SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mundy* [2011] QCA 217
PARTIES:	**R** **v** **MUNDY, Shane Lewis** (applicant)
FILE NO/S:	CA No 280 of 2010 DC No 964 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	2 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2011
JUDGES:	Muir and Fraser JJA and Margaret Wilson AJA 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 refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of breaking and entering premises and stealing – where the applicant and co-offenders broke into a gun shop and stole 55 firearms – where the theft was well planned and sophisticated – where most of the firearms have not been recovered and a number have been used in subsequent criminal activity – where the applicant participated in the offence to discharge a drug debt – where the applicant claimed he did not know the plan was to steal firearms until the offence was in progress – where the applicant's role in the offence was as a lookout and carrier of weapons – where the applicant was sentenced to eight years imprisonment – whether the sentence is manifestly excessive in all the circumstances *R v Anderson* [1998] QCA 272, distinguished *R v Bell* [2002] QCA 321, distinguished *R v D* [1996] 1 Qd R 363; [1995] QCA 329, applied *R v Meredith* [2002] QCA 481, cited *R v Munt* [1999] QCA 141, distinguished *R v Whelan* [1998] QCA 151, considered

COUNSEL:	F Richards for the applicant D Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application should be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** The applicant was found guilty by a jury after an eight day trial in the District Court of breaking and entering premises and stealing. On 26 August 2010 he was sentenced to imprisonment for eight years with a parole eligibility date fixed at 26 August 2014. On 9 February 2011 the Court extended time for the applicant to apply for leave to appeal against sentence until 17 November 2010. The ground of the proposed appeal is that the sentence is manifestly excessive in all the circumstances.

Circumstances of the offence

[3] The applicant and other offenders broke into a gun shop at Ipswich in September 2007 and stole numerous firearms. They gained entry by cutting through the ceiling and steel mesh. The security alarms were disarmed and telephone cables were cut so that silent alarms could not be activated. A video surveillance system was removed and the hard drive was taken. No fingerprints were found by police at the premises. In all 55 firearms were stolen, consisting primarily of handguns. There were also some semi-automatic rifles. Efforts were made to conceal or destroy the identification numbers on the firearms. Most of the firearms have not been recovered. The applicant was given five of the stolen handguns. He sold four of those, and one was found in his possession. Five firearms were found in the shed of Wesener, one of the applicant's co-offenders. Wesener was said to have "masterminded" the offence. Three firearms were used in "home invasions", one was used by a man to commit suicide, and two were used in separate shooting offences. Another firearm was kept "for protection" by an associate of a man who had been assaulted by members of a motorcycle gang. Another was found in the house of a known drug dealer.

[4] As was accepted in the applicant's written submissions in this application, the motivation for the offence was to sell the firearms on the black market. Their resale value in that market was considerably higher than their retail value. The sentencing judge accepted that the applicant was not involved in planning the offence, but he was used as a lookout and to help carry the stolen weapons away from the premises. The applicant claimed that he did not know that the plan was to steal guns until the offence was in progress. His version was that he was a reluctant participant; despite not knowing exactly what the offence entailed, he agreed to play the role of "lookout" because he owed money to, and felt intimidated by, his drug dealer, who was involved in the offence. In rejecting the applicant's allegation that he was a reluctant participant, the sentencing judge referred to the applicant's conduct in dealing with the handguns he was given, to evidence that he had bragged about the firearms, and to the fact that he had continued to associate with Wesener after the offence.

The applicant's personal circumstances

[5] The applicant was 30 years of age at the time of the offence and 33 at sentence. He had an extensive criminal history in the 14 year period before he committed the offence. His prior offending was of a kind which reflected his long standing drug addiction. The recorded 28 offences included street offences, drug offences, property offences, breaches of court orders, two burglaries, three offences of entering premises and committing indictable offences, two stealing offences, and one offence of receiving property obtained from crime. The most severe sentences imposed upon him were three months suspended imprisonment in February 2001 and four months imprisonment in February 2003. After the applicant committed the present offence and before he was sentenced for it, he committed numerous other offences of a similar character to his previous offences. In addition, one of the numerous offences for which the applicant was sentenced to 18 months imprisonment in June 2010 was a serious assault which he committed in January 2010. The applicant committed that and many other offences (mostly entering, or breaking and entering premises and stealing) after he had been charged with the present offence.

[6] A psychiatrist, Dr Kar, noted that the applicant was of indigenous origin and had an itinerant lifestyle. The applicant did not have a mental illness but was diagnosed as having anti-social personality disorder, and severe opioid dependence and amphetamine abuse, which were in early remission because the applicant was incarcerated. The applicant had some work qualifications and had maintained some employment in the past. He had been smoking cannabis from the age of 12 or 13 and started using amphetamines and heroin at about the age of 15. He had a stable relationship with his girlfriend with whom he had a 15 month old daughter. Dr Kar expressed the opinion that the applicant was at risk of "committing future petty crimes as before, especially if he relapsed again into substance use." That might occur despite the applicant's current, positive motivation to avoid future use of drugs. The applicant's experience of fear (from associating with the more dangerous persons who organised the offence), a longer custodial sentence, fatherhood and a change of residence would help the applicant change his lifestyle. Dr Kar did not consider the applicant to be a serious danger to the community directly, or at risk of committing any serious violent offences, but his drug habit increased the risk that he might be manipulated by others to commit much more serious offences.

Sentencing remarks

[7] The sentencing judge considered that general deterrence and personal deterrence were important considerations. Her Honour did not accept defence counsel's submission that *R v Meredith*[1] supported a sentence of six years imprisonment. The sentencing judge referred to the circumstances that the applicant had not cooperated with police, and the theft and onselling of the weapons involved the facilitation of extreme violence by others. Her Honour observed that the offence was "well planned and sophisticated involving the theft of property to be used in the likely furtherance of criminal activity, and … criminal activity has in fact been facilitated by the commission of the offence."

[8] The sentencing judge did not accept the prosecutor's submission that a head sentence of 12 years was appropriate. Her Honour thought that a sentence of 10 to

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1 [2002] QCA 481.

12 years would have been appropriate if the applicant had been involved in planning the offence, but as his role was as a lookout and a carrier of the weapons, a sentence of eight years was appropriate.

The parties' submissions

[9] The applicant submitted that he had a limited involvement in the offence and that the sentencing judge gave too much weight to: the professionalism of the break-in; what her Honour described in the course of argument as "the indefinable aggravation of stealing guns to sell on the black market"; the subsequent use of some weapons in offences; and the applicant's criminal history. The applicant submitted that those people who subsequently used the stolen firearms were responsible for their own actions. The applicant submitted that he was denied the mitigating effect of matters favourable to him, including: his chronic, long term drug dependency; his motivation for assisting in the offence; his limited knowledge of the offence; the extent to which fear of his associates and a sense of obligation influenced his participation in and conduct after the offence; the nature of his past offending as petty and committed to support his drug dependency; his limited history of previous offences; the absence of any past offences involving weapons or violence; and the unlikelihood of future offences of violence. Alternatively, the applicant contended that insufficient weight was given to those matters. The applicant also submitted that the sentencing judge failed to give proper consideration to *R v Munt*.[2]

[10] The respondent submitted that there were no comparable sentences for this case in which the offender and his colleagues deliberately and professionally targeted a large number of firearms with a view to their distribution on the black market. Those facts placed this offending at the highest end of the range, moderated only by the fact that the applicant was not the "mastermind" but had a secondary role in the offence. Although there was no violence involved in the offence, the respondent emphasised that the stolen weapons were used, and must always have been expected to be used, in offences of violence. The respondent contended that that fact rendered applicable to this case the sentence of nine to 10 years which was suggested in *R v Whelan*[3] as being appropriate in a case where violence was used in offences of breaking, entering and stealing and similar offences. The respondent also submitted that the applicant's subsequent sales of four firearms formed part of the offence which should be taken into account. The respondent disputed the applicant's characterisation of his criminal history as "limited" and his previous offences as "petty", and submitted that it was optimistic to predict that future violent offences were unlikely. The applicant had been convicted of an offence of violence and did not have substantial prospects of rehabilitation generally. His long term drug dependency had brought him before the courts so many times that any tendency to leniency had been exhausted and the subjective factors in his favour were "thin". The applicant was not denied the mitigating effects of the favourable factors, but they were markedly outweighed by the seriousness of the offence in this case.

[11] The parties referred to other cases which I will discuss in the course of considering the application.

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2 [1999] QCA 141.

3 [1998] QCA 151.

Consideration

[12] *R v Munt* concerned an offence in which Munt and co-offenders, including Anderson, broke into a house and adjoining shed and stole property worth between $85,000 and $90,000, most of which was not recovered. The stolen property included what Pincus JA described as "many guns". More details of the offence were given in *R v Anderson.*[4] The offenders opened safes, forced very secure doors, and ransacked the house. They stole 45 firearms, including about 35 handguns. Munt was sentenced to five years imprisonment. It appears from Pincus JA's reasons that the inference drawn against Anderson, that there was a purpose of "'vending' [guns] to other criminally minded persons to assist them in crimes involving violence",[5] could not be drawn against Munt. Thomas JA, with whose reasons Shepherdson J agreed, referred to "the fact that Munt was less involved in the 'vending' of the stolen firearms".[6] In a majority decision Munt's application for leave to appeal against sentence was refused. Thomas JA held that the sentence was appropriate having regard to the seriousness of Munt's conduct and his prior criminal record. That criminal record is not set out, but it can be gleaned from the reasons that Munt had committed some relatively minor offences dealt with in the Magistrates Court, some non-payments of fines which had led to prison in default, and nothing in his record was comparable in seriousness with Anderson's prior offence of armed robbery in company.

[13] *R v Munt* does not support the applicant's contention that eight years imprisonment was outside the sentencing discretion. Although it is not entirely clear, it seems that Munt's criminal history was less serious than the applicant's. More importantly, on the sentencing judge's findings, the applicant's offence was more serious than Munt's. As the applicant must have appreciated at least by the time the offence was in progress, the offence was sophisticated and well planned. On the applicant's version he was prepared to participate in the offence as a lookout for co-offenders without knowing the details of the intended offence and, after he discovered that the object of the offence was to steal a large number of firearms, he continued to participate by carrying firearms away from the scene. It was not a mitigating factor that the applicant participated in order to discharge a "drug debt". The applicant's version that he participated under duress or in response to some perceived pressure cannot be reconciled with the sentencing judge's finding that the applicant was not a "reluctant participant". The evidence to which the sentencing judge referred amply justified her Honour in rejecting that self-serving version. There being no legitimate market for the stolen firearms, the applicant must also have appreciated that they were destined for resale on the black market. As the respondent submitted, they could be sold on the black market for much larger sums than their retail value only because the buyers either could not obtain the necessary gun licences or because they wished to conceal their ownership of guns.

[14] The evidence justified the sentencing judge's conclusion that the applicant should be sentenced on the footing that he was a party to a "well planned and sophisticated [offence] involving the theft of property to be used in the likely furtherance of criminal activity, and that criminal activity has in fact been facilitated by the commission of the offence." It is true that those people who subsequently used the stolen firearms were responsible for their own actions. It is also true that the

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4 [1998] QCA 272.

5 [1998] QCA 272 at p 19 per Ambrose J.

6 [1999] QCA 141 at p 6 [2].

applicant's unlawful sale of four of the firearms and the unlawful sales of the other weapons more directly facilitated the subsequent criminal activity. Contrary to the respondent's submission, those unlawful sales were uncharged offences[7] which could not be taken into account in aggravation of the penalty for this offence. However the sentencing judge did not take those unlawful sales into account to increase the penalty; rather, her Honour took into account the circumstance that the applicant participated in a theft of numerous firearms, primarily handguns, which would likely be used in subsequent criminal activity. That circumstance significantly increased the applicant's culpability. The sentencing judge was right to take it into account: see *R v D*.[8] It was that circumstance which made the offence much more serious than the applicant's previous property offences. It made deterrence, and particularly general deterrence, a very important consideration in fixing upon the appropriate sentence. Nor was it in contest in this application that the sentencing judge was entitled to take into account the indirect consequence of the applicant's offence that some of the stolen firearms were in fact used in subsequent criminal activity.

[15] The applicant also referred to *R v Bell*.[9] That offender was sentenced on his pleas of guilty to five years imprisonment for 27 offences of dishonesty, the most serious of which by far was breaking into a police station with another and stealing 16 concealable firearms. The facts that the offender pleaded guilty and stole a much smaller number of weapons distinguish it from this case. Furthermore, the appropriateness of that sentence was not in issue and it was not considered in the Court's reasons. I do not regard *R v Bell* as having circumscribed the sentencing discretion in this case.

[16] Of more significance is the Court's decision in relation to Munt's co-offender in *R v Anderson*. At the hearing of the application, that decision was drawn to the parties' attention and they were invited to make submissions upon the question whether it constrained the exercise of the sentencing discretion here. In *R v Anderson* the Court, by majority, varied the six year sentences of imprisonment for the breaking, entering and stealing charge and the housebreaking charge which the sentencing judge had made cumulative upon a sentence for a previous offence. The Court replaced those sentences with concurrent sentences of six years imprisonment and an order concerning parole which left the sentences with a relatively small cumulative effect. That variation, which was made to avoid the aggregate sentence being unfairly oppressive,[10] is not relevant here. What is relevant is that Thomas JA, with whose reasons McPherson JA agreed, gave separate consideration to the appropriate range of sentence for the offence and concluded that six years imprisonment was "relatively severe".[11] That raises the question whether the applicant's sentence is reconcilable with *R v Anderson*, since Anderson had a markedly worse criminal record than the applicant, he was a principal offender, and Thomas JA described his offence as "a serious example of the offences of house breaking and breaking, entering and stealing".

[17] When *R v Anderson* was decided, the maximum penalty for the breaking, entering and stealing offence was 14 years imprisonment.[12] It was increased to

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7 *Weapons Act* 1990 (Qld), s 50B.
8 [1996] 1 Qd R 363 at 403.
9 [2002] QCA 321.
10 [1998] QCA 272 at [24].
11 [1998] QCA 272 at [31].
12 *Criminal Code Act* 1899 (Qld), reprint 1B, s 419(1).

imprisonment for life on 1 July 1997.[13] However, although Ambrose J held that the maximum penalty both for housebreaking with intent, and breaking, entering and stealing, at the time of the offence (4 March 1996) was 14 years imprisonment,[14] the majority proceeded on the basis that the maximum penalty for Anderson's housebreaking offence was life imprisonment.[15] The difference between the number of firearms stolen by Anderson (45) and the applicant (55) does not seem particularly significant. However, despite the fact that Anderson was a principal offender in his offence, Anderson's culpability was not as grave as the applicant's so far as the object and results of the offence are concerned. Thomas JA observed that "[t]he nature of the property taken is a relevant matter, as the availability of hand guns, especially in the hands of persons of dubious character, is a serious threat to law and order",[16] but the applicant was sentenced on the footing that the object of his offence was to acquire firearms which would probably be used, and which were in fact used, in subsequent offences by others. *R v Anderson* should not be regarded as having confined the sentencing discretion to a maximum penalty of six years imprisonment.

[18] *R v Meredith* and *R v Whelan* involved what Dowsett J called in *R v Whelan* "a cluster of offences"[17] involving breaking, entering and stealing, or similar offences, by drug users and others who stole to meet their immediate need for money. Neither decision concerned offences involving circumstances in any way analogous to the circumstances of the applicant's offence. The readily foreseeable consequence of this offence that people who subsequently obtained the stolen firearms might use them in numerous other offences took the appropriate sentence beyond the range found to be appropriate in those decisions, even taking into account that those decisions concerned multiple offences. Nothing is to be gained by a detailed analysis of those cases, but it is relevant that in *R v Whelan*, Dowsett J, with whose reasons Davies and Pincus JJA agreed, observed that a sentence in the vicinity of nine to 10 years seemed much more appropriate to offences involving property where violence was also involved, than to the breaking, entering and stealing and housebreaking offences which that offender committed to service her drug addiction.[18] That statement is not directly applicable in the very different circumstances of the applicant's offence, but there is some force in the respondent's submission that in this case the violence "was merely transposed down the distribution chain." More accurately, whilst this offence did not itself involve or produce violence, it facilitated the use of violence in subsequent offences by numerous other people.

[19] The applicant could not claim the benefit of having no relevant criminal history even though the present offence involved a serious escalation in his offending. He also could not claim the benefit of remorse, a plea of guilty, or cooperation with the authorities. The applicant emphasised the psychiatrist's prognosis, but that was understandably guarded about the applicant's prospects of rehabilitation. The applicant's persistent offending before, and even after, he had been charged with

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13 *Criminal Law Amendment Act* 1997 (Qld), s 73; SL No 152 of 1997.

14 [1998] QCA 272 at 19 [23].

15 [1998] QCA 272 at 12 [27]. Until the 1997 amendments, the maximum penalty for housebreaking was life imprisonment only if the offence was committed at night: *Criminal Code Act* 1899 (Qld), reprint 1B, s 419(2).

16 [1998] QCA 272 at 11 [26].

17 [1998] QCA 151 at p 7.

18 [1998] QCA 151 at p 7.

this serious offence is of concern. The applicant's role was relatively limited and his culpability was less serious than one who "masterminded" the offence, but such an offender might be given an even more severe penalty than eight years imprisonment. Those, and all of the other circumstances upon which the applicant relied, were taken into account by the sentencing judge.

[20] This was an extremely serious example of the offence, for which the maximum penalty is life imprisonment. I am not persuaded that the sentence was manifestly excessive.

Proposed order

[21] I would refuse the application.

[22] **MARGARET WILSON AJA:** I agree with the order proposed by Fraser JA and generally with his Honour's reasons, but I wish to add the following observations.

[23] His Honour has referred to the decision of this Court in *Anderson*.[19] In my respectful opinion that case is of limited assistance, primarily because of the totality issues involved in it, and also because there was apparently no evidence of the use of the stolen firearms in the commission of other offences in that case.

[24] Anderson was convicted of three offences committed on 4 March 1996 – breaking, entering and stealing; house breaking; and stealing.

[25] At the time he was sentenced for those offences, he was serving sentences for other offences, his existing sentences being due to conclude on 30 April 2000.[20] Those offences included armed robbery in company for which he had been sentenced on 20 May 1993 to five years imprisonment with eligibility to apply for parole after serving 15 months. He had been released on parole when he committed the offences on 4 March 1996, but was returned to custody on 31 January 1997 when he began to serve the remaining two years and eight months of that sentence.

[26] The sentencing judge imposed six years imprisonment on each count, to commence on 30 May 1999, which he erroneously took to be the completion date of the sentences Anderson was then serving, and failed to fix a new parole date. On appeal to this Court, Anderson was sentenced to concurrent terms of imprisonment of six years from 27 February 1998 for the first two counts, and three years imprisonment on the third count, with parole eligibility on 27 June 2001 (three years and four months after the commencement of the sentences). That made his final release date 27 February 2004.[21]

[27] In *Anderson* Thomas JA gave reasons for judgment with which McPherson JA agreed. He described the task of determining and imposing the appropriate sentence thus –

> "[23] To do this is a task of surprising complexity. This is produced by the variety of sentences imposed previously, some of which were cumulative, and by the circumstance

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19 [1998] QCA 272.

20 [1998] QCA 272 at [28] – [29] per Thomas JA; referred to in *R v Munt* [1999] QCA 141 at [6] per Pincus JA.

21 See the discussion of Anderson in *R v Munt* [1999] QCA 141 at [6] per Pincus JA.

> that the present offences were committed when the appellant was on parole in respect of earlier offences. This led to the suspension of his parole and his return to custody on former sentences before he was dealt with on the present matter.
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> [24] I propose to state briefly the matters relevant to the determination of what might ordinarily be thought to be the appropriate range of sentence for offences of the present severity, having regard to this man's prior criminal history and other antecedents. I shall then analyse the effect of pre-existing sentences so that the overall effect of the additional sentences that must now be imposed can be seen. In the end, a sentence must be fashioned which will not, in combination with other sentences, be unfairly oppressive, or offend the totality principle (*R v Coss* (CA 262 of 1994, 15 March 1995); *R v Laman* (CA 142 of 1997, 21 October 1997))."

His Honour noted that counsel for the Crown, on appeal, submitted that although a sentence of six years imprisonment might be regarded as at the top of the available range for offences of the kind under consideration, it could be justified having regard to the circumstances, and that counsel for Anderson submitted that a sentence of three years imprisonment (cumulative upon the existing sentences) would appropriately meet the situation.[22]

[28] Thomas JA was concerned to impose a sentence which reflected Anderson's overall criminality. He said –

> "[30] The total criminal conduct which needs to be assessed consists of the armed robbery in company and related offences committed in 1992, a breach of the *Bail Act* (which was thought serious enough to warrant three months cumulative) apparently committed before he was dealt with on the armed robbery charge, his commission of the present offences on 4 March 1996, a variety of minor offences committed in 1996 which appropriately attracted concurrent short-term sentences, and his escape from legal custody (for which he was sentenced to four months cumulative) which occurred on 27 May 1997 after he had been arrested on the present matters. It can be seen that the criminality with which we are concerned is that which was engaged in over two relatively short periods namely 1992-1993, and 1995-1996. As at the sentencing date for the present matters (27 February 1998) he had already served a little under three and a half years. The question then is how much more is justifiable? The sentence must reflect in some way that the present offences were committed whilst he was on parole, and that some of the offences, of their very nature, call for cumulative treatment.
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> [31] It seems to me that the situation would best be met by imposing a relatively severe concurrent sentence, which in this instance should be one of six years, at the same time

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22 *R v Anderson* [1998] QCA 272, [27] per Thomas JA.

> allowing for a relatively small cumulative effect to be included by reason of his commission of other offences including his escape from custody. This can be achieved by a postponement of his parole eligibility date of four months beyond the half way mark of the concurrent six-year sentence."

[29] On my analysis of Thomas JA's reasoning in *Anderson*, his Honour did not identify what would have been the appropriate range for this offending absent the other offending and the sentences imposed for it. His description of six years imprisonment as "relatively severe" was in the context of the applicant's overall criminality and the other sentences he was already serving. In other words, it was affected by the totality principle. Indeed, in *R v Munt*[23] his Honour said –

> "[4] … Anderson's sentence was very much affected by the circumstance that his offence had reactivated the full balance of an earlier five year term, upon which he was on parole when the present offences were committed. Upon cancellation of parole he became obliged to serve the remaining two years and eight months of that sentence. In order to avoid the undue oppression that would arise, this court in Anderson's case (CA No 90 of 1998, 11 September 1998) deliberately framed a sentence with a substantial overlap between the old sentences and the new. Anderson's recent offences had already been the cause of considerable disadvantage to him before he was actually sentenced on them. For a valid comparison between Anderson's sentence and Munt's sentence to be made, the total criminality of each offender, and the total sentences of the court in respect of each offender need to be seen.
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> [5] Anderson's total criminality arose out of offences committed over two relatively short periods, namely 1992-1993, and 1995-1996. These consisted of an armed robbery in company and related offences in 1992, a breach of the *Bail Act* 1980 (*Qld*) (three months cumulative), his commission of the present offences on 4 March 1996, a variety of minor offences in 1996 (concurrent short term sentences) and his escape from legal custody in May 1997 (four months cumulative). At the date of his sentence on the present matters (27 February 1998) he had already served three and a half years, and his new sentence of six years was ordered to commence on that date. When the special direction concerning parole is taken into account, his overall sentence was nine and a half years, and the minimum period he would have to serve before becoming eligible to be considered for parole was six years and ten months."

[30] In *Anderson* the reasons for judgment of the three judges who constituted the Court do not refer to evidence of the actual use of the firearms in the commission of other offences, whereas there was such evidence in the present case. The actual harm

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23 [1999] QCA 141.

caused by offending conduct is a relevant factor in sentencing, and, in my respectful view, this distinguishing feature, which is alluded to by Fraser JA in para [14] of his reasons, is of considerable significance and supports the imposition of a harsher sentence than that in *Anderson*.