

SUPREME COURT OF QUEENSLAND

CITATION: *R v Marshall* [2004] QCA 487

PARTIES: **R**
v
MARSHALL, Jay William
(applicant)

FILE NO/S: CA No 283 of 2004
DC No 49 of 2001

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 17 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 23 November 2004

JUDGES: McPherson and Jerrard JJA and 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 – JURISDICTION, PRACTICE AND
PROCEDURE – JUDGMENT AND PUNISHMENT –
SENTENCE – where applicant sentenced for multiple
robbery and burglary offences – where offences involved
breach of a suspended sentence for similar offences – where
remaining 15 months portion of suspended sentence activated
cumulatively on a 3 year sentence – 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 (Queensland) for the
respondent

- [1] **McPHERSON JA:** I have read and agree with the reasons of Philippides J. I agree that this application for leave to appeal against sentence should be dismissed.
- [2] **JERRARD JA:** In this application for leave I have read and agree with the reasons for judgment of Philippides J, and respectfully agree with those and the order proposed.

- [3] **PHILIPPIDES J:** This is an application for leave to appeal against the activation of a suspended sentence of 15 months' imprisonment ordered to be served cumulatively on the breach of the suspended sentence between December 2002 and March 2003.
- [4] The applicant was dealt with on 24 January 2001 in respect of the original offences for which he received a partially suspended sentence. They concerned 3 counts of entering a dwelling and committing an indictable offence, one of unlawful use of a motor vehicle, one of stealing and one of fraud. The offences occurred when the applicant broke into holiday units on the Gold Coast and stole property, while the occupants were asleep. From one unit, the applicant stole car keys, and then unlawfully used the car and stole property from the car. From another unit, the applicant stole a pin card, which he then used to withdraw money. The total value of property unrecovered was \$5,775. The applicant pleaded to these offences and was sentenced to 2 years' imprisonment, suspended after 9 months for an operational period of 3 years. A declaration was made as to 124 days served in pre-sentence custody.
- [5] Also on 24 January 2001, the applicant pleaded to a further 21 count ex-officio indictment, for similar offences committed in 1996 and 1998, when he was aged 13 to 15. No further punishment was imposed for those offences. In addition, the applicant was dealt with for breach of a suspended sentence imposed on 10 May 2000 for unlawful use of a motor vehicle and ordered to serve 3 months imprisonment concurrently.
- [6] On 17 July 2001, the applicant pleaded to an offence of grievous bodily harm and was sentenced to imprisonment for 1 year and 125 days to be served concurrently with the term imposed on 24 January 2001, with a recommendation for parole after 6 months. A declaration as to pre-sentence custody was made. That offence was committed on 17 February 2000 and therefore prior to the operational period of the 2001 suspended sentence which was activated in the present case.
- [7] The applicant breached the 2001 suspended sentence by committing 17 further dishonesty, property and drug offences between December 2002 and March 2003. On 27 October 2003, the applicant pleaded to all 17 counts and was sentenced to an effective term of 19 months' imprisonment, and given the benefit of a suspended sentence on an intensive drug rehabilitation order.
- [8] The applicant breached the 2003 suspended sentence by committing a further 31 offences between December 2003 and March 2004. Again these offences were property, dishonesty and drug offences. He was dealt with in respect of that offending on 23 April 2004 and sentenced to 3 years' imprisonment. In addition, the previous intensive drug rehabilitation order was terminated and the applicant was ordered to serve the 19 months' imprisonment previously suspended concurrently. A declaration was made as to the time served being 63 days.
- [9] On 23 July 2004, the applicant was dealt with for the breach of the suspended sentence imposed on 24 January 2001. The effective sentence imposed on the applicant for that breach was that he serve the whole of the remaining portion of the suspended sentence of 15 months' imprisonment, cumulatively on the 3 year sentence then being served.

- [10] The applicant is currently 22 years of age and has a young daughter aged one. He has a very extensive criminal history of property offences dating back to 1998. The offences committed by him arise out of his serious drug addiction, particularly to heroin. He was introduced to drugs at a very early age by his parents, who were both heroin addicts. The applicant has, on a number of occasions, received lenient sentences, including suspended sentences and opportunities to address his drug dependency. Opportunities for drug rehabilitation at Logan House and Moonah Rehabilitation Centre have not been followed through.
- [11] The ground upon which the application is made is that the sentence imposed was manifestly excessive. Before the learned sentencing judge, it had been urged on behalf of the applicant that only a part of the suspended term be required to be served and that a cumulative order not be made.
- [12] In activating the whole of the remaining period of the suspended sentence, the learned sentencing judge observed that the applicant had been given the benefit of an intensive drug rehabilitation order, that his continuing offending was not trivial and the serious nature of the original offences. His Honour also took into account the period remaining under the suspended sentence and the sentences then being served, in determining that it was not unjust that the applicant be required to serve the whole of the suspended term of imprisonment and that he do so cumulatively with the other periods being served.
- [13] In my view, it has not been demonstrated that the sentencing discretion has miscarried in his Honour so dealing with the applicant. Given the applicant's persistent offending and his failure to take advantage of more lenient options offered to him, it cannot be said that his Honour erred in the exercise of his discretion by requiring the applicant to serve the whole of the remaining period of the suspended sentence. Furthermore, notwithstanding the applicant's youth, his personal circumstances and the need to ensure that the activation of the suspended sentence not have a crushing effect, I consider that in this case it was within his Honour's sentencing discretion to order that the suspended sentence be served cumulatively. That was required in order to reflect the totality of the offending conduct, which was persistent and extensive.
- [14] Accordingly, I would dismiss the application.