

SUPREME COURT OF QUEENSLAND

CITATION: *R v Mulder* [2002] QCA 455

PARTIES: **R**
v
MULDER, Lewis Purnachandra
(applicant)

FILE NO/S: CA No 202 of 2002
DC No 185 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Maroochydore

DELIVERED EXTEMPORE ON: 28 October 2002

DELIVERED AT: Brisbane

HEARING DATE: 28 October 2002

JUDGES: de Jersey CJ, McPherson JA, Mullins 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 sentences imposed on 3 June 2002 for counts 2 and 3 granted.**
2. Application for leave to appeal against sentence imposed on 15 July 2002 refused.
3. In respect of the sentences for which leave to appeal has been granted, the appeal is allowed in respect of those sentences and the sentences are varied by the addition of the declaration that:

“Pursuant to section 161 of the *Penalties and Sentences Act 1992*, it is declared that 105 days spent in pre-sentence custody between 18 February 2002 and 3 June 2002 be deemed time already served under the sentences.”

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – PROPERTY OFFENCES – applicant pleaded guilty to 2 counts – applicant had been in pre-sentence custody – a declaration under s161 *Penalties and Sentences Act 1992* (Qld) should have been made in respect of that pre-sentence custody – declaration made

CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – PROPERTY OFFENCES – applicant charged with 3 counts – applicant initially pleaded guilty to counts 2 and 3 – separate custodial sentences imposed for each count – applicant pleaded guilty to count 1 – applicant received custodial sentence to be served concurrently with other sentences – whether custodial sentence imposed for count 2 is manifestly excessive – where sentence imposed exceeded range submitted by prosecutor – whether sentence should reflect range submitted – where applicant had significant prior criminal history – where sentence coupled with post present community based release recommendation – in those circumstances sentence not manifestly excessive

Penalties And Sentences Act 1992 (Qld), s161

COUNSEL: AJ Rafter for the applicant
PD Kelly for the respondent

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

MULLINS J: The applicant applies for leave to appeal against three sentences. The applicant pleaded guilty to counts 2 and 3 on indictment 185 of 2002 presented at Maroochyore District Court on 3 June 2002. Count 2 was breaking and entering premises and stealing. Count 3 was wilful damage. These offences were committed on 18 February 2002.

On count 2, the applicant was sentenced to two and a half years imprisonment. On count 3, the applicant was sentenced to 12 months imprisonment. It was recommended that the applicant be eligible for post-prison community based release after serving 12 months.

Count 1 on that indictment was also a charge of breaking and entering premises and stealing, but in respect of events which occurred on 27 May 2000. The applicant pleaded guilty to that

offence of 15 July 2002 and was sentenced to 12 months imprisonment which was to be served concurrently with the sentences imposed on 3 June 2002.

There was confusion at the sentence hearing on 3 June 2002 about what suspended sentences needed to be dealt with. The applicant had been in custody between 18 February 2002 and 3 June 2002 in respect of counts 2 and 3 and a summary offence of contravene direction on 18 February 2002 which arose out of the police investigation of the offences which are counts 2 and 3.

That summary offence was dealt with in the Magistrates Court on 24 July 2002 for which the applicant was fined \$300, in default six days imprisonment to be served concurrently with the existing sentences.

It is common ground that a declaration under section 161 of the Penalties and Sentences Act 1992 should have been made when the applicant was sentenced on 3 June 2002 in respect of the period of 105 days between 18 February and 3 June 2002.

The applicant also submits that the sentence of two and a half years imprisonment for count 2 exceeded the range submitted by the Prosecutor of 18 months to two years and that the sentence in respect of count 2 should be varied to conform with that range. That sentence was imposed, however, with the applicant being given the benefit of the recommendation of post-prison community based release after 12 months.

At the time of sentencing on 3 June 2002 the applicant had a significant prior criminal history and had committed the offence on 18 February 2002 during the operational period of suspended sentences imposed on 14 June 2002.

The sentence of two and a half years coupled with the post-prison community based release recommendation was not manifestly excessive.

I would therefore grant the application for leave to appeal in respect of the sentences imposed on 3 June 2002 for counts 2 and 3 and otherwise refuse the application for leave to appeal against the sentence imposed on 15 July 2002.

In respect of the sentences in respect of which I would grant leave to appeal I would allow the appeal in respect of those sentences and vary the sentences by the addition of the following declaration:

"Pursuant to section 161 of the Penalties and Sentences Act 1992, it is declared that 105 days spent in pre-sentence custody between 18 February 2002 and 3 June 2002 be deemed time already served under the sentences."

THE CHIEF JUSTICE: I agree.

McPHERSON JA: I also agree.

THE CHIEF JUSTICE: Those are the orders.
