

SUPREME COURT OF QUEENSLAND

CITATION: *R v Rodgers* [2002] QCA 418

PARTIES: **R**
v
RODGERS, Barry William
(applicant)

FILE NO/S: CA No 13 of 2002
DC No 481 of 2001

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich

DELIVERED EXTEMPORE ON: 9 October 2002

DELIVERED AT: Brisbane

HEARING DATE: 9 October 2002

JUDGES: McMurdo P, Cullinane and Atkinson JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made.

ORDER: **Grant application to re-open sentence. Vacate the sentence imposed by this Court on 22 April 2002 and re-impose the sentence given by the original sentencing Court.**

CATCHWORDS: CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE- JUDGMENT AND PUNISHMENT – SENTENCE - where application to re-open sentence pursuant to s188(1)(c) *Penalties and Sentences Act 1992* (Qld) – where applicant sentenced to a cumulative term of imprisonment of 9 months with a recommendation for parole after 3 months –where applicant’s term of actual imprisonment unintentionally increased on appeal by suspending sentence after 3 months – where original sentence re-imposed

Penalties and Sentences Act 1992 (Qld), s 188(1)(c)

COUNSEL: The appellant appeared on his own behalf
C W Heaton for the respondent

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

THE PRESIDENT: This is an application to re-open a sentence imposed by this Court, in part differently constituted, on 22 April 2002 under section 188(1)(c), Penalties and Sentences Act 1992 (Qld). The applicant, who was at that time and is today self-represented, applied for leave to appeal against a sentence imposed upon him in the District Court for indecently dealing with a child under 16 years, the offence occurring in 1996.

The applicant has a long history of similar offending behaviour commencing in New Zealand in 1962. At the time this offence occurred, a warrant for his arrest was current in respect of offences which occurred in New South Wales between 1974 and 1989. The applicant fled to New Zealand where he committed further similar offences for which he served a period of imprisonment. He was then extradited to New South Wales and was sentenced to eight years' imprisonment. His full time release date for the New South Wales offences was 21 April 2005.

The Queensland sentencing Judge imposed a cumulative term of imprisonment of nine months, with a recommendation for parole after three months, indicating that this meant he would be eligible to apply for parole on 21 January 2003.

This Court, in an effort only to create greater certainty of release for the applicant in his sentence, granted leave to appeal against sentence, allowed the appeal and set aside the

original sentence, instead imposing a cumulative nine month term of imprisonment suspended after three months.

Unfortunately, the Court has now been informed that the effect of that sentence is that the suspended sentence cannot commence until the expiration of the eight year sentence, and the earliest potential release date is now 21 May 2004. This means this Court has unintentionally increased the applicant's actual period of imprisonment before becoming eligible for release, something which is not ordinarily done without giving the applicant notice and the opportunity to withdraw his application for leave to appeal.

The respondent concedes this an appropriate matter for re-opening under section 188(1)(c), Penalties and Sentences Act 1992 (Qld). The Court has also had assistance from Ms Rafter, a legal officer with the Corrective Services Department, who has helpfully attended the proceedings today at the request of the Court. Both she and the respondent inform us that the only sentence which can give effect to the intention of the original sentencing Court and the intention of this Court when it heard the appeal is, in fact, the original sentence imposed.

In those circumstances I would grant the application to re-open the sentence, vacate the sentence imposed by this Court on 22 April 2002, and re-impose the sentence given by the original sentencing Court.

ATKINSON J: I agree.

CULLINANE J: I agree.

THE PRESIDENT: That is the order of the Court.
