

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Shepherd* [2003] QCA 343

PARTIES: **R**  
**v**  
**SHEPHERD, Jennifer Kathleen**  
(applicant)

FILE NO/S: CA No 188 of 2003  
SC No 252 of 2002  
SC No 81 of 2003  
SC No 283 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED  
EXTEMPORE ON: 7 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 7 August 2003

JUDGES: McMurdo P, Jerrard JA 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 again sentence granted**  
**2.Appeal allowed only in respect of the sentences imposed**  
**for counts 1 and 2 of indictment No 81 of 2003 and only**  
**to the extent that they be ordered to be served**  
**concurrently with the other sentences**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND  
PROCEDURE – JUDGMENT AND PUNISHMENT –  
SENTENCE – OTHER MATTERS – QUEENSLAND –  
where the applicant was sentenced for breach of a community  
service order made in regard to indictment No 252 of 2002 as  
well for offences under indictment No 81 of 2003 – whether  
in the circumstances the sentences imposed were manifestly  
excessive

COUNSEL: The appellant appeared on her own behalf  
L J Clare for the respondent

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

MUIR J: The applicant seeks leave to appeal against

sentences imposed on her on 2 June 2003, by Judge of the Supreme Court on the grounds that the sentences were manifestly excessive. On 8 August 2002, the applicant was convicted on her own plea of guilty and sentenced to 240 hours community service for a term of two years on the following counts: count one, unlawful supply of heroin; count three, unlawful possession of heroin; count four, unlawful possession of 3,4-methylenedioxyamphetamine and cannabis sativa and count five, a summary offence of unlawfully having in possession a water pipe used in connection with the smoking of a dangerous drug. She was also sentenced on count two, unlawful supply of heroin to imprisonment for 18 months, the term of which was wholly suspended with an operational period of three years. For convenience, all of these offences will be referred to as counts on the first indictment.

The applicant breached the community service order and came before the sentencing Judge again on 2 June 2003, when she was dealt with for the breach of the order and for two offences committed since the original sentencing date. I will refer to those as counts on the second indictment. They were stealing compact discs, a monitor, photographic equipment and other goods belonging to her landlord between 27 July 2002 and 29 August 2002, and dishonestly obtaining a sum of money between 28 July 2002 and 28 August 2002.

As the later offences were committed within the operational period of the suspended sentence imposed on 8 August 2002, the applicant was resentenced for the offences the subject of the

suspended sentence. The sentences imposed and orders made on 2 June 2003 were as follows: count one, 15 months imprisonment; counts three and four, six months imprisonment; count five, two months imprisonment; count two, that is the breach of the suspended sentence, 15 months imprisonment.

His Honour did not impose the whole of the original 18 months, finding it unjust to do so, taking into account the 83 days already spent in custody. The community service order was set aside and a fine of \$200 was imposed in default of which, 14 days imprisonment to be served cumulatively upon the terms imposed for the offences the subject of the first indictment. The other sentences imposed which I have just mentioned were ordered to be served concurrently.

For the offences on the second indictment, sentences of four months imprisonment, on each of the two counts, were imposed to be served concurrently with the default term of imprisonment, if activated, but cumulatively upon all other terms of imprisonment ordered to be served on that day. In summary, when regard is had to section 155 of the Penalties and Sentences Act, the applicant became liable to serve 15 months imprisonment in respect of the offences on the first indictment, plus eight months in respect of the offences on the second indictment, making a total of 19 months in all.

The applicant is 27 years of age. She left school after year 10 and completed a certificate in visual arts at a TAFE College. She left home when 17 years of age and obtained work

as a retail trade assistant. Increasing drug and alcohol abuse prevented her from securing and keeping employment. Eventually, she commenced criminal activity in order to finance her heroin dependency.

The applicant's only criminal convictions prior to those of 8 August 2002 were convictions for possessing dangerous drugs and utensils or pipes used in connection with the use of a dangerous drug, for which he was fined \$200 and no conviction was recorded. She was also convicted on 4 November 2002 and fined \$300 for unauthorised dealing with shop-goods on 19 October 2002.

The sentencing remarks of 8 August 2002 reveal that the matters giving rise to counts one and two on the first indictment arose when the applicant drove a person with whom she was living, to places at which he supplied heroin to an undercover police operative.

The sentencing remarks disclose, also, that the applicant freely made admissions to police and voluntarily sought alcohol and drug treatment. The breaches of the community service order were failures to report on two occasions, for which his Honour concluded no adequate explanation had been forthcoming. The two counts on the second indictment involve theft of property from the applicant's landlord over a period of time and the defrauding of pawnbrokers to whom the property was taken.

The applicant received \$2,173 from the pawnbrokers and his Honour's view was that this was rather less than the value of the subject property. The applicant's mother retrieved a considerable amount of the property, returned it to the landlord, and repaid all but \$264 to the pawnbrokers. Some of the thefts occurred whilst the applicant was on bail, and others occurred during the pendency of the community service order and during the term of the suspended sentence.

The quantity of heroin involved in count 1 on the first indictment was 1.369 grams and in count 2 on that indictment 1.252 grams for each supply an undercover police operative paid \$900.

The psychologist's report before the sentencing Judge contains the following opinions:

"The general impression of Ms Shepherd is that of a 24 year old Caucasian female with average intelligence, history of heroin dependency and mental health problems. Moreover she has utilised illicit drugs to support these coping deficits particularly during these life events. As Ms Shepherd has not received appropriate treatment from a mental health professional she appears to have experienced a decline in mental state. These clinical symptoms appear to have been masked by the effects of heroin. Given Ms Shepherd's personal history and psychological vulnerability, she appears to be susceptible to the coercion of significant others."

It is noted in the report that the applicant is complying with a prison-based methadone program.

Under section 147 subsection 2 of the Penalties and Sentences Act the Court must order that an offender convicted of an

indictable offence for which imprisonment may be imposed during the term of the suspended sentence be ordered to serve the whole of the suspended sentence unless it would be unjust to do so.

No injustice has been shown in the order made by the sentencing Judge, and indeed, on this hearing the applicant said that she had no complaint in respect of that matter. The sentence imposed pursuant to section 120 of the Act in relation to breach of the community service order, being the same as that imposed in respect of the suspended sentence, cannot be said to be manifestly excessive either.

The approach of the sentencing Judge in making the sentences imposed for the counts on the second indictment cumulative on the first indictment sentences was a perfectly orthodox one. The former offences were of a different nature to the drug offences and committed during the term of a suspended sentence and community based order. The sentencing judge properly took these matters in account.

It appears however that his Honour's attention was not drawn to evidence before him which supports the view that contrary to his understanding the applicant did in fact comply in other than a minimal degree with the community service order. It thus falls to this Court to exercise the sentencing discretion afresh.

Having regard to the overall degree of the applicant's criminal conduct once mitigating circumstances are taken into account, including efforts made by her and on her behalf to effect restitution as well as having regard to her attempts to comply with the community service order and time spent in its compliance, it is appropriate that the sentences imposed in respect of counts 1 and 2 on the second indictment be made concurrent with the other terms of imprisonment.

I would allow the appeal only in respect of the sentences imposed in respect of counts 1 and 2 on the second indictment and only to the extent that they be ordered to be served concurrently with the other sentences. I would not otherwise interfere with the sentences imposed including the fine and the term of imprisonment ordered in default of payment of the fine.

THE PRESIDENT: I agree.

JERRARD JA: I agree with Justice Muir that the sentences imposed in respect of the offences described in the indictment dated 10th December 2001 should be served concurrently with each other and with the sentences imposed in respect of the indictment dated 12th March 2003. The sentences imposed on 2nd of June 2003 by the learned sentencing Judge resulted in a total sentence of 19 months imprisonment and that sentence has not been established as being manifestly excessive.

However the sentencing remarks of the learned Judge reveal that there was a matter of fact that was taken into consideration adversely to this applicant and which was not fully justified. This was that she had not performed any community service. The learned sentencing Judge's remarks at page 56 of the record indicated or suggested that despite her willingness that an order be made for the performance of community service that she must have had very little intention of ever complying with it.

It appears that in fact there was some degree of compliance with that order, as indicated in a report of a psychologist placed before the learned Judge. Since we are therefore sentencing this applicant afresh, I agree with the result proposed by Justice Muir.

THE PRESIDENT: The orders are as proposed by Justice Muir. Do you understand what's happened? The four month sentence is now concurrent with the suspended sentence and the fine for the breach of community service still stands.

APPLICANT: Okay. Thank you very much.

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