

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Trott* [2003] QCA 15

PARTIES: **R**  
**v**  
**TROTT, Wayne Anthony**  
(applicant)

FILE NO/S: CA No 301 of 2002  
DC No 2370 of 2002  
DC No 2371 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 3 February 2003

DELIVERED AT: Brisbane

HEARING DATE: 3 February 2003

JUDGE: McPherson JA, Jerrard JA and Mullins J  
Separate reasons for judgement of each member of the Court;  
each concurring as to the order made

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

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AGAINST SENTENCE - where applicant sentenced for thirteen offences on first date and an additional five offences at a later date - where sentencing on later date proceeded on the basis that the Court should determine what would have been the additional period of imprisonment if the additional offences had been dealt with on the earlier date - where sentence imposed extended applicant's earliest release date and full time release date by six months - where applicant sought leave to appeal on the grounds that sentence imposed was manifestly excessive - where trial judge's sentencing discretion not shown to have been wrongly exercised

*Penalties and Sentences Act 1992 (Qld), s 13A*

COUNSEL: R S Munt, with leave, for the applicant  
R G Martin for the respondent

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

McPHERSON JA: Justice Mullins will deliver her reasons first.

MULLINS J: The applicant applies for leave to appeal against the sentence imposed on him on 30 August 2002 after pleading guilty to one count of enter dwelling and steal and four counts of unlawful use of a motor vehicle. The offences were committed in July and August 2001.

The applicant was born on 17 October 1969 and was, therefore, 31 years old at the time of offending. He has an extensive criminal history which is explained by long term heroin addiction which he is endeavouring to address.

By the time the applicant was apprehended for these offences in mid-November 2001, he was due to be dealt with on 23 November 2001 for a series of dishonesty offences committed over the period between 24 May and 12 August 2001.

A total of 13 offences were dealt with on 23 November 2001 before his Honour, Judge Botting, and the effective sentence imposed was imprisonment for 21 months. The sentencing, therefore, proceeded on 30 August 2002 on the basis that the Court should determine what would have been the additional period of imprisonment imposed if the five outstanding offences had also been dealt with on 23 November 2001. These outstanding offences involved loss of property valued at \$19,407. The offences dealt with on 23 November 2001 had involved approximately \$26,000 in property loss.

One complication with the sentencing on 23 November 2001 was that it proceeded on the basis of the application of section 13A of the Penalties and Sentences Act 1992.

The full-time release date in respect of the sentence which had been imposed by his Honour, Judge Botting, was calculated to be 22 August 2003 and the conditional release date was calculated to be 22 January 2003.

On 30 August 2002, the learned sentencing Judge imposed a sentence of 18 months imprisonment for the five additional offences. The learned sentencing Judge recommended that the applicant be eligible for post-prison community based release after 22 July 2003, which has the effect of extending the applicant's earliest possible release date from 22 January 2003 to 22 July 2003, which is a further period of six months in actual custody.

This accorded with the Prosecutor's submission that a further sentence of six months in actual custody would have been imposed if all offences had been dealt with in November 2001. The learned sentencing Judge observed that the Prosecutor's submissions were at the bottom end of the range for what might be thought acceptable for the additional five offences.

The grounds on which the appellant relies to apply for leave to appeal against the sentence is that it is manifestly excessive. The approach taken by the learned sentencing Judge on 30 August 2002 properly reflected the totality principle.

Before the learned sentencing Judge, counsel for the applicant had agreed with the head sentence of 18 months that was proposed by the Prosecutor but had argued for it to be suspended after six months, which would have had the effect of only allowing a further one month in actual custody if the conditional release date of 22 January 2003, in respect of the sentence imposed on 23 November 2001, had been observed, but would have left the applicant with a further 12 months to serve if he offended again during the operational period of the suspended sentence.

The learned sentencing Judge considered the option of suspending part of the term of imprisonment as requested by the applicant's counsel, but rejected that option for reasons which are set out in the sentencing remarks and are unexceptional, having regard to the applicant's extensive criminal history and the perceived likelihood, on the basis of that history, that he would re-offend during the operational period of any suspended term of imprisonment.

The applicant's fear that the authorities may not observe the recommendation for post-prison community based release is not a basis for challenging the decision of the learned sentencing Judge not to suspend part of the term of imprisonment imposed on 30 August 2002 for the five additional offences. The sentence imposed for those five additional offences could not, in all the circumstances, be characterised as outside the appropriate range.

I therefore consider that the application for leave to appeal against the sentence imposed on 30 August 2002 should be refused.

McPHERSON JA: I agree.

JERRARD JA: I agree with the observations of her Honour. The critical issue is whether or not the learned sentencing Judge fell into error in choosing to make an order which provided for the possibility for release of the applicant on post-prison community based release, rather than for the suspension of portion of his sentence.

That was always a discretionary decision for the Judge and it has not been shown that his Honour actually took any matters into consideration which he ought not to have considered, or failed to consider any relevant matters. As her Honour, Justice Mullins, has observed, the Judge explained why he considered that a partly suspended sentence might, in fact, be harder upon this applicant than a sentence which required that he satisfy a Community Corrections board that it was appropriate to release him on parole.

The discretionary decision that the Community Corrections board will make in this matter, as to whether to release the applicant in July 2003 will be a matter for that board. It does not make the sentence manifestly excessive to recognise that the applicant, who has two convictions for escape and one for attempted escape, will have great difficulty in achieving

the low or open security classification usually required before a person is released on post-prison community based release.

It remains a matter of discretion for that board and the learned Judge's sentencing discretion is not shown to have been wrongly exercised.

Accordingly, I agree, in the end, with the result of the appeal.

McPHERSON JA: The order of the Court is that the application for leave to appeal against sentence is dismissed.

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