SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shaw* [2012] QCA 304
PARTIES:	**R** **v** **SHAW, Troy Alexander** (applicant)
FILE NO/S:	CA No 154 of 2012 DC No 534 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2012
JUDGES:	Margaret McMurdo P and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. Application for leave to appeal against sentence granted.

2. Appeal allowed to the following limited extent:

(a) Set aside the order that the sentences imposed for the offences in indictment no 535 of 2012 be served cumulatively;

(b) Order that the sentences imposed for the offences in indictment no 850 of 2012 be served concurrently with each other but cumulatively upon the sentences imposed for the offences in indictments nos 534 and 535 of 2012;

(c) Set aside the order that the sentences imposed on the summary offences be served "cumulative upon the other sentences";

(d) Order that the sentence imposed for the summary offence of failing to appear in breach of bail undertaking (charge 1) be served cumulatively upon the sentences for all other offences;

(e) Order that otherwise the sentences imposed for the summary offences (charges 2-7) be served concurrently with the sentences imposed on all other offences.

3. The sentences imposed at first instance are otherwise confirmed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – GENERALLY – where applicant brought application to appeal sentence as manifestly excessive – where primary judge's orders failed to give effect to s 33(4) of the *Bail Act* 1980 (Qld) – whether primary judge erred – whether sentence was manifestly excessive in all the circumstances

Bail Act 1980 (Qld), s 33(1), s 33(4)
Corrective Services Act 2006 (Qld), Sch 4
Criminal Code 1899 (Qld), s 651
Criminal Practice Rules 1999 (Qld), r 62
Penalties and Sentences Act 1992 (Qld), s 4, s 188(1)

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
R v Bowen & Ambrym [1998] QCA 394, considered
R v De Villiers [1999] QCA 422, considered
R v Hamilton [2009] QCA 391, considered
R v Moss [1999] QCA 426, considered
R v Reu; ex parte Attorney-General of Queensland, unreported, Court of Criminal Appeal, Qld, CA No 120 of 1999, 28 May 1999, considered

COUNSEL: The applicant appeared on his own behalf
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with White JA's reasons and proposed orders.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and with the orders proposed by her Honour.

[3] **WHITE JA:** The applicant pleaded guilty to 12 offences on three indictments and seven summary charges in the District Court at Brisbane on 4 June 2012. He was sentenced as follows:

Indictment No 535 of 2012 – 10 July 2010 and 6-9 September 2010 offences

COUNT	OFFENCE	SENTENCE
1	Assault occasioning bodily harm	6 months
2 and 3	Unlawful use of a motor vehicle	6 and 9 months
4, 5, 7, 8	Stealing	3 months x 4
6	Dangerous operation of a vehicle	18 months

Indictment No 534 of 2012 – 10 October 2010 offences

COUNT	OFFENCE	SENTENCE
1	Robbery whilst armed, in company, and with wounding	5 years

Indictment No 850 of 2012 – 25 May 2011 offences

COUNT	OFFENCE	SENTENCE
1	Threatening violence at night	6 months
2	Assault occasioning bodily harm, whilst armed, and in company	1 year
3	Wilful damage	3 months

Summary Offences (File No 793 of 2012) – various dates[1]

CHARGE	OFFENCE (chronological order)	SENTENCE
6	Obstruct police	3 months
7	Breach of bail	6 months
2	Breach of bail	6 months
1	Fail to appear	6 months
3	Contravene direction	Convicted and not otherwise punished
4	Obstruct police	3 months
5	Public nuisance	1 month

[4] All groups of sentences were ordered to be served concurrently with each other. The sentences on indictments 535 and 534 were ordered to be concurrent but those on indictment 850 were to be served cumulatively on the sentences imposed on indictments 535 and 534. Sentences for the summary charges were pronounced by the sentencing judge to be concurrent amongst themselves "but cumulative upon the other sentences".[2]

[5] A parole eligibility date of 19 November 2013 was ordered. Pre-sentence custody of 257 days was not able to be declared but it was taken into account in setting the parole eligibility date being approximately eight and a half months pre-sentence custody plus 17 and a half months to 19 November 2012. That was calculated as approximately 26 months – one-third of a total period of imprisonment which his Honour said was of six and a half years.[3]

Application for leave to appeal

[6] The applicant's notice filed on 19 June 2012 sought leave to appeal the sentence imposed on the grounds that it was manifestly excessive. The applicant applied unsuccessfully to Legal Aid. He filed no outline in support of his application and when the matter came on for hearing he indicated that without legal assistance he did not wish to pursue his application. Counsel for the respondent had suggested in his written outline that the primary judge had neglected to give effect to s 33(4) of the *Bail Act* 1980 which requires that a term of imprisonment imposed as punishment for a breach of a bail undertaking to appear be imposed cumulatively on

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1 The numbering of the charges in the Bench Charge Sheets creates confusion. There are seven charges but two are numbered "4" (obstruct police). The second obstruct police has been renumbered "6" and the breach of bail (consuming alcohol) has been renumbered "7" in the summary charges endorsement sheet.

2 AR 78.

3 AR 78.

any other term of imprisonment imposed at the same time. Once this was given effect to by the authorities the applicant's period of imprisonment would be seven years, not six and a half years which was the expressed intention of the judge. That matter having been raised with the applicant, who appeared by video link from the correctional facility, he elected to continue with his application.

[7] The applicant was aged 17 to 18 years at the time of the offences and 19 years at the time of sentence. He was still 19 when he appeared on this application.

Error in sentence?

[8] A comparison of the transcript of the sentence hearing, the primary judge's sentencing remarks and pronouncement of judgment, the endorsement on the Court Order Sheets by the associate and the entries on the Verdict and Judgment Record demonstrates that there has been error in the endorsement which has been carried through to the Verdict and Judgment Record and an "error" in the pronouncement of the primary judge's orders. It is, therefore, necessary to set out the relevant parts of the sentencing remarks before turning to those documents. His Honour said:

> "In respect of the armed robbery in company with personal violence on the 10th of October, I sentence you to a period of imprisonment of five years [indictment no 534]. In respect of the assault occasioning bodily harm on the 10th of July 2010, I impose a period of six months' imprisonment. I impose a similar sentence in respect of the unlawful use of Mrs Vickers' vehicle. In respect of the unlawful use of the motor vehicle involved in driving from Cairns to Deception Bay, I impose a period of nine months' imprisonment. In respect of the dangerous operation of the motor vehicle, I impose a sentence of imprisonment of 18 months. I also impose three months' imprisonment in respect of each of the four stealing offences involving the petrol and the number plates [indictment no 535]. **I make all of those sentences concurrent."**[4]

[9] His Honour then turned to the offences on indictment no 850 of 2012:

> "In respect of the offences of threatening violence at the IGA, I impose six months' imprisonment. In respect of the assault occasioning bodily harm whilst armed in company, I impose a sentence of one year. In respect of the wilful damage at the watch-house, I impose a sentence of three months. I make each of those sentences concurrent with one another, **but cumulative on the earlier sentences…"**[5]

His Honour explained that the sentence for the offences at the supermarket would have incurred a sentence in excess of one year but for "the cumulative effect of them **on top of the other sentences**".[6]

[10] The primary judge continued dealing with the summary offences which included two breaches of the conditions of his bail and a failure to appear contrary to the *Bail Act*:[7]

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4 AR 77, emphasis added.
5 AR 77-78, emphasis added.
6 AR 78, emphasis added.
7 Failure to appear, failure to reside at prescribed address and consumption of alcohol.

> "You've also been convicted, as I said earlier, on a number of summary matters. In respect of the breach of bail, numbers 1 and 2[8] in the schedule of summary matters, I impose a sentence of six months' imprisonment. In respect of the contravening a direction and public nuisance, counts 3 and 5, I impose one month imprisonment [corrected in the case of the contravention which had a maximum of 40 penalty units to finding the offence proven and imposing no further punishment]. In respect of the obstruct or assaulting police, being counts 4 and 6, I impose three months' imprisonment. **I make all of those sentences concurrent, but cumulative upon the other sentences**."[9]

[11] His Honour concluded:

> "The overall effect of your sentence, therefore, is one of six and a-half years' imprisonment. I take into account the 257 days of presentence custody and set a parole eligibility date of the 19th of November 2003. You can just both do your maths but I think that's correct. It's 13th of November 2013."[10]

[12] The parole eligibility date of 19 November 2013 has been endorsed on the Court Order Sheets and the Verdict and Judgment Record and is plainly the correct date. By inference his Honour was concerned to fix a parole eligibility date at the one-third mark as had occurred with the co-accused, Blakey, taking into account the 257 days in pre-sentence custody which could not be declared. A precise calculation as to days was not required and his Honour's approach describing that period as eight and a half months was not demurred to by counsel below. This meant that from the date of sentence on 4 June 2012 a further 17 and a half months on a head sentence of six and a half years needed to be served in prison which ends on or about 19 November 2013 not 13 November 2013.

[13] The endorsement on the Court Order Sheet for indictment no 534 of 2012 is correct. However, the endorsement for indictment no 535 of 2012 is not. After setting out the sentence in respect of each of the counts the associate endorsed:

> "All sentences to be served concurrently with one another but **cumulatively** upon the sentence ordered in indictment 534/12."[11]

The parole eligibility is correctly endorsed.

[14] For indictment no 850 of 2012, after setting out the sentence for each of the charges, the endorsement reads:

> "All sentences to be served concurrently amongst themselves, but cumulatively upon the sentence ordered in indictment 534/12."

This correctly reflects the judge's pronouncement.

[15] After setting out the sentence imposed for each of the charges which had been transmitted to the District Court pursuant to s 651 of the *Criminal Code*, the endorsement reads:

> "All sentences to be served concurrently."[12]

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8 There were three offences contrary to the *Bail Act*.
9 AR 78, emphasis added.
10 AR 78.
11 AR 10, emphasis added.
12 AR 14.

This was correct so far as it went but did not reflect the judge's pronouncement that those sentences were to be "*cumulative upon the other sentences*".

[16] The Verdict and Judgment Record has been endorsed consistently with Form 44 and r 62 of the *Criminal Practice Rules* 1999 containing the information which r 62 requires. After setting out the offences and pleas and the order of the judgment of the court in relation to each, at the end, the following is endorsed:

> "All sentences to be served concurrently amongst themselves, but cumulatively upon the sentence ordered in Indictment 534/12."

Each page has been stamped with the District Court Registry Brisbane stamp and initialled by the Registrar on 5 June 2012 at Brisbane. That endorsement does not unambiguously reflect the judgment of the court because the accumulation is directed to be on indictment 534 which would include indictment 535 as well as indictment 850 and the summary charges and takes no account of the requirements of s 33(4) of the *Bail Act* 1980.

[17] Section 33(4) of the *Bail Act* 1980 provides:

> "Where a court in making an order under this section directs that a term of imprisonment (the ***first mentioned term of imprisonment***) be imposed (whether in the first instance or in default payment of a fine) upon a defendant then, notwithstanding any Act, law or practice, the following applies–
>
> (a) the first mentioned term of imprisonment shall take effect from the expiration of the deprivation of liberty of the defendant pursuant to a term of imprisonment–
>
> (i) imposed upon the defendant pursuant to this section or a law of the Commonwealth or the State at the same time as the first mentioned term of imprisonment is imposed…"

The offence for which an order may be made pursuant to s 33(4) is the offence of failing to surrender into custody in accordance with a bail undertaking.[13] In the *Penalties and Sentences Act* 1992, "term of imprisonment" means "the duration of imprisonment imposed for a single offence".[14] This means that the term of imprisonment of six months for the failure to appear offence must be served cumulatively on the other terms of imprisonment imposed for the summary charges (and the other sentences imposed that day), the maximum of which was three months for obstructing and assaulting police. This results in a further six months being added to the period of imprisonment beyond that contemplated by the primary judge.

[18] When examined there is ambiguity in the way in which the primary judge has structured the overall sentence. The two groups of offences in indictment no 535 in July and September 2010 and indictment no 534 in October 2010 were close in time and the sentences were ordered to be served concurrently; the May 2011 offences' sentences were to be cumulative on those sentences which followed the approach to the co-accused's sentence earlier by a different judge. The summary charges, which included the breach of the bail undertaking, were to be cumulative "upon the other

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13 Section 33(1).

14 Section 4, cf. "period of imprisonment" which means "the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment…". Those expressions have the same meaning in the *Corrective Services Act* 2006, see Schedule 4.

sentences". In light of his Honour's expressed intention to impose a six and a half year sentence overall; that the legislation required a bail undertaking breach punished by imprisonment to be cumulative on any other term of imprisonment imposed at the same time (a requirement of which his Honour was aware); and that the May 2011 sentences were imposed immediately before his Honour dealt with the summary charges, the preferable construction to the sentence is that the accumulation is upon the May 2011 term of imprisonment. It seems that his Honour intended to make only the bail undertaking breach punishment cumulative.[15] Had the error been identified earlier, the primary judge could have corrected his slip pursuant to s 188(1) of the *Penalties and Sentences Act*. Instead, he pronounced all the summary terms of imprisonment to be cumulative. What ought to have occurred was to make all but the bail undertaking (failure to appear) breach sentence concurrent with the sentences imposed in indictment 850 and charge 1 cumulative on those sentences. As a consequence, a clear error has occurred in the sentence and the sentencing discretion must be exercised afresh.[16]

Circumstances of offending

[19] Each indictment proceeded on a schedule of facts.

Indictment No 535 of 2012 – July and September 2010 offending

[20] Just after midnight on 10 July 2010 the complainant, aged 20, and some friends parked their three vehicles in the car park of McDonalds at Woree. The complainant was sitting in his vehicle in the driver's seat with the door open talking to others who were around the car. Shortly afterwards the applicant arrived in a motor vehicle with others. One of the occupants of that car approached the group around the complainant and began talking. The rest of the applicant's group also walked over. The applicant, who was unknown to the complainant, ran towards his vehicle and punched him in the back of the head as he was sitting in the car. He turned to see the applicant with his fist aimed as if he were about to swing again. The complainant grabbed the applicant by the throat in an attempt to push him away. The applicant grabbed the complainant by the throat and forced him out of the vehicle. He put the complainant in a headlock before they both went to the ground. While there he put his left arm on the complainant's throat and punched his head many times with his right hand. The applicant was distracted by the other people present which enabled the complainant to get up and run to his vehicle and drive away to safety.

[21] The complainant was examined the next day and was observed to have two contusions to the head with some swelling of the cheek and tenderness of the left jaw. There were no fractures.

[22] When the applicant attended at the Cairns police station the following day in circumstances mentioned below he was charged with assault occasioning bodily harm (count 1).

[23] After assaulting the complainant at McDonald's, the applicant went to his foster carer's home and stole a motor vehicle which he drove away and then parked later in a Cairns suburb undamaged. The applicant ultimately responded to a text

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15 AR 47, 48 and 50 were the prosecutor expressly referred to the breaches of bail attracting a cumulative six month term and his Honour's implied acquiescence.

16 *AB v The Queen* (1999) 198 CLR 111 at [130] per Hayne J.

message sent by police and told them where he had left the vehicle which was recovered. He attended the Cairns police station the next day (11 July) and was charged with unlawful use of a motor vehicle (count 2), and with count 1 mentioned above. He was granted bail.

[24] About a month later, on 7 September 2010, the applicant and his brother gained access to a vehicle owned by a teacher who had parked her car, a BMW sedan, outside her school and drove it away (count 3 – unlawful use of a motor vehicle). They intended to drive to Brisbane. Acting on a complaint about the failure to pay for petrol, police sought to intercept the car as it approached Rockhampton. At about 1.30 am on 8 September the car driven by the applicant was observed overtaking a semi-trailer at high speed. Police activated lights and sirens but the vehicle did not pull over. The applicant, by his own later admission, turned the headlights off for about 20 seconds at a speed of about 220 kilometres per hour (count 6 – dangerous operation of a motor vehicle). Police terminated the pursuit on losing sight of the vehicle.

[25] The applicant and his brother abandoned the car at Deception Bay after removing the plates and attempting to replace them with plates stolen from a local car (count 7 – stealing from the Minster for Transport). They wiped down the BMW in an attempt to avoid detection.

[26] Three stealing counts (counts 4, 5 and 8) related to obtaining petrol from petrol stations on the journey south and driving away without paying. After the applicant was arrested and charged he was granted bail.

Indictment No 534 of 2012 – 10 October 2010

[27] On Sunday 10 October 2010, the complainant bus driver finished a run at about 10.30 pm and, prior to commencing the return journey, parked the bus under a street light at Woree. He closed the door and began counting the money – approximately $311. This location was the end and commencement of his run. He turned the bus around to commence the next run and shortly after was flagged down by the applicant and his co-accused, Thomas Stephen Blakey, who was about ten weeks younger. They were wearing jackets with hoods over their heads. The applicant was armed with a knife. He demanded money, raising his right hand holding the knife. The complainant radioed for help but as he did so the applicant swung the knife at him in a threatening manner. Blakey grabbed the money tin, as did the complainant, and a brief struggle ensued. The complainant was wearing glasses which were struck by the knife wielded by the applicant. The knife glanced off and penetrated the complainant's lower left eyelid and through the nasal bone into the nasal mucosa.

[28] The applicant and Blakey ran from the bus and the complainant called for help. He was transported to hospital by ambulance, vomiting blood due to internal bleeding from the injury which caused blood to run down the back of his throat. The damage to his left eye was repaired under anaesthetic. The assault had devastating psychological consequences for the complainant. He was unable to return to work for about 12 months and then only part-time and with some supervision. He was unable to return to working night shifts and as a result has suffered financial loss. The primary judge described the complainant as having become "in many respects, a frightened and broken man as a result of [the] conduct on that night".[17] The assault was captured on CCTV in the bus.

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[17] AR 71.

[29] The applicant and his co-offender were arrested the following day on 11 October 2010. The applicant made admissions. He was charged with Blakey with one count of robbery whilst armed in company and wounding. He was refused bail but on 10 January 2011 he was granted bail.

Indictment No 850 of 2012 and Summary Charges

[30] On 11 May 2011 the applicant was dealt with in the Magistrates Court for a number of summary charges which included public nuisance; assaulting or obstructing police; failure to stop a motor vehicle; possession of utensils; stealing, and breach of bail in respect of which he was given nine months probation with no conviction recorded.

[31] On 25 May 2011, just two weeks after being placed on probation, at about 8.30 pm, the applicant and Blakey caused a disturbance outside a supermarket in Cairns North. Both were intoxicated. A consensual fight ensued between them and an employee. The applicant and Blakey were moved on by another person, left the area and went to a nearby unit (presumably where one of them lived) where they armed themselves with knives and returned to the supermarket. They threatened staff and three customers by banging on the glass windows and saying they would kill them. This conduct constituted count 1 – threatening violence by words or conduct at night.

[32] The applicant kicked and broke the glass front door of the supermarket and repeatedly hit the door with a shopping trolley. This conduct constituted count 3 – wilful damage. The co-offender, Blakey, was also hitting the door. An employee pushed the supermarket's "hold up" button and rang police. Another employee ran to the door and attempted to lock it. As he did so, the applicant poked a knife through a broken part of the door and stabbed him in the knee causing a three centimetre puncture wound to the lateral aspect of the left knee. This conduct constituted count 2 – assault occasioning bodily harm whilst armed and in company. That employee moved a drink machine in front of the door to prevent the applicant and Blakey entering. They left the area shortly afterwards.

[33] Police then attended the applicant's residence in response to a loud disturbance complaint. The applicant was arrested and on being escorted away he kicked out at a door jam, propelling a police officer backwards, almost falling over a balcony railing. The applicant's conduct that day had breached "no alcohol" and curfew conditions of his bail. The conduct at the residence related to charge 6 – assault/obstruct police, and charge 7 – breach of bail conditions. When breath tested in the watchhouse at about 10.30 pm the applicant registered .139 per cent and Blakey .149 per cent. The applicant damaged an intercom speaker in one of the cells in the watchhouse by ripping it from the wall. It cost $2,420 to repair and was also the subject of count 3 on the indictment – wilful damage.

[34] The applicant was granted committal bail subsequently on 22 August 2011, the conditions of which required him to live at a particular address and attend at the Magistrates Court for his committal hearing. On approximately 16 September 2011 the applicant moved without approval from his bail address. This constituted charge 2. On 9 January 2012 the applicant failed to surrender into custody at the Cairns Magistrates Court. This constituted charge 1.

[35] On 20 March 2012 police from Burpengary were called to attend at a McDonald's restaurant in relation to a male (the applicant) who had caused a disturbance by popping balloons and throwing coins. The applicant was later located at the Narangba train station where he was given a formal direction to provide his name and date of birth. He supplied a false name and a correct date of birth. Later police attended at a residential address and spoke with the applicant in relation to outstanding arrest warrants and other matters. He pushed police and began to run and when tackled, struggled violently. This conduct constituted assaulting and obstructing police and was the subject of charge 4. The earlier conduct by contravening the direction to provide his correct name was the subject of charge 3. The conduct at the McDonald's restaurant was the subject of charge 5, committing a public nuisance.

The co-offender

[36] The applicant's co-offender, Blakey, was sentenced in the District Court at Cairns on 16 December 2011. The transcript of those proceedings and the sentencing remarks were tendered on this applicant's sentence.[18] Blakey was about ten weeks younger than the applicant. He was a co-accused with the applicant in indictment no 534 of 2012 which concerned the attack on the bus driver on 10 October 2010 and in indictment no 850 of 2012 which concerned the incident at the supermarket on 25 May 2011.

[37] Between 5 and 11 October 2010, Blakey committed 12 offences of unlawfully entering a motor vehicle with intent, four offences of stealing from those vehicles and a possession of cannabis offence. Blakey breached his bail conditions when he committed the joint offences but they seem to have been dealt with before he appeared in the District Court.[19]

[38] Blakey had no criminal history prior to this period of criminal conduct.[20] He was poorly educated but came from a relatively stable family. He had left school at 14 and had found regular work as a trolley collector, labourer and tiler. He was said to have started mixing with a bad crowd which led to the heavy consumption of cannabis and alcohol. Through his counsel he expressed remorse and concern for his victims and an intention to participate in literacy and numeracy courses in prison as well as substance abuse programmes.

[39] Blakey was sentenced to six months imprisonment for each of the motor vehicle and stealing offences and three months imprisonment for possession of cannabis, to be served concurrently. He was sentenced to five years imprisonment for the robbery of the bus driver with which he was jointly charged with the applicant to be served concurrently with the first group of motor vehicle offences and 12 months imprisonment for the supermarket offences, to be served cumulatively on the five year sentence. Parole eligibility was fixed at 16 March 2013, that is, after two years, after taking into account 264 days on remand which could not be declared.

Submissions below

[40] Like Blakey, the applicant had no previous criminal history before he embarked on this 10 month period of offending. The prosecution submitted that the applicant

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18 AR 97-130.

19 AR 108-109.

20 There was no offending in the Childrens Court; AR 125.

should receive the same sentence as Blakey because the issue of parity was paramount, there being no concessions made at Blakey's sentence proceeding that Blakey was any less culpable than the applicant. The prosecutor, in fact, submitted that the applicant was a worse offender because his early offences committed alone were more serious than Blakey's other offences and that he continued to offend with respect to the supermarket offences when he was on probation. He had more breaches of bail conditions and had absconded. The prosecutor contended for a further cumulative term of six months additional to that which had been imposed on Blakey to reflect the breaches of bail conditions with the result that the applicant should spend a further three months in actual custody than Blakey. The prosecutor did not contend that Blakey's sentence was inappropriate in all the circumstances and referred the primary judge to a number of comparable sentences.

[41] Defence counsel related that the applicant was sent into foster care when he was 11, his parents having separated when he was aged three and he lived with his mother until he was 11. He was fostered to some five families and finally settled with the family from whom he took the motor vehicle the subject of the first unlawful use of a motor vehicle count. He was educated to grade 11 at school where he performed satisfactorily. He undertook employment thereafter as a tyre fitter and as a brickie's labourer. When he left the foster carer's home he lived with his 24 year old older brother who was involved in amphetamine taking and excessive consumption of alcohol. The applicant became a heavy consumer of amphetamines and alcohol. He was intoxicated on the night he and Blakey attacked the bus driver. The applicant ceased taking dangerous drugs for a short period of time before he went into custody and reported that he had not taken them since.

[42] Defence counsel referred to a number of the glassing cases which, as the prosecutor observed, were not of assistance. Defence counsel sought a sentence of four and a half years for the robbery of the bus driver and a 12 month sentence for the wounding at the supermarket. When the applicant gave interviews (not on every occasion) to police he admitted his criminal conduct. The final submission by defence counsel was for a head sentence of four and a half to five years for all offences and a parole eligibility date "about mid-March 2013".[21]

[43] The most important comparable sentence was that imposed upon Blakey. The primary judge examined those proceedings closely. Of the other relevant authorities, the first in time is *R v Bowen*.[22] Bowen and his co-offender pleaded guilty to robbery in company with personal violence. The offending conduct involved a savage attack on a 52 year old female taxi driver. She was directed to a sparsely populated rural area. There was some pre-planning as the young men had no money to pay. The co-offender used a t-shirt that had been given to him by Bowen to strangle the complainant. The driver lost consciousness after the t-shirt was pulled tight around her neck. The offenders fled taking cigarettes, money and other items. The complainant suffered long term psychological damage and financial loss. The offender, Bowen, who was aged 19 when sentenced, had previous convictions for street offences and a drug offence. His co-accused was older with a more extensive criminal history. Bowen was intellectually challenged and neither of the offenders could read or write. Bowen had been sentenced to six years imprisonment but on appeal the sentence was reduced to four and a half years. The court concluded that, although the offence was serious, insufficient

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21 AR 63.

22 [1998] QCA 394.

recognition was given to the pleas of guilty, the age of the applicant, that there was no serious criminal history, and that there was intellectual disadvantage.

[44] *R v Reu; ex parte Attorney-General*[23] involved a serious armed robbery in which the offender and two companions, disguised, robbed a fruit and vegetable store in the evening when the manager and three employees were present. The three staff members were forced into a cold room, the door closed and a fork lift vehicle driven into it, causing the tines to penetrate the door thus preventing it from sliding open. The offender grabbed the manager by the hair and placed a knife at her throat. She was forced to open a safe which contained nearly $20,000 which was taken. That event had a significant psychological affect on the manager and the employees.

[45] A second indictment contained 13 counts relating to breaking, entering and stealing from premises. All but one of those counts was derived from the offender's own admissions. He pleaded guilty and was sentenced to four years imprisonment in respect of the armed robbery, suspended after nine months, and to two years imprisonment for the offences on the second indictment, suspended after six months. A suspended sentence of six months was activated to be served concurrently with the other sentences. The offender was between 24 and 25 when he committed the offences. He came from a dysfunctional family. He had a lengthy criminal history as a juvenile. He had some prospects of rehabilitation. Davies JA, with whom Derrington J and Chesterman J (as his Honour then was) agreed, observed that without the mitigating discounting factors a sentence of six years would have been justified for the armed robbery. His Honour commented that a cumulative sentence might have been imposed for the activated suspended sentence. His Honour considered that the range for an armed robbery of that kind was in the range of six to eight years. In view of the mitigating features, the court held that although the sentences were low, even "generous", the mitigating factors justified the reduction.

[46] *R v Moss*[24] concerned an applicant who pleaded guilty to armed robbery for which he was sentenced to imprisonment for six years with a recommendation for parole after two years. The offender, who was aged 18, entered a video store at about 11.00 pm at night. The only person present was the complainant who was working alone in the store. The offender spoke briefly to him then produced a knife about 20 centimetres long with a black handle and a serrated blade from his clothing. He demanded money. When the complainant backed away the offender made as if to climb over the counter. The complainant then put his hands in the air and removed the cash drawer. Two customers entered the store and the offender hid his knife from their view. He told the complainant to hurry, reached over the counter and removed the money from the till before leaving the store having taken about $450. The robbery was recorded on CCTV.

[47] The offender wore no disguise and was identified. His fingerprints were located on the front counter. The offender had immediately travelled interstate and was extradited and remanded in custody. He pleaded guilty on ex officio indictment. He was on probation when he robbed the video store. He had a poor upbringing and was described as having a considerable prior criminal history, most of the offences having been committed when he was a juvenile. The offending was precipitated by the use of alcohol and cannabis. McPherson JA observed that the offence was a

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23 Unreported, Court of Criminal Appeal, Qld, CA No 120 of 1999, 28 May 1999.

24 [1999] QCA 426.

serious one and the cases suggested a range for a first offence of this kind as ordinarily being between three and five years. The six year sentence was reduced to one of five years.

[48] Counsel for the respondent referred the court to *R v De Villiers*[25] where the offender, who was aged about 17, pleaded guilty to four counts of armed robbery in company; one count of doing grievous bodily harm with intent; one count of wounding; and one count of unlawful use of a motor vehicle. The offender was sentenced to eight years imprisonment for the most serious of the armed robberies. He and his co-accused, who was sentenced under the *Juvenile Justice Act* 1992 (Qld), entered a pizza shop at about 10.30 pm. The co-accused, wearing a balaclava and carrying a hunting knife, grabbed a customer, a 17 year old girl, and held the knife to her throat. The offender demanded money. He was at the time in possession of a small knife but did not use it in a threatening manner. A few days later the co-offender entered a service station wearing the balaclava and carrying a knife or machete. The offender remained in the getaway car but knew that his co-offender intended to rob. The next set of offences occurred later the same year. They stole a car and selected a convenience store to rob at night. There were two other offenders with them. The co-accused, wearing a balaclava and armed with a knife, entered the store in which there were four women. He grabbed an employee around the throat and held the knife to it pushing the point into her neck. The offender demanded money and he also approached another woman and grabbed her purse. A fight ensued with two men who had entered the store and the offender hit one of the men on the back of the head with the money drawer. The offenders fled.

[49] The principal motivation for the offences was to finance the co-offender's drug habit. The court concluded that the penalty imposed was excessive because insufficient allowance had been made for the offender's young age and lack of prior convictions. It was thought that he would benefit from a shorter period of imprisonment and a longer period on parole. The sentence of eight years was reduced to one of six years with a recommendation for release on parole after serving two and a half years.

Discussion

[50] Those cases serve to demonstrate that a sentence of five years for the serious armed robbery of the bus driver was well within range when the mitigating circumstances are taken into account. This is the same sentence as Blakey, whose criminal conduct overall was less serious than the applicant's.

[51] As to the appropriate structure of the sentences, in *R v Hamilton*,[26] the offender was a 17 year old first offender who pleaded guilty to one count of doing grievous bodily harm and one count of attempted armed robbery of a taxi driver. The offending concerned two incidents with two taxi drivers. The President, in the course of her reasons, said:

> "The offences occurred in two quite separate time periods. In such circumstances, a global penalty is often and may properly be imposed on the most serious offence of grievous bodily harm, with concurrent sentences on the remaining offences. But, like the

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25 [1999] QCA 422.

26 [2009] QCA 391.

> primary judge, I consider that the better approach in this case is to impose cumulative sentences on both these serious offences. But, applying the totality principle requires that, to ensure the overall effect of the cumulative sentence is not crushing, the sentence must be appropriately moderated."[27]

[52] The sentence overall of six and a half years imposed by the primary judge is the appropriate sentence and his manner of structuring the sentences is one which I would adopt in re-sentencing. The five year sentence for the most serious of the offences – the attack on the bus driver – was appropriate for an offence of this kind as the comparable sentences indicate. The sentencing judge was correct to impose a cumulative sentence for the quite distinct knifing of the employee at the supermarket more than six months later. The breaches of the bail conditions were serious and were required by the legislation to be cumulative on the other sentences imposed. The totality principle was respected.

[53] It is troubling that such a young man must be sentenced to a lengthy period of imprisonment. Little was said below about his rehabilitation prospects. He seemed to have no outside support. In that circumstance and his apparently trouble-free youth, a lengthy parole period will be essential to keep him from a return to drugs and alcohol and further offending.

[54] I would make the following orders:

1. Application for leave to appeal against sentence granted.

2. Appeal allowed to the following limited extent:

   (a) Set aside the order that the sentences imposed for the offences in indictment no 535 of 2012 be served cumulatively;
   (b) Order that the sentences imposed for the offences in indictment no 850 of 2012 be served concurrently with each other but cumulatively upon the sentences imposed for the offences in indictments nos 534 and 535 of 2012;
   (c) Set aside the order that the sentences imposed on the summary offences be served "cumulative upon the other sentences";
   (d) Order that the sentence imposed for the summary offence of failing to appear in breach of bail undertaking (charge 1) be served cumulatively upon the sentences for all other offences;
   (e) Order that otherwise the sentences imposed for the summary offences (charges 2-7) be served concurrently with the sentences imposed on all other offences.

3. The sentences imposed at first instance are otherwise confirmed.

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[27] At [21].