

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Cooper* [2010] QCA 227

PARTIES: **R**  
**v**  
**COOPER, Emily Jane**  
(applicant)

FILE NO/S: CA No 164 of 2010  
DC No 3216 of 2009  
DC No 960 of 2010  
DC No 1125 of 2010

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 26 August 2010 (ex tempore reasons)

DELIVERED AT: Brisbane

HEARING DATE: 26 August 2010

JUDGES: Muir and Chesterman JJA and Mullins J  
Separate reasons for judgment of each member of the Court,  
Muir JA and Mullins J concurring as to the orders made,  
Chesterman JA dissenting

ORDER: **1. The application for extension of time within which to apply for leave to appeal against sentence is granted.**  
**2. The time for filing the application for leave to appeal against sentence is extended to 9 July 2010.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant was convicted on her pleas of guilty of one count armed robbery, two counts stealing, three counts fraud, one count burglary, one count attempted fraud, one count failing to properly dispose of syringe and one count possess a dangerous drug – where applicant sentenced to imprisonment for 4 years suspended after 14 months for an operational period of 5 years for the armed robbery count – where applicant sought extension of time within which to apply for leave to appeal against sentence – where the application was 12 days out of time – whether sentences were manifestly excessive – whether it is in the interests of justice to grant the extension

COUNSEL: The applicant appeared on her own behalf  
D R Kinsella for the respondent

**SOLICITORS:** The applicant appeared on her own behalf  
Director of Public Prosecutions (Queensland) for the  
respondent

**MUIR JA:** The application for adjournment is refused. I will ask Justice Mullins to deliver the first judgment.

**MULLINS J:** The applicant applies for an extension of time to appeal against the sentences imposed on her in the District Court on 27 May 2010.

Her application for extension and application for leave to appeal were filed in the Court on 9 July 2010, which was 12 days late.

The applicant appears for herself on this application. In her written application, she has given a very brief explanation for her delay. She is in prison and “had to submit request forms” and “to see sentence management.” She says that she then lodged the form as soon as possible with Legal Aid. She has produced to the Court a copy of a facsimile that shows that an application for leave to appeal was received by her from Legal Aid on 23 June 2010.

If given the extension, the applicant's main contention is that she was not given a pre-sentence custody declaration for the time she spent in custody between 22 September 2009 and 14 May 2010. Even if she is not entitled to a formal pre-sentence declaration, she relies on that imprisonment to assert that the effect of the sentence imposed on 27 May 2010 is to require her to serve two years in custody, which makes the sentence imposed on 27 May 2010 manifestly excessive.

The applicant also relies on an error made by the learned sentencing Judge in incorrectly describing her as being on probation and parole when she committed the armed robbery on 8 April 2009, when she was on probation only.

The applicant also has material to confirm the diagnosis and treatment of her bipolar disorder which was not produced before the sentencing Judge.

The applicant, who was drug addicted at the time she committed the offences, is 25 years old. She was 24 years old when she committed the offences.

The applicant had previously been given two years' probation on 14 July 2008. She breached that probation when she committed the armed robbery on 8 April 2009. She had otherwise breached that probation order and was re-sentenced in the Magistrates Court on 15 May 2009 to imprisonment for 12 months with an immediate parole release date.

The armed robbery and the other indictable offences for which the applicant was sentenced on 27 May 2010 (two counts of stealing, three counts of fraud and five counts of attempted fraud) were committed between late March and early April 2009, whilst she was on probation, but before she was given parole.

Because she did not provide a test sample on 3 June 2009, her parole was suspended for two months from the day that she was taken into custody, which was 23 July 2009. On that day, she was found in possession of four used syringes and was charged with a summary offence of failing to properly dispose of a syringe. When she was being inducted into the women's prison, she was found in possession of heroin that she had hidden for use whilst in prison. She was therefore charged with another summary offence of possession of dangerous drugs.

These two summary offences were committed while she was on parole, but she was not sentenced for these offences until the sentencing on 27 May 2010, when she was convicted but no further penalties were imposed.

The respondent has obtained an affidavit from Mr Merrett who works in sentence management at the prison who asserts that the applicant served the remainder of her sentence of 12 months until 14 May 2010 because she was on remand for the summary offences committed on 23 and 28 July 2009.

There does not seem to be scope for the operation of s 209 of the *Corrective Services Act* 2006 in relation to those offences, but it appears that s 199 of that Act may have resulted in the pre-sentence custody up to 14 May 2010 not being declarable at the time of the sentence on 27 May 2010.

The sentence of imprisonment of four years suspended after 14 months with an operational period of five years imposed for the armed robbery was moderate, but there is scope for the applicant to pursue her claim that the overall effect of the sentence, when taken in conjunction with the period that she spent in custody from 23 July 2009, was manifestly excessive.

Although the sentencing Judge was aware that the applicant had been in custody prior to being sentenced, for which it was submitted that no pre-sentence custody declaration could be given for the period up to 14 May 2010, the submissions before the sentencing Judge did not explore the overall effect of the sentence that was being imposed on 27 May 2010.

Because of the very short delay in filing the application and the complications arising from the applicant's pre-sentence imprisonment, I have concluded that it is in the interests of justice that the applicant be granted an extension of time to pursue her application for leave to appeal against the sentence.

I would order:

- (1) The application for extension of time within which to apply for leave to appeal against sentence is granted.
- (2) The time for filing the application for leave to appeal against sentence is extended to 9 July 2010.

**CHESTERMAN JA:** I would refuse the application.

The sentence that was in fact imposed upon the applicant met the justice of the case. Whatever the legal status of the time spent in custody prior to sentence, the learned sentencing Judge dealt with the reality of the situation thinking that the 10 months spent in custody could not be declared as time already served.

The sentence was structured to take that custody fully into account. The head sentence was ameliorated and then suspended to fix a time the Judge thought appropriate as time spent in actual custody. The sentence was well within range and is not, in my view, excessive.

The application for leave to appeal against sentence or, rather, an application for leave to appeal against sentence would, in my view, have no realistic prospects of success and for that reason, as I say, I would refuse this application.

**MUIR JA:** I acknowledge the merits of the reasons just given by Justice Chesterman. I regard the matter as borderline but, generally, for the reasons given by Justice Mullins and because of the degree of confusion which seemed to have existed at the time of sentencing, I would grant the application.

The order of the Court is as Justice Mullins proposed.