

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Power* [2002] QCA 497

PARTIES: **R**  
**v**  
**POWER, Luke John**  
(applicant)

FILE NO/S: CA No 282 of 2002  
DC No 54 of 2002  
DC No 309 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Townsville

DELIVERED EXTEMPORE ON: 15 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 15 November 2002

JUDGES: de Jersey CJ, Jerrard JA and Mullins J  
Separate reasons for judgment of each member of the court,  
each concurring as to the order made

ORDER: **Application for leave to appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – REMISSION, PAROLE AND PRISONER CLASSIFICATION – where applicant expected to be sentenced to two years and six months imprisonment with a parole recommendation after nine months as a result of a deal made between defence counsel and the prosecution – where applicant was sentenced to a period of two years and three months imprisonment with no parole recommendation – whether the deal made between defence counsel and the prosecution imposed an obligation on the learned sentencing judge to make a recommendation for parole

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant’s admitted conduct consisted of intermittent but persistent offences of burglary, stealing and dishonesty – where the applicant has had no respect for the property of

others for a considerable period of time – where the applicant urged that his sentence should reflect his attempts at rehabilitation – whether sentence manifestly excessive

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

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

JERRARD JA: On 8 October 1997 Luke Power was convicted in the Cairns Magistrates Court on a charge of entering premises with intent to commit an indictable offence and sentenced to six months imprisonment to be suspended for a period of two years. On 16 November 1998 an indictment was presented in the Cairns District Court charging Mr Power with a number of offences, of which some were allegedly committed before 8 October 1997 and some afterwards; and thus the latter were during the period of suspended imprisonment.

Mr Power did not appear to answer that indictment, and on 14 December 1998 a warrant was issued for his arrest.

Mr Power was actually questioned by police in Townsville on 16 August 2001 when found in possession of a small quantity of cannabis sativa, but gave an incorrect name and address; and was only finally identified and located in Townsville on 31 January 2002 when police were called to premises he occupied with his de facto wife, and then about 18 month old child. He was charged with the possession on 31st January 2002 of things and property used in connection with the smoking of a dangerous drug, and he then volunteered to the police the commission of a number of further offences relating to property committed by him between 5 May 2000 and 21 January

2002. He was ultimately sentenced to a total of two years and three months imprisonment on 16 August 2002 in the Townsville District Court. Those sentences included the period of six months imprisonment suspended on 8 October 1997 and two further terms of imprisonment cumulative upon that six months, in respect of all other offences admittedly committed by him.

These include the offences charged in the indictment presented in Cairns on 16 November 1998, to which indictment he pleaded guilty on 11 charges, and he also pleaded guilty to 15 charges on an ex officio indictment presented in the Townsville District Court on 9 August 2002. He likewise pleaded guilty to six summary matters transferred from the Cairns and Townsville Magistrates Court. He seeks leave to appeal against those sentences totalling two years and three months imprisonment, complaining that the sentences imposed do not reflect the extent of his admitted cooperation with the police and the Court.

As to that, the Crown did not challenge his counsel's submissions to the learned sentencing Judge that Mr Power had desired to "clean the slate" with the police and had driven them around Townsville pointing out premises into which he had gained illegal entry. He pleaded to an ex officio indictment charging those offences he admitted, and to the six summary charges. One of those was failing to surrender himself when on bail on 9 December 1998; one was an offence of possessing amphetamine on 10 August 1998; one was possession of cannabis

sativa on 16 August 2001; one was supplying a false name on that same date; and the other two were the offences committed at his premises on 31st January 2002.

Mr Power also complains in a written submission that on 9 August 2002, the date on which he actually entered his pleas of guilty to the ex officio indictment, his barrister had "made a deal with the prosecution" that his pleas would result in a sentence of two years and six months imprisonment with parole recommended after nine months. However, he was not sentenced that day, but was sentenced by a different Judge on 16 August 2002 to a sentence shorter by three months but without any recommendation for release on parole.

At the time of his sentence the then 26 year old Mr Power was living with his wife and de facto child and was employed as a night filler between nine to 15 hours each week at Bi-Lo. It was strongly urged on his behalf that he had voluntarily rid himself since January 2002 of his previously heavy addiction to amphetamines, and that the sentence should reflect his attempt to rehabilitate himself.

His criminal history has relevance here. He was first convicted as an adult on 5 July 1993, having previously appeared in the prior six years in the Cairns and Townsville Childrens Courts on a number of offences of stealing and breaking and entering. His July 1993 convictions were for six convictions of breaking and entering premises, and for stealing, wilful damage and unlawful damage, and false

pretences. He was sentenced to four months imprisonment. He was also placed on probation. He appeared the same day in the Cairns District Court where he was also sentenced to four months imprisonment and placed on probation for three years on at least six further charges of breaking and entering premises, five further charges of stealing, and charges of wilful and unlawful damage, and false pretences.

In July 1994, having been released from custody and while on probation, he was convicted of charges of receiving and possession of a dangerous drug, and on a second appearance that same month of two further offences of attempting to break and enter a dwelling house, and of possessing a dangerous drug, those offences also being committed whilst on probation.

In October 1994 he was re-sentenced in the Cairns District Court for the offences for which he had been placed on probation 18 months earlier and this time was sentenced to two years imprisonment. His next relevant appearance was in September 1996 in the Cairns Magistrates Court where he was convicted of unlawfully using a motor vehicle earlier that same month, and sentenced to four months imprisonment. That offence had been committed after serving that two year term. He next appeared in the Cairns Magistrates Court on 8 October 1997 when he received the sentence of six months imprisonment suspended for two years described earlier.

The offences for which he was indicted in November 1998 and sentenced in August 2002 were for seven offences of breaking

and entering, and stealing, two offences of breaking, entering and committing wilful damage, and two offences of attempting to enter with intent. Six of those offences were all committed on 10th August 1998 in Cairns, and thus during the currency of the suspended term of imprisonment. Mr Power and a juvenile accomplice had entered and attempted to enter a number of premises that day and have stolen property from or damaged the premises they did enter.

With respect to the offences the commission of which was volunteered by Mr Power to the police on 31st January 2002, those were offences committed in May 2000, February 2001, May 2001, October and November 2001, and in January 2002. His admitted conduct consists of intermittent but persisting offences of burglary of premises and stealing from them, accompanied by further offences of dishonesty involved in using Mastercards stolen from premises he burgled, and otherwise dealing with stolen Mastercards.

The learned sentencing judge correctly held that Mr Power's conduct required that the suspended six month sentence be served. The learned judge also quite correctly imposed cumulative sentences of 18 months imprisonment in respect of all of the offences of dishonesty committed by Mr Power after the occasion of the imposition of that suspended sentence. Finally, the learned judge acted in accordance with sentencing principles in making cumulative on the sentence of two years imprisonment otherwise ordered by the learned judge, a further sentence of three years imprisonment for failing to appear on

9 December 1998 in accordance with Mr Power's bail undertaking.

Mr Power does not complain about the sentences totalling two years and three months imprisonment and in fact had "agreed" to three months more. Despite that agreement between counsel which he describes, the fact is that it is a judge who imposes a sentence, and not counsel by agreement between them.

In any event, counsel for the Crown suggested to the learned sentencing judge that a sentence of four years be imposed and Mr Power's counsel suggested two years, substantially suspended. The sentences actually imposed were relatively lenient ones in respect of persistently dishonest behaviour. Aggravating that behaviour was the offence of wilful damage committed between 19th May 2001 and 20th August 2001, during which period Mr Power had caused extensive damage to the premises he and his de facto partner were then renting. It appears that Mr Power has had no respect for anyone else's property for some considerable time. In those circumstances the sentences imposed by the learned judge were in no way manifestly excessive irrespective of whatever sentence Mr Power expected to be imposed. I consider that the application for leave to appeal against sentence should be dismissed.

THE CHIEF JUSTICE: I agree.

MULLINS J: I agree.

THE CHIEF JUSTICE: The application is refused.

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