SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collins* [2003] QCA 154
PARTIES:	**R** **v** **COLLINS, Terry Allan James** (applicant)
FILE NO/S:	CA No 23 of 2003 DC No 424 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	9 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2003
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal allowed** **2. Appeal allowed** **3. Set aside sentences imposed and order that convictions be recorded on both counts and that the applicant be ordered to perform 120 hours of community service in respect of the first conviction, and in respect of the second matter, order that the applicant be released on probation for three years with a condition in that probation order requiring that the applicant make payment of $1000.00 to the Registrar of the District Court at Townsville on behalf of the complainant Sue Ann Simpson as restitution, such restitution to be paid in such time and in such amounts as directed by an authorised Corrective Services Officer to the applicant, and in any event in full by three months from the date of this amended order**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant sentenced to six months imprisonment at age eighteen – where applicant's criminal history minimal – where applicant had expressed a willingness to make restitution if so ordered – where learned trial judge did not specifically take this willingness into account when sentencing – whether sentence manifestly excessive

R v Barling [1999] QCA 16; CA No 304 of 1998, 5 February 1999, considered
R v Cramond [1999] QCA 11; CA No 411 of 1998, 4 February 1999, considered
R v Henderson [1993] QCA 336; CA No 198 of 1993, 16 August 1993, distinguished
R v Sharkey [1994] QCA 121; CA No 28 of 1994, 29 March 1994 distinguished
R v Weyers [2001] QCA 311; CA No 52 of 2001, 2 August 2001, distinguished

COUNSEL: B G Devereaux for the applicant
M J Copley for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

JERRARD JA: On the 17th of April 2002 at about 5 a.m. in the morning, the applicant Terry Collins and another man Travis Knouth unlawfully took Sue Simpson's Ford Falcon motor car from outside her residence at 13 Cope Street, Mt Louisa in Townsville, and drove it into some bushland near the Mt Low parkway. They bogged it and set fire to it, intending thereby to destroy any possible fingerprints or other forensic link between themselves and that car. The two offenders had been celebrating Terry Collins' 18th birthday which happened five days earlier and had no money left for a taxi and they wished to get home to Bushland Beach. Some workmen working in that bushland off the Mt Low parkway saw Ms Simpson's car being driven by; and one recognised Mr Collins as the driver. Both witnesses followed the vehicle on foot and found it bogged and burning. Mr Collins and Mr Knouth were seen decamping from the scene. Mr Collins was located on 30 April 2002, questioned and arrested and charged with both the arson and the unlawful use of Ms Simpson's motor car.

On 4th February 2003, he was sentenced on his plea of guilty to six months imprisonment on each count, with an order that thereafter he be on probation for three years. He has applied for leave to appeal those sentences, arguing that they are manifestly excessive. As at the date of his sentence, Mr Knouth had not been dealt with. The latter person was on remand in custody in respect of other offences involving both violence and dishonesty, and already had an extensive criminal history.

Mr Collins' plea of guilty was to an ex officio indictment, and the Crown Prosecutor described the applicant as having been very cooperative with the police when interviewed, and as having provided a written statement implicating both himself and Mr Knouth. The prosecution expected to call Mr Collins as a witness in that matter against Mr Knouth if it went to trial. The Court was told that Mr Collins had had no further contact with his co-offender since the events of 17th April 2002.

The complainant Ms Simpson was described as being out of pocket to the extent of $1,000 by reason of the loss of her car which was described by the Crown as being burnt out. It does not appear that the applicant had taken any steps to recompense her for that loss prior to the date of his being sentenced. As against that, he was described as a young man with an excellent work history who had remained in employment since leaving school in 1998. He had been most recently employed since July 2002 by Tip Top Bakery, and his counsel's

instructions were that Mr Collins could comfortably make repayment of $100 per month as restitution and I quote, "if the Court is so minded". Mr Collins was actually released on bail on the day of his sentence and is now in a position to make complete restitution within a short period.

The learned sentencing Judge referred inter alia to the remarks of this Court in the matter of R v Cramond, CA number 411 of 1998. As the Judge remarked, this Court indicated in that case that a head sentence of up to three years may be imposed in cases of arson of a motor vehicle. That was the sentence imposed by this Court in a successful appeal by the applicant Cramond following a trial in which Mr Cramond was convicted of the unlawful use and arson of a motor vehicle which had been leased by his ex-partner. Following their acrimonious separation, Mr Cramond had set fire to that uninsured motor car doing $16,000 worth of damage to it. No compensation had been provided by the time of the sentence which was at least five years later (this was because it took four years before the investigating police became aware that Mr Cramond had admitted taking and burning his ex-partner's car). Mr Cramond had no prior convictions. The judgment of Justice Mackenzie which is relevantly the judgment of the Court records and I quote:

> "Support can be found in the authorities for the view that where there is no suggestion of fraud and where the safety of others is not consideration, a head sentence of up to three years may appropriately be imposed as for example in Henderson, CA No. 198 of 1993 and in Sharkey, CA No. 28 of 1994."

In Cramond, this Court actually reduced the sentence of four

years imprisonment originally imposed and imposed the three years imprisonment I have described.

A similar sentence of three years imprisonment was upheld by this Court in the matter of Weyers, CA No 52 of 2001, when hearing an application by Mr Weyers following his conviction, after a trial, for the arson of a bus. That bus had been the complainant person's home. Mr Weyers set fire to it following an argument. The bus was destroyed. The judgment of this Court records that there was no suggestion that Mr Weyers had any capacity, or even willingness to recompense the complainant for the loss of his home.

Mr Weyers had a record of convictions for criminal offences from 1985 onwards, which convictions had twice resulted in sentences of imprisonment for six months. The judgment of Davies JA, relevantly the judgment of the Court, rejected the submission made on Mr Weyer's behalf that three years imprisonment was the appropriate sentence where the matter before the Court involved one or more of any of the following, namely:

- features of premeditation; or
- the possibility of persons being in occupation of a dwelling; or
- the destruction of property of substantial monetary value; or
- an intention to defraud an insurer or other party; or

- damage or destruction of a police station or other public building.

As I have said, Davies JA rejected that submission, pointing to the sentence of three years imprisonment imposed by this Court in a matter of Barling, CA No 304 of 1998. In that matter, that offender was only 22 years of age, with a minor criminal history, who had burnt a caravan valued at about $10,000 in an apparently impetuous offence, and who had demonstrated substantial remorse to the extent of attempting suicide. Mr Barling had also sought medical and psychological help for his emotional problems. There was a recommendation in that case that he be considered for release on parole after serving 12 months of his sentence.

Those three decisions of this Court justified the statement of the learned sentencing Judge quoted earlier. The decision in Cramond had the effect of making little relevant distinction between sentences for the arson of a motor vehicle and the arson of a house. The cases of Henderson and Sharkey, both cited by Justice Mackenzie in his reasoning in Cramond, were cases where the relevant offender had set fire to a house, for the purpose of revenging himself against his spouse. Each man had pleaded guilty and in Sharkey an appeal against a sentence of three years imprisonment with parole recommended after nine months was dismissed. In Henderson, the sentence of four years imprisonment with parole recommended after serving 12 months was altered by this Court to a sentence of three years imprisonment with parole recommended after nine months. The

effect of the judgments in Henderson, Sharkey, Cramond, Weyers and Barling is to establish a degree of consistency in head sentences for arson, but does not involve potential fraud or possible injury to others.

In those circumstances, a head sentence of up to three years following a trial could have been justified in this case. However, the critical matters here are those going to mitigation. These include the applicant's youth in that he was only 18 at the time he was sentenced. There was also the fact that he committed these offences in the company of a co-offender who had a history of much more significant past offending behaviour, and that it was that co-offender who actually set fire to the vehicle.

The learned sentencing Judge did not specifically refer to those last two matters; nor that it was the co-accused who actually got into the car with a coat hanger. Had any significant restitution been made prior to the applicant's sentence, a sentence of imprisonment completely suspended may have been appropriate. I note that the applicant has only one finding of guilt in respect of a prior criminal offence as an adult, that being for possessing dangerous drugs on the 28th of August 2001. On that occasion, no conviction was recorded.

What troubles me about the sentence which includes a sentence of six months imprisonment is that Mr Collins was only 18 years old when sentenced and appears to have been led into this offence. And further that his counsel had described to

the Court a capacity and willingness by Mr Collins to make restitution to the complainant if so ordered by the Court. That last matter was also not specifically taken into consideration by the learned Judge. The applicant has not lost his employment because he was released on bail as described, and because of this he is in a position now to make restitution.

Because of his youth, a feature of which is not present in any of the cases I have described and his willingness to make restitution, also not described in any of the cases to which I have referred, I consider that it follows that whilst a custodial sentence was certainly within the range as a general proposition, it was appropriate in the circumstances of this case and this applicant to impose a non-custodial sentence by reason of the matters the learned Judge did not make particular reference to.

In the circumstances, I would order the sentences imposed be set aside and order instead that convictions be recorded on both counts, and that the applicant be ordered to perform 120 hours of community service in respect of the first conviction, namely for unlawful use of the complainant's vehicle. And in respect of the second matter, that he be released on probation for three years with a condition in that probation order requiring that he make payment of $1,000 to the Registrar of the District Court of Townsville on behalf of the complainant Sue Ann Simpson as restitution, such restitution to be paid in such time and in such amounts as directed by an authorised

corrective services officer to the applicant; and in any event in full by three months from the date of this amended order. I understand that the applicant consents to an order in those terms.

WILLIAMS JA: Yes. I agree

MUIR J: I agree.

WILLIAMS JA: The order of the Court will be leave to appeal granted. The appeal is allowed. The sentence below is set aside and in lieu thereof there will be sentences as indicated by Justice Jerrard in his reasons.
