SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2004] QCA 74
PARTIES:	**R** **v** **ANDERSON, SHANNON JAMES** (applicant)
FILE NO/S:	CA No 355 of 2003 DC No 301 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
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 order made.
ORDERS:	**1. Grant the application and allow the appeal** **2. Set aside the sentence below of seven and a half years imprisonment on count 10 and impose in lieu a sentence of five years**
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 GRANTED – PARTICULAR OFFENCES– PROPERTY OFFENCES - where applicant pleaded guilty to numerous property offences – where applicant sentenced to a head sentence of 7 ½ years imprisonment and a recommendation for eligibility for post prison community based release after 2 ½ years – whether sentence manifestly excessive – whether there is a real risk the applicant might serve all of his sentence or beyond the 2 ½ years intended by the learned sentencing judge *Corrective Services Act* 2000 (Qld), s 135 *Penalties and Sentences Act* 1992 (Qld), s 189 *R v Gates* [2002] QCA 320; CA No 99 of 2002, 23 August 2002, considered *R v Robinson* [1995] QCA 131; CA No 534 of 1994, 24

March 1995, cited

COUNSEL: The appellant appeared on his own behalf
D Meredith for the respondent

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

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of White J and agree with all that is said therein. Though the applicant is fast building up a criminal history which will necessitate the imposition of heavy penalties if further offending occurs, I am of the view that a head sentence here of seven and a half years imprisonment, albeit with a recommendation for eligibility for post-prison community based release after two and a half years, was manifestly excessive. In reaching that conclusion I have been greatly influenced by the applicant's age and the extent of his co-operation with the police. It does appear that without his candid confession his involvement in some of the offences may well have gone undetected.

[2] I agree with the orders proposed.

[3] **WHITE J:** The applicant, who appeared on his own behalf, seeks leave to appeal against the overall sentence imposed on him in the District Court at Maroochydore on 6 October 2003. He is a young man of 22, 21 when the offences were committed between 7 February and 15 April 2003.

[4] He pleaded guilty to three counts of burglary; one count of entering premises with intent; six counts of break, enter and steal; two counts of entering premises and stealing; two counts of entering premises and committing an indictable offence and, on *ex officio* indictment, one count of burglary. At the time these offences were committed the applicant was on an intensive correction order imposed in the District Court at Maroochydore on 28 August 2002.

[5] Various terms of imprisonment, all concurrent, were imposed, the longest being of seven and a half years in respect to count 10 involving the theft of Australian currency, foreign currency and property to the value of $134,000 from a dwelling-house. The applicant was recommended for post-prison community based release after serving two and a half years of his sentence to reflect his cooperation with police and other mitigating factors. He was found to have breached his intensive correction order and the un-expired term of that order of 237 days was ordered to be served concurrently with the other sentences. Pre-sentence custody of 154 days was declared as time served.

[6] The applicant has a very extensive criminal history dating back to 1999 including prison sentences actually served for a range of similar offences including approximately 18 counts of house-breaking or similar and 20 counts of unlawful use of a motor vehicle or allied offences. In August 2000 he was sentenced to 18 months imprisonment cumulative on an activated suspended sentence and a sentence imposed for breach of probation. The applicant was addicted to various drugs and ostensibly offended to support these habits.

[7] The facts relating to the offences were contained in a schedule which was made an exhibit in the court below. In the course of some four interviews with police the applicant revealed his responsibility for most of those offences. The total amount of unrecovered property in respect of the 14 offences on the first indictment was $201,454.50. Before this court the applicant challenged some of the amounts contained in the schedule but his counsel did not do so below. Some of the premises were private dwellings and some businesses. Two offences, particularly, stand out. On 7 February 2003 the applicant and a co-offender forced entry into the complainant's residence, located a safe and took from it Australian and foreign currency together with jewellery, clothing, cameras, disks and personal papers. The estimate of the value of the property lost was $42,000.

[8] On 21 March 2003 the applicant entered the complainant's residence through an unlocked window. The applicant said in his record of interview that on gaining entry to the residence he collected items of value and then located a safe in a wardrobe. Since he was unable to open it he telephoned a friend who attended with a sledge hammer. The contents were removed and the offenders went to a beach resort. They counted between $70,000-$80,000 in Australian currency, noted foreign currency, jewellery and other items. The total value of the property assessed by the complainant was $134,000. The applicant took about $20,000 in cash. The offenders burnt the foreign currency to avoid police detection. The applicant told police he was unaware of the whereabouts of the other property. The applicant stayed at a resort at Noosa spending the whole amount in a week on drugs and his friends.

[9] The offence on the *ex officio* indictment concerned events which took place on 1 March 2003 when the applicant broke into the complainant's residence through a garage door, and having kicked open an internal wall, ransacked a desk stealing sets of keys. Fingerprints eventually identified the applicant.

[10] The applicant cooperated with the police to the extent that he confessed to the offences in an endeavour to set his life in order and to rehabilitate himself. He did not identify his co-offenders.

[11] The learned sentencing judge had the benefit of a detailed report from a community corrections officer about the applicant's response to the intensive correction order imposed in August 2002 and reports from Dr Harvey Whiteford, a well-known psychiatrist. Dr Whiteford diagnosed the applicant as exhibiting the criteria for an anti-social personality disorder due to a range of factors including an abusive and dysfunctional early family life and later alleged sexual abuse by a teacher. He has engaged in long-term drug abuse including heroin and amphetamines, tobacco and alcohol. His criminal activity has supported both his drug addictions and his life as he has had no meaningful employment. Whilst acknowledging the many destabilising events of his life, the learned sentencing judge pointed out that many people with troubled backgrounds do not resort to crime and noted the applicant's complete disregard for the rights of others.

[12] Before this court the applicant complained that the sentence imposed was excessive because the learned sentencing judge failed to take account of his remorse; that he was not on an intensive correction order at the time when he committed these offences and that his Honour failed to appreciate Dr Whiteford's reports. The applicant contends for a head sentence of five years to be suspended after two,

to two and a half years. He seeks a lesser sentence to be with his sick mother and other family and to obtain treatment which he denies he has been offered in the corrections system.

[13] The learned sentencing judge acknowledged the applicant's remorse by referring to his extensive cooperation with police – a sure indicator of remorse. The applicant clearly was on an intensive correction order when these offences were committed. After some discussion at the hearing the applicant accepted that that was so. The point he wished to make was, that as the court report indicated, until January 2003 he had reported as directed and made some attempt to comply with the other requirements of the intensive correction order. He attended alcohol and drug assessment with the Special Health Services but failed to continue with follow-up psychological counselling as directed. He failed to take up the offer of sexual abuse counselling. He performed only three-quarters of an hour community service citing his poor psychological and physical health status as a reason for not doing so. The applicant apparently experienced relationship problems with his ex-partner who had given birth to his child in September 2002 and with a girlfriend who was on remand, as well as the health of his mother, the influence of an unsatisfactory peer group, lack of employment skills and limited income as well as an itinerant lifestyle. His drug problems continued.

[14] The applicant complained that proper medical treatment is not available to him in prison. As Dr Whiteford noted, there are numerous appropriate courses and counselling that he can avail himself of whilst in custody.

[15] The learned sentencing judge rightly recognised that the applicant was a risk to the community and had not taken up the opportunities offered to him whilst on the intensive correction order to turn his life around. In fixing the point at which the applicant could apply for post-prison community release at two and a half years the learned sentencing judge sought to recognise and give credit for the applicant's cooperation.

[16] The respondent submitted that when the applicant's extensive past criminal history for like offences is considered, the extent of the loss to his victims, the wasted opportunities for rehabilitation, and comparable sentences considered by this court the conclusion must be that the head sentence is not manifestly excessive.

[17] *R v Robinson* [1995] QCA 320; CA No 534 of 1994, a decision of 24 March 1995, has facts very similar to the present although significantly less property was involved. The applicant in that case appeared for himself. Fifteen offences of dishonesty were charged on the indictment and the sentencing judge took a further 76 offences into account pursuant to s 189 of the *Penalties and Sentences Act* 1992. Of those, there were 10 burglaries and 35 offences of house breaking. There were other stealing charges and false pretences charges. The total value of property was said to be over $80,000. That applicant was 23 when he committed the offences and had a record for similar offences including one of aggravated burglary intentionally causing serious injury for which he was sentenced to eight years imprisonment. He was sentenced to seven and a half years imprisonment. The learned sentencing judge in that case recommended parole after two and a half years because of the applicant's cooperation with police. He was said to have had an unfortunate childhood in which his father had introduced him to heroin to which he had become addicted. He wished to have his non-parole period reduced so that he

could engage in rehabilitation. Although it was noted that his cooperation with police might have been reflected in a shorter head sentence, nonetheless the sentences were held to be within range bearing in mind the applicant's extensive criminal record.

[18] A recent decision of *R v Gates* [2002] QCA 320; CA No 99 of 2002 of 23 August 2002, is also comparable. Mackenzie J giving a judgment with which the other members of the court agreed said at page 4 of his reasons

> "The schedule of sentences relied on by the Crown and the applicant shows that while there is a wide range of sentences for these kinds of offences, in a case where there is a lengthy criminal history and a large amount of property, head sentences of the level imposed [which was seven years] are not uncommon for burglary. Substantially higher penalties can be found but they are generally cases where value of property involved is higher than in this case [$16,000]. Equally, lower sentences can be found which are no doubt affected by their individual facts as well."

[19] In that case the applicant had pleaded guilty on *ex officio* indictment to seven counts of burglary, six counts of stealing, 10 counts of fraud, one of attempted fraud and one of possession of house breaking implements with a circumstance of aggravation being 25 offences in all committed over a three month period. The applicant was 29 when he committed most of the offences and had a long history of committing similar offences comprising over 50 break and enters as well as other dishonesty offences. He had served a number of periods of imprisonment. It was noted that he had a serious heroin problem of long standing. He had attempted to rehabilitate himself by enrolling in pre-tertiary subjects whilst in custody with a view to entering a tertiary course in the field of community welfare. He complained that he was not given sufficient credit for his early plea of guilty and the positive steps that he had taken for his rehabilitation. As in *Robinson*, his criminal history suggested that a head sentence of seven years was not manifestly excessive. A recommendation for parole eligibility after serving three years had been made which reflected only a six month allowance for all the positive factors in his favour. The court varied the sentence and recommended parole eligibility after two and a half years.

[20] The applicant referred the court to a number of sentences imposed in the District Court with features similar to his offences. The sentences imposed range from five years down to one month and community orders. The applicant expressed some familiarity with some of these offenders and had concluded, at least in the case of some of them, that their offences were far worse than his. These sentences were all, no doubt, governed by their specific facts, as are all sentences. *Robinson* and *Gates* have the advantage of being decisions of this court where a review of the appellate decisions for similar offences was undertaken. In *Robinson* the applicant was guilty of many more offences than this applicant – a further 76 pursuant to s 189 of the *Penalties and Sentences Act* – even if the monetary amount was less than here and had an act of violence which caused serious injury in his criminal history. In *Gates* the applicant was 29 years whereas here the applicant was only 21 when he committed the offences as well as having a more extensive criminal history. These differences suggest that a head sentence of seven and a half years was too high.

There is a further matter which was not developed before the learned sentencing judge but ought to have been apparent.

[21] This court had the opportunity of hearing from the applicant as he made his submissions. He contended that it was highly unlikely that he would be granted post-prison release at the time recommended and that there was a risk that he would serve the whole or at least a very large part of the seven and a half year sentence bearing in mind his criminal history. It might also be added that his attitude and demeanour as demonstrated in court, whilst not discourteous, was not entirely conciliatory and tended to be argumentative and might operate against him with the prison authorities.

[22] When his significant cooperation with police which cleared up a great many serious property offences, his youth and the real risk that the applicant might serve all of his sentence or well beyond the two and a half years intended by the learned sentencing judge are considered the sentence is manifestly excessive. In order to recognise those factors the head sentence of seven and a half years should be reduced to five years. The applicant seeks to have his sentence suspended to ensure he is released. He will need continuing supervision on release to help him to adhere to his resolve to be drug free and to avoid criminal conduct. The legislative scheme of permitting application for post-prison release at the half-way mark of two and a half years can be availed of by the applicant.

[23] It is necessary only to interfere with the sentence imposed on count 10 to which the head sentence of seven and a half years attached to achieve recognition of the applicant's cooperation. The gradation of seriousness of the other offences which the individual concurrent sentences reflected will not now be the case so far as count 10 is concerned but if the purpose for which that sentence is reduced is kept firmly in mind then the terms of imprisonment attached to the other counts are not inappropriate.

[24] I would grant the application and allow the appeal to the extent of setting aside the sentence of seven and a half years imprisonment on count 10 and imposing in lieu a sentence of five years and make no recommendation for post-prison community release outside the provisions of s 135 of the *Corrective Services Act* 2000.

[25] The formal orders are:
1. Grant the application and allow the appeal.
2. Set aside the sentence below of seven and a half years imprisonment on count 10 and impose in lieu a sentence of five years.

[26] **McMURDO J:** I agree with the reasons of White J and with the orders proposed.