SUPREME COURT OF QUEENSLAND

CITATION:	*R v White; ex parte A-G (Qld)* [2004] QCA 72
PARTIES:	**R** **v** **WHITE, Dennis John** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 356 of 2003 SC No 392 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2004
JUDGES:	Williams JA and White and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Vary each of the sentences imposed at first instance by deleting the provision that the sentence be suspended with an operational period** **3. Declare that the respondent was in custody for 56 days between 2 April and 28 May 2002 and that is declared to be imprisonment already served under the sentence**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where respondent convicted of trafficking, torture, burglary, common assault and kidnapping – where sentenced to effective term of imprisonment of four and a half years, suspended after serving 12 months with operational period of five years – where learned sentencing judge reduced head sentence to take account of early plea of guilty and further reduced head sentence because of time already spent in custody – where learned sentencing judge made further reduction by ordering

suspension of sentence – whether further reduction amounted to "double discounting" – whether sentence ultimately imposed manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s 161

COUNSEL: M J Copley for the appellant
A J Moynihan for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **WILLIAMS JA:** This is an appeal by the Attorney-General against sentences imposed on the respondent, Dennis John White. The respondent pleaded guilty to trafficking in a dangerous drug (methylamphetamine), torture, burglary with a circumstance of aggravation, two counts of common assault, and kidnapping for ransom. As will be detailed in a moment, whilst there was some connection between the offences, they fell into three distinct groups calling for separate sentencing considerations.

[2] The sentences imposed were as follows:

(i) Trafficking: Four and a half years imprisonment, suspended after serving 12 months, with an operational period of five years;

(ii) Torture: Two years imprisonment, suspended after serving eight months, with an operational period of three years;

(iii) Burglary: Eighteen months imprisonment, suspended after serving six months, with an operational period of three years;

(iv) Common Assault: One years imprisonment, suspended after serving three months, with an operational period of two years;

(v) Kidnapping: Two years imprisonment, suspended after serving eight months, with an operational period of three years.

It was ordered that all sentences be served concurrently.

[3] The method by which the learned sentencing judge arrived at those sentences is of critical importance and more will be said about that subsequently. Before doing that it is necessary to outline briefly the circumstances of the offences.

[4] Between January 1997 and 13 December 2000, a period of four years, the respondent carried on the business of trafficking in methylamphetamine, then a second schedule drug. On sentence there was some doubt as to the extent of the trafficking, but it was clear that the operation was of considerable size. There were instances of sales of the drug to an accomplice in $500 amounts, instances of sales in one pound lots, evidence that the respondent cooked drugs two or three times per week, and significant payments to associates. The respondent made four sales of methylamphetamine to a covert police operative between October and December 2000 for which he was paid $11,550; the powder supplied ranged in purity from 42.7 per cent to 66.5 per cent. The respondent sold large quantities of the drug to

"bikies" and was seriously assaulted by "bikies" because he refused to supply the drug for free. As the learned sentencing judge noted because of that beating the respondent was in a wheelchair for some five months. As he was in fear of his life the respondent surrendered to the Criminal Justice Commission and on that happening investigating police found equipment used for the production of methylamphetamine in his vehicle.

[5] The learned sentencing judge was satisfied that there was "some significance in the size of the operation" and concluded that a sentence of four and a half years imprisonment was within the "appropriate range" for that offence. The Attorney-General on appeal does not challenge that conclusion.

[6] The second offence, torture, occurred on 2 April 2002. The relationship between the respondent and his wife deteriorated during the period she was caring for him after his beating in July 1999. There were some arguments over a period of time leading up to 2 April 2002 when the offence in question occurred. The respondent told his wife she was "finished" and punched her in the face. His wife's 16 year old daughter called the police, but the respondent ripped the phone cord from its socket. The wife and daughter fled to a car, but the respondent prevented them driving away by smashing the window with a double barrel shotgun. The butt struck his wife on the shoulder. The respondent pointed the weapon at his wife's head and told her to get out of the vehicle; he then told her daughter to go for a walk. The respondent hit his wife in the arm with the barrel of the gun and told her, about eight times, that he would shoot her. He was holding the gun only an inch from her head. The respondent hit his wife's ear with the barrel of the gun causing a wound. He put the muzzle against his wife's temple and said, "This is it". The wife was terrified, and as found by the learned sentencing judge, she believed she was "going to die". The extent of her terror is indicated by the fact that she wet herself. The respondent continued to menace his wife with the weapon until police arrived. In the course of the incident the respondent had rounds of ammunition available for use and told his wife he had the weapon loaded for three days waiting for an opportunity to kill her. Clearly there was an intended element of terrorisation in the respondent's conduct. The incident only came to an end with the arrival of the police.

[7] The learned sentencing judge noted there were some matters in favour of the respondent; he did not shoot his wife and the whole incident "lasted over a relatively short period of time".

[8] After referring to submissions on sentence from each side the learned sentencing judge noted that "comparable sentences … would allow me to impose a sentence of two years for the torture".

[9] As will become obvious the learned sentencing judge was at that stage building up an overall sentence and in that context the Attorney on this appeal does not challenge a sentence of two years for this offence. It has to be said that for the events which occurred on 2 April 2002 looked at in isolation a sentence of two years imprisonment (particularly given the respondent's criminal history to which reference will be made later) was a sentence at the very bottom of the range.

[10] The remaining offences occurred on 20 June 2002. At about 4.00 am the respondent, armed with a shotgun and sawn off .22, confronted his estranged wife's brother outside his house at Logan. The learned sentencing judge noted that the

respondent had "obviously been drinking". The respondent indicated that he wanted to revenge the loss of his wife on her family. He entered the dwelling of his wife's brother and threatened violence. That constituted the burglary. The charges of common assault related to incidents involving the respondent on the one hand and his wife's brother and his 19 year old stepdaughter Tina Dwyer who was also in the house on the other. When the respondent was told that his wife was not at the residence he said that he needed to get to Oakey and that Tina would drive him. The respondent refused to let his wife's brother drive and insisted that it be the young woman. Under the duress of the arms the respondent was carrying Tina got into the driver's seat of the vehicle. There followed a drive from Logan to a point outside of Dalby where the car was stopped by a police roadblock. That was about 12.45 pm. Tina Dwyer was able to leave the vehicle and walk to the safety of the police. In the course of the drive police had been negotiating with the respondent by telephone.

[11] In the circumstances the learned sentencing judge concluded that the kidnapping offence came within s 354A(3) of the Criminal Code and that the maximum term of imprisonment for the offence was 10 years.

[12] Again in the course of calculating an overall sentence to impose the learned sentencing judge concluded that the appropriate term of imprisonment for the kidnapping offence would be two years. Again it has to be said that if one was looking at the kidnapping offence alone (in the light of the respondent's criminal history) a higher sentence would have been called for.

[13] The Attorney-General did not challenge on the hearing of the appeal the accumulation of four and a half years for the trafficking, two years for the torture, and two years for the burglary and kidnapping making a total of eight and a half years.

[14] The learned sentencing judge then indicated that that sentence had to be "ameliorated by your guilty pleas, the fact you have saved your wife and stepdaughter from further stress in having to give evidence of these events" and by pleading to an ex-officio indictment. There was also reference to the obvious "cooperation on your part in having all of the matters dealt with in the way that they have been dealt with today".

[15] The learned sentencing judge went on to say:

> "I therefore consider that you have facilitated the course of justice to a degree that warrants a significant reduction in the term of imprisonment that would have otherwise been appropriate. That would bring the notional term back to six years."

The Attorney-General on the hearing of the appeal did not challenge the reduction from the notional eight and a half year head sentence to six years to bring into account those ameliorating factors.

[16] The respondent had spent approximately 15 months in pre-sentence custody, but that could not be deducted applying s 161 of the *Penalties and Sentences Act* 1992 because the respondent was not in custody for the offences in question "and for no other reason"; the custody also related to some other summary offences which would not have attracted a significant custodial sentence. The learned sentencing

judge quite properly recognised that that period of approximately 15 months imprisonment had to be brought into account in some way.

[17] Before detailing the approach of the learned sentencing judge it is necessary to refer to the respondent's criminal history. His first convictions were in 1966 when on two occasions he was convicted of stealing. In August 1966 he received his first prison sentence; he was sentenced to 18 months imprisonment, suspended after three months, for two counts of breaking, entering and stealing. The next significant conviction was that for rape in 1970; he was then sentenced to imprisonment for five years. There was also an associated conviction for carnal knowledge of a girl under 17 years; a concurrent term of three months imprisonment was imposed. For an escape from custody he received imprisonment of 12 months in December 1973. Then in 1986 he was convicted and imprisoned for nine years for an armed robbery in company with personal violence. Earlier in that year he was also convicted of assault occasioning bodily harm and imprisoned for six months. Whilst in custody the respondent took part in a prison riot in December 1987 and received an eight month cumulative term. In 1998 he was sentenced to one months imprisonment, suspended for two years, for the unlawful possession of weapons. In September 1999 he breached a bail undertaking and was sentenced to three months imprisonment, suspended for two years. It follows that the respondent's conviction on the trafficking charge breached the terms of those last two suspended sentences.

[18] As I have already indicated, given the respondent's serious criminal history involving major offences of violence, the sentences of two years for the torture and kidnapping charges would have been well below range if they were not part of the overall sentence imposed on the respondent.

[19] I now return to the approach of the learned sentencing judge. Having arrived at a notional head sentence of eight and a half years for all the offences that was reduced to six years because of the ameliorating factors associated with the early guilty pleas, the learned sentencing judge then had to give credit for the time already spent in custody in arriving at the final sentence. The reasons of the learned sentencing judge went on:

> "I could impose cumulative sentences and then make a recommendation for parole that takes into account the time in custody. I am not attracted to that option. I am not attracted to it because with your record you will have difficulty obtaining post-prison community based release and there is therefore some attraction in suspending the terms of imprisonment that I impose. Rather than take the course of imposing cumulative sentences, what I have done is I have come up with the figure of six years which seems to be common to both … counsel … as an overall term of imprisonment. What I am going to do is impose concurrent sentences in respect of each of those offences to which you have pleaded guilty today, and the penalty that I am going to impose on the trafficking recognises the sentence which is in reality the ultimate sentence for your overall criminality but is also an appropriate sentence for the trafficking."

[20] It was then that the learned sentencing judge imposed the sentences that have been detailed above. In effect that meant that the sentencing judge first deducted from the six year level of sentence previously determined 18 months to take into account the time already spent in custody. But then there was a further reduction in that it was ordered that the sentence of four and a half years, the head sentence, be suspended after the respondent served 12 months. Given that the respondent had served approximately 15 months in custody that meant that he would only serve 27 months in custody for all the offences that he was being dealt with for on that occasion before being released subject to a bond which would be in place for a further four years.

[21] In my view however one looks at the effective sentence that was ultimately imposed it was manifestly inadequate as a punishment for the offences in question. It seems to me that the error in the sentencing process could be identified in one of two ways. Firstly, the learned sentencing judge erred in saying that a sentence of four and a half years imprisonment "is in reality the ultimate sentence for your overall criminality but is also an appropriate sentence for the trafficking". That statement cannot be reconciled with the previous reasoning that a notional head sentence of eight and a half years reflected the overall criminality before discounting for the co-operation with police and the justice system. What could be said, and I suspect what the learned sentencing judge was endeavouring to say, was that serving a sentence of four and a half years, given the time already spent in custody, reflected the overall criminality and that equated the appropriate sentence for the trafficking offence. Secondly, it could be said that having made an appropriate reduction (from eight and a half years to six years) to take account of the early plea of guilty and then reducing that further to four and a half years because of time already spent in custody, the discounting to which the respondent was entitled had been expended. Making a further reduction by ordering suspension of the sentence after 12 months was erroneous in that there was no justification for it. That further discounting amounted to "double discounting".

[22] Essentially counsel for the Attorney-General conceded the eight and a half year head sentence was appropriate and the reduction to six years for the ameliorating factors was also within range. He also accepted that a further reduction to four and a half years because of time already spent in custody was within range. But he submitted that any further discounting was inappropriate. In consequence it was submitted on behalf of the Attorney-General that the sentences imposed should be varied by deleting all reference to suspension after a period of time with an operational period. That would have the consequence that the sentences would be four and a half years imprisonment for the trafficking, two years imprisonment for the torture, eighteen months imprisonment for the burglary, one years imprisonment on each of the assault charges, and two years imprisonment for the kidnapping, all sentences to be served concurrently.

[23] Counsel for the respondent submitted that there was no discernible error in the approach of the sentencing judge and further that, to interfere with the sentence as proposed by counsel for the Attorney-General, was not justified on an appeal by the Attorney-General against sentence. The first proposition is rejected for the reasons given above. Once it is accepted that the effective sentence was manifestly inadequate it is appropriate to substitute the proper sentence on an Attorney's appeal.

[24] This case highlights the problems faced by a sentencing judge when a number of separate very serious offences are being dealt with at the one time. There are a number of factors, some competing, which have to be brought into account and the sentencing task is never an easy one in those circumstances. Ultimately one has to have regard to the overall criminality of the offences and determine whether or not the sentence as structured adequately reflects all relevant considerations. Ultimately I have come to the conclusion that the sentence imposed was manifestly inadequate and that the appeal ought to be allowed. In my view an appropriate sentence will be achieved if the various orders for suspension were deleted. The consequence would be that the sentences would be as indicated in paragraph [22] hereof.

[25] Since the matter was reserved the court has been informed that in addition to the approximate period of 15 months in pre-sentence custody referred to above, the respondent was also in custody for 56 days between 2 April and 28 May 2002 in relation to subject offences and for no other reason. In consequence he is entitled to a declaration pursuant to s 161 of the *Penalties & Sentences Act* in relation to that. This court should therefore add to the sentence a declaration in those terms.

[26] To achieve that result the formal orders of the court are:

(i) Appeal allowed;

(ii) Vary each of the sentences imposed at first instance by deleting the provision that the sentence be suspended with an operational period.

(iii) Declare that the respondent was in custody for 56 days between 2 April and 28 May 2002 and that is declared to be imprisonment already served under the sentence.

[27] **WHITE J:** I agree with the reasons of Williams JA and the orders which he proposes.

[28] **McMURDO J:** I agree with the reasons of Williams JA and the orders he proposes.