SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kengike* [2013] QCA 40
PARTIES:	**R** **v** **KENGIKE, Bill** (applicant)
FILE NO/S:	CA No 257 of 2012 DC No 176 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	12 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2013
JUDGES:	Muir and Fraser JJA and Martin J 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 the applicant pleaded guilty to one count of armed robbery in company with personal violence – where the applicant's offending breached the terms of a suspended sentence – where the applicant had an extensive criminal history – where the applicant was sentenced to six and a half years imprisonment to be served cumulatively upon sentences being served for earlier offending – where the applicant contends that the sentence offends that totality principle – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 156A *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, distinguished *R v Brown* [2000] QCA 402, considered *R v Lund* [2000] QCA 85, considered *R v Main and Fauid* [2012] QCA 80. considered
COUNSEL:	R East for the applicant S P Vasta for the respondent

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

[1] **MUIR JA**: The applicant was 27 years of age when convicted on his plea of guilty in the District Court on 3 September 2012 of armed robbery in company with personal violence on 10 December 2011. He applies for leave to appeal against his sentence of six and a half years with a fixed parole eligibility date of 15 April 2015.

[2] The applicant's offending breached the terms of a suspended sentence of six months imprisonment imposed in the Beenleigh Magistrates Court on 28 October 2011 for the unlawful use of a motor vehicle on 1 October 2011. It was ordered that the six month term be served concurrently with the six and a half year term.

[3] The applicant had a bad criminal history which commenced in December 1998. He was first sentenced to a term of detention on 16 July 2003 for an offence committed as a minor.

[4] On 17 November 2006, he was sentenced to two years imprisonment with immediate release on parole for two robberies with actual violence when armed and in company. He had already spent 215 days in pre-sentence custody which was not declarable but which was taken into account.

[5] On 6 January 2007, he committed another robbery with actual violence when armed and in company and was sentenced on 17 October 2007 to four years imprisonment. Eligibility for parole was fixed at 4 July 2009. The offence was committed about six weeks after the applicant's release from prison on parole.

[6] When in custody he was convicted of two offences: one of wilful damage, the other of dealing with part of a syringe. He was given a revised parole eligibility date of 16 February 2011. He was released on parole on 28 November 2011 and committed the subject offence 12 days later. As a result of his breach of parole, the applicant was required to serve the balance of his sentences then being served, approximately 14 months.

[7] The subject offending occurred when, on the evening of 10 December 2011, the large heavily built applicant entered a 7-Eleven store in company with another male. The applicant leant over the counter and grabbed the relatively small store attendant by the shirt. He held a pair of scissors, with the blade open, in his other hand and demanded that the attendant open the cash register. The attendant complied. The applicant took approximately $200 from the cash register, which he handed to his accomplice, as well as a number of packets of cigarettes and fled with his accomplice in a vehicle.

[8] At the time of the sentencing hearing, the applicant's full time discharge date in respect of the earlier sentence was 15 February 2013. The result of his parole eligibility date being fixed at 15 April 2015 meant that slightly more than two years imprisonment had to be served before he became eligible for parole.

[9] It was submitted on behalf of the applicant that the six and a half year term of imprisonment is manifestly excessive having regard to the nature of the offending conduct and because it offends the totality principle.

[10] In *R v Main and Fauid*,[1] the only comparable sentence referred to in support of the former proposition, Fauid was refused leave to appeal against a five and a half year term of imprisonment with a parole eligibility date fixed at approximately halfway. Fauid was 36 at the time of offending and had a lengthy criminal history which included no convictions for robbery. When sentenced, he had been in prison for nine months and seven days under sentences imposed in the Magistrates Court. The armed robbery sentence was made concurrent with the earlier sentences. The actual robbery, which was of a bottle-shop at night manned by a lone female attendant, was committed by Fauid's female co-offender. Fauid's role was to reconnoitre the bottle-shop and serve as a lookout. He was sentenced on the basis that he was involved in the planning and execution of the robbery. The attendant was threatened with a knife and $1,600 was taken. The sentence was held not to be manifestly excessive.

[11] The applicant's counsel submitted that Fauid's offending was more serious than the applicant's in that a knife was involved and there was more pre-planning as Fauid's accomplice used a disguise and he had conducted a reconnaissance.

[12] Counsel for the respondent submitted that the offending in Fauid was less serious. Although there was more pre-planning than in the subject offence, the offending was not in company and did not involve the use of personal violence. Counsel for the respondent submitted also that it was significant that the offending was committed by a person with a bad history of similar offending and occurred 12 days after the applicant's release on parole in respect of an offence of a similar nature. It also occurred in the operational period of a suspended sentence. These were relevant considerations as was the need to protect the community from the applicant's depredations.

[13] In *R v Lund*,[2] the 32 year old applicant was refused leave to appeal against a sentence of six years imprisonment after a plea of guilty. His accomplice was armed with scissors when he menaced two women in a fish shop and escaped with $1,166. In *R v Brown*,[3] the 39 year old applicant, who had committed only one minor offence in the 10 years prior to the offence in question, was refused leave to appeal against a sentence of six years imprisonment imposed for armed robbery with personal violence. Armed with a plastic toy gun and disguised, he demanded money from employees in a post office. He opened a till and its drawer fell on the floor spilling its contents. When the applicant attempted to pick up the money, one of the employees grappled with him and he fled empty-handed. Neither of these cases supports the applicant's argument.

[14] As for the totality principle, it was submitted that the sentencing judge should have adjusted the head sentence to one of five years to prevent the sentence from being "crushing" and to take into account the real possibility that the applicant would not be released on parole. It was submitted that the "aggregate sentence" did not "fairly and justly reflect the total criminality of the offender's conduct".

[15] The principle in *Mill v The Queen*[4] has only limited relevance in the circumstances under consideration. The earlier robbery was committed more than four years prior

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1 [2012] QCA 80.
2 [2000] QCA 85.
3 [2000] QCA 402.
4 (1988) 166 CLR 59; [1988] HCA 70.

to the subject robbery and the sentence imposed in respect of it was imposed more than four years before the subject sentence. It would have expired had it not been for the appellant's misconduct. Section 156A of the *Penalties and Sentences Act* required that the subject sentence be imposed cumulatively on the earlier sentence. Moreover, the applicant received the benefit of the term of the activated suspended sentence being made concurrent with the other sentences. There was no error in principle. Although the sentence imposed was quite high I am not persuaded that it was manifestly excessive.

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

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

[18] **MARTIN J:** I agree with Muir JA.