SUPREME COURT OF QUEENSLAND

CITATION:	*R v Osborn* [2004] QCA 314
PARTIES:	**R** **v** **OSBORN, Leslie Roy** (applicant)
FILE NO/S:	CA No 176 of 2004 DC No 299 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	27 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2004
JUDGES:	McPherson JA, Williams JA, Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – SENTENCING – PROPERTY OFFENCES – where applicant was given a suspended sentence of four years for armed robbery, and entering and stealing from a dwelling house – where applicant repeatedly breached suspended sentence – whether sentencing judge erred by ordering applicant to serve 12 months of the remaining 2 years of the suspended sentence *Penalties and Sentences Act 1992* (Qld), s 147
COUNSEL:	The applicant appeared on his own behalf M R Byrne for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: The applicant for leave for appeal against sentence is Leslie Roy Osborn. On 2nd March 2001 he pleaded

guilty to counts for armed robbery and entering and stealing in a dwelling house.

He was sentenced on that occasion by Judge Wylie to an effective term of four years imprisonment to be suspended after nine weeks. There was a period of 115 days of pre-sentence custody so that the applicant would have been released in about mid-August 2001. There was no appeal against the sentence.

The operational period fixed for that sentence was five years. Within that period the applicant was on 11th March 2003 convicted and sentenced by Judge Noud on counts of stealing and assault occasioning bodily harm.

He had engaged in taking some items from the sports store. There was a tussle with members of the staff of the store and one of them was bitten on the arm. It appears that the application is or was then a carrier of hepatitis C.

Judge Noud ordered that the applicant serve 15 months of the suspended term of imprisonment which, of course, left an outstanding balance of two years in the original four year term still to be served. Again a period of pre-sentence custody had the effect that the applicant was released from prison in April 2003.

It appears that the motive for offending on both occasions was the applicant's need to obtain money to buy drugs to satisfy his heroin addiction. His criminal history, which commences in 1998, records a number of drug offences together with breaches of community service orders, orders granting bail, fine option orders and so on.

After his release from prison in April 2003 under the sentence imposed by Judge Noud, the applicant was found in a disused building on 22nd October 2003 about to inject himself with morphine. As a result of that he was convicted and fined $600 in the Brisbane Magistrates Court. That did not, however, complete the proceedings arising out of that offence. He was still left with the breach of the terms of his original suspended sentence imposed by Judge Wylie, the duration of which will extend through to 2nd of March 2006.

On this occasion, as a result of his having committed the offence of which he was convicted in the Magistrates Court, the applicant was brought before Judge Forno on 20th of May 2004. Remarking that it was "perhaps a little against his better judgment", Judge Forno decided it would be unjust to order that the applicant serve the whole of the balance of the two years of the suspended sentence that remained.

His Honour thereupon sentenced the applicant by directing that only half of that remaining term of two years be activated. He ordered that a period of 12 months be served leaving the further 12 month period, in his words, hanging over the applicant's head to encourage him to get his life in order. In imposing this sentence the learned Judge took into account the applicant's youth and adopted the submission made by Mr Farmer of counsel, who appeared for the applicant on that occasion.

The applicant was, it may be noted, 21 years of age at the date when the original four year sentence was imposed by Judge Wylie, and a little less than 24 years old when sentenced by Judge Noud. He was born on the 18th of May 1979 and so must have just celebrated his 25th birthday when sentenced by Judge Forno on 20th of May 2004. His complaint against that sentence is that it was far too excessive and that his Honour had given insufficient weight to his efforts to rehabilitate himself.

The basic difficulty with the application before us is that s 147(2) of the *Penalties and Sentences Act* requires the Court to make an order under section 147(1)(b) of the Act unless it is of opinion that it would be unjust to do so. Section 147(1)(b) is a provision conferring power to order that the

whole of the suspended period of imprisonment be served. It is therefore only if the Court thinks that that course would be unjust that it may order that part only of the suspended term be served. This is what the Judge did here, and it is, although in favour of the applicant, something that he now complains about on appeal.

It goes considerably further than I would be prepared to accept to submit, as the applicant does, that the Judge ought, if he has the power to do so, to have ordered that no portion of the suspended part of the sentence be served when the applicant came before him. In deciding the question of such injustice under the section, s 147 (3), specifies a number of factors to be taken into account by the Judge or Court in question. That would include the offender's antecedents and criminal history, the degree to which the offender has reverted to criminal conduct of any kind and anything that satisfies the Court that the offender has made a genuine effort at rehabilitation, including the relative length of any period of good behaviour during the operational period.

Measured against these considerations, the applicant here does not score well at all. He has on separate occasions breached the suspension condition by committing the offences which brought him back before Judge Noud and then Judge Forno. He

has a history in the past of passing up previous opportunities for reform provided earlier non-custodial sentences. He says he has now conquered his heroin addiction and has rehabilitated himself. It was, therefore, just extreme misfortune that on the single occasion when he re-offended the police happened upon him the very moment of his injecting heroin. One does not need to be unduly cynical to lack confidence in the accuracy of his assertions that he has completely rehabilitated himself.

However that may be, the question before us is whether the Judge was wrong in imposing the sentence that he did. In my opinion it cannot be said that he was, especially taking into account that the proposal was one which he thought was generous to the applicant and which he adopted in part because it was the very one suggested by the experienced counsel who appeared for the applicant before him.

In my view his Honour's reasoning and conclusions cannot be faulted. This application is not one that can succeed. I would therefore refuse the application for leave to appeal against sentence.

WILLIAMS JA: In my view the sentencing Judge in the circumstances outlined by Justice McPherson gave due weight to

factors in favour of the applicant in ameliorating the period of the suspended sentence to be served pursuant to the provisions of section 147 of the Penalties and Sentences Act. I agree that the application should be dismissed.

HOLMES J: I agree with the reasons and proposed order of Justice McPherson and Justice Williams.

McPHERSON JA: The order is the application for leave to appeal against sentence is dismissed.
