

SUPREME COURT OF QUEENSLAND

CITATION: *R v Robinson* [2004] QCA 479

PARTIES: **R**
v
ROBINSON, Jason Heath
(applicant/appellant)

FILE NO/S: CA No 322 of 2004
DC No 290 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 10 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 19 November 2004

JUDGES: Jerrard JA, Mackenzie and Philippides JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted**
2. Appeal allowed to the extent of substituting a cumulative term of 15 months imprisonment for the cumulative term of two years, and make no recommendation for parole (post prison community based release)

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – TOTALITY – where appellant pleaded guilty to a number of offences of dishonesty – where head sentence of two years imprisonment imposed – where that sentence was ordered to be served cumulatively upon the one year, seven month and 10 day balance of a partly suspended sentence of two and a half years imprisonment – where 411 days served in custody prior to sentence not able to be taken into account as time already served in relation to the head sentence of two years – whether sentence imposed manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 161

Mill v R (1988) 166 CLR 59, cited

COUNSEL: K M McGinness for the applicant/appellant
R G Martin SC for the respondent

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

- [1] **JERRARD JA:** On 20 August 2004 Jason Robinson pleaded guilty to a number of offences of dishonesty, and was ordered to serve a total of two years imprisonment for those offences, that sentence to be cumulative upon the one year seven months and 10 days balance of a partly suspended sentence of two and a half years imprisonment, which unexpired balance sentence was activated that day by order of the learned sentencing judge. In the result Mr Robinson was ordered to serve after 20 August 2004 what would be in total a sentence of three years seven months and 10 days imprisonment if all served; the learned sentencing judge recommended that Mr Robinson be eligible for parole after serving two years of the sentences imposed that day.
- [2] Mr Robinson has applied for leave to appeal against that sentence, arguing that it is made manifestly excessive by two periods of custody totalling 411 days already served before 20 August 2004, and which could not be taken into account as time already served in respect of the offences against property for which Mr Robinson was being sentenced on 20 August 2004. Mrs McGinness, Mr Robinson's counsel on this appeal, submits that the effect of adding the two and a half year sentence (to be now served in full) to the two years cumulative imposed on 20 August 2004, **and** the 411 days served but not declared, is that Mr Robinson received a total sentence of five years seven and a half months imprisonment, of which he will serve four years before being eligible for parole. She submits that total effective sentence is an excessive one for offences for which Mr Robinson was originally sentenced to the partly suspended sentence, and the subsequently committed offences for which he was sentenced on 20 August 2004. Her submission made particular reference to the totality principle described in *Mill v R* (1988) 166 CLR 59 at 62-63.
- [3] To evaluate that argument, it is necessary to refer to Mr Robinson's quite extensive criminal history. After a number of appearances in children's courts in New South Wales, he was first dealt with as an adult on 18 February 1992, for offences that included malicious damage. Then followed a number of convictions for stealing, attempted stealing, and assault. He appeared in the Campbelltown District Court at Cabramatta on 15 November 1998, and was sentenced for offences which included assault, kidnapping, attempted armed robbery, and robbery while armed with a dangerous weapon. For the attempted robbery he was sentenced to two years imprisonment commencing on 19 February 1998 and ending 18 February 2000, and for the robbery while armed with a weapon sentenced to two years imprisonment commencing on 19 February 2000 and ending on 16 February 2002. The sentences for the other offences were concurrent.
- [4] He was then sentenced on 22 November 1999 for an offence of escaping, and for an offence of aggravated breaking and entering. He received concurrent terms of imprisonment for those.
- [5] He was released on parole, and well before February 2002, because his counsel informed the learned sentencing judge that in June 2001 New South Wales

authorities revoked his parole, but permitted him to move to Queensland. In this State he committed an offence of breaking, entering and stealing on 14 March 2001, one of the offences for which he was sentenced on 20 August 2004, and the only one of those which was committed before he received the partly suspended sentence. Then on 2 June 2001 he committed the serious offences of breaking into the Gatton Police Station, breaking into a safe in it, taking firearms and ammunition out of it and thereby stealing them, and attempting to get away from the premises with those and with a stolen police badge and cap as well. He had been disturbed when in there as he stole the firearms, and he pointed one of them at police officers; the judge who sentenced him for those offences described him as having been very lucky that the police were level headed enough to react calmly to him doing that, rather than shoot him.

- [6] He was sentenced on 23 April 2002 for those offences committed on 6 June 2001, having been in custody for the 325 days that had elapsed by then since his unlawful entry to the police station. The sentencing judge was sympathetic to the fact that he had a significant drug problem and had spent time in custody attempting to “address” it, and observed that he had family support. The judge noted that Mr Robinson had already spent a very long time in custody, and sentenced him to two and a half years imprisonment, ordering that it be suspended after he served a period of 325 days imprisonment. The judge then declared that the 325 days in pre-sentence custody was time already served, and Mr Robinson was released that day. Those were relatively lenient head and actual custody sentences imposed that day for someone with his record who tried to steal concealable firearms from a police station.
- [7] By April 2002 Mr Robinson had spent the greater part of the previous four and a quarter years in custody. In New South Wales he was in custody from at least 19 February 1998 until, in all likelihood, late 2000; and in custody again from 2 June 2001 onwards. It was up to Mr Robinson after that whether or not he re-offended when released on 23 April 2002.
- [8] Regrettably he did, committing a series of offences against property, those being the ones for which he was sentenced on 20 August 2004. They had began exactly two years earlier, on 20 August 2002, when he committed the offences of attempting to unlawfully use a motor vehicle, and breaking, entering, and stealing a stereo from that motor car (counts 1 and 2).
- [9] The next recorded offence was committed on 21 September 2002, when he unlawfully used a motor vehicle (count 3), and he offended again on 2 October 2002 (count 4) when he burgled a unit and stole property totalling around \$5,000.00 from it. He was actually arrested that same day in respect of the offences constituting counts 1 and 2, and must have been released on bail. He next offended on 10 October 2002, when he unlawfully entered a motor vehicle, and when apprehended that same day was found after arrest to be in possession of house breaking instruments, and a set of stolen number plates (counts 5, 6 and 7). He had committed those offences while on bail.
- [10] He was held in custody from 11 October 2002 until 7 March 2003, a total of 148 days. The learned sentencing judge was not told why, nor why he was released. All that the judge was told was that could not be treated as time already served in respect of counts 1 to 7. Mrs McGinness assisted this court with information

showing that he had been remanded in custody on 10 October 2002 on the charges that became counts 1 to 7 on the indictment, and also on one charge of unlicensed driving and a charge of wilful damage. Those latter two charges explain why the period from 10 October 2002 to 7 March 2003 could not be declared under s 161 of the *Penalties and Sentences Act* 1992 as time served in respect of proceedings for offences on the indictment “and for no other reason.” The information this court has does not reveal when he was dealt with for that driving offence, or what happened to the wilful damage charge. He was released on bail on all charges on 7 March. He was then charged with driving offences, including dangerous driving and unlicensed driving, on 14 August 2003 and held in custody for 14 days until dealt with for those offences in the Magistrates Court on 28 August 2003, when he was fined \$2,500.00 in default 50 days, and allowed three months to pay.

- [11] After his release on 7 March 2003 he committed an offence of burglary on 15 May 2003 (count 8), in which property of a value of \$21,428.00 was stolen, of which \$2,300.00 worth of property was recovered. His last offence (count 9) – one of receiving stolen property – was committed between 26 July 2003 and 8 August 2003. He received six record albums. Counts 8 and 9 were therefore committed while he was on bail for a second time.
- [12] Although Mr Robinson was charged with the offence of receiving in count 9 on 7 August 2003, and had earlier been questioned on 2 July 2003 about the offence constituting count 8, he remained on bail despite admitting the commission of those two offences. He was returned to custody on 1 December 2003 and remained there from then until the date of sentence on 20 August 2004, a period of 263 days. The learned sentencing judge was told (correctly) that he was in custody for “this and other offences”, and that those 263 days therefore could not be declared time already served.
- [13] The information his counsel provided this court shows that he was remanded in custody for a drug offence and yet more driving offences from 1 December 2003 onwards, as well as on all of the offences for which he was sentenced on 20 August 2004, bail finally having been refused. It follows that the 263 days in custody were served on remand for the offences the subject of this application, and for other driving offences and a drug offence. The driving offences were one charge of speeding and two of disqualified driving. Those charges were dealt with on 16 November 2004, and a sentence of six months imposed. There are no outstanding charges. All up there were (148 + 263) 411 days in custody not available for declaration pursuant to s 161 of the *Penalties and Sentences Act* 1992, but which were served on remand in respect of counts 1 to 7, and 263 days served in respect of counts 8 and 9.
- [14] Mrs McGinness conceded that it was a proper exercise of the learned sentencing judge’s discretion to order that Mr Robinson serve the whole of the unexpired portion of the suspended sentence, a period of one year seven months and 10 days; and likewise a proper exercise of that discretion to order that the inevitable additional term of imprisonment, to be imposed for the offences committed during the operational period of that suspended sentence, be served cumulatively upon the one year seven month 10 day unexpired term. However, she submitted that the effect of the sentences imposed really equated to a period in custody of five years seven and a half months, with parole available only when there was one year, seven and a half months left to serve. She submitted that resulted in a sentence which,

perhaps inadvertently, overlooked the totality principle which required the sentencing judge to review the aggregate sentence and consider whether that was just and appropriate.

- [15] I respectfully consider that the argument which contends that Mr Robinson has an effective non-parole period of four years overlooks both that he had not been continuously in custody since 2 June 2001, and the reason for that, namely that he got out of prison on a suspended sentence, and later on, on bail as well. His first return to custody on 11 October 2002, after having spent some five and a half months in the community, was as a result of his unlawful conduct engaged in when serving the then suspended sentence. He was also in the general community from early March 2003 until early December that year, a period of nine months, save for the fortnight ending on 28 August 2003.
- [16] Regarding the 411 days, the learned sentencing judge said of it that “it cannot be declared in your favour, but I do take it into consideration”, and said when imposing the two year cumulative sentence for the nine counts on the indictment that he was reducing that cumulative sentence to a certain extent. It is reasonable to infer that that was both because the sentence was cumulative and also because the judge was taking into consideration – as the judge said would be done – the fact that 411 days had been already spent in custody in respect of the majority of those offences, although not solely in respect of any of them.
- [17] Regarding the offences for which Mr Robinson was sentenced on 23 April 2002 and 20 August 2004, a sentence of five years, seven and a half months imprisonment may not have been excessive, as his conduct had the aggravating and serious features of his offending at least once while on parole from New South Wales, offending soon after release on parole in that State and entering this State, offending by attempting to steal guns and ammunition from a police station, offending soon after release from custody on a partly suspended sentence, twice further offending when released on bail after earlier arrest, and his offences showed a pattern of repeated commission of property offences whenever he was out of prison. This is the submission Mr R Martin SC made for the respondent; his submission centred on the proposition Mr Robinson was sentenced quite leniently in April 2002, making the total sentence (if the 411 days is notionally added as time served) an appropriate or defensible one.
- [18] The learned judge did not sentence Mr Robinson to five years and seven months imprisonment, and the fact that Mr Robinson will serve a variety of broken terms aggregating to one of that length, if not earlier released on parole, is not because of the sentencing judge’s orders. It is because of other actions by Mr Robinson. The consequences of those other actions do not make the sentences imposed manifestly excessive; and the 325 days spent in custody after 2 June 2001 are really irrelevant to the sentence passed on 20 August 2004.
- [19] What this court has to consider is whether the sentences imposed on 20 August 2004 for the offences committed after 23 April 2002 were manifestly excessive. In deciding that, what cannot be done now is to re-sentence Mr Robinson for the offences committed at the Gatton Police Station, even if those were lenient. Considering the post-April 2002 offences, a sentence of three years seven months and 10 days is not excessive for those offences, considering his record and the circumstances; but a sentence of four years eight and a half months is. Mr Robinson

had spent one year and 46 days in custody on remand for seven of those offences, and 263 days on remand for the other two. The sentences imposed on 20 August 2004 do not take that sufficiently into account, and produce an excessive total length of imprisonment.

- [20] I would substitute a cumulative sentence of 15 months imprisonment for the cumulative term of two years, and make no recommendation for parole (post prison community based release).
- [21] **MACKENZIE J:** I agree with the orders proposed by Jerrard JA for the reasons given by him.
- [22] **PHILIPPIDES J:** I agree with the reasons for judgment of Jerrard JA and with the orders proposed.