SUPREME COURT OF QUEENSLAND

CITATION:	*R v Parker* [2002] QCA 403
PARTIES:	**R** **v** **PARKER, Steven James** (applicant/appellant)
FILE NO/S:	CA No 160 of 2002 DC No 868 of 2002 DC No 1263 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2002
JUDGES:	Williams and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence allowed** **2. Appeal allowed in respect of each of the sentences imposed on 7 May 2002, and each sentence varied by deletion of the words "twelve months" and insertion instead of the words "nine months"**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – CONCURRENT, CUMULATIVE AND ADDITIONAL SENTENCES, SENTENCES ON ESCAPE AND COMMENCEMENT OF SENTENCE – where applicant was sentenced to 12 months imprisonment to be served cumulatively on the expiration of his existing sentence – operation of s 152 of the *Corrective Services Act* 2000 (Qld) – where s 152(2)(a) was applied to the applicant when sentenced thereby setting his release date for his existing sentence at 25 October 2002 – where Queensland Community Corrections Board later applied s 152(2)(c) of the Act to the applicant thereby extending his release date to 14 April 2003 – where s 152(2)(c) was the correct provision which should have been applied by the learned sentencing judge – where the learned sentencing judge was provided with incorrect information which did not accurately reflect the applicant's

situation – where s 152(2)(c) applied to the applicant the moment he pleaded guilty to the commission of an offence while on parole thereby substantially reducing the time regarded as time already served under the sentence as previously calculated under s 152(2)(a) – whether error occurred at time of sentence

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant argued that a significant error, both in fact and law, operated at the time he was sentenced – where applicant did not apply to the Court pursuant to s 188 *Penalties and Sentences Act* 1992 (Qld) to reopen his sentencing proceeding but chose to apply for leave to appeal against sentence – whether sentence should be considered afresh on its merits rather than applicant having to demonstrate it is manifestly excessive

Corrective Services Act 2000 (Qld), s 75(1)(c), s 150, s 151, s 152
Penalties and Sentences Act 1992 (Qld), s 188

R v Leith [2000] 1 Qd R 660, cited
R v Maniadis [1997] 1 Qd R 593, cited
R v Selle [1998] QCA 291; CA No 205 of 1998, 7 August 1998, referred to

COUNSEL: The applicant/appellant appeared on his own behalf
PF Rutledge for the respondent

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

[1] **WILLIAMS JA**: I agree with the orders proposed by Jerrard JA and with his reasons.

[2] **JERRARD JA**: On 5 April 2001 the applicant Steven Parker was released on parole, and on 25 June 2001 he and a co-offender were caught in the act of breaking and entering Woolworth's premises at Sunny Park Shopping Centre. They had stolen some cigarettes. The applicant was arrested and later released on bail. On 31 October 2001 he was discovered to be in possession of a car stolen from the Brisbane Airport on or about 22 September 2001, possession of which he abandoned on 31 October 2001. On 1 November 2001 he stole another car from a car yard in Nerang, and when later observed and pursued that same day by police, operated that motor vehicle dangerously at speeds of up to 180kmph and 100kmph in the township of Canungra. He was found in possession of it in New South Wales on 9 November 2001, and crashed that vehicle when escaping that day from police attention. He was located and arrested in Canberra on 4 December 2001, extradited to Queensland on 5 February 2002, and on 7 May 2002 pleaded guilty to breaking entering and stealing the premises of Woolworths, two charges of unlawfully using

a motor vehicle, and one charge of dangerous operation of a motor vehicle. He was sentenced to twelve months imprisonment to be served cumulatively upon the expiration of the term of imprisonment he was then serving and on which he had been released on parole. The learned judge sentencing him on 7 May 2002 was told that the full time discharge date for a six year sentence imposed on 18 December 1997, and which the applicant was then completing, was 25 October 2002. The effective sentence then imposed on 7 May 2002 was therefore a maximum of 17 months imprisonment, if served fully. Mr Parker has applied for leave to appeal against that sentence, arguing that circumstances since that sentence was ordered on 7 May 2002 mean he will actually serve a maximum of 23 months imprisonment, if served fully.

[3] He has a lengthy record of convictions. He had convictions when a child in years 1983 to 1986, and has convictions as an adult from 1991 onwards. On 23 February 1995 he was sentenced in New South Wales to two and a half years imprisonment for robbery, and he escaped from custody when serving that term. On 18 December 1997 he was sentenced in the Brisbane District Court to six years imprisonment for offences of armed robbery, unlawful use of a motor vehicle, breaking and entering, and attempted burglary. He had committed all those offences when an escapee from New South Wales, and some of those had been committed after he had been taken into custody in Queensland, and had escaped from the John Oxley Centre.

[4] The judge imposing the six year sentence in December 1997 remarked that the applicant had been in custody from 18 July 1996 until 5 October 1996, and again from 19 November 1996 until 18 December 1997. This totalled 473 days on remand awaiting sentence. The judge also noted that the applicant might expect to serve a further two years and nine months imprisonment in New South Wales, plus a further sentence in New South Wales for the offence of escaping.

[5] The applicant was extradited to New South Wales in July 1999, and management of the six years imprisonment imposed in Queensland in December 1997 was transferred to New South Wales. He was sentenced on 25 February 2000 in New South Wales for the offence of escaping committed after he was sentenced in that State on 23 February 1995. The sentence imposed for that offence of escape was a six month minimum term from 5 December 2000, such term to conclude on 4 April 2001. The order made on 25 February 2000 by the Penrith District Court specified that he was to be released subject to supervision on 5 April 2001, and that ordered supervision was to conclude on 4 April 2002. If Mr Parker had not re-offended, he would have completed serving that six year term, and all other sentences, on 4 April 2002.

[6] The applicant's conviction on the charge of breaking and entering Woolworth's premises on 25 June 2001 was an admission to re-offending whilst under that supervision, and within two and a half months of being released from custody. The two subsequent offences of unlawful use of a motor vehicle, and the offence of dangerous operation of one of those vehicles, were committed when on bail from the first offence. He has a lengthy record for convictions of dishonesty. The learned judge imposed the cumulative sentence of twelve months imprisonment on 7 May 2002 on the basis that the applicant's full time discharge date was 25 October 2002. With the applicant's history of offending as an escapee while on parole and when on bail, and his general criminal history, those sentences for a

fairly determined course of dishonest conduct could not be said to be at all excessive.

[7] What Mr Parker argues is that his sentence is rendered manifestly excessive by reason of an error occurring when it was imposed.[1] When Mr Parker was sentenced on 7 May 2002 his calculated full time discharge date on the six year sentence imposed in December 1997 was 25 October 2002. This discharge date resulted from the fact of loss, pursuant to s 75(1)(c) of the *Corrective Services Act* 2000 (Qld), of his one third remissions for good behaviour; together with the addition of 55 extra days in which he had been at large. He lost his remissions of sentence for good behaviour under the provisions of the *Corrective Services Act* because during that period of six years imprisonment he had been released under a post prison community based release order, had offended, and had been returned to prison. Loss of those one third remissions would ordinarily have meant that his full time discharge date on that six year sentence was 31 August 2002; but the addition of the 55 extra days took it to 25 October 2002.[2]

[8] It is necessary at this stage to refer to specific provisions of the *Corrective Services Act*.

Section 150 relevantly provides that:

> "(1) A corrections board may, by written order-
>
> (a) amend, suspend or cancel a post-prison community based release order if the board reasonably believes the prisoner subject to the order-
>
> (i) has contravened the order; or
>
> (ii) poses a serious risk of harm either to themselves or someone else."

Section 151 relevantly provides:

> "(1) A prisoner's parole order is automatically cancelled if the prisoner is sentenced to another term of the imprisonment for an offence committed, in Queensland or elsewhere, during the parole period."

Section 152 relevantly provides:

> "(1) This section applies if a prisoner's parole order is cancelled-
>
> (a) under section 150(1)(a)(i) because the prisoner contravened a condition of the parol order; or…
>
> (d) under section 151 because the prisoner was sentenced to another term of imprisonment for an offence committed during the parole period.
>
> (2) The time for which the prisoner was released on parole before-
>
> (a) the prisoner contravened the condition; or…
>
> (c) the prisoner committed the offence;
>
> counts as time served for the prisoner's period of imprisonment."

[9] The 55 days at large, the addition of which resulted in the full time discharge date of 25 October 2002, themselves resulted from the fact of the suspension of Mr Parker's

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1 As to the admissibility of evidence about events occurring post the sentence date see *R v Maniadis* [1997] 1 Qd R 593, *R v Selle* [1998] QCA 291; CA No. 205 of 1998, 7 August 1998, and *R v Leith* [2000] 1 Qd R 660.

2 These dates are taken from information provided by Department of Corrective Services to both the applicant and respondent and exhibited to the court by both.

parole by order on 13 December 2001, followed by his return to custody in Queensland 55 days later on 6 February 2002, and then the cancellation of his parole by order on 8 March 2002. The suspension would have been ordered pursuant to s 150(1)(a)(i) of the *Corrective Services Act*, by reason of the Queensland Communities Correction Board reasonably believing that Mr Parker had contravened the provisions of the order. When his parole was cancelled in March 2002, it appears that s 152(2)**(a)** was applied to Mr Parker, and he was treated as having contravened the conditions of his parole order on 13 December 2001. Section 152(2)(a) then had the effect that only the period when he was released on parole before contravening those conditions, (that is, from 5 April 2001 until 13 December 2001) was taken as time served pursuant to his six year period of imprisonment otherwise expiring now on 31 August 2002. The 55 days in which he was thereby at large from 13 December 2001 until being returned to custody in Queensland on 6 February 2002 were added on, resulting in the full time discharge date of 25 October 2002.

[10] This was the declared position when Mr Parker was sentenced. The effect of his pleas of guilty and convictions is that s 152(2)**(c)** of the *Corrective Services Act* applies to him, which has the result that only the time between his release on parole on 5 April 2001, and the date of his commission when on parole of the first offence for which he was convicted (25 June 2001), counts as time served for the six year sentence. None of the period between 25 June 2001 and 13 December 2001 is now calculated as time served, and he has accordingly had the equivalent number of days (171) added to the unexpired portion of the six year sentence. This has resulted in the full time end date for that six year sentence being 14 April 2003.

[11] The correct position actually applying was available for calculation as at the date the learned judge imposed sentence. It is simply that the judge was given the wrong information, which did not accurately reflect the effect of what was occurring. Section 152(2)(c) applied to Mr Parker the moment he pleaded guilty and established by that plea that he had committed an offence on 25 June 2001. It is the plain intention of the *Corrective Services Act* that the time Mr Parker spent at large thereafter, (referred to by Mr Parker as "street time") and until his eventual apprehension and return to custody, not count as time served under that sentence.

[12] I think the critical question is **not** whether or not a sentence of twelve months imprisonment, cumulative upon a sentence already being served which sentence ends in mid April 2003 rather than in late October 2002, is manifestly excessive. Mr Parker has succeeded in demonstrating a significant error, both of fact and law, operating at the time he was sentenced; and although he has not formally applied to the court pursuant to s 188 of the *Penalties and Sentences Act* 1992 (Qld) to reopen the proceeding in which he was sentenced, I do not think he should be disadvantaged by choosing instead to apply for leave to appeal the sentence. That is, the sentence should be considered afresh on its merits, rather than the applicant have to demonstrate that it is manifestly excessive.

[13] The sentencing remarks made on 7 May 2002 demonstrate that the learned sentencing judge intended a relatively compassionate approach. The learned judge referred to the applicant's wife and young child, and to the applicant's desire to do something about his life. The judge advised the applicant that he had to accept responsibilities for his own actions, and that the judge had no option but to impose a

custodial sentence. I think the sentence imposed was a relatively compassionate one.

[14] Mr Parker did appear a reasonably intelligent man and reasonably fit and healthy, despite his past history of drug usage. He appears to have the capacity to do more worthwhile things with his life than he has for the past seven years. Since he has to serve as part of the six year sentence all of the 226 days he was not in custody in Queensland between 25 June 2001, (the date of his first offence after release on parole) and 6 February 2002 (when returned to Queensland custody), and since he has actually been in custody from 4 December 2001, I think it is appropriate to continue with the intention and general spirit of the orders made by the learned sentencing judge. I would substitute a sentence of nine months imprisonment cumulative upon the expiration of the sentence now being served for the sentence originally ordered. I think any lesser term of imprisonment for the offences he did commit when on parole would be inadequate.

[15] What Mr Parker submits next is that he has core drug, alcohol, and gambling problems. He recognises that until steps are taken by him to challenge those problems it is highly unlikely his pattern of offending will change. He says he has little prospect of getting parole with his history, and I agree with that. He says he intends and wants to do a nine month live in rehabilitation program in premises known as Logan House. He had been requested to enrol in that program when last on parole, but failed to do so, choosing to remain on drugs.

[16] I think the live in course at Logan House might considerably help him. Nothing else seems likely to. The applicant suggests that the sentence imposed on him should be suspended as and from the expiry date of the six year sentence, so that he can then start the Logan House rehabilitation program.

[17] The difficulty with that application is that it means that no effective sentence would be imposed at all for the sentences to which he pleaded guilty. That outcome would result in orders which imposed a manifestly inadequate sentence. Assuming that the applicant is genuine in his wish to rehabilitate himself, his past history of criminal conduct and most recent offending behaviour means that realistically he will have to undertake that program in Logan House in his own time. I do not think that it would assist Mr Parker if this court made orders that simply absolved him from punishment for serious offences. I also think that suspending the sentence of nine months would have an unacceptable risk that Mr Parker would simply continue with his present pattern of offending whenever he lives in the non prison community.

[18] I would order:

- That the application for leave to appeal against sentence be allowed.
- That the appeal be allowed in respect of each of the sentences imposed on 7 May 2002, and each sentence varied by deletion of the words “twelve months” and the insertion instead of the words “nine months”.

[19] **ATKINSON J**: I agree with the reasons of Jerrard JA and with the orders he proposes.