

SUPREME COURT OF QUEENSLAND

CITATION: *R v Karbanowicz* [2003] QCA 543

PARTIES: **R**
v
KARBANOWICZ, Matthew Douglas
(appellant)

FILE NO/S: CA No 295 of 2003
DC No 465 of 2003

DIVISION: Court of Appeal

PROCEEDING: Appeal against sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 4 December 2003

DELIVERED AT: Brisbane

HEARING DATE: 4 December 2003

JUDGES: McPherson and Williams JJA and McMurdo J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Leave to appeal granted**
2. Appeal allowed and orders below amended to provide for suspension of sentences in all cases after serving a period of nine months with an operational period still of four years overall

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF THE OFFENDER - whether sentence is manifestly excessive – where the offender has committed various offences, some whilst on probation order, some whilst on bail but has pleaded guilty and co-operated with the police – factor not considered at trial where particular circumstances prevent his progressing thorough a medium security correctional centre to a low security correction centre

R v Perrem, CA 119 of 2000, considered
R v Gee, CA 247 of 1998, considered

COUNSEL: The appellant appeared on his own behalf
B G Campbell for the respondent

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

McMURDO J: The applicant seeks leave to appeal against sentences imposed in the District Court for offences to which he pleaded guilty on 8 August 2003. There were 23 offences upon two indictments together with four summary offences.

There were 14 offences of burglary and stealing, four further offences of stealing, one of fraud, two of unlawful use of a motor vehicle, in one case with a circumstance of aggravation, and two offences of entering premises with an intent to steal. The summary offences were one of being unlawfully in an enclosed yard, a bail offence and two related offences of behaving in a disorderly manner and obstructing police.

For the 14 offences of burglary and stealing, he was sentenced to four years' imprisonment suspended after 15 months with an operational period of four years. On the other offences on the indictments, he was sentenced to 12 months and, upon the four summary offences, four months' imprisonment. The sentences are to be served concurrently.

The applicant argues that these sentences are manifestly excessive.

The offences were committed at various times from the end of 2000 when the applicant was 20 years of age. He was 21 when sentenced. He had a prior criminal history involving some drug matters and offences of dishonesty including one involving the entry of a dwelling and some bail offences. Prior to the present matters, he had not been imprisoned.

JUDGMENT

On those prior matters, there were several probation orders, the most recent of which was by the Magistrates Court on 25 July 2002 when there was a probation order for a period of two years. The report from his probation officer describes his response to the various conditions of this order as extremely poor. Many of these offences were committed whilst he was subject to that probation order. It appears that the sentencing Judge may have been less than fully informed on that matter because he was told that the only relevant probation order was an earlier one for a period in which none of the present offences was committed.

The explanation for the offences is the applicant's heroin addiction. The applicant broke into houses and stole cash and saleable items such as mobile phones, jewellery, computers and electrical goods. Some of the offences were committed with another offender but most were committed alone. It is not suggested that the sentence imposed upon that other offender is significant to the applicant's case.

Apart from the burglaries, there are offences of stealing from public places such as shops and cafes. In no case was there violence involved. One of the offences of unlawful use of a motor vehicle involved the use of a car in order to transport stolen property. There is also an offence of stealing a police officer's mobile phone. In all, approximately \$60,000 worth of property was stolen or damaged.

A number of these offences were committed whilst the applicant was on bail in relation to some other of the present matters, in some cases very shortly after his release.

He pleaded guilty to each charge and co-operated with the police by disclosing a number of the houses from which he had stolen.

He has had a very unfortunate upbringing. His father was murdered when the applicant was 12. At the time of his sentence, he had been in presentence custody for 85 days and he was described as then drug free.

The sentencing Judge was referred to two judgments in this Court, the first being the Queen v. Shane Robert Gee, CA 247 of 1998, and the second the Queen v. Steven Matthew Perrem, CA 119 of 2000, the first of which was said to be more relevant. In Gee, a sentence of four and a-half years with a recommendation for release on parole after 15 months was upheld. Gee was a heroin addict who was 18 when sentenced. Like the applicant, he was on probation when he committed the offences although the sentencing Judge, as I have mentioned, did not understand that to be the case here.

There was a feature in Gee's case which is not present here which was that Gee deliberately preyed upon elderly householders.

Perrem involved a much larger number of offences including 81 of entering premises with intent to steal although the total

amount involved was not much more than in the present case. To that point, Perrem had had a relatively minor criminal history for which he had not been to gaol until he was sentenced for having breached the Bail Act. Most of his offences were committed whilst he was on bail. He was also a heroin addict and about the same age at the relevant times as the applicant here.

Perrem was given a head sentence of six years for seven of the offences with a recommendation for parole after two years and three months which was upheld by the majority on appeal. In Perrem, there is a discussion of other cases which, considered with Gee and Perrem itself, shows that the head sentence of four years in the present case was within the relevant range as it was conceded to be by the applicant's counsel before the sentencing Judge.

The applicant was plainly entitled to a substantial allowance for his co-operation and his timely plea of guilty. But for one matter which I will mention in a moment, it would be my view that the sentences which were imposed were not manifestly excessive and the application for leave to appeal would be dismissed. That matter, however, is something which was raised in this Court which, it can be fairly said, was not ventilated in the Court below.

It comes from the suggested consequence for the way in which the applicant will have to serve his term of imprisonment from the fact that, from the murder of his father, another offender

- that is, the man who murdered his father - is presently serving a term of imprisonment and specifically in the medium security Borallon Correctional Centre. The applicant, who appears in person, has told this Court that that is preventing his progressing through a medium security correctional centre to a low security correctional centre according to what he says is a classification already made in his favour.

For present purposes, I would accept that this at least may be the case and it is not contested by the Crown although it is a matter which had been raised within the applicant's written outline of argument. That is a matter which, in my view, would have been of some significance to the sentencing Judge had that problem been anticipated and the subject of submissions to and consideration by his Honour. It is a matter which, in my view, especially having regard to the fact that the applicant is a relatively young person and this is the first time he has been to gaol, which calls for some variation to the present orders.

Having regard to that matter, it is my view that he should be given leave to appeal and the appeal should be allowed and that the orders below should be amended so as to provide for a suspension of his sentences in all cases after serving a period of nine months with an operational period still of four years overall. Otherwise the orders below would not be varied.

McPHERSON JA: I agree.

JUDGMENT

WILLIAMS JA: I agree.

McPHERSON JA: The order of the Court is that the sentences are varied to the extent stated in the reasons of Justice McMurdo.
