SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wirth* [2005] QCA 166
PARTIES:	**R** **v** **WIRTH, Hans Jurgen** (applicant)
FILE NO/S:	CA No 53 of 2005 DC No 54 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	18 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2005
JUDGES:	McMurdo P, Jerrard JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for extension of time to appeal against conviction refused** **2. Application for extension of time to apply for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – where applicant originally sought extension of time to appeal against conviction and sentence – where subsequently sought extension of time to apply for leave to appeal against sentence only CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – where two month delay in filing application for leave to appeal against sentence –

where explanation for delay no legal experience in filing appeals and only recently able to contact solicitor wished to handle appeal – whether satisfactory explanation for delay – whether extension of time should be granted

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – where applicant convicted after pleas of guilty to three counts of armed robbery, two counts of deprivation of liberty, two counts of serious assault, one count of armed robbery with personal violence and minor summary offences – where sentenced to terms of six, seven and seven and a half years imprisonment for armed robbery offences – where sentenced to eight and a half years imprisonment for armed robbery with personal violence – where all robbery offences declared to be serious violent offences under Pt 9A *Penalties and Sentences Act* 1991 (Qld) – where sentenced to lesser terms of imprisonment for remaining offences – where all sentences to be served concurrently – where no recommendation for post-prison community-based release – where aged between 53 and 55 when committed offences – where three of armed robbery offences committed whilst on bail and two whilst on two grants of bail – where distress caused to victims – where resisted arrest and forcibly disarmed – where alcoholic and depressive – where attempts at rehabilitation unsuccessful – where minor prior convictions – where early plea of guilty – where majority of offences dealt with by ex officio indictment – where good work history – whether sentence manifestly excessive

R v Crossley (1999) 106 A Crim R 80, applied
R v Dawson [2004] QCA 438; CA No 270 of 2004, 15 November 2004, distinguished
R v Keating [2002] QCA 19; CA No 251 of 2001, 6 February 2002, applied
R v Matthewson [2001] QCA 4; CA No 226 of 2000, 30 January 2001, distinguished
R v McDonald [2001] QCA 238; CA No 46 of 2001, 22 June 2001, distinguished
R v Orchard [2005] QCA 141; CA No 11 of 2005, 6 May 2005, distinguished
R v Toms [2004] QCA 406; CA No 259 of 2004, 29 October 2004, distinguished

COUNSEL: A J Kimmins, with K Greenwood, for the applicant
S G Bain for the respondent

SOLICITORS: Russo Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the

respondent

THE PRESIDENT: The application for an extension of time to appeal against conviction is dismissed.

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THE PRESIDENT: The applicant, Mr Wirth, originally applied for an extension of time to appeal against his conviction and for leave to appeal against his sentence but he now wishes to appeal only against his sentence which he contends is manifestly excessive.

He pleaded guilty in the District Court at Beenleigh on 9 December 2004 to an assortment of serious offences contained in two indictments. The first indictment contained one count of armed robbery on 20 December 2001. The second indictment contained one count of armed robbery on 11 June 2003 (count 1), which was committed whilst Mr Wirth was on bail for the first armed robbery, one count of armed robbery (count 2), two counts of deprivation of liberty (counts 3 and 4), one count of armed robbery with personal violence (count 5), and two counts of serious assault (counts 6 and 7).

Counts 2 to 7 all occurred on 1 November 2003 whilst Mr Wirth was on bail for the 2001 armed robbery and the June 2003 armed robbery. He was also sentenced on a number of relatively minor summary offences occurring between 20 December 2001 and 1 November 2003.

He was sentenced to seven years imprisonment on the armed robbery of 20 December 2001 in the first indictment; seven and a half years imprisonment on the armed robbery of 11 June 2003 (count 1 on the second indictment); six years imprisonment on the armed robbery of 1 November 2003 (count 2); and eight and a half years imprisonment on the armed robbery with personal violence (count 5). He was sentenced to lesser concurrent terms of imprisonment in respect of the remaining offences. All the robbery offences were declared to be serious violent offences under Part 9A *Penalties and Sentences Act* 1992 (Qld) ("the Act").

Mr Wirth's application was not filed until 10 March 2005, about two months out of time. His sworn explanation is basically that contained in his application: "I have no legal experience in relation to filing appeals and was only recently able to contact the solicitor I wished to handle my appeal." He also swears that he was unaware of the time limits applicable to any appeal and was given and initially accepted legal advice that he had no prospect of success.

This does not entirely satisfactorily explain why he did not exercise his right to apply for leave to appeal within the statutory permitted time. Nevertheless, if there were some clear manifest injustice, such as the sentence was plainly manifestly excessive, this Court would extend time to allow the application and appeal. This Court should consider

whether Mr Wirth has shown that, if an extension of time were granted, his sentence was manifestly excessive.

Mr Wirth was born in Germany and came to Australia as a young boy. He was aged between 53 and 55 when he committed these offences. He had only minor prior convictions. He had been fined $100 for stealing in 1983 and had been convicted of two minor street offences in 1992 and 2000 for which he was also fined.

The first offence of armed robbery was committed on 20 December 2001 at the Sara Lee factory outlet store at the Daisy Hill shopping centre. Mr Wirth entered the store wielding a serrated knife. He demanded money and was given notes from the till. He demanded more money. When that was not forthcoming he left but not before stating to his unfortunate victims "I know where you are, if I get caught I will come back and cut your throat." He left in a vehicle and its registration number was taken. Wirth's daughter, who was friendly with staff members at the store, became suspicious of her father. The knife used was similar to a kitchen knife in the Wirth's home and $1,880 was found elsewhere in the home. When Mr Wirth was arrested by police he was aggressive and abusive.

Later on the 3rd of April 2002 he phoned 000 and told the operator to tell the arresting officer "His time's up." This threat constituted the first of the summary offences to which Wirth pleaded guilty.

The facts of the offences on the second indictment were outlined in a schedule tendered at the sentence proceedings. At about 6 pm on 11 June 2003 Mr Wirth approached a woman serving at a bottle shop in the Daisy Hill shopping centre. He was wearing surgical gloves, distinctive blue clothing and a torn sheet over his face. He produced a knife and demanded that the woman fill the cloth bag he was holding. He took $843. He demanded that the front doors and the interior roller door be closed and then left the premises. He was seen to leave the shopping centre in a Mitsubishi Colt. The registration number was again taken. The car was registered to Wirth's mother. He was located at about 7.30 pm that evening at the Chatswood Tavern. He told police he had been at the tavern since 4 pm. Hotel staff did not confirm this story. Police found a white sheet in his car. Police saw him drop something into a garden bed where they located a mobile phone case containing $895. Clothing similar to that worn by the offender was found in nearby rubbish bins. He declined to participate in a record of interview with police. These facts constituted count 1 on the second indictment.

Count 2 on that indictment occurred in this way. At about 7.09 pm on 1 November 2003 a man again approached staff in the same bottle shop telling them "Give me all your fucking money." He was wearing a balaclava and dark tracksuit and threatened them with a concealed sawn-off shotgun. He threatened to shoot the staff members and demanded that they put money from the safe into a plastic shopping bag. He

committed counts 3 and 4 by shutting his unfortunate victims in a cold room, telling them, "If you make a fucking call I'll shoot ya."

Later that night, at about 9.18 pm, he committed count 5 at the bottle shop of the Springwood Hotel. He was again wearing a balaclava and carrying the sawn-off shotgun. He approached a male employee, pointed the gun at him and demanded money. The employee froze. Mr Wirth struck the employee in the chin with the barrel of the gun causing bruising. The employee then took money from the cash registers and gave it to Wirth, who placed it in his pockets. Wirth ordered the employee to the rear of the store. He pushed another employee at gunpoint and ordered him to empty another register. A driver of the vehicle told Wirth to "hurry up". Wirth then jumped into the car with $1,405. The security officer followed the offenders to Springwood. Wirth and the driver of the car argued and the driver ran away.

Police located Wirth in the car holding a double-barrel shotgun. They told him to drop the gun but he did not comply. The police officer identified himself and spoke to Wirth for about 15 minutes instructing him to release the gun. Wirth said, "I'm going to kill you, you lying fucking dog." Police then released a police dog which attacked Wirth's ankle and enabled the two police officers to forcibly disarm him. The shotgun was found to be unloaded but the terrorised victims of the robberies and the police officers did not know that at the time and they were understandably concerned for their lives.

The circumstances of his apprehension constituted counts 6 and 7 on the indictment.

Victim impact statements were tendered showing the devastating effect on some of Wirth's many victims in his offending spree. Defence counsel at sentence emphasised the early plea of guilty and that some matters were dealt with by an ex officio plea. Wirth had had a successful business as a painter and decorator until recent times when his alcoholism affected his life detrimentally.

A report from psychiatrist Dr Curtis helped explain how a mature man with a sound background like Wirth came to be involved in such protracted and serious criminal behaviour. The report revealed that Wirth is an alcoholic and a depressive who is concerned about his alcoholism and his criminality on his aged mother whom he had hoped to assist in her old age, not burden with his own troubles. He had made attempts to rehabilitate in Logan House but at the time of sentence without success. Dr Curtis admitted that Wirth had failed to achieve sobriety and relapse prevention. Wirth was in need of surgery for an abdominal aneurism but this could not be performed until his chronic liver disease and general debilitation caused by his alcoholism was addressed. It was clear from Dr Curtis's report and the report from Logan House that Wirth's prospects of rehabilitation at the time he was sentenced were, to say the least, not promising.

In his sentencing remarks the learned primary judge noted that one victim had supplied a victim impact statement which demonstrated in particular the serious effect on him caused by Mr Wirth holding the gun to the head during the robbery. His Honour also noted the highly dangerous circumstances of Mr Wirth's apprehension whilst he was armed with the shotgun and that the aggravating circumstance of count 1 on the second indictment was committed whilst on bail for the first indictment and counts 2 and 3 on the second indictment were committed whilst he was on bail for two other armed robberies. His Honour said that he was taking into account the plea of guilty, Wirth's assistance to police, his age and state of health. His Honour noted that he had read Dr Curtis's report and in which Dr Curtis discussed a number of mental health issues affecting Wirth. His Honour also took into account Wirth's physical health, his good work history and his personal circumstances.

His Honour nevertheless determined that it was appropriate to make serious violent offender declarations. Because of the declarations and because 111 days of the period that Wirth had spent in presentence custody could not be the subject of a formal declaration under s 161 of the Act, his Honour determined to impose sentences at the lower end of the appropriate range, which was agreed at sentence by both prosecutor and defence counsel to be eight to 10 years imprisonment.

The effective sentence imposed then for all of Wirth's offending behaviour over almost two years is eight and a half years imprisonment of which he will have to serve 6.8 years before becoming eligible for release on parole.

He contends now that this sentence is manifestly excessive, relying on a number of sentences said to be comparable where offenders applied to this Court for leave to appeal against sentences for offences of armed robbery: *R v McDonald* [2001] QCA 238; *R v Matthewson* [2001] QCA 4; *R v Dawson* [2004] QCA 538. These cases do not assist Mr Wirth in this application.

The facts of those offences are not truly comparable to the unusual facts of this case. Furthermore, the fact that sentences imposed in those cases of between eight and a half years imprisonment and 10 years imprisonment with declarations that the offences were serious violent offences under Part 9A of the Act does not demonstrate that the sentence imposed on the different facts here was manifestly excessive. The case of *R v Orchard* [2005] QCA 141 is also distinguishable on its facts.

Whilst the individual offences in *McDonald*, *Matthewson* and *Dawson* could arguably be said to be more serious than the facts here, it is the number of offences committed by a mature offender over a long period while on bail and with escalating violence which makes Mr Wirth's offending particularly deserving of a salutary penalty.

The other cases on which Mr Wirth relies, *R v Keating* [2002] QCA 19 and *R v Toms* [2004] QCA 406 are so factually different from this that they offer no assistance to his argument that the appropriate sentencing range here should have been between six and eight years imprisonment. Indeed, the observations of Thomas JA in Keating at pages 8 to 9 with which the other members of the Court agreed, support the proposition accepted at first instance and relied on by the respondent that a sentence of between eight to 10 years imprisonment was the appropriate range here. In support of that proposition see also *R v Crossley* (1999) 106 AcrimR 80.

Even accepting that Wirth has demonstrated a satisfactory explanation for the delay in filing his application, he has not persuaded me that there would be any utility in granting an extension of time for leave to appeal. He is a mature man who committed four offences of armed robbery over an extended period, three of them whilst on bail and two whilst on two grants of bail. One involved personal violence. He has undoubtedly caused great distress to his victims, employees simply trying to do their job. He was quite prepared to threaten his victims with a shotgun, to inflict personal injury and to shut them in a cold room. When apprehended by the police, he was prepared to threaten the officers with his gun and was only apprehended with the assistance of a police dog.

Despite his plea of guilty and the other mitigating factors, the persistent commission of such serious offences, most while

on bail, requires a salutary penalty to deter not only Wirth but others who might consider committing such offences. On the facts here, the judge did not err in making the declarations under Part 9A of the Act. The declaration did not make the global sentence imposed for all this offending manifestly excessive.

Wirth has not demonstrated that a punishment for such criminality requiring him to serve 6.8 years in prison before becoming eligible for parole is manifestly excessive. It follows that I would refuse the application for an extension of time for leave to appeal against sentence.

JERRARD JA: I agree with the order proposed by the President and with her reasons. Those reasons support the opinion of Mr Wirth's counsel who represented him at his sentence and which opinion was put before this Court on Mr Wirth's application for an extension of time; that was that the sentences imposed fell within the range of appropriate sentences for repeatedly committing serious and violent offences including when on bail.

ATKINSON J: I agree with the order proposed by the President and with the reasons given by her Honour and by Justice Jerrard.

THE PRESIDENT: The application is refused.
