SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2010] QCA 158
PARTIES:	**R** **v** **ANDERSON, Wayne Kevin** (applicant)
FILE NO/S:	CA No 18 of 2010 DC No 556 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	22 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2010
JUDGE:	McMurdo P, Muir JA and Cullinane J Judgment of the Court
ORDERS:	**1. The application for leave to appeal is granted;** **2. The appeal is allowed;** **3. The sentence imposed in the District Court at Townsville on 13 November 2009 is set aside in so far as it sets a fixed parole release date of 30 June 2011 and substitute a parole release date of 30 October 2010.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – NON-PAROLE PERIOD OR MINIMUM TERM – GENERALLY – applicant convicted of one count of wilful damage, one count of assault occasioning bodily harm, two counts of common assault and one count of threatening violence – convictions breached suspended term of imprisonment imposed in 2005 – applicant sentenced to a total of six months imprisonment served cumulatively with fifteen months of suspended sentence – parole release date fixed significantly past halfway point of head sentence – primary judge failed to give reasons for parole release date – whether sentencing discretion has miscarried CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – MANIFESTLY EXCESSIVE OR INADEQUATE – applicant has made efforts at rehabilitation – whether sentence imposed was excessive

Penalties and Sentences Act 1992 (Qld), s 160B

R v Kitson [2008] QCA 86, cited
R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201, applied
R v Norden [2009] 2 Qd R 455; [2009] QCA 42, applied

COUNSEL: A Collins for the applicant
M Lehane for the respondent

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

[1] **THE COURT:** The applicant seeks leave to appeal against sentences imposed in the District Court at Townsville on 13 November 2009.

[2] He pleaded guilty to five counts:

1. Wilful damage

2. Assault occasioning bodily harm

3. Common Assault (2)

4. Threatening violence.

[3] He was sentenced to six months imprisonment on each charge.

[4] Those terms were to be served concurrently as between themselves but cumulatively upon a term of suspended imprisonment which had been imposed on 14 October 2005 in the District Court at Townsville.

[5] On 14 October 2005 the applicant had been sentenced in relation to a number of offences, the details to which we will return to shortly. The operative sentence imposed was three years' imprisonment to be suspended after serving 12 months with an operative period of three years.

[6] The learned sentencing Judge in sentencing the applicant in respect of the matters the subject of this application, invoked 15 months of the two years' suspended imprisonment expressing the view that it would be unjust to require him to serve the whole of the suspended sentence. His Honour did this "because of the positive matters that have been placed before me". A parole release date of 30 June 2011 was fixed.

[7] The applicant was born on 24 November 1978. He has a criminal history which includes a number of breaches of domestic violence orders as well as drug and other offences.

[8] The information placed before the learned sentencing Judge in these matters was that the earlier offences fell into two groups separated by some time. The first group occurred on 9 March 2004 and attracted the operative term of imprisonment. The offences in this group were burglary, common assault, assault occasioning bodily harm and robbery with violence.

[9] The applicant was it appears owed money by a man and telephoned that person's mother looking for the debtor. After making threats to come and damage her house

he arrived and used a meat hook to pull out a security window and forced his way through the front door. This constituted the offence of burglary. The other offences arose out of threats against the woman whose house he had entered and an assault upon another person who was present. The applicant left at some time but returned and picked up a tomahawk which he swung at the other person present before punching him in the face causing him facial injuries.

[10] On 26 May 2004 the applicant assaulted the former male partner of his (the applicant's) then de facto partner. The former partner had come to see the applicant's de facto partner about their children. The applicant punched this man a number of times, knocking him to the ground and kicking him in the face.

[11] The next group of offences arose out of a traffic accident on 28 May 2004. The applicant got out of his car and punched and head butted through the complainant's passenger windscreen following which he punched the complainant to the face and bit him on the left hand.

[12] On 27 June 2005 the applicant entered the house of his partner causing damage to a security door. Shortly after this there was an argument in which he placed her in a headlock and bit her on the nose. He drove his vehicle erratically at a time when she was in it and he threatened to bash her before he drove the vehicle onto a grassed embankment which he pushed her over.

[13] The offences the subject of these applications, were all committed on 9 October 2007. The complainant is the applicant's mother. She resided with her elderly mother at a house at Wulguru where the applicant had spent the previous evening. On the afternoon of 9 October a man came to the residence to speak with the applicant. He appears to have taken offence at this person's presence, as a result of which he flew into a rage and committed a series of offences. The first was constituted by his punching holes in a wardrobe door and a bedroom door and damaging other property. This damage was done during the course of the relevant events. He grabbed his mother by the shoulders and pushed her to the ground in the course of which she struck her head on an exercise bike. The complainant apparently reacted to the applicant's attack upon her by punching him in the chest, as a result of which he punched her a number of times in the face with his closed fists and followed her into the lounge room where he grabbed her by the shoulders and pushed her against the wall causing her to strike the back of her head. He left but returned and spat blood onto his mother. He then threatened to tie her up and burn the house down, saying that all he needed was a jerry can of petrol and a rope.

[14] The applicant's mother has provided a victim impact statement. It appears that she refuses to have anything further to do with the applicant and speaks of her physical and emotional health having deteriorated and her ability to cope and interact socially being severely reduced. The applicant's grandmother was present during these events and sought to dissuade the applicant but was abused for her trouble.

[15] Counsel for the prosecution contended before the learned sentencing Judge for a sentence of six months on each of the five offences to which he pleaded guilty and counsel for the applicant acquiesced in this submission. This was the sentence which the learned sentencing Judge imposed on each of those counts.

[16] The prosecutor contended that the whole of the suspended imprisonment should be invoked.

[17] The circumstances of both lots of offences as well as the applicant's criminal history generally, bespeak an angry, violent man. Drugs and alcohol have played a significant role in his offending.

[18] He has however taken steps to overcome his problems and there is evidence that he has made considerable progress in this regard. He has consulted a psychotherapist and received treatment for anxiety, anger and depression. He has obtained and maintained employment. There is evidence that his commitment to his family has played an important role in the progress that he has made.

[19] The complaint which the applicant makes concerns the order made by the learned sentencing Judge fixing the applicant's parole release date at 30 June 2011.

[20] In a part of the transcript of proceedings which had initially been deleted from the record, the following exchanges recorded:

> "Ms Keegan: Your Honour would still need to set a parole release date, your Honour?
>
> His Honour: I'm not sure what the effect of the - of an order is without - without fixing it or recommending it. I don't know - for example, he will have to serve certainly the 15 months, will he?
>
> Ms Kelsey: Your Honour, I - I believe Ms Keegan is right in a sense that your Honour does have to set a parole - parole release date. I'm not sure that he - he automatically has to serve the 15 months that's been activated unless your Honour sets a date."

[21] His Honour said in pronouncing sentence said:

> "Well, I think he should serve that 15 months and six months. I'll fix the parole release date as the 30th June 2011."

[22] The applicant it seems had denied involvement in these matters up to and including the committal proceedings. On 13 December 2009 he was indicted for these offences and a count of robbery. Upon the entering of a nolle prosequi on that count, the applicant pleaded guilty to these offences.

[23] His Honour referred to the applicant's admission of his involvement in these offences as something which had occurred "belatedly".

[24] In *R v Norden* [2009] QCA 42, Holmes JA discussed the nature of the task which a sentencing Judge who is required to consider invoking a term of suspended imprisonment is faced with:

> "What must be borne in mind is that a judge acting under s 147 is not re-sentencing an offender, but dealing with him for a breach of suspended sentence. The first step in that process is to consider whether it is unjust to make an order that the offender serve the whole of the suspended imprisonment. Necessarily, in deciding whether it is unjust to so order, relevant considerations will be that a parole release date or parole eligibility date is to be set, and when it is to be set. Decisions as to parole cannot sensibly be made as a separate exercise of discretion; one does not decide

> that it is not unjust to order the offender to serve the whole of the suspended imprisonment and only then turn to consideration of a parole date. Rather, the judgment required by s 147(2) must be made allowing for the prospective parole date, among other relevant factors. That process is appropriately regarded as entailing a single exercise of discretionary judgment; and the appeal from an order made under s 147(1)(b) should be regarded as correspondingly confined to an examination of that discretionary judgment."

[25] This situation is not altered because the order is made in combination with others.

[26] In a case such as the present the sentencing Court is obliged by s 160B(3) to fix a parole release date.

[27] Whilst the sentencing Court undoubtedly has power to fix a parole release date beyond the halfway mark or for that matter at the end of the term of imprisonment, some good reason must exist for taking such a course.

[28] In *R v Leu*; *R v Togia* [2008] QCA 201, Fraser JA (with whom the other members of the Court agreed) said at paragraph 20:

> "In the absence of any order concerning parole eligibility, the applicants would have become eligible to apply for a parole order after serving half of the five year term. The judge was empowered to fix a later date upon which the applicants would become eligible for parole, but such orders are the exception rather than the norm and should not be made unless there is good reason to do so."

[29] On its face the fixing of a parole release date less than two months before the end of a 21 months total term of imprisonment would appear to be anomalous. Some good reason would be required to justify the making of such an order.

[30] The learned sentencing Judge's remarks do not articulate any such reason. The remarks which are set out at para 20 might suggest that His Honour thought that the applicant had to serve the whole of the fifteen months' suspended sentence which had been invoked. If this is a correct interpretation of what His Honour said then it would be an erroneous belief.

[31] Failure to articulate a reason for such an order justifies a conclusion that the sentencing discretion has miscarried. See *R v Kitson* [2008] QCA 86 per Fraser JA at para 19.

[32] The appropriate sentence falls to be considered by this Court. Though the applicant's conduct towards his mother was vicious and cowardly and his earlier criminal history very serious, there were some factors to be taken into account in his favour. These were his plea of guilty albeit in the circumstances that have been described and the steps that he has taken with some degree of success to overcome his problems with drugs and alcohol.

[33] The sentence of six months on each of the offences subject to the application represents the starting point contended for by both parties and does not reflect any allowance for the matters just referred to.

[34] We think that an order fixing the applicant's parole release date at about the halfway mark, namely 30 October 2010 would make appropriate allowance for the various considerations which have to be allowed for.

[35] We would grant the application, allow the appeal and set aside the sentence imposed in so far as it sets a fixed date parole release date of 30 June 2011 and substitute therefore a parole release date of 30 October 2010.