SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coulton* [2010] QCA 331
PARTIES:	**R** **v** **COULTON, Leslie James** (applicant)
FILE NO/S:	CA No 156 of 2010 DC No 183 of 2010 DC No 91 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	26 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2010
JUDGES:	Fraser and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application and allow the appeal.** **2. Set aside the parole release date fixed in the District Court at Townsville on 18 June 2010 and instead fix the applicant's parole release date as 15 December 2010.** **3. Declare that the nine days served by the applicant in presentence custody between 9 June 2010 and 17 June 2010 is imprisonment already served under the sentence in respect of count 1 in the ex officio indictment.** **4. Otherwise confirm the orders made in the District Court at Townsville on 18 June 2010.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted on his own plea of guilty of unlawfully using a motor vehicle – where that offence constituted a breach of a six month wholly suspended sentence – where the sentencing judge ordered the applicant to serve the whole of the six month suspended

sentence and imposed a cumulative sentence of six months imprisonment for the unlawful use offence – where the sentencing judge fixed a parole release date just over seven and a half months into the effective 12 months sentence – where the applicant applied for leave to appeal against his sentence – where the applicant contended that as the sentencing judge did not give reasons for fixing a parole release date past the halfway point of the head sentence the sentencing discretion miscarried – whether the sentencing discretion miscarried – whether the *Penalties and Sentences Act* 1992 (Qld) empowers a sentencing judge to fix a parole release date during the period of an activated suspended sentence which forms part of a combined sentence

Penalties and Sentences Act 1992 (Qld), s 159A

R v Anderson [2010] QCA 158, applied
R v Gray [2010] QCA 161, applied
R v Lui [2009] QCA 366, cited
R v Newman [2008] QCA 147, applied
R v Norden [2009] 2 Qd R 455; [2009] QCA 42, applied

COUNSEL: The applicant appeared on his own behalf
B G Campbell for the respondent

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

[1] **FRASER JA:** On 18 June 2010 the applicant was convicted on his plea of guilty of unlawfully using a motor vehicle on 9 June 2010. That offence constituted a breach of a wholly suspended sentence of six months imprisonment, with an operational period of three years, imposed on 15 April 2008 for two counts of burglary and one count of assault occasioning bodily harm whilst armed and in company. The sentencing judge ordered that the applicant serve the whole six months' suspended imprisonment and sentenced the applicant to a cumulative term of six months imprisonment for the unlawful use offence. The sentencing judge fixed a parole release date on 8 February 2011, after the applicant will have served a little over seven and a half months of the effective term of 12 months' imprisonment.

[2] The applicant has applied for leave to appeal against his sentence. The grounds of the application are that the sentencing discretion miscarried because the sentencing judge failed to give reasons for fixing a parole release date past the halfway point of the head sentence and that the sentence was manifestly excessive.

Circumstances of the offences

[3] Very early on a morning in March 2007 the applicant and another person entered a young man's house and stole beer and video games. A little later the applicant and two others entered another house. They were seen and pursued by the man who occupied that house. The applicant went outside and returned with a relative who was armed with a baseball bat. That accomplice, and the applicant who had armed

himself with a glass or terracotta cup, then set about violently assaulting the occupant. The complainant's injuries included tenderness to his spine, contusions to his face, lacerations to both elbows requiring suturing, and a very small pulmonary contusion or pneumothorax. The judge who sentenced the applicant for those offences remarked that he had participated in a "very savage bashing" and "a very vicious attack". His Honour decided to suspend the six months' imprisonment for those offences because of the prospects for the applicant's rehabilitation. He pleaded guilty, he had found employment, he had the benefit of a positive reference from his employer, and it appeared that there was a high probability that the applicant would be on full time employment by 6 June 2008.

[4] During the operational period of the suspended imprisonment, in June 2010, the applicant and his brother were at the complainant's house when the applicant's brother asked the complainant for her car key. The complainant subsequently discovered that the key had been taken. Police responded to complaints from local residents that a vehicle was hooning around the streets at high speed and doing burnouts on sporting fields. There was some very dangerous driving, a near miss with a pedestrian, and a collision with another car, but the prosecution could not identify who took the car keys or who drove the car. At some stage the applicant was in the car. The prosecutor did not contradict defence counsel's submissions that the applicant was to be sentenced as a party to the offence and not as the driver and that the applicant's brother, who was older than the applicant, perhaps had some influence over the applicant in persuading him to ride in the car.

Applicant's personal circumstances

[5] The applicant was 17 years old when he committed the offences in March 2007 and 20 when he committed the offence in June 2010. He had no criminal history before he committed the March 2007 offences. He breached his bail before he was dealt with for those offences. During 2008 and 2009 he committed offences whilst he was subject to the suspended sentence. He was convicted and fined for offences of trespass, contravene direction, driving under the influence, and two offences of breaching bail. He was discharged without a conviction for an offence of possessing a knife. A few months before the applicant committed the June 2010 offence he was convicted and fined for possessing a dangerous drug and he was ordered to serve 80 hours of community service for his unlawful use of a motor vehicle.

Sentencing remarks

[6] The sentencing judge referred to the circumstances of the earlier offending, noted that the applicant had pleaded guilty on an *ex officio* indictment to the unlawful use of a motor vehicle, and recorded his agreement with defence counsel's submission that it was not unjust to order the applicant to serve the whole of the suspended imprisonment. The sentencing judge referred to the warning given to the applicant by the judge who imposed the suspended imprisonment that the applicant would likely be ordered to serve that six month term if he re-offended. The sentencing judge rejected defence counsel's submission that the sentence for unlawful use of a motor vehicle should be served concurrently. His Honour remarked that such an order would result in no punishment. The sentencing judge recorded that the applicant had been in presentence custody for the unlawful use offence for nine days and took that period into account in fixing the applicant's parole release date.

Consideration

[7] The applicant, who represented himself at the hearing of his application for leave to appeal, did not make any submissions.

[8] The respondent's counsel submitted that the sentencing judge should have made a declaration under s 159A of the *Penalties and Sentences Act* 1992 (Qld) that the nine days which the applicant had served in presentence custody was time already served under the sentence in relation to the unlawful use of a vehicle charge. That submission must be accepted. The sentencing judge did not identify any ground for failing to exercise the discretion to make that declaration and none is apparent.

[9] In the sentencing judge's report to this Court, his Honour observed that a parole release date was fixed for the *ex officio* indictment and that, in relation to the suspended imprisonment, the order that the applicant serve the whole of the suspended imprisonment was in accordance with the *Penalties and Sentences Act*. As that reasoning apparently formed the essential explanation for the parole release date fixed by the sentencing judge it should have been articulated in the sentencing remarks,[1] but it was not. I accept the submission for the respondent that the sentencing judge misdirected himself that the *Penalties and Sentences Act* did not empower the fixing of a parole release date during the period of an activated suspended sentence. In the cases cited by the respondent's counsel, *R v Newman*[2], *R v Norden*[3] and *R v Gray*,[4] this Court analysed the relevant sections and decided that the Act confers that power upon sentencing judges. *R v Anderson*[5] is directly relevant in this application. In that case the Court confirmed that the Act empowers sentencing judges to fix a parole release date within the period of an activated suspended sentence which forms part of a combined sentence of imprisonment.

[10] Whether that is a correct exercise of the sentencing discretion must depend upon the facts of each case. In an appropriate case the circumstance that an offender has breached a suspended sentence will itself justify a sentencing judge in exercising the discretion instead to fix the parole release date at a point after the offender has served the whole of the activated suspended sentence, even though that might produce a parole release date well after the mid-point of a combined sentence. However the sentencing judge did not approach the sentence in that way but instead misdirected himself that the parole release date must be fixed at an appropriate time within the subsequent period of the combined sentence. It cannot be concluded that this error did not materially influence his Honour's selection of the parole release date. It is therefore necessary for this Court to exercise the sentencing discretion afresh.

[11] It is not unjust to order the applicant to serve the whole of the suspended imprisonment, particularly having regard to the seriousness of the original offence and the applicant's reversion to and persistence in criminal conduct in his offences after the suspended sentence was imposed, eight of which amounted to breaches of that suspended sentence. In light of the limited basis upon which the applicant fell to be sentenced for the offence of unlawful use of a motor vehicle as submitted by his counsel at the sentencing hearing, but having regard also to the applicant's

---

1 C.f. *R v Lui* [2009] QCA 366 at [14] to [15]; see also *R v Anderson* [2010] QCA 158 at [27] to [31].
2 [2008] QCA 147 at [19] to [22].
3 [2009] 2 Qd R 455 at [13] to [14].
4 [2010] QCA 161 at [2], [15], and [40] to [44].
5 [2010] QCA 158 at [24] to [25].

criminal history and particularly that this was his second offence of that character in breach of the suspended sentence, the appropriate term of imprisonment for that offence is six months. It should be declared that the nine days the applicant has served in presentence custody between 9 June and 17 June 2010 is taken to be imprisonment already served under the sentence in relation to that offence. It is appropriate to order that imprisonment to be served cumulatively upon the activated six months' imprisonment in circumstances in which the applicant committed that and other offences in breach of the suspended sentence of imprisonment imposed for the earlier and quite different offending.

[12] There should be a parole release date which takes into account those aggravating circumstances, but in view of the limited nature of the applicant's participation in the unlawful use offence, his youthfulness, and his cooperation and very early pleas of guilty, the parole release date should not be deferred for a lengthy period beyond the mid-point of the combined sentence. A substantial period on parole might assist the applicant to break his pattern of repeated offending, which will otherwise see him imprisoned for increasingly lengthy periods. It is appropriate to fix 15 December 2010 as the applicant's parole release date. The applicant will then have served more than six months in custody, taking his presentence custody into account, leaving a little less than six months to be served on parole.

Proposed Orders

[13] I would make the following orders:

1. Grant the application and allow the appeal.

2. Set aside the parole release date fixed in the District Court at Townsville on 18 June 2010 and instead fix the applicant's parole release date as 15 December 2010.

3. Declare that the nine days served by the applicant in presentence custody between 9 June 2010 and 17 June 2010 is imprisonment already served under the sentence in respect of count 1 in the ex officio indictment.

4. Otherwise confirm the orders made in the District Court at Townsville on 18 June 2010.

[14] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with those reasons and the orders which his Honour proposes.

[15] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the reasons of his Honour and with the proposed orders.