SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kuzmanovski; ex parte A-G (Qld)* [2012] QCA 19
PARTIES:	**R** **v** **KUZMANOVSKI, Aleksandar** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 250 of 2011 DC No 180 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	24 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2012
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where respondent pleaded guilty to one count of armed robbery and was convicted and sentenced to three years imprisonment with an immediate parole release date – where appellant argues that the release of the respondent on immediate parole was plainly unreasonable and unjust – where respondent stole a motor vehicle – where respondent produced a replica weapon – where complainant suffered distress and impairment to income earning capacity – where the respondent entered an early guilty plea and cooperated with authorities – where respondent suffered from Asperger's Disorder – where impairments in respondent's working memory and verbal comprehension were likely to affect his reasoning and judgment – where respondent's capacity to understand the consequences of his behaviour was significantly impaired – where respondent was influenced by a computer game – where respondent had no prior criminal history – where

psychologist suggested that future re-offending could be prevented – where psychologist suggested that if respondent was incarcerated he would be "highly susceptible" to the influences of more skilled delinquents – where psychologist suggested that prospects of rehabilitation, and therefore the protection of community against future re-offending, would be improved by not incarcerating respondent – whether immediate release on parole was manifestly inadequate

Lacey v Attorney-General of Queensland (2011) 242 CLR 573; [2011] HCA 10, cited
R v Dullroy & Yates; ex parte A-G (Qld) [2005] QCA 219, applied
R v Moss [1999] QCA 426, considered

COUNSEL: A W Moynihan SC for the appellant
J McInnes for the respondent

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

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

[2] **FRASER JA:** On 12 August 2011 the respondent pleaded guilty to one count of armed robbery on 26 July 2010. He was convicted and sentenced to three years imprisonment with an immediate parole release date. It was ordered that a copy of a psychological report on the respondent be provided to Queensland Corrective Services.

[3] The Attorney-General has appealed against the sentence on the ground that it is manifestly inadequate. The Director of Public Prosecutions, who appeared for the Attorney-General, accepted that the sentence of three years imprisonment was within range but he argued that to release the respondent on immediate parole was plainly unreasonable and unjust. I will discuss that argument after I have first summarised the circumstances of the offence, the respondent's personal circumstances, and the remarks by the sentencing judge.

[4] The respondent was 21 years old when he committed the offence. At about midday on 26 July 2010 he went to a car dealership on the Gold Coast, enquired about cars for sale, and asked the complainant car salesman if he could test drive one of the cars. The complainant initially drove the car with the respondent as a passenger. When the respondent asked to drive, the complainant pulled the car over. Both men got out of the car. The respondent walked to the passenger door, produced a replica handgun and aimed it at the complainant. He told the complainant to turn around, walk back, and not make a scene or scream or the respondent would shoot him. The respondent got in the car and drove off.

[5] The complainant was very distressed and in fear for his life. He did not know that the gun pointed directly at his face was a replica. The complainant's victim impact statement testifies to the adverse impacts of the offence on his sense of security, his continuing emotional distress and anger, and the resulting limitations of his ability to earn income in his occupation as a car salesman.

[6] The stolen car was seen in a car park at the respondent's residence. When police attended they found the respondent at his unit and the keys to the stolen car on the respondent's key ring. He admitted taking the car and he directed the police to the replica gun which was in the car. He was transported to the watch house where he participated in a record of interview and made full admissions. The offence was not carefully planned. The respondent told police he had been watching action movies and thought it would be exciting to steal the car. As soon as he did so, he regretted it and was ashamed and embarrassed. He had expected the police to show up and he had intended to dump the car. The respondent entered an early plea of guilty and cooperated with the authorities.

[7] It was recorded in the schedule of facts tendered by the prosecutor that the police who interviewed the respondent considered that he was genuinely sorry for his actions. That was consistent with the respondent's mother's statement that after the offence the respondent was shocked, severely depressed and crying for months. Similar remarks were made in a report by a psychologist. The psychologist reported that the respondent suffered from Asperger's Disorder, which had been diagnosed when the respondent was a child. He had a predilection for action related computer games, including games which involved stealing cars. In effect, he took his script for the robbery from such a game. Whilst he appreciated the difference between the games and reality and knew that what he did was wrong and illegal, the impairments in his working memory and verbal comprehension were likely to affect his reasoning and judgment. He was unlikely to anticipate the reactions of the complainant and others (and his own reaction), and his capacity to understand the consequences of his behaviour was significantly impaired. His disorder also significantly limited his capacity to take the perspectives of others. Conversely, he had a superior capacity for non-verbal reasoning and visual spatial analysis and an above average ability to process verbal and non-verbal information. Despite the limitation on the complainant's capacity to take the perspective of others, he himself experienced a high degree of distress and trepidation when he understood from seeing the complainant's facial cues that the complainant was distressed. The psychologist also considered that the respondent was, for his age, socially naïve and immature.

[8] According to the respondent's mother, he had never before displayed any signs of aggression at all. He had no criminal history. At the time of the offence the respondent was gainfully employed as an apprentice chef. After the respondent committed the offence the respondent's employer, who spoke well of his work, regarded him as no longer suitable to hold his position. The respondent was able to obtain virtually immediate employment as a sales supervisor at an advertising company. The employer's managing director spoke highly of the respondent and his future prospects in that employment.

[9] The psychologist recommended a variety of treatments and strategies and expressed the opinion that, because of the respondent's cognitive abilities, he was likely to respond to those strategies. The psychologist considered that the respondent's history suggested that there were factors which might protect against future re-offending. However if the respondent was incarcerated at a correctional centre he would be "highly susceptible" to the influences of more skilled delinquents. His access to the necessary specialist services would also be limited and restricted to the correctional centre routine and, because of his developmental disorders, he would be at a considerable risk of abuse and at a greater risk of mental health problems. The

respondent's risk of recidivism would be likely to be reduced by participation in the activities and programs which the psychologist recommended to be undertaken in the community.

[10] The sentencing judge accepted the prosecutor's submission that this type of offence was very serious and prevalent. As was also submitted and accepted by the sentencing judge, where replica weapons are used victims often suffer lasting psychological harm, as was likely in the case of the complainant. The sentencing judge also took into account that the complainant was in a similar position of vulnerability in his work as taxi drivers, shop keepers who work alone at night, and service station employees. The sentencing judge referred to the evidence in considerable detail. After mentioning the comparable sentencing decisions relied upon by the prosecutor and defence counsel, the sentencing judge held that a term of significant imprisonment must be imposed and that actual custody was within range. After carefully considering the facts of this case, the sentencing judge determined that the respondent should be sentenced to imprisonment for three years, to reflect the serious nature of his offending and the adverse affect on the complainant. The order for immediate release on parole was made because of the matters personal to the applicant, which I summarised earlier. The sentencing judge ordered release on parole rather than suspending the sentence to ensure that the respondent was subject to strict supervision over the following three years and that if he breached his parole he would be taken into custody and would have to serve that term of imprisonment.

[11] As was accepted for the Attorney-General, the head sentence of three years imprisonment is within the range of appropriate sentences established by *R v Moss* [1999] QCA 426, although it is at the low end of that range. The Attorney-General acknowledged that this Court has held that for the offence of armed robbery, non-custodial sentences are, depending on the circumstances, within the sound exercise of the sentencing discretion for youthful first offenders. But it was submitted that this was ordinarily confined to 17 to 18 year old offenders, the leniency being extended primarily to reflect the greater prospects of rehabilitation of that category of offenders. The qualification in the Attorney-General's argument that the category does not "ordinarily" extend to those who are no longer teenagers, correctly acknowledged that, at least in an unusual case, a non-custodial sentence in circumstances such as these may be imposed where the offender is older than 18. It was submitted for the Attorney-General, however, that the examples of 20 and 21 year old offenders being given the benefit of that special leniency were restricted to cases in which considerations of parity with the sentence imposed on another offender called for it.

[12] The authorities do not support the submission. In *R v Dullroy & Yates; ex parte A-G (Qld)* [2005] QCA 219, the Attorney-General's appeals against wholly suspended sentences of four years imprisonment imposed for the offence of robbery whilst armed and in company were dismissed. White J, as White JA then was, with whose reasons McMurdo J agreed, considered that the sentences were lenient but that they were not manifestly inadequate, so that it was not open to the Court to allow the appeals. Whilst Dullroy was 16 to 17 years of age at the time of the offending, Yates was 22 years old at that time. The offence was more serious than in the present case, because it was a carefully planned robbery. It was committed in company (there were four offenders in all), and the offenders used a gun which they had stolen from a dwelling. In addition to Dullroy pointing the gun at two employees of the store they robbed, Yates entered carrying a fish knife.

Furthermore, there were six employees working at the store, five of whom were forced into a cold room under the threat of the gun, and the three female staff members who gave victim impact statements had suffered greatly from the offending. Like the respondent in this case, Dullroy and Yates had no previous criminal history. The older man, Yates, was socially vulnerable but had some real prospects of rehabilitation if not sent to jail.

[13] In support of the Attorney-General's argument that the case turned upon parity considerations, reference was made to the following paragraph of the Chief Justice's reasons:

> "In terms of the comparability of the overall positions of Dullroy and Yates, the learned Judge proceeded, reasonably in my view, on the basis they should receive the same treatment. While Dullroy was the younger man, and a child when he committed the robbery, it was he who instigated and planned it, and he carried out a larger role. Further, he carried the additional burden of the later offending. There seems no particular reason however why they should in the end have been treated differently."

[14] As I read that passage, the sentencing judge did not give special leniency to Yates or Dullroy because of the sentence imposed on the other; rather the sentencing judge balanced the different circumstances in the case of each offender and concluded that each should receive the same sentence.

[15] White J (as White JA then was) said at [50] – [54]:

> "His Honour concluded that both of these respondents went 'seriously off the rails'. In the case of Dullroy he thought his age and immaturity and the unsettling experience of being taken out of his familiar environment were major factors in his wrongdoing whilst Yates, despite his additional years, was vulnerable due to his background and circumstances. He found that in both young men the prospects of rehabilitation were excellent and already underway. This is not disputed by the Attorney-General. He noted the need for general deterrence being of the view that personal deterrence was not needed. He recognised that there are many places where workers are isolated and that the offence was typically a terrifying event for many of them often leaving long lasting psychological scarring. He correctly recognised that there was no basis for differentiating between the two.
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> A number of cases have been referred to by counsel: *R v Moss* [1999] QCA 426; *R v Mather* [1999] QCA 226; *R v Reu, ex parte Attorney-General* [1999] QCA 196; *R v Maslen* [1998] QCA 198; *R v Smith* [2004] QCA 31; *R v Clark* [1998] QCA 477; *Breeze*; and *Taylor & Napatali; ex parte Attorney-General (Qld)*. Of these cases, only that of *Taylor and Napatali* needs be considered closely because it most closely resembles these appeals. It was decided after the 1997 amendments to the *Penalties and Sentences Act*. The Attorney-General appealed against the imposition of a 12 month intensive correction order pursuant to s 113 of the *Penalties and Sentences Act* for the offence of robbery in company with violence. The two

offenders aged 17 and 20 pleaded guilty on *ex-officio* indictment. Neither had any previous convictions. Both came from difficult family backgrounds. The principal complainant, a 28 year old woman was on duty in the course of her employment at a 24 hour service station in Kingston. She was serving a customer, when the two offenders came into the service station shop holding guns, one a single barrelled rifle and the other a pistol. Neither gun was loaded and the pistol was a replica pistol although the complainants did not know this. The offenders had been drinking and decided, relatively spontaneously, that they would carry out the robbery. Although their heads were covered their faces were not and one was recognised as a regular customer to the shop. Napatali pointed the rifle in the direction of the female complainant and then jammed it at the back of the customer's head. Taylor demanded money be put in a shopping bag and they ran from the shop. The amount taken was about $600. Police interviewed the two young men who confessed to committing the offence. The court received favourable references in respect of each.

In that case as here, the critical factor influencing the sentencing discretion was that the respondents were youthful first offenders for whom the sentencing judge considered there was some real prospect of rehabilitation if they were not sent to jail. McPherson JA observed at 583 that that has long been regarded as a significant factor in sentencing. His Honour quoted with approval from the reasons for judgment of Wanstall CJ (with whom Matthews and Kelly JJ agreed) in *R v Price* [1978] Qd R 68 at 70-71 who in turn quoted from the reasons for judgment of Burbury CJ in *Lahey v Sanderson* [1959] Tas SR 17:

> 'The courts have recognised that imprisonment is likely to expose a youth to corrupting influences and to confirm him in criminal ways, thus defeating the very purpose of the punishment imposed. There has accordingly been a universal acceptance by the courts in England, Australia and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and, in the ordinary run of crime, the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord Goddard, the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. With that I respectfully agree.'

The Chief Justice said that was a correct principle to be applied.

McPherson JA reviewed extensively a number of previous decisions dealing with youthful first offenders convicted of armed robbery. He concluded that the repeal of s 9(4) of the *Penalties and Sentences Act* did not remove the discretion whether or not to impose a term of imprisonment on a young first offender. His Honour noted that the primary judge had attempted to reconcile the competing interests of victims and offenders and concluded that the decision to punish them by way of an intensive correction order, having regard to other

> sentences in cases involving offenders and offences of a similar nature, the sentence could not be regarded as manifestly inadequate.
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> McMurdo P noted the desirability of not sending youthful offenders without prior conviction to prison because of the chances of favourable reformation. She noted that the schedule of sentences imposed in armed robbery cases on 17 year olds between 1988 and 1992 referred to in *R v Bainbridge* (1993) 74 A Crim R 265 showed that where the offender had no relevant previous convictions, only 7 of the 24 matters involved custodial sentences and three were for six months or less. She noted that the combined effect of s 9(3) (the amending provision) and many of the matters listed for consideration in s 9(4) had the result that although the youth of an offender was still relevant, its weight was less than prior to the 1997 amendment. She concluded at 589:
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> > 'Parliament has wisely left judges an unfettered sentencing discretion to impose the most appropriate sentence in order to meet the unique facts of each case. That discretion must, of course, be exercised properly and will only be reviewed on an Attorney-General's appeal where the sentencing judge has erred in principle either because an error was discernable or a manifest inadequacy demonstrated: see *Melano*.'[1]
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> She agreed, as did Thomas JA, that the appeal should be dismissed there being no discernable error or manifest inadequacy in the sentence."

[16] Very similar considerations apply in this appeal. The psychologist's report suggests that this is a case in which the prospects of the respondent's rehabilitation, and therefore the protection of the community against future re-offending, would be improved by not incarcerating the respondent for the twelve months imprisonment contended for by the Attorney-General. Whilst the community would no doubt be entirely protected during that twelve month period, the evidence suggests that the long term protection of the community would be enhanced instead by the order made by the sentencing judge. As was the case in *R v Dullroy & Yates*, and also in the similar decision in *R v Taylor & Napatali; ex parte A-G (Qld)* [1999] QCA 323, the respondent was a youthful first offender for whom the sentencing judge considered there were real prospects of rehabilitation if he was not sent to jail. On the other hand, a custodial sentence might very well increase the risk of recidivism. The reasons for extending leniency to youthful first offenders in appropriate cases of this character have also been noted in numerous decisions.

[17] It was submitted that there was reason to be "circumspect" about the extent of the respondent's disorder, given that his mother and employers spoke of his functioning at a high level, he finished school at Year 12, he lived independently, he had many friends, and he was hard working and financially self-sufficient. It was also submitted that it was "difficult to see" that the disorder was a "major" contributing factor to the offence. Certainly the respondent's emotional and intellectual deficits did not excuse his offence or require the sentencing judge to impose a non-custodial sentence, but the sentencing judge did not over-emphasise those features of the case.

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[1] That approach to an appeal by the Attorney-General has since been confirmed by the High Court in *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573.

[18] It was submitted for the Attorney-General that it would have to be a "rare and exceptional case" that would justify a non-custodial sentence for the offence of armed robbery, which carries a maximum penalty of life imprisonment. I accept that the immediate parole made the sentence a lenient one. A custodial sentence was certainly within range, but that is not sufficient to justify this Court intervening. The question for this Court is not whether it would have imposed this sentence but whether the sentence was manifestly inadequate, that is, that the sentence was so inadequate that it was outside the discretion reposed in the sentencing judge.

[19] It was for the sentencing judge to balance the competing considerations which were required to be taken into account. Her Honour plainly gave anxious consideration to the appropriate sentence. Whilst I accept that the provision for immediate release on parole was lenient, I am not persuaded that the overall sentence is so inadequate as to justify the conclusion that it was manifestly inadequate.

[20] I would dismiss the appeal.

[21] **CHESTERMAN JA**: I agree with the order proposed by Fraser JA for the reasons given by his Honour.