SUPREME COURT OF QUEENSLAND

CITATION:	*R v Paton* [2011] QCA 34
PARTIES:	**R** **v** **PATON, Nathan Richard** (applicant)
FILE NO/S:	CA No 177 of 2010 DC No 980 of 2009 DC No 1750 of 2009 DC No 1833 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2011
JUDGES:	Chief Justice, Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTEREFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to a number of burglary and stealing offences and offences relating to the dangerous operation of a motor vehicle – where the applicant was young in age and had a serious drug addiction – where the applicant had a lengthy criminal history – where the applicant co-operated with police – where the trial judge was required to make the sentence cumulative upon a previous suspended sentence under s 156A *Penalties and Sentences Act* 1992 (Qld) – whether the sentence was manifestly excessive *Criminal Code* 1899 (Qld), s 328A *Penalties and Sentences Act* 1992 (Qld), s 156A *R v Frame* [2009] QCA 9, cited *R v Hammond* (1996) 92 A Crim R 450; [1997] 2 Qd R 195; [1996] QCA 508, considered *R v Karbanowicz* [2003] QCA 543, considered

R v Mason [1998] QCA 177, considered
R v Matthews, unreported, Martin DCJ SC, DC No 1533 of 2010, 19 August 2010, considered
R v Paton [2010] QCA 298, cited
R v Reside [2000] QCA 104, considered
R v Theuerkauf & Theuerkauf; ex parte A-G (Qld) [2003] QCA 94, cited

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

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

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of White JA. I agree that the application should be refused, for those reasons.

[2] **MUIR JA**: I agree that the application for leave to appeal against sentence should be refused for the reasons given by White JA.

[3] **WHITE JA**: On 25 October 2010 this Court[1] granted the applicant's application for an extension of time to appeal against sentence.

[4] The applicant was sentenced on 13 August 2009 in the District Court at Brisbane on his own pleas of guilty to offences contained in two indictments. On the first indictment he pleaded guilty to two counts of stealing; one count of unlawfully using a motor vehicle to facilitate the commission of an indictable offence; four counts of unlawful use of a motor vehicle; one count of burglary and stealing and one count of the dangerous operation of a motor vehicle. On the second indictment he pleaded guilty to five counts of unlawful use of a motor vehicle; one count of stealing; three counts of burglary and stealing; one count of breaking, entering and stealing and one count of entering premises and stealing. He also pleaded guilty to a number of summary offences – two counts of failure to stop a motor vehicle; two counts of disqualified driving and one count of trespass.

[5] The applicant was born on 6 April 1986 and was aged 22 at the time of the offences. The offences were committed over less than a month in October 2008. He had then been released on parole for only 15 days. He had a very lengthy criminal history for like offences. He had three previous convictions for the dangerous operation of a motor vehicle[2] and an extensive traffic history. The prosecutor below mentioned some 146 convictions for property offences. On 16 April 2008 the applicant was convicted and sentenced to 12 months imprisonment in respect of burglary, stealing and unlawful use of a motor vehicle. He was also dealt with for breach of a suspended sentence imposed on 11 April 2007 for three offences of burglary. The court had imposed a sentence of 30 months imprisonment to be suspended for four years. On 16 April 2008 the magistrate activated that suspended sentence and ordered the applicant to serve the 30 months imprisonment with a parole release

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1 *R v Paton* [2010] QCA 298.

2 In her sentencing remarks her Honour mentioned two previous convictions, but this does not seem significant.

date on 16 September 2008 some five months later. At the time of these sentences he was in custody on parole suspension which was revoked automatically following his convictions. The full time release date in respect of the activated suspended sentence was 15 October 2010.

[6] Since the offences for which the applicant was being sentenced included an offence contained in the schedule of serious violent offences to the *Penalties and Sentences Act* 1992 (dangerous operation of a motor vehicle contrary to s 328A of the *Criminal Code*) during the currency of a parole order, the court was required to make the sentence for that offence cumulative upon the expiration of the 30 months sentence.[3] Her Honour imposed cumulative terms of imprisonment of three years for each of the burglary offences and for the dangerous operation of the motor vehicle and 18 months imprisonment on the other indictable offences on the sentence of 30 months but concurrent amongst those sentences. Her Honour set a parole eligibility date of 14 October 2011 that is, after serving a further 12 months from the full time release date of 15 October 2010 and at the one-third mark.

[7] It is only the schedule offence which is required to be cumulative – the dangerous operation of the motor vehicle. Her Honour did not state any other reason for making all the sentences cumulative other than the obligation to do so imposed by s 156A. Doing so has no obvious practical effect as the three year sentence subsumes the other sentences. Her Honour would have been justified in doing so for the other offences because they constituted a distinct body of offending quite separate in time from the earlier offending for which the suspended sentence had been activated.

[8] The applicant, who appeared for himself, contended that the sentence imposed was manifestly excessive. His grounds appear in documents which he handed up to the court and may be summarised:

- his offending was driven by his drug dependency from a very early age;
- since incarceration he has completed the high substance abuse program known as Pathways;
- he is well on the road to rehabilitation;
- he has maintained employment whilst in custody as well as completing a fitness course and a brick laying course;
- the sentence is a crushing one since, with his history of offending on parole, he is unlikely to be granted parole;
- thus he will serve the entire 30 month sentence and possibly the balance three year sentence making a total of five and a half years imprisonment and has received no benefit from his extensive co-operation in the administration of justice.

[9] The applicant contends that he should have been granted an intensive correctional order under strict supervision or given a parole eligibility date of 14 October 2011 or he should be re-sentenced to a total of four years with no parole eligibility date and a suspended sentence.

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3 *Penalties and Sentences Act* 1992, s 156A.

The circumstances of the offending

[10] The facts relating to the charges on both indictments were the subject of schedules of facts handed up to the court. On 27 October 2008 at about 10.30am police officers conducting a patrol at Inala in a marked police vehicle noticed a stationary car which had been reported as stolen. They did a U-turn activating lights and sirens in an attempt to intercept the car but it took off and police lost sight of it. At about 2.00pm police were alerted to the area where the car was seen. The stolen car, driven by the applicant, crossed in front of the police car, causing it to brake heavily, and sped away. The police activating lights and siren commenced pursuit. The applicant was seen to increase the car's speed and failed to slow down or stop at two approaching give way signs. It turned right into oncoming traffic on Blunder Road, a 70 kilometre per hour, four lane carriageway with two lanes in either direction divided by a concrete barrier and a median strip. Cars were parked on the shoulder of the road and the stolen vehicle was seen to drive out into the lanes and towards oncoming traffic. A number of cars were forced to take evasive action to avoid colliding with the stolen car. That section of Blunder Road consists of hills and rises which restricted the vision of motorists. Traffic was described as reasonably heavy and the stolen car travelled at speeds between 60 and 119 kilometres per hour. It passed through a major intersection with four lanes converging in each direction, still on the wrong side of the road, through a red light and without noticeably slowing. A number of cars were forced to take evasive action through the intersection.

[11] Police terminated the pursuit due to the danger. Shortly after, the stolen vehicle was found abandoned. Its front driver's side tyre had disintegrated and it appeared that it had been driven for some distance on its wheel rim. The applicant was arrested in relation to other matters on 28 October 2008 and in the interview made admissions in relation to the driving offence, agreeing that his manner of driving was dangerous.

[12] The applicant participated in "drive around" exercises with police on 28 October and 1 November 2008 in an effort to clear up a number of offences. In the month preceding his arrest the applicant, either alone or in company, had stolen a number of cars, usually from the driveway of homes and/or stole some of the contents. He had broken into houses and rummaged through the owners' possessions taking items. A safe was stolen from one property containing personal documents, jewellery and cash to the value of $20,000. There was not a great deal of damage done to the cars or destruction of other property. The prosecutor below conceded that whilst the applicant was clearly implicated in the dangerous operation of the motor vehicle and in some of the burglary offences there was not a strong case in respect of other offences. For the majority of the offences the case against the applicant was largely his own admissions. The plea of guilty was described as timely after a full hand up committal hearing and entered at an early stage upon the presentation of the indictment.

[13] The prosecutor submitted, rightly, that the applicant was a recidivist offender who was a menace to society in terms of the property of others and his driving. The applicant had three prior convictions for the dangerous operation of a motor vehicle. The prosecutor submitted for a cumulative head sentence of three years to attach to the burglary and dangerous operation counts with lesser concurrent terms in relation to each of the other counts. He submitted that parole eligibility should be fixed at one-third of the three years to recognise the plea of guilty and co-operation.

[14] Counsel for the applicant submitted for a suspended sentence or a sentence that did not involve his client having to deal with the authorities such as parole (these were his instructions, he said). He did not disagree with the structure of the sentence proposed by the prosecutor nor with the range. In that circumstance the applicant faces a considerable difficulty.[4]

Discussion

[15] When the applicant was sentenced he had undertaken no rehabilitation programs although his counsel mentioned that he was hoping to improve his health and educational standing but had been unable to participate in any drug and alcohol programs because he was a remand prisoner. Her Honour rightly recognised that the applicant's driving was "seriously dangerous", occurring, as it did, over a relatively long period of time in suburban streets during the day time when other vehicles and pedestrians were around with the real potential that people could have been seriously hurt or killed. Her Honour commented on the applicant's disruptive and dysfunctional upbringing in a family where his siblings had been involved in crime, particularly drugs. She noted that he had been involved in the drug scene from a very early age and that his offending was related to that dependency. The applicant's pleas of guilty at an early stage and his co-operation with police were acknowledged and for which he was entitled to a significant discount.

[16] In setting the head sentence at three years her Honour said she took into account the applicant's young age, his full co-operation with police and that any term of imprisonment would be cumulative. Because of his criminal history her Honour was not persuaded that a suspended sentence was appropriate and she was clearly correct. Her Honour mentioned the applicant's reluctance to have as part of his sentence a parole eligibility order observing only that it was a matter for him.

[17] Mr Meredith, counsel for the respondent, referred to a number of comparable decisions to support his submission that the sentence imposed below was well within range. The applicant in *R v Karbanowicz*[5] was sentenced in respect of 14 offences of burglary and stealing and other offences including unlawful use of a motor vehicle with a circumstance of aggravation. He was sentenced to four years imprisonment for the burglary and stealing offences suspended after 15 months with an operational period of four years. On the other offences he was sentenced to 12 months imprisonment. He was aged 20 with a prior criminal history involving some drug matters and offences of dishonesty. He had not been in prison before. The explanation for his offending was his heroin addiction. In none of the offences was violence involved. In all some $60,000 worth of property was taken or damaged. Some of the offences were committed whilst on bail. He pleaded guilty and co-operated with police by disclosing a number of houses from which he had stolen. His upbringing was particularly unfortunate. The court reviewed a number of other sentences and concluded that a head sentence of four years was well within the relevant range. Because of a factor not relevant to this application, on appeal his sentence was suspended after serving nine months. The present applicant's overall criminal history is worse and the dangerous driving a serious example of that offence.

[18] In *R v Mason*[6] the applicant was aged 17 and 18 when he was sentenced for housebreaking offences. He was sentenced to imprisonment on separate

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4 *R v Frame* [2009] QCA 9 at [5].
5 [2003] QCA 543.
6 [1998] QCA 177.

indictments for numerous offences of burglary and stealing dealt with on different occasions but which were all to be served concurrently. He was on parole, probation and bail in relation to some of the offending. He had some unlicensed driving and unlawful use of a motor vehicle charges. He was described as being fully co-operative with police after he was apprehended and pleaded guilty on ex officio indictment. About $9,500 remained outstanding from the offending. A recommendation was made that he be considered eligible for release on parole after serving 19 months. That applicant had a previous criminal history for similar offending. The sentence of four years was described as high but not manifestly excessive. He co-operated with police in telling them of offending which they did not connect to him. At the time of his offending he was likely addicted to heroin. The court reduced his eligibility for parole to nine months in the hope that with a head sentence of four years he would be deterred from further offending.

[19] Mr Meredith also referred to *R v Reside*.[7] That applicant pleaded guilty to a large number of property offences contained on three indictments. For the most part they involved entering dwellings and stealing and one count of unlawful possession of a motor vehicle. He was sentenced to four years imprisonment in respect of the entering a dwelling with intent, burglary and stealing offences suspended after 18 months with an operational period of four years. The applicant engaged in a short chase with police in a vehicle which contained his wife and two year old son. He was, however, only charged with unlawful use of a motor vehicle. He was aged 25 who, with his wife, made frank admissions about many property offences. They were amphetamine users and committed the offences to support their habit. The applicant had a most unfortunate younger life and had attended drug rehabilitation courses in prison. The sentence was not disturbed.

[20] Mr Meredith also referred to *R v Theuerkauf & Theuerkauf; ex parte A-G (Qld)*[8], a case concerning the dangerous operation of a motor vehicle. That sentence is not comparable in as much as the dangerous driving was far worse than the present with aggravating features not here present of deliberately driving at a complainant. Furthermore, it was an Attorney-General's appeal and the moderation which then attended such appeals makes it an unsuitable comparable sentence.

[21] Those cases would suggest that a head sentence of four years for the multiple burglary offences, bearing in mind the applicant's lengthy previous criminal history for like offending, would not have been beyond range. A head sentence of three years for the dangerous operation of the motor vehicle offence, given that the applicant had three previous convictions for that offence together with many traffic offences including driving unlicensed, suggests that a severe sentence was called for. Because the sentence was to be served cumulatively upon the expiration of the activated suspended sentence this required for some moderation when looking at the totality of the sentences. This her Honour did by reducing the head sentence from what would have been an unremarkable four years to three years. Apart from the requirement that the dangerous operation of a motor vehicle offence was required to be cumulative, there was good reason for imposing a cumulative sentence with respect to the other offending. Her Honour appropriately took into account the plea of guilty and co-operation in the administration of justice by the recommendation for parole after 12 months, that is after serving one-third of that sentence.

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7 [2000] QCA 104.

8 [2003] QCA 94.

[22] The applicant has referred to the case of *R v Matthews*, a decision of Judge Martin SC in the District Court at Brisbane on 19 August 2010. The applicant had pleaded guilty to 61 indictable offences including 30 offences of breaking or entering premises. Seventeen of those related to entering motor vehicles. The offending occurred over approximately a five year period but the majority over a relatively short period. The learned sentencing judge noted that the applicant had a very bad criminal history for similar offending due to a very bad drug addiction. He had been given opportunities to rehabilitate in the past. The offender was sentenced to a head sentence of three years imprisonment ordered to be served cumulatively upon a sentence that he was serving with a parole eligibility date of 29 August 2011. It seems that the offender in that case had been free of drugs for two years so that his Honour was able to comment that he was then, at the time of sentence, well on the way to rehabilitation.

[23] The applicant, here, particularly drew the court's attention to observations made by this Court in *R v Hammond*[9], quoted by Judge Martin particularly at pp 455-456, contending that those observations were apt in his case:

> "The true relevance of drug addiction as a factor contributing to the commission of crime and its effect in the sentencing process has never been adequately explained. In our view it is a factor that may help an offender to the extent of showing that his or her descent into the crime in question was a *secondary* consequence of desperation produced by a human weakness rather than a primary choice."

That may well be the explanation for this applicant's offending. It is not an excuse. If, as the applicant contended before us, he is truly on the path to rehabilitation from his dependence on alcohol and drugs and ceases to believe that being a criminal is a way of life, his prospects of obtaining parole are significantly enhanced notwithstanding his poor prior history of performance on parole. Those are matters now for the parole authority not this Court. In *Matthews* the court had evidence of that rehabilitation at the time of sentence. It cannot be said, looking at the applicant's prior criminal history, the duration and dangerousness of the driving and the number of offences, that the head sentence was manifestly excessive. Due recognition was given to the applicant's co-operation in the administration of justice with the parole eligibility date after one-third. I can discern no error below and would refuse the application for leave to appeal.

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9 (1996) 92 A Crim R 450.