence would not properly reflect the gravity of the offences; an appropriate sentence for the total criminality would be five years' imprisonment. The sentence should attach to Count 2, which was closely connected with Counts 1 and 3. The sentencing judge noted that Count 3 carried a minimum penalty of 18 months' imprisonment (because the weapon was used in the commission of an indictable offence: *Weapons Act* 1990 (Qld), ss 50(1)(d)(i)).

[13] The sentencing judge accepted submissions by the applicant's counsel that it was unlikely that the applicant would have access to the necessary programs in prison to qualify for parole in a timely way and that credit for the applicant's pleas of guilty should be reflected by a reduction of the head sentence rather than by the usual approach of early parole eligibility. For that reason the sentencing judge reduced the notional imprisonment of five years for Count 2 by 18 months, resulting in the effective sentence imposed of three years and six months' imprisonment. The sentencing judge took into account the fact that the applicant had been in custody for 12 months in fixing the date upon which the applicant would be eligible for release on parole as 16 December 2017.

Ground 1: The sentence is manifestly excessive

[14] The applicant argued that the sentence was manifestly excessive for four reasons: (1) the sentence for Count 3 was excessive; (2) the starting point (the notional head sentence for the total criminality in all counts of five years' imprisonment with parole eligibility after two years) was excessive; (3) the reduction of the notional head sentence was less than one-third although there was no reason not to give "the

usual credit" for the very early plea; and (4) the non-parole period was well beyond the half-way point of the sentence, thereby deferring what otherwise would have been the statutory entitlement to apply for parole.

[15] The third reason is closely analogous to the proposition that a prima facie case of manifest excess is established by a departure from the common sentencing practice of fixing parole eligibility after one-third of the total term in the absence of a particular reason for doing so. That is inconsistent with principle.[1] As to the fourth reason, the reason why the non-parole period extends beyond the mid-point of the sentence is that a discount for the pleas of guilty was given in the reduction of the notional head sentence instead of in an earlier parole eligibility date, an approach that had been advocated by the applicant's counsel in the applicant's interest. That disposes of any argument that manifest excess is demonstrated by the mere fact that the non-parole period under the head sentence imposed extends beyond the half-way point of the term.

[16] The arguments of both parties focussed upon the second reason, which contends that the sentence is manifestly excessive because the notional head sentence would have been excessive, but the ultimate question is whether the actual sentence – including the effective term and the provision for parole eligibility – is manifestly excessive.

[17] Two sentencing decisions cited by the prosecutor at the sentence hearing concerned the offence in Count 1 of dangerously operating a motor vehicle with the circumstance of aggravation of being affected by an intoxicating substance, for which the maximum penalty is five years' imprisonment. In *R v Isaac* [2001] QCA 95 and *R v Hess* [2002] QCA 184, the offenders were sentenced to two years' imprisonment. In *Isaac* the sentence was suspended after six months with an operational period of two and a half years and in *Hess* the applicant was sentenced to imprisonment with a recommendation for parole after nine months. In some respects the driving in both cases was more dangerous than in the present case, particularly because the offender drove at much higher speeds and, in *Hess*, unintentionally collided with a police officer, causing him some injury.

[18] However, in *Isaac* the dangerous driving appears to have occurred over a much shorter distance and period of time, he was not on parole at the time of his offence, and he had a criminal record which seems to have been less serious than the applicant's record; in *Hess* the sentencing judge indicated that a much heavier sentence would have been imposed but for the fact that the offender was already serving a lengthy sentence. McPherson JA, who gave the principal judgment in each case, remarked in *Isaac* that there was no basis for saying that the sentence was excessive, and he remarked in *Hess* that the offender was perhaps treated more leniently than was justified in all of the circumstances. With these in mind, those decisions do not confine the sentencing discretion in this case to a head sentence of two years' imprisonment for Count 1 if it were considered alone.

[19] The Court was also referred to sentences imposed for combinations of offences with some broad similarities to the combination of offences committed by the applicant – *R v Staines* [2011] QCA 321, *R v Wing* [2007] QCA 138, and *R v Vogt* [1995] QCA 183. In *Staines*, the Court resentenced an offender on appeal for one count of the

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1 *R v Rooney; R v Gehringer* [2016] QCA 48 [16], citing *R v Hoad* [2005] QCA 92 [31]. See also *Hili v The Queen* (2010) 242 CLR 520.

dangerous operation of a motor vehicle and two summary offences under the *Weapons Act* 1990 (Qld), possessing a .357 magnum revolver and a sawn off 12 gauge shotgun and having possession without reasonable excuse of a shotgun that had been shortened. The sentence ultimately imposed on appeal for the dangerous driving offence was four months' imprisonment, but the effective term was two and a half years, because a lengthy period of pre-sentence custody could not be declared to be imprisonment served under the sentence. The dangerous driving in that case was more serious than here, particularly because the offender, when confronted by police, accelerated his car rapidly towards a police officer, requiring that police officer to fire at the car and take evasive action to avoid being run over. Chesterman JA with whose reasons Muir JA and Margaret Wilson AJA agreed, considered that for the dangerous driving offence, a term of imprisonment of two years and six months should be substituted for the term of three years imposed at first instance, because the prosecutor had asked for a sentence of two and a half years' imprisonment and there should be some moderation for the sentence being made cumulative upon the activated balance of a suspended sentence of three years' imprisonment. Those circumstances, together with the fact that the maximum penalty for the dangerous driving in that case (which did not include any circumstance of aggravation) was three years' imprisonment, rather than five years' imprisonment as in this case, result in the sentence imposed on *Staines* not being a reliable guide to the appropriate sentence in this case.

[20] In *Wing*, the Court refused leave to appeal against a sentence of four and a half years with parole eligibility after 18 months for one count of doing grievous bodily harm. That sentence also took into account the criminality in dangerous operation of a motor vehicle and unlawful possession of a weapon. After drinking heavily, that offender drove erratically near a hotel. The offender demanded to know who had thrown a bottle at his car. The responsible person came forward and the offender picked up a shotgun and pointed it at the ground. The offender drove to another hotel. Three people who approached his car noticed the barrel of the gun poking out of the driver's window. When one of the approaching people attempted to knock the barrel of the gun away the shotgun discharged and the complainant was struck by pellets in her thighs. She was left with substantial scarring on both legs and skin grafts. The offender's behaviour was grossly negligent and reckless but not intentional. de Jersey CJ referred to serious aspects of the offending: consumption of a substantial amount of alcohol; driving under the influence of alcohol in outlandish fashion in a public place where danger to life was a distinct possibility; resort to a gun which the offender should have known was loaded; the proximity of people attracted by the offender's bizarre behaviour; and the resulting serious, irreparable damage to the complainant. The offending in the present case is less serious in some aspects, particularly because the applicant's firearm was not loaded and there was no physical injury to any person. On the other hand the applicant created a frightening and dangerous situation by intentionally pointing a firearm at an armed police officer and the applicant's personal circumstances are far less favourable; the offender in *Wing* was 23 years old, had no previous criminal convictions and only a minor traffic history, and did not commit his offences whilst on parole.

[21] In *Vogt*, the offender was refused leave to appeal against the sentence of five years' imprisonment, with eligibility for parole after two years, for dangerous driving whilst adversely affected by alcohol. That sentence also reflected the offender's criminality in other offences of unlawful use of the motor vehicle with a

circumstance of aggravation and wilful damage to a vehicle in the night time. That offender was only 21 years old when he was sentenced. He had a lengthy criminal history. In the course of stealing a motor vehicle in the centre of Brisbane at about 11 o'clock at night, the offender reversed the vehicle down a one way street in the wrong direction at some speed, driving erratically and missing several parked vehicles. After stopping the vehicle, he deliberately reversed it into a police vehicle that had been positioned to stop him, causing damage to the police vehicle. The offender accelerated away from the police vehicle. He drove at two police officers, forcing them to take evasive action. A third police officer was required to take evasive action as the offender's vehicle continued at an increasing speed. He drove at speeds far in excess of the speed limit, crossed marked traffic lanes without indicating, and drove through red lights, causing vehicles to take evasive action. He also steered sharply towards a police vehicle, causing a collision between them and losing control of his vehicle and crashing. Moynihan J, with whose reasons Ambrose J and Pincus JA agreed, considered that the offender's dangerous driving was in a different category from cases in which a person with a similarly high blood alcohol content drove dangerously. This offender was a criminal "in the course of a criminal act embarking on a course of dangerous driving to escape apprehension which involved deliberately driving at police vehicles in his attempt to escape and which involved putting members of the police force and public at risk as he persisted in his attempts to avoid apprehension."

[22] The applicant did not deliberately drive at police or police vehicles, he did not cause damage, and it was not submitted that anyone was forced to take evasive action to avoid a collision; but the applicant's dangerous driving put members of the police force and the public at risk of harm and the applicant was also convicted of a serious assault. Overall the offending in *Vogt* was objectively more serious, but *Vogt* was only 21, he did not commit his offences whilst on parole, and the penalty for Count 3 requires the applicant to spend a minimum of 18 months in a correctional facility.

[23] The cited cases provide only limited assistance here. Accepting that *Vogt* and *Wing* nevertheless make the notional head sentence of five years' imprisonment mentioned by the sentencing judge seem severe by comparison, the applicant's commission of offences only four months after he had been released on parole, the nature of the offences, and the applicant's criminal history, made protection of the community an important consideration in his sentence. That is so despite the suggestions of sensitivity and genuine insight and remorse evidenced by the applicant's letters, his relapse prevention plan, and his conduct in looking for a rehabilitation facility. The significance of community protection in this sentence distinguishes it from most of the cited sentencing decisions.

[24] The sentence imposed upon the applicant seems severe but for the reasons I have given it is not manifestly excessive.

Ground 2: procedural error

[25] The second ground of the application is that the sentencing judge committed a procedural error in failing to invite submissions concerning the proportion of the sentence to be served before parole eligibility. Counsel for the applicant cited *R v Kitson* [2008] QCA 86 at [20]-[22], which was decided in the context the principle, established by *R v McDougall & Collas* [2007] 2 Qd R 87 at 94 [14], 97 [21] and *R v Assurson* [2007] QCA 273 at [22], [27], and [33]-[34], that "good reason"

should be demonstrated before a sentencing court fixes a parole release dated a point later than half of the term. In *R v Kitson* at [17], after referring to relevant legislative provisions, I referred to *R v Norton* [2007] QCA 320 and observed, that "where the applicant has a claim upon the discretion for an order that he be released after serving less than half of the head sentence in view of his plea of guilty and personal circumstances, a parole release date which is significantly beyond the midpoint of the head sentence is very unusual" and that if such an unusual order were to be made, the sentencing remarks should explain the process of reasoning underlying it.

[26] Relevantly, to ground 2, the applicant in *Kitson* contended for error on the ground that the possibility of a postponement of the parole release date beyond the mid-point of the sentence was not mentioned in submissions or by the sentencing judge at the hearing. That contention was accepted for the reason that "that aspect of the sentence was unusual and was not sought or contemplated in the submissions of either party" and therefore "should not have been imposed without the learned judge adverting to it and giving the parties an opportunity to be heard." This is an entirely different case. The submission for the applicant (mentioned in [12] of these reasons) that credit for the pleas of guilty should be reflected by a reduction of the head sentence, rather than by the usual approach of early parole eligibility, inevitably impacted upon the proportion of the sentence to be served before parole eligibility. In circumstances in which the sentencing judge accepted that submission it cannot be said that the sentencing judge erred by failing to invite submissions concerning the proportion of the sentence to be served before parole eligibility.

Ground 3: adequacy of the sentencing judge's reasons

[27] Contrary to the assumptions underlying paragraphs 3 and 4.1 of ground 3, nothing in *Kitson* requires a sentencing judge to explain why a parole eligibility date does not reflect the common sentencing practice of allowing parole eligibility after one-third of the term. In *Kitson* the Court rejected the submission on behalf of the respondent that it could be assumed that the mitigating factors which otherwise might have been recognised by fixing an early parole release date had been reflected in the offender being given a head sentence of 12 months' rather than 18 months' imprisonment: *Kitson* at [13]-[14]. In this case just that kind of reasoning was articulated by the sentencing judge.

[28] Again, paragraph [12] of these reasons explains why the contention in paragraph 4.2 of ground 3 must be rejected. It clearly appears from the sentencing remarks why the parole eligibility date was later than one-half of the reduced sentence. The bases underlying the decision in *Kitson* are absent from this case, in which counsel for the applicant invited the sentencing judge to depart from the common sentencing practice of reflecting an offender's pleas of guilty and other personal circumstances in an early parole release date and instead to reflect such circumstances in a reduction of an otherwise appropriate head sentence.

[29] The applicant cited *Kitson* for paragraph 2 of ground 3, but that case has nothing to say about the necessary content of reasons for imposing a head sentence. The sentencing judge's explanation was more than adequate. As to paragraph 1 of ground 3, the applicant cited no authority for the proposition that a sentencing judge must specifically explain why the sentence exceeds a statutory minimum. In any case,

the sentencing judge referred to the weapon being a semi-automatic handgun,[2] noted that the paranoid and confused applicant held the gun, and remarked that the applicant's criminal history and the nature of the offences on the indictment made protection of the community of fundamental importance. That was a sufficient explanation for the relatively slight increase of two months above the statutory minimum penalty of 20 months for unlawful possession of a Category H weapon with the circumstance of aggravation that the applicant, an adult, used the weapon to commit an indictable offence.

[30] The applicant argued that both counsel had assumed an 18 month sentence was appropriate and that this would reflect the non-parole period. No such assumption was expressed in their submissions. It may have been implicit in the submission that three to three and a half years was an appropriate head sentence, but of course that did not bind the sentencing judge.

Proposed order

[31] None of the grounds of the application are established. I would refuse the application.

[32] **APPLEGARTH J:** I agree with the reasons of Fraser JA and with the order his Honour proposes.

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[2] Category H weapons comprehend a variety of weapons under 75 cm in length; extending to permanently inoperable weapons and all pistols: *Weapons Categories Regulation* 1997 (Qld), s 7.