SUPREME COURT OF QUEENSLAND

CITATION:	*R v Getawan* [2005] QCA 350
PARTIES:	**R** **v** **GETAWAN, Andrew Craig** (applicant/appellant)
FILE NO/S:	CA No 188 of 2005 DC No 21 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2005
JUDGES:	Jerrard and Keane JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for an extension of time** **2. Allow the application for leave and appeal against sentence** **3. Vary the sentence imposed by deleting the order that the sentence of three years be suspended after the applicant has served nine months, and ordering instead that it be suspended after he has served six months**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – applicant pleaded guilty to entering premises with intent to commit an indictable offence and armed robbery in company – applicant and a co-offender both sentenced to three years imprisonment suspended after nine months for an operational period of four years – co-offender had sentence reduced on appeal to a suspension after 83 days of imprisonment – applicant subsequently applied for extension of time to bring sentence application on the basis of parity with his co-offender – whether extension of time should be granted

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 – applicant's co-offender participated in police interview and named applicant as being involved in offence – applicant refused police interview on legal advice but entered early guilty plea – applicant subsequently breached bail three times prior to sentence – applicant had sole care of eight year old son from August 2004 due to mother's drug problems – applicant had good employment record and rehabilitative prospects – whether in comparison with co-offender's reduction the applicant's period of actual imprisonment was manifestly excessive

R v Basawa [2001] QCA 222; CA No 81 of 2001, 5 June 2001, considered
R v Briese; *ex parte A-G* [1997] QCA 10; [1998] 1 Qd R 487, considered
R v Briody [2002] QCA 364; (2002) 134 A Crim R 170, considered
R v Hammond [1996] QCA 508; [1997] 2 Qd R 195, cited
R v Slattery [2001] QCA 108; CA No 354 of 2000, 21 March 2001, considered
R v Taylor & Napatali [1999] QCA 323; (1999) 106 A Crim R 578, considered
R v Tran; ex parte A-G [2002] QCA 21; (2002) 128 A Crim R 1, considered

COUNSEL: C A Cuthbert for the applicant/appellant
M R Byrne for the respondent

SOLICITORS: O'Sullivans Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA:** This proceeding is an application made on 18 July 2005, and received by this Court on 25 July 2005, for an extension of time in which to apply for leave to appeal against a sentence imposed in the District Court on 1 April 2005. On that date the applicant and his co-offender were each convicted of one offence of entering premises with intent to commit an indictable offence, and one count of armed robbery in company. Those offences had occurred on 23 February 2003. Both the applicant and his co-offender were convicted on their pleas of guilty on 1 April 2005 and both were sentenced to three years imprisonment, to be suspended after each had served a period of nine months, the suspension to be for an operational period of four years. Mr Getawan intends, if granted the extension of time, to argue that that sentence was manifestly excessive.

[2] Mr Getawan had no prior convictions, but as at the date of sentence had three convictions for breaching conditions of his bail for the offences of robbery and entering premises with intent. Those breaches of bail, being late in reporting to a

police station, were committed on 30 April 2004, 21 June 2004, and 23 November 2004. The learned sentencing judge gave appropriate weight to Mr Getawan's unblemished history before 23 February 2003 by the recommendation that the sentence be suspended after nine months; the learned judge otherwise gave appropriate weight to the necessity for deterrence of the offence of armed robbery of service stations and small shops, citing the judgment of this Court in *R v Hammond* [1997] 2 Qd R 195.

[3] That citation was appropriate, because this offence was committed at 3.00 am on 23 February 2003 on the premises of a hot bread shop at Marsden when the two offenders entered; Mr Getawan was carrying a piece of wood and started hitting a trolley while shouting "Money, money!" Mr Getawan's co-offender, one David Horne, was carrying a metal pipe and told one of the victims "Do not open the door or I'll hit you".[1] Another victim then handed a bag of money to Mr Horne, and Mr Getawan and Mr Horne then ran out the rear door.

[4] Mr Getawan's application for an extension of time has been prompted by Mr Horne's successful appeal to this Court heard on 22 June 2005, which resulted in his immediate release. But Mr Horne was successful in his application for a reason which is not applicable to Mr Getawan. That was the fact that when located by police on 20 April 2004, more than a year after the commission of the offence, Mr Horne participated in an electronic record of interview in which he made full admissions and identified Mr Getawan and another person to the police as co-offenders. Mr Horne's evidence established the case against Mr Getawan. Mr Horne also told police that he was physically sick with remorse the next day after the commission of the offence. In contrast with the conduct of Mr Horne in making a confession and identifying Mr Getawan, Mr Getawan, when approached by police, and after getting legal advice, declined to be interviewed.

[5] Mr Horne also put material before the learned sentencing judge demonstrating good prospects for his future as a law abiding citizen, including that he had maintained employment for nearly all of the two years between the date of the offence and the date of sentence. Mr Getawan likewise put information before the learned judge to the effect that he had succeeded in overcoming an addiction to drugs – he had been using amphetamines at the time of the offence – and also had a good record of employment. Further Mr Getawan was by then the sole carer for his eight year old son, and intended to obtain university qualifications in the future as a psychologist. He had assumed care for his son in August 2004, when the boy's mother could not care for him, because she was undergoing drug rehabilitation. Mr Getawan and the boy's mother had previously shared a drug-addicted lifestyle, which had existed at the time of his offence of robbery. These were all matters relevant to mitigating his sentence.

[6] The learned judge, when imposing sentence on Mr Getawan and Mr Horne on 1 April 2005, considered it inappropriate to distinguish between them. This Court held on Mr Horne's successful application that that approach had failed to recognise the importance of Mr Horne's co-operation with the authorities, communicating as it did an attitude consistent with prospects of a sound future, which should be recognised as a consideration tending towards the imposition of a lower sentence in his matter. There was also his clearly genuine regret for what he had done.

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1 These facts are taken from the judgment of *R v Horne* [2005] QCA 218

[7] Mr Getawan did not demonstrate by co-operation with the police an attitude consistent with future good prospects in the way Mr Horne did. In those circumstances the learned sentencing judge was correct in referring to the principles expressed in *R v Hammond*, in which case this Court remarked that service stations and small shops, particularly those which provide services at night to the public, are recognised as vulnerable to attack, and that deterrence of that was necessary. The issue on this application is solely whether the sentence imposed on Mr Getawan was manifestly excessive, there being personal factors relevant to mitigation. This Court has previously held there were compelling reasons for distinguishing between the sentence to be imposed on Mr Horne and that imposed on Mr Getawan, and Ms Cuthbert, counsel for Mr Getawan, did not argue there should be the same sentences for each.

[8] Ms Cuthbert relied on a series of earlier decisions of this Court in support of the submission that six months in actual custody was at the higher end of the scale of actual imprisonment to which it was appropriate to sentence Mr Getawan in the circumstances. Those circumstances included the fact of his good work history, which had only been interrupted in July 2004 by his preparing himself to take sole care of his son in August 2004; his absence of any prior convictions; his goal of self improvement by qualifying as a psychologist; and the efforts he had taken to rid himself of a dependence on amphetamines. Further, a report from a psychologist which was placed before the learned sentencing judge expressed the opinion that Mr Getawan seemed to feel genuine remorse about his involvement about the robbery, with symptoms of mild depression over that and of course the forthcoming court case; and expressed the opinion that Mr Getawan would be unlikely, under his current circumstances, to commit an offence of that nature again. Further, Ms Cuthbert submitted that no actual violence had been done to anyone in the robbery, the amount stolen was $750 (there is no evidence of any restitution), and it was a spur of the moment offence committed by three relatively young men who had all consumed alcohol. Mr Getawan had also consumed amphetamines.

[9] The cases on which Ms Cuthbert relied included *R v Briese*; *ex parte Attorney-General* [1998] 1 Qd R 487; *R v Taylor & Napatali* (1999) 106 A Crim R 578; *R v Lovell* [1999] 2 Qd R 79; *R v Basawa* [2001] QCA 222; *R v Slattery* [2001] QCA 108; *R v Tran; ex parte Attorney-General* [2002] QCA 21; *R v Briody* [2002] QCA 364; and *R v Bartorillo & Bartorillo* [1996] QCA 381.

[10] In *Briese* that offender was 19 when sentenced, whereas Mr Getawan was 25, and 23 when he offended. In *Briese* that offender was sentenced to probation, community service, and ordered to make compensation. The non-custodial sentence is explained by his age. In *Taylor & Napatali* those offenders were aged 17 and 20 respectively, both had pleaded guilty to the offence of armed robbery in company which they committed on a service station while armed with a single-barrelled rifle, and they were each sentenced to 12 months imprisonment to be served by way of an intensive correction order. This Court did not increase those sentences on an appeal by the Attorney-General. Their age saved them from a heavier penalty. In *Lovell* that applicant was nearly 19 when he committed an offence of robbery on a corner store in which he was armed with a pool cue, while his 17 year old accomplice remained outside to act as a lookout. That offender pleaded guilty, and his appeal against a sentence of six months imprisonment and three years probation was rejected. He had no relevant prior convictions; that sentence and the one in *Taylor*

& Napatali established that both intensive correction orders and up to six months actual custody are certainly within the range for offenders up to 20 years of age.

[11] The offender in *Basawa* threatened a female complainant who was walking near Burleigh Heads with a pocket knife, and stole from her a bottle of beer from a six-pack she was carrying. That offender had a significant criminal history for drug related offences, traffic offences and minor property offences; he was 23 years old when he offended and 24 when sentenced. He had been convicted in 1999 in Victoria for robbery and sentenced to two months imprisonment, suspended for 12 months. That must have been a quite minor offence of robbery. Mr Basawa succeeded on his appeal in having his sentence reduced to a sentence of six months imprisonment followed by three years probation; the Court of Appeal also suggested that an intensive correction order would have been equally appropriate because of what was described as the "unique circumstances" of the case. Those included Mr Basawa's mental health, and that his capacity to control his actions when he committed the offence were impaired because of the schizophrenia and drug abuse in which Mr Basawa had engaged. That offender's mental history, and the description of the case as unique, make it unreliable as a precedent.

[12] In *Slattery* that offender was aged 21 at the time of the commission of an offence of armed robbery in company, in which his co-offenders were aged 14, 15 and 15. That offender was the driver of a motor vehicle whose occupants robbed a service station, and he said he was not aware that a knife would be used in the robbery. His share of the proceeds was only $20, and nobody was hurt in that offence. Mr Slattery's original sentence of three years imprisonment suspended after nine months was reduced on appeal to one of 130 days in custody followed by probation; but that result came about because his co-offenders were juveniles and because of issues of the parity of his sentence with those of the co-offenders.

[13] In *Tran* that offender successfully resisted an appeal by the Attorney-General against a 12 month intensive correction order imposed for an offence of armed robbery with personal violence, but that offender was also ordered to pay $15,000 compensation within one month of the sentence in default of 12 months imprisonment. That offender had followed a pensioner home from the Treasury Casino, and had struggled with the complainant at the door of the complainant's home. The offender succeeded in getting the complainant's wallet and ran away; Mr Tran was apprehended soon after, because he had crashed his car into a tree near a neighbouring house. The complainant's wallet and money were found in the car, which was a write-off, and Mr Tran was not indemnified by his insurer. He was 24 years old when he offended and when sentenced; he had a gambling addiction, and had taken out a bank loan to pay the complainant the $15,000 compensation that the complainant wanted. A relevant matter on sentence was that if Mr Tran was sentenced to actual imprisonment, he would be unable to service repayment of that loan. The payment of compensation in that matter makes a significant distinguishing feature.

[14] In *Briody* the applicant Michael Briody was sentenced to three years imprisonment suspended after he had served nine months for the offence of armed robbery in company with personal violence. The victim was a taxi driver, and the co-offenders were Mr Briody's 17 year old brother and another apparently very young person. Michael Briody was only 18 when he committed that offence. The offenders punched the taxi driver a number of times and threatened him with a knife. They

stole approximately $100 and were arrested by police within a couple of days. Michael Briody had only a minor criminal history, and this Court dismissed his application for leave to appeal. That result does not assist Mr Getawan, because while this Court recognises the clear need to protect taxi drivers from armed robbery, because of the very vulnerable position in which they are placed, this Court has also declared the clear need likewise to protect service stations and other premises staying open late at night. The only significant difference, then, between the matter of *Briody* and this one is that no violence was done to anyone by Mr Getawan or Mr Horne, unlike the position in *Briody*.

[15] The sentences to which Ms Cuthbert referred the Court do not demonstrate that six months actual imprisonment was at the high end of the proper range available for a 24 year old first offender who took part in an armed robbery in company of a service station. The nine month term in actual custody has not been shown to be manifestly excessive. But on this application a question of parity does arise because the material now presented to the Court – particularly the report of the psychologist – and which was not before this Court on Mr Horne's application, shows that Mr Getawan's personal circumstances demonstrate in his favour that there are good grounds for considering that, like Mr Horne, he too would be able to avoid re-offending in the future. He had had a good work history until stopping work to look after his son, and had not re-offended in the two years prior to sentence. That being so, the only distinguishing feature between the two offenders was Mr Horne's considerably greater co-operation with the authorities. Even so, Mr Getawan did enter an early plea of guilty, when there was only the possibility that Mr Horne might give evidence against him. In those circumstances, and because of the peculiar history of the matter with Mr Horne's successful application being following by Mr Getawan's application for an extension of time, I consider it that to achieve a proper parity Mr Getawan should not spend three times as long in actual custody as Mr Horne; twice as long seems more justifiable. Any greater disproportion would leave Mr Getawan with a justifiable sense of grievance.

[16] In the circumstances I would grant the application for an extension of time, allow the application and appeal, and vary the sentence imposed by deleting the order that the sentence of three years be suspended after Mr Getawan has served nine months, and ordering instead that it be suspended after he has served six months.

[17] **KEANE JA:** I have read the reasons for judgment of Jerrard JA, and agree with his Honour's reasons and with the orders which his Honour proposes.

[18] **CULLINANE J:** I have had the opportunity to read the judgment of Jerrard JA in this matter and agree with the orders proposed.