**[2018] QCA 12**

**COURT OF APPEAL**

**MORRISON JA**
**PHILIPPIDES JA**
**BODDICE J**

**CA No 150 of 2017**
**DC No 142 of 2016**

**THE QUEEN**

**v**

**KAUFMAN, Bradley Mark** **Applicant**

**BRISBANE**

**WEDNESDAY, 21 FEBRUARY 2018**

**JUDGMENT**

**BODDICE J:** On 15 June 2017, the applicant pleaded guilty to one count of armed robbery. He was sentenced to imprisonment for five and a-half years. His parole eligibility date was set at 15 June 2017. The applicant seeks leave to appeal that sentence on the grounds it was manifestly excessive. The basis for that assertion is that the applicant had already served 797 days in pre-trial custody which, whilst not declarable, ought properly to have been taken into account in the fixing of the head sentence. The applicant submits that after taking that period of pre-sentence custody into account, he ought to have been sentenced to imprisonment for three years and four months.

The Crown accepts that the head sentence imposed on the applicant did not properly take into account the 797 days in pre-sentence custody. At issue is whether this Court, in re-exercising

the sentencing discretion, ought to immediately suspend the sentence of imprisonment of three years and four months. The applicant was born on 24 February 1989. He was 26 years of age at the time of the offence. He is now 28 years of age. He has a not insignificant past criminal history. It includes offences for aggravated robbery and other offences of violence. He was on parole at the time of the commission of the offence for serious offences, including aggravated burglary and aggravated robbery with a weapon.

The applicant has previously served actual periods of imprisonment, both in the Australian Capital Territory and New South Wales. He has a longstanding addiction to drugs.

The offence of armed robbery was committed on 8 April 2015. The premises was that of a pharmacy. The applicant acted as a look-out whilst the principal offender disguised himself and used a 15-centimetre knife to intimidate a young pharmacist and shop assistant. Some 25 boxes of drugs and a quantity of cash was stolen in the robbery. The applicant then drove the getaway vehicle away from the scene. The sentencing judge took into account the applicant's age, past criminal history, and his involvement in the offence.

The sentencing judge noted the need for deterrence in this type of offending. Considerations of both personal and general deterrence loomed large in the exercise of his sentencing discretion. After considering comparable authorities, the sentencing judge considered the appropriate sentence, having regard to the aggravating features, including the serious nature of the armed robbery, the fact it was committed whilst on parole and involved pre-meditation and a degree of sophistication, this warranted a significant head sentence notwithstanding the mitigating features of a plea of guilty which, although late, was timely.

The sentencing judge expressly noted that the applicant had already served 797 days in custody whilst on remand. Whilst that time was not declarable because it related to a significant amount of other offending which had not yet been finalised, the sentencing judge stated that he intended to take it into account in fixing a parole eligibility date.

As the respondent properly concedes, whilst the period in pre-sentence custody was taken into account in fixing a parole eligibility date, it was not taken into account in fixing the head

sentence. There is no doubt that a sentence of imprisonment of five and a-half years fails to adequately take into account that significant period in pre-sentence custody. The failure to do so constitutes a clear error in the exercise of the sentencing discretion. That error has resulted in the imposition of a sentence which is manifestly excessive in all of the circumstances.

This conclusion requires a re-exercise of the sentencing discretion. There is no doubt that the original head sentence of five and a-half years imprisonment was an appropriate balance of the aggravating and mitigating features, having regard to comparable authorities. I would re-exercise the sentencing discretion by imposing a head sentence which is reduced by the period of 797 days pre-sentence custody that ought to have been taken into account when fixing the original sentence. That results in a head sentence of three years and four months.

Whilst the applicant submits that the sentence of imprisonment ought then to be suspended from today, the applicant is not an appropriate candidate for a suspended sentence. He is a mature individual who has an unenviable criminal record. Previous periods of imprisonment have not caused him to desist in his criminal conduct. He requires supervision and the protection of the community requires supervision. Allowing for the circumstances, I would, however, fix the applicant's parole eligibility date at today, 21 February 2018.

I would order:

1. Leave to appeal be granted.
2. The appeal be allowed.
3. The sentence of imprisonment previously imposed be set aside.
4. The applicant be sentenced to three years and four months imprisonment with a parole eligibility date at 21 February 2018.

**MORRISON JA:** I agree.

**PHILIPPIDES JA:** I also agree.

**MORRISON JA:** The orders of the Court will be those proposed by Justice Boddice.