# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *R v Ross* [2004] QCA 21 |
| PARTIES: | **R**<br>**v**<br>**ROSS, Lew**<br>(applicant) |
| FILE NO/S: | CA No 343 of 2003<br>DC No 1459 of 2003<br>DC No 2410 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED EX TEMPORE ON: | 11 February 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 February 2004 |
| JUDGES: | de Jersey CJ, Davies JA and Mackenzie J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Application 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 – PROPERTY OFFENCES – where recommendation for post prison community based release rather than suspension – whether desirability of post prison supervision and assistance is relevant – where applicant has history of offences of dishonesty – where number of offences large and property not recovered has high value – whether sentence is manifestly excessive |
| COUNSEL: | The applicant appeared on his own behalf<br>R G Martin for the respondent |
| SOLICITORS: | The applicant appeared on his own behalf<br>Director of Public Prosecutions (Queensland) for the respondent |

MACKENZIE J: This is an application for leave to appeal against an effective sentence of six years with a recommendation for post prison community based release after two years for a large number of offences of dishonesty. One indictment which, for convenience, I will call the first indictment, contains 67 counts and an ex officio indictment contains a further three.

Two of the counts in the first indictment concerned related offences in 1995 of entering a dwelling house with intent and stealing. In April 1995, after the date of those offences, the applicant was sentenced for 36 other offences of dishonesty with a further five being taken into account. He was sentenced to three and a half years imprisonment, which it was said in the record, inflated to about five years after he later received cumulative sentences for breaches of bail, escaping from custody and dangerous driving.

Three of the offences in the first indictment are related offences committed in 2000, comprising entering a dwelling and stealing goods worth about $9,500, attempting to unlawfully use a Holden HSV at the premises and eventually unlawfully using another vehicle from the same premises to take the goods away.

In June of 2000 the applicant appeared in the District Court in respect of four other offences of entering dwelling houses and received a fully suspended sentence on the basis that he said he was to be receiving treatment for his drug addiction.

The first indictment also contains five offences committed in early 2001, comprising three burglaries, in one of which the home owner's motor vehicle was unlawfully used to take $16,000 worth of goods away. There was also an unrelated unlawful use of a motor vehicle.

In April 2001 the applicant was sentenced to 12 months for a separate offence of entering a dwelling which had been committed in 2000. In May 2001 he received six months imprisonment, cumulatively, for a further 10 offences of dishonesty. From March to October 2002 he committed the remaining 60 property offences in the first indictment and the ex officio indictment. In this period, about $90,000 worth of property remained unrecovered. The total value of property unrecovered in respect of all of the offences in the indictments was about $122,000.

The areas in which the offences were committed extended from Brisbane to Logan, the Gold Coast and Toowoomba. It is apparent that the pattern of offending was that the applicant was hardly out of custody when offences began again. He had a raging heroin addiction at the time and was also involved with amphetamines.

The prosecution argued at sentencing for a sentence in the range of six to seven years, which defence counsel said he could not cavil with. The Crown Prosecutor conceded that there has been extensive cooperation with police during drive

arounds for the purpose of identifying premises at which offences had been committed.

This had resulted in the applicant being charged with 70 offences rather than the 18 upon which the prosecution had direct evidence of his involvement. However, it was pointed out that many of the offences had been committed while he was on bail. The learned sentencing Judge said in his sentencing remarks that he took both of those matters into account. It was inevitable that the latter tended to counteract the benefit attributed to the former. It is difficult to argue convincingly that insufficient emphasis was given to cooperation as the applicant's written submissions allege.

Defence counsel submitted that since the applicant had spent about 12 months in custody, imprisonment of five years from the date of sentence would be appropriate. He pressed for a suspension after 12 months, rather than a recommendation for early post prison community based release, on the basis that the applicant might not obtain parole immediately upon eligibility to apply. He also said that his client had expressed an intention to undertake treatment and rehabilitation in respect of his drug addiction. He was not using drugs while in custody.

One of the matters raised by the applicant is that he was dissatisfied with his legal representation. He says that his original barrister was replaced late and that the substituted counsel did not know enough about his case which disadvantaged

him. The record does not reflect this. It suggests that what could be said in the applicant's favour was placed before the sentencing Judge. The learned sentencing Judge sentenced the applicant to an effective sentence of six years by imposing that sentence for the offences in which entry of dwelling houses was involved and lesser sentences concurrently for the others. He declared 337 days in pre-sentence custody as time already served. He made a recommendation for post prison community based release after two years.

The applicant's complaint that if he had been charged with breaking and entering instead of burglary he would have been entitled to a lesser sentence on a number of counts appears to be based on a misapprehension since a variety of offences involving breaking and entering or entering a dwelling house were assimilated under the description of burglary by amendment of the Criminal Code in 1997. Prior to that the term "burglary" was applied to breaking and entering a dwelling house in the night time.

The effect of the learned sentencing Judge's orders was that at the time of sentence the applicant would have a head sentence of about five years and one month remaining to be served and an entitlement to apply for post prison community based release after about another 13 months had passed. The only substantial difference between that outcome and that requested by his counsel was that the applicant was not entitled to be released on suspension of his sentence after the extra 13 months in custody. No valid complaint can be

made about the effective sentence of six years, given the applicant's bad history of offences of dishonesty, the repetitiveness of his conduct and the value of the property not recovered.

With respect to the question whether an order for post prison community based release rather than a suspension makes the sentence manifestly excessive, the applicant stressed his concern that he was unlikely to get parole immediately when eligible. It is indicated in the record that he had done relevant courses in prison but feels that his record will count against him.

Suspension of a sentence rather than an order of eligibility for early release is not something given as a matter of course. Whether an order for suspension is appropriate in a particular case will depend on a range of factors. Factors personal to the prisoner, particularly any that indicate that he may need the benefit of supervision and assistance available under the post prison community based release system, which would not be available if the sentence is suspended, are in my view, relevant.

In his sentencing remarks, the learned sentencing Judge referred to the possibility that a person given a firm date for suspension may take advantage of that not to be cooperative in prison. The applicant has told us today that there are no areas for concern in that regard since his behaviour in prison has been satisfactory. I do not think

that that reference in the sentencing remarks vitiates the sentence.

In my opinion, given all the circumstances of the case, no reason has been established for thinking that the exercise of the sentencing discretion to make a recommendation rather than order a suspension is miscarried. A recommendation after two years adequately recognises the factors in the applicant's favour, including his cooperation. The fact that there is a recommendation not a suspension does not in my view render the sentence manifestly excessive. I would therefore refuse the application for leave to appeal against sentence.

THE CHIEF JUSTICE: I agree.

DAVIES JA: I also agree.

THE CHIEF JUSTICE: The application is refused.

---