SUPREME COURT OF QUEENSLAND

CITATION:	*R v McQuillan* [2011] QCA 5
PARTIES:	**R** **v** **McQUILLAN, Ricky James** (applicant)
FILE NO/S:	CA No 133 of 2010 DC No 1020 of 2009 DC No 197 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	8 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2011
JUDGES:	Chief Justice, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – applicant pleaded guilty to 24 offences including breaking and entering, stealing and fraud – applicant sentenced to concurrent terms of imprisonment such that time served for new offences would be five years – sentences were made cumulative on remaining term of imprisonment for prior sentence – applicant breached parole in committing the instant offences – where applicant was to be extradited interstate to serve another term of imprisonment at conclusion of sentence – whether the term imposed was manifestly excessive in the totality of the circumstances CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – applicant taken into custody following commission of offences while on parole – parole was suspended – applicant pleaded guilty at an early stage – sentencing judge ordered parole eligibility after one third of sentence served – whether sentence failed to recognise

mitigating factors – whether pre-sentence custody declaration should have been made in relation to time served following suspension of parole until sentencing for new offences

Corrective Services Act 2006 (Qld), s 209(1)
Penalties and Sentences Act 1992 (Qld), s 159A, s 160C

R v Joyce [1986] 1 Qd R 47, considered

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

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

[1] **CHIEF JUSTICE**: The applicant seeks leave to appeal against sentences imposed upon him in the District Court on 19 May 2010.

[2] He was then sentenced for offences contained in a 22 count indictment which was presented ex officio, and another two count indictment.

[3] The most serious count on the ex officio indictment was breaking and entering commercial premises and stealing computer equipment involving a loss of the order of $10,000. That occurred in 2004. He was sentenced to five years imprisonment. The other offences, which attracted two to five year concurrent terms, involved breaking and entering and stealing from nine motor vehicles, entering and stealing from four business premises, entering a business premises with intent, receiving, four counts of fraud and possessing things used in connection with unlawful entry with a circumstance of aggravation. Those offences were committed in September 2009, most of them on the same day and at the same location. The Judge set a parole eligibility date of 18 July 2012, which will be 20 months into the five year term, that is, after one-third.

[4] The counts on the other indictment involved entering business premises and stealing alcohol and food, and attempting to enter a jewellery shop. The loss in relation to those counts was of the order of $820. Those offences were committed in May 2009. He was sentenced to concurrent terms of three years and two years respectively.

[5] The applicant was 39 years of age when sentenced. He has a lengthy Queensland and South Australian criminal history, largely explained by his drug addiction. He also suffers social phobia and anxiety, for which he is medicated. He has an eight year old son who lives with the son's mother.

[6] On 19 May 2004, the applicant pleaded guilty in the Magistrates Court to a raft of similar offending, including entering premises and committing an indictable offence, breaking and entering and committing an indictable offence, unlawful entry of a vehicle, fraud, receiving, attempted unlawful entry of a vehicle, unlawful use of motor vehicles, burglary. He was given an overall sentence of two years six months imprisonment, but it was suspended with an intensive drug rehabilitation order made. Unfortunately he re-offended, and on 21 July 2008, the drug rehabilitation order was vacated and he was re-sentenced to 34 months imprisonment, with

a parole eligibility date of 1 March 2009. When the applicant came to be sentenced in the District Court, his full-time release date was 20 November 2010.

[7] Also relevant to the issue of totality is the circumstance that on 28 June 2006 the applicant was sentenced in South Australia, for broadly similar offending, to five years imprisonment with a non-parole period of two years four months. That is yet to be served, and when he completes his imprisonment in Queensland, he will be extradited to South Australia to serve that term.

[8] The learned sentencing Judge took the view that the term he imposed, five years imprisonment, must commence at the conclusion of the term imposed in the Magistrates Court on 21 July 2008, that is 20 November 2010. He thereby followed the submission of both Counsel, but Counsel now acknowledge that His Honour was not bound to have the five year term commence at that time, although he had a discretion to order the term to be served cumulatively upon the term then being served. In fact the deferral of the commencement of the five year term was only for six months from when he was sentenced, and as Counsel for the respondent points out, the instant offending was separate offending and committed while on parole in two jurisdictions, warranting a cumulative order.

[9] His Honour declared two days of pre-sentence custody, 19 September 2009 when the applicant was taken into custody and the following day when his parole was suspended. The applicant contends that the whole of the period from 19 September 2009 to when he was sentenced on 19 May 2010 should have been declared. But for the rest of the period he was serving the sentence imposed in the Magistrates Court following suspension of parole, so that a declaration could not have been made in relation to that balance (s 159A *Penalties and Sentences Act* 1992 (Qld)).

[10] The applicant emphasized that his parole had been suspended not revoked. The pre-sentence custody certificate records that parole was suspended on 21 September 2009 and that "[i]f the offender is convicted and further sentenced to a term of imprisonment for these offences, the parole order will be automatically cancelled…" Compare s 209(1) *Corrective Services Act* 2006 (Qld). Even so, the imprisonment to which the applicant was subject involved serving the balance of the 34 month term imposed in the Magistrates Court on 21 July 2008: he was not simply on remand for the instant offences.

[11] The applicant submitted that the Judge made inadequate allowance for his pleas of guilty. His Honour ordered parole eligibility after one-third, which is unexceptionable.

[12] The broader question is whether imposing a five year term (with parole eligibility after 20 months), in the context of the then current imprisonment in Queensland and the time subsequently to be served in South Australia, was manifestly excessive. That the applicant must endure the consequences of breaching his parole is clear. The issue is whether a lesser term than five years should nevertheless have been set. The applicant contends that four years should have been set, and seeks a set release date. A parole release date could not be set with a four or five year term (s 160C *Penalties and Sentences Act* 1992 (Qld)). The Judge was entitled to contemplate parole for the applicant, with the supervision it entails, rather than suspended sentences.

[13] Allowing for the five year term, his serving 14 months for the earlier Queensland offending, and two years four months in South Australia, the overall period of imprisonment aggregates to eight and a half years, but if he is released on parole after 20 months of the five year term, he will serve five years two months.

[14] For serious offending of this extent, committed over a period of years, that seems not unreasonable, noting the persistence of his offending and his having committed the instant offences while on parole in two jurisdictions. Support rests in the now rather old but still relevant authority of *R v Joyce* [1986] 1 Qd R 47, 50.

[15] I would refuse the application.

[16] It remains to mention the Judge's unwittingly mistaken observation that the applicant committed counts one and two on the ex officio indictment while subject to the suspended sentence imposed in the Magistrates Court on 19 May 2004. Only count one fell into that category. But the error did not overall have any real significance for the outcome.

[17] **FRASER JA**: I agree with the reasons for judgment of the Chief Justice and the order proposed by his Honour.

[18] **WHITE JA**: I have read the reasons for judgment of the Chief Justice and agree with his Honour's reasons and the order which he proposes.