

SUPREME COURT OF QUEENSLAND

CITATION: *R v Abraham* [2011] QCA 270

PARTIES: **R**
v
ABRAHAM, Al Rewi
(applicant)

FILE NO/S: CA No 127 of 2011
DC No 907 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 7 October 2011

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2011

JUDGES: Muir and Chesterman JJA, and Fryberg J
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 pleaded guilty at the re-trial to seven counts of burglary and one count of breaking, entering and stealing – where the applicant had earlier been convicted of a large number of offences of dishonesty and the dangerous operation of a motor vehicle and was sentenced to five years’ imprisonment suspended after two years – where the applicant’s plea of guilty to the ten counts put him in breach of the suspended sentence – where the applicant had been remanded in custody for three years and seven months – where the lengthy period in remand did not relate to the ten counts and no declaration of time served could be made – where the applicant claimed he should not have been sentenced on the counts of unlawful operation of a motor vehicle as the sentences had already been served – whether there was an error in the sentences imposed

COUNSEL: C F C Wilson for the applicant (pro bono)
B J Power for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **MUIR JA:** I agree that the application for leave to appeal should be refused for the reasons given by Chesterman JA.
- [2] **CHESTERMAN JA:** On 29 September 2009, after a nine day trial, the applicant was convicted of four counts of armed robbery in company and six counts of unlawfully using a motor vehicle to facilitate the commission of an indictable offence. The offences were the armed robberies. On 25 January 2010 he was sentenced on those 10 offences and eight further offences to which he pleaded guilty. The other offences were:
- Seven counts of burglary and stealing; and
 - One count of breaking, entering and stealing.
- [3] Earlier, on 29 March 2004 he had been convicted of a large number of offences of dishonesty and the dangerous operation of a motor vehicle. He was sentenced to five years' imprisonment suspended after having served two years. The offences of which he was convicted on September 2009 and January 2010 put him in breach of the suspended sentence.
- [4] On 25 January 2010 he was sentenced effectively to five years' imprisonment for the burglaries and eight years' imprisonment for the armed robberies. Twelve months of the suspended sentence was activated for the breach. The sentences were to be served concurrently but cumulatively on the sentence of 12 months which the appellant was required to serve for breach of the earlier suspended sentences. A declaration that he had been convicted of a serious violent offence was made with respect to one of the armed robberies. Effectively, then, the appellant was sentenced to nine years' imprisonment for the whole of his offending.
- [5] On 24 August 2010 the jury's verdicts on the 10 counts which went to trial were set aside because of a fundamental irregularity in the trial. A new trial was ordered and was set to commence on 27 April 2011. On the morning of the trial the appellant intimated that he would plead guilty to the 10 charges. On 29 April 2011 he was duly arraigned and pleaded guilty.
- [6] The applicant had, prior to his trial, been remanded in custody for the extraordinary period of three years and seven months, from 28 June 2006 to 25 January 2010. That time in custody was in respect only of the offences of which he was convicted, after trial and by his own plea, on 29 September 2009 and 25 January 2010 respectively. Accordingly that period of 1,307 days was declared as time served pursuant to the sentences imposed on the latter date.
- [7] When the applicant came to be sentenced on 29 April 2011 the same declaration could not be made because the lengthy period of remand in custody did not all relate to the offences for which he was then being sentenced. Some related to the offences to which he had pleaded guilty in January 2010.
- [8] To avoid injustice to the applicant which would follow on the imposition of a sentence of appropriate severity for the armed robberies, but which did not take into account the lengthy period spent in custody on remand, prosecutor and defence

counsel submitted that an artificially lenient sentence should be imposed to be served cumulatively on the five years imposed on the burglary offences. The end result was as an effective sentence of eight years, the same as that imposed on the previous occasion. The sentences imposed on both occasions were to be served cumulatively on the activated part of the suspended sentence i.e. 12 months.

- [9] The formal orders were that on each offence a conviction was recorded and the appellant was sentenced on each offence to three years' imprisonment to be served concurrently with each other but cumulatively on the sentences imposed on 25 January 2010. A parole eligibility date was set 12 months thence, 29 April 2012. The declaration as to the commission of a serious violence offence was not repeated. The date on which the applicant would have been eligible for parole pursuant to the sentences imposed in January 2010 was approximately 20 November 2013. The absence of a declaration as to the commission of a serious violent offence, and the earlier eligibility for parole were benefits afforded to the applicant by reason of his pleas of guilty, notwithstanding that they came very late.
- [10] It will be seen that the learned sentencing judge, and counsel for defence and prosecution, all strove to achieve the same level of sentencing that had been imposed earlier with the adjustment mentioned to recognise the co-operation with the administration of justice afforded by the pleas of guilty.
- [11] The applicant had one complaint about the sentences. He submits that he should not have been sentenced at all on the counts of unlawfully using a motor vehicle because the sentences had already been served by the time he came to be dealt with in April this year. There was no complaint about the sentences of three years on the robbery counts. The net result in period of imprisonment would not be affected but the alleged sentences for unlawful use were said to have the result that the Court of Appeal should re-sentence the applicant. What was sought in lieu of the sentences imposed was an order that the terms of three years' imprisonment imposed for the armed robberies be suspended after 12 months thus giving the applicant certainty as to his date of release.
- [12] Given the nature of the applicant's arguments it is not necessary to set out in any detail the circumstances of the offences or of the applicant's criminal history. Both are appalling. On two occasions the applicant and an accomplice armed with a revolver held up suburban post offices. On a third occasion they robbed a liquor barn. On each occasion they threatened serious personal harm to employees and customers. At one post office a customer's purse was taken pursuant to threats that the woman would be shot if she did not give up her handbag. It was that offence which initially led to the declaration that the applicant committed a serious violent offence. The counts of unlawfully using motor vehicles related to cars which were stolen and then driven to and from the scenes of the robberies.
- [13] The applicant has a very lengthy criminal history for all kinds of dishonesty, drug use and some violence. He appears to have been an incorrigible criminal. There could be no sensible complaint about the severity of the sentences imposed, and there was none.
- [14] The only complaint is a technical one which is said to enliven the discretion of this Court to re-sentence. If the complaint is not made good there is no basis for interfering with the sentences. Even if the alleged error were made out the

sentences imposed are not manifestly excessive and no point would be served by interfering in the manner sought by the applicant. Given his appalling history it cannot be appropriate to release the applicant without supervision.

- [15] In fact there is no such error. The submission that the applicant had served the three year sentences imposed for the unlawful use of the motor vehicle is based upon the misunderstanding that the sentences which took effect when pronounced on 25 January 2010 remained in effect. Each sentence was one of three years' imprisonment. At that date the applicant had already spent more than three years in custody which was declared to have been time served so that the sentences would have been exhausted. However those sentences, and the convictions on which they followed, were set aside by the Court of Appeal on 24 August 2010 with retrospective effect. They were expunged so that, retrospectively, they never took effect, and the applicant's incarceration was not referable to them. Consequent upon the appeal the applicant was in custody (a) on remand for the offences which were to be re-tried and (b) pursuant to the sentences imposed for the burglary offences which had not been affected by the order of the Court of Appeal on 24 August 2010.
- [16] On 29 April 2011 the charges again came before the court. The applicant was validly sentenced for them only on this occasion. Of course the time spent in custody had to be recognised in some way, as it was, but in point of law the applicant was first sentenced on 29 April 2011.
- [17] There was, accordingly, no error in the sentences imposed. The application for leave to appeal should be refused.
- [18] **FRYBERG J:** I agree that this application should be refused for the reasons given by Chesterman JA.