SUPREME COURT OF QUEENSLAND

CITATION:	*R v Suarez* [2012] QCA 190
PARTIES:	**R** **v** **SUAREZ, Lorenzo David** (applicant)
FILE NO/S:	CA No 97 of 2012 DC No 1391 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 July 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2012
JUDGES:	Fraser and Gotterson JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of fraud to the value of $30,000 or more and two counts of passing a valueless cheque – where the applicant sentenced to two years' imprisonment for the fraud and 12 months' imprisonment for each of the other two offences – where all sentences were ordered to be served concurrently – where a parole release date was set such that the applicant would be released after serving six months – where the applicant was on parole at the time of offending – where the applicant made a timely plea and full restitution – whether the trial judge gave enough weight to the totality principle – whether the sentence imposed was manifestly excessive *Corrective Services Act* 2006 (Qld), s 209, s 211 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, cited *R v Allen* [2005] QCA 73, cited *R v Brockfield* [1993] QCA 348, cited *R v Donnelly and Corbic* [2007] QCA 77, considered

R v L; ex parte Attorney-General of Queensland [1996] 2 Qd R 63; [1995] QCA 444, cited
R v Miceli [1998] 4 VR 588; (1997) 94 A Crim R 327; [1997] VSC 22, cited
R v Nuttall [2011] 2 Qd R 328; [2011] QCA 120, cited
R v Phillips & Woolgrove (2008) 188 A Crim R 133; [2008] QCA 284, considered
R v Piacentino; R v Ahmad (2007) 15 VR 501; [2007] VSCA 49, considered
R v Sheehan [2007] QCA 409, cited
R v Todd [1982] 2 NSWLR 517, cited
R v Whitnall (1993) 42 FCR 512; (1993) 68 A Crim R 119; [1993] FCA 271, cited

COUNSEL: A J Kimmins for the applicant
A D Anderson for the respondent

SOLICITORS: Bell Miller Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA**: On 8 February 2012 the applicant, Lorenzo David Suarez, pleaded guilty to three separate offences identified in the record as:

> Count 6 – an offence against s 427A(1)(b) of the *Criminal Code* committed on or about 12 January 2007 of passing a valueless cheque in discharge of a debt;
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> Count 7 – an offence of fraud against s 408C(1)(c) of the *Criminal Code* committed on divers dates between 12 and 15 January 2007 by dishonestly inducing delivery of property, namely, bank credits and money; and
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> Count 10 – an offence against s 427A(1)(b) of the *Criminal Code* committed on or about 2 May 2007 of passing a valueless cheque in discharge of a debt.

[3] Sentencing occurred on 5 April 2012 at the District Court in Brisbane. The applicant was sentenced as follows:

> Count 6 – imprisonment for 12 months;
> Count 7 – imprisonment for two years;
> Count 10 – imprisonment for 12 months.

All sentences are to be served concurrently. A parole release date after service of six months to occur on 4 October 2012 was set.

Circumstances of the offending

[4] The three counts related to separate transactions involving high return investment opportunities presented by the applicant to others. In the case of count 6, the dishonoured cheque was for $85,000 given in purported repayment with interest of a loan of $60,000 made to the applicant by the payee of the cheque. For count 7, an

amount of $27,000 was paid over to him to be lent to an entity which, he said, was to use the funds to secure the release to the entity of certain housing commission properties. In fact, that entity did not exist. With count 10, the dishonoured cheque was for $47,000. It was given in purported part repayment of a loan of $51,500 which the payee had made to the applicant.

[5] In all, in relation to these three counts, the applicant received a total of about $138,000. Those respective amounts were repaid in full by the applicant in February 2012, and prior to sentencing.

[6] Committal hearings for counts six and 10 offences were held on 4 June 2008. The committal hearing for the count 7 offence was held on 13 April 2011.

[7] It may be noted that for each of those three counts, the plea of guilty to the respective offence followed upon discontinuance by the prosecution, after the respective committal hearings, of charges of more serious offences. For counts 6 and 10, charges of fraud with circumstances of aggravation were discontinued, and for count 7, the circumstance of aggravation in the fraud was discontinued.

Previous convictions and parole

[8] On 7 May 2002, the applicant was sentenced for offences of dishonesty which involved a large amount of property taken by him, as a business operator, over a period of years. Some of that offending had continued after arrest and whilst the applicant was on bail.

[9] The head sentence imposed for that offending was seven years imprisonment with a recommendation for parole after serving two years with pre-sentence custody of 36 days. The sentence period was to expire on 1 April 2009. The applicant was released on parole on 29 November 2004 by which time he had spent about 32 months in custody, including the pre-sentence custody.

[10] The offences for which the applicant was convicted in April of this year were committed while he was on parole. Complaints were made to the police concerning the count 7 and count 10 offences on 5 and 9 May 2007 respectively. A complaint concerning the count 6 offence was made to them on 8 June that year. The applicant was charged with the count 10 offence on 4 June 2007; the count 6 offence on 27 July 2007; and the count 7 offence on 14 July 2010.

[11] On 4 June 2007, the District Manager of the Parole Board suspended the applicant's parole. This was done upon receipt by the District Manager of information that the applicant had, on that day, been charged with a number of fraud offences, including the count 10 offence but not the count 6 or count 7 offences, and was to appear in the Brisbane Magistrates Court on the following day.

[12] Forthwith upon the suspension the applicant returned to custody. The Parole Board decided to continue the suspension of parole on several occasions during 2007 and 2008. A relevant consideration to their decisions was the numerous fraud and dishonesty offences alleged to have been committed by the applicant during 2007.

[13] In the result, the applicant remained in custody serving the 2002 sentence until he was released on 1 April 2009 upon the expiry of that sentence. His period in custody from the date of suspension of parole until the date of release was some 22 months.

[14] The applicant was granted bail in respect of the offences for which he appeared in the Magistrates Court on 5 June 2007. He remained on bail for them during the currency of the 22 months to which I have referred. His bail was continued after his release from custody on 1 April 2009.

Ground of appeal

[15] The ground of appeal on which this application is based is that the sentences imposed on 5 April 2012, as structured, were manifestly excessive. In written submissions, the applicant identified two aspects to the structure which, it was argued, caused the sentences to be manifestly excessive. One was that a sentence for count 7 of two years imprisonment was manifestly excessive. The other was that to have required the applicant to serve any period of imprisonment beyond the date of hearing of this appeal was manifestly excessive.

[16] Conformably, with those aspects, the applicant submitted that the appropriate substantive orders that this court ought make are that:

- The sentence for count 7 be reduced to 12 months imprisonment;
- The applicant be released from custody on parole immediately.

The applicant submitted additionally that an order for immediate release from custody ought to be made whether or not the sentence for count 7 is reduced.

[17] In written submissions, the applicant argued that, in sentencing, the learned judge had not given adequate weight to a number of factors,[1] some of which were elaborated in written submissions. The applicant also argued that his Honour had failed to give proper and adequate weight to delay in prosecution;[2] and that he had misapplied the totality principle by not having any or adequate regard for the 22 months spent in custody from the time of suspension of parole until his release.[3]

[18] It is convenient to consider first the factors addressed in oral submissions to which I have referred in the immediately preceding paragraph. They relate to the applicant's timely plea of guilty; the absence of conviction of other offences over a five year period; and full restitution having been made.

Timely plea of guilty

[19] It is evident that, as he was required to do, the learned judge did have regard for a timely plea of guilty. In the course of making the sentencing remarks, he said:[4]

> "… I note in that regard your pleas of guilty were entered to the three charges I have nominated after significant negotiations with the Crown and should be recognised as a timely plea in those circumstances, although obviously it was only the day before the final trial listing that the matter actually resolved. However, you need to be given due recognition for those pleas."

Absence of convictions over a five year period

[20] In *R v Donnelly and Corbic*[5] this court held that absence of re-offending during a bail period of three and a half years was relevant and to be accorded weight in

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1 Submissions para 8.
2 Ibid para 7.
3 Ibid para 9.
4 Record 46 LL1-11.
5 [2007] QCA 77.

sentencing for the offence in respect of which the bail was granted.[6] Building upon that, the applicant submitted that here there had been no re-offending on his part for a period of about five years. In oral submissions, that period was identified as one that commenced in May or June 2007 at which time the complaints which led to counts 7 and 10 and to count 6 were respectively made.

[21] There is no specific reference in the sentencing remarks to this factor. That may be attributable to the fact that whilst *Donnelly and Corbic* was referred to by name in the sentencing submissions, the reference was made passingly in the context of the topic of delay. This factor was not the subject of separate submission on that occasion.

[22] In any event, the influence of that factor in the current circumstances is moderated by the feature that for 22 months of the period in question, the applicant was in custody and had no realistic opportunity of committing similar offences. It is also moderated by the fact that shortly prior to the commencement of the five year period nominated in the submission, the applicant had offended repeatedly whilst on parole.

Full restitution

[23] The fact that full restitution had been made was referred to by the learned judge in his sentencing remarks. He said:[7]

> "You also need to be given due recognition for the fact that now full compensation has been made for the monies handed over by these people and again, that was made in February of this year."

Further, in the context of explaining his intention to set the release date earlier than one-third of the sentence, his Honour made express reference to this factor.[8]

[24] His Honour also was mindful of the fact that the applicant had borrowed in order to make the restitution. He made reference to the impact that serving a term of imprisonment would have upon the lender.[9]

[25] It is quite clear that his Honour regarded the full restitution financed by borrowing as a significant mitigating factor. The decision in *R v Whitnall*[10] supports that approach.

[26] I note at this point that the applicant's written submissions refer also to personal factors relating to his full-time employment, his reunion with his family and their relocation to Rockhampton. These were referred to in material put before his Honour. That he took them into account is evident from the following sentencing remarks:[11]

> "There are various personal circumstances placed before me on the basis that your personal circumstances should militate that you do not serve actual time in custody at this stage. In my view, the serious nature of this offending in the context of your prior history outweighs those personal impacts."

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6 At [8]; [42].
7 Record 46 LL18-22.
8 Record 47 LL4-5.
9 Record 46 LL48-49.
10 (1993) 68 A Crim R 119 at p 128.
11 Record 46 LL32-42.

I note also that "factors outlined" in a report of a clinical neuro-psychologist were also mentioned in those written submissions as not having been accorded weight or adequate weight. What particular factors should have been taken into account were not identified in written or oral submissions. Nor was an explanation then given of how any of them should have been taken into account on the applicant's case.

Delay

[27] In *R v Phillips & Woolgrove*,[12] this Court considered the role that delay between commission of an offence and sentence may play by way of mitigation in sentencing. Fraser JA (with whom McMurdo P and Mackenzie AJA agreed) summarised the state of the law as established by the authorities in this way:

> "[56] … In *R v L; ex parte Attorney-General of Queensland*,[13] this Court left open the possibility of mitigation attributable to a lengthy delay between commission of an offence and sentence involving general notions of fairness. Of course there must be an excessive delay before the principle applies. But in my opinion, where an offender bears no responsibility for excessive delay in sentencing which was productive of unfairness to the offender, that delay may be taken into account whether or not it was attributable to any fault on the prosecution side. Subsequent decisions of this Court applying the same principle do not suggest a contrary view.[14] The judgment of Tadgell JA in *R v Miceli*[15] and the decisions cited in that case – particularly *R v Todd*[16] - also support the view that the fact that unresolved charges are hanging over the head of an offender for reasons not attributable to the offender may itself justify some mitigation of the sentence."

[28] Here, the applicant pointed to the time that had lapsed between the dates in 2007 when the offences were committed and the date of sentence, in all, a little over five years. Particular reference was made to the delay between committal in 2008 and sentence for the counts 6 and 10 offences and the delay between the complaint to the police and charging for the count 7 offence in 2010.

[29] However, the applicant did not argue that the delay had been productive of unfairness to him in any particular respect. The thrust of the submission was that the applicant had had the unresolved charges hanging over his head for a lengthy period of time and that factor, of itself, justified some mitigation of the sentence. The decisions in *Miceli* and *Todd*, referred to by Fraser JA, indicate that mitigation on that account would be justified where the delay is not attributable to the offender.

[30] In dealing with this factor, the learned Judge said:[17]

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12 [2008] QCA 284 at [56].

13 *R v L; ex parte Attorney-General of Queensland* [1996] 2 Qd R 63 at 67; [1995] QCA 444.

14 *R v Brockfield* [1993] QCA 348 at p5 and *R v Sheehan* [2007] QCA 409 at pp 4 and 5.

15 *R v Miceli* (1997) 94 A Crim R 327 at 330, per Tadgell JA (with whose reasons Winneke P and Charles JA agreed).

16 *R v Todd* [1982] 2 NSWLR 517 at 519 E-520A per Street CJ and at 521G-522 per Moffitt P.

17 R 45 L42-R46 L1.

> "You pleaded guilty to the offences shortly before the trial date in February of this year. I note in that regard that it was not the first trial date. The matter has been listed for trial on a number of occasions. Adjournments were granted for a variety of reasons. On occasions, you did not have legal representation. On other occasions, the Crown had provided material late in the piece, but it seems to me you have contributed to the delay by the way in which you have dealt with this matter. …"

[31] The applicant is critical of these observations in so far as they hold the applicant responsible for having contributed to the delay. That, it is argued, led his Honour to fail to allow for delay as a mitigating factor.

[32] The basis of the criticism is that there was no material "actually" before the learned Judge on sentence which showed that the applicant had contributed to delay. However, the criticism overlooks the personal knowledge that his Honour had of the proceedings. He had had the conduct of the matter for about two years prior to sentence. In the course of the sentence hearing,[18] he put to counsel for the applicant that delay had been the product of a number of causes, some of which were the responsibility of the applicant and some the responsibility of the prosecution. As to the former, he mentioned adjournment of the trial listings to accommodate unsuccessful severance applications and a lack of haste in negotiating the plea outcomes. Those were matters of which the learned Judge had personal knowledge. He was well placed to reach the conclusion he did with respect to responsibility for delay. In my view, the criticism lacks a solid foundation and does not reflect any significant error.

Totality principle

[33] It is common ground that there was scope for the application of the totality principle here with regard to the totality of the criminality of the offences for which the applicant was sentenced in 2002 and those for which he was being sentenced, in respect of both the head sentence and the non-parole period to be served.[19] The learned Judge was alive to that.[20]

[34] There is a significant point of difference between the applicant and the respondent as to how his Honour should have applied the principle. The difference was centred upon how the 22 months spent in custody after suspension of parole ought to be approached.

[35] The applicant submits that the 22 months in custody should be seen as punishment for the offences for which he was being sentenced because it was the commission of those offences that triggered the suspension of parole. On that approach, it is submitted, the notional head sentence for those offences was 46 months (the two year sentence imposed for count 7 plus the 22 months). Allowing for the six months non-parole period ordered the result will be, it is said, that for these offences the applicant will be required to serve, in effect, 28 months in custody for a head sentence of 46 months. The submission was completed with the proposition that, at most, the applicant should have been required to serve 50 per cent of the 46 months,

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18 R 35-36.

19 *Mill v The Queen* (1988) 166 CLR 59.

20 R45 L29.

and with the observations that the sentences under appeal require him to serve about 60 per cent of it, and that by the date of hearing of the appeal he had already served more than 50 per cent of it.

[36] By contrast, the respondent submitted that the totality principle did not require the Court to regard the 22 months as either sentence or time served in custody for the 2007 offending. That period was, in truth, the balance of the sentence for the offending for which the applicant was sentenced in 2002. It was a period of the sentence which he was required to serve because his offending conduct carried out whilst on parole, had resulted in the suspension.

[37] There is no legislative prescription which required the learned Judge to take into account the 22 months in custody or to take it into account in any particular way. The applicant referred to the decision of the Court of Appeal of Victoria in *R v Piacentino and Ahmad*.[21] In that case, the Court affirmed that where an offender who is to be sentenced for offences committed while on parole is already serving a sentence in consequence of a breach of parole, then the sentencing judge must have regard to and when appropriate, might apply the principle of totality in moderating the sentence to be imposed.[22]

[38] It must be said at once that this decision does not support a principle or an approach by which all of the sentence for earlier offending which has been served in custody as a consequence of a breach of parole by later offending, is to be treated as if it is a sentence that has been imposed in respect of the later offending. So also, for time served in custody. The decision does not support the approach urged by the applicant.

[39] Consistently with the approach endorsed in *Piacentino,* his Honour did have regard to the period of 22 months in custody in sentencing. Relevantly, he said:[23]

> "You were returned to custody on the 4th of June 2007 and you completed that sentence on the 1st of April 2009. None of that period of time is time that I can declare as time served in relation to these matters. It seems to me the relevance of that, not only the aggravating factor of committing these offences whilst on parole, is the fact that I need to take that aspect into account in determining the appropriate penalty here.
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> It seems to me totality issues are relevant, but it also seems to me that it would plainly be open to a sentencing judge to sentence you to cumulative sentences for these new offences which were committed on parole, and indeed, that is what I would have done if you had come before me still serving that sentence."

Clearly, the learned Judge proceeded on the basis that that period in custody was a matter to which he was to have regard. He was correct in so doing. He was also correct in not taking it into account as a period of sentence served in custody for the offences for which he was then sentencing.

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21 (2007) 15 VR 501; [2007] VSCA 49.

22 At [80] per Eames JA (with whom Buchanan, Vincent, Nettle and Redlich JJA agreed). The court also held that a specific Victorian legislative provision precluded that approach when revocation of parole was prospective only at the time of sentencing for subsequent offences committed on parole.

23 R 45 LL10-40.

[40] Later in the course of sentencing,[24] his Honour referred to two factors, the plea of guilty and the making of full restitution, as those that caused him to shorten the period to be served in custody to less than "the usual one-third". He did not refer to the 22 months in custody in this context. The approach affirmed in *Piacentino* did not require the learned Judged to moderate the sentence on account of it. He might have done so had he considered that in the circumstances moderation was appropriate.

[41] It seems clear from his remarks that his Honour did have regard for that period but balancing it against the aggravating circumstances of the series of offences committed whilst on parole; he considered that further moderation on its account was not appropriate. It was open to his Honour to approach the matter that way.

[42] In oral argument, the respondent proposed a further aspect to which his Honour could have had, and this Court might have, regard as justifying the approach taken. The aspect had not been developed in the written submissions.

[43] In short, it was argued that pursuant to the operation of provisions in ss 209 and 211 of the *Corrective Services Act* 2006, there was a period of five months between January and June 2007 during which the applicant was on parole but which was not to be counted as time served under his 2002 sentence. This, it was said, remained unserved time and was something to be taken into account in reviewing the "totality of the sentence", but not as an approximate equivalent for the six months he is to serve in custody for the sentences under appeal.

[44] In my view, it would have been inappropriate for his Honour to have proceeded on a footing that there remained unserved some portion of the sentences imposed in 2002 in circumstances where the applicant had been released from custody in 2009 on the basis that those sentences had been served. This Court should not proceed on that footing either.

Concluding observations

[45] At the hearing of the appeal, the applicant did not develop an argument in support of the written submission that the sentence of two years for the count 7 offence was manifestly excessive. On its face, there is no apparent disproportion between that sentence and those imposed for the count 6 and 10 offences. The former is a crime; the latter are misdemeanours.

[46] The applicant also argued that the sentences as structured are manifestly excessive in that they require him to spend time in custody.

[47] The sentencing remarks disclose that his Honour was of the view that serious re-offending on parole for offences which carried a seven year head sentence, warranted actual time in custody.[25] It was open to him to take that view.[26] Significantly, the applicant had demonstrated that the incentive afforded by an early recommendation for parole had been insufficient to stop his offending.

[48] As noted, the period ordered to be served in custody is less than the usual one-third of sentence for a plea of guilty. In support of a suspension after a shorter period

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24 R 47 LL1-5.

25 R 46 LL50-55.

26 Compare *R v Nuttall* [2011] 2 Qd R 328; [2011] QCA 120.

than the six months ordered, the applicant referred to the decision of this Court in *R v Allen*.[27]

[49] In that case, the offender had committed a number of offences of stealing as a servant and had made full restitution by sale of the family home. The amount involved was in the order of $66,000. He was sentenced to four years imprisonment to be suspended after 15 months. On appeal, the period until suspension was reduced to nine months. The circumstances of that case differ significantly from those here in that the offender was not being sentenced for serious offences committed whilst on parole.

[50] In my view, the applicant has not established that the sentences under appeal are manifestly excessive.

Disposition

[51] I would refuse the application for leave to appeal against sentence.

[52] **PHILIPPIDES J:** I agree that the application for leave to appeal should be refused for the reasons given by Gotterson JA.

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[27] [2005] QCA 73.