SUPREME COURT OF QUEENSLAND

CITATION:	*R v Casey* [2003] QCA 152
PARTIES:	**R** **v** **CASEY, Joel Peter** (applicant)
FILE NO/S:	CA No 34 of 2003 DC No 482 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EXTEMPORE ON:	3 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2003
JUDGES:	McPherson JA and Fryberg and Muir JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Application dismissed** **A warrant issue for the arrest of the applicant**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – where applicant convicted on own plea of two counts of armed robbery in company – where sentenced on each count to 3 years' imprisonment to be suspended after serving 4 months with an operational period of 3 years and sentences to be served concurrently – where the applicant seeks leave to appeal against the sentences – whether the sentences imposed were manifestly excessive *Penalties & Sentences Act* 1992 (Qld), s 9 *R v Del Arco* [1994] QCA 70; CA No 289 of 1993, 25 March 1994, considered *R v Cross* CA No 90 of 1991, considered *R v Groves* [1995] QCA 248, CA No 113 of 1995, 27 April 1995, considered *R v Hanrahan, Schneider & Taylor* [1992] QCA 477; CA 309 of 1992, 1 December 1992, considered *R v Melano, ex parte Attorney-General of Queensland* [1995] 2 Qd R 186, considered *R v Moss* [1999] QCA 426; CA No 270 of 1999, 8 October 1999, considered *R v Taylor & Napatali; ex parte A-G (Qld)* [1999] QCA 323; CA 157 and 158 of 1999, 20 August 1999, considered

COUNSEL:	A W Moynihan for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

MUIR J: The applicant was convicted in the District Court on 10 October 2002 on his own plea of two counts of armed robbery in company. He was sentenced on each count to three years' imprisonment suspended after four months with an operational period of three years.

The sentences were ordered to be served concurrently. The applicant seeks leave to appeal against the sentences on the grounds that they were manifestly excessive.

The applicant's mother, a co-accused, was also convicted on her own plea and sentenced on 10 October. Sentences of three years to be served concurrently were also imposed on her but in her case the sentences are to be suspended after six months. She was also given concurrent sentences for fraud and stealing. Two other co-offenders, Maudsley and Burns, participated in the offences and were sentenced in the District Court in Townsville on 8 November 2002.

Maudsley, who was 17 years of age at the time of the offences, was sentenced to three years' imprisonment suspended after six months with an operational period of three years. Burns, aged 18 years at the time of the offences, was sentenced to two years and nine months suspended after four months with an

operational period of three years. Because the other three co-accused were sentenced for the same offences as the applicant it is necessary, in determining whether the sentences imposed on the applicant were manifestly excessive, to have regard to the extent of the co-offenders participation in and responsibility for relevant events.

At the time of the offences the applicant was living in a house with his mother who was then aged 43. Maudsley and Burns were destitute and had come to live with the applicant and his mother some time prior to the date of the offences. The applicant's mother obtained a degree of education in 1991 and a Bachelor of Community Welfare in 1994. At one stage, she was a tutor at the James Cook University and has generally been employed as a teacher in one capacity or another.

She developed a depressive disorder in about 1997 and has been a long term recipient of psychiatric care. The applicant is her only son. He was educated to year 12 and since leaving school has been employed as a meat worker, supermarket employee, painter and in doing home handy man work. He is said to have been an active sportsman and to have represented the Townsville and Burdekin districts in either or both of soccer and basketball.

He had no criminal history prior to the dates of the subject offences. After the offences, but before his arrest, he was convicted of three minor offences. One of those offences, however, was an offence occasioning bodily harm for which he

was bound over to be of good behaviour for six months on a recognisance of $150. No conviction was recorded.

The applicant's mother's criminal history commenced in November 1994 when she was convicted of a breach of the peace and of using insulting language. In 1999 she was convicted of misappropriating property and some other minor offences of no particular relevance for present purposes. In December 2002 she was convicted of unauthorised dealing in shop goods (on 25 November 2000) and of assaulting a police officer (on 4 January 2002).

Burns had a conviction for possessing dangerous drugs. The date of the offence was 18 October 2001 and he was fined $200. Maudsley had no previous convictions of any relevance.

On 24 September 2001, the date of the first offence, the four co-accused lacked money to buy groceries. Maudsley and Burns decided to remedy the situation by robbing a nearby convenience store. They mentioned the proposal to the applicant and his mother who both embraced the idea. The applicant made two balaclavas out of a beanie for use by Maudsley and Burns in their operation.

The applicant's mother conducted a reconnaissance of the store and returned with some advice about the proposed robbery. Maudsley and Burns observed by the applicant and his mother went into the kitchen, took two knives and departed.

At about 9.30 in the evening, masked and armed with the knives, they burst into the convenience store, demanded money from a married couple operating the store and fled after being given about $600 or $700. On return to the dwelling house they gave most of the proceeds of the money to the applicant's mother who with the assistance of the others spent most, if not all of it, on groceries and other household items.

On the evening of 5 October 2001, household finances having become depleted once more, the applicant's mother, in the presence of the other three, suggested robbing a nearby service station. The applicant and his mother both actively encouraged Maudsley and Burns to carry out the robbery and overcame Maudsley's initial reluctance to repeat his previous performance.

The applicant gave further assistance by retrieving the balaclavas and a knife which had been hidden since the first robbery. The applicant's mother once more carried out a reconnaissance. She reported back with her findings and the four co-accused then drove to the vicinity of the service station where the applicant, his mother and Burns waited whilst Maudsley, masked and armed with a knife, ran into the service station and demanded money from the console operator.

He was given $300 or $350 and made his own way back to the house. The other three drove back. The applicant's mother was given the proceeds of the robbery presumably for use on household expenditure on behalf of the four co-accused. On

her advice the balaclavas and clothing used in the robberies were disposed of.

The prosecution case, at first instance, was that after arrival at the service station Maudsley returned without carrying out the robbery and was told by the applicant, "Don't back out now." The applicant's counsel's version of the incident was that the applicant said words to that effect when Maudsley appeared to be hesitating but that they were not said in Maudsley's presence or hearing.

The sentencing remarks make no mention of this factual difference and it is to be assumed that the sentencing Judge accepted the defendant's version. As Mr Copley, who appears for the Crown, points out, however, the conduct of the applicant is not irrelevant even on his version of events.

On behalf of the applicant, Mr Moynihan argued that the sentencing discretion had miscarried because:

(a) Insufficient weight had been given to the applicant's age, limited criminal history and to the fact that he was not a principal offender.

(b) The sentence should have been significantly less than that imposed on his mother who was a mature woman with a more substantial criminal background. His sentence should also have been less than that of the principal offenders.

In submissions, he placed particular reliance on Queen v Taylor and Napatali, Court of Appeal 157 and 158 of 1999. That decision is useful for the applicant in that it makes plain that it is within the range of a valid sentencing discretion for a youthful first offender not to be sentenced to a term of actual imprisonment for the offence of armed robbery in company with violence.

The robbery in that case was carried out at a service station by the appellants who were armed with a replica pistol and a rifle which was probably lacking a firing pin. One of the appellants placed the muzzle of the rifle against the back of a customer's head. That appellant was aged 20, whilst the other offender who carried the replica pistol was aged 17. The sentence imposed on each of the appellants, who pleaded guilty on an ex officio indictment, was 12 months' imprisonment to be served by way of an intensive correction order.

The reasons for judgment of McPherson JA contained a useful exposition of the principles which guide appellate Courts on appeals against sentence as well as an exploration of the treatment of youthful first offenders in robbery cases in recent years. His Honour's judgment draws attention to the fact that some of the sentences considered in R v del Arco, Court of Appeal 289 of 1993 were in respect of offences which predated the repeal of section 9, subsection 4 of the Penalties and Sentences Act 1992 in 1997.

In del Arco it had been stated that 15 out of 28 sentences imposed on 17 year old youths for armed robbery or armed robbery in company were non custodial. In Taylor v Napatali his Honour and the other members of the Court refused to accept the proposition advanced on behalf of the Attorney-General that the consequences of the repeal was that the Courts are now required, except in great exceptional circumstances to impose substantial terms of imprisonment on even youthful first offenders for a single offence of armed robbery in company with violence.

Taylor v Napatali was an Attorney's appeal. It was thus subject to the principles discussed in the judgment of the Court in R v Milano ex parte Attorney-General (1995) 2 QdR 186 at 189, 190. The guiding principle, of course, is that the sentence appealed against cannot be interfered with unless the primary Judge has made some identifiable error in exercising the sentencing discretion.

I am not satisfied that any such error has been identified. Reference to R v Moss, CA No 270 of 1999, R v Groves, CA No 113 of 1995, R v Cross, CA No 90 of 1991 and R v Hanrahan, Schneider and Taylor, CA Nos 298, 299 and 309 of 1992 support a sentence, at least as high as that imposed.

Mr Moynihan recognising this difficulty concentrated on what he submitted was a lack of parity between his client's sentence and that imposed on his co-offenders, two of whom were principal offenders. It is true that the applicant did

not enter the subject premises with a weapon in the case of either robbery but his role in both was an active one which went well beyond that of a driver or co-driver of a getaway car.

In the case of the first robbery, as well as offering verbal encouragement and being present in the getaway vehicle, he fashioned the disguises used in carrying out the robbery. He was aware that Maudsley and Burns had knives. In the second robbery he retrieved a disguise and knife for Maudsley to use. Also both robberies involved a degree of planning and premeditation.

Both Maudsley and Burns pleaded guilty on an ex officio indictment and received particular consideration by virtue of section 13A of the Penalties and Sentences Act. Although the applicant pleaded guilty he did not do so until the morning of the trial. These two matters suggest that the applicant was not unfairly treated by being given a sentence similar to that imposed on the principal offenders.

As for the parity or lack thereof between the sentence imposed on the applicant and that imposed on his mother it would normally be expected that she would be dealt with more severely having regard to her age, the familial relationship and likely position of influence over her son.

Her role in both robberies was greater than that of the applicant and she had a criminal history which, although not

extensive, exceeded that of the applicant. It would seem that in determining her sentence the primary Judge took into account her psychiatric difficulties as he was entitled to do.

He was also informed by the prosecution that she was prepared to give evidence the following day for the prosecution at the trial of the person involved in the fraud case. In any event, it seems to me that the sentence imposed on her was most likely a lenient one. For these reasons I would dismiss the application.

McPHERSON JA: I agree.

FRYBERG J: I agree.

McPHERSON JA: A warrant will issue for the arrest of the applicant which unless otherwise ordered is to lie in the Registry for seven days. Is that satisfactory to you or do you not want the seven day-----

MR COPLEY: In my submission, there is no necessity for that part of the order today because the condition - one of the conditions upon which he was granted bail was that on the day of the hearing of the appeal he should present himself to the Mundingburra police station at 9.00 a.m. and wait there until the resolution of the appeal.

McPHERSON JA: I see. WE do not know if he has done that or not?

MR COPLEY: I do not know but presumably he would comply with his conditions.

McPHERSON JA: Well, what do you say?

MR MOYNIHAN: It need not lie in those circumstances, your Honour.

McPHERSON JA: Yes. I gather there has been some difficulty getting in touch with him? At least, I am talking about the Registry's attempts to do so. Very well.

A warrant will issue for the arrest of the applicant.

The application is dismissed. That is the order of the Court.
