

SUPREME COURT OF QUEENSLAND

CITATION: *R v Hoeksema* [2005] QCA 190

PARTIES: **R**
v
HOEKSEMA, Jamie Rodney
(applicant/appellant)

FILE NO/S: CA No 61 of 2005
DC No 1067 of 2004
DC No 271 of 2005

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 3 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 3 June 2005

JUDGES: McMurdo P, McPherson and Williams JJA
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 to the extent of ordering that the sentence imposed for Count 2 on Indictment No 271 of 2005 be served concurrently with the sentence imposed on 1 March 2005

CATCHWORDS: CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – OFFENCE COMMITTED WHILE ON BAIL OR PROBATION AND EFFECT OF BREACH OF PROBATION – attempted burglary committed whilst on probation for other offences – whether custodial sentence appropriate

COUNSEL: S P Barry for the applicant/appellant
D L Meredith for the respondent

SOLICITORS: Michael Hefford for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Mr Justice McPherson will deliver his reasons first.

McPHERSON JA: The applicant, Jamie Rodney Hoeksema, seeks leave to appeal against sentences imposed on him on 1st of March of this year, following upon breaches of probation and for a further offence of attempted burglary. On the offences following on the breaches of probation, he was re-sentenced to 12 months' imprisonment. A cumulative sentence of a further 12 months' imprisonment, suspended after four months for an operational period of three years, was imposed for the additional offence of attempted burglary.

On 12th of March 2004, the applicant was sentenced in the Magistrates Court to 12 months' probation for a number of offences that are described in the outlines of counsel for the Crown as "nuisance offences", including counts of possessing dangerous drugs, possession of a knife in a public place, possessing tainted property and possession of property suspected to have been used in connection with the commission of a drug offence. No conviction was recorded for those matters.

These offences arise out of four separate incidents which I will briefly relate. On 21st January 2003, he was apprehended in possession of a syringe containing methylamphetamine or speed. On 2 June 2003, he was arrested and found to be carrying a large knife, as well as some 6.6 grams of cannabis sativa, which he intended to sell, and three mobile phones

suspected of being tainted property. On 3 July 2003, he was again found in possession of a small amount of cannabis and on 25 July 2003, he was once more apprehended in possession of a large knife, and two mobile phones, apparently suspected of being stolen or tainted property.

After apprehension for each of these offences, he was granted bail, so that the subsequent offences, to which I have referred or will refer, were committed while he was on bail.

On the 8th of July 2004, he was convicted of entering a dwelling at New Farm and committing an indictable offence in the early hours of the morning, at a time when the occupants were in bed there. It was on the 13th of June 2003 that the offence was committed. He stole property to the value of \$13,244, including wallets, purses, handbags, credit cards, keys, telephones and jewellery, none of which has been recovered. It may be relevant or not to add that the property was insured and the complainants have received recompense from the insurance company, though it should also be noted that they were greatly disturbed by the intrusion into their homes in that way.

In respect of this offence, Judge Boyce imposed three years' probation and 100 hours' community service. Again, no conviction was recorded. This offence was not a breach of the previous probation order as it was committed prior to the applicant being sentenced for those matters.

However, the most recent offence involved a breach of those probation orders, in respect of which the learned sentencing judge, on this occasion, re-sentenced the applicant pursuant to s 126(4) of the *Penalties and Sentences Act* 1992.

Then on 7th of August 2004, the applicant again attempted to burgle a private residence by cutting the screen of a balcony sliding door. He was identified as the offender by fingerprints he had left at the attempted point of entry, but no property was taken, evidently because the applicant could not gain entry to the unit which he was attempting to burgle. This offence was committed less than a month after Judge Boyce had given the applicant the benefit of a community service order and probation in lieu of a gaol sentence. It is plainly that feature which makes his conduct very serious in the circumstances.

The applicant was 17 years' old when he committed the first set of offences, 18 by the time of the most recent offence and 19 at sentencing on the present occasion. He has had an unfortunate personal history. From an early age, he appears to have suffered from some form of psychiatric disorder. He is said to be functionally illiterate, having been unable to cope with school at a fairly early age.

His mother appears to have rejected him finally from the time when he was about eight years' old. We are told she was a heroin addict and the marriage of his parents ended when the applicant himself was only two years' old. By the age of 12,

he was smoking marijuana daily and at 15 was experimenting with speed or methylamphetamine. For some time he seems to have lived on the streets, although his father has been helping him in recent times.

Before the learned sentencing judge on this occasion, the applicant submitted that his attitude to life had now changed and that he now had stability in his life for the first time. He has been staying with his father or at his father's house, his father being a building contractor, who has been providing him support in the form of casual work in his building firm. The applicant and his young girlfriend, by whom he has now had two children, are evidently also living with the father and his step-mother.

The sentencing judge rejected his plea to be given the benefit of a suspended sentence and a further period of probation. He cited the applicant's poor response to his earlier probation orders and his, as he described it, appalling performance when on community service orders.

It cannot be said to have been a wrong exercise of discretion for the sentencing judge on this occasion, to have sentenced him to imprisonment for 12 months for the burglary in 2003 and the stealing which occurred then, that being the offence that previously came before Judge Boyce. The function of a judge in re-sentencing for a breach of probation in circumstances like these extends to reconsidering the seriousness of the offences

committed in the light of the offender's subsequent behaviour or criminal conduct.

In this instance, Judge Boyce, took a very lenient view of the applicant's past offending. He did so in the interests of his rehabilitation, but he also specifically warned the applicant that he might expect a sentence of 12 to 18 months for that offence if in fact he re-offended, as he did. That he did within a very short period thereafter, as I have already mentioned. He performed very little of the community service that was ordered and altogether has not shown himself willing in the past to make the effort to comply with orders of the Court.

Nevertheless, he is still a very young man, with an unhappy, even tragic, past. At re-sentencing, the judge was told that he had been drug free for the past three or four months. We have no further information on the subject, but as matters stand, we have no reason to believe that that would have changed. He is being helped by his father, who has, as I have said, employed him in his building business. He has obligations to his young wife or de facto wife and his two children as they now are and there is some evidence that he is determined to carry out his obligations to them. He has committed only one offence of a really serious character, that is the burglary to which I have referred, and he pleaded guilty to the most recent offence on the 7th of August 2004. He has a persistent record of offending, mostly however for comparatively minor offences, but I think that altogether the

penalty imposed on the applicant on this occasion was more severe than might perhaps have been expected having regard to all his circumstances.

In the end, I consider that justice would be served by ordering that the sentence imposed for the most recent offence, being count 2 on Indictment number 271 of 2005, be served concurrently with the other sentences imposed on 1st of March 2005. To that extent, the application and appeal should, in my opinion, be allowed and the sentence imposed on that date should be varied accordingly.

THE PRESIDENT: I agree.

WILLIAMS JA: I agree.

THE PRESIDENT: Those are the orders of the Court.
