# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Torrens* [2011] QCA 38 |
| PARTIES: | **R**<br>**v**<br>**TORRENS, Robert Wayne**<br>(applicant) |
| FILE NO/S: | CA No 184 of 2010<br>DC No 251 of 2010<br>DC No 258 of 2010<br>DC No 307 of 2010 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Ipswich |
| DELIVERED ON: | 11 March 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 March 2011 |
| JUDGES: | Margaret Wilson AJA, Ann Lyons and Martin JJ<br>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 dismissed** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of dangerous operation of a motor vehicle with a circumstance of aggravation, two counts of stealing, two counts of attempting to unlawfully use a motor vehicle, one count of burglary and stealing, one count of entering premises with intent to commit an indictable offence and one count of entering premises and stealing – where applicant sentenced to four years' imprisonment – where parole eligibility date set at a point after 37.5 per cent of the sentence had been served – where applicant cooperated and made full admissions – whether the parole eligibility date being set at a point later then after one third of the sentence has been served makes the sentence imposed manifestly excessive<br><br>*Penalties and Sentences Act* 1992 (Qld)<br><br>*R v Hess* [2002] QCA 184, cited<br>*R v PAA* [2006] QCA 56, cited<br>*R v Robertson* [2008] QCA 164, cited<br>*R v Ungvari* [2010] QCA 134, cited |

COUNSEL: J McInnes for the applicant
M Lehane for the respondent

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

[1] **MARGARET WILSON AJA**: The application for leave to appeal against sentence should be dismissed for the reasons given by Justice Ann Lyons.

[2] **ANN LYONS J**: On 2 August 2010 the applicant, who is currently 25 years of age, pleaded guilty to eight offences on Ipswich District Court indictments 251/10 and 258/10. The sentences imposed meant he was effectively sentenced to four years' imprisonment with parole eligibility fixed at a date after he had served 18 months in custody. He now seeks leave to appeal contending that the sentence in all the circumstances was manifestly excessive.

[3] Indictment 258/10 contained one count of dangerous operation of a motor vehicle on 4 January 2010 with circumstances of aggravation. The circumstances of aggravation were that at the time of committing the offence he was adversely affected by an intoxicating substance and he had previously been convicted of a similar offence also while intoxicated. He was therefore sentenced to a period of two and a half years' imprisonment and was absolutely disqualified from holding a driver's licence given his previous history of driving offences.

[4] He also pleaded guilty to seven counts on ex-officio indictment 251/10 which charged two counts of stealing, two counts of unlawful use of a motor vehicle, one count of burglary and stealing, one count of entering premises with intent to commit an indictable offence and one count of entering premises and stealing. Those offences had all occurred between August 2009 and February 2010. A period of imprisonment of 12 months was imposed to be served concurrently with the sentence imposed for the dangerous driving offence.

[5] All of those offences also breached a suspended sentence which had been imposed on 26 November 2008. A period of 18 months was activated and was ordered to be served cumulatively on the other periods of imprisonment which were imposed.

[6] Accordingly the effective head sentence was four years' imprisonment. A parole eligibility date was set at 9 September 2011. A period of pre-sentence custody of 146 days was able to be declared. This meant that the applicant had essentially to serve 18 months' imprisonment before he would even be considered for parole.

**This Appeal**

[7] Counsel for the applicant conceded that the sentences imposed for each of the eight offences were within range but the sentence was excessive when consideration was given to the date at which parole eligibility had been fixed. The applicant therefore seeks leave to appeal his sentence on the basis that the parole eligibility date was fixed by the learned sentencing judge at a date beyond the usual one third mark of the sentence. Counsel argues that the applicant had a legitimate expectation of parole eligibility at the usual one third point of his sentence because of his extensive co-operation. It was clear that the applicant had made full admissions and that the matter had proceeded by way of an ex-officio indictment in relation to seven counts and by way of a full hand up committal in relation to the one count indictment.

[8] A parole release date at the one third mark would have been after 16 months' imprisonment rather than the date which was fixed which was after 18 months.

[9] The applicant argues that parole eligibility should have been set at 9 July 2011 rather than 9 September 2011.

**The Circumstances of the Offences**

[10] Counts 1 to 3 on the ex-officio indictment occurred in one week in August/September 2009. Count 1 involved stealing $300 from the house of an elderly couple who were at home at the time. Counts 2 and 3 involved unsuccessful attempts on the same night to use cars to travel from Wynnum to Ipswich.

[11] Counts 4 to 6 all occurred on 4 February 2010. The applicant broke a car window in an attempt to steal. He then entered a child care centre and rifled through a handbag but was interrupted by its owner. He subsequently walked into a store and stole $550 from a cash register after pushing the cashier aside to do so.

[12] Count 7 involved a count of going to Coles and stealing money on 28 February 2010.

[13] The single count indictment involved a charge of dangerous operation of a motor vehicle whilst adversely affected. This offence related to a police chase on 4 January 2010. That chase took 20 minutes and covered a total of 13 kms where there were incidents of excessive speeding as well as running two stop signs and a red light, driving on the wrong side of the road and failing to indicate turns and lane changes. The pursuit started at 1:54 am and he had a blood alcohol concentration of 0.117 at 4:05 am. He did not have a licence and the car was not registered.

[14] He was granted bail on that offence and was therefore on bail when he committed counts 4 to 7 on the ex-officio indictment.

[15] The suspended sentence imposed on 26 November 2008 was for thirteen offences which included entering premises, unlawful use of motor vehicles and dangerous operation of a motor vehicle on 12 October 2008, again involving a police chase. On that date he was sentenced to 18 months' imprisonment on each offence which was fully suspended for two years. He therefore breached the suspended sentence by committing these offences in the period August 2009 to February 2010. That offending commenced nine months into the operational period of the suspended sentence and the dangerous operation of a motor vehicle occurred some 14 months into the operational period.

**The Crown's Submission on Sentence**

[16] At sentence the prosecutor referred to the decision of *R v Hess*[1] as a comparable decision in relation to dangerous operation of a motor vehicle. Hess had been sentenced to two years for a police chase. He was 28 years old and had a blood alcohol reading of 0.176. The sentence imposed of two years with parole after nine months incorporated a reduction as it was to be served cumulatively upon a five and a half year sentence.

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1 [2002] QCA 184.

[17] The Crown's ultimate submission on sentence was that the applicant be sentenced to a head sentence of three years' imprisonment for the indictable offences and that a period of 18 months be activated for the breach of the suspended sentence which should be served cumulatively. Effectively therefore a sentence of four and a half years was argued for. It was also submitted that a suspended sentence would not provide a period of supervision and that a period of parole was needed to ensure that he did not commit further offences. The Crown prosecutor noted:

> "Of course that then places your Honour in a position that a parole eligibility date is what's required by law, or a suspended sentence.
>
> My friend will no doubt make a submission with respect to a suspended sentence, or a lesser head term to three years, with a parole release date. In my submission that would be far too low for this defendant. The – the period should be four years and six months."

**The Defence's Submissions**

[18] The Defence submissions noted that in relation to the period of imprisonment of four years which had been imposed on 5 May 2006 the applicant had effectively served three years in custody of that four year sentence. Counsel submitted therefore that the sentence sought was a sentence which gave the certainty of a fixed parole release date rather than an uncertain parole eligibility date. That submission was based on a very real concern that because of his criminal history he would serve a long period of time in actual custody. Counsel essentially suggested a head sentence for all matters of three years with a parole release date which reflected a period of ten months in custody. This would then leave a long period on parole which would mean he would have supervision for two years and two months after his release.

[19] In support of this submission Counsel relied on the applicant's youth, the promise of work on his release and the fact that he had the support of his de-facto partner of five years. He also noted that he was responsible for four children. Counsel stated that the criminal history was consistent with drug addiction and drug use but that the applicant had taken the initiative of getting in touch with the ATODS (Alcohol Tobacco and Other Drugs Service) and wished to address his alcohol and drug addiction. He also had very concerning personal circumstances given that his mother was diagnosed with liver cancer, his aunt had breast cancer and his grandmother had bone cancer.

**The sentence imposed**

[20] In imposing the sentence the learned sentencing judge specifically acknowledged the applicant's pleas of guilty but also indicated that given the seriousness of the offence of dangerous operation of a motor vehicle he had to serve a period of imprisonment in relation to that charge.

[21] The learned judge in her Honour's sentencing remarks noted that over and above the seriousness of that offence were other factors which made the applicant's offending even more serious. In particular he had a serious criminal history for like offending, he had committed offences whilst on bail and he had breached a suspended sentence. Her Honour stated:

> "It's made worse by the fact that you've got a history involving dangerous operation of a motor vehicle, drink driving, stealing cars, and, in fact, you also have a history for stealing, and robbery, and entering premises, and those type of property offences.
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> It doesn't look as though you've ever actually had a licence, but you have got a history which involves offences of driving under the influence, or putting a car in motion under the influence, dangerous operation whilst adversely affected, and dangerous driving, and, in fact, at the time you were on a suspended sentence for the dangerous driving, that you committed this dangerous driving.
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> You were on bail for the dangerous driving, in this case, when you committed further offences of stealing, although I accept that what you told the police was probably true, that you were, in fact, desperate for money and that that's why you were stealing the property.
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> That explains why you did it, but the problem that I face here is that, whilst I accept that you're very sorry for what you did…you continue to offend. You've been locked up in custody for three years and when you get released, within about 12 months, you start offending again.
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> So, whilst I accept that you're very sorry for what you've done, it's seems to me that, nonetheless, a substantial period of imprisonment is called for. I take into account the fact that you are still young, that you have young children who you care very much for, and a partner who you care very much for. I take into account the fact that you've pleaded guilty, but this - these are very serious offences, particularly with your history, and even though you made admissions, you simply don't seem to be able to stop offending.

[22] Following an interjection from the applicant that he was now getting the help he needed to stop his offending her Honour continued:

> "Well, I'm going to give you the earliest recommendation for parole that I can, but it's not going to be the recommendation for parole that you want, Mr Torrens."

[23] Those words of her Honour have been seized upon by the applicant to argue that her Honour actually intended to impose the earliest parole recommendation that she could but had failed to do so essentially due to an error in calculation.

[24] The applicant also argues that the sentence sought on appeal whilst not a great reduction does go beyond 'fine tuning'. Counsel for the applicant relies in particular on the decision of *R v PAA*[2] where Jerrard JA endorsed the proposition that there was a usual practice to grant a parole release at the one third mark on pleas of guilty. His Honour held:

> "[14] The recommendation for parole after eighteen months only reduces the minimum non-release time by twenty-five per cent, since the automatically occurring parole eligibility date would be after

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2 [2006] QCA 56.

> twenty-four months. In light of the early notification of pleas of guilty, the applicant's expressed remorse, his age of almost seventy-eight, the absence of any prior convictions at all, his excellent work record, and the fact that he will serve his prison sentence in a country different from his country of origin to which he will be deported immediately upon his release, or so the sentencing Judge was told, I consider that the learned sentencing Judge erred in not reducing the minimum non-release period by a greater degree than twenty-five per cent. A reduction of up to one-third is common enough in the sentencing practices of the criminal courts of this State, and there are matters in mitigation in this applicant's case already referred to which warrant a greater reduction than one-third. I also consider that this applicant should be given a specified release date rather than one dependent upon a decision of the Community Corrections Board."

[25] Whilst his Honour did recognise a 'common approach' it was clear in that decision that the ultimate sentence in fact depended on the actual circumstances of the particular case. In the circumstances of that case, as his Honour stated, there were no prior convictions and there were some unusual personal factors as well. The importance of focusing on the actual circumstances in an individual case was also recently endorsed in the decision of *R v Robertson*[3]. In that case this Court considered a similar argument to that advanced by the present applicant, namely that there should have been 'the usual allowance' for release at the one third mark. The Court however rejected such an approach and held:

> "[2] … One of those submissions was that the sentencing judge did not apply "the usual allowance of one-third but rather increased that to something nearer 42%." It was submitted that the "usual" factors in mitigation "entitled me to be released at the one-third mark in accordance with the ordinary approach".
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> [3] I would reject that reasoning process, although in the end I agree that release after serving 12 months of a three year term is the appropriate sentence **when all of the relevant factors are taken into account in this particular case.**
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> [4] The applicant's submission referred to the quite common cases in which an offender's personal circumstances suggest an encouraging view of the prospects of rehabilitation and there are other factors in mitigation, such as a plea of guilty, remorse, and co-operation with authorities. In such cases, depending on the particular circumstances, recommendations for consideration for post-prison community based release or suspension of sentence are not uncommonly made after about one-third of the sentence has been served.
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> [5] It must be borne in mind though that most of those sentences were imposed in the context of a legislative regime under which (to put it broadly) in the absence of any more favourable order, prisoners were eligible to be considered for parole at the mid-point of the term of imprisonment imposed by the court. That remains the case for many sentences of more than three years imprisonment regulated by the

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3 [2008] QCA 164.

> *Penalties and Sentences Act* 1992 (Qld). In respect of those sentences it has been held that "good reason" must be demonstrated before fixing as the parole eligibility date a point later than the mid-point of the term.
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> [6] To the extent that decisions establish ranges within which sentences are regularly imposed for similar offending, it is of course right to take them into account, but in the end the proportion which the period to be served in prison bears to the whole term is to be fixed by taking into account all of the circumstances rather than by some rule of thumb. **The authorities do not condone, in any aspect of sentencing, some arithmetical approach under which a deduction is made from a pre-determined range of sentences**: the sentencing judge is obliged "to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all."" (footnotes omitted)

[26] Accordingly that decision made it very clear that all the relevant factors must be taken into account and that an arithmetical approach is not the appropriate way to proceed. In my view in the present case her Honour very carefully considered all of the relevant factors in the applicant's favour but the objective negative factors such as his prior history, his offending whilst on bail and the breach of his suspended sentence meant that the sentence imposed needed to reflect that reality. Her Honour in fact specifically said so in her reasons which are set out above in paragraphs [20] and [21].

[27] The applicant had a very concerning and lengthy criminal history which had commenced in 2002. He had been sentenced to numerous offences on 5 May 2006 which had included robbery with actual violence whilst armed and in company on 3 and 6 June 2005 as well as one count of dangerous operation of a motor vehicle whilst intoxicated and five counts of unlawful use of a motor vehicle. He received a head sentence of four years' imprisonment.

[28] The next period of offending had then commenced in October 2008 after he served almost three years of the four year sentence. Those October 2008 offences included entering premises, four counts of unlawful use of a motor vehicle and a further count of dangerous operation of a motor vehicle whilst intoxicated. He was given a fully suspended sentence for those offences which in the circumstances of his previous offending was a significant indulgence.

[29] It is clear from her Honour's sentencing remarks that she was very aware of all of this history which was clearly very concerning to her. The sentence imposed was a sentence of two and a half years' imprisonment for the dangerous operation of a motor vehicle with concurrent sentences of 12 months for the property offences. In my view those sentences were entirely appropriate and this has in fact also been conceded as appropriate by Counsel for the applicant. As the breach of the suspended sentence was proved the whole of the suspended sentence of 18 months was imposed. It was also clearly appropriate to activate the whole of the period of the suspended sentence given he was once again before the court for like offending just nine months after the fully suspended sentence had been initially imposed.

[30] Her Honour also specifically recognised the applicant's personal circumstances which included his youth, his young family, family illness and his desire to

rehabilitate. In my view however, when those personal factors are balanced against the other relevant factors including his long history of offending, his breach of the recently imposed fully suspended sentence as well as a breach of bail, the sentence imposed was not manifestly excessive. I do not consider that the learned sentencing judge took too unfavourable a view of those factors given the circumstances that could not be ignored. The applicant had been given a considerable opportunity to amend his ways when his sentence had been fully suspended in November 2008 and he had squandered that opportunity.

[31] I also consider that the sentence imposed, and the parole eligibility date set as part of that sentence, does adequately recognise the applicant's pleas of guilty. In *R v Ungvari*[4] the importance of an appropriate recognition to a plea of guilty was emphasised, White JA with whom the President and Muir JA agreed stated:

> "[30] As a matter of general practice in this jurisdiction, the one-third mark of the sentence of imprisonment is seen as an appropriate starting point to recognise a plea of guilty. It may be adjusted up or down as the particular circumstances warrant. One-third of eight years is approximately two years and eight months. When the pre-sentence custody of 113 days is taken into account, a parole eligibility date order of 1 November 2012 means that the applicant will have served three years and approximately two months of the total sentence. That is, the applicant will be eligible for parole after serving just on 40 per cent of the sentence.
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> [31] It is a positive obligation for a sentencing court to take into account a guilty plea and that the primary Judge did. A reduction may be made having regard to the time at which the offender pleaded guilty or informed the relevant law enforcement agency of his intention to plead guilty. A recommendation for consideration for early release on parole is included within the definition of "sentence" in s 4 of the *Penalties and Sentences Act* 1992. It is important in the overall administration of justice that offenders be encouraged to plead guilty by an appropriate reduction in the sentence which would have been imposed upon them had they elected to go to trial. Such a course frees resources which would otherwise be devoted to a trial including the availability of courtrooms, the cost of a full trial, and inconvenience to witnesses. Although the parole eligibility recommendation is a matter for the sentencing court's discretion, the very modest discount made below for the plea of guilty suggests that his Honour took too unfavourable a view of it and thereby failed to accord the plea sufficient weight. An appropriate recognition would be parole eligibility after serving two years and eight months, taking into account the 113 days declared, which gives a parole eligibility date of 26 April 2012." (footnotes omitted)

[32] As this Court has so often said the proportion that the period to be served in prison bears to the whole term is to be fixed by taking into account all of the circumstances rather than by some rule of thumb. I consider that a period of imprisonment of four years with a parole eligibility date after 18 months was a sentence which took into account all the circumstances. Even if an arithmetical approach was to be adopted it

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4 [2010] QCA 134.

is clear that the date set was adjusted to slightly more than the one third mark but was still six months less than the half way mark of two years. Such a date gave the applicant a parole eligibility date in fact at a point after 37.5 per cent of the sentence had been served as opposed to the 33.33 per cent sought by the applicant. In my view the parole eligibility date which was fixed did give appropriate recognition to the pleas of guilty and could not be described in truth as a 'modest discount".

[33] Importantly however the sentence was fixed after taking into account all the circumstances as required. The sentencing discretion did not miscarry, the sentence was not manifestly excessive. I consider the sentence imposed was a sound exercise of the sentencing discretion.

[34] I would dismiss the application for leave to appeal.

[35] **MARTIN J:** For the reasons given by Ann Lyons J, I would dismiss the application for leave to appeal against sentence.