# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Kitching* [2003] QCA 539 |
| PARTIES: | **R**<br>**v**<br>**KITCHING, Jason Peter**<br>(applicant) |
| FILE NO: | CA No 310 of 2003<br>DC No 1820 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED EX TEMPORE ON: | 3 December 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 December 2003 |
| JUDGES: | McMurdo P, Davies JA and Chesterman J<br>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 refused** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON - PROPERTY OFFENCE – whether sentence was manifestly excessive – whether mitigating factors were given adequate weight - where punishment imposed upon applicant was less than that imposed upon co-accused<br><br>*R v Moss* [1999] QCA 426; CA No 270 of 1999, 8 October 1999<br>*R v Mather* [1999] QCA 226; CA No 76 of 1999, 17 June 1999<br>*R v Vanderwerff* [1999] QCA 169; CA No 479 of 1998, 14 May 1999 |
| COUNSEL: | A J Kimmins for the applicant<br>D Meredith for the respondent |

SOLICITORS: Bell Miller for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Justice Chesterman will deliver his reasons first.

CHESTERMAN J: On 22nd of August last, the applicant pleaded guilty to an ex officio indictment which charged him with armed robbery. He was sentenced to three and a-half years' imprisonment, to be suspended after serving nine months. He complains that the sentence is manifestly excessive.

The offence was committed on 12 August 2002. The applicant had been jointly accused with one Matthew Steven Martin, who also pleaded guilty to armed robbery, and was sentenced to four years' imprisonment, to be suspended after serving 12 months.

The robbery occurred at the Salisbury Hotel, where Martin worked as a barman. He and the applicant had discussed robbing the hotel on two or three occasions before actually putting the idea into action. Martin was a gambler, and had acquired a substantial debt. That was his motive for planning the robbery. He was slightly younger than the applicant, but more intelligent and energetic.

At about midnight, two of the hotel's employees, a young woman and a slightly older man, were alone in the office counting

the day's takings. The doors had been locked, but Martin used his knowledge of the premises to enter through an air-conditioning unit. He was dressed in several layers of clothing to disguise his body shape. He wore a balaclava, and was armed with a kitchen knife having a blade about 15 centimetres long.

He demanded the money from the employees. He altered his voice to avoid recognition. The female employee was terrified. She dropped the till she was carrying. Martin demanded that the other employee place the money in a plastic bag which he held. All together just over $15,000 was stolen.

The applicant's part had been, it seems, to drive Martin to the hotel, wait for him, and then certainly to drive rapidly away. He received $5,000 for his assistance.

Both accused were questioned by police soon after the robbery. The applicant initially denied all involvement, but after a short interval, made full admissions to the police. He admitted being involved in the planning of the robbery. He knew that Martin intended to menace the employees with a knife. He had helped Martin bury some clothes which he had worn as a disguise.

Both the employees were badly shaken by their experience, and continue to suffer symptoms of stress and anxiety. Neither the applicant nor the co-accused had any previous criminal history. The applicant comes from a stable and supportive

family. His parents lent him $7,500, being half of the amount taken, to allow him to make restitution. The applicant is repaying that amount by instalments.

He is of low-average intelligence, and is described as socially unsophisticated, but he has obtained and was able to keep regular employment. The applicant and the co-accused both pleaded guilty and cooperated fully with the police investigation. The applicant, as I mentioned, has made substantial restitution. He was 25 years of age at the time of the offence, and was 26 when sentenced.

The applicant makes two complaints. The first is that the sentence was manifestly excessive. The second is the disparity between his sentence and that imposed upon Martin is insufficient, and gives rise to a legitimate sense of grievance that he has been treated harshly in comparison to Martin.

There is no substance in the first point. A sentence of three and a-half years' imprisonment for armed robbery, which involved menacing two employees with a large knife, and obtaining $15,000, is impossible to describe as excessive.

When one has regard to the suspension of the sentence after nine months, the submission becomes ludicrous. A brief reference to some other cases will demonstrate the point. In The Queen v. Moss, CA 270 of 1999, the applicant robbed a video store of a few hundred dollars. He was armed with a

knife, with which he threatened a 19 year old part-time employee.

Aggravating features of the robbery were the use of the knife, that the employee was alone, that the applicant persisted with his offence when customers entered the store, and that the applicant was on probation at the time of the offence. He was 18, and had a considerable criminal history.

An ameliorating factor was said to be the lack of planning that had gone into the offence.

The Court suggested that the range for a first offence of armed robbery would ordinarily be between three and five years. Moss was sentenced to five years.

That case was said to be more serious than The Queen v. Mather, Court of Appeal 76 of 1999, in which the applicant was sentenced to four years' imprisonment for armed robbery. He obtained $135 from a convenience store in Bowen.

He was 35 years of age, with a good work record, and an insignificant criminal history. He was unarmed, but had manufactured a child's toy to make it appear as though he held a pistol.

The crime was spontaneous. It involved almost no preparation, and certainly no planning to avoid detection. He made restitution, pleaded guilty, and offered compensation to the

employee whom he had terrified. The potential for harm was small given that the applicant was unarmed. No threats were made in the course of the robbery.

This case is more serious than the circumstances in Moss and in Mather. The appellant's personal circumstances are similar to Mather's.

The second complaint is equally without substance. It may be accepted that sentences imposed on a person who acts only as a driver for those who carry out a robbery have, in practice, been more lenient than for those who actually commit the robbery. That was pointed out in The Queen v. Vanderwerff, Court of Appeal 479 of 1998.

But the punishment imposed here on the applicant was less than that imposed on the co-accused, Martin. That discrepancy reflected the fact that Martin was the prime instigator of the offence. He was the one who wielded the knife, entered the premises, and threatened the employees.

It must be recalled, however, that the applicant involved himself in the planning, he knew that Martin intended to use the knife to obtain the money, and he assisted by taking him to and from the premises, and by concealing evidence which would have connected Martin with the offence.

Although Martin's criminality was greater than the applicant's, it was not much greater.

Both accused were dealt with leniently. This, no doubt, reflected their lack of criminal convictions, good prospects of rehabilitation, and the likelihood that neither would reoffend.

However, the fact that the sentences imposed on both were lenient gave the learned sentencing Judge less scope to discriminate between the sentences to give effect to the differing degrees of criminal involvement.

If the applicant's sentence were now to be further reduced to make for a greater disparity in the sentences the result would be that he would be inadequately punished.

I would therefore dismiss the application.

THE PRESIDENT: Although the applicant, according to the psychological report tendered on his behalf is of low-average intelligence, he was not an immature 17 year old when he committed this offence, but a 25 year old who had worked and lived away from his home in central Queensland. The sentence of three and a-half years' imprisonment, suspended after nine months was, as the applicant's counsel properly concedes, within the appropriate range in the circumstances.

On the facts here, a heavier penalty could have been imposed on the co-offender but the lenient sentence imposed on him is not such as to make the disparity between the sentence imposed

on him, when compared to that imposed on this applicant, manifestly excessive. The sentence imposed on this applicant recognised the applicant's lesser role in the commission of the offence and balanced the competing interests of his rehabilitation, with the required deterrent penalty for a serious offence of this type, which has had the expected detrimental consequences for the victims.

I agree with Mr Justice Chesterman, that the application for leave to appeal against sentence should be refused.

DAVIES JA: I agree that the application for leave to appeal against sentence should be refused, for the reasons given by Mr Justice Chesterman.

THE PRESIDENT: That is the order of the Court.