SUPREME COURT OF QUEENSLAND

CITATION:	*McQuire v South Qld RCCB* [2003] QSC 414
PARTIES:	**KEVIN ANDREW McQUIRE** (applicant) **v** **SOUTH QUEENSLAND REGIONAL COMMUNITY CORRECTIONS BOARD** (respondent)
FILE NO/S:	BS No 9167 of 2003
DIVISION:	Trial Division
PROCEEDING:	Judicial Review Application
DELIVERED ON:	11 December
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2003
JUDGE:	White J
ORDER:	**1. Dismiss the application** **2. The applicant to pay the respondent's costs**
CATCHWORDS:	CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where applicant convicted on seven counts of misappropriation of property – where applicant sought post-prison community based release pursuant to *Corrective Services Act* 2000 (Qld) ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – RELEVANT AND IRRELEVANT CONSIDERATIONS – where respondent refused application for release on ground that respondent had failed to pay compensation to victims – where respondent claimed to be impecunious – whether respondent failed to take into account relevant considerations pertaining to applicant's financial position *Corrective Services Act* 2000 (Qld), s 3 *Penalties and Sentences Act* 1992 (Qld), s 188 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, considered *R v McQuire & Porter (No. 2)* [2000] QCA 40, 25 February 2000, referred to

COUNSEL: S Lynch for the applicant
M Plunkett for the respondent

SOLICITORS: Jacobsen Mahony Lawyers for the applicant
Crown Solicitor for the respondent

[1] The applicant is a prisoner who is aggrieved of a decision of the respondent ("the Board") to refuse him post-prison community based release pursuant to the *Corrective Services Act* 2000.

[2] On 16 February 1999 the applicant pleaded guilty to seven counts of misappropriation of property between 1990 and 1991. The value of the property was $685,000. His co-accused was one Porter. The essence of the offences was that money had been obtained from members of the community with promises to invest the money securely at a high rate of interest. The Crown contended that the money had been used by the accused personally. None of the monies was repaid. Hall DCJ sentenced the applicant to a term of imprisonment of five years to be wholly suspended. The Attorney-General appealed against that sentence on the ground that it was manifestly inadequate. The Court of Appeal set aside the sentence imposed below on 8 June 1999 and remitted the matter to another District Court judge for re-sentencing.

[3] When the matter came on for re-sentence on 9 August 1999 counsel for the applicant sought orders for the stay of the proceedings or alternatively for leave to withdraw the plea of guilty on the basis that the applicant had been induced to plead guilty by the representation of the prosecutor that the DPP would not appeal against a wholly suspended sentence if imposed. Hanger DCJ declined to stay the proceedings or to permit the applicant to withdraw his plea of guilty.

[4] The prosecution provided material including financial material to the applicant's counsel during a short adjournment which would be relied on on sentence. The applicant contends that he advised his then counsel that details in the documents about his financial position were not correct. Probably because of his intention to appeal the refusal of leave to withdraw his plea of guilty, the applicant instructed that his counsel should not engage in the sentence process. Counsel expressly did not admit the factual basis upon which the Crown was proceeding nor concede any facts. He told the sentencing judge that his client disputed factual matters being advanced but did not seek to cross-examine or argue any different basis for approaching the financial figures presented by the prosecution.

[5] The prosecutor made submissions to the effect that companies over which the applicant had control were in an asset positive position of $867,000.

[6] The applicant was sentenced to a term of imprisonment of seven years. A compensation order was made in respect of half the amount of money misappropriated, namely, $322,500. The sentencing judge ordered that $161,250 be paid within six months of the date of sentence and the other half on 10 February 2003, immediately prior to his parole eligibility date. Those sums were to be paid to the victims. Default terms of imprisonment were imposed to be served cumulatively on the sentence of seven years. In respect of the first amount the default term was three months imprisonment and for the second amount due on 10 February 2003 the default term was nine months.

[7] The applicant appealed the order refusing leave to withdraw the plea and appealed against sentence. The Court of Appeal delivered its decision on 25 February dismissing the appeal against the decision to refuse leave to withdraw the plea of guilty and varied the sentence by a majority to the extent of making a recommendation for eligibility for parole after serving three years and appointing 10 April 2000 as the date for paying the first instalment of the compensation.

[8] Subsequently the applicant applied for the re-opening of his sentence on the ground of a clear factual error of substance pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992. By then the applicant needed an extension of time before making the application. That appeal was heard on 4 November this year and the Court of Appeal delivered its judgment on 28 November. Although the hearing of the appeal occurred after the decision of the Board which the applicant challenges, for completeness it may be noted that the court refused the application to extend time on the basis that there was no prospect of succeeding in the application.

[9] The first instalment of compensation was not paid by the due date and on 11 July 2000 a warrant was executed on the applicant. The second instalment was due on 10 February 2003 which was unpaid. A second warrant was executed on 3 August 2003. Accordingly the default provisions came into operation and the applicant has a cumulative term of 12 months added to his existing sentence.

[10] Although the applicant has lived in this country for in excess of 15 years it is understood that when he is released from detention either at the expiration of the terms of imprisonment or, if granted post-prison community release when that occurs, he will be deported to New Zealand.

[11] The applicant has made three applications for post-prison community release on 11 June 2002, 9 January 2003 and 11 July 2003. The reasons for refusing the third application were given on 8 September 2003. It is from that decision that this application is brought although because of the way in which the Board expressed its reasons it is necessary to consider the bases for the earlier refusals.

[12] Without seeking to oversimplify the Board's and the applicant's positions they might be summarised in this way – the Board's concerns are that the applicant has not addressed his offending behaviour demonstrated by his failure to compensate his victims by directing or causing discretionary income to be directed in satisfaction of the compensation orders. The applicant maintains that he was at the time of sentence, and continues to be, impecunious and unable to make any payments of compensation and it is unreasonable of the Board to persist in its position.

[13] On this application Mr S Lynch for the applicant sought to tender a financial analysis of the applicant's affairs by BDO Kendalls, chartered accountants, dated 17 September 2003. That report was not before the Board when it made its decision and I refused to receive it.

Application 11 June 2002

[14] The applicant first applied for post-prison community release on 11 June 2002. The Board rejected the application on 30 July 2002. It noted that the sentencing court considered that he had access to sufficient assets to discharge orders for

compensation to the victims of the offences by means of two instalments. It noted that the Court of Appeal accepted that that was so. The Board expressed its concern that the applicant had failed to pay the first instalment and the indication was that the second would not be met either. The Board was concerned that if released into the community the applicant would be deported from Australia and the second instalment date, 10 February 2003, would pass without satisfaction and the complainants be substantially disadvantaged.

Application 9 January 2003

[15] The applicant had not appeared personally before the Board in respect of his first application. It seems he had not appreciated the influence which the non-payment of the compensation would have. He appeared for the second application and produced a number of documents. He indicated that he thought that it would be difficult for a person without an accounting degree or similar background to appreciate his financial situation. The Board had a report from Avon Rowbotham, a senior community correctional officer with the assessment unit. She recommended that it was inappropriate to grant parole at that stage.

[16] In its letter of 14 February 2003 declining to grant release the Board referred to its earlier decision on 30 July 2002 and that the applicant had continued not to accept responsibility for his offending behaviour nor did he express remorse. The Board mentioned that":

> "It also appears you have been party to an arrangement which is *prima facie* fraudulent whereby unsecured creditors (your brother and sister) have been given a priority in relation to payment whereby other legitimate creditors are financially disadvantaged."

This was based on information given to the Board by the applicant. The Board referred this matter to the Australian Securities and Investment Commission ("ASIC"). The Board concluded that since the applicant would be deported from Australia if he were granted post-prison community release it was inappropriate to grant release until the investigation being undertaken by ASIC about the allegations of priority had been completed.

[17] The applicant sought a statement of reasons and these were provided by the Board on 23 April 2003. The Board set out the background and in particular the comments of the sentencing judge that the applicant must have been taken to admit the elements of the offences when he pleaded guilty including the amount of money misappropriated, and that the applicant had not sought to adduce any evidence nor make any submissions in mitigation. The Board particularly referred to the following comment in the reasons for judgment of McMurdo P in the Court of Appeal on 25 February 2000 (*R v McQuire & Porter (No. 2)* [2000] QCA 40) at para 79:

> "The payment of compensation would have been a fact arguably entitling the applicants to a lesser penalty. No compensation had been paid at the time of the sentence. Porter was unable to make compensation as he was a bankrupt without assets; no explanation was given on behalf of McQuire. In such circumstances, the learned judge was entitled to order that compensation be made by McQuire.

> The orders for compensation made by the sentencing judge against McQuire may assist victims in any civil action and may be a relevant factor when consideration is given to any application for parole in due course."

[18] The Board noted that during the interview with the applicant on 10 February 2003 he had indicated that he was a beneficiary of a discretionary trust controlled by him and that he held a controlling interest via another company in a company, Sovereign Mortgage Corporation, which continued to receive commissions by way of "trail" fees. The applicant told the Board that all funds were directed to the applicant's wife. The Board noted that there were substantial monies owing to the applicant's family trust on a subdivision at Tallebudgera held in the name of California Court Pty Ltd operated by the applicant's brother and sister. The family trust had made a loan to the applicant's sister in the sum of $340,000 and no demand had been made for the return of that money.

[19] The Board expressed its concern that the applicant may be party to an arrangement *prima facie* giving rise to a further offence whereby unsecured creditors were being given a priority over other creditors. The Board did not consider in those circumstances that the applicant had suitably addressed his offending behaviour and declined to grant him post-prison community based release.

Application of 11 July 2003

[20] The applicant brought a further application for post-prison community release, the subject of the present application, on 11 July 2003. He was interviewed by Ms Rowbotham on 22 July 2003. She noted that a warrant relating to the non-payment of the second amount of compensation had been issued out of the Southport District Court the previous day. She noted:

> "In relation to the matters regarding the applicant's dealings that the Board referred to the Australian Securities Investment Commission, the Board has been advised that ASIC is unable to take any further action at this time."

She wrote:

> "It is respectfully recommended that, notwithstanding that the nine months default period will be added to his sentence, bringing his total sentence to eight years imprisonment, Mr McQuire is eligible for community based release at this time. He has completed all programs required, has incurred no breaches and his institutional behaviour is classed as excellent. There are no known further charges anticipated against the offender at this time."

[21] Prior to the decision being made by the Board the second warrant was executed on the applicant and the default period of nine months was added to his sentence.

[22] On 15 August 2003 the Board declined to grant the application for post-prison community based release. The Board wrote that it considered that he had not addressed his offending behaviour nor was it satisfied that he had made a genuine attempt to make restitution "and has elected to serve the default period". It accordingly considered him to be "an unacceptable risk".

[23] On 8 September the Board gave a statement of reasons. The Board set out the history of the matter including a restatement of the quotation from McMurdo P's reasons for judgment in the Court of Appeal previously set out. It made reference to previous applications and previous decisions and summarised them. Because they are relatively short the reasons for the present decision can be set out in full.

> "At its meeting on 11 August 2003 the Board considered all matters which had previously been discussed including your application of 14 July 2003 and the matters which were referred to in that application which included amongst other things your social background, your criminal background, completion of relevant programmes and your release plans. The Board also took into account the matters which were contained in the Woodford Correctional Centre Assessment Unit Update Report which was prepared for the purposes of the meeting on 11 August 2003 following an interview held between yourself and Ms Avon Rowbotham dated 14 July 2003.
>
> The Board held concerns the subject of correspondence to you of 30 July 2003 [sic 2002] and 14 February 2003 and which we more specifically detailed in a Statement of Reasons provided to you on 23 April 2003.
>
> The Board also noted there was no evidence of any offer made to pay any of the compensation ordered to be paid by way of compensation to your victims.
>
> The Board taking those matters in account formed the view that you had not addressed your offending behaviour and as it was not satisfied you had made a genuine attempt to make restitution and had elected to serve the default period, and therefore considered you to be an unacceptable community risk at this time."

[24] The applicant had no previous convictions and was characterised as a "model" prisoner. He had numerous leaves of absence during his imprisonment.

[25] The exit report from the cognitive skills program which he completed included the comment:

> "Kevin's persona is that of "calculated risk taking". He certainly cannot be described as impulsive. Kevin describes his offending behavior in terms of justifying and normalizing his actions within the corporate world."

A psychological assessment conducted by Ms Jennifer Payne concluded:

> "Psychological assessment of Kevin McQuire suggests that he is an opportunist and will continue to be self-serving. Therefore, it is probable that he may continue to be exploitative in the future. Given the nature of Mr McQuire's offences, community based supervision will not uncover nor deter similar offences."

It is in the context of those findings that the assessment of the applicant as an unacceptable community risk must be read since this was material considered by the Board and there is no other possible basis for the finding. The Board was not persuaded by the applicant that he had no access to funds but believed he had the power of direction which he chose not to exercise. It was this failure which persuaded the Board, it would seem, together with the matters adverted to by Ms Payne and the exit report, to conclude that he had not addressed his offending behaviour and had made no genuine attempt to comply with the order for compensation.

[26] Mr Lynch submitted that at least two matters had ceased to be live issues by the time the subject decision was made and were therefore irrelevant considerations entertained by the Board. The Board had referred earlier to the ASIC investigations and the second payment in the future. By the second paragraph of its reasons set out above, the Board incorporated its concerns expressed in those earlier letters and reasons into the present reasons. These are careless errors and although courts have been and are mindful not to scrutinise the reasons of an administrative decision maker with an eye to error a reader may question if the Board properly addressed the issues that it needed to. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 the court said of the need not to examine the reasons too finely:

> "These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

As has been noted above, the Board's concerns can be identified albeit with some further development of the rather compact reasons.

[27] It is not contended that the question of the payment of restitution is an irrelevant consideration. The real complaint of the applicant is that the Board does not accept that he is unable to pay. There was no information before the Board which would suggest that it failed to take into account appropriate considerations. There seems to have been no attempt, judging from the transcript of the hearing before the Board on 10 February, by the applicant to take the Board through the financial statements of the relevant companies and the trust deeds to demonstrate why his contention that he is impecunious is maintainable. It may be that the accountant's analysis will provide that assistance on the next application which is to be made shortly.

[28] There are no express criteria for application by a Board when considering an application for post-prison release. The discretion is unconfined except as the matter and scope of the statutory provisions will dictate what it is that must be kept in mind. An object of the *Corrective Services Act* 2000 is for "community safety and crime prevention through humane containment, supervision and rehabilitation", s 3(1). The interests of the public must be a necessary aspect of any decision to grant release.

[29] The sentencing court was persuaded that the applicant had the financial capacity to meet an order for compensation. It was not so persuaded in the case of his co-accused Porter who was a bankrupt. Accordingly the order for compensation was

made. The applicant has maintained for a very long time that he is in no position to comply with that order. He has not, hitherto, produced material which has persuaded the Board (or which ought to) that the sentencing court and the Court of Appeal have misunderstood the evidence about his financial affairs. In light of the psychologist's report and the exit report from the cognitive skills program the Board was entitled to be concerned that the applicant was a risk to the community of further offending of a similar kind. His exemplary prison conduct was not to the point. Even though there is lack of precision in the reasons of the Board and some carelessness in the expressions used, on the material before it, it cannot be concluded that the Board took into account irrelevant considerations or failed to appreciate considerations which were placed before it; even less that it was a decision that was relevantly unreasonable.

[30] The application is dismissed with costs.