SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tsiakas* [2004] QCA 360
PARTIES:	**R** **v** **TSIAKAS, John Wayne** (applicant/appellant)
FILE NO/S:	CA No 202 of 2004 DC No 173 of 2004 DC No 192 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2004
JUDGES:	Williams JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against sentence** **2. Allow the appeal** **3. Set aside the sentences imposed on the 14 counts on the ex officio indictment on 8 June 2004 and substitute therefor sentences in each case of three years' imprisonment to be served cumulatively upon the 40 months' suspended imprisonment which the applicant was ordered to serve on that day**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – PROPERTY OFFENCES – whether sentencing judge erred in totality principle – whether sentence is manifestly excessive – whether sentence fell outside range of sentences given by other judgments of court – where applicant committed offences during period of suspended sentence *Mill v The Queen* (1988) 166 CLR 59, considered *R v Anderson* [2004] QCA 74, CA No 355 of 2003, 19 March 2004, cited *R v Barnes* [1993] QCA 529, CA 296 of 1993, 10 November

1993, cited
R v Burrows CA No 376 of 1989, 11 April 1990, cited
R v Kavanagh [1993] QCA 159, CA No 64 of 1993, 5 April 1993, cited
R v Robinson [1995] QCA 131, CA No 534 of 1994, 24 March 1995, cited
R v Ross [2004] QCA 21, CA No 343 of 2003, 11 February 2003, cited
R v Slade [2003] QCA 191, CA No 147 of 2002, 8 May 2003, considered
R v Whelan [1998] QCA 151, CA No 430 of 1997, 17 March 1998, considered

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

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

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Cullinane J and I agree, for the reasons stated therein, that the orders should be as stated therein.

[2] **CULLINANE J:** The applicant seeks leave to appeal against sentences imposed in the District Court at Townsville on 8 June 2004.

[3] On that day he pleaded guilty to one count of arson, one of burglary, two of entering premises and stealing, two of entering a vehicle with intent, four of unlawful use of a motor vehicle and four of stealing. On each count he was sentenced to five years' imprisonment, such terms to be served concurrently as between themselves but cumulatively upon a period of 40 months which represented the suspended portion of a term of imprisonment of five years which had been imposed on 23 August 2002. He had already served 20 months of the term of five years imposed on that day.

[4] On 23 August 2002 he had pleaded guilty to five counts of unlawfully using a motor vehicle, three counts of unlawfully using a motor vehicle with a circumstance of aggravation, three counts of burglary, one count of wilful damage, one count of entering premises with intent, one of fraud, one of stealing and one of entering premises and stealing.

[5] The total value of the property involved in those offences, dealt with in August 2002 was said to be something in the order of $125,000 of which $100,000 was ascribable to an offence involving the entering of a dwelling and the stealing therefrom of a substantial quantity of property including a number of firearms, jewellery, and electrical equipment.

[6] The applicant was born on 7 June 1975.

[7] He was 29 when sentenced on 8 June 2004. He pleaded guilty on an ex officio indictment.

[8] He had already served some 281 days pre-sentence custody and a declaration was made that this was imprisonment already served under the sentences imposed.

[9] The applicant has an extensive criminal history in Queensland and elsewhere. The history involves many property offences as well as other types of offences. In Queensland his first conviction was in the Children's Court in 1987.

[10] The offences for which he was dealt with on 8 June 2004 were committed as already mentioned during the operational period of a partially suspended sentence and involved in most cases entering premises and stealing and in one case setting fire to a vehicle of a value of $5,000. One of the counts of entering and stealing involved using a stolen vehicle to force open the door of a newsagency. The applicant assisted the police by participating in a record of interview. He was said to have been a heroin addict but was not at the time of the commission of these offences although he was said to have been drinking heavily. The total value of the property involved in these offences was said to be $6,290.

[11] The applicant does not complain about the fact that the sentences imposed were cumulative upon the 40 months of the partly suspended sentence or the fact that he was ordered to serve the whole of the suspended part of that sentence.

[12] The complaint is that sentences of five years' imprisonment for the offences for which he was dealt with on 8 June 2004 are manifestly excessive given that they were to be served cumulatively on the suspended imprisonment he was ordered to serve. It is said that when regard is had to the totality principle the sentences imposed cannot be supported.

[13] The applicant says that the reasons of the learned sentencing Judge revealed an error in principle in his approach to the question of totality.

[14] The sentences imposed, so the argument ran, should be set aside because of this and this court should re-sentence the applicant. Alternatively it was said that even if it be accepted that there were no error of principle the sentence falls outside the range of sentences established by judgments of this court and must be regarded as manifestly excessive.

[15] The error is said to be revealed by two passages in the reasons of the learned sentencing Judge. It appears at pages 35 and 36:

> "If I activated the suspended sentence that amounts to three years and four months, on my calculations, and if I sentence you to two and a-half years more that makes a total of five years and 10 months, which is 10 months more only than the sentence that was imposed on you by Judge Robin and that, in my view, would not be an adequate community response for continuing offending of a like nature and during the operational period of a suspended sentence, recognising though that that suspended sentence will be activated."

[16] The second appears at page 36:

> "However, I must recognise two factors in your case. One is what is called the 'totality principle' and that is, I must ensure that the total sentence imposed on you by combining the unserved suspended sentence and the new sentence for the present offences must not be

> so out of kilter with the sentence imposed for all of the offences together."

[17] In *Mill v The Queen* (1988) 166 CLR 59 at 66 the High Court said that the proper approach in a case like this is to ask what sentences would have been imposed if the accused had been sentenced for all offences at the one time.

[18] The above passages and in particular the second of them suggest that the learned sentencing Judge looked at the prospective impact only of the sentences he was to impose overlooking the 20 months already served pursuant to the sentences imposed in August 2002. It is reasonable to conclude that this may have affected the sentences ultimately imposed. In these circumstances it falls to this Court to re-sentence the applicant.

[19] The applicant referred the Court to cases which it is said demonstrate that if the applicant had been dealt with for all offences at the same time the head sentence could not have exceeded seven years' imprisonment. See *R v Anderson* [2004] QCA 74 and *R v Ross* [2004] QCA 21 and *R v Slade* [2003] QCA 191. A total term of ten years, it was argued, is on the outside of the permissible range.

[20] In *Slade's* case, reference was made to *R v Whelan* [1998] QCA 151.

[21] That case concerned an applicant who had committed a number of property offences (42) between May 1995 and January 1997 involving a total amount of property of some $160,000. Most of these offences occurred whilst she was on probation. She had a substantial criminal history dating back to 1984.

[22] She was sentenced to nine years' imprisonment. The Court of Appeal reduced the sentence to one of seven years and allowed a recommendation of eligibility for early release to stand.

[23] The Court in *Whelan*'s case was referred to a number of judgments which included sentences of nine and a half years' imprisonment (See *Burrows* CA No 376 of 1989), eight years and eight months with a recommendation for eligibility for parole after three years and six months (See *Kavanagh* No 64 of 1993) and seven years with a recommendation for eligibility after three years (See *Barnes* CA 296 of 1993) and seven years with a recommendation after two years (See *Robinson* CA No 534 of 1994).

[24] Those cases, particularly *Burrows*, *Kavanagh* and *Robinson*, were (according to Dowsett J with whose judgment the other members of the Court agreed) instances of persons being dealt with for a repetition of conduct previously committed "which previously would have justified a sentence in the vicinity of seven years".

[25] All of those offences involved substantial numbers of property offences committed by offenders each of whom had a substantial history of offences. They fall into the same category as this matter. It is noteworthy that the court in *Burrows, Kavanagh* and *Barnes* expressed the view that the sentence was high or heavy or at the top of the range but did not interfere with it.

[26] His Honour said at page 7:

> "Justification of the present sentence depends upon acceptance of Burrows as providing a good guide to the top of the appropriate range. While it is very difficult to discriminate between that case

> and the present, the same remark might be made about Kavanagh, Barnes and Robinson. A range of seven to ten years may be appropriate for such a cluster of offences as occurs in each of these cases but much will depend upon the previous history of the accused and also upon the degree of cooperation with the police. It is quite common for an offender apprehended in connection with some such offences to admit to involvement in many others. This no doubt assists the police in some respects, although one doubts if it is generally of much comfort to the victims. However, one must observe that a sentence in the vicinity of nine to ten years seems much more appropriate to offences involving property where violence is also involved, than to offences of the present kind."

[27] Allowance has to be made on the present case for the pleas of guilty on an ex officio indictment and the applicant's co-operation with the police. I do not lose sight of the fact that one of the offences involved a ram raid on business premises.

[28] In my view a consideration of those cases and of the cases to which the respondent referred us, which all involved a large number of property offences involving property of substantial value committed in a number of instances, while the applicant was serving a suspended sentence or was on probation or subject to an intensive correction order, leads me to the conclusion that an appropriate sentence in the present case would be one of three years' imprisonment to be served cumulatively upon the suspended portion of the sentences imposed in August 2002.

[29] I would grant leave to appeal against sentence, allow the appeal, set aside the sentences imposed on the 14 counts on the ex officio indictment on the 8 June 2004 and substitute therefor sentences in each case of three years' imprisonment to be served cumulatively upon the 40 months' suspended imprisonment which the applicant was ordered to serve on that day.

[30] **JONES J:** I have read the reasons prepared by Cullinane J in this matter and I agree with those reasons and the orders proposed.