SUPREME COURT OF QUEENSLAND

CITATION:	*R v McMahon* [2004] QCA 460
PARTIES:	**R** **v** **McMAHON, Justin Brian** (applicant)
FILE NO/S:	CA No 337 of 2004 DC No 2010 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	25 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2004
JUDGES:	McPherson JA, Jerrard JA, Philippides J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal and appeal allowed;** **2. The sentence imposed on 3 September 2004 is varied by omitting the recommendation for parole (PPCBR);** **3. It is declared that the applicant be eligible for parole (PPCBR) on 3 September 2004**
CATCHWORDS:	CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where applicant convicted and sentenced for a series of armed robberies in 1997 – whilst in custody he confessed to an additional armed robbery, and pleaded guilty to it in 2004 – the learned sentencing judge did not intend to punish the applicant further for the additional armed robbery, as it was part of the series of offences in 1997, and, accordingly, gave the applicant a concurrent term of imprisonment, but made a parole recommendation after 18 months, on the assumption that she was obliged to do so by s 157 *Penalties and Sentences Act* – where applicant already eligible for parole prior to sentencing – whether learned sentencing judge erred by making parole recommendation *Penalties and Sentences Act* 1997, s 157

R v Fifita [2004] QCA 201; CA No 22 of 2004, 11 June 2004, cited
R v McCormick; ex parte A-G (Qld) [1999] QCA 354; CA No 205 of 1999, 27 August 1999, cited

COUNSEL: A J Moynihan for the applicant
D L Meredith for the respondent

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

McPHERSON JA: This is an application for leave to appeal against sentence on 3rd September 2004. The applicant pleaded guilty to one count of armed robbery and one count of unlawful use of a motor vehicle and was sentenced to a term of six years' imprisonment in respect of it with a recommendation for parole after 18 months. This term of imprisonment was to be served concurrently with the cumulative sentences that the appellant was and is serving for other offences.

The subject offence was one of a series of other armed robberies committed by the applicant in late 1996 and early 1997 for which he had already been sentenced in October 1997.

To explain the issues raised by this application it is necessary to set out the details of those other offences although the only matter that falls to be considered here is, in the end, the recommendation for parole after 18 months.

On 5th November 1993 the applicant was sentenced by Judge Kimmins to four years' imprisonment for five counts of unlawful use of a motor vehicle, six counts of stealing, one of dangerous driving, one of dangerous driving causing

grievous bodily harm and four counts of wilful damage. While on parole for those offences during a period of a few months in late 1996 and early 1997, the applicant committed the series of further already mentioned offences, which included nine counts of armed robbery, nine of unlawful use of a motor vehicle and two counts of stealing to all of which he pleaded guilty.

On 31st October 1997 Judge Boyce sentenced the applicant to 12 years' imprisonment to be served cumulatively upon the four year sentence imposed by Judge Kimmins on 5th November 1993. He recommended the applicant for parole on 15th January 2003. In November of 2002 the applicant was convicted of escaping from lawful custody and sentenced to a further term of imprisonment to be served cumulatively on his existing sentence.

Before receiving the subject sentences under appeal here, the effect of all further cumulative sentences was that the full-time discharge date of the applicant was 20th February 2012 and he would have been eligible for parole from 15 June 2003.

On this occasion the applicant, on his own initiative, confessed while in custody to having in February 1997 committed offences of armed robbery and unlawful use of a motor vehicle. He pleaded guilty to those offences on 3rd September 2004 and was sentenced for them on that day. He had, on the occasion in question, stolen a motor vehicle and used it to drive his co-offender to a post office shop. He

waited in the car while his co-offender, who was armed with a sawn-off rifle and had a balaclava on, robbed the post office and stole $2,845. There is no doubt that it was a serious offence.

However, on 3rd of September 2004 the learned sentencing Judge took the view that if the applicant had been sentenced by Judge Boyce for the subject offence in 1997, along with the others that came before him on that occasion, no additional punishment would have been imposed and that the six year sentences should therefore be served concurrently. Her Honour also, as defence counsel submitted she should do, made a recommendation for parole after 18 months on the assumption that she was obliged to do so by s 157 of the *Penalties and Sentences Act*. The applicant submits that the learned sentencing Judge erred by making such a recommendation.

By 3rd of September 2004 the recommendation made by Judge Boyce had already spent its force and was no longer current. See *R v McCormick; ex parte Attorney-General* [1999] QCA 354 and the discussion in *R v Fifita* [2004] QCA 201. The effect of the recommendation made here therefore is that the applicant will now not be eligible for parole until 3rd March 2006 instead of on or after June 2003 as was previously the case.

It is evident from her Honour's remarks that she did not intend to make the applicant's position worse but was led into

making the recommendation by counsels' submissions that it was necessary to do so.

The applicant is now 29 years of age and has been in custody since 1997. While in prison he has taken part in drug rehabilitation programs and has been drug free for five years. He admitted to the present offences because he does not want to be "looking over his shoulder" when he is released and he is afraid that he may then be confronted and charged with them. When at liberty he hopes to start his life afresh.

In prison he has, by all accounts, become a model prisoner. On one occasion he gave evidence at committal proceedings concerning a killing in the gaol. That was done at considerable risk to himself and he has since been anonymously threatened with death by someone in the prison. He has a letter of comfort from a senior police officer recognising his cooperation in that respect. Reports about his conduct in prison have been uniformly favourable and he has successfully undertaken a number of TAFE courses to equip himself for life after his release.

This is one of those rather uncommon cases in which there is good reason to think that the applicant has rehabilitated himself and rid himself of the drug addiction which previously dogged his life. The duration of his future incarceration is now dependent on the attitude of the Community Corrections Board. It is not within our power to determine it; but if the unintended consequence of the parole recommendation made here

is only to defer consideration of his release then it would, for all the reasons I have given, be the appropriate course to remove it from the sentence imposed on 3rd of September 2004. This course is not actively opposed by the Crown.

The appeal should, in my opinion, be allowed and the sentence imposed on 3rd of September 2004 varied to the extent of omitting the recommendation for parole that is contained in it.

JERRARD JA: I agree with the presiding Judge.

PHILIPPIDES J: I agree.

McPHERSON JA: The order will be as I have stated it.

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McPHERSON JA: The Court, having heard Mr Moynihan further on this matter, declares that the applicant be eligible for parole (PPCBR) on 3 September 2004.

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