SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kynaston* [2005] QCA 322
PARTIES:	**R** **v** **KYNASTON, Robert John Phillip** (applicant/appellant)
FILE NO/S:	CA No 146 of 2005 DC No 109 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	29 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2005
JUDGES:	Jerrard and Keane JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against sentence** **2. Allow appeal** **3. Set aside the sentences ordered on counts 1 and 2 on the indictment** **4. Order instead on count 1 that the applicant be sentenced to 12 months imprisonment and then released on probation on his consenting to being placed on a probation order for three years with such order to contain the general requirements specified in s 93 of the *Penalties and Sentences Act* 1992 (Qld)** **5. Further order that the terms of the probation order be explained to the applicant by his legal representatives and that a conviction be recorded** **6. Vary the sentence imposed on count 2 by deleting the recommendation for eligibility for post-prison community based release after the applicant has served 18 months and ordering instead that that sentence of four years imprisonment be suspended after the applicant has served 12 months thereof for an operational period of four years**

CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – applicant pleaded guilty to two armed robberies of service stations – at time of offences applicant had drug addiction – applicant had limited prior criminal history – applicant showed genuine remorse and wrote apologetic letters to service station managers – applicant's rehabilitative efforts demonstrated by evidence of applicant becoming free of drug addiction and starting up a plastering business partnership – applicant had family support and a small child with his partner – whether sentencing judge gave insufficient weight to applicant's rehabilitation – whether a probation order should be imposed to allow continued monitoring of applicant's rehabilitation *Criminal Offence Victims Act* 1995 (Qld), s 14 *Penalties and Sentences Act* 1992 (Qld), s 93, s 94(1)(d) *R v Hammond* [1996] QCA 508; [1997] 2 Qd R 195, considered *R v Hood* [2005] QCA 159; CA No 38 of 2005, 13 May 2005, applied *R v Maxfield* [2000] QCA 320; [2002] 1 Qd R 417, cited
COUNSEL:	D L Kellie for the applicant/appellant S G Bain for the respondent
SOLICITORS:	Aboriginal and Torres Strait Islander Legal Service for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

JERRARD JA: This is an unusual case. The applicant has no prior convictions for offences of dishonesty, and convictions previously only for offences in and about the use of an uninsured or unregistered vehicle or when unlicensed, all committed in 1999, or else for breaching fine option or bail orders arising out of those matters, yet he has pleaded guilty to two offences of armed robbery. This is a surprisingly limited prior history of offending for an applicant who then committed those two offences.

The offences were committed in February 2004 with the first committed on 15 February and the second a week later on 21 February. In each of those the victims were people employed in service stations and on the first occasion, the offence committed on 15 February 2004, Mr Kynaston and his co-offender entered the complainant's door at 11.40 pm. His co-offender was armed with a large knife. Mr Kynaston held the door open while the co-offender demanded that the console operator fill a bag with money from the cash register and $208 was taken. The two offenders then ran from the scene.

The clear reason for the commission of that first offence was Mr Kynaston's addiction at the time to amphetamines. The same motive was the reason for the second offence. On that second offence, Mr Kynaston drove himself and his co-offender to a service station where he held up the console operator with a knife at around 8.30 pm. A bag was filled with money and handed over to Mr Kynaston who was located shortly after nearby by police when Mr Kynaston's car failed to start. He and the other two offenders involved in the second robbery had had to leave the scene on foot when that vehicle failed.

Mr Kynaston was born on 30 January 1979. He was 25 years old at the time he committed the offences and 26 years old when sentenced. As described, he has no serious criminal record but has struggled with an addiction, firstly, to marijuana, and then to amphetamines. It was while he was so addicted that he committed both offences.

There was evidence before the learned sentencing judge to the effect that Mr Kynaston ceased his use of those drugs within months of his arrest in February 2004 and in March of this year he self-referred himself to the Alcohol, Tobacco and Other Drugs Service at Redcliffe.

Offences of armed robbery of service stations in which knives are brandished at attendants or operators, such as these offences, are dealt with seriously by this Court even though the amount stolen is often relatively small and even though the weapons which are brandished are often not used. The head sentence of four years imposed by the learned sentencing judge reflects that matter and this Court stated in *R v Hammond* [1997] 2 Qd R 195, to the effect and I quote:

> "From a review of the sentences, it can be seen that deterrence is a significant factor in sentencing for armed robbery. Service stations and small shops, particularly those which provide services at night to the public, are recognised as vulnerable to attack and the potential harm to the victims, psychologically in most cases and physically in many, is said to justify a firm line in sentencing."

The learned sentencing judge cited that very observation. It follows that the head sentence of four years imposed in this case cannot be said to be manifestly excessive, particularly not when there are two offences of armed robbery.

What makes this case unusual is the efforts that Mr Kynaston has made since being placed on bail, after committing those offences in February 2004, to rehabilitate himself and his apparently successful efforts to live a drug-free existence. His claims to have done so are supported by observations made

of him by Mr Mark Conway, a senior social worker with the Aboriginal and Torres Islanders Corporation for Legal Services, who presented a court report.

Mr Kynaston's claims are also supported by signed statements from his mother, from her friend named Vikki Joyce, who has known him for 12 years, from a former neighbour, from Mr Kynaston's present partner's mother, from Mr Kynaston's brother with whom Mr Kynaston now or prior to sentence had been operating a plastering business which traded as E A & S Plastering Company and which had traded since 13 January 2005, from another of Mr Kynaston's brothers, from Mr Kynaston's partner and, finally, a statement from Mr Kynaston himself.

The plastering business was described in a number of those references as flourishing and Mr Kynaston actually wrote a letter of apology to the managers of each of the service stations which he robbed. The substantial written reference material in the appeal record presents a strong argument that Mr Kynaston has genuinely demonstrated regret for the serious violent offences he committed and has also demonstrated a capacity to live a very different life. He and his current partner now have a small child.

This is one of those cases, sadly unusual, in which there is much more than mere assertion of the prospects of rehabilitation and in which there is some concrete evidence of it as a continuing choice. There are not many people who present for sentences on charges of armed robbery who are

successfully self-employed.

In those circumstances, I am satisfied that the learned sentencing judge placed too little weight on the overall benefit to the community of allowing Mr Kynaston's rehabilitation to continue after he serves a necessary minimum period in prison while at the same time imposing a lengthy period of imprisonment overall which Mr Kynaston will have to serve if he reoffends. The learned sentencing judge did not refer, in express terms, to either the fact of apparent successful escape from drug addiction or to the fact of apparent successful self-employment.

If Mr Kynaston does reoffend he will have to serve all or a lengthy part of a suspended sentence of imprisonment but that will be a matter for him. This Court, in my opinion, should make an order now available to it by reasons of a decision in *R v Hood* [2005] QCA 159 that Mr Kynaston have a sentence on one count which is partly suspended and on the second count undergo a relatively lengthy period of probation. That will give him the opportunity for counselling and the support in his efforts to remain away from drugs and to undertake such courses as the probation officer requires.

Accordingly, I would allow the application, grant the appeal, set aside the sentences ordered on counts 1 and 2 on the indictment and order instead on count 1 thereof that Mr Kynaston is sentenced to 12 months imprisonment and then released on probation on his consenting to being placed on a

probation order for three years with such order to contain the general requirement specified in s 93 of the *Penalties and Sentences Act* 1992 (Qld) and further order that the terms of that order be explained to the applicant by his legal representatives and that a conviction be recorded.

In respect of count 2, I would order that the sentence imposed be varied by deleting the recommendation for eligibility for post-prison community based release after the applicant had served a period of 18 months of that sentence and order instead that that sentence of four years imprisonment be suspended after Mr Kynaston has served 12 months thereof.

KEANE JA: I agree with the reasons of Jerrard JA and with the orders that he proposes.

FRYBERG J: The applicant raised a number of arguments before us. One of them was that he was entitled to have certainty as to the date of his release in a way which cannot be provided by the order made below, which left that date to be decided by the appropriate Board. I would reject that argument.

It seems to be based on an assumption that the system provided by statute for the operation of post prison community based release is somehow to be assumed by sentencing Courts to operate in a manner contrary to law. Sentencing judges should not make that assumption. It is, of course, different if the evidence in a particular case shows that a recommendation regarding PPCBR would not be a suitable form of mitigation.

Prisoners unlawfully denied PPCBR can seek redress: see *R v Macksfield* [2002] 1 Qd R 417.

I am also concerned at what seems to be an increasing practice by persons who have indicated an intention to plead guilty to prolong the period for which they are on bail in order to manufacture evidence for use on sentencing. From time to time one sees cases where the protracted period has been used to generate evidence which, while it may be commendable over the period for which it is relevant, nonetheless leaves one without any confidence of what will happen in the future.

Evidence created in such circumstances should be viewed with considerable suspicion, particularly in cases where the Crown has not been given time to investigate it thoroughly or its importance in the scale of things is not such as to warrant a significant devotion of resources to it. In this case, the evidence was completely ex parte and one has no idea of how substantial it was.

I am conscious also of the fact that many successful bank robbers operate in self-employed partnerships.

In *R v Hammond*, to which reference has already been made, the Court drew attention to the vulnerability of persons who work in small businesses to armed robbery. It was recognised that they are vulnerable to attack and that sentences take into account the potential harm to the victims, psychologically, in most cases and, physically in many.

It is right that this potential should be a factor in sentencing but the law requires more than regard simply to the potential for injury to victims. Section 9(4)(d) of the *Penalties and Sentences Act*, applicable in this case, mandates that any injury to a member of the public be something to which the Court must have regard primarily.

There is no indication in the sentencing remarks in this case that such regard was had. That is hardly surprising since the Judge was not told what injury, if any, was suffered by the victims. Under section 14 of the *Criminal Offence Victims Act* the Crown Prosecutor should inform the sentencing Court of appropriate details of the harm caused to a victim of a crime. In the present case the Crown Prosecutor did not inform the Court of those details and did not proffer any explanation for why he did not do so. Of course, section 14(1) does not impose an absolute mandatory duty. It is, however, when read with section 9(4)(d), in my view, a sufficient foundation for sentencing Courts to proceed on the basis that there will be an explanation provided to them in cases where it is not possible for the Crown to fulfil the obligation which ordinarily rests upon it on sentencing of providing relevant information to the sentencing Court. As I said, in the present case, no such explanation was provided.

The fact that reference was made in very general terms, not unlike those used in *Hammond*, to potential for harm to victims by the Prosecutor, if anything, suggests to me that the

question of the harm to the particular victims in this case was overlooked. In my view, there has been a miscarriage in the sentencing process for that reason. That being so, the obligation is upon us to resentence.

I am of a like view to the presiding Judge as to the appropriate sentence which ought to be imposed for the reasons which he has expressed and I, therefore, concur in the order proposed.

JERRARD JA: The orders I have proposed will be the orders of the Court.
