SUPREME COURT OF QUEENSLAND

CITATION:	*R v Clarke* [2011] QCA 138
PARTIES:	**R** **v** **CLARKE, Callan Troy** (applicant)
FILE NO/S:	CA No 267 of 2010 DC No 129 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	24 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2011
JUDGES:	Fraser and Chesterman JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. Substitute a sentence of three years for the sentence of four years imposed at first instance.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of two counts of robbery whilst armed with an offensive instrument – where the applicant appeals against his sentence on the grounds that the learned sentencing judge failed to properly make allowance for the totality principle when imposing sentences – whether the sentences imposed are manifestly excessive *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, applied *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26, applied *R v Matthewson* [2001] QCA 4, considered *R v McDonald* [2001] QCA 238, considered *R v Murray* [2008] QCA 340, considered

COUNSEL:	K Prskalo for the applicant R W Griffith for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: I agree with the reasons for judgment of Cullinane J and the orders proposed by his Honour.

[2] **CHESTERMAN JA**: I agree with Cullinane J.

[3] **CULLINANE J:** The applicant seeks leave to appeal against sentences imposed in the District Court at Townsville on 8 October 2010 for two counts of robbery whilst armed with an offensive instrument.

[4] The applicant who was born on 16 May 1975 was sentenced to imprisonment for four years on each count.

[5] The offences were committed on 19 July 2001.

[6] In each of the two counts a video store was involved. The applicant went to the premises armed with what some of the witnesses described as a machete and wearing a black balaclava. In one case a little over $100 was stolen from the premises whilst in the other some $12,000 representing the takings for four nights was taken from the business.

[7] Although in December 2008 the applicant had volunteered to the police his responsibility for one of these offences, he went to trial in respect of both of them. The learned sentencing judge described him as engaging the jury with 'a fanciful tale that you had dreamt up after your confession'.

[8] The applicant has what the learned sentencing judge described as an appalling record.

[9] He has been before the courts in Western Australia, the Northern Territory, South Australia and Queensland since he was a minor. He has many convictions for breaking entering and stealing type offences and other offences of dishonesty and was sentenced to terms of imprisonment and detention in those jurisdictions.

[10] Since 1992 he has appeared in courts in Queensland in respect of offences such as unlawful use of a motor vehicle, breaking entering and stealing and wilful and unlawful damage to property.

[11] In February 1997 he was sentenced to nine months imprisonment for unlawfully using a motor vehicle and then appeared before the court on 2 April 1997 in respect of unlawful use of a motor vehicle, dangerous driving and wilful and unlawful damage to property. Sentences of 18 months were imposed in respect of the more serious of these offences. After appearances in April and October 1998 he appeared before the District Court at Townsville on the 6 September 1999 on a large number of offences of dishonesty. He was sentenced to a term of imprisonment of five years to be suspended after two years.

[12] He appeared again in the District Court at Townsville on 15 February 2002. The large number of offences on which he then appeared included two counts of robbery with actual violence whilst armed with an offensive weapon in company. The learned District Court judge who dealt with him on that occasion made a distinction when passing sentence between those offences committed before September 1999 and those committed after that date.

[13] On one of the counts of robbery he was sentenced to four years and six months whilst on a count of armed robbery committed after that date he was sentenced to four years and six months imprisonment which was to be served cumulatively with a term of three years imprisonment which represented suspended imprisonment imposed on 6 September 1999, the full term of which was invoked. The suspended imprisonment represented the three years of the five years imposed on 6 September 1999 and suspended after two years.

[14] The applicant has been before the court regularly in respect of serious offences of dishonesty. He has shown no signs of modifying his criminal behaviour notwithstanding terms of imprisonment and he has committed a large number of offences during the currency of a suspended term of imprisonment.

[15] The seriousness of the offences which are the subject of this application largely speak for themselves.

[16] The primary basis upon which the application is pursued concerns what is said to be the failure of the learned sentencing Judge to properly make allowance for the totality principle when imposing sentences in respect of these two matters.

[17] Unfortunately the criminal history which was tendered does not accurately represent the position of the applicant so far as the terms of imprisonment he has been sentenced to serve are concerned.

[18] It was common ground before us that at the time he was sentenced in respect of these two matters he was serving a term of some nine years and seven months imprisonment commencing on 27 July 2001.

[19] The total term of imprisonment is made up by the following:

(a) Townsville Magistrates Court on 27 July 2001 for offences of dishonesty and breach of the *Drugs Misuse Act* in respect of which he received a term of nine months imprisonment together with a term of one month imprisonment for breach of the *Bail Act* which was necessarily cumulative.

(b) On 15 February 2002 for a large number of offences of dishonesty including armed robbery for which four and a half years of imprisonment was imposed to be served cumulatively with a term of three years imprisonment representing the suspended imprisonment that had been imposed in September 1999.

(c) In Cairns District Court on the 6 November 2002 the applicant was ordered to serve three months cumulative upon the sentences imposed on 15th February 2002 in the Townsville District Court.

[20] The total term then is nine years and seven months so that with the terms the subject of the application the total imprisonment is in excess of 13 years.

[21] It is submitted that this is excessive and a sentence of three years should be substituted for the term of four years.

[22] Here the applicant came to be dealt with for the two offences of armed robbery which were committed at about the time of the earlier offences particularly those for which he appeared before the District Court on 15 February 2002. He came before the court at the time when he was approaching the latter stages of terms of imprisonment which total nine years and seven months.

[23] The principles in cases such as *R v Mill* (1988) 166 CLR 59 and *R v Postiglione* (1997) 189 CLR 295 are applicable here.

[24] The court must consider what sentence would have been likely to have been imposed if the applicant had been sentenced for these matters at the time he was dealt with in February 2002.

[25] The cases referred to by both counsel, such as *R v Matthewson* [2001] QCA 4, *R v McDonald* [2001] QCA 238 and *R v Murray* [2008] QCA 340 suggest that the total period of imprisonment is somewhat disproportionate to the total criminality involved. Whilst considered alone the terms imposed below were unobjectionable, when the matter is considered overall insufficient allowance for the totality principle has been made.

[26] I would grant the application and allow the appeal and substitute a sentence of three years for the sentence of four years imposed by the learned sentencing judge at first instance.