

SUPREME COURT OF QUEENSLAND

CITATION: *R v PX* [2005] QCA 246

PARTIES: **R**
v
PX
(applicant/appellant)

FILE NO/S: CA No 14 of 2005
DC No 1226 of 2004
DC No 1227 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 15 July 2005

DELIVERED AT: Brisbane

HEARING DATE: 24 June 2005

JUDGES: Williams, Jerrard and Keane 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 against sentence allowed
3. Set aside the sentence of eight years imprisonment
4. In lieu thereof, substitute a sentence of six years imprisonment with a declaration of 893 days as time already served
5. Further reasons of Keane JA to be handed down separately and shall only be distributed to the parties involved in the appeal
6. The further separate reasons not be further published and that a copy thereof be placed in a sealed envelope together with a revised copy of the transcript of that part of the proceedings which were not conducted in open court, and that it only be opened pursuant to a further order of this Court or upon application to reopen the sentence made pursuant to s 188(2) of the *Penalties and Sentences Act 1992 (Qld)*

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE

SENTENCE - WHEN GRANTED - GENERALLY - where applicant pleaded guilty to seven counts of armed robbery as well as other offences involving burglary, stealing and the unlawful use of a motor vehicle - where applicant sentenced to eight years imprisonment - where applicant had provided a high level of co-operation to the authorities - whether adequate weight had been given to this co-operation by the sentencing judge

Penalties and Sentences Act 1992 (Qld), s 13A

Hayes v R (1981) 3 A Crim R 286, cited
R v Gladkowski [2000] QCA 352; (2000) 115 A Crim R 446, cited
R v M [2001] QCA 131; [2002] 1 Qd R 520, applied
R v Perrier (No 2) [1991] 1 VR 717, cited
R v Thompson [1994] QCA 393; CA No 336 of 1994, 16 November 1994, cited

COUNSEL: J D Farmer for applicant/appellant
 R G Martin SC for respondent

SOLICITORS: Legal Aid Queensland for applicant/appellant
 Director of Public Prosecutions (Queensland) for respondent

- [1] **WILLIAMS JA:** For the reasons given by Keane JA the application for leave to appeal against sentence should be granted, the appeal should be allowed, and a sentence of six years imprisonment substituted; the declaration that the applicant spent 893 days in pre-sentence custody should remain.
- [2] **JERRARD JA:** In this appeal, I have had the benefit of reading the reasons for judgment of Keane JA, and his proposed orders, and respectfully agree with those reasons and orders. I add the following comments.
- [3] In *R v Thompson* [1994] QCA 393 this Court reduced that appellant's otherwise appropriate head sentence of 20 years by 40 per cent, to reflect that appellant's cooperation in providing the investigating police with information about his own offences and information about offences committed by other people. This Court then took one third off the non-parole period otherwise applicable, to reflect the pleas of guilty and other cooperation relating to that appellant's own offences. This Court cited with apparent approval from the decision of the English Court of Appeal in *R v King* (1986) 82 Cr App R 120, where that court imposed on appeal a sentence which reflected an "informer's discount" greater than 50 per cent; the otherwise appropriate head sentence of 10 years was reduced to four and a half.
- [4] In *Thompson*, this Court also quoted with apparent approval the remarks of McGarvie J in *R v Perrier (No 2)* [1991] 1 VR 717 at 726, which suggested that an informer's discount could lead to a courier, whose cooperation resulted in the conviction of a principal drug trafficker, receiving a discount of about two-thirds of the sentence otherwise appropriate for that courier who had pleaded guilty. This Court also referred with approval to statements by Burt CJ in *Hayes v R* (1981) 3 A

Crim R 286, where that learned judge spoke of substantial allowances when sentencing informers, of 50 per cent or more.

- [5] In *R v Demir* [1995] QCA 332 this Court repeated that it had recognised in *R v Thompson* that substantial discounts, from the sentence which would otherwise be appropriate, could be justified where an offender had implicated others. The Court noted the risk of retribution in prison that an imprisoned informant faced, whose incarceration was therefore likely to be under especially burdensome conditions. It also noted that excessive leniency for informers carried the risks of encouraging false allegations and of affronting community standards, if the effective sentence was disproportionate to the gravity of the offence committed and the personal circumstances of the offender. In that case, an otherwise appropriate head sentence of eight years was modified by a recommendation for parole eligibility after 15 months. In *R v Gladkowski* [2000] QCA 352 this Court repeated that an applicant is entitled to a substantial informer's discount for extensive cooperation, which discount took into account the risk of incidental retributive violence against the informer whilst incarcerated, and which could exceed 50 per cent; in that case the Court actually reduced the otherwise appropriate head sentence by one-third, and the parole eligibility date by more than 50 per cent.
- [6] The learned sentencing judge in this matter considered that 11 years was the appropriate head sentence without the informer's discount, and despite Mr Farmer's best endeavours, like Keane JA, I was not persuaded that an 11 year head sentence was beyond the available range for Mr PX's very serious offending; but, like Keane JA, I accept Mr Farmer's submission that the discount granted on the head sentence, of less than 28 per cent, was noticeably below the levels actually applied and recommended in those earlier decisions of this Court. I also agree with Keane JA that not only is Mr PX entitled to an informer's discount in respect of the offences of robbery, but there is also the further discount to which he must be entitled by reason of his giving relevant information about drug dealing within a correctional institutional. I agree that that should result in the order Keane JA proposes, which reduces the head sentence otherwise appropriate by less than 50 per cent, but the parole eligibility date by a greater percentage.
- [7] **KEANE JA:** On 9 December 2004 the applicant was convicted on his plea of guilty of seven counts of armed robbery in company, one count of attempted armed robbery in company, two counts of unlawful use of a motor vehicle to facilitate the commission of an indictable offence, one count of unlawful use of a motor vehicle *simpliciter*, one count of fraud, two counts of burglary and stealing, one count of break, enter and steal and one count of enter premises and steal. He was sentenced to eight years imprisonment in respect of the counts of armed robbery in company and four years imprisonment on the other counts. All sentences were to be served concurrently. It was declared that he had spent 893 days in custody as time already served.

Circumstances of the offences

- [8] The offences of armed robbery were committed on four separate occasions, and were described by the learned sentencing judge as professional robberies which involved a degree of pre-planning, the surveillance of target premises, the use of disguises and stolen vehicles. The targets were mostly small, vulnerable businesses and their staff. On these occasions the applicant's co-offender was armed with a sawn-off shotgun while the applicant did not carry a weapon.

The applicant's circumstances

- [9] The applicant was born in 1962. He was aged 39 at the time of the offending which occurred between 26 February 2002 and 28 March 2002.
- [10] The applicant has a lengthy criminal history, including drug offences and offences of dishonesty including house breaking. The applicant has previously been incarcerated. The only previous conviction for an offence involving violence was for an assault which occurred in 1991.

The sentence

- [11] The learned sentencing judge observed that the offending for which the applicant was sentenced in December 2004 represented a significant step up in the level of seriousness of the applicant's criminal misconduct.
- [12] Her Honour remarked upon the terror which the ruthlessness of the robberies must have caused among their victims.
- [13] The learned sentencing judge sentenced the applicant on the basis that his co-offender in the robberies was the principal organizer of the offences.
- [14] The learned sentencing judge acted upon submissions made in camera pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld) that related to the applicant's co-operation with the authorities. Those submissions were advanced again in this Court. Having considered these submissions, which demonstrate a high level of co-operation with the authorities on the part of the applicant, it is my opinion that the applicant should have been sentenced to only six years imprisonment.
- [15] As my reasons for reaching that conclusion involve consideration of the nature and extent of the applicant's co-operation I consider that those reasons, in line with the comments of this Court in *R v M*,¹ should be handed down separately from these reasons and shall only be distributed to the parties involved in the appeal. The Court should order that those separate reasons not be further published and that a copy thereof be placed in a sealed envelope together with a revised copy of the transcript of that part of the proceedings which were not conducted in open court, and that it be opened pursuant only to a further order of this Court or upon an application to reopen the sentence made pursuant to s 188(2) of the *Penalties and Sentences Act* 1992 (Qld).

Conclusion

- [16] I would grant the application for leave to appeal against sentence, allow the appeal, set aside the sentence of eight years imprisonment and substitute, in lieu thereof, a sentence of six years imprisonment with a declaration of 893 days as time already served.

¹ [2001] QCA 131 at [11]; [2002] 1 Qd R 520 at 524.