SUPREME COURT OF QUEENSLAND

CITATION:	*R v Burns* [2004] QCA 437
PARTIES:	**R** **v** **BURNS, Jace Stafford** (appellant)
FILE NO/S:	CA No 305 of 2004 DC No 367 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	16 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2004
JUDGES:	Williams JA and Mackenzie and Philippides JJ
ORDER:	Grant leave to appeal and allow the appeal only to the following extent: (1) substitute four years imprisonment for the six years imprisonment on count 42, arson (2) substitute five years imprisonment for six years imprisonment on counts 40 and 43, burglary (3) the recommendation for post prison community based release and the declaration with respect to pre sentence custody should stand
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where sentencing judge exercised discretion to recommend post prison community based release – whether a suspended sentence more appropriate – whether justice miscarried CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – PROPERTY OFFENCES – where applicant engaged in course of criminal conduct – where over 200

	property offences, mostly burglaries, unlawful use of motor vehicles and arson of vehicles – where sentencing judge differentiated between applicant's juvenile and adult offences – where differential of four years for adult offences – whether sentence for adult offences was excessive – whether sentencing judge gave sufficient weight to youth of applicant
	Penalties and Sentences Act 1992 (Qld), s 189
COUNSEL:	M Johnson for the applicant R Pointing for the respondent
SOLICITORS:	Locantro Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: I will ask Justice Mackenzie to deliver his reasons first.

MACKENZIE J: The applicant was born on the 24th of April 1986. From the 3rd of September 2002 when he was almost 16 and a half until the 9th of May 2003, when he was about two weeks beyond his 17th birthday, he engaged in a course of criminal conduct reflected in a 45 count ex officio indictment, a schedule pursuant to section 189 of the Penalties and Sentences Act admitting to 147 other offences and two summary offences.

The offences in the indictment comprised 15 counts of burglary and stealing, one attempted burglary, two counts of breaking and entering with intent, two of entering with intent, seven of stealing, one of fraud, 11 of unlawfully using a motor vehicle, two of arson of a motor vehicle, one attempted unlawful use of a motor vehicle, two of aggravated receiving and one of dangerous operation of a motor vehicle. The schedule included 141 offences of burglary and stealing, four

of burglary, one of attempted burglary and one of attempted stealing. The summary offences were breach of bail at a charge of disqualified driving.

According to the facts placed before the sentencing Judge, the majority of the offences occurred when the applicant went with two associates, an 18 year old and a 25 year old, who is acknowledged to have been the ringleader, to the Sunshine Coast where they would then separate to commit offences.

The burglaries with which the applicant is charged or which he has admitted were committed in many cases by climbing up balconies of unit buildings and entering units by breaking in or by entering through unlocked doors. In many cases the occupants were asleep while the offences were committed. On the five occasions when the occupants were roused by what was happening, the applicant fortunately left without inflicting any violence on them.

The majority of the offences were committed on the Sunshine Coast in a variety of areas from Noosa to Caloundra. The remainder were committed on the Gold Coast. In some instances keys were taken during the offences and used to drive away vehicles which are the subject of counts of unlawfully using motor vehicles. One of the arson offences involved a four wheel drive valued at over $50,000 and was committed in this way while the applicant was still 16. The other offence of arson, committed after he had turned 17, concerned a vehicle

valued at over $19,000 in which keys had been left while it was parked outside the owner's residence.

The total value of property attributable to the applicant's offences exceed $390,000. The property stolen in the burglaries typically consisted of money and easily disposed of items such as mobile phones, jewellery, cameras, laptops, CD's, small electrical goods and other personal items including credit cards.

The applicant had been arrested on the 19th of April 2003 for unlawful use of a motor vehicle taken from the Gold Coast, following a police chase at Deception Bay. He was given bail for this offence and then committed the offences in counts 35 to 45 while on bail for that offence. He was again arrested on the 2nd of May 2003 after being apprehended for dangerous operation of a motor vehicle he had broken into a few days earlier and was unlawfully using.

He engaged in a high speed attempt to escape police for about two kilometres through a 50 kilometre per hour area. He lost control of the vehicle but escaped only to be apprehended later the same day. He was released on bail on this occasion as well. Counts 39 to 45 were committed on bail for this offence.

The series of offences in Queensland commenced about three months after he had been dealt with in Tasmania for an

aggravated armed robbery, apparently an armed robbery of a service station while in company.

It was said that he had become addicted to amphetamines after arriving on the Gold Coast although counsel suggested it may have occurred somewhat earlier and the present offences were committed because of his addiction.

The learned sentencing Judge differentiated between the penalties imposed in respect of the offences committed while the applicant was under 17 years of age and those committed after he had turned 17.

In respect of the former category, he sentenced the applicant to two years imprisonment. With respect to the offences committed while the applicant was an adult the sentences which formed the main basis of complaint are those for counts 40 and 43, both for burglary and stealing, and count 42, for arson of a motor vehicle.

In respect of each of those counts, he was sentenced to six years imprisonment with a recommendation for post prison community based release after two years imprisonment. 470 days presentence custody were declared to be time already served. Sentences of two years imprisonment concurrent with those terms were imposed for all of the other adult offences on the indictment except for the counts of unlawful use of a motor vehicle for which a concurrent sentence of three years imprisonment was imposed.

On the authorities, a sentence of six years for arson of a motor vehicle, even in the circumstances of this case, appears excessive. In my view, a sentence of four years should be substituted for the offence in count 42.

It was submitted in support of the application for leave to appeal that the sentencing Judge had failed to give sufficient weight to the youth of the applicant. It was submitted that the conduct for which the sentences of six years imprisonment were imposed for the adult offences where for essentially the same behaviour as that for which he had been sentenced to two years imprisonment for the offences committed as a child and that a differential of four years for essentially the same behaviour was inappropriate.

It was conceded that different factors came into play once the applicant committed offences as a adult, but it was submitted that the extent of the differential displayed in the sentences was inappropriate. It was submitted that the appropriate sentence was four and a half years imprisonment coupled with certainty of release by reason of suspension of the sentence rather than a recommendation for post-prison community based release.

It was submitted that, taking into account the 470 days served up to the time of sentence together with the period spent in custody pending the hearing of the application, immediate suspension was appropriate. It was submitted that the

applicant's very great cooperation in identifying the premises he had burgled as well as his youth warranted a greater than usual allowance for early release.

Dealing first with the submission that the applicant should be given the certainty of a suspended sentence rather than the uncertainty of a recommendation, the case, in my view, is not one where the learned Judge’s exercise of discretion to give a recommendation rather than a suspension miscarried. On the contrary, in my view, it is a case where a recommendation rather than suspension is appropriate.

The applicant is plainly in a category of persons in need of assistance for a period after his release. His youth, his problem with drugs and some disturbing aspects of the arson offences and the explanation for his propensity to unlawfully use motor vehicles, demonstrate this.

With respect to the sentence of six years imprisonment, the very large number of offences, the value of property involved and the circumstances in which the offences were committed, make his conduct inherently serious. While it is true to say that had he committed all of them as a child he may well have received only a two year sentence, two observations may be made.

One is that, as a matter of legislative policy, the sentencing options in respect of a child are compressed into a narrower range than for an adult. The second is that those committed

as an adult cannot be divorced from those that were committed while he was a child as the latter form the context in which the adult offences must be considered. It is accepted that it is a material factor in sentencing that the offender is very young.

In this case it is obvious that the sentence imposed is a very long one for a young person but the offending behaviour is also exceptional and showed no sign of abating voluntarily. Further, the offences were numerous and of a kind that causes victims to suffer not only the economic loss, but also a feeling of insecurity that often lingers because their personal security has been violated.

There was a continuous course of serious criminal conduct not checked by the fact that on two occasions during its course he was arrested for individual offences. Notwithstanding his release on bail twice, he continued to commit similar offences, the most serious of which were the further offences of burglary and stealing and arson.

The series of offences in Queensland follow very closely after he had been dealt with in Tasmania for an offence of armed robbery. Had he been older at the time of the present offences he would almost certainly have been sentenced to a substantially longer period than six years. The sentence of six years imprisonment was moderated from what would have been imposed on an adult offender who committed a similar group of offences.

Nevertheless, allowance within a proper exercise of discretion has to be made in recognition of matters in his favour. His cooperation was very substantial. He is still very young. There was some indication that during his presentence custody he has attempted to address his offending behaviour. In the circumstances, in my view, the sentence imposed did not adequately allow for those favourable aspects. In my view a sentence of five years should be substituted for the sentence of six years but, in my view, the recommendation for post prison community based release should remain at a period of two years.

WILLIAMS JA: I agree.

PHILIPPIDES: I also agree.

WILLIAMS JA: The orders of the Court therefore are:

Grant leave to appeal and allow the appeal only to the following extent:

(1) substitute four years imprisonment for the six years imprisonment on count 42, arson;

(2) substitute five years imprisonment for six years imprisonment on counts 40 and 43, burglary;

(3) the recommendation for post prison community based release and the declaration with respect to pre sentence custody should stand.
