

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Harlow* [2012] QCA 245

PARTIES: **R**  
**v**  
**HARLOW, Jake William**  
(applicant/appellant)

FILE NO/S: CA No 201 of 2012  
DC No 244 of 2012

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich

DELIVERED EX TEMPORE ON: 12 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 12 September 2012

JUDGE: Holmes and Gotterson JJA, Philip McMurdo J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **Orders delivered ex tempore on 12 September 2012:**

- 1. Leave to appeal granted.**
- 2. Appeal allowed.**
- 3. The date for the applicant's release be fixed at 12 September 2012.**
- 4. It is declared that the applicant has spent a period of 18 days from 10 August 2012 to 28 August 2012 in presentence custody.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the appellant pleaded guilty to a charge of attempted armed robbery in company – where the appellant was sentenced to 12 months' imprisonment with parole after two months of the term – where the appellant has currently served 18 days of that sentence – where a co-offender of the appellant was sentenced as a principal offender and received a sentence with immediate parole – whether the sentence imposed on the appellant offends the principle of parity such that he should be released on parole immediately

*Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46, considered  
*Postiglione v the Queen* (1997) 189 CLR 295; [1997] HCA 26, considered  
*R v Dullroy and Yates; ex parte Attorney-General (Qld)* [2005] QCA 219, cited  
*R v Kuzmanovski; ex parte Attorney-General (Qld)* [2012] QCA 19, cited

COUNSEL: S L Kissick for the applicant/appellant  
B J Merrin for the respondent

SOLICITORS: McMillan Kelly and Thomas Lawyers for the applicant/appellant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **PHILIP McMURDO J:** On 10 August 2012, the applicant was sentenced in the District Court at Ipswich for an offence of attempted armed robbery in company. The sentence was 12 months' imprisonment with a parole release date set as 10 October, that is, after two months of the term. He applies for leave to appeal against that sentence. He was granted bail pending appeal on 28 August, so that he has spent 18 days in custody.
- [2] The applicant pleaded guilty and there was no dispute about any fact. The offence was committed in this way. The applicant and three others decided to rob a convenience store which was operated by a woman in her 50's. The applicant was then aged 20. The others were his 17 year old brother and two 14 year old boys. The applicant drove them to the store and waited in the car whilst they went inside. They demanded money.
- [3] One of the 14 year olds was carrying a knife, which belonged to the applicant's brother. The boy carrying the knife demanded money, as did the applicant's brother. The complainant, the woman who ran the store, refused this demand and told them to leave. She produced a hockey stick and hit one of the offenders with it, but not before a customer in the store had been threatened with the knife.
- [4] The applicant's brother grabbed the hockey stick from the complainant and damaged a number of items in the store before unsuccessfully attempting to strike the complainant. He then dropped the stick and ran. The applicant was located by police a few months later. He participated in an interview, in which he admitted his involvement. He told police that he had become involved so as to keep an eye upon his younger brother because he was concerned for him.
- [5] The applicant had no previous convictions. That was noted by the sentencing Judge, who referred also to his early plea of guilty and what the Judge described as the applicant's dysfunctional childhood. The application for leave is made upon the basis that, it is argued, the sentencing Judge did not apply the principle of parity of sentencing.
- [6] In May this year, the applicant's brother pleaded guilty to the offence and was sentenced to 18 months' imprisonment but with immediate parole. He was sentenced

upon the basis that he was the principal offender. The learned sentencing Judge who imposed that sentence fixed an immediate parole release date because of his youth, cooperation with police, his difficult upbringing, mental health issues for which he was being treated and what her Honour regarded was the public interest in not actually imprisoning him.

- [7] The applicant's brother did have previous convictions for offences of violence, although committed as a juvenile, and two convictions from minor summary offences as an adult. The 14 year old boys were each sentenced to 18 months' probation. In the present case, the sentencing Judge said that, "Although your three co-offenders were not gaoled as a result of their involvement, that was probably due to the fact that they were children at the time, that is under 18."
- [8] As the respondent accepts, a sentence which involves some amount of actual imprisonment need not be imposed upon an offender of the applicant's age for an offence of this kind. *R v Kuzmanovski; ex parte Attorney-General* [2012] QCA 19, *R v Dullroy and Yates; ex parte Attorney-General* [2005] QCA 219. But apart from the parity principle, it was open to the sentencing Judge to impose the sentence which he did.
- [9] In *Lowe v The Queen* (1984) 154 CLR 606 at 610, Gibbs CJ, with whom Wilson J agreed, said that an appellate Court should intervene where the disparity between sentences imposed upon co-offenders "is such as to give rise to a justifiable sense of grievance or, in other words, to give the appearance that justice has not been done."
- [10] In *Postiglione v the Queen* (1997) 189 CLR 295 at 301, Dawson and Gaudron JJ, referring to *Lowe v The Queen*, said that if there is a justifiable sense of grievance then "the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options."
- [11] Of course, it is necessary to consider the respective circumstances of the co-offenders, as well as the respective degrees of criminality in their participation in the offence. In the present matter, the sentencing Judge referred to the differences in circumstances in the passage which I have quoted, but only to their differing ages. As to that factor, his Honour was right to say that the others were children at the time. But the applicant's brother, as a 17 year old, was sentenced as an adult, as is required by the law of this State.
- [12] His Honour did not address any different degrees of criminality here. Most importantly, the applicant's brother had been sentenced as the principal offender. It is rightly accepted by the respondent here that the brother's culpability was more serious than that of the applicant. Of course, the applicant's brother was given a longer head sentence, but he was immediately paroled. His participation was more serious than that of the applicant and, unlike the applicant, he had previous convictions.
- [13] In my conclusion, the disparity in the sentences for these two young men, whereby one was sent to gaol and the other more serious offender was not, offended the parity principle, giving rise to what the authorities have described as a justifiable sense of grievance. I would therefore grant leave to appeal and allow the appeal by fixing the date for the applicant's release on parole as today, 12 September 2012.
- [14] I would declare that the applicant has spent in presentence custody a period of 18 days from 10 August 2012 to 28 August 2012.

[15] **HOLMES JA:** I agree.

[16] **GOTTERSON JA:** I agree.

[17] **HOLMES JA:** The orders will be as Justice McMurdo has indicated.