SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tuki* [2004] QCA 482
PARTIES:	**R** **v** **TUKI, Jay Dillon** (applicant)
FILE NO/S:	CA No 326 of 2004 DC No 249 of 2004 DC No 327 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	17 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 order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – where applicant sentenced to 4 years imprisonment for two counts armed robbery in company and one count attempted armed robbery with a recommendation for post prison community based release after 15 months – where applicant 19 years of age at sentencing – where co-offender received lesser sentence under *Juvenile Justice Act* – whether sentence manifestly excessive *Juvenile Justice Act* 1992 (Qld) *Lowe v R* (1984) 154 CLR 606, cited *Postiglione v R* (1997) 189 CLR 295, cited *R v GB and LB* [1999] QCA 46; CA No 443 and CA No 449 of 1998, 26 February 1999, cited *R v Casey* [2003] QCA 152; CA No 34 of 2003, 3 April 2003, cited *R v Dempsey* [1995] QCA 466; CA No 261 of 1995, 22 August 1995, distinguished *R v Lovell* [1998] QCA 36; [1999] 2 Qd R 79, cited *R v Mather* [1999] QCA 226; CA No 76 of 1999, 17 June

1999, distinguished
R v Moss [1999] QCA 426; CA No 270 of 1999, 8 October 1999, distinguished
R v Payne [2002] QCA 75; CA No 337 of 2001, 14 March 2002, cited
R v Slattery [2001] QCA 108; CA No 354 of 2000, 21 March 2001, cited
R v Taylor & Napatali; ex parte A-G (Qld) [1999] QCA 323; (1999) 106 A Crim R 578, cited

COUNSEL: K M McGinness for the applicant
R Pointing for the respondent

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

[1] **JERRARD JA:** In this application for leave to appeal I have read the reasons for judgment of Philippides J and Mackenzie J, and respectfully agree with those reasons, and with the order proposed by Philippides J. The difficulty this applicant faces was that he had pleaded to three serious robbery offences committed over a 15 month period. In the matter of *R v Casey* [2003] QCA 152, this court upheld a sentence of three years imprisonment suspended after four months for an operational period of three years for two offences of robbery, where that offender was 17 years old with no prior criminal history, did not enter the premises, and was encouraged to take part in the offences by his mother. That sentence shows that the head sentence of four years imprisonment imposed upon this applicant for the most serious offence of armed robbery in company was within the range allowable on a proper sentencing discretion. This applicant was armed on each occasion and entered, or tried to enter, the various premises. The head sentence of four years was mitigated by the recommendation made for post-prison community based release after Mr Tuki has served 15 months. Whether he can obtain parole will depend on his efforts.

[2] Mr Tuki was only a young adult offender, being only 19 when sentenced, but still apparently older than either of his co-offenders. The learned sentencing judge did have regard to Mr Tuki's youth, as the judge was required to do, including the benefit the community will experience if Mr Tuki can be directed, while still young, away from repeat offending. Mr Tuki's youth does not result in the sentences imposed giving him any legitimate sense of grievance, when comparing those sentences with the one imposed on his co-offender, the child B. Mr Tuki's three offences of armed robbery and attempted armed robbery showed a pattern of behaviour justifying a term of imprisonment intended to deter its continuation, but with the possibility of his getting community based earlier release. I respectfully agree with Mackenzie J that the fact that B was sentenced as a child does not require that Mr Tuki receive a sentence comparable to that which would be imposed if he were a child; his sentences were those appropriate to a very young adult.

[3] **MACKENZIE J:** I agree with the order proposed by Philippides J for the reasons given by her. I wish to comment further on only one aspect. The submission was made that there was a disparity between the applicant's sentence and that of his co-offender B, such as to engender a legitimate sense of grievance in him (*Lowe v R*

(1984) 154 CLR 606, 610; *Postiglione v R* (1997) 189 CLR 295, 301, 313). It was submitted that the fact that B was sentenced under the *Juvenile Justice Act* 1992 did not detract from the need for proportionality of treatment.

[4] B was only 15 at the time of the joint offences. The applicant was about 18 ½. B was involved in only two offences and the applicant in three, the offence not committed with B having been committed when he was just 17. There was no significant difference in their respective degrees of culpability in committing the joint offences.

[5] *R v Slattery* [2001] QCA 108 was cited as an example of a case where a sentence on an adult had been reduced in a case where there were juvenile co-offenders. Although the issue of disproportion was discussed in it, it was conceded by the applicant's counsel not to be binding authority for the proposition relied on. That concession was in my view well founded. *Slattery* was a case where the applicant played a minor role, in a single offence, compared with the juveniles involved.

[6] Reference is made in *Slattery* to *R v GB and LB* (CA Nos 443 and 449 of 1998, unreported, 26 February 1999). It was a case where grievous bodily harm which was very minor and transient was done in a brawl. The sentencing judge had been inclined to impose a non-custodial sentence on both a juvenile and his brother, who was slightly older at 18. However, he was persuaded by the Crown, erroneously, that some custodial portion of the sentences was inevitable. Further, the principle that detention of a juvenile was a last resort had been overlooked. In the circumstances, passing reference to the unfairness of the adult offender having to serve actual imprisonment for equal involvement is not clear authority for the proposition underlying this application.

[7] While some cases may demonstrate, like *Slattery*, that an adult co-offender with juveniles has suffered an injustice because the sentence imposed on him was manifestly excessive by reference to the particular facts of the case, in my view there is no general principle that the mere fact that co-offenders are dealt with differently because one is dealt with as an adult and one as a child, requires this court to reduce the sentence from what is otherwise an appropriate level for the adult offender by resort to the principle of parity. The fact that the sentences are imposed under different schemes of sentencing necessarily implies that there will be differential treatment. The tentative view expressed by Moynihan SJA in *Slattery* that adults ought not to be advantaged in sentencing because their co-offenders are sentenced under the different juvenile justice regime is, in my view, sound.

[8] **PHILIPPIDES J:** This is an application for leave to appeal against sentences imposed in relation to two counts of armed robbery in company and one count of attempted armed robbery.

[9] On 24 August 2004, the applicant was sentenced to 3 years' imprisonment for an offence of armed robbery in company committed on 27 May 2002. That matter proceeded by way of ex officio indictment. The applicant was also sentenced on his plea to two counts on a second indictment. Count 1 concerned an armed robbery in company committed on 14 August 2003, in respect of which a sentence of 4 years' imprisonment was imposed. Count 2 concerned an attempted armed robbery committed on 29 August 2003, for which a sentence of 3 years' imprisonment was imposed. All sentences were ordered to be served concurrently and a

recommendation was made for post prison community based release after 15 months' imprisonment.

[10] The applicant was born in New Zealand on 31 March 1985 and was 17 and 18 years of age at the time of the offences and 19 at sentencing. The applicant has a minor criminal history. In July 2002, he was placed on a 6 month, $200 good behaviour bond for behaving in a disorderly manner and obstructing a police officer. In October 2002, he was fined for possessing dangerous drugs. In March 2004, he was fined for unauthorised dealing with shop goods. On each occasion no conviction was recorded.

[11] The applicant has had a disadvantaged background. His parents separated when he was 4 years old, following a turbulent relationship. When he was 5 years old, he sustained a major head injury when he was hit by a car. He has required special remedial assistance with his education and has the literacy level of an 8 year old. A psychologist's report, which was tendered at sentencing, suggested that the applicant had a borderline to low average level of intelligence.

[12] The first of the offences committed, namely that committed on 27 May 2002, concerned the armed robbery of a store at Kingston. The circumstances were that the complainant, a store attendant, saw a masked man enter the store armed with a steel bar. He saw another armed and masked man (the applicant) standing just outside the front door. The first man produced a bag and demanded money, threatening the complainant with the steel bar, telling him to hurry up. The money ($520) was placed in the bag and the two offenders fled. The police were called and subsequently located the applicant's face mask. In May 2004, the applicant's latent fingerprints were found on the mask. The applicant was arrested in June 2004 and declined to be interviewed.

[13] The circumstances of the second offence of armed robbery are that in the early hours of 14 August 2003, the applicant and B, his co-accused, went to a petrol station at Woodridge. The complainant, Scales, had been working a night shift as a console operator and had locked the front doors to the store, putting them on "exit" mode, which enabled him to control the entry of customers. At about 1.15 am, the applicant knocked on the side window of the store and the complainant activated the door to allow him access. The applicant had a metal pole about 90cms long and 5cms thick and a black bag, which he placed on the counter and said "get all the money and put it in the bag". The complainant responded, "Coppers have just been through here and they come through here every 5 to 10 minutes. It's not worth it". As he said this, the complainant pointed out towards the pumps and he noticed another person (the co-accused B) standing at the doorway. B lifted his shirt to reveal a knife in the waistband of his pants. The complainant felt scared and concerned for his wellbeing. The complainant activated the alarm, thereby sending a message to police. At this point, B approached the counter. He was wearing what looked like a gorilla costume mask and also holding a metal pole. B told the complainant to hurry up and to give them the whole till. The applicant and B grabbed the till and fled. The entire episode was captured on video surveillance.

[14] Identifying clothing, the masks and the metal poles were subsequently located in a nearby vacant lot. Both the applicant and B participated in recorded interviews. B made admissions that he had attended the service station with the applicant in order to rob it, that he had covered his face with a mask and had carried a large metal pipe, so as to frighten the complainant and assist in the robbery. The applicant was

considerably less forthcoming. He said that he had been approached by two unknown males, who asked him to keep a look out for them, but said that he was not aware what he was to be looking out for. He said that the two males went to the service station and ran past him a short time later holding costume masks in their hands. Notwithstanding these statements the applicant subsequently admitted his involvement and at sentence it was conceded that he was the first to enter the service station.

[15] The circumstances concerning the attempted robbery are that on 29 August 2003, the same complainant was again working a night shift at the petrol station at Woodridge and had activated the "exit" mode for the front doors of the store. At about 12.30 am, the complainant heard a knock on the glass doors. In the security monitor he saw a young male (a co-accused called Walker) wearing a beanie. The complainant activated the door allowing him entry. The complainant then saw two other individuals outside (the applicant and B) and recognised one as the person who had robbed the store on 14 August 2004. (Both the applicant and B were armed with objects later admitted to be cricket bats.) The complainant caused the doors to shut. This prevented Walker from fleeing and B and the applicant from gaining entry to commit the robbery.

[16] Security footage showed Walker attempting to enter the store with a bandana over his face and a beanie pulled down. It also showed him communicating with the applicant and B, who also had their faces covered and their heads hooded. The applicant and the others involved participated in recorded interviews. The applicant admitted that he had attended the service station with the others with the intention of robbing it, but denied that he was armed with any weapon and that his face was masked. He later admitted that he had attended the store armed with a cricket bat.

[17] In imposing sentence, the learned sentencing judge took into account, as circumstances of aggravation common to the three offences, the use of weapons and the fact that the offences were committed while in company. His Honour emphasised the importance of considerations of deterrence for offences of the type committed, observing that the businesses involved in each offence were relatively soft targets and that the offences in question were prevalent in the district concerned. The learned sentencing judge viewed the offences seriously, noting the increased potential for violent conflict, which arises when weapons are used in the execution of robberies. His Honour observed that, although the applicant was to be sentenced as an adult in respect of all the offences, considerations of youth and rehabilitation remained important and had regard to those matters and the other matters of mitigation, including the applicant's pleas, personal circumstances and recent personal progress. His Honour noted the applicant's previous convictions as being of a minor nature.

[18] His Honour recognised, as a relevant consideration, the sentences to be imposed upon the applicant's co-offenders, but noted that there was no issue of direct parity. B was sentenced to supervision for 2 years with no conviction being recorded. Although B had a criminal history from New South Wales, which included two entries for offences of robbery in company, His Honour noted that he had participated in a lesser number of offences than the applicant and was 15 years of age at the time of sentence and therefore sentenced under the *Juvenile Justice Act* 1992. Walker, who was 18 years of age at the time of the offence and had no criminal history, was sentenced to 12 months' imprisonment to be served by way of intensive correctional order for the single offence in which he was involved.

[19] The applicant contended that the sentences imposed on him were manifestly excessive. It was submitted that the sentence which should have been imposed is one of 2 to 2½ years imprisonment, with a suspension or recommendation after 6 to 9 months. Relying on *R v Lovell* [1999] 2 Qd R 79, it was submitted that the learned sentencing judge failed to have proper regard to the applicant's co-operation and youth. In addition, it was submitted that even allowing for the different sentencing regimes under which the applicant and B were sentenced, the disparity between the applicant's sentence and B's was such as to give rise to a legitimate sense of grievance on behalf of the applicant.

[20] At sentence the prosecutor referred to the cases of *R v Moss* [1999] QCA 426, *R v Mather* [1999] QCA 226 and *R v Dempsey* [1995] QCA 486 as comparables. However, *Mather* and *Dempsey* are of little assistance as they both involve older offenders, Mather being 35 and Dempsey being 27. Nor is *Moss* of great assistance. That case concerned an 18 year old offender, with a lengthy criminal history, who had robbed a video store. Aggravating features there were that the offender was armed with a knife and was on probation at the time. His sentence was reduced on appeal to one of 5 years with a recommendation after 2 years.

[21] The applicant relied upon *R v Casey* [2003] QCA 152, *R v Taylor & Napatali; ex parte A-G* (Qld) (1999) 106 A Crim R 578, *R v Slattery* [2001] QCA 108 and *R v Payne* [2002] QCA 75 as comparatives.

[22] *Casey* concerned two offences of armed robbery in company imposed on the offender Casey, who was 17 years old, with no prior criminal history. Two other youths participated in the offences. Casey did not enter the premises on either occasion to effect the robberies and played a subsidiary role, being encouraged to take part in the offences by his mother, who received the proceeds to buy household groceries. Concurrent sentences of 3 years' imprisonment, suspended after 4 months for an operational period of 3 years were not disturbed on appeal.

[23] In *Taylor's* case, the court dismissed an Attorney's appeal against a sentence of 12 months' imprisonment to be served by way of an intensive correctional order, imposed on a 17 year old offender and a 20 year old offender for armed robbery in company with violence. The robbery was carried out at a service station, using a replica pistol and a rifle, which was probably lacking a firing pin. The offenders had no previous convictions and had entered pleas after making full and frank confessions. Whilst the desirability of not sending youthful offenders with no prior convictions to a period of actual imprisonment was emphasised, it must be noted that the offenders were only involved in one offence.

[24] In *Slattery*, a sentence of 3 years' imprisonment suspended after 9 months for an operational period of 3 years imposed on 21 year old offender, was reduced on appeal to one of 131 days imprisonment followed by 2 years probation. Slattery was the driver of a motor vehicle used in the robbery of a service station, which was carried out by his three juvenile co-offenders and involved the use of a knife. He had a minor criminal history. His 15 year old co-offender, who had previously robbed the service station, was sentenced to 12 months probation and another 15 year old co-offender was sentenced to community service. An important consideration in reducing the sentence imposed on Slattery, was the injustice following from his serving a substantial period of imprisonment, while his co-offenders, who actually carried out the robbery, were dealt with more leniently,

even taking into account the different sentencing regime. Again, it is to be observed that Slattery was involved in only a single offence.

[25] In *Payne*, a sentence of 3 years' imprisonment, suspended after 9 months for an operational period of 5 years, was varied on appeal by substituting a sentence of 2 years' imprisonment, suspended after 6 months for an operational period of 3 years. Payne was sentenced for 5 offences, including one of robbery whilst armed with a knife and a syringe and in company. He had no prior convictions and had an intellectual disability of a mild degree, which rendered him vulnerable to exploitation and had a long standing anxiety disorder. He had been assessed as meeting the criteria for a disability support pension. He presented as a low risk of re-offending provided supervised. In addition, he had volunteered his involvement in a number of offences with which he may otherwise have not been charged.

[26] In my view the sentences imposed are supported by the authorities and cannot be shown to be manifestly excessive. Whilst the applicant had the benefit of the pleas, it cannot be said that he demonstrated extensive co-operation. Where he made statements to the police he sought to downplay his involvement. Given the level of offending and the escalating nature of his behaviour, the sentence imposed was within the proper sentencing discretion. His Honour had careful regard to the important matters of mitigation present, in particular the applicant's youth, his pleas, the need for rehabilitation and for parity, to the extent possible, whilst recognising the different sentencing regime applicable to the co-offenders.

[27] In my view, the learned sentencing judge proceeded on correct sentencing principles and appropriately took into account all mitigating factors relevant to the applicant. I am not persuaded that an analysis of the applicant's personal circumstances required the imposition of more lenient sentences such that the sentences imposed can be said to be manifestly excessive. Whilst a more lenient sentence may also have been within the sentencing discretion, the sentence imposed has not been demonstrated to be manifestly excessive.

[28] Accordingly, I would dismiss the application.