SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mitchell* [2005] QCA 178
PARTIES:	**R** **v** **Mitchell, Melissa Marie** (applicant/appellant)
FILE NO/S:	CA No 77 of 2005 DC No 593 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	31 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2005
JUDGES:	de Jersey CJ, Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Vary the sentence on counts 5 and 6 by sentencing the applicant on each count to 1 years imprisonment followed by a probation order of two years duration** **4. Vary the sentence on counts 3 and 4 by sentencing the applicant on each count to 9 months imprisonment** **5. All sentences to be served concurrently**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – where applicant convicted on own pleas of guilty on two counts of robbery with personal violence, two counts of stealing, wilful destruction and motor vehicle offences – applicant sentenced concurrently to four years imprisonment for the robbery offences and 18 months imprisonment for the motor vehicle offences – recommendation that she be eligible for post prison community based release after serving 18 months – whether

	sentence manifestly excessive – structuring a sentence of imprisonment followed by probation for applicant in need of supervision
	Penalties and Sentences Act 1992 (Qld), s 9, s 92
	R v Nagy [2003] QCA 175; [2004] 1 Qd R 63, considered *R v Kazakoff; ex parte Attorney-General (Queensland)* [1998] QCA 459, CA No 236 of 1998, 27 August 1998, considered *R v Taylor; ex parte Attorney- General* (1999) 106 A Crim 578, considered *R v Casey* [2003] QCA 152, CA No 34 of 2003, 3 April 2003, considered *R v Campbell* [1997] QCA 314, CA 287 of 1997, 29 August 1997, considered *R v Cameron* [2004] QCA 341; CA No 255 of 2004, 20 September 2004, considered
COUNSEL:	A W Moynihan for the applicant/appellant C W Heaton for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: I will invite Justice Atkinson to deliver the first judgment.

ATKINSON J: The applicant, Melissa Marie Mitchell, has applied for leave to appeal a sentence imposed on her in the District Court on 24 March 2005. On that date she was convicted on her own plea of guilty on two counts of robbery with personal violence (counts 5 and 6), two counts of stealing (counts 1 and 7), one count of wilful destruction (count 2), one count of unlawfully using a motor vehicle to facilitate the commission of an indictable offence (count 4) and one count of unlawfully using a motor vehicle (count 3).

She was sentenced to four years' imprisonment on each of the robbery offences, 18 months' imprisonment on each of the unlawful use of a motor vehicle offences and 12 months' imprisonment on each of the two counts of stealing and the count of wilful destruction. All sentences were to be served concurrently. It was recommended that she be eligible for post prison community based release after serving 18 months' imprisonment.

The facts on which she was sentenced were set out in a schedule which was tendered to the Court. They show a period of offending from 24 June to 8 December 2003.

Count 1 occurred on 24 June 2003 when the applicant and a male person entered Bellrose Jewellers at the Grand Plaza shopping centre at Browns Plains. An attendant at the store showed them a number of rings. When asked how they would be paying for the rings the applicant and her male accomplice ran off taking three of the rings with them. The rings were valued at $2,434.

On 22 July 2003, the male person was identified through fingerprints left at the store. He was interviewed on 21 October 2003 and made full admissions to the offence but said that the applicant was responsible for taking the rings. The police executed a search warrant at her residence on 28 November 2003. She admitted the offence but said that the male person was the one who took the rings because he wanted

them for his girlfriend. She was issued with a notice to appear.

Count 2 on the indictment occurred on 27 July 2003. The applicant was at the BP Service Station at Kingston when she had an argument with her former partner and father of her now five year old daughter. When angry, she repeatedly punched a glass door until it cracked. She then left the scene. It was not until 8 December 2003 that she was located in relation to this offence and issued with a notice to appear.

Count 3 on the indictment occurred on 13 October 2003. The applicant and another male person were passengers in a white Hyundai motor vehicle which had been stolen by another male person. It had been driven erratically and abandoned with a deflated front tyre. When approached by the police the applicant admitted she had been a passenger in the vehicle which she knew to be stolen. She was arrested and issued with a notice to appear.

Just over a month later on 20 and 21 November 2003 the most serious offences, robbery with violence, occurred. Counts 4 and 5 occurred on 20 November 2003. Two male persons picked up the applicant in a stolen car. That constituted count 4 - unlawfully using a motor vehicle to commit an indictable offence. The indictable offence was the stealing of a mobile phone from a 17 year old girl who was walking along a street in Beenleigh. The applicant was counselled to commit the theft by the two male accomplices in the stolen vehicle.

Count 5 occurred when the applicant approached the 17 year old girl from behind. The applicant said, "That's my phone" and tried to grab the complainant's mobile phone from her. When the complainant resisted the applicant punched her in the left side of her face. The applicant then demanded the complainant's purse as well, which she refused to hand over. The applicant pulled at the complainant's bag causing its contents to fall on the ground. The applicant grabbed the complainant's purse and ran off, getting into the stolen vehicle. When she got back into the car one of the male persons took the victim's property from her.

The complainant suffered cuts to the inside of her mouth and bruising and swelling to the left side of her face. The applicant was not apprehended in relation to these offences until 28 November 2003. She was then issued with a notice to appear. These circumstances represented the offence of robbery with violence which was count 5 on the indictment.

On the following day, 21 November 2003, the applicant approached a 16 year old boy who was standing at the Beenleigh bus station and asked him for the time. When he got his mobile phone from his bag the applicant took it and ran towards her male accomplices. The complainant chased and caught her and she punched him once to the left cheek with a closed fist. He again asked for his phone and one of the males with the applicant told him that if he came near the

applicant, he would punch him too. These circumstances represented count 6 on the indictment, robbery with violence.

On 8 December 2003, the applicant and a male accomplice were caught leaving K Mart at the Logan Central Shopping Centre, carrying a quantity of clothing with coat hangers still attached. They were detained until police arrived. She admitted taking the clothing. This represented count 7 on the indictment.

The applicant argued that the sentencing discretion miscarried because the learned sentencing Judge firstly employed a notional sentence for the robbery offences that was beyond the appropriate range; secondly, imposed a global head sentence that was manifestly excessive to represent the combined criminality; and thirdly, placed too much weight on deterrence (section 9(1)(c) of the Penalties and Sentences Act 1992 (PSA)) and protection of the community (section 9(1)(e) of the PSA) and failed to give enough weight to the matters in mitigation so as to impose a sentence that was unjust in all the circumstances (section 9(1)(a) of the PSA.

It is convenient to deal with these submissions in reverse order. In order to determine whether or not the sentence is manifestly excessive, one must first look at the sentencing principles for offences of this type, and secondly at comparable cases to determine what is the sentencing range for offences of this type committed by this offender.

Section 9(1) sets out the only purposes for which sentences may be imposed. The detailed provisions of section 9 give more precise effect to the purposes set out in section 9(1). The matters to which the Court must have regard are set out in subsection 9(2). However, as a result of amendments made in 1997, if the offender is to be sentenced for any offence of violence, then the principles mentioned in subsection (2)(a), that is that a sentence of imprisonment should be imposed as a last resort and that a sentence allows the offender to stay in the community is preferable, are not applicable.

In such a case the Court must have regard primarily to the matters set out in subsection 9(4).

"

(a) The risk of physical harm to any members of the community if a custodial sentence were not imposed;

(b) The need to protect any members of the community from that risk;

(c) The personal circumstances of any victim of the offence;

(d) The circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

(e) The nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) Any disregard by the offender for the interests of public safety;

(g) The past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) The antecedents, age and character of the offender;

(i) Any remorse or lack of remorse of the offender;

(j) Any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) Anything else about the safety of members of the community that the sentencing Court considers relevant."

These principles apply in particular to the sentencing on counts 4, 5 and 6 while the general principles set out in subsection 9(2) apply to counts 1, 2, 3 and 7.

With regard to counts 4, 5 and 6, it can be seen that there is some risk of physical harm to members of the community if the applicant is not exposed to a custodial sentence because of the real risk that she will continue to offend by stealing and resorting to her fists if this stealing is opposed. There is no doubt a need to protect members of the community, particularly more vulnerable members of the community, from that risk.

The circumstances of the offences of robbery with violence are that they are street offences which engender fear in ordinary law abiding members of the community who are going about their daily business. However, it cannot be said that the extent of the violence used was as grave as many of the offences of this type. There were no weapons used and the physical violence offered was one punch rather than a repeated number of punches, nor was there any other physical violence offered other than a single punch. While this is violent behaviour it is at the lower end of violent behaviour in offences of this type. No serious injury was caused to either complainant.

The past record of the applicant is one that shows she has been in trouble before and that she is having a troubled youth but her previous offences were unauthorised dealing in shop goods rather than any more serious offences. She has only ever previously been subjected to fines.

She has a drug problem with amphetamine and has made numerous, albeit unsuccessful, attempts to rehabilitate herself. She has attempted rehabilitation at AMEND, Assisting Mothers End the Need for Drugs, a program run by the St Luke's Nursing Service, and at Moonyah, a Salvation Army hostel. She has lived at a drug free hostel called Joyce Wilding and stayed at the Salvation Army hostel at the Gold Coast which assists people with drug dependency. She has had great difficulty ridding herself of her drug habit but has not given up on the first attempt but continued to attempt rehabilitation.

She is still a very young woman. At the time of the offences she was 18 and 19 and is still only 20 years old. It is highly likely that her offences are caused by her drug addiction and immaturity and desire to be accepted by her peer group. She is a young mother, having had a child at the age of 15.

Her remorse is shown by the plea of guilty and her acceptance of her guilt on various counts when questioned by the police. There are a number of references by members of her family and her friends about their attempts to help her and the low point she was at in her life when she committed these offences. The

safety of members of the community is best served in this case by giving weight to rehabilitation of the applicant as well as deterrence. Both are necessary to endeavour to prevent future offending behaviour.

In addition, with regard to the other offences that do not involve violence, that is counts 1, 2, 3 and 7, there is the principle that a sentence of imprisonment should be imposed only as a last resort. The sentencing principles when a judge is sentencing an offender for a number of distinct, unrelated offences, was set out by the Court of Appeal in *R v Nagy* [2004] 1 Qd R 63. Williams JA said at [39]:

> "Where a Judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted."

This is a case where it is appropriate to fix the sentence for the most serious offence which is higher than that than would have been fixed had it stood alone, the higher sentence taking into account the overall criminality but that should not mean that the sentence imposed on counts 5 and 6 should be artificially inflated.

To determine whether or not the sentences imposed were manifestly excessive, it is necessary to consider what the proper sentencing range was given the circumstances of the offences and the circumstances of the applicant. She is a young woman with a relatively minor criminal history, who committed offences that were driven by a drug habit and peer group pressure and who pleaded guilty on the indictment. On the other hand her offending spree took place over a six-month period and involved the use of violence against innocent members of the community.

A sentence of four years' imprisonment with a recommendation for eligibility for parole after 18 months was the sentence imposed by this Court in *R v Kazakoff, ex parte Attorney-General* [1998] QCA 459. In that case the offender assaulted a police officer. He pleaded guilty to a charge of assault occasioning bodily harm whilst armed and in company. The victim was a police officer acting in the course of his duty. The assault involved a melee of young men pushing and striking at the police officer before Kazakoff struck him on the head with a piece of timber. The police officer suffered a laceration to the top of his head, a fractured nose and severe swelling to the jaw. That offence, while a single offence, was considerably more serious than the instant case.

This Court dismissed an Attorney's appeal in *R v Taylor; ex parte Attorney-General* (1999) 106 A Crim R 578. In that case a sentence of imprisonment for 12 months to be served by way

of intensive corrections order in the community was not regarded as manifestly inadequate in circumstances where the respondents, who were aged 17 and 20 years, went to a service station, one armed with a replica pistol and the other with an inoperative rifle. The rifle was pointed in the direction of the female attendant and then jammed into the back of a male customer's head. The demand was made for money and about $600 was taken. Neither offender had any previous convictions and made full confessions when interviewed. In that case the President, with whom Thomas JA agreed, examined the amendments made to the Penalties and Sentences Act to which I have referred, whereby an offender who commits an offence involving violence no longer has the benefit of the principle that a sentence of imprisonment should be imposed as a last resort.

Her Honour observed that while weight given to the youth of the offender is less than it was prior to the 1997 amendments, it is still a relevant factor. They had pleaded guilty to armed robbery in company with violence. The maximum possible sentence was life imprisonment.

That decision was referred to with approval in *R v Casey* [2003] QCA 152 where an appeal against sentence was refused. In that case the applicant had been convicted of two counts of armed robbery in company and was sentenced on each count to three years' imprisonment to be suspended after serving four months with an operational period of three years. In that case the applicant was involved in two robberies on service

stations where the offenders were masked by balaclavas and a knife was used as a weapon.

In *R v Campbell*, Court of Appeal 287 of 1997, 29 August 1997, a sentence of four years had been imposed for a robbery with violence in company as well as one count of unlawful use of a motor vehicle and one of housebreaking. The offences were committed on three different occasions within a period of three months from June to September 1996. After he was arrested on one of the charges, he committed a further offence.

The principal offence was the robbery in company with actual violence. That was a vicious attack on an 18 year old at night who was attacked by a group of 10 youths, one of whom was carrying a stick. He was punched in the head several times. The applicant was 18 years old when he committed the offence but had a considerable criminal record including convictions for possession of drugs, three counts of wilful damage, stealing, two counts of assaulting police, one assault occasioning bodily harm and two break and enter offences. He was on probation at the time that each offence was committed. This court regarded the sentence of four years as excessive and reduced it to three years with a recommendation that he be considered for parole after he served 12 months.

In *R v Cameron*, Court of Appeal 255 of 2004, this court refused an application to reduce a head sentence of two and a-half years' imprisonment which was suspended after 52 days for

an operational period of three years imposed upon a 19 year old who pleaded guilty to one offence of robbery with personal violence involving a handbag snatch. The violence offered the complainant there was as a result of his grabbing the bag which the complainant would not let go of and therefore she was dragged along the ground as the offender persisted with his robbery.

The circumstances of the offence therefore are somewhat less serious than either of the robberies committed by this applicant and she has also committed two robberies in the context of the series of offences committed over a period of six months.

The learned prosecutor submitted a comparison with *Cameron* demonstrated that a sentence of three years was about the sentence that the applicant could expect for her series of offences.

There is no doubt that a sentence for the offence of robbery must reflect the community's strong disapproval of such criminal behaviour. However, that could be done in this case, as the applicant's counsel submitted in his written submissions, by imposing a sentence of two to three years, partially suspended after serving nine to 12 months with an operational period of three years.

While a head sentence of two years' imprisonment may well have been sufficient if there had been but one offence of robbery

with personal violence, in view of the number and type of the offences and the period over which they took place it is appropriate to sentence at the higher end of that range.

In this case, however, as the applicant's counsel submitted in his oral submissions with which the learned prosecutor agreed, that would mean that the applicant would lack the advantage of a community based order. She certainly appears to be a person who would benefit from supervision in the community. As a result of amendments made to section 92 of the Penalties and Sentences Act in 2002, it is now open to a Court to impose a period of imprisonment of up to one year to be followed by probation of not less than nine months or more than three years. It is appropriate to impose such an order in this case rather than impose a longer head sentence which is suspended after nine or 12 months.

I would grant the application for leave to appeal the sentence, allow the appeal and in its place impose a sentence of one year's imprisonment on each of counts 5 and 6 to be followed by a probation order of two years' duration. The applicant should be sentenced to nine months' imprisonment on each of the unlawful use of motor vehicle offences and the rest of the sentence should remain as it is. All sentences should be served concurrently.

THE CHIEF JUSTICE: I agree with the orders proposed by Justice Atkinson. The probation order to be on the usual terms. Our assumption is that this will be brought to the

attention of the applicant and her consent signified to the Sheriff in due course.

MR MOYNIHAN: I'll undertake to do that, your Honour.

THE CHIEF JUSTICE: I think that should formally be done.

MR MOYNIHAN: Yes, your Honour.

THE CHIEF JUSTICE: I also agree with Justice Atkinson's reasons. There is another incidental issue I wish to address separately. It concerns the content of the learned primary Judge's report to the Court. Rule 94 of the *Criminal Practice Rules* 1999 obliges the Registrar in cases like these to seek the primary Judge's comments in writing on "the case generally, a point arising in the appellant's case (and) the accuracy or otherwise of the trial transcript."

Sub rule 3 provides that the Judge may give any comment the Judge desires to furnish and "state in the comments any inaccuracy in the trial transcript whether or not a party has alleged the inaccuracy."

Judges have traditionally confined such reports to the accuracy of the transcript of the primary proceeding or drawing attention to any aspect of arguable significance not apparent from that transcript. In this era when full transcripts are regularly available it should rarely be necessary or justified to go further.

Importantly Judges do not and should not use such reports as a vehicle for advocating the appropriateness of, for example, the sentence imposed. That is because it would be inimical to perceptions of the objectivity of the appeal process were an appellate court to be seen as receptive to representations from the Judge whose sentence or order is the subject of the appeal or application. The outcome of an appeal in this adversarial system falls to be determined by the Court of Appeal on the basis of the submissions of the parties to the proceeding.

While this Judge's report was not extensive or comprehensive it did trespass beyond the legitimate bounds, hence these observations. It should, however, be confirmed that the content of the report had no bearing on the Court's disposition of the application.

MULLINS J: I agree with the reasons of Justice Atkinson and the orders proposed and the observations made by the Chief Justice.

ATKINSON J: I also agree with the observations made by the Chief Justice.

THE CHIEF JUSTICE: The orders are as indicated by her Honour Justice Atkinson.
