# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *R v Omar* [2012] QCA 23 |
| PARTIES: | **R**<br>**v**<br>**OMAR, Shoaib**<br>(applicant) |
| FILE NO/S: | CA No 325 of 2011<br>DC No 1561 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 24 February 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 February 2012 |
| JUDGES: | White JA, Margaret Wilson AJA and Atkinson J<br>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 applicant pleaded guilty to one count of burglary with circumstances of aggravation, one count of kidnapping and one count of assault occasioning bodily harm – where applicant sentenced to four years imprisonment – where applicant co-operated with police – where lack of parity with co-offenders – where applicant the prime mover in the planning and commission of offences – where applicant chose to make application for leave to appeal against sentence in the context of a legislative scheme which prevents him from making an application for parole whilst the appeal is undecided – whether the sentence imposed was manifestly excessive in all the circumstances<br><br>*Corrective Services Act* 2006 (Qld), s 180<br>*Criminal Code* 1899 (Qld), s 7(1)(a), s 7(1)(b), s 7(1)(c), s 8, s 339(1)(3), s 354(1), s 359F, s 419(1)(3)(b)<br><br>*R v AR* [2003] QCA 538, cited<br>*R v El-Masri* [2003] QCA 52, cited<br>*R v P; ex parte A-G (Qld)* [2002] QCA 69, distinguished |

| | |
|---|---|
| COUNSEL: | B H P Mumford for the applicant<br>V A Loury for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **WHITE JA:** I have read the reasons of Margaret Wilson AJA and agree with her Honour's reasons and the order which she proposes.

[2] **MARGARET WILSON AJA**: The applicant and two co-offenders pleaded guilty to one count of burglary with violence while armed and in company, one count of kidnapping and one count of assault occasioning bodily harm while armed.

[3] On 25 November 2011 the applicant was sentenced to imprisonment for four years for the burglary, for a similar term for the kidnapping and for 18 months for the assault occasioning bodily harm. The sentences were made concurrent. Pre-sentence custody of 380 days was declared time already served, and parole eligibility was fixed at 10 March 2012 (after one-third of the head sentence).

[4] The two co-offenders, Alicia Bronwyn Green and Tia Margaret Hodgkiss, each received sentences of two and a half years for the first two offences and 12 months for the third, to be served concurrently. Short periods of pre-sentence custody (23 days and 27 days respectively) were declared time already served, and they were both ordered to be released on parole immediately.

[5] The applicant seeks leave to appeal against sentence on the ground of manifest excessiveness. His counsel made two principal submissions – that the head sentence of four years was manifestly excessive and that there was disparity between his client's sentence and those imposed on the co-offenders.

**The facts**

[6] The offences were committed on 11 November 2010, when the applicant was aged 21 and his co-offenders were aged 17.

[7] The complainant was an 18 year old girl who had formerly been in a relationship with the applicant. It was through her that the applicant and his co-offenders had met. The applicant and the complainant were defendants in a pending criminal court matter, in which they due to appear on 16 November 2010. The applicant believed that the complainant was going to give evidence against him in that matter. Ultimately, that matter was resolved: the Crown offered no evidence, and an order restraining unlawful stalking was made pursuant to s 359F of the *Criminal Code* 1899 (Qld).

[8] On the day of the offences, the applicant had been smoking cannabis that was apparently laced with methamphetamine. As a result of conversations with his co-offenders he thought the complainant was going to testify against him.

[9] The offending conduct began at about 6 am when the applicant and his co-offenders arrived by car at the complainant's unit, where she was at home alone. Ms Green went to the front door and coaxed the complainant into letting her in, telling her that the applicant had a gun. The complainant telephoned her boyfriend. Then

Ms Hodgkiss entered the unit, followed 10 seconds later by the applicant. He had a gun in his left hand. He was pulling the slide of the gun back and releasing it. The gun was in fact a replica.

[10] The complainant ran to the bathroom, still on the phone to her boyfriend. She tried to close the door, but the applicant pushed it open. There was a struggle in which she tried to disarm him and he tried to take the phone from her. In the struggle, the applicant hit her on the face, across the hands and on her left arm. She suffered bruising and scratches from the assault.

[11] The applicant left the unit and returned to the car. The co-offenders took the complainant from the unit to the car, either by dragging or hurrying her. The applicant drove to bushland. During the drive he was described as "going crazy". He said repeatedly that people were telling him that the complainant was going to testify against him. At one stage he told Ms Hodgkiss to give him his gun, and she removed it from the glovebox and loaded it with ammunition. The complainant screamed and tried to get out of the car, but the child safety locks had been engaged at the applicant's direction and the windows had been locked.

[12] When they reached the bushland, the applicant stopped the car. He took the gun and pointed it at the complainant's face, saying, "Do you think that I'm fucking around?" They were parked there for about two hours, during which time the applicant repeatedly questioned the complainant about the pending court case.

[13] Ms Hodgkiss complained that she was unwell and wanted to go home. The applicant drove her to a nearby location where she was dropped off. At a later point in the journey, he stopped the car and told the complainant that he felt guilty about what he had done. He said he did not want to scare her, but just to talk to her. He said he was scared and that he did not want to go to jail. He asked her not to "dog" on him. He threw the gun away, and then drove to a police station to report in accordance with a bail undertaking.

[14] By that time, police had become aware that an incident had occurred. The applicant denied any knowledge of it and declined to be interviewed. Police officers spoke to the complainant. The two co-offenders confessed their involvement in interviews with police and provided statements to police.

**The applicant's antecedents**

[15] The applicant was born in Afghanistan, and came to this country with his parents when he was a baby. He left school after finishing year 11.

[16] He had a criminal history, beginning at age 19. He was first convicted of using a carriage service to menace, harass or cause offence in May 2008. He was convicted of wilful damage on four occasions, assaulting or obstructing a police officer on one occasion and common assault on one occasion. The assault involved throwing eggs, one of which hit the complainant on the arm. He had convictions also for dishonesty and property offences, including fraud and stolen property. He was subsequently convicted of dangerous operation of a motor vehicle.

[17] He had not previously been imprisoned. He had twice been sentenced to probation, and he had breached both of the probation orders by re-offending. The offences of 11 November 2010 were committed less than three months after he was re-

sentenced for breaching the probation orders. Five days after committing those offences he was sentenced to three months imprisonment, wholly suspended, for dangerous operation of a motor vehicle.

[18] A psychologist, Peter Perros, interviewed the applicant about five weeks before the sentencing hearing. The applicant told Mr Perros of a troubled upbringing attributable in part to cultural and religious issues, and in part to his father's having a violent temper and being very strict. He had been a rebellious teenager and an illicit drug user. He had also been prescribed antidepressant, antipsychotic and tranquillising medications. Mr Perros considered that he needed extensive counselling, and that it was important that he refrain from illicit substance abuse and continue with his prescribed regime of medications under medical/psychiatric supervision. He concluded –[1]

> "I believe that if he can establish stability in terms of relationship, family, and employment then Mr Omar will enjoy a vastly better prognosis than predicted by his current circumstances. He may need counselling and support to achieve these goals.
>
> As regards risk of recidivism, I have to say that the history obtained from Mr Omar suggests a high likelihood of further violence and I fear he may develop a psychosis if he relapses."

**Submissions before sentencing judge**

[19] The prosecutor submitted to the sentencing judge that the head sentence should be within the range of four to five years imprisonment, with parole eligibility after one-third. Defence counsel submitted that the applicable range was two to three years, with parole eligibility after one-third.

**Matters referred to by the sentencing judge**

[20] The sentencing judge described the offences as serious. His Honour referred to the abduction having gone on for two hours and the grave impact it had on the complainant. He said –[2]

> "I do not want any of you to not understand in relation to this sentence that what a judge has to keep in mind is not only personal deterrence, but general deterrence as well …"

[21] His Honour referred to the applicant's remorse, and the apology he had written to the complainant. The applicant had co-operated in the proceeding by consenting to a full hand-up committal and then pleading guilty. His Honour took account of the psychologist's opinion, and of the applicant's having undertaken courses whilst in custody.

[22] His Honour said –[3]

> "You are a young person, too, Mr Omar, but you, I have to say, were the person who originated the plan and must bear the consequences of it. I hasten to say that I do not overlook these mitigating factors."

---

1 Record p 149.
2 Record p 126.
3 Record pp 122 – 123.

[23] His Honour took a somewhat lenient view of the applicant's criminal history when he observed –[4]

> "Mr Omar, you have a criminal history. It contains one offence of violence, but it was minor. It involved the throwing of eggs, but you committed these offences, the Prosecutor points out, in the November of 2010, as I have already said, and that was not long after having been dealt with for breaches in the Magistrates Court in August 2010.
>
> The history is there, but I get that into perspective, I trust, and appreciate the fact that you have not been involved in anything like this before. It was unfortunate that you did become involved and Mr Menolotto[5] has stressed, and I have tried to understand, your perceptions as a young man about what was going on around you."

**Discussion**

[24] The applicant stood to be sentenced for burglary with circumstances of aggravation, for which the maximum penalty was life imprisonment, kidnapping for which the maximum penalty was seven years imprisonment and assault occasioning bodily harm with a circumstance of aggravation for which the maximum penalty was 10 years imprisonment.

[25] As counsel for the respondent submitted in this application, the offences were premeditated and involved a degree of planning. The applicant was the originator of the plan. Punishment and deterrence, both personal and general, were particularly important. A very disturbing feature of this case was the applicant's motive for the offending – to prevent the complainant from giving evidence against him in a pending criminal matter. It is inimical to the public interest in the integrity of our justice system that anyone should engage in conduct of this type targeted at someone who might give evidence against him or her. This feature of the applicant's offending afforded added significance to general deterrence in fashioning the appropriate sentence.

[26] While the applicant's troubled background, his immaturity and his consumption of illicit drugs may have been some explanation for his behaviour, they were no excuse for it. The sentencing judge fairly took account of such mitigating factors in fixing the head sentence, and he made allowance for the pleas of guilty in fixing parole eligibility at one-third.

[27] The applicant was the prime mover in the planning and commission of the offences. It was he who carried the gun, and who inflicted the injuries on the complainant. The co-offenders Ms Green and Ms Hodgkiss were two years younger. Ms Green had no criminal history and there was only one entry on Ms Hodgkiss' criminal history which the sentencing judge described as insignificant. Unlike the applicant, they fully co-operated with police.

[28] The sentencing judge did not err in imposing a heavier sentence on the applicant than those he imposed on the co-offenders. The degree of disparity between the sentences properly reflected their relative culpabilities.

---

4 Record pp 125 – 126.

5 Counsel who appeared for the applicant before the sentencing judge.

**Comparable sentences**

[29] Consideration of the comparable cases cited by the parties confirms that the head sentence of four years with parole eligibility after one-third was not manifestly excessive.

[30] In *R v P; ex parte A-G (Qld)*[6] the offender pleaded guilty to six charges arising out of events occurring over a three day period. The offences were committed in the context of a turbulent de facto relationship. There were two counts of assault occasioning bodily harm, one count of assault, one count of kidnapping, one count of attempted burglary with a circumstance of aggravation and one count of wilful damage. A sentence of six months imprisonment was imposed for the assault occasioning bodily harm, assault and wilful damage. Three years imprisonment, suspended after 12 months, was imposed for the kidnapping and attempted burglary. The sentences were ordered to be served concurrently. The offender kidnapped his nine year old stepson, and holding a knife, demanded that he reveal information about his mother (the respondent's de facto)'s whereabouts. The boy took him to the unit where his mother was. When they arrived outside the unit, the offender grabbed the boy by the throat, placed the knife against his throat, and said that he was the first one to die. The boy became visibly upset, and was screaming. The offender asked the boy's mother to let him in before he killed the child. The respondent was aged 31. He had a significant criminal history, including convictions for offences of violence, and was a drug addict.

[31] On an appeal against sentence brought by the Attorney-General, the Court of Appeal set aside the sentence of three years for the kidnapping, and in lieu thereof imposed a sentence of four years imprisonment. It also set aside the order suspending the sentences after 12 months, and did not make any recommendation for early parole eligibility. Williams JA commented that a sentence of four years imprisonment might be regarded as on the light side. McPherson JA said that the sentence being imposed on appeal should not necessarily be taken as an upper benchmark for offences of this kind.

[32] Counsel for the applicant did not suggest that his client's conduct was objectively less serious than that of the offender in *P's case*. Instead, he pointed to his client's relative youth, his unfortunate personal background and his limited criminal history. It is not clear that his client co-operated in the administration of justice to any greater degree than *P*. In any event, having regard to the concluding remarks of McPherson and Williams JJA and to the early parole eligibility granted to the applicant but not to *P*, the applicant's sentence was not manifestly excessive by comparison with *P's case*.

[33] In *R v A*[7] and in *R v El-Masri*[8] the offender applied unsuccessfully for leave to appeal against sentence on the ground of manifest excessiveness. I accept counsel for the respondent's submission that the sentence imposed on the applicant sits comfortably with the sentences in those cases.

[34] In *A's case* the offender pleaded guilty to one count of kidnapping, one count of common assault, two counts of assault occasioning bodily harm, one count of sexual

---

6 [2002] QCA 69.
7 [2003] QCA 538.
8 [2003] QCA 52.

assault, and one count of sexual assault in company. The complainant was his former girlfriend, and the offences were committed as revenge for her ending the relationship. The offender was aged 32 and had a significant criminal history including convictions for offences of violence. He was sentenced to six years imprisonment for the kidnapping and six and a half years for the sexual assault in company. Both of those offences attracted a serious violent offence declaration.

[35] The offences for which sentences were imposed in *El Masri's case* arose out of two incidents involving the same complainant who owed the offender a drug debt. El Masri was sentenced to five years imprisonment for offences of deprivation of liberty and assault occasioning bodily harm committed in late 1999, and offences of deprivation of liberty, kidnapping for ransom (which carried a higher maximum penalty than kidnapping) and assault occasioning bodily harm committed in early 2000. In the first incident the complainant was deprived of his liberty in a car and assaulted. In the second incident El Masri was a party to the conduct of two other men who assaulted the complainant with an iron bar and a baseball bat, tied him up, blindfolded him and struck him several more times before placing him in the boot of a car. They threatened to shoot him. The two abductors took the complainant to El Masri, who punched and kicked him in the head and neck, and asked how he would get his money. El Masri had the complainant call his mother; he told her she had until 9 o'clock to get the money or her son would be dead. El Masri, was aged 22 at the time of the offences, and he had a troubled background as an immigrant. He was sentenced to five years imprisonment for the kidnapping for ransom and to three years imprisonment for the other offences, all to be served concurrently.

**Parole eligibility**

[36] The sentencing judge ordered that the applicant be eligible for parole on 10 March 2012.

[37] Section 180 of the *Corrective Services Act* 2006 (Qld) provides –

> "**180 Applying for parole order etc.**
>
> (1) A prisoner may apply for a parole order if the prisoner has reached the prisoner's parole eligibility date in relation to the prisoner's period of imprisonment.
>
> (2) However, a prisoner can not apply for a parole order—
>
> (a) if a previous application for a parole order made in relation to the period of imprisonment was refused—
>
> (i) until the end of the period decided by the parole board that refused the previous application; or
>
> (ii) unless a parole board consents; or
>
> (b) if an appeal has been made to a court against the conviction or sentence to which the

period of imprisonment relates—until the appeal is decided; or

(c) otherwise—more than 180 days before the prisoner's parole eligibility date.

(3) The application must be made—

(a) in the approved form; and

(b) to the parole board that may, under section 187, hear and decide the application.

(4) A parole order for a prisoner may start on or after the prisoner's parole eligibility date."

[38] But for this application for leave to appeal against sentence, the applicant might have made an application for parole (no more than 180 days before his parole eligibility date) in anticipation of its being dealt with by the Parole Board on or soon after 10 March 2012. He made a deliberate choice to make this application for leave to appeal against sentence in the context of a legislative scheme which prevents him from making such an application while an appeal against sentence (which should be taken to include an application for leave to appeal against sentence) is undecided. In the circumstances, the operation of the legislation cannot be said to make his sentence manifestly excessive.

**Outcome**

[39] I would order that the application for leave to appeal against sentence be refused.

[40] **ATKINSON J:** I agree with the order proposed and the reasons of Margaret Wilson AJA.