# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v McMillan* [2005] QCA 93 |
| PARTIES: | **R**<br>**v**<br>**McMILLAN, Jesse John**<br>(applicant/appellant) |
| FILE NO/S: | CA No 278 of 2004<br>SC No 447 of 2003<br>SC No 27 of 2004<br>SC No 517 of 2004<br>SC No 518 of 2004<br>SC No 519 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 April 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8 November 2004 |
| JUDGES: | McPherson and Jerrard JJA, and Fryberg J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made. |
| ORDERS: | **1. Grant the application and allow the appeal for the limited purpose of varying the sentences as set out hereunder.**<br>**2. Set aside the declaration pursuant to s 161 of the *Penalties and Sentences Act* 1992 and in lieu thereof:**<br>**(a) State that the applicant was held in presentence custody between 16 August and 27 September 2002 and between 30 January 2003 and 9 June 2004, a period of 538 days;**<br>**(b) Declare that that time is time already served under the sentences imposed for the offences in indictments 447/03 and 518/04;**<br>**(c) Direct that the records of the court be noted with the fact that this declaration was made and its details and the fact that the declared time was taken into account in imposing sentence; and**<br>**(d) Direct that the Chief Executive Officer (Corrective Services) be advised of the declaration and its details.** |

**3. Order that each of the terms of imprisonment imposed in respect of indictment 27/04 be suspended after the applicant has served a period of six months of the term for an operational period of five years.**

**4. Set aside the sentences imposed on indictment 519/04 and in lieu thereof:**

**(a) Sentence the applicant to imprisonment for three years on each count, these sentences to be served concurrently;**

**(b) Direct that each of these sentences commence immediately after the applicant has served 2½ years of the period of imprisonment imposed in respect of the offences set out in indictments 447/03, 518/04 and 27/04;**

**(c) Direct that the applicant be released after he has served nine months of imprisonment under these sentences upon his giving security by recognisance in the sum of $5,000 that he will be of good behaviour for three years;**

**(d) Direct that the Sheriff reduce this order to writing and cause a copy to be given to the applicant, together with an explanation of the purpose and consequences of making this order;**

**(e) Direct that the reasons set out in paragraph [20] be entered in the records of the court.**

CATCHWORDS: CRIMINAL LAW – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Concurrent, cumulative, and additional sentences, and commencement of sentence – Offences under federal and state jurisdiction – Where the applicant was sentenced to a term of imprisonment for federal offences to be served cumulatively on terms of imprisonment imposed in respect of State offences – Whether sentence was manifestly excessive

*Crimes Act* 1914 (Cth), s 16, s 16E, s 19(3)(d)
*Corrective Services Act* 2000 (Qld), s 135(2)(e), s 139
*Penalties and Sentences Act* 1992 (Qld), s 13(1), s 157

COUNSEL: J R Hunter for the appellant
M J Copley for the first respondent
P G Huygens for the second respondent

SOLICITORS: Legal Aid (Queensland) for the appellant
Director of Public Prosecutions (Queensland) for the first respondent
Director of Public Prosecutions (Commonwealth) for the second respondent

[1] **McPHERSON JA**: For the reasons given by Fryberg J, I agree with the orders which his Honour has proposed.

[2] **JERRARD JA**: In this appeal, I have read the reasons for judgment of Fryberg J and respectfully agree with those, with His Honour's careful analysis of the relevant Commonwealth and State legislation applicable in this appeal to imposing sentences, and with the orders proposed.

[3] **FRYBERG J**: On 6 August 2004 the applicant pleaded guilty in the Trial Division to eight indictable offences and five summary offences. He was then sentenced to varying terms of imprisonment for the indictable offences. In respect of the summary offences he was convicted but no further penalty was imposed; it is unnecessary to refer to them further. The indictable offences were set out in four separate indictments. One was a charge of dangerous operation of a motor vehicle with a circumstance of aggravation; two involved defrauding the Commonwealth and dishonestly gaining advantage by deception (these were in relation to social security fraud and were Commonwealth offences); and the balance were cannabis-related offences committed as a result of his involvement in the production of two substantial cannabis crops which were destined for sale. Before setting out the penalties which they attracted it is convenient to refer to the circumstances of the offences in chronological order.

[4] The applicant was first granted a social security benefit in 1995. At all material times after April 1999 he was in receipt of Newstart allowance in his own name; it must be assumed legitimately. On 16 January 2000 he lodged another application for the allowance in the name Glenn Anthony Miller. He produced bogus documents to support that application. It was granted, with effect from 6 January 2000 and was paid for a total of 48 fortnights as a result of false fortnightly or monthly forms submitted by the applicant. He received $17,109.12. On 20 October 2000 he lodged a further application for the allowance in the name of Jesse John McMillan. Again he produced bogus documents in support of the application. It was granted with effect from 6 October 2000 and was paid for a total of 29 fortnights, again as a result of false fortnightly or monthly forms submitted by the applicant. He received $11,975. He was entitled to neither of these benefits. Of that amount the Commonwealth had recovered $236.65 by the date of sentencing. The sentencing judge rightly described the means by which the applicant defrauded the Commonwealth as elaborate and sophisticated, involving some intelligence and some application.

[5] On 24 May 2001 police raided the applicant's house at Cedarvale, near Beaudesert. They found 10.556 kg of cannabis sativa spread around the interior of the house. Most of it was in the process of drying out. Shopping bags and garbage bags filled with cannabis were also found as well as six very small plants. The applicant told police some of the cannabis had been grown by him, the rest he had purchased. He was in the process of weighing and bagging the drugs for sale in one pound bags. Some seeds found by the police were to be planted to grow more. He admitted supplying some of the drug to another person. He was released on bail but subsequently failed to appear and a warrant was issued.

[6] On 21 October 2001 at about 2:30 pm police observed the applicant with a pillion passenger behaving oddly. Police activated the siren of the police vehicle, the applicant stopped and allowed the passenger to alight and he then sped off. A chase

followed involving two police vehicles, during which the applicant reached speeds in excess of 100 kph in 50 and 60 kph zones. Eventually the applicant crashed his motorcycle into a third police vehicle. He had a blood alcohol content of 0.125 per cent and was unlicensed. Despite the outstanding warrant, he was again given bail.

[7] On 16 August 2002 police located the applicant in a caravan park at Acacia Ridge. He told police that he had cannabis in his vehicle and on searching it they found a total of 7.429 kg. He declined to answer any questions. He was released on bail on 27 September 2002.

[8] On 28 January 2003 police raided a bushland property at Undullah near Beaudesert. The applicant fled on a motorcycle. Police found a plantation of 303 cannabis plants ranging in size from 50 cm to 1.5 m. The plants weighed 45.603 kg without roots. Police also found tools and other items associated with the crop.

[9] Two days later the applicant was arrested. He remained in custody until again released on bail on 9 June 2004. From then until he was sentenced on 6 August he resided at Logan House. Part of the time in custody was in respect of the social security offences.

[10] The sentences imposed are set out in the following table:

| IND/ COUNT | DATE OF OFFENCE | CHARGE | GP | SENTENCE |
|---|---|---|---|---|
| **447/03** | | | | |
| 1 | 23/5/01 | Supply cannabis | | 2 months |
| 2 | 1/9/00-25/5/01 | Produce cannabis circ of aggravation | A | 2 years |
| 3 | 16/8/02 | Possess cannabis circ of aggravation | | 2 years |
| **518/04** | | | | |
| 1 | 21/10/01 | Dangerous operation of motor vehicle with circ of aggravation | | 2 years |
| **27/04** | | | | |
| 1 | 28/1/03 | Produce cannabis circ of aggravation | B | 3 years |
| 2 | 28/1/03 | Possess things in connection with crime | | 1 year |
| **519/04** | | | | |
| 1 | 6/1/00-23/5/01 | Defrauding the Commonwealth | | 3 years |
| 2 | 24/5/01-10/11/01 | Dishonestly gaining advantage by deception | C | 3 years |

The judge ordered that sentences within the same group be served concurrently; that the sentences in group B be served cumulatively on those in group A; and that those in group C be served cumulatively on those in group B. Thus the period of imprisonment in respect of the State offences (groups A and B) was five years and that in respect of the federal offences three years. He disqualified the applicant absolutely from holding or obtaining a driver's licence. In relation to the State offences he declared in accordance with s 161 of the *Penalties and Sentences Act* 1992 that 538 days between certain nominated dates was time already served under the sentences. He made no recommendation regarding parole under s 157 of that Act in respect of the State offences. In respect of the federal offences he ordered that:

> "… there be a recognisance release order after you have served nine months from the date you would otherwise be eligible for parole in respect of the sentences imposed for the State offences. My evident intention is that I expect you to be eligible for parole after you have served two and a half years' imprisonment I have imposed, and you have already served about 18 months of that. *It is my intention that you be released on parole at the expiration of the nine months I have ordered in respect of the Commonwealth offences which would follow your notional eligibility for parole under the State offences.*[1]"

He ordered that the applicant make reparation to the Commonwealth in the sum of $28,847.47.

[11] The sentencing judge took into account the fact that a number of the offences were committed while the applicant was on bail. He described the applicant's disdain for his obligation to society and his antisocial behaviour as appalling and the applicant as having been irresponsible, selfish and criminal. The description was appropriate. The judge regarded the level of offending as serious and its persistence as disturbing, particularly having regard to the applicant's age (about 31 at the time of the first of the offences). However he mitigated the "very substantial" period of imprisonment which he would otherwise have imposed, first to avoid depriving the applicant of hope for the future or making him think that there was no point in persisting in an attitude of optimism and a positive approach. The applicant does not now suggest that the sentences imposed offend the totality principle. Second his Honour took into account in mitigation evidence from an addictions counsellor at Logan House of the applicant's progress toward rehabilitation during his two-month stay. The judge said that he wanted to give the applicant some prospect of a reasonably early release and the chance to lead a productive life. Third, by the recognisance release order which he made, his Honour attempted to make the applicant eligible for release on parole nine months before the halfway point in the total period of imprisonment. Doubtless this was in recognition of the plea of guilty. It is not clear when the applicant unequivocally informed the Director of Public Prosecutions of his intention to plead guilty. Committal hearings were held, but there was no cross-examination. Presumably the decision was conveyed some time between February and June 2004. That was not an early plea of guilty; but neither was it a late one.

[12] The applicant was aged 34 at the time of sentencing. He had a criminal history, including one drug offence. For an earlier offence of driving while disqualified he had been sentenced to nine months imprisonment.

[13] It was common ground among the parties (both the State and Commonwealth Directors of Public Prosecutions were represented) that there are some technical defects in the sentences actually imposed. I shall revert to this aspect of the matter below. I deal first with the substantive issues raised.

[14] The applicant submitted that the sentence imposed was manifestly excessive for four reasons:

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1 My emphasis.

- The sentences imposed were higher than they should have been because the judge wrongly assumed there was evidence that the applicant was making a living from cannabis;
- Even assuming the sentences gave effect to the judge's intention, a reduction of only nine months in the period before the applicant became eligible for parole was insufficient discount for his pleas of guilty;
- The applicant had excellent prospects of rehabilitation; and
- The applicant had been released on bail prior to sentencing.

[15] The first point was based upon something said by his Honour with reference to the social security fraud: "You went to some lengths to avoid detection, at a time, as I say, when you were making a living from unlawfully producing cannabis." That sentence was criticised on the ground that, subject to a trivial exception, there was no evidence before his Honour that the applicant had ever sold cannabis. It was however conceded that he produced cannabis for commercial purposes; and the employment history which his counsel placed before the judge disclosed no work after 1999. I would draw the inference that at all material times the applicant was carrying on the business of production of cannabis for profit. He did not disclose that fact to the Department of Social Security. It is true that there was no direct evidence of the amount of profit (if any) which he made, and he was drawing three allowances. They might, for part of the time, have contributed to his living. However I have no doubt that the sentence imposed was not aggravated by any view which his Honour might have held as to the level of profit made by the applicant. There is no substance to this point.

[16] The period of imprisonment envisaged by his Honour for serious and protracted offending was eight years. His Honour's intention was that the applicant be eligible for parole after serving three years and three months of that period. That is a significant discount, although not as large as can be seen in many other cases. I am unpersuaded that it is so small as to lead to the inference that his Honour's discretion miscarried by failing properly to recognise the pleas of guilty. Notification of the pleas did not occur at an early stage. Moreover it does not follow that the reduction of the head sentences by his Honour in order to mitigate the totality of the period of imprisonment and enhance the applicant's prospects of rehabilitation must be reflected by a mathematically equivalent mitigation in respect of eligibility for parole or post-prison community based release.

[17] The applicant submitted that there was no guarantee that he would be granted release at the time envisaged by his Honour. Subject to s 139 of the *Corrective Services Act* 2000, a prisoner has a legitimate expectation of release in accordance with a recommendation of the sentencing judge under s 157 of the *Penalties and Sentences Act* 1992. Creating that expectation, which is enforceable[2] by proceedings under the *Judicial Review Act* 1991, is one way of reducing a sentence in accordance with s 13(1) of the *Penalties and Sentences Act*. Apart from the technical question considered below, I see no reason why his Honour should not have made the order which he did if he considered it appropriate. However there is some force in the submission that his Honour intended rather more certainty than could be achieved by a recommendation under s 157 - see in particular the passage emphasised above.[3] On that basis the order which he made may not be apt to give

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2 Compare *R v Maxfield* [2002] 1 Qd R 417 at pp 424-5.

3 Paragraph [10].

effect to his intention. Counsel for the respondents recognised this in their concession that it would be appropriate to give effect to the judge's intention by suspending the term of imprisonment for the state offences after 2½ years.

[18] The judge took the applicant's prospects of rehabilitation into account in the sentence which he imposed. I agree with the course which he took. In my judgment there is a limit to the weight which can be given to evidence of rehabilitation generated over as short a period as two months immediately preceding the date of sentencing. The applicant received adequate recognition for his efforts.

[19] Associated with that point was the submission that insufficient recognition was given to the fact that the applicant had been released on bail, thus enabling him to embark upon his rehabilitation. It was submitted that in these circumstances it was an excessive outcome to put him back into custody to serve a further 21 months before eligibility for parole. It was submitted that the grant of bail by a Supreme Court judge would have created in the applicant's mind an expectation that he had served what was required of him and that he would now undertake a rehabilitative component. It was not demonstrated that at the time bail was granted the applicant had notified his intention to plead guilty. In any event in my judgment it would have been unreasonable for the applicant to expect a reduction in his sentence simply because he had been granted bail. What mattered was his prospects for rehabilitation; and these were taken into account by the sentencing judge.

[20] In my judgment the sentence intended to be imposed by the judge was not manifestly excessive. On the contrary I think it was in substance correct. In reaching that conclusion I have considered all other available sentences. In all the circumstances of the case, I am satisfied that no sentence other than imprisonment was appropriate, because of the seriousness of the offences and the circumstances of their commission.[4]

[21] Unfortunately some confusion has arisen about whether the sentences imposed reflect what the judge intended. His Honour was sentencing under two different sentencing regimes, with different rules regarding cumulative sentences; something which the Court has described as "a notoriously difficult task"[5]. Under the *Penalties and Sentences Act* 1992 a cumulative sentence is imposed by directing (I precis the section) that the imprisonment start from the end of the preceding period of imprisonment.[6] Although the judge did not use that exact formula of words, it is plain that that is what he intended in respect of the imprisonment in group B in the table above. That imprisonment creates no problem. However there is a problem in relation to the federal sentences (Group C). It is common ground that his Honour intended that these sentences not commence until the end of the preceding imprisonment for the State offences. That would be the position if those offences had been State offences, but it is not so under the *Crimes Act* 1914 (Cth). That Act provides that in circumstances such as the present, the sentencing judge must, by order, direct when each federal sentence commences, so that, if a non-parole period applies in respect of any State sentence, the first federal sentence to commence after the end of that period commences immediately after the end of the period.[7] (It may

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4 *Crimes Act* 1914, s 17A.
5 *R v Weiss* [2000] QCA 262.
6 Section 156. I use "period of imprisonment" in the statutory sense: see s 4.
7 *Crimes Act* 1914, s 19(3)(d).

be assumed for present purposes that the provisions of the *Corrective Services Act* 2000 relating to post-prison community based release[8] define a non-parole period for that purpose.[9]) Unfortunately, his Honour's attention was not directed to this provision, and no such direction was given.

[22] At this stage it is not easy to see how effect may precisely be given to his Honour's intention without embarking upon a complete resentencing process and, at least arguably, increasing one or more of the sentences imposed for State offences[10]. Neither of the respondents suggested such a course. Because we did not hear full argument on them, I shall mention some of the difficulties without expressing an opinion on their resolution. The impossibility of fixing sentences for federal offences to commence at the end of the period of imprisonment under State offences when there is a non-parole period in existence for the latter has already been referred to. If it were sought to make State sentences commence at the end of the full term of Commonwealth sentences, other problems would arise. One would be whether, having regard to s 154 of the *Penalties and Sentences Act* 1992 a State sentence can be ordered to commence at the completion of a Commonwealth sentence. It is arguable that the power to order accumulated imprisonment granted by s 156 of that Act is insufficient for such an order on the ground that "offence" in that section does not include a federal offence. The approach adopted by the Victorian Court of Criminal Appeal in *R v O'Brien*[11] may not be possible in Queensland because s 155 of the Queensland Act (the equivalent of s 15(1) of the *Penalties and Sentences Act* 1985 (Vic)) is not within the exceptions to s 154. A second would be whether such an order (at least in cases to which s 19AC(4) of the *Crimes Act* did not apply) would mean that either the (mandatory) recognisance release order made under s 19AC(3) of that Act was a futility or that the prisoner had to be released for a period before the State sentence began. A third, viz whether s 161 of the *Penalties and Sentences Act* 1992 applies to federal offences, appears to have been resolved.[12]

[23] The judge below envisaged that release under the recognisance release order should occur nine months after the date when the applicant should have served half of the period of imprisonment imposed for the State offences. To achieve this technically he could by order have directed that the federal sentences commence immediately after the applicant had served half the period of imprisonment imposed for the State offences (which is also the non-parole period[13]). That omission is easily rectified, albeit at the expense of shortening the overall period of imprisonment for which the applicant is liable on all counts to 5½ years. Having regard to the concession made by the respondents the applicant's release at the point intended by his Honour should be ensured by suspending part of the relevant term of imprisonment.

[24] In the course of the argument on the application a couple of minor technical issues arose which can also conveniently be dealt with by varying the sentences: the

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8 Section 135(2)(e). This was assumed in *R v Dobie* [2004] QCA 140 and *MacCormack v R* [2005] QSC 049.

9 See the definition of "non-parole period" in s 16 of the *Crimes Act* 1914.

10 Compare *Neal v The Queen* (1982) 149 CLR 305.

11 (1991) 57 A Crim R 80 at p 95.

12 See s 16E *Crimes Act* 1914 and *R v Hoong* [1995] 2 Qd R 182.

13 If the definition of "non-parole period" in the *Crimes Act* applies at all, it must in my judgment relate to the period of non-eligibility for post-prison community based release, not to the period which in fact elapses until such release is granted.

declaration as to time already served should in my judgment have related only to the imprisonment in group A in the table above and the recognisance release order should have specified the security required to be given. These matters too may be rectified immediately, without further proceedings.

[25] I would make the following orders:

1. Grant the application and allow the appeal for the limited purpose of varying the sentences as set out hereunder.

2. Set aside the declaration pursuant to s 161 of the *Penalties and Sentences Act* 1992 and in lieu thereof:
   (a) State that the applicant was held in presentence custody between 16 August and 27 September 2002 and between 30 January 2003 and 9 June 2004, a period of 538 days;
   (b) Declare that that time is time already served under the sentences imposed for the offences in indictments 447/03 and 518/04;
   (c) Direct that the records of the court be noted with the fact that this declaration was made and its details and the fact that the declared time was taken into account in imposing sentence; and
   (d) Direct that the Chief Executive Officer (Corrective Services) be advised of the declaration and its details.

3. Order that each of the terms of imprisonment imposed in respect of indictment 27/04 be suspended after the applicant has served a period of six months of the term for an operational period of five years.

4. Set aside the sentences imposed on indictment 519/04 and in lieu thereof:
   (a) Sentence the applicant to imprisonment for three years on each count, these sentences to be served concurrently;
   (b) Direct that each of these sentences commence immediately after the applicant has served 2½ years of the period of imprisonment imposed in respect of the offences set out in indictments 447/03, 518/04 and 27/04;
   (c) Direct that the applicant be released after he has served nine months of imprisonment under these sentences upon his giving security by recognisance in the sum of $5,000 that he will be of good behaviour for three years;
   (d) Direct that the Sheriff reduce this order to writing and cause a copy to be given to the applicant[14], together with an explanation of the purpose and consequences of making this order[15];
   (e) Direct that the reasons set out in paragraph [20] be entered in the records of the court.

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14 *Crimes Act* 1914, s 20(4).
15 *Crimes Act* 1914, s 16F(2).