SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2003] QCA 254
PARTIES:	**R** **v** **M**
FILE NO/S:	CA No 64 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Mount Isa
DELIVERED ON:	20 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2003
JUDGES:	Jerrard JA, White and Wilson JJ Separate reasons for judgment for each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant's offending behaviour shows complete disregard for the law – where continuous pattern of offending whilst released on bail – where applicant's youth only matter in his favour – where applicant sentenced to two years imprisonment to reflect overall criminality of his behaviour – whether sentence manifestly excessive CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – JUVENILE OFFENDERS – RELEVANT PRINCIPLES – where sentencing guidelines encourage punishment by means other than imprisonment – where parole only available if sentence in excess of two years – where probation not available if term of imprisonment less than one year – where sentence of one year would fail to reflect extent of applicant's offending – whether punishment, general deterrence and protection of community outweigh considerations of rehabilitation *Corrective Services Act* 2000 (Qld), s 134

Juvenile Justice Act 1992 (Qld), s 109
Penalties and Sentences Act 1992 (Qld), s 9, s 13, s 92(1)(b)

R v Juric [2003] QCA 132; CA No 431 of 2002, 25 March 2003, considered
R v Laskus [1996] QCA 120; CA No 56 of 1996, 24 April 1996, considered
R v Nagy [2003] QCA 175; CA No 24 of 2003, 2 May 2003, referred to
R v Reuben [2001] QCA 322; CA No 99 of 2001, 7 August 2001, considered
R v White [1992] QCA 419; CA No 244 of 1992, 19 October 1992, considered
Sweet v Armstrong [1995] QCA 406; CA No 151 of 1995, 1 September 1995, considered

COUNSEL: K M McGinness for the applicant
D A Holliday for the respondent

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

[1] **JERRARD JA:** On 13 February 2003 the applicant M pleaded guilty in the District Court in Mount Isa to two counts of burglary, two of stealing, one each of wilful destruction, unlawful use of a motor vehicle, and house breaking; and two counts of commission of a serious assault on a police officer. He had committed the first burglary offence when he was subject to an immediate release order and all of the remaining offences were committed on bail. His conduct throughout the 10 month period in which those offences were committed showed a continuous pattern of being taken into custody, being released on bail, and then re-offending. The exception was the offence of wilful destruction, which occurred whilst he was in custody. He was sentenced on 13 February 2003 to an effective term of two years imprisonment and applies for leave to appeal, arguing that sentence was manifestly excessive.

[2] The only matter of significance in favour of his application is his youth. He was born on 5 November 1985, and committed some of the offences for which he was sentenced on 13 February 2003 while still a child. He had a quite significant record of appearances in the Mount Isa, Brisbane and Cairns Childrens Court by the time he turned 17 (on 5 November 2002), with frequent findings of guilt for committing offences of entering the dwellings of others and stealing from them. He had also committed wilful damage to the property of others, and at least once had received property stolen from another.

[3] The most recent order relevant to the matters now under consideration was a sentence imposed on 4 March 2002, in the Mount Isa Childrens Court (where most of his appearances occurred) for wilful destruction of property. He was sentenced to two months detention, to be served by way of an immediate release order. On 26 March 2002 and while undergoing that order he committed the first offence for which he was sentenced in the Mount Isa District Court, namely burglary of the dwelling of a John Parsons, from whose home alcohol, jewellery, electrical

equipment, keys, a diabetes testing kit, clothing, and other property was stolen. The applicant was arrested on those matters and released on bail, apparently on 6 April 2002.

[4] He then committed the offence of burglary of the dwelling house of a Dianne Ivers on 14 April 2002, and the offence of stealing from her jewellery, alcohol, soft drink, electrical equipment, compact discs, some household items, and a sum of money. It appears he was arrested for those offences on 8 May 2002, and remained in custody until released on bail on 24 July 2002. While still in custody the day before, he had committed the offence of wilful destruction when he smashed an armoured plate glass window with a rock.

[5] Soon after being released he committed the offence of house breaking, committed on 3 August 2002, for which he was arrested on 5 August 2002. He was again released on bail on 6 August 2002.

[6] With the exception of the offence of wilful destruction which had been committed at Townsville, the offences described so far were all committed in Mount Isa. The applicant next offended in Ayr on 22 October 2002, when he entered a dwelling house with intent to commit an indictable offence, for which matter he was dealt with in the Ayr Magistrates Court on 24 October 2002. He was placed on 12 months probation. While now on probation and while still on bail for the offences of burglary, stealing, wilful damage, and house breaking already described, he committed the offences of unlawfully using a motor vehicle and stealing on 5 January 2003, at Townsville. He was then an adult. Those offences arose out of his being a passenger in a stolen motor vehicle and stealing property in it. Released on bail on 8 January 2003, he committed the two offences of serious assault on 19 January 2003 when he spat in the face of a police officer at the Mount Isa Watchhouse. He told the police officer that officer would get Hepatitis A and B. He has subsequently informed police officers that he is not a carrier of either of those infectious conditions, and offered to submit to tests to prove this.

[7] The learned sentencing judge sentenced him to 12 months detention for the offences of burglary and house breaking committed as a child, and six months detention for the stealing and wilful damage offences, likewise committed as a child. He was sentenced to two years imprisonment for the unlawful use of a motor vehicle and offences of serious assault all committed as an adult, and 12 months imprisonment for the offence of stealing committed as an adult. The sentencing remarks of the learned judge record that the applicant, after being granted bail on 6 August 2002 had subsequently had his bail revoked, but again been admitted to bail on 11 November 2002. The sentencing remarks also record the applicant's words when committing one of the offences of serious assault, namely:

> "Fuck you, you will get Hep A and Hep B. Your life is fucked and I don't care. I will only go away for two months for this but you will be fucked for life, fuck you."

[8] The learned judge remarked that the applicant's conduct in and about his assaulting that officer had been aggressive, reflected very seriously on the applicant's attitude to police officers who were carrying out their duty, and that those offences of serious assault were part of a larger number committed while the applicant was on bail, and which fact showed his complete disregard for the law. The judge described the applicant as a repeat offender.

[9] Those observations are all accurate. However, the learned judge had had the assistance of a pre-sentence report which described the major factor that appeared to contribute to the applicant's offending behaviour as being his inability to provide appropriate boundaries for himself while in the company of his peers. A number of the offences of burglary and house breaking had been committed with others. The applicant's behaviour generally had deteriorated since the death in 1997 of a loved foster father, and after the applicant had been placed in contact with his natural family, in which his older brother and cousins were all "involved in the criminal justice system". His foster mother had endeavoured to move him away from Mount Isa and from the influence of his peer group, and his behaviour had improved in that period. He was assessed as needing a continuous positive male role model, and as demonstrating a capacity to like and form relationships with male departmental youth workers. A difficulty there was that those relationships ended when those officers were transferred, and the applicant's behaviour then deteriorated again. It was thought he may feel a sense of abandonment as men he respected kept leaving his life.

[10] He is still very young, and keeping him in detention for any lengthy period very much restricts his contact with significant older males to contact with older men in prison. This is not likely to have any significant rehabilitative effect. The sentencing principles declared in Part 5 of the *Juvenile Justice Act* 1992 (Qld) in s 109 thereof, and in Part 2 of the *Penalties and Sentences Act* 1992 (Qld) in sections 9 and 13, encourage a view of the imposition of detention orders on children, and imprisonment for adults, as sentences to be imposed as a last resort. This is particularly so with very young adults and while there are prospects of steering them away from continuing criminal behaviour by means other than imprisonment.

[11] When imposing sentence the learned judge began and concluded his sentencing remarks with a description of the applicant having pleaded guilty to five counts of burglary, as well as a count of house breaking and the other offences already described. It appears the learned judge had overlooked that the Crown had entered a nolle prosequi on each of three counts of burglary on one of the two indictments presented to the judge. Since all five counts originally alleged against the applicant were allegedly committed as a child, it is possible that the error in the number of offences of burglary to which the applicant had pleaded guilty did not lead the learned judge into imposing any heavier penalty than would have been imposed for the commission of two only offences of burglary.

[12] Ignoring that matter, the provisions of s 134 of the *Corrective Services Act* 2000 (Qld), which make the opportunity for release on parole only available to persons sentenced to imprisonment for **more** than two years, makes this two year sentence potentially heavier than a sentence of, say, two and a half years imprisonment. On the latter sentence the possibility of release on parole would occur after 15 months had been served, whereas on the two years actually ordered early release is only available to the applicant either by remission pursuant to s 75 of that Act, or conditional release pursuant to s 76. Either variety of release requires that two thirds of the two year term be actually served, and neither of those would result in the applicant having the potential benefit of any counselling by a Corrective Services Officer. That possibility, or the possibility of the like counselling pursuant to a probation order, is of particular relevance to a young offender needing positive adult, and particularly male, role models, and who in the past has respected some male officials offering guidance.

[13] The sentence of two years imprisonment was described by the learned sentencing judge as a head sentence. That is, it was a sentence intended to reflect the overall criminality of the applicant's behaviour[1]. Acknowledging it is a head sentence, and that it nevertheless appears a hard one when imposed on a 17 year old with some capacity to develop relationships which may steer him away from offending, this would have been a difficult matter in which to impose sentence. A problem in sentencing the applicant is that parole is only available if the sentence is more than two years, and probation is not available under s 92(1)(b) of the *Penalties and Sentences Act* if the actual imprisonment which precedes the probation is more than one year. This means that to make an order which included both imprisonment and probation, the maximum period which could be ordered for this repetitive offending on bail would be one year, followed by up to three years probation. In the circumstances in which his offending behaviour included spitting on a police officer as described that sentence would be toward the bottom range of available penalties, although it would include a significant potential rehabilitative component.

[14] The sentence which was imposed was towards the top end of the range of available penalties, and two years imprisonment for unlawfully using a motor vehicle when a passenger is a very heavy penalty when only one "head" sentence was actually required. Furthermore, there was no order making counselling available. Even so, that counselling had been made available in October 2002 and the applicant re-offended soon after. That was the fifth time probation had been ordered for the applicant, it being previously ordered on 19 March 1999, 14 May 1999, 17 September 1999 and 25 January 2000. He had also been placed on immediate release orders on 14 April 2000, 2 June 2000, and 4 March 2002. In addition, he was ordered to perform community service on 13 October 2000, 22 December 2000, 25 January 2001, 30 May 2001, 19 November 2001 and 10 August 2002. In those circumstances and when so many opportunities for counselling had already been offered, the sentence actually imposed was one within the available ambit of a discretionary judgment. The fact that one or more members of this court may have imposed a sentence more structured to provide counselling yet again does not make the sentence imposed manifestly excessive, and no error of principle is otherwise revealed.

[15] I add that the argument presented by both parties in their respective outlines of argument focussed upon the appropriate sentence for the two offences of serious assault. The applicant pointed to the following sentences. There was one of six months imprisonment ordered to be cumulative and ordered in respect of an adult female offender in the matter of *Sweet v Armstrong* [1995] QCA 406 (CA No 151 of 1995, judgment delivered 1 September 1995). Another was the sentence of four months imprisonment suspended after two months upheld in the matter of *R v Laskus* [1996] QCA 120 (CA No 56 of 1996, judgment delivered 24 April 1996) in which that offender was a 19 year old pregnant female with no prior convictions. Then there was the sentence of three months imprisonment wholly suspended, imposed in the matter of *R v Reuben* [2001] QCA 322 (CA No 99 of 2001, judgment delivered 7 August 2001) imposed on a 27 year old male offender with a prior minor criminal history who bit a police officer. Finally there was the sentence of 12 months imprisonment to be served cumulatively, imposed on a 29 year old

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[1] This court discussed the appropriate principles when imposing sentences for a number of distinct, unrelated offences in *R v Nagy* [2003] QCA 175, particularly at [39]

male offender with a poor criminal history in the matter of *R v White* [1992] QCA 419 (CA No 244 of 1992, judgment delivered 19 October 1992). For its part the respondent referred the court to the 18 month sentence imposed in the matter of *R v Juric* [2003] QCA 132 (CA No 431 of 2002, judgment delivered 25 March 2003) imposed on an adult male offender with a lengthy criminal history, for offences of spitting in the face of two different police officers. The argument from each side tended to overlook the fact that the applicant's offences of serious assault were the last in a series of offences he had committed, and was declared to be a "head" sentence.

[16] In the circumstances I would order that the application for leave to appeal be dismissed.

[17] **WHITE J:** I have read the reasons for judgment of Jerrard JA and those of Wilson J and agree with them that the application for leave to appeal against sentence should be refused.

[18] This is a young man, notwithstanding his youth, from whom the community in which he lives needs to be protected. He has been given an extraordinary number of chances for rehabilitation but, for whatever reason, has failed to avail himself of them.

[19] I agree with their Honours' comments that it is regrettable that it is not possible to add a period of probation to any term of imprisonment over 12 months. This is a matter which, I believe, has been drawn to the attention of the legislature in other appeals. Although canvassed in argument with counsel, a term of imprisonment of 12 months together with 12 months probation, as their Honours have commented, would have been inadequate for all of the applicant's offending behaviour.

[20] **WILSON J**: I have read the reasons for judgment of Jerrard JA where the circumstances of the applicant's offending and his criminal history are fully set out.

[21] The applicant is an indigenous youth still aged only 17, and it is hardly necessary to restate the comparative lenience often extended to youthful offenders in order to maximise their prospects of successful rehabilitation. However, there must be a point at which punishment, general deterrence and the protection of the community outweigh considerations of rehabilitation. This applicant's criminal history and his negative response to previous non-custodial orders are deeply disturbing. Clearly a custodial term was warranted in this case, and a term of two years was within the range of appropriate sentence although at the high end of that range, even given the applicant's youth.

[22] Courts endeavour to fashion sentences to provide for counselling and support, but they can do so only within the framework provided by the Legislature. Regrettably, it was beyond the power of the sentencing judge to add a period of probation to any term of imprisonment beyond 12 months in duration. Given all the circumstances, a term of 12 months imprisonment coupled with 12 months probation would have been inadequate for this series of offences.

[23] One can only hope that within the prison system there are programs available to the applicant, of which he takes advantage, which will assist his rehabilitation, and that upon his release from prison there will be members of his own community ready

and willing to give him the support he so obviously needs, and that he avails himself of that support.

[24] I agree that the application for leave to appeal should be dismissed.