SUPREME COURT OF QUEENSLAND

CITATION:	*R v Saebar* [2011] QCA 142
PARTIES:	**R** **v** **SAEBAR, Jason Robert** (applicant)
FILE NO:	CA No 316 of 2010 DC No 1457 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2011
JUDGES:	Chesterman and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant submits that the sentences was infected by a misunderstanding of the combined operation of s 92 and s 156A of the *Penalties and Sentences Act* 1992 (Qld) and the sentences were manifestly excessive – whether the sentences were manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 90, s 91, s 92, s 93, s 94, s 156A
COUNSEL:	C Heaton SC for the applicant T A Fuller SC for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **CHESTERMAN JA**: I agree that the application for leave to appeal against sentence should be refused. I agree with the reasons of Daubney J.

[2] **WHITE JA**: I agree with Daubney J's reasons for refusing the applicant leave to appeal against the sentences imposed on him on 16 December 2010.

[3] **DAUBNEY J:** On 16 December 2010, the applicant was convicted on his own pleas of guilty of the following offences for which the following sentences were imposed:

(a) One count of dangerous operation of a motor vehicle with circumstances of aggravation – two and half years imprisonment;

(b) One count of unlawful use of a motor vehicle – two and half years imprisonment;

(c) One charge of failing to remain at the scene of an accident – conviction recorded but no further penalty imposed;

(d) One charge of unlicensed driving – 12 months imprisonment.

[4] These sentences were ordered to be served concurrently with one another, but cumulatively on a sentence which was then being served by the applicant. A parole eligibility date of 6 April 2012 (i.e. 15 months after commencement of these sentences) was fixed. He was also disqualified absolutely from holding or obtaining a driver's licence.

[5] The applicant now seeks leave to appeal against the sentences. It was submitted that leave ought be granted because:

(a) the learned sentencing judge's approach to the sentences was infected by a misunderstanding of the combined operation of s 92 and s 156A of the *Penalties and Sentences Act* 1992 ("PSA"), and

(b) in any event, the sentences were manifestly excessive.

Background

[6] The applicant was born in January 1975. His criminal history commenced in 1992 when, at the age of 17, he was convicted on two charges of unlawful use of a motor vehicle. That was just the start of an almost uninterrupted history of criminality, involving no less than 22 court appearances for various motor vehicle, property and breach offences, including:

- 14 prior convictions for unlawful use of a motor vehicle;
- Three prior convictions for dangerous operation of a motor vehicle;
- Four prior convictions for dangerous operation of a motor vehicle with circumstances of aggravation.

[7] His traffic history included eight offences of disqualified driving.

[8] In the course of being dealt with by the courts on those prior occasions, the applicant had received the benefit of a variety of non-custodial and supervisory orders, including probation (1992), a community service order (1996), and an intensive drug rehabilitation order (2004). He breached all of those orders. He also breached suspended sentences which were imposed on him in 2000 and 2004.

[9] The most recent offending prior to the present incidents occurred in December 2008, when he committed a further two offences of dangerous operation of a motor vehicle and one of unlawful use of a motor vehicle. On 18 February 2009 he was sentenced to two years imprisonment for those offences. He was released on 20 December 2009, and was on parole when he committed the first of the present offences in early 2010. As will appear, he surrendered himself to police on 21 February 2010 and was granted bail in respect of the charge of dangerous operation of a motor vehicle with a circumstance of aggravation. While at liberty on that bail, he re-offended shortly thereafter, and was taken into custody.

[10] He remained in custody from 20 March 2010. As at the date he was sentenced on the current matters (16 December 2010) he was still serving the balance of the two year term of imprisonment to which he had been sentenced on 18 February 2009.

The current offences

[11] The circumstances of the current offending can be stated briefly.

[12] On 18 February 2010, the applicant was driving his brother's car from a hotel. He had earlier had an altercation with his brother. At the time, the applicant did not hold a valid driver's licence. While turning a corner, the applicant attempted to overtake a truck ahead of him. In so doing, he crossed unbroken lines on the road onto the wrong side of the road, and collided with another vehicle. He then fled the scene of that accident. Both vehicles were extensively damaged, and the driver of the other vehicle was taken to hospital as a precautionary measure.

[13] On 21 February 2010, the applicant voluntarily attended the Roma Street police station. He said that he did not wish to be interviewed, but wanted to be charged to ensure his and the general public's safety. He was charged with the count of dangerous operation of a motor vehicle with circumstances of aggravation, and was released on bail.

[14] On 20 March 2010, police observed the applicant driving a vehicle which had been stolen some days previously. The attention of police was drawn to the vehicle because it was not displaying front registration plates. On ascertaining that the vehicle had been stolen, police approached the vehicle. The applicant, who was in the front driver's seat, told police that the car was stolen, and that he did not "want to run and hurt anyone". After being charged with unlawful use of a motor vehicle, the applicant was returned to custody.

[15] The summary offences of failing to remain at the scene and of unlicensed driving arose in the course of these incidents on 18 February and 21 March 2010.

The sentences

[16] The learned sentencing judge imposed, as I have already noted, a head sentence of two and a half years with a parole eligibility date fixed at a point 15 months from the day when the two and a half year sentence would commence. In the course of his sentencing remarks, the learned judge noted:

(a) the dim prospect of the applicant actually being released on parole, in view of his history;

(b) the submission by the prosecution that a head sentence in the range of three to four years was appropriate;

(c) defence counsel's agreement with that range, while urging a sentence towards the bottom of the range together with, in view of the unlikelihood of parole being granted, a suspension of the sentence to take into account the plea of guilty;

(d) the fact of the plea of guilty and the applicant's volunteering himself to police and subsequent co-operation with police.

[17] His Honour noted the applicant's statement to police that he wanted to be charged to ensure his and the general public's safety. His Honour continued:

> "So, you have a clear idea of the dangerousness of your actions, yet apparently a compulsion to continue offending. I am not prepared to make an order that would see you released from prison without supervision. It is not clear to me that you have a history of involuntary treatment under the Mental Health Act. It is good that you are having treatment while in gaol but there must, for the community's safety, be a guarantee of your supervision and hopefully treatment upon release.
>
> Because of the provisions of section 156A of the Penalties and Sentences Act, that is, because the offence that you have committed, the offences include dangerous operation committed while on parole, the sentence I impose today must be cumulative. That further complicates things.
>
> It might have been a useful way to dispose of your case by putting you on 12 months' imprisonment followed by probation. It seems to me I cannot do that. I propose, then, to take into account all that can be said on your behalf by reducing the head sentence.
>
> What can be said on your behalf is that you have had a difficult life and you, it seems, have been effectively homeless for quite some years since your mother's death. You have serious addiction problems and by all the material, serious mental health problems. Also, you have cooperated in your pleas and you cooperated, to some degree it must be said, with the police. So the upshot is this, for the charge of dangerous operation and the charge of unlawful use I sentence you to two and a-half years' imprisonment concurrent with each other."

The relationship between s 92 and s 156A of the PSA

[18] Counsel for the applicant submitted that the sentencing judge's approach to this particular sentence was flawed by reason of a misapprehension as to the interplay between s 92 and s 156A of the PSA. Counsel for the applicant submitted that a sentencing option open to his Honour would have been to make a probation order, including a period of imprisonment under the probation order, and that this could have been moulded to allow the applicant to be imprisoned for 12 months in respect of these offences and then released under supervision. The sentencing judge, however, considered that such a sentencing option was not available to him in the circumstances of this case. Counsel for the applicant submitted that his Honour erred in that respect.

[19] It will be recalled that the applicant committed the subject offences while released on parole. Accordingly, when sentencing for the subject offences the learned sentencing judge in this case was constrained by s 156A(2) of the PSA:

> "(2) A sentence of imprisonment imposed for the offence [committed while on parole] must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve."

[20] At the time of being sentenced for the current offences, the applicant was still serving a term of imprisonment.

[21] The applicant contends, however, that, notwithstanding the fact that s 156A required that any term of imprisonment imposed for the current offences had to be cumulative on the term of imprisonment currently being served by the applicant, the sentencing judge could have made probation orders under Part 5 Division 1 of the PSA.

[22] Section 90 of the PSA empowers a court to make a probation order, whether or not it records a conviction. Sections 91 and 92 of the PSA provide:

> "**91 Making of an order**
>
> If a court convicts an offender of an offence punishable by imprisonment or a regulatory offence, the court may –
>
> (a) whether or not it records a conviction – make for the offender a probation order mentioned in section 92(1)(a); or
>
> (b) if it records a conviction – make for the offender a probation order mentioned in section 92(1)(b).
>
> **92 Effect of order**
>
> (1) The effect of a probation order is –
>
> (a) that the offender is released under the supervision of an authorised corrective services officer for the period stated in the order; or
>
> (b) that the offender –
> (i) is sentenced to a term of imprisonment for not longer than 1 year; and
> (ii) at the end of the term of imprisonment the offender is released under the supervision of an authorised corrective services officer for the remainder of the period stated in the order.
>
> (2) The period of the probation order starts on the day the order is made and must be –
>
> (a) if the order is made under subsection (1)(a) – not less than 6 months or more than 3 years; or
>
> (b) if the order is made under subsection (1)(b) – not less than 9 months or more than 3 years.

(3) The requirements of a probation order made under subsection (1)(a) start on the day the order is made.

(4) The requirements of a probation order made under subsection (1)(b) start –

(a) immediately the offender is released from prison; or

(b) if the offender is released to a re-integration program – at the end of the program.

(5) A term of imprisonment imposed under subsection (1)(b)(i) must not be suspended under part 8."

[23] Section 93 sets out the general requirements which a probation order must contain, and s 94 allows for a probation order to contain other requirements, such as submission to medical treatment and compliance with particular conditions.

[24] The situation urged for in this case, namely a period of imprisonment followed by a period of supervision, is that contemplated by s 92(1)(b).

[25] The insuperable difficulty for the applicant's present contention is that, by s 92(2), the period of the probation order starts on the day the order is made. A probation order made under s 91(b) and s 92(1)(b) contains two elements – a term of imprisonment followed by release under supervision. The reference in s 92(2) to the period of the probation order starting on the day the order is made is a reference to both of those elements, and not merely the component which consists of release under supervision. It is therefore impossible for a probation order which includes an element of imprisonment to be made unless the circumstances are such as to allow the imprisonment under the probation order to start on the day the order is made. Such an outcome was not possible in this case – the operation of s 156A mandated that the commencement of any term of imprisonment imposed for the current offences had to be postponed until completion of the term of imprisonment which was currently being served.

[26] Accordingly, I do not consider that the learned sentencing judge committed any error in his approach to the operation of s 92 and s 156A in the circumstances of this case.

The sentence imposed

[27] The submission on behalf of the applicant that the sentence was manifestly excessive was, in effect, that the order for parole eligibility after 15 months on a two and a half year head sentence was excessive, and that the date for parole eligibility should have been set at about the 12 month mark. It was submitted that setting the parole eligibility date at a point half way through the head sentence did not appropriately reflect the mitigating factors in this case.

[28] In fact, counsel for the applicant below had conceded that a range of three to four years imprisonment was appropriate in this case. In the course of sentencing, the learned sentencing judge had regard to:

(a) the fact that the applicant had pleaded guilty;

(b) the material which suggested that the applicant may have been suffering from some mental illness;

(c) material which suggested that the applicant was addicted to alcohol and drugs;

(d) the applicant's conduct in volunteering himself to police in respect of the first offence and co-operating with police when apprehended on the second occasion.

[29] The learned sentencing judge said that he was not prepared to make an order that would see the applicant released from prison without supervision. There was no challenge to the appropriateness or correctness of that observation. His Honour also properly had regard to the fact that the sentence imposed by him had to be cumulative on the sentence currently being served.

[30] As appears from the passage from the sentencing remarks which I have quoted above, the conclusion reached by his Honour was to moderate the head sentence by imposing a term of imprisonment of two and a half years. I do not accept the submission that the learned sentencing judge should have further moderated the sentence by ordering parole eligibility at a point about one third of the way through the sentence which he imposed. It is often, but not invariably, the case that a sentencing judge will moderate a sentence to take account of a plea of guilty by setting a parole release date or a parole eligibility date at a point one third of the way through the head sentence. This common practice does not, however, fetter a sentencing judge's discretion, particularly in circumstances, such as the present, where the head sentence itself has already been moderated. Clearly, one of the significant factors which influenced the sentencing judge in moderating the head sentence was the fact of the unlikelihood of the applicant being granted parole, given his appalling history of offending and breach.

[31] In my view, it cannot be said that, in the circumstances of this case, the approach of the sentencing judge in moderating the head sentence and fixing the parole eligibility date at a point half way through the moderated head sentence was inappropriate, let alone one which resulted in a sentence which was manifestly excessive.

Conclusion

[32] Accordingly, I would order that the application for leave to appeal against sentence be dismissed.