SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gerrard* [2003] QCA 69
PARTIES:	**R** **v** **GERRARD, Phillip Arthur** (applicant)
FILE NO/S:	CA No 427 of 2002 SC No 48 of 2001 SC No 626 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	21 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2003
JUDGES:	McPherson and Davies JJA, and Philippides 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 - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT – whether unjust to order the suspended sentence be served where it was breached two weeks after imposition
COUNSEL:	The applicant appeared on his own behalf D L Meredith for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: This is an application for leave to appeal against a sentence imposed in the Supreme Court on 11 November 2002. The history of the matter is that on 30 January 2001 the applicant pleaded guilty to one count of supplying a dangerous drug on 28 May 1999 and another count of being in possession of tainted property on the same day.

What happened was, that in the course of a drug search in relation to another matter, the police took possession of a mobile telephone. While it was in their custody the telephone rang and a police officer answered it. He took the name and address of the caller, who was the applicant, and arranged to return his call. On calling back, arrangements were made for the applicant to supply a quantity of amphetamines. The applicant was arrested en route to getting the drugs and $1,165 was found in his possession.

On 30 January 2001, he was sentenced on the first count to nine months' imprisonment wholly suspended for 18 months and on the second count to three months' imprisonment wholly suspended for six months, those sentences being concurrent.

Despite the opportunity to avoid imprisonment which the sentence provided him with, the applicant breached the condition of suspension very soon afterwards. On 10 February 2001, which was less than a fortnight after the sentencing in the Supreme Court, he drove a motor vehicle while under the influence of liquor, his blood alcohol level being .14. He was fined $700 and disqualified from driving for six months.

On 31 March 2001, he again drove while under the influence, the blood alcohol level on that occasion being .08, and this time was fined $600 and disqualified for 12 months.

Then on 10 October 2001, he drove while disqualified from the previous occasions. He was fined $1,000 and disqualified absolutely.

Each of these convictions was recorded. Breach proceedings were taken under s.147 of the Act and on 11 November 2002 he was brought back before the Supreme Court Judge who had originally sentenced him in January of the previous year.

Under s.147(1) of the Penalties and Sentences Act the Court in such circumstances has the alternative either (a) of extending the operational period or (b) of ordering the offender to serve the whole of the suspended imprisonment or (c) of ordering the offender to serve such part of the imprisonment as the Court orders. Section 147(2) provides that the Court must make an order of the second kind unless it is of opinion that it would be unjust to do so in view of all the circumstances that have arisen since the suspended imprisonment was imposed.

In the particular circumstances of this case, her Honour saw no reason why it would be unjust not to follow the course envisaged by s.147(b), that is to say the second of these alternatives.

The applicant's complaint before us essentially is now that the effect of removing the suspension is to make his offence disproportionate to that of one of his co-offenders who was sentenced it may be for a more serious offence as well as for

this one. However that may be, the fact of the matter is that the suspension in his co-offender's case has, as far as we know, not been the subject of breach proceedings like these.

The provisions of s.147(2) of the Act make it clear that what must be looked at now is the circumstances that have arisen since the suspended imprisonment was imposed. Nothing apart from the removal of the suspension has occurred that would lead us to think that it would be unjust now that the applicant serve his sentence.

He had already breached the suspended sentence before proceedings were taken again in the Supreme Court, and he had, if it comes to that, originally been treated leniently by having the sentence wholly suspended.

He was 44 years old at the time of the original sentencing in the Supreme Court but he has a record of convictions going back to 1973 when he was dealt with in the Geelong Children's Court in Victoria for offences including breaking into a storeroom and stealing, larceny of a motor vehicle (four counts) speeding, wilful damage and so on. In 1975 he was dealt with for making a false report to police; in 1976 in the Geelong Magistrates Court for burglary, two counts of theft of a motor car and driving while intoxicated; and in the Geelong County Court for robbery in company (five counts).

In 1977 he breached his probation. In 1979 he was dealt with in the Geelong County Court again for attempted robbery. In

1981 he was convicted of offensive behaviour and driving under the influence, refusing a breathalyser test and driving without a licence.

In 1983 he went armed with an offensive weapon (twice) and was convicted of theft once, breached his parole and again drove while intoxicated. In 1984 he was dealt with in the Magistrates Court for theft and for being armed with an offensive weapon. He failed to appear in 1985 in the Magistrates Court on a charge of possession of a drug of dependence and drove whilst disqualified and failed to stop at a stop sign.

He drove without a licence in 1989. In 1990 he was convicted of two counts of assault occasioning bodily harm in Murwillumbah and he drove while disqualified in 1993. In 1985 and 1987 he was convicted of driving under the influence on two occasions, driving while unlicensed on three occasions, and cultivating a prohibited plant. These offences occurred in Bundaberg, Caboolture and Southport.

Then his record shows that he had no convictions between 1993 and 1999, which was a matter that was taken into account in his favour in the original sentencing. So far as his work record is concerned, he was listed as unemployed, but there is some mention of his running a farm in Gatton.

All matters considered, even if the original sentence was open for us to reconsider on this occasion, I would be indisposed

to revisit the sentence on this occasion. It is, however, not that sentence with which we are here concerned, but with the circumstances that followed its imposition.

In my opinion, the Judge did not err in ordering the offender to serve the whole of the suspended period of the imprisonment that she had imposed on the original occasion; indeed, no evidence has been put before us which would demonstrate that it was unjust to make such an order in view of the circumstances that have arisen since the suspended sentence of imprisonment was imposed. I would therefore dismiss the application for leave to appeal.

DAVIES JA: I agree.

PHILIPPIDES J: I agree.

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