SUPREME COURT OF QUEENSLAND

CITATION:	*R v Webb* [2005] QCA 282
PARTIES:	**R** **v** **WEBB, John Douglas** (applicant)
FILE NO/S:	CA No 151 of 2005 DC No 364 of 2005 DC No 1328 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2005
JUDGES:	de Jersey CJ, Keane JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
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 REFUSED - GENERALLY - where applicant pleaded guilty to multiple counts of burglary and stealing, unlawful use of and possession of motor vehicles and motor vessels as well as fraud - where applicant was sentenced to four years imprisonment to be suspended after eight months - where sentence was to be served cumulatively with sentence of two years suspended after four months imposed by the Supreme Court for convictions in relation to a number of drug offences - whether the learned trial judge erred in failing to accord sufficient weight to the "totality principle" when sentencing the applicant - whether the learned trial judge had recognised that the applicant's offending may have been the result of his drug addiction - whether the starting head sentences adopted by the learned trial judge when sentencing for the applicant's fraud convictions were excessive

Mill v The Queen (1988) 166 CLR 59, applied
R v Hammond [1996] QCA 508; [1997] 2 Qd R 195, considered
R v Perrem [2000] QCA 339; CA No 119 of 2000, 18 August 2000, cited

COUNSEL: B G Devereaux for the applicant
M J Copley for the respondent

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

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree that the application for leave to appeal against sentence should be dismissed, and with His Honour's reasons.

[2] **KEANE JA:** On 12 May 2005 the applicant pleaded guilty to six counts of burglary and stealing, one count of breaking and entering a car and stealing, one count of unlawful use of a motor vehicle with a circumstance of aggravation, two counts of unlawful use of a motor vehicle, one count of unlawful possession of a motor vehicle, two counts of attempted unlawful use of a motor vehicle with a circumstance of aggravation, one count of unlawful possession of a motor vessel, one count of wilful damage, seven counts of stealing, nineteen counts of fraud and one count of attempted fraud. The offences were committed in a protracted episode of dishonest conduct from the end of October 2003 to 23 April 2004.

[3] The applicant was sentenced to four years imprisonment, to be suspended after eight months for an operational period of four years, on all counts except for the offence of attempted fraud for which he was sentenced to two years imprisonment, suspended after eight months, for an operational period of four years. These terms of imprisonment were to be served concurrently, but cumulatively upon a sentence of two years imprisonment, suspended after four months for an operational period of two years, imposed by the Supreme Court on 31 January 2005 for convictions with respect to one count of possession of amphetamine, one of production of amphetamine and one of possession of articles used in connection with the production of amphetamine. The drug offences were committed in April 2004.

[4] In relation to the cumulative sentence, the learned sentencing judge said:

> "I am going to make the sentence I impose today cumulative on the sentences imposed by the Supreme Court because they are really entirely separate. Your use of amphetamines and your production of amphetamines just explains your crime spree, but beyond that it does no more, it seems to me. It is quite a separate thing. It was dealt with quite separately, and so there ought to be a separate sentence for that. I do not propose to take into account the time you have spent under that sentence in reducing further sentences that I impose for those reasons."

[5] It is argued on the applicant's behalf that the learned sentencing judge erred:

(a) in failing to consider the "totality principle",[1] it being contended on the applicant's behalf that there was a relevant relationship between the drug offences and the offences for which he was being sentenced on 12 May 2005 "because most of them substantially emanated from the addiction."

(b) in failing to apply the principle in *R v Hammond*[2] to help determine the applicant's character for the purposes of s 9(2)(f) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act"). In this regard, it is said that the applicant had virtually no criminal record before the collapse of his marriage and his decline into drug addiction. It is argued on the applicant's behalf that he should have been regarded as a weak character, rather than a hardened criminal, and therefore amenable to rehabilitation; and

(c) in that the head sentences for ten of the fraud counts were plainly excessive being 80 per cent of the statutory maximum for relatively moderate examples of the offence.

[6] Before addressing these arguments, it is necessary to refer briefly to the circumstances of the offences and the applicant's personal circumstances.

Circumstances of the offences

[7] The "crime spree" to which the learned sentencing judge referred included burglary and stealing mail and personal items to create a false identity to facilitate fraudulent transactions. The counts of burglary related to unoccupied houses.

[8] The applicant was apprehended for the first time on 7 January 2003 as he returned a car which he had hired using a false identity created from personal papers which he had previously stolen. Police searched the applicant and his co-accused, and found a hotel key. They searched his hotel room, which he had also hired using false papers he had created, and found stolen cheque books, bank cards and other documents which linked him to other offences. Even when he was apprehended, he supplied a false name to the police, and his true identity was revealed only when he was fingerprinted.

[9] He was given bail; and while on bail he continued to offend.

[10] The total loss suffered by the complainants was $50,647.49.

[11] The applicant refused police interviews in relation to most counts. He made some attempts to mislead police. Subsequently he made some voluntary disclosures of two offences.

The applicant's circumstances

[12] The applicant was born on 28 March 1972. He was aged 31 and 32 at the time of the offences and 33 at the time of his sentence.

[13] He had a minor criminal history of little present relevance.

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1 *Mill v The Queen* (1988) 166 CLR 59 at 66 - 67.

2 [1996] QCA 508 at [18] - [19]; [1997] 2 Qd R 195 at 199 - 200.

[14] The applicant is a qualified boilermaker. His marriage collapsed in 2003. His engineering business also collapsed after his marriage break-up. He began using amphetamines, which he also produced for his own use.

[15] From 23 April 2004 to 31 January 2005, the applicant spent 284 days on remand. While in prison he completed courses in drug rehabilitation and remained drug-free. Further, he was attacked by other inmates and severely injured.

The sentence

[16] It was submitted on behalf of the Crown that four years imprisonment was the starting point for the sentence, but that allowance should be made for the 284 days spent on remand, and that the plea of guilty should be recognised by a parole recommendation. On behalf of the applicant it was submitted that a head sentence of four years imprisonment with suspension after 16 months was appropriate, and the "totality principle" meant that the time on remand and the four months in actual detention ordered by the Supreme Court in January 2005 should be taken into account so as to reduce the period of actual imprisonment on the current charges to between two and three months. It was submitted that those sentences should commence at the conclusion of the unsuspended portion of the Supreme Court sentence.

[17] His Honour took into account the applicant's apparently successful efforts at rehabilitating himself from his drug addiction. The learned sentencing judge said that, notwithstanding the applicant's personal circumstances to which reference has been made, so many persons had been adversely affected by the applicant's misconduct that the court was obliged to take a serious view of these offences. The applicant's identity fraud was said to be of special concern.

[18] His Honour described the Crown submission for a head sentence of four years as "benign". That view was open to his Honour having regard to the decision of this Court in *R v Perrem*.[3] The learned sentencing judge was entitled to adopt four years as the head sentence only on the basis that it reflected, to some extent, the applicant's pleas of guilty. Further, his Honour was not satisfied that the applicant was remorseful.

[19] The learned sentencing judge proceeded to sentence the applicant on the basis that, taking into account the pleas of guilty and the saving of expense to the administration of justice, a suspension of the sentence after 18 months was appropriate. His Honour fixed upon the period of eight months actual imprisonment by taking into account the time already served on remand.

The applicant's arguments

[20] I return to a consideration of the arguments advanced on the applicant's behalf. As to the contention that the learned sentencing judge failed to observe the "totality principle", I am of the opinion that this submission must be rejected.

[21] The totality principle requires a sentencing judge who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed

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[3] [2000] QCA 339; CA No 119 of 2000, 18 August 2000. In that case a sentence of six years with a recommendation for parole after two years and three months was held to be appropriate in the case of a young man with a limited criminal history whose offences of dishonesty were fuelled by his drug addiction.

and each properly made cumulative in accordance with principle "to review the aggregate sentence and consider whether the aggregate is 'just and proper'."[4]

[22] In the present case, the appellant's offences of dishonesty may have been associated with his dependence on drugs, but the applicant was not sentenced, either in the Supreme Court or by his Honour, for his dependence on drugs. The learned sentencing judge approached the task of sentencing explicitly with a view to imposing a sentence which was a "just and appropriate" aggregate sentence. In so far as that sentence was cumulative upon the sentence imposed by the Supreme Court in respect of the drug offences, it was in conformity with the submissions made on behalf of the applicant and the Crown. The offences of dishonesty were committed at times different from the drug offences. The drug offences were largely committed after the offence of dishonesty. While there may or may not have been some causal connection between the two groups of offences, the elements of each offence, and the occasions on which the offences occurred, did not overlap. The learned sentencing judge recognised that the Supreme Court had itself refrained from taking into account at all the offences of dishonesty in fixing upon a sentence which reflected the overall criminality of the drug offences. The learned Supreme Court judge proceeded on the clear basis that the applicant was the only "victim" of his drug offences. Further, the learned Supreme Court judge plainly left it to the court which was to deal with the applicant's offences of dishonesty to fashion a sentence which took into account the time spent by the applicant on remand. The learned sentencing judge was correct to regard the drug offences as separate for the purpose of fixing upon a sentence which was "just and appropriate" to the overall criminality involved in the applicant's offences of dishonesty bearing in mind his drug dependence.

[23] In my view, the imposition of eight months actual imprisonment cumulative upon the four months imposed for the drug offences - making a total of twelve months actual imprisonment for all the applicant's crimes - "cannot be said in all the circumstances of the case, . . . [to be] incommensurate with the gravity of the whole of his proven criminal conduct or with his due deserts."[5]

[24] The submission that the learned sentencing judge ignored the principle in *R v Hammond*[6] must also be rejected. The learned sentencing judge did refer to the relationship between the collapse of the applicant's marriage, his descent into drug addiction and the crime spree in which he then engaged. His Honour referred as well to the apparent success of the applicant's efforts at rehabilitation. It cannot be said that he failed to advert to the applicant's drug addiction and the likelihood that the applicant's problem was that he was a weak character rather than a hardened criminal.

[25] The learned sentencing judge was plainly troubled by the nature of the applicant's offending and the absence of clear evidence of remorse. The applicant's offences of dishonesty served to fund luxurious living. It is hardly surprising that he was not prepared to accept that the applicant's offending was explicable entirely as a temporary failure by a weak character. The offences of dishonesty were evidently

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4 Thomas, *Principles of Sentencing*, 2nd Ed (1979) at 56 - 57; cited with approval in *Mill v The Queen* (1988) 166 CLR 59 at 62 - 63.

5 *R v Knight* (1981) 26 SASR 573 at 576; cited with approval in *Mill v The Queen* (1988) 166 CLR 59 at 63.

6 [1996] QCA 508 at [18] - [19]; [1997] 2 Q d R 195 at 199 - 200.

carried out with some deliberate pre-planning. Further, and importantly in this regard, it cannot be said that any other party actively attempted to lead the applicant astray. In those circumstances, there is not, in my respectful opinion, a sufficient basis on which this Court is able to say that his Honour was wrong to reach the conclusion that he did.

[26] In conclusion in relation to the applicant's second argument, it was open to his Honour to conclude that the seriousness of the offending and the claims of deterrence were such as to mean that the claims of rehabilitation in this case could not justify a more lenient sentence.

[27] The third argument advanced on the applicant's behalf should also be rejected. In proceeding as he did to fix an aggregate sentence without special regard for the less serious fraud offences, the learned sentencing judge was proceeding in conformity with the invitation extended by the applicant's counsel. Having regard to the association of these offences with the other offences committed in the course of the applicant's six month crime spree, and the invitation to the learned sentencing judge to proceed as he did in fixing one head sentence, no error on the part of the learned sentencing judge has been demonstrated.

[28] Because no error on the part of the learned sentencing judge has been demonstrated, no occasion arises for this Court to exercise the sentencing discretion afresh.

Conclusion and orders

[29] In my opinion the application for leave to appeal against sentence should be dismissed.

[30] **WILSON J:** I respectfully agree with the reasons for judgment of Keane JA and with the order he proposes.