DISTRICT COURT OF QUEENSLAND

CITATION:	*Age v Queensland Police Service* [2020] QDC 169
PARTIES:	**NATHAN KEITH AGE** (appellant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	4 of 2020
DIVISION:	Appellate
PROCEEDING:	Appeal under s 222 *Justices Act 1886*
ORIGINATING COURT:	Magistrates Court, Mount Isa
DELIVERED ON:	9 June 2020 (*delivered ex tempore*)
DELIVERED AT:	Cairns
HEARING DATE:	9 June 2020
JUDGE:	Fantin DCJ
ORDER:	**1. The appeal is allowed.** **2. On count 1, the defendant is convicted and sentenced to eight months imprisonment to be served cumulatively upon the sentence imposed on 19 June 2019.** **3. The date the defendant is eligible for parole is fixed at 9 June 2020.** **4. On the summary charge of trespass, the appellant is convicted and not further punished.** **5. Order that a copy of the revised reasons for this decision be provided to the Parole Board of Queensland.** **6. Direct the Registrar to provide to the appellant, through his solicitors, a Parole Board Queensland fact sheet and a form 29 application by prisoner for parole order to facilitate the appellant's solicitors assisting him with an application for parole.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY

EXCESSIVE OR INADEQUATE – where the appellant was sentenced in the Magistrates Court for a number of offences - whether the Acting Magistrate erred by failing to correctly apply the totality principle – whether the Acting Magistrate failed to moderate the sentence down to account for the total period of imprisonment the appellant was liable to serve – where the Crown concedes the appeal

Legislation
Justices Act 1886 s 222
Penalties and Sentences Act 1992 s 9, s 156A, s 160B
Corrective Services Act 2006 s 209

COUNSEL	M Hibble for the appellant
	J Marxson for the respondent
SOLICITORS	Gunn Lawyers for the appellant
	The Office of the Director of Public Prosecutions for the respondent

[1] This is an appeal against sentence on the basis of manifest excess. The Crown concedes the appeal. I have been particularly assisted by helpful written outlines of submissions from both parties, as well as oral submissions. I accept the parties' joint position that the appeal should be allowed, and the appellant re-sentenced. These are my reasons for that decision.

[2] On 13 February 2020, the appellant was sentenced in the Magistrates Court at Mt Isa by an Acting Magistrate for one count of burglary and commit indictable offence and one count of trespass. The Acting Magistrate imposed a head sentence of 15 months imprisonment on the burglary offence, to be served cumulatively upon an earlier sentence of 15 months imprisonment which had been imposed on the appellant on 19 June 2019.

[3] The Acting Magistrate further ordered that the appellant would be eligible for parole on 6 September 2020. This date was the full-time discharge date of the 15 month sentence imposed on 19 June 2019. Therefore, the full time expiry date, with the sentence imposed on the 13 February 2020, was 6 December 2021.

[4] On the lesser offence of trespass, the appellant was convicted and no further penalty was imposed.

[5] The appellant now appeals, pursuant to section 222 of the *Justices Act 1886* (Qld) against the sentence on the ground that it was manifestly excessive.

[6] The manifest excess is said to arise because the Acting Magistrate fell into error by failing to correctly apply the totality principle when sentencing the appellant to a cumulative term of imprisonment. He failed to moderate the sentence down to account for the total period of imprisonment the appellant would then be liable to serve.

[7] On 19 June 2019, the appellant had been sentenced in the Magistrates Court at Mt Isa for a number of property and dishonesty type offences. They included, but were not limited to, two charges of burglary and commit indictable offence; five charges of enter premises or attempted enter premises and commit indictable offence; and one charge of attempted enter premises with intent to commit indictable offence. There were also some minor charges of trespass, wilful damage and failure to appear.

[8] On that occasion, the Magistrates Court imposed a head sentence of 15 months imprisonment on one of the burglary offences, with lesser concurrent sentences for the other offending. The court set a parole release date of 6 November 2019, which was after the appellant had served one third of that 15 month sentence. Twelve days of pre-sentence custody were declared, which had the effect of backdating the start of the sentence to 7 June 2019.

[9] The appellant was released on parole on 6 November 2019. He re-offended within about five weeks of his release by committing the offences the subject of this appeal. His parole was suspended, and he was returned to custody on 10 December 2019.

[10] The circumstances of the offending on 10 December 2019 involved him engaging in an unsophisticated burglary with a co-offender. Although any burglary is serious, this was clearly unsophisticated. He stole numerous bottles of alcohol, an iPod, a handbag and a small amount of cash. All up, about $150 worth of property was recovered.

[11] The appellant was located by police a short time later in possession of some of the stolen items. He identified his co-offender to police. At the time he committed the offences, he had just turned 19 and was on parole for the earlier property offending. Despite his young age, he had a poor criminal history, which included a large number of similar offences, although he had only been sentenced to imprisonment on the occasion when he was dealt with by the Magistrates Court on 19 June 2019.

[12] The fact that the appellant had previous convictions for like offending, including sentences of imprisonment for like offending imposed a short time before this offence, was clearly an aggravating feature. The fact that he offended while he was on parole for the earlier offending showed a continuing attitude of disobedience to the law. As a consequence, personal deterrence was a more significant factor on the sentence then it might otherwise have been.

[13] Nonetheless, his criminal history cannot be allowed to overwhelm the objective gravity of the offending in question. In addition, the fact that the appellant was still a very young man at the time he committed the offence meant that rehabilitation was also a significant factor on sentence, and had to be recognised in some demonstrable way.

[14] The court was required, pursuant to section 9(2) of the *Penalties and Sentences Act 1992* (Qld) to take into account, amongst other things, the assistance the appellant gave to law enforcement agencies in the investigation of the offence, including by identifying his co-offender, the time he had spent in custody for the offence before being sentenced, the sentences already imposed on the appellant that he was liable to serve, as well as his previous convictions (section 9(10) of the *Penalties and*

Sentences Act 1992), and the fact that the sentence imposed must not be disproportionate to the gravity of the current offence (section 9(11) of the *Penalties and Sentences Act 1992*).

[15] At the hearing, the police prosecutor submitted that the starting point should be around 15 months imprisonment. But the parties specifically submitted to the Acting Magistrate that he would be required to impose the sentence cumulatively on the sentence that he was currently serving, and could only fix a parole eligibility date, rather than a parole release date.

[16] The solicitor for the appellant addressed his Honour on the requirement to moderate down the sentence, given that it had to be served cumulatively, and that the parole eligibility date should be set taking into account the total period of imprisonment.

[17] The appellant's solicitor also placed before the Acting Magistrate some brief antecedents, which made it clear that the appellant had a disadvantaged upbringing, had only been educated to year eight standard and had started drinking alcohol at age 15. He further submitted that the motivation for the offending was alcohol, and that the majority of the items stolen were bottles of alcohol. He submitted that the appropriate sentence would be one of eight months imprisonment to be served cumulatively with a parole eligibility date set earlier, on the basis that rehabilitation was a significant factor on the sentence.

[18] The Acting Magistrate gave very brief sentencing remarks. He made no reference to the need to moderate the sentence of 15 months to take account of the requirement for mandatory cumulation. He made no reference to the appellant's antecedents or young age, or any other mitigating factors in terms of setting the parole eligibility date.

[19] The principles applicable on such an appeal are not in dispute. The appeal is by way of rehearing. There is no application to adduce fresh evidence. The sole ground of appeal is on the basis of manifest excess. That is, that the sentence fell outside the range of the proper sentencing discretion.

[20] Of course, appellate intervention on the ground of manifest excess is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the Court is driven to conclude that there must have been some misapplication of principle.

[21] In my view, this is such a case. The result of the impugned sentence is, in my view, unreasonable or, plainly unjust, and I infer that there has been a failure to properly exercise the discretion. Even accepting that a different court might have struck a different balance between the competing considerations which have to be weighed in the exercise of the discretion, the sentence imposed in this case was beyond the permissible range.

[22] Section 156A of the *Penalties and Sentences Act 1992* required the Acting Magistrate to impose a cumulative sentence, because the burglary offence was committed while on parole. On the imposition of the sentence, section 209 of the *Corrective Services Act 2006* (Qld) operated to automatically cancel the appellant's parole. This engaged section 160B of the *Penalties and Sentences Act*, which

obliged the Acting Magistrate to impose a parole eligibility date, rather than a parole release date.

[23] The effect of the Acting Magistrate's order was that the appellant would serve a total unbroken period of imprisonment of 30 months, being from 6 June 2019 until 6 December 2021. Of that period, he would serve some 14 months in actual custody before being eligible for parole on 6 September 2020. His Honour needed to consider the total combined period of imprisonment to ensure that the cumulative effect of the sentence did not result in a penalty which was unjust in all of the circumstances. In order for the sentence imposed to be permissible, it must have been the case that a practical sentence of 30 months imprisonment with parole eligibility after half, or 15 months, was appropriate in all the circumstances. The cases demonstrate that such a sentence was not appropriate in all the circumstances.

[24] Even allowing for the requirements of general and personal deterrence, given that the appellant offended while on parole a short time after being released for similar offending, an appropriate sentence could have been achieved by a short period of imprisonment imposed cumulatively followed by supervision in the community. That is particularly so in the case of a young offender with relevant criminal history who committed a property offence while on parole.

[25] In my view, the sentence was manifestly excessive and that was likely due to a failure to properly moderate the penalty to take into account the requirement that it be imposed cumulatively.

[26] Having found error, I must now resentence the appellant. I have taken into account the relevant cases referred to by the parties in their written submissions, to the extent that they are relevant, as a guide on sentence. I accept the parties' submissions, which are not far apart, to the effect that a short period of imprisonment with an immediate parole eligibility date would appropriately take into account totality, the appellant's criminal history and the relevant mitigating and aggravating features.

[27] The parties submit that the cases support a term of imprisonment between six and eight or nine months, served cumulatively on the sentence of 19 June 2019. I accept that submission.

[28] I order that a copy of the revised reasons for this decision be provided to the Parole Board of Queensland. I direct the Registrar to provide to the appellant, through his solicitors, a Parole Board Queensland fact sheet and a form 29 application by prisoner for parole order to facilitate the appellant's solicitors assisting him with an application for parole, given that I have made his parole eligibility date today.

[29] The orders, then, are that the appeal is allowed. On count 1, the defendant is convicted and sentenced to eight months imprisonment to be served cumulatively upon the sentence imposed on 19 June 2019. I fix today as his parole eligibility date. On the summary charge of trespass, the appellant is convicted and not further punished.