SUPREME COURT OF QUEENSLAND

CITATION:	*R v McKinless* [2004] QCA 280
PARTIES:	**R** **v** **McKINLESS, Brendon Donald** (applicant)
FILE NO/S:	CA No 140 of 2004 DC No 138 of 2004 DC No 946 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave to appeal against sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	4 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2004
JUDGES:	Davies JA, McPherson JA, Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – BREAKING, ENTERING AND STEALING – SENTENCING – whether sentence manifestly excessive
COUNSEL:	The applicant appeared on his own behalf M J Copley for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: On 23 April 2004 the applicant was sentenced in the District Court at Brisbane to serve a term of six years imprisonment with a recommendation for parole after two years.

This is an application for leave to appeal against that sentence.

There were two indictments before the sentencing Judge containing charges of 21 offences committed during a seven month period between August 2002 and March 2003. On the ten count indictment the applicant pleaded guilty to and was sentenced for four counts of entering premises and stealing (four years each), two counts of entering premises with intent (four years each), stealing (one year), receiving (six months) and fraud (six months).

On the 11 count indictment to which the applicant pleaded guilty ex officio, the applicant was sentenced for six counts of entering premises and stealing (four years each), two counts of break, enter and steal (six years each), unlawful use of a motor vehicle (two years), a negligent act causing harm (12 months) and attempted fraud (three months).

In addition the applicant pleaded guilty to the following summary offences, unlicensed driving (six months), obstructing police (six months), breach of bail (six months), possession of a pipe (six months) and failure to take care of a syringe (six months).

The sentencing Judge ordered all of the sentences to be served concurrently but made a recommendation for parole after two years. A declaration was also made that 220 days of pre-sentence custody had been served by the applicant.

The applicant was arrested on 19 November 2002 for counts 2 to 5 on the 10 count indictment and then given bail. While on bail the applicant committed counts 7 to 10 on that indictment and all of the counts on the ex officio indictment. The applicant had previously been sentenced in the District Court on 20 July 2001 for three counts of entering premises with intent, two counts of breaking, entering and stealing and one count of entering premises and stealing. A sentence of 18 months imprisonment to be suspended after serving 182 days with an operational period of two years was imposed for those offences.

All of the offences for which the applicant was sentenced that are the subject of this appeal were committed in breach of that suspension. The sentencing Judge ordered the applicant to serve the remainder of that partially suspended sentence, but made it concurrent with all the other sentences. In effect, therefore, he received no punishment for those offences beyond that which he had served before committing the

breach apart from the time that he has now been sentenced to serve.

The details of the offences appear in a schedule of facts tendered at the sentencing hearing. The majority of offences were committed by the applicant entering business premises and stealing laptop computers or other computer related equipment. On one occasion he entered the house. He also received a stolen cheque and made unlawful use of a motor vehicle. A total of $214,000 worth of property was stolen by the applicant, most of which has not been recovered. That, on any view, is a large amount and there is no prospect of restitution.

His modus operandi seems to have been to enter hotels, department stores and business premises, many of them in the central city area, during the day or early evening and remove laptop computers and the like which were within his reach. If his presence was challenged, as happened on a few occasions, he gave some spurious excuse for being there. His behaviour disclosed a degree of persistence in offending and also some self-confidence in carrying out his crimes.

The highest head sentence of six years imprisonment was imposed for each of the two break and enter offences. In

count 2, between the 11 January 2003 and 13 January 2003, the applicant gained entry to the premises of Maunsell Computers at Milton by using an electronic security card of a kind that was only given to employees. It is not clear how he obtained the card, although inquiries revealed that a junior employee had lost a card shortly before the offence took place. The applicant forced open filing cabinets on the premises and stole three laptop computers, two chargers, one digital camera and a sum of cash.

In count 10 the applicant entered premises owned by Guide Dogs for the Blind by means of the public access door that was open, but then proceeded to the staff only storage area where he stole a toy guide dog.

The applicant was also charged with a negligent act that occurred while he was being searched by the police. He was asked to empty his pockets and after taking some items out of his pockets assured the police officer that they were empty. The complainant police officer then commenced to pat the applicant down, but while patting the lower right-hand pocket the police officer's right index finger was pricked by an uncapped syringe that was still in the applicant's pocket and which made it bleed.

The experience naturally caused much distress to the police officer in question, who being apprehensive of its consequences for him and his family was unable to return to work, at any rate, by the time of the sentence hearing.

In addition to the partially suspended sentence imposed in the District Court on 20 July 2001, which I have already referred to, the applicant has been before the Courts for similar offences on at least two other occasions. In December 1996 he was given two years probation for five counts of receiving and in September 2000 he was given a six months intensive correction order for offences involving entering premises and committing or with intent to commit an indictable offence.

The applicant was born on 21 April 1979. He was 23 at the time he committed the offences and 25 at sentencing. He appears to have had an advantageous upbringing in a good home although his father is said to have treated him harshly and his parents' marriage broke up when he was 11.

He has been living with his mother and his stepfather, who treats him well. An early problem was attention deficit disorder which was diagnosed at the age of 13, when he was excluding from attending state schools. Dexamphetamine was

prescribed when he was 16 and from the age of 18 he no longer needed it. He does not require it now.

At 16 he became addicted to heroin which he injected up to four times a day. He now claims to have rid himself of this habit and was working in a video shop before starting a small business of his own, which does not seem to have gone very far. He has a supportive mother with whom he has a close relationship, who has written an impressive reference in his favour. She asked the sentencing Judge that her son not be condemned to be "another young man on a downward spiral of lengthy stints in prison".

Unfortunately there is no way in which he can now expect to escape some period in prison. On previous occasions he has had the benefit of the opportunities which Courts make available in the hope of discouraging young men from engaging in crime. In 1996 he was given probation for two years for the various offences of receiving. The probation was breached and his record shows four charges of failure to appear. In 2000 he was given an intensive correction order by Judge Brabazon in the District Court which the applicant breached. His record shows other Court appearances before being sentenced in July 2001 by Judge O'Sullivan, which was the

occasion when he was sentenced to 18 months imprisonment suspended for two years after 182 days.

Her Honour made it clear that what she was giving him was, as she said, "a one-off chance" which he would undo if he was brought back for further offences during the suspension period. He forewent that suspension when he committed the offences now before us. He was on bail when he committed the offences in counts 7 to 10 of the 10 count indictment.

We were referred by way of comparison to *R v. Slade* [2003] QCA 191. He was sentenced to a longer term of seven and a half years imprisonment with a recommendation for parole after three years. There were, in his case, altogether 424 offences over a longer period but of a somewhat lesser kind, mostly the use of stolen credit cards, but likewise involving property to the value in that case of $200,000. Slade was 27 years old at sentencing and was addicted to methylamphetamine which he had started using at age 24. He was the father of a small child. In refusing leave to appeal Justice Holmes in this Court said that the applicant there had had the benefit of a good deal of leniency in the past and that it was significant that his offences entailed breaches of suspended sentences and bail. Those comments are equally apposite here. Much though it is to be regretted this young man must be sentenced to prison, I

am not able to identify any error in the sentence imposed. The application for leave to appeal should therefore be dismissed.

DAVIES JA: I agree.

HELMAN J: I agree.

DAVIES JA: The application is dismissed.
