# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Rankin* [2004] QCA 2 |
| PARTIES: | **R**<br>**v**<br>**RANKIN, Michael Anthony**<br>(applicant/appellant) |
| FILE NO/S: | CA No 289 of 2003<br>DC No 174 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Gladstone |
| DELIVERED ON: | 3 February 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 February 2004 |
| JUDGES: | McMurdo P, Davies JA and McPherson JA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made. |
| ORDER: | **1. Application for leave to appeal against sentence and appeal allowed.**<br>**2. Sentence varied by ordering that it be suspended for five years after the applicant has served two years of the sentence imposed by the District Court.** |
| CATCHWORDS: | CRIMINAL LAW –PARTICULAR OFFENCES- PROPERTY OFFENCES – BURGLARY AND LIKE OFFENCES – SENTENCING - applicant pleaded guilty to counts of burglary, assault occasioning bodily harm whilst armed, and attempted armed robbery with violence - whether parity of sentence between applicant and co-offenders – whether sentence manifestly excessive.<br><br>*R v Couper* [2003] QCA 429; CA No 213 of 2003, 25 September 2003, considered<br>*R v Feher* [2001] QCA 449; CA No 132 of 2001, 17 October 2001, distinguished.<br>*R v Grogin* CA No 198 of 1998, 27 August 1998, considered.<br>*R v Sailor* [2003] QCA 227; CA No 55 of 2002, 26 May 2003, distinguished. |

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| COUNSEL: | A W Moynihan for the applicant<br>M J Copley for the respondent. |
| SOLICITORS: | Legal Aid Queensland for the applicant.<br>The Director of Public Prosecutions (Queensland) for the respondent. |

McPHERSON JA: The applicant for leave to appeal was sentenced on pleas of guilty in the District Court at Gladstone to two counts of (1) burglary by breaking and entering with violence while armed with accompanying property damage (2) attempted armed robbery with personal violence; and (3) assault occasioning bodily harm while armed.

He was sentenced to imprisonment for five years on each count to be served concurrently.

On 6th December 2001 at about 8.30 p.m., the complainant was at home at his flat in Gladstone where he lived with a young woman and her two-year-old child. There was a sound of banging on the door and she went to answer it, holding the child in her arms. After it happened again, she stepped back and the next thing was that the glass sliding door was smashed and the applicant forced his way in, knocking the adjacent television set over.

He was dressed in black clothing and wearing a beanie over his head. He was carrying a wooden axe handle about two feet in length. He demanded the complainant's wallet and drugs.

The complainant, who had been sitting on the couch, was struck in the face with the axe handle, which caused lacerations which later required stitching. He jumped up and tackled the applicant and dragged him into the kitchen. Being somewhat larger, he managed to subdue the applicant, who at some stage lapsed into unconsciousness. When the complainant relaxed his grip, the applicant made good his escape.

He was arrested some time afterwards, after the police had interviewed the two women, H and L, as I will call them, who were also charged, convicted and sentenced for some of the same offences. It emerged that H had previously had a relationship with the complainant and on this account bore some resentment against him and possibly also against his new companion.

H hired the applicant to carry out the burglary and the assault. She agreed to pay him $100 for carrying it out, and for this purpose she and L drove him from Maroochydore, where he lived, to Gladstone. They were evidently not personally present at the complainant's home when the break in took place but were outside somewhere waiting in their car for the offences to be committed. They were, in that sense, secondary offenders to some of the applicant's offences under s 7 of the Code.

The case is rather typical of criminal home invasions of this kind, with the possible difference that on this occasion the offenders succeeded in identifying their intended victim correctly, which is often not the case. Attacks like these have always been regarded as serious and they attract a heavy penalty.

The sentence here is said to be excessive because of the applicant's pleas of guilty, that he was acting on the instructions of H, who procured his involvement, and that there was a lack of parity between the sentences imposed on the two co-offenders as compared to his own.

They were sentenced by different Judges at a time before he was sentenced, H receiving a three and a half year sentence, partly suspended, that is to say, suspended after eight months, which was, I understand, a reduction from a notional four and a half years' sentence, suspended after 12 months.

L received a wholly suspended sentence. The sentence imposed on her may fairly be disregarded in this context. She had no previous convictions and does not seem to have participated much in events, apart from providing company and evidently support and some encouragement in joining in the drive to Gladstone. The Judge who sentenced her formed the view that she had played a much lesser part than H had. Both L and H had the considerable advantage on sentencing of having given section 13A statements for use against the applicant.

H had a previous conviction of her own for breaking and entering. She was undoubtedly the moving spirit in this criminal enterprise, but without the applicant's assistance, the offences probably could not and would not have been committed at all.

His previous record strongly influenced the sentence he received. His criminal career started with convictions in the Children's Court as long ago as 1992 for breaking and entering, stealing, unlawful use and wilful property damage. Further such convictions appear in the same and following years to and including 1996, in the course of which he was sentenced on at least three occasions to terms of imprisonment, having previously failed to make use of orders for probation that had been given in his favour. Since about 1998 his offending has consisted mainly of drug offences, although in 1998 he was fined for attempting to obtain property dishonestly. He has more than once been convicted of assault occasioning bodily harm and on several occasions of offences of disorderly behaviour.

The applicant is now 28 years old. He had what appears to have been educational opportunities and a good start in life, which he threw away. He says he started using drugs and alcohol at the age of 15 and getting them has evidently been the motivation for his criminal offending. On the journey to Gladstone his co-offenders plied him with drugs and alcohol to prepare him for the break in, but that, as the sentencing

Judge said, does not excuse his conduct. In his favour, he has worked from time to time but his addiction seems always to have got the better of him. The comparable cases referred to on appeal all have features that to my mind distinguish them from this.

*R v Grogin* CA No 198 of 1998, 27 August 1998, was a case in which some adjustment in sentence was called for on appeal, owing to an error in calculating the period of presentence custody.

*R v Feher* [2001] QCA 449; CA No 132 of 2001, 17 October 2001, was a case in which the application for leave to appeal was dismissed. The offence was more serious than this, and the sentence of five and a half years was described by Justice Davies as "a little generous" to the applicant. It was a worse case than this and, had it not been for a section 13A statement, the principal offender would, it appears, have received a sentence of some eight years' imprisonment.

In *R v Couper* [2003] QCA 429; CA No 213 of 2003, 25 September 2003, a sentence of three years described on appeal by one of the Judges as "moderate" was nevertheless reduced by six months for reasons of disparity with other offenders in the matter. And in *R v Sailor* [2003] QCA 227; CA No 55 of 2002, 26 May 2003, a sentence of only 12 months was not disturbed. The applicant there was a much younger man who had not previously been to gaol, who had good prospects of rehabilitation and only a minor criminal history, and who had

cooperated and expressed remorse. He and his companions apparently believed the house they entered was unoccupied, so that, unlike this, the offence was not planned or premeditated in any way. It was, moreover, an Attorney's appeal to which different considerations of course apply. Even so, Justice Davies thought it a borderline case.

By contrast, this was a planned home invasion involving a complete stranger, that is to say, the applicant, who had no personal animus against the victim and who burst into a home in the night, armed and injuring the complainant, and doing so purely, so far as one can see, as someone else's agent or “hitman” for which he was to receive a small sum of money.

If it had been a robbery committed on commercial premises in the daylight, it is difficult to believe the applicant would have attracted a much heavier sentence, especially having regard to his previous record.

The experience to which the complainant and his partner were subjected has naturally had a lasting impact on their lives. What remains, however, is the fact that the other two co-offenders, and in particular H, have received sentences which appear to be out of accord with that imposed on the applicant himself. It is obvious that he was manipulated by H to carry out the offences to which he pleaded. She knew his criminal record and his weakness for alcohol and drugs and she played on those weaknesses to procure him to commit the offences. She appears to have exaggerated or fabricated tales of wrongs

to herself in order to persuade him to assist her in her purpose of injuring the complainant. It is not easy to see that she was not equally responsible with him for what resulted.

I think that the applicant here therefore has some justification for feeling a sense of grievance about the disparity between the sentence he received and those imposed on the other two. Mr Copley concedes that the sentence of five years' imprisonment was at the top of the range and accepts that some adjustment in the sentence may be appropriate.

I am disposed to agree with this view of the matter while continuing to think that this offence and others like it are particularly serious and should be visited with heavy penalties. The fact is, however, that the others seem to have got off, as I see it, rather more lightly, certainly in the case of H, than perhaps they deserved.
Mr Copley submits that any recommendation for suspension should not take effect earlier than the two year mark, and I am disposed to agree with this submission. I consider it would make for appropriate parity with the co-offenders, or as near as one can achieve in these cases, if the sentence were altered in that way.

I would therefore allow the application and appeal and vary the sentence by ordering that it be suspended for four years

after the applicant has served two years of the five year sentence imposed in the District Court.

THE PRESIDENT: I agree.

DAVIES JA: I agree.

THE PRESIDENT: The orders are as proposed by Justice McPherson.

MR COPLEY: May I just clarify one point, did your Honour Mr Justice McPherson say that it should be suspended for four years after serving two years?

McPHERSON JA: Yes, I meant to say that the period of suspension should be four years. I suppose I put it badly.

MR COPLEY: My understanding is that it would have to be for five years.

McPHERSON JA: Five years.

MR COPLEY: If the head sentence is five years.

THE PRESIDENT: Because the head sentence is five.

McPHERSON JA: All right. I'll substitute five for four.

MR COPLEY: Thank you, your Honour.

THE PRESIDENT: Yes, the sentence is as corrected.