SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kapitano* [2002] QCA 496
PARTIES:	**R** **v** **KAPITANO, Darren Glen** (applicant)
FILE NO/S:	CA No 196 of 2002 DC No 1673 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EXTEMPORE ON:	11 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2002
JUDGES:	McMurdo P, McPherson and Davies JJA Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Application granted. Appeal allowed. Instead of the sentence of 13 years imposed on counts 10 and 14, substitute a sentence of 11 years' imprisonment. Offences are declared serious violent offences.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE - WHEN GRANTED – where sentence application – where applicant cooperated with authorities – where other mitigating factors - whether sentence is manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 13A, s135(2)(c) *R v Gladkowski* (2000) 115 A Crim R 446, considered
COUNSEL:	A W Moynihan for the applicant T A Fuller for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded guilty on the 31st of May 2002 to an ex officio indictment, containing 10 counts of armed robbery, two counts of attempted armed robbery, two counts of armed robbery in company and one count of dangerous operation of a motor vehicle, with a circumstance of aggravation. These offences occurred between 9 April and 14 May 2001. A schedule of offences on various dates, from November 2000 to May 2001, was also taken into account, under s 189 Penalties and Sentences Act 1992 (Qld), namely four counts of stealing, one count of receiving, one count of entering a dwelling house with intent, two counts of unlawful use of a motor vehicle, two counts of possession of tainted property, one count of possessing a dangerous drug and one count of failing to appear. On the 13th of June 2002, the applicant was sentenced to an effective term of imprisonment of 13 years. The applicant is therefore deemed to have been convicted of a serious violent offence, with the consequence under s 135(2)(c) Corrective Services Act, 2000 Queensland that he must serve 80 per cent of this period before eligibility for parole.

The offences contained in the indictment occurred as follows: the applicant over a five week period, robbed eight banks, five TAB franchises and one newsagency, primarily to finance a heroin addiction. On each occasion, he was armed with a replica pistol, threatened his victims, was not disguised, but sometimes wore a baseball cap and sunglasses. The applicant said he committed the offences in order to finance his own

heroin addiction and that of his fiancée and that they were using between them, about $3,500 of heroin each day.

During two of the offences, he was in company with a male co-offender, who was armed on one occasion with a knife and on the other with an iron bar. The robberies netted $25,749. During the commission of the last robbery, the applicant was confronted by police and attempted to escape on a motor cycle.

He was pursued by police at high speed and then apprehended. He cooperated with the authorities, by taking part in a formal record of interview and admitted his involvement in 13 of the 14 armed robberies. On 31 October 2002, he gave a statement to police, admitting his involvement in the remaining robbery and further cooperated with the authorities so that s 13A Penalties and Sentences Act 1992 (Qld) was pertinent.

The applicant contends the sentence is manifestly excessive when the mitigating factors are taken into account, in particular the applicant's cooperation with the authorities.

The prosecution at sentence initially contended that a sentence of 20 years imprisonment was warranted. The learned primary Judge questioned this and asked for assistance with comparable decisions. When the Court resumed, the prosecutor contended a term of imprisonment of 15 years' imprisonment was appropriate but that sufficient recognition to the early plea of guilty and the applicant's additional cooperation warranted a further two year reduction to 13 years' imprisonment. The

prosecution referred to comparable cases at the sentence, which pre-dated the 1997 amendments to the Penalties and Sentences Act and which therefore included recommendations for parole as part of the sentence, an option which is no longer available. These comparable cases are therefore of limited use.

His Honour determined that a sentence of 16 years' imprisonment was appropriate before discounting for any mitigating factors. The applicant contends that the sentence imposed taking into account all mitigating factors was one of 9 to 10 years' imprisonment.

The applicant was 31 at sentence and 30 when the offences occurred. He has a lengthy criminal history, commencing in 1984 when he was 13 years of age. His convictions continued as an adult and he was first sentenced to a term of imprisonment in 1988 for multiple offences of dishonesty. He continued to offend as an adult and was sentenced to increasing terms of imprisonment, as well as community based orders, some of which he breached. In 1998, he was sentenced to a concurrent three year term of imprisonment, with a parole eligibility date of 28 October 1998, for four counts of receiving and six counts of false pretences. What can be said in his favour is that he had no previous convictions for serious offences of violence such as these.

Although the applicant cooperated with the authorities, he was linked to one of the offences by DNA evidence, to two offences

by finger print evidence and by photoboard identification and surveillance video footage, in respect of other offences. He was of course apprehended during the commission of the last offence in time.

The applicant emphasises that although the offences were extremely serious, they lacked a degree of professionalism and sophistication. The firearm was a replica, which could not be loaded or discharged, there was no actual violence inflicted and most of the offences were not in company. The applicant fully cooperated with the authorities and has suffered the consequences.

Tendered victim impact statements demonstrated the traumatic and long-term effect of the applicant's serious conduct on the victims.

The applicant was examined by psychologist Peter Perros on 17 May 2002. Mr Perros observed that the applicant has demonstrated a limited response to rehabilitation in the past and presently attends fortnightly Narcotic Anonymous meetings in prison. He described the applicant as psychologically damaged, institutionalised, of average intelligence and a man who copes poorly with life outside institutions. The applicant has had a traumatic life. His mother and two of his sisters are dead. He does not know his biological father and he has lost contact with his surviving sisters. Mr Perros is of the view that the applicant copes maladaptively with stress through substance abuse and crime. He has few work skills or

support outside the prison and has a poor prognosis. It will take years of support and counselling before he is able to live comfortably outside an institution and until then, poses a significant risk of relapse.

A review of the comparable sentences to which we have been referred by both the applicant and the respondent, including R v. Crossley (1999) 106 A Crim R 80; R v. McDonald [2001] QCA 238, CA No 46 of 2001, 22 June 2001; R v. Matthewson [2001] QCA 4, CA No 226 of 2000, 30 January 2001; R v. Keating [2002] QCA 19, CA No 251 of 2001, 6 February 2002; R v. Haluzan [2002] QCA 94, CA No 339 of 2001, 15 March 2002 and R v. Tilley, Ex Parte Attorney-General [2002] QCA 144, CA No 27 of 2002, 19 April 2002.

Some of these cases involved loaded firearms, in which, in one instance, the gun was discharged, actually wounding the victim. On the other hand, the applicant here committed a very large number of armed robberies, including eight bank robberies. The cases demonstrate, however, that the applicable sentence before any discount for mitigating factors whatsoever was about 15 years' imprisonment and that the appropriate range, when taking into account the mitigating factors especially the early plea and the applicant's very significant cooperation with the authorities, was a sentence of 11 years: see R v. Gladkowski (2000) 115 A Crim R 446.

The sentence imposed here did not sufficiently give adequate recognition to that cooperation here and is therefore

manifestly excessive. I would grant the application, allow the appeal and instead of the sentence of 13 years imposed on counts 10 and 14, substitute a sentence of 11 years' imprisonment.

Those offences are declared to be serious violent offences. I would not otherwise interfere with the sentence imposed at first instance.

It will be necessary to close the Court and deal with a brief matter.

McPHERSON JA: Yes, I agree with what has been said by the presiding Judge.

DAVIES JA: I also agree.

THE PRESIDENT: Those are the orders of the Court.
