SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coglan* [2004] QCA 486
PARTIES:	**R** **v** **COGLAN, Benjamin James** (applicant)
FILE NO/S:	CA No 284 of 2004 DC No 214 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	17 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2004
JUDGES:	McPherson JA, Jerrard JA, Philippides J 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 – SENTENCING – ARMED ROBBERY – where applicant convicted after a trial of armed robbery in company with violence, and sentenced to three years imprisonment – whether sentence manifestly excessive
COUNSEL:	The applicant appeared on his own behalf B G Campbell for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Qld) for the respondent

[1] **McPHERSON JA**: The applicant pleaded not guilty to a charge of armed robbery in company with violence. He was convicted of this offence after a trial in the District Court at Cairns and was sentenced to serve a term of three years imprisonment, with a declaration that 5 days of presentence custody had already been served. He applies for leave to appeal against that sentence.

[2] On 10 November 2003, the applicant, with three other co-offenders, robbed a convenience store at a service station in Cairns. The applicant was 19 years old at the time of the offence.

[3] They all drove to the convenience store, in the applicant's car. The plan was that the applicant would pretend to be a customer, so that the console operator would open the doors to the convenience store, which were normally kept closed at

that time of the night as a security measure until the console operator decided to open them and let the customer in.

[4] The applicant walked into the convenience store. The doors were not locked, as they had expected, because the 54 year old female complainant who was employed at the store was outside tidying up. She followed the applicant into the store. Shortly after this, two of the co-offenders, Denning Paull and Ashley, a juvenile, went into the convenience store armed with knives and with pillow cases over their heads to disguise themselves.

[5] Ashley pushed the complainant into a staff-only security door, and told her to open it. The complainant at first could not remember the code that was required to open the security door. Ashley told her that she had until the count of 3 to get the door open. The complainant remembered the code and opened the door. Ashley continued to threaten her, and told her to open the cash register, which she did. At one stage Ashley held his knife to the throat of the complainant.

[6] They stole a total of $415 cash, before leaving the convenience store in the applicant's car, which was driven by Mitchell Smith, who was the other co-offender. They abandoned the car at a nearby location and ran away.

[7] During the robbery, Denning Paull had grabbed the applicant by the shirt, presumably to make it look as if he was a customer who was not involved in the robbery. The applicant did not himself inflict any violence on the complainant. He was, however, extensively involved in the planning of the robbery. It was his car that was used, and they had driven around to the convenience store beforehand to plan the robbery. The applicant's role was to act as a decoy to enable them to gain entry to the convenience store at that time of night. The applicant knew that Paull and Ashley would be wearing disguises and armed with knives.

[8] At the hearing in this Court, the applicant who appeared in person by video link from North Queensland, said that at the trial his defence was that he was coerced by his co-offenders. Mr Campbell of counsel for the Crown on appeal said that, having consulted the trial transcript, the applicant's defence evidently was that he was not a party to the offence or its planning, but simply an innocent passer-by who happened to be in the shop as a customer when the others burst in. The applicant confirmed this was so. His defence along those lines was not accepted by the jury, who preferred the evidence of his co-offenders who testified against him.

[9] The applicant was on probation at the time he committed the offence. On 7 May 2003, he had been given three years probation for four counts of breaking and entering and stealing. He breached the terms of his probation by failing to report, failing to pay restitution, and failing to perform community service. He was convicted and dealt with for breaching his probation on 12 January 2004 and again on 11 March 2004. He was also convicted on 9 January 2002 of attempted fraud, and breaking, entering and stealing. His probation officer prepared a report, which was by no means favourable to him. He plainly treats his obligations under these forms of rehabilitative treatment with almost complete indifference.

[10] The main factors advanced in the applicant's favour at sentencing were his youth, (he was 19 years old at the time of the offence), and his psychological problems. He has been diagnosed with a number of psychological disorders. Mr Renneberg, a psychologist, in a report dated 21 April 2003, diagnosed the

applicant with dysthymic disorder, conduct disorder and an antisocial personality disorder. In October 2003, Ms Richardson, also a psychologist, diagnosed the applicant with a major depressive disorder, and thought that he might also have a personality disorder. Strictly speaking it is no part of a psychologist's function to diagnose or to treat mental illness, but only to assess intellectual function. The opinion of Dr Trott, psychiatrist, is therefore of greater weight. He diagnosed the applicant as having a mild chronic depressive illness and an adjustment disorder. Despite the differences in these diagnoses, it may be accepted that the applicant has problems of some kind, which is something that the learned sentencing judge took into account when sentencing him. Her Honour, moreover, recommended that the applicant receive psychological assessment, monitoring and treatment while in prison, which is something that other judges have also recommended in the past, but apparently without effecting any improvement in the applicant's condition or his behaviour.

[11] The applicant's sentence of three years imprisonment was higher than that of his co-offenders, but well within sentencing range for offences of this kind, having regard to the applicant's criminal record. Ashley, who was 16 years old at the time of the robbery, was sentenced as a juvenile to be detained for 6 months, with a conditional release order under the Act after three months. In fact, he appears to have played an active part in threatening the complainant; but, unlike the applicant, he had no criminal history and he co-operated with the police and he pleaded guilty.

[12] Denning Paull, who came into the convenience store armed with a knife, was given a 12 months intensive correction order. The main distinguishing features between his case and the applicant's are that he was 17 years old, he did not have an extensive criminal record, and he pleaded guilty ex officio, after co-operating extensively with the police, and, in particular, he gave evidence against the applicant at his trial.

[13] Finally, Mitchell Smith, who drove the vehicle away from the crime scene, was sentenced to 12 months in prison and also received another but concurrent sentence at the same time. He was 18 years old and had an extensive criminal record, which includes convictions for armed robbery and fraud in New South Wales while a juvenile, and convictions in Queensland for breaking and entering and stealing. In his favour, however, he pleaded guilty and cooperated with the police, including giving evidence against the applicant at his trial.

[14] The offence of armed robbery, with the two circumstances of aggravation that it was in company and that violence was used, carries a maximum penalty of life imprisonment. The applicant received three years imprisonment which her Honour reduced from four years to three because of his relative youth, his psychological condition, and the fact that he was not the actual perpetrator of the violence. This last factor may have been unduly favourable to him. He was well aware of what was intended. Before us, he complained that the learned judge had not taken account of his co-operation with the police. What this "co-operation" involved, however, was that, after police had traced the abandoned get-away car to him, he identified his co-accused and claimed he was an innocent customer at the time when the offence was committed. It was no wonder the others gave evidence against him at the trial, at which he also testified but was not believed.

[15] There was a good deal of planning in all this, which the cynical among us might believe extended to ensuring that the applicant adopted the role of decoy to provide him with an "escape route" or story to use to police if things went wrong. In fact, the others turned the tables on him after he had put the police on to them. The sentences of Paull and Smith would, said White DCJ in sentencing them, have been two years imprisonment had it not been for their s 13A statements and their testimony against him. It is noteworthy, too, that it was the youngest members of the conspiracy who were assigned the most serious job of "roughing up" the console operator, while Smith, who had a bad record, stayed in the car. It was the applicant's car that was used to travel to the scene of the robbery.

[16] The operator Mrs Lewis has, as one would expect, reacted very badly to the experience, and suffers loss of sleep and appetite, stress and other problems. She now gets into panic states, and on one occasion at work she says she was in such a condition that she locked herself in her car and could not move. Before us, the applicant offered to pay her $5,000; but he has still paid only $85 out of an earlier parole condition that he pay some $3,800 in reparation to a previous victim. In the light of this, I could regard his offer as worthless.

[17] There can, as Mr Campbell pointed out to us, be no cause for complaint on the score of disparity of his sentence with that of the offender Smith. Under the Act, the applicant will be eligible for consideration for parole after 18 months. He did not plead guilty or provide a s 13A statement. Smith who did and who gave evidence, received a sentence of 12 months imprisonment. Under the *Corrective Services Act*, he is therefore not entitled to be considered for parole but under s 76 only conditional release after serving two thirds of his sentence. If, without his co-operation, he had been sentenced to two years, he would thus have served 16 months, which is close enough to the 18 month half-way point at which the applicant will qualify for consideration under the Act.

[18] Her Honour Judge Bradley, who sentenced the applicant after presiding at his trial, took into account all of the factors operating in his favour which on appeal the applicant has stressed to this Court. Not only was the sentence imposed appropriate, but I also agree with the remarks her Honour addressed to the applicant in her assessment of him in the course of sentencing.

[19] The application for leave to appeal should be dismissed.

[20] **JERRARD JA**: In this application I have read the reasons for judgment of McPherson JA and respectfully agree with those and the order proposed.

[21] **PHILIPPIDES J:** I agree for the reasons stated in the judgment of McPherson JA that the application for leave to appeal against sentence should be dismissed.