SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hyatt* [2011] QCA 55
PARTIES:	**R** **v** **HYATT, Martin Leigh** (applicant)
FILE NO/S:	CA No 261 of 2010 DC No 223 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	29 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2011
JUDGES:	Margaret Wilson AJA, Ann Lyons and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to a number of charges relating to unlawful use of a motor vehicle, dangerous operation of a motor vehicle, stealing, wilful damage, burglary, commission of an indictable offence, entering premises, assault and escaping from lawful custody – where the applicant was sentenced to six and a half years with parole eligibility date set at three years of that sentence – where sentencing judge took into account applicant's plea of guilty and apologies to officers who had been subject of his attack in the Magistrates Court – where sentencing judge took into account recidivist offending of applicant- whether setting the parole eligibility date at the three year mark made the sentence excessive *Penalties and Sentences Act* 1992 (Qld), s 10, s 13 *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, cited *Bawden v ACI Operations P/L* [2003] QCA 293, cited *Camden & Anor v McKenzie & Ors* [2008] 1 Qd R 39; [2007] QCA 136, cited *Crystal Dawn Pty Ltd & Taylor v Redruth Pty Ltd* [1998] QCA 373, cited

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Corrigan [1994] 2 Qd R 415; [1993] QCA 417, cited
R v Doraho [2011] QCA 29, considered
R v Finch [2009] QCA 276, cited
R v Hantzisavvas [1981] Qd R 74, cited
R v Kitson [2008] QCA 86, cited
R v Melville [2009] QCA 108, cited
R v Norton [2007] QCA 320,cited
R v Ungvari [2010] QCA 134, cited

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

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

[1] **MARGARET WILSON AJA:** I have read the reasons for judgment of Martin J, and adopt his account of the relevant facts and the sentences imposed.

[2] The learned sentencing judge commented on the applicant's antecedents and the seriousness of his offending behaviour, and then said –

> "I take into account your plea of guilty to all of these offences at an early date, in so far as the ex officio indictment is concerned particularly, your cooperation with the administration of justice to that extent, what has been tendered to the Court on your behalf, although your apologies for your behaviour in Court were somewhat belated. I take into account also what your counsel has said. But I must take into account the extent and nature of your criminal behaviour and recidivist offending."

[3] His Honour went on to impose a head sentence of five years for the dishonesty and driving offences and a charge of assaulting police, and a cumulative sentence of 18 months for the escape and assault charges arising out of his jumping the dock in a Magistrates Court. The parole eligibility date he set was effectively three years from the commencement of the imprisonment. As Martin J has demonstrated, the sentence was consistent with the applicant's criminality and sufficiently recognised the mitigating factors.

[4] By s 10 of the *Penalties and Sentences Act* 1992 (Qld) if a court imposes a sentence of imprisonment, it must state its reasons for doing so in open court. By s 13, when an offender pleads guilty, the court must take the guilty plea into account, and state in open court that it has done so – although, as Macrossan CJ and Lee J observed in *R v Corrigan*,[1] it is not actually obliged to make a reduction in sentence on account of it. In that case, their Honours said –

> "It is obviously desirable for a sentencing court to state specifically how it is reducing a sentence when it purports to do so. If an appeal is subsequently brought and it is contended that the sentence imposed is excessive because there has been no sufficient reduction made, the

[1] [1994] 2 Qd R 415, 416.

> question whether there has, in truth, been a reduction at all and also whether the reduction is sufficient will be considered by the appeal court.
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> We think that a recommendation for consideration for early release on parole can qualify as a reduction of sentence within s 13. It is an order made which is highly beneficial to an offender and ameliorates the effect of the sentence as it would otherwise apply. An order recommending can be regarded as included within the definition of "sentence" in s 4 of the *Penalties and Sentences Act* and such an order has been held to have the character of "sentence" for other purposes as well, namely applications under s 668D of the *Criminal Code*: see *R v Hantzisavvas*.[2]"

[5] White JA noted in *R v Ungvari*[3] that there is a general practice of adopting the one-third mark of the sentence of imprisonment as an appropriate starting point. Here the learned sentencing judge fixed a parole eligibility date at about 45 per cent of the six and a half year period of imprisonment which he imposed.

[6] Counsel for the applicant submitted that his Honour erred in not giving reasons for departing from the one-third starting point. While I agree with Martin J that there was no appealable error in this regard, I wish to add the following comments.

[7] The learned sentencing judge correctly approached the sentencing as an integrated process, and set a parole eligibility date as a component of the overall sentence he imposed. Had he not fixed a parole eligibility date, the applicant would have had to serve 50 per cent of the period of imprisonment before becoming eligible for parole.[4]

[8] In *R v Kitson*[5] Fraser JA said –

> "[18] As was said in the joint judgment in *Markarian v The Queen*,[6] accessible reasoning is necessary in the interests of victims, the parties, appeal courts, and the public. Such an explanation might be quite brief in many cases, but here the reasons do not explain at all why the parole release date was postponed until after the mid-point of the sentence."

In that case an offender who pleaded guilty was sentenced to a term of less than three years imprisonment and given a parole release date later than the halfway point of that term. As Fraser JA observed, the parole release date was unusual and it had not been sought or contemplated in the submissions of either party. In those circumstances his Honour considered that the learned sentencing judge had erred in not giving reasons for fixing the parole release date as he did.

[9] *Kitson* was considered recently in *R v Doraho*[7] on an application for leave to appeal against a sentence of six months imprisonment with a parole release date fixed on

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2 [1981] Qd R 74.
3 [2010] QCA 134, [30].
4 *Corrective Services Act* 2006 (Qld), s 184.
5 [2008] QCA 86, [18].
6 (2005) 228 CLR 357; [2005] HCA 25, [39].
7 [2011] QCA 29.

the last day of that term. Chesterman JA (with whom Fraser JA agreed) made the observation quoted by Martin J in paragraph [44] of his reasons for judgment. The President commented[8] –

> "It is clear from his Honour's sentencing remarks, even without adverting to the judge's preceding exchange with counsel, that he determined the applicant required a period of six months actual imprisonment to break his cycle of dependency on marijuana and to deter him from re-offending. The sentence imposed does not involve community supervision, but such sentences had not assisted the applicant in the past in ending his unlawful use of and dependence on marijuana. Whilst not stated in terms, it can be clearly inferred from the judge's comments that, at this time, this was achievable only by the applicant's commitment to stop offending." (Emphasis added.)

[10] In the present case the prosecutor did not make any submissions directed specifically at what would be a proper parole eligibility date. The applicant had previously been sentenced to time in custody, and his counsel told the learned sentencing judge that despite a parole recommendation he had previously been denied parole, and his "realistic attitude" was that "a recommendation for release to parole" might not mean much.

[11] It is desirable that sentencing remarks be succinct, sharply focussed and expressed in a way likely to resonate with the offender, the victim and the public at large. They also have to be able to withstand the scrutiny of appellate courts. The reasons for structuring a sentence in a particular way should ordinarily appear in the sentencing remarks, and a sentencing court may more readily infer error when reasons are not expressed.[9]

[12] Complex legal questions sometimes arise in sentencing proceedings, and a detailed explanation of the effects of statutory provisions may be necessary. Occasionally it may be appropriate to reduce legal analysis to writing, and publish reasons for the sentence at the time it is handed down.[10] This was not such a case.

[13] The extent to which an appeal court may have regard to exchanges between the bench and counsel in amplification of the reasons given when passing sentence was not explored on this application. I think a cautious approach is warranted. Exchanges between the bench and counsel are designed to draw out and test submissions, and remarks made by a judge during such exchanges are often at odds with a conclusion at which he or she ultimately arrives after hearing both sides and giving their submissions due consideration. In my respectful opinion a practice of relying unduly on exchanges between the bench and counsel should not be allowed to develop.

[14] I would dismiss the application for leave to appeal against sentence.

[15] **ANN LYONS J**: I agree with the reasons of Martin J and with the order proposed by his Honour. I also agree with the observations of Margaret Wilson AJA in urging a cautious approach in relation to the adoption of exchanges between the bench and

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8 At [7].

9 *Chivers v Western Australia* [2005] WASCA 97; *R v Koumis* [2008] VSCA 84; *R v Prasad* [2000] NSWCCA 539, [52].

10 For example, *R v Hargraves & Stoten* 8 June 2010 per Fryberg J; reasons [2010] QSC 188.

counsel during argument. I agree that such exchanges are often designed to test counsels' submissions and in many cases are in the nature of preliminary observations. However, in some cases, it is clear that "Amplification of the reasons"[11] can in fact be found in these exchanges and in such cases may be adverted to in order to expand the reasons set out in the sentencing remarks. This may only be done in the clearest of cases. This was such a case.

[16] **MARTIN J:** The applicant seeks leave to appeal against a sentence of six and a half years with a parole eligibility date of 12 July 2012, that is, the point at which the applicant will have served three years of that sentence.

[17] On 21 October 2010 the applicant pleaded guilty to a number of charges. The learned sentencing judge grouped the charges and imposed concurrent sentences on the first five groups. The sentence on the last group was imposed cumulatively upon the others. Those charges, together with the sentences imposed, are set out below:

• Three counts of unlawful use of a motor vehicle and one count of stealing	5 years
• Six counts of stealing, two counts of unlawful use of a motor and one count of wilful damage	3 years
• Two counts of dangerous operation of a vehicle	2 years
• One count of burglary and commission of an indictable offence, one count of entering premises and committing an indictable offence by breaking and one count of wilful damage	2 years
• One count of assault	12 months
• One count of escaping from lawful custody and two counts of assault	18 months

[18] The applicant had spent 466 days in pre-sentence custody and it was deemed to be time already served under the sentence.

The Applicant's Criminal History

[19] The applicant was born in 1984 and has a history of convictions for similar offences to those the subject of this appeal. I include a brief summary of those convictions below:

2001
He was convicted of: entering a dwelling house with intent to commit an indictable offence; stealing; and several counts of unlicensed and disqualified driving.

Those offences were heard together with other matters which were Children Court matters and which consisted of numerous offences of unlawful use of a motor vehicle, together with wilful damage and house breaking offence. A sentence of 18 months was imposed.

In the same year he was convicted of some minor drug offences and given probation.

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11 *R v Doraho* [2011] QCA 29 at [19].

2003
He was convicted of further minor drug offences.

2004
He was convicted of a number of charges of stealing and of attempted robbery with actual violence whilst armed and in company. He also pleaded guilty to a number of other charges including unlawful use of a vehicle, wilful damage, fraud, stealing, deprivation of liberty, numerous *Weapons Act* offences, a number of *Traffic Act* offences, and a number of minor drug offences. The head sentence was five years. According to submissions made before the learned sentencing judge in this matter the applicant was not released from prison on parole. He served the whole sentence.

[20] The offences for which he was sentenced and which are the subject of this appeal were committed in a period commencing in July 2009, that is, within six months of being released from his previous period of imprisonment.

The Offences

[21] The applicant's offences need to be set out in some detail because the concentration of them over a short period of time was something which was the subject of submissions before the learned sentencing judge.

[22] On 2 July 2009 the applicant stole a Ford utility from a service station. Later that same day, the applicant drove the utility to a service station at which he filled the car with fuel but made no attempt to pay for it.

[23] The utility vehicle was later found completely submerged in the Ross River, Townsville. The applicant was seen deliberately driving the vehicle down a boat ramp into the river.

[24] Later that day, the applicant stole a wallet from a woman shopping at a shopping centre and then drove off in a car.

[25] In the week commencing 4 July 2009 the applicant stole registration plates from a Holden Statesman motor vehicle. They were found later to have been affixed to another vehicle.

[26] On 7 July 2009 the applicant stole a Hyundai Excel motor vehicle from a shopping centre, drove it to another shopping centre where he swapped the registration plates on the car with that of another car then left the centre.

[27] On the same day the applicant caused wilful damage to a set of gates at a business premises by driving into them in a stolen vehicle. The gates remained closed but were damaged.

[28] On the same day the applicant stole another set of registration plates from a motor vehicle to swap with a vehicle he had earlier stolen.

[29] On 8 July 2009 the applicant stole a vehicle parked outside a bottle shop and drove off. He abandoned the car but removed a quantity of tools and other material which had a value of approximately $9,700.

[30] On the same day, the applicant stole a motorcycle from a private dwelling. He did this by entering onto the property. He drove it to a shopping centre car park and abandoned it.

[31] On 9 July 2009 the applicant stole a motor vehicle from a shopping centre and items belonging to the owner including a mobile phone and a watch were taken. They had a value of approximately $310.

[32] On 10 July 2009 the police went to a residential address for the purpose of locating the applicant. When he saw them, he left the premises and the police followed him. During this time he drove within the speed limit, but upon entering a car park he accelerated and drove towards an exit. The police pursued the applicant. He accelerated to a speed of approximately 100kph and overtook stationary vehicles by travelling along the shoulder of the road. He performed a number of dangerous manoeuvres at high speed and the police were unable to apprehend him.

[33] On 11 July 2009 the applicant was seen driving a vehicle with stolen registration plates. The police followed him and attempted to intercept the vehicle. He again engaged in dangerous driving at high speeds. Police attempted to block the vehicle at various points. At one stage a police officer stood in front of a parked vehicle and the prisoner accelerated past him striking him on the hand with the mirror of the vehicle. As he left the scene, oncoming cars were forced to take evasive action to avoid colliding with him.

[34] On 11 July 2009 the applicant stole another set of registration plates.

[35] The applicant was eventually apprehended. On 18 September 2009 he was to appear in the Gladstone Magistrates Court for a mention of other charges. He was in custody at the time of his appearance. In the courtroom at the time were the magistrate, the police prosecutor, a watch house staff member, the magistrate's clerk and the solicitor for the applicant. At the conclusion of the appearance the applicant was told that his bail application had been refused and that he would be remanded in custody. Upon being advised of this, he jumped onto the chair in the dock, leapt over the security glass enclosure and ran towards his solicitor. At this point the police prosecutor intervened and the applicant swung his fist at him on two occasions. The watch house officer assisted the prosecutor in an attempt to restrain the applicant and the three men fell to the floor of the courtroom and a struggle ensued. The applicant bit the prosecutor on the arm and punched him several times in the head, causing open lacerations to both his eyebrows. The learned sentencing judge remarked, having seen the photographs, that the wounds had the appearance of having been attacked by a dog.

Submissions on Appeal

[36] The submission made on behalf of the applicant was an uncomplicated one. It was that the setting of the parole eligibility date at the three year mark made the sentence excessive.

[37] Mr McInnes, who appeared for the applicant, referred the court to the decision of the Court of Appeal in *R v Ungvari* [2010] QCA 134 where, at [30], White JA said:

> "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."

[38] It was a matter of complaint for the applicant that the learned sentencing judge did not give reasons for departing from that "starting point".

[39] Before dealing with that issue I wish to refer to the comparative sentences which were the subject of submissions. The case of *R v Melville* [2009] QCA 108 was said by Mr McInnes to be similar in many respects to this case. Melville was a young man with an alcohol problem. The applicant appears, from the convictions recorded against him so far, to have a drug problem. Melville committed a dangerous operation of a vehicle in evading police and, in doing so, breached a 20 month suspended sentence. He also assaulted police in a serious way whilst in custody. He was given cumulative sentences totalling five years and three months, with a parole eligibility date at approximately 50 per cent. On appeal this was reduced so as to permit a parole application after two years and one month, or 40 per cent of the head sentence. This change was explained by reference to breaches of earlier court orders. The applicant's criminal history is much more serious than that of Melville and the assault on police should, I think, be regarded as being more serious given that it took place in a court room.

[40] The Crown submitted that the decision of most assistance was that of *R v Finch* [2009] QCA 276. Finch was 22 to 23 years old at the time of the offences and had committed a number of serious offences over a period of about 10 months. This was said to have been due to his addiction to drugs. Prior to that 10 month period he had a limited criminal history although during that period he was in breach of a probation order, two suspended sentences and bail conditions. Finch's offences revolved around breaking into premises and dwellings and stealing property. A substantial amount of property was stolen. There were also offences of dangerous driving in Finch's case. I note that one substantial difference between Finch and the applicant is that Finch made substantial admissions to the police which resulted in his being charged with offences which could not otherwise have been solved. No doubt the leniency referred to in *AB v The Queen* (1999) 198 CLR 111 was afforded him. Finch was sentenced to six years and three months imprisonment with a parole eligibility date after one-third, which was not disturbed on appeal.

[41] The sentences imposed in *Melville* and *Finch* do not provide a useful source for comparison as the relevant facts of the offences in those cases are not sufficiently similar to the facts in this case.

[42] I return to the error said to have been committed by the learned sentencing judge by his not having explicitly set out reasons for departing from the so-called "starting point".

[43] There is no doubt that reasons are required in certain limited circumstances where a parole eligibility date is set. That will occur in the circumstances identified by Fraser JA in *R v Kitson* [2008] QCA 86 where, at [17] and [19], his Honour said:

> "[17] First, in a case such as this, where the applicant has a claim upon the discretion for an order that he be released after serving less than half of the head sentence in view of his plea of guilty and personal circumstances, a parole release date which is significantly beyond the midpoint of the head sentence is very unusual: cf *R v Norton* [2007] QCA 320 per Douglas J. So much was not in contention in this application. If such an unusual order is to be made, in my opinion the duty to give reasons requires that the sentencing remarks explain the process of reasoning underlying it.
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> …

> [19] There are decisions of this Court to the effect that a failure to give reasons that ought to have been given amounts to appealable error: *Camden & Anor v McKenzie & Ors* [2007] QCA 136; *Bawden v ACI Operations Pty Ltd* [2003] QCA 293 at [29]; *Crystal Dawn Pty Ltd & Taylor v Redruth Pty Ltd* [1998] QCA 373."

[44] More recently, in *R v Doraho* [2011] QCA 29, Chesterman JA, after having referred to the remarks of Fraser JA in *Kitson*, said:

> "[19] The reasons given by a sentencing judge for choosing the particular structure of a sentence in preference to others, and for explaining the length of the sentence, need be neither elaborate nor long. It is enough if they reveal, even in outline, why the particular sentence was imposed. Amplification of the reasons given when passing sentence may be found in the exchanges between counsel and judge which precede the imposition of the sentence."

[45] In the present case the learned sentencing judge explicitly referred to the fact that he took into account the applicant's pleas of guilty, especially with regard to the ex officio indictment, his cooperation with the administration of justice which that evidenced and the belated apologies which the applicant had sent to the officers who had been the subject of his attack in the Magistrates Court. Having said that, he noted that he had to take into account the extent and nature of the applicant's criminal behaviour and recidivist offending.

[46] The obligation of a sentencing court was set out in the reasons of White JA in *R v Ungvari* [2010] QCA 134 where her Honour said:

> "[31] It is a positive obligation for a sentencing court to take into account a guilty plea and that the primary Judge did.(*Penalties and Sentences Act* 1992, s 13) 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. (*Penalties and Sentences Act* 1992, s13 (2)(a), (b)) 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. (*R v Corrigan* [1994] 2 Qd R 415) 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."

Conclusion

[47] In my opinion, the learned sentencing judge had ample reasons for not allowing the applicant the full exercise of discretion in the sense of setting a parole eligibility date at one-third of the head sentence. These are apparent in his remarks and in his exchanges with counsel. The parole eligibility date is less than the halfway mark of the period of imprisonment and the learned sentencing judge was entitled to take into account, and to mould a sentence which recognised the criminal spree which the applicant entered upon shortly after emerging from a previous term of imprisonment. There was insufficient material to allow a sentencing judge to form the view that the applicant had demonstrated good prospects of rehabilitation.

[48] The sentence was consistent with the criminality of the applicant's behaviour and the learned sentencing judge sufficiently recognised the mitigating factors (including his pleas of guilty) by reducing the head sentence from the seven years sought by the Crown and then setting a parole eligibility date at a little less than the half way point.

Order

[49] I would dismiss the application for leave to appeal against sentence.