SUPREME COURT OF QUEENSLAND

CITATION:	*R v Perkins & Gooley* [2005] QCA 377
PARTIES:	**R** **v** **PERKINS, Robert James** (applicant) **R** **v** **GOOLEY, Shaun William** (applicant)
FILE NOS:	CA No 187 of 2005 CA No 204 of 2005 DC No 305 of 2005 DC No 394 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	7 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2005
JUDGES:	McMurdo P, Keane JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. In CA No 187 of 2005: Application for leave to appeal against sentence refused** **2. In CA No 204 of 2005: Application for leave to appeal against sentence refused**
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 - applicants convicted after pleas of guilty to armed robbery in company together with a third offender - convenience store robbery - applicant Perkins armed with a knife directed complainant to place money in a bag and directed customers to stay back - applicant Gooley took money from till - third offender acted as lookout - $300 in money and cigarettes stolen - applicant Perkins sentenced to 12 months imprisonment and three years probation - applicant Gooley sentenced to three years imprisonment suspended after 12 months with an operational period of three

years - third offender sentenced to 12 months imprisonment to be served by way of an intensive correction order

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 - applicant Perkins aged 20 at time of offence - co-operation with police - early plea of guilty - intelligence within mentally deficient range - indications of drug and alcohol abuse - considered an impressionable and emotionally vulnerable young man who represents a medium risk of re-offending given present lifestyle in psychological report - whether unjustifiable disparity between sentence imposed on applicant Perkins and co-offenders - whether sentence manifestly excessive

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 - applicant Gooley aged 20 at time of offence - co-operation with police - implicated co-offenders in record of interview - early plea of guilty - on prescribed medication for schizophrenia and attending Beenleigh Mental Health Centre for treatment for his schizophrenia and depression at time of offence - regulated patient under *Mental Health Act* 2000 (Qld) - more extensive criminal history than co-offenders - whether unjustifiable disparity between sentence imposed on applicant Gooley and co-offenders - whether sentence manifestly excessive

Lowe v The Queen (1984) 154 CLR 606, cited
R v Bainbridge, Cullen & Ludwicki (1993) 74 A Crim R 265, considered
R v Dullroy & Yates; ex parte A-G (Qld) [2005] QCA 219; CA No 111 of 2005 and CA No 112 of 2005, 24 June 2005, considered
R v Getawan [2005] QCA 350; CA No 188 of 2005, 23 September 2005, distinguished
R v Gladkowski [2000] QCA 352; (2000) 115 A Crim R 446, distinguished
R v Horne [2005] QCA 218; CA No 104 of 2005, 22 June 2005, distinguished
R v Mather [1999] QCA 226; CA No 76 of 1999, 17 June 1999, cited
R v Moss [1999] QCA 426; CA No 270 of 1999, 8 October 1999, cited
R v Rogers [2005] QCA 490; CA No 373 of 1995, 7 November 1995, cited
R v Taylor & Napatali; ex parte A-G (Qld) [1999] QCA 323; (1999) 106 A Crim R 578, considered

COUNSEL: A J Rafter SC for applicant Perkins
A W Moynihan for applicant Gooley
D L Meredith for respondent

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

[1] **McMURDO P:** The applicants, Perkins and Gooley, together with a third offender Wilkinson, pleaded guilty in the District Court at Beenleigh on 19 July 2005 to one count of armed robbery in company. Gooley also pleaded guilty to a summary offence of possession of pipes used to smoke a dangerous drug. Perkins was sentenced to imprisonment for 12 months and three years probation. Gooley was sentenced to three years imprisonment to be suspended after serving 12 months with an operational period of three years for the robbery offence and to one month concurrent imprisonment on the summary offence. Wilkinson was sentenced to 12 months imprisonment to be served by way of an intensive correction order. Both Perkins and Gooley contend that the sentences imposed on them were manifestly excessive.

[2] Perkins was 20 at the time of the offence and 21 at sentence. His only criminal history was a minor breach of bail on 13 October 2004, apparently related to this offence, for which he was convicted and fined $60. Wilkinson was 19 at the time of the offence and 20 at sentence. He had two previous entries in his criminal history: unauthorized dealing with shop goods in October 2003 for which he was fined $120 with no conviction recorded and possession of utensils or pipes in April 2004 for which he was convicted and fined $120. Gooley was 20 at the time of the offence and 21 at sentence. His criminal history was more extensive than his co-offenders, commencing in 2002 with a street offence and followed later that year with two counts of wilful damage. On two occasions in 2004 he was dealt with for contravening a direction or requirement under the *Police Powers and Responsibilities Act* 2000 (Qld) and on one occasion was convicted and fined for breaching his bail. Later that year he breached fine option orders and was convicted and fined $400 for common assault and stealing arising out of a dispute with his girlfriend over a mobile phone. In 2005 he was dealt with for breaching the community service order imposed for the contraventions of a direction or requirement and for breaching a probation order imposed for unlicensed driving.

[3] The prosecution conceded at sentence that all offenders entered an early plea of guilty.

[4] The serious offence of armed robbery occurred in a rather amateurish way. The complainant was working at a Beenleigh 7-Eleven store in the early hours of the morning of 27 September 2004. Gooley and Perkins approached the store on push bikes. Perkins was wearing a balaclava. Gooley was not disguised and was wearing a bright, distinctive jacket. The complainant observed them and pushed a security button to alert police. Perkins and Gooley alighted from their bikes, entered the store and approached the counter. Perkins pointed a six inch thin-bladed knife at the complainant who described the weapon as resembling a steak knife. Perkins told the complainant to place money in a bag and directed customers in the store to stay back. Gooley took money from the till as the complainant filled the offenders' backpack with money. Perkins told him to include cigarettes (specifying the Longbeach brand) instead of coins. In total $300 in money and cigarettes was

stolen. Wilkinson was hiding outside in the bushes keeping a lookout. Perkins and Gooley left the store with the proceeds of the robbery and cycled away after meeting up with Wilkinson.

[5] Within a fortnight Gooley had been identified by police as a suspect. He participated in a record of interview in which he implicated his co-offenders. Perkins and Wilkinson were subsequently interviewed and also co-operated with police. All three made ready admissions to the offence. A fourth offender, a juvenile who was with Wilkinson, was cautioned.

[6] When police apprehended Gooley he was in possession of water pipes which smelt of cannabis. He admitted that he had used them to smoke cannabis.

[7] Perkins' counsel at sentence tendered a report from a psychologist, Mr Hatzipetrou. The report recorded that Perkins was abandoned by his mother early in his childhood and was reared by his father, who suffered from alcoholism. Perkins came to Brisbane in 2002 and lived in a caravan. He was supervised by his older brother who continues to be supportive. Perkins has had persistent and significant learning difficulties throughout his school years and has attended special education units within mainstream schools. He has significant literacy and numeracy deficits. He claims he was coerced by his more skilled peers to become involved in this offence. He has been in receipt of a disability support allowance since the age of 16. He was sometimes a binge drinker and he abused cannabis. The tests undertaken suggested that Perkins' intelligence was within the mentally deficient range. It seems he committed the offence under the influence of cannabis and afterwards was ashamed and embarrassed by his actions and felt sympathy for the complainant. Mr Hatzipetrou considered Perkins an impressionable and emotionally vulnerable young man who represents a medium risk of reoffending, given his present lifestyle. Mr Hatzipetrou recommended that Perkins have alcohol and drug counselling, take part in a programme involving random drug screens, be managed and supported by a disability service provider and referred to a clinical neuropsychologist for a comprehensive psychological assessment of intellectual and performance functioning to address his cognitive and learning impairments. These interventions and regular supervision and support may reduce the risk of reoffending.

[8] Mr Perkins had written a letter to the complainant apologizing for his actions. Two references were tendered on Mr Perkins' behalf which suggested that, despite his offending, Perkins had some good qualities and supported the psychologist's conclusion that Perkins was intellectually impaired and easily led. At the hearing of this application we were told that he now has work available to him as a painter and he continues to have the support of his older brother.

[9] Wilkinson was one of triplets. At sentence he had completed six months of an apprenticeship in metal fabrication. His employer provided a reference to the court. Wilkinson immediately expressed remorse for his involvement in the offence to police in the record of interview. He told police he was keeping lookout but did not know his co-offenders were armed until after the incident. He received $20 and a packet of cigarettes. He tried to talk his co-offenders out of committing the offence but in the end, participated in a limited way. The prosecutor agreed that Wilkinson's role in the offence was less than that of Gooley and Perkins and conceded that his

prison sentence could be served in the community by way of an intensive correction order.

[10] Gooley's counsel at sentence told the court that Gooley was attending the Beenleigh Mental Health Centre for treatment for his schizophrenia and depression at the time of his offences, although no expert reports were tendered. He submitted that Gooley was then a regulated patient under the *Mental Health Act* 2000 (Qld). Gooley had previously been admitted to hospital after an episode of self-harm in December 2003. In April 2004 he was again admitted to hospital and then readmitted a few days after his release. At the time of his offence he was on prescribed medication for schizophrenia. As a child he had been diagnosed as suffering from Attention Deficit Hyperactivity Disorder. Gooley had at sentence and continues to have the support of his parents. During the hearing of this application we were told that Gooley, too, now has employment available to him.

[11] No victim impact statement was tendered but the court can infer that the experience was frightening and unpleasant for the unfortunate complainant.

[12] In sentencing the offenders the learned judge referred to the seriousness of the offence of armed robbery in company, to the need for deterrence and to the need to protect victims like the complainant. His Honour also referred to the mitigating factors of the pleas of guilty, co-operation with the administration of justice and the references and reports tendered, stating that the punishment would have been greater but for those matters.

[13] Mr Rafter SC who appears for Perkins in his application emphasizes Perkins' youthfulness, his lack of prior or subsequent convictions, his co-operation with police and his early plea of guilty at the committal proceedings. He especially emphasizes the contents of the psychological report and Perkins' intellectual impairment as a mitigating factor: see *R v Dunn*.[1] He contends, relying on the observations of Mason J (as he then was) in *Lowe v The Queen*[2] that there is an unjustifiable disparity between the sentence imposed on Perkins and that imposed on Wilkinson who, although he played a less active role in the offence, had prior convictions. Mr Rafter also emphasized the recent decisions of this Court in *R v Horne*[3] and *R v Getawan*.[4] Those cases are distinguishable from Perkins and Gooley, however, in that in the period between Horne and Getawan's offending in February 2003 and their sentence in April 2005, both had made significant and apparently successful efforts at rehabilitating themselves.

[14] Mr A W Moynihan, counsel for Gooley, also contends that the sentence imposed on his client was unjustly disparate with that imposed on Wilkinson citing *Lowe v The Queen*[5] and *R v Rogers*.[6] Mr Moynihan points out that his client is at risk of spending three years in prison compared to the one year term of imprisonment to be served by way of an intensive correction order imposed on Wilkinson. He emphasizes that it was Gooley's admissions to police that resulted in the apprehension of his co-offenders. Mr Moynihan submits that his Honour did not

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1 [1994] QCA 147; CA No 29 of 1994, 13 May 1994.
2 (1984) 154 CLR 606, 610 - 611.
3 [2005] QCA 218; CA No 104 of 2005, 22 June 2005.
4 [2005] QCA 350; CA No 188 of 2005, 23 September 2005.
5 Above, Gibbs CJ, 609.
6 [1995] QCA 490; CA No 373 of 1995, 7 November 1995.

give sufficient weight to Gooley's co-operation with the police in implicating his co-offenders and that it can be inferred that it may be more difficult for him whilst incarcerated because of his degree of co-operation with police. Mr Moynihan also emphasizes that Wilkinson took part in the planning, played an active role as lookout, shared in the proceeds of the robbery and had a prior criminal history.

[15] As Mr Meredith who appears for the respondent in both applications concedes, non-custodial sentences for young offenders who have pleaded guilty, even to a serious offence such as an armed robbery in company like this offence, can sometimes be adequate punishment: see for example *R v Bainbridge, Cullen & Ludwicki*;[7] *R v Taylor & Napatali*[8] and most recently *R v Dullroy & Yates; ex parte A-G (Qld)*.[9] Had Perkins and Gooley been placed on lengthy, carefully structured community-based orders comprising probation, compensation and community service, an Attorney-General's appeal would be unlikely to have succeeded.

[16] It is not, however, for this Court to exercise its discretion afresh. This Court can only interfere if the sentence imposed was manifestly excessive or if the sentencing judge has acted on some wrong principle of law or has mistaken pertinent facts.

[17] The sentences imposed on the applicants were within the appropriate range for this serious and too prevalent offence, even taking into account the mitigating circumstances, namely the offenders' relative youthfulness, early pleas of guilty, co-operation with the authorities, limited previous criminal history and rehabilitative prospects: cf *R v Moss*[10] and *R v Mather*.[11] The degree of Gooley's co-operation, whilst commendable, did not warrant the substantial informer's discount discussed by this Court in *R v Gladkowski*.[12]

[18] There were sound reasons for the imposition of a lighter penalty in Wilkinson's case than in the cases of Perkins and Gooley. Wilkinson was the youngest of the three offenders. He was also the least involved in the commission of the offence, was not involved in planning the threats of violence with the knife and at least tried to persuade his co-offenders to desist. Although he had some minor criminal history, his prospects of rehabilitation were much more promising than those of either Perkins or Gooley because he had completed six months of an apprenticeship and was well thought of by his employer. Although Perkins' unfortunate family background and mental incapacity invoke sympathy, the psychological report suggested some caution as to his prospects of successful rehabilitation. Gooley has the misfortune to suffer from serious mental illnesses and, despite the great benefit of parental support, this does not suggest particularly promising prospects of rehabilitation. Bearing in mind Gooley's comparatively young age and his mental health background, it is surprising that his Honour did not sentence Gooley to a term of probation after serving a period of imprisonment, rather than merely suspending his sentence, but this may have been because Gooley had previously breached a probation order. This does not, however, amount to an error in law.

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7 (1993) 74 A Crim R 265.
8 (1999) 106 A Crim R 578.
9 [2005] QCA 219; CA No 111 and CA No 112 of 2005, 24 June 2005.
10 [1999] QCA 426; CA No 270 of 1999, 8 October 1999.
11 [1999] QCA 226; CA No 76 of 1999, 17 June 1999.
12 [2000] QCA 352; (2000) 115 A Crim R 446.

[19] I am not persuaded that the sentences imposed on Perkins or Gooley were manifestly excessive, nor that there was an unjust disparity between the sentences imposed on Perkins and Gooley when compared to that imposed on Wilkinson, nor that his Honour in any other way erred in fact or law.

[20] I would refuse each application for leave to appeal against sentence.

[21] **KEANE JA:** I agree with the reasons of McMurdo P and with the orders proposed by her Honour.

[22] **DOUGLAS J**: I have had the advantage of reading the reasons of the President with which I agree.