# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Herbert* [2014] QCA 83 |
| PARTIES: | **R**<br>**v**<br>**HERBERT, Jason Robert**<br>(applicant) |
| FILE NO/S: | CA No 321 of 2013<br>DC No 249 of 2013 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Extension (Sentence) |
| ORIGINATING COURT: | District Court at Beenleigh |
| DELIVERED ON: | 17 April 2014 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 April 2014 |
| JUDGES: | Fraser, Gotterson and Morrison JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Application for extension of time for applying for leave to appeal against sentence refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted on a plea of guilty to a count of armed robbery – where the applicant was sentenced to nine years imprisonment with a fixed parole eligibility date – where the applicant applied for an extension of time in which to appeal against the sentence – whether the sentence was manifestly excessive – whether application for extension of time should be granted<br><br>*Penalties and Sentences Act* 1992 (Qld), s 9(2)(l)<br><br>*R v Bealing* [2003] QCA 323, cited<br>*R v Bradford* [1997] QCA 391, cited<br>*R v Brennan* [2001] QCA 253, cited<br>*R v Herbert*, unreported, Western Australia Court of Criminal Appeal, No 63 of 1996, 18 April 1997, related<br>*R v Johnson* [1998] QCA 182, cited<br>*R v Kapitano* [2012] QCA 288, cited<br>*R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, applied |
| COUNSEL: | The applicant appeared on his own behalf<br>P J McCarthy for the respondent |

SOLICITORS: The applicant appeared on his own behalf
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 11 September 2013 at the District Court at Beenleigh, the applicant, Jason Robert Herbert, was convicted on a plea of guilty to a count of armed robbery committed on 19 January 2013. He was sentenced that day to imprisonment for a term of nine years with a parole eligibility date fixed at 10 September 2017. The learned sentencing judge declined to accede to a prosecution submission that a serious violent offender declaration be made.

[3] The applicant filed a notice for application of extension of time within which to appeal (Form 28) in this Court on 18 December 2013. He also filed with it an application for leave to appeal against sentence (Form 26). That document lists a single ground of appeal, namely, that the sentence is manifestly excessive in all the circumstances.

[4] Two issues which are central to the exercise of the discretion to grant an extension of time within which to appeal are whether there is good reason for having delayed in filing an application for leave to appeal and whether it would be in the interests of justice to grant the extension of time sought.[1]

**Delay**

[5] In the Form 28, the applicant, who is self-represented, attributed delay in failing to file an application for leave to appeal by 8 October 2013 to his status as a self represented litigant and also to his being "unaware of limitation of time to lodge an appeal". At the hearing of the application, he refined his unawareness as being that of "the exact time for appeal". He referred also to time lost in attempting to obtain legal advice as to whether he had grounds on which he could appeal and in dealing with a personal issue involving his mother's health interstate.

[6] There is good reason to view with scepticism the applicant's explanations of the delay. His initial assertion that he was unaware of a time limit is dubious. He had previously represented himself in an application for an extension of time to appeal against a sentence imposed upon him in Western Australia.[2]

[7] Notwithstanding the unsatisfactoriness of his explanations, I would not regard that as being determinative against his application for an extension of time. The decisive issue for this application is whether it is in the interests of justice that it be granted. That issue is one that depends upon the prospects that an appeal against sentence would have of success. I now turn to consider that issue.

**Circumstances of the offending for which the applicant was sentenced**

[8] The applicant, who was 39 years of age at the time, went into a liquor store at Crestmead at about 7.30 pm. He was armed with a black machete about 70 cm long

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1 *R v Tait* [1999] 2 Qd R 667 at 668.

2 *R v Herbert*, unreported, WACCA 63 of 1996, 18 April 1997, at p 4.

with circles cut out in the blade. He was wearing a balaclava. He approached the complainant manager of the store, a 46 year old male. The manager who was working alone at the time, was stacking stock in a refrigerator at the rear of the store.

[9] The applicant brandished the machete and told the manager to come over and empty the till. The manager complied. The applicant hurried up the manager, demanding also spirits and cigarettes. The applicant left the store with a little under $600 cash from the till, four bottles of Bundaberg Rum and three packets of cigarettes. The machete was not used to strike the manager.

[10] Some three days later, the applicant was located, having been identified from CCTV footage from a camera installed at premises near the liquor store. The footage showed the applicant "scoping" the liquor store before making his entry into it.

[11] The manager suffered from a post-traumatic stress disorder as a result of the applicant's treatment of him. He was medicated for depression and high blood pressure.

**The applicant's prior criminal history**

[12] The offending for which the applicant was sentenced was committed whilst he was at large. He had failed to comply with a residential condition of parole granted to him in New South Wales and had removed his electronic monitoring device. A warrant had been issued in New South Wales for his re-arrest on 11 December 2012.

[13] The applicant's prior criminal record tendered at the sentence hearing revealed a history of criminal offending in New South Wales, South Australia, Victoria and, most significantly, Western Australia. His criminal record included thirteen previous convictions for armed robbery. In detailing more recent history, the learned sentencing judge said:

> "You were serving a sentence in excess of 15 years of imprisonment, which was the recalculation when that was transferred from Western Australia to NSW, and the most recent conviction, prior to your release on parole, was an offence of unlawful wounding with intent, which occurred in prison in Western Australia. I've read each of the appeal decisions relevant to those various offences of armed robbery. After a short release in mid 2012 on parole you were returned to secure custody.
>
> You were again released on parole in New South Wales for a period of 11 days in November of 2012."[3]

It was during the last-mentioned parole release period that the applicant absconded from New South Wales, came to Queensland and then offended.

[14] At the time of sentence, the applicant was liable to serve a further four years, nine months and 27 days in New South Wales. He was also liable to be extradited in due course to Western Australia in respect of conspiracy offences alleged to have been committed by him in that state.

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[3] Tr3 LL31-40.

**Factors considered by the learned sentencing judge**

[15] In arriving at the sentence, the learned sentencing judge had regard to:

(i) the objectively serious aspects of the offending, including pre-planning, the use of a "significant" weapon and the vulnerability of the complainant;
(ii) the serious adverse impacts on the complainant;
(iii) the applicant's early plea of guilty and cooperation;
(iv) the significant need for personal and general deterrence and for protection of society in light of the applicant's appalling criminal record of similar repeat offending;
(v) the fact that the applicant was at large when he offended in Queensland; and
(vi) the unserved time the applicant was liable to serve in New South Wales to which his Honour gave "fairly minimal weight… given the circumstances of [the applicant's] current offending".[4]

[16] His Honour fixed the term of imprisonment of nine years after taking into account a period of 223 days that the applicant had been held in custody since the offending but were not declarable as term served under the sentence. He arrived at a parole release date which required that four years of the sentence be served because it appeared to him to be "the most appropriate way to recognise the relatively modest mitigating factors" in the applicant's case.

**The applicant's argument**

[17] The applicant did not file a written outline of submissions. In oral submissions, he proposed that a sentence more appropriate to his offending was imprisonment for a period of between four and six years. He said that allowing for the time he has yet to serve in New South Wales, such a sentence would require him to serve somewhere between eight to ten years or so in prison on the footing that he would be most unlikely to be granted parole in Queensland or New South Wales.

[18] Notwithstanding the explanation of the approach in the sentencing remarks to which I have referred, in order to demonstrate manifest excessiveness in his sentence, the applicant suggested that in order to arrive at a sentence of nine years, the learned sentencing judge must have started from a head sentence of 14 to 16 years for the totality of his offending from which he subtracted almost five years as attributable to the unserved New South Wales sentence, and then moderated the sentence further for circumstances of mitigation.

[19] The applicant also referred to a decision of this Court in *R v Kapitano*.[5] In that case, a sentence of 12 years imprisonment was imposed on pleas of guilty to three counts of armed robbery, three counts of attempted armed robbery, one count of receiving stolen property with a circumstance of aggravation and one count of dangerous operation of a motor vehicle with a circumstance of aggravation. Upon serving this sentence, the offender would be required to serve a further two years and two months of a New South Wales sentence which he was serving when he absconded from custody, came to Queensland, and then committed the offences for which he was being sentenced. The court regarded this sentence as being manifestly excessive and substituted a sentence of 10 years imprisonment.

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4 Tr5 LL21-25.
5 [2012] QCA 288.

**The respondent's argument**

[20] The respondent submitted that a sentence of nine years imprisonment accorded with other sentences for comparable offending. In particular, reference was made to *R v Bradford*[6] where, on a plea of guilty to a count of armed robbery of a service station, the offender was sentenced to eight years imprisonment. He had a criminal history including an instance of stealing with actual violence whilst armed. At the time of the offending for which this sentence was imposed, the offender was armed with a machete which he used to hit the complainant with the blunt end. The sentencing judge had stated that in his view eight years was "at the bottom of the range" for the offending. The members of the appellate court did not express a different view. They agreed that there was no basis on which the sentence could be said to be manifestly excessive.[7]

[21] The respondent also referred to *R v Bealing*,[8] *R v Brennan*[9] and *R v Johnson*.[10] In *Bealing*, the offender pleaded guilty to one count of armed robbery, one count of attempted armed robbery in company and one count of unlawful use of a motor vehicle to facilitate the commission of an indictable offence. This offending was carried out when the offender had failed to return to prison while absent on leave. He was serving a six year sentence for dangerous driving causing death. He was sentenced to a term of eight years imprisonment cumulative on the sentence he was serving when he was given the leave of absence.

[22] In *Brennan*, the offender was convicted at trial of the armed robbery of a TAB outlet. He brandished a gun or gun-like object at the attendant and demanded money. He escaped with some cash after the attendant hit him several times with a stool. The sentencing judge imposed a sentence of 12 years imprisonment and made a serious violent offender order. On appeal, the sentence was reduced to eight years imprisonment with a serious violent offender order. The court considered that a number of aspects of the case brought it "below the high end of the range for sentences for armed robbery". The absence of a criminal history of armed robbery was regarded as being "of particular importance".[11]

[23] The offender in *Johnson* pleaded guilty to counts of armed robbery in company and unlawful use of a motor vehicle with a circumstance of aggravation. He and another offender robbed a convenience store at closing time. He produced a small hand gun and aimed it at the proprietor, demanding money. The offender was sentenced to 10 years imprisonment for the armed robbery with eligibility for parole after serving three years. He was 19 years old. At the time of the offending, he was an escapee from custody in New South Wales where he was serving a minimum three year sentence for similar offending and faced a further cumulative sentence for three years for other similar offending. On appeal, the sentence of 10 years was regarded as "a high one", but not manifestly excessive. The parole eligibility date was considered to be a "correspondingly generous" one.[12]

[24] Counsel for the respondent drew the court's attention to the following observations of Davies JA on which he relied:

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6 [1997] QCA 391.
7 Per Cullinane J, Davies JA and Lee J concurring.
8 [2003] QCA 323.
9 [2001] QCA 253.
10 [1998] QCA 182.
11 At p 4 per Davies JA, Thomas and Williams JJA concurring.
12 At p 6 per Davies JA, Pincus JA and Sheperdson J concurring.

> "The learned sentencing Judge thought it appropriate, in sentencing the applicant, to disregard what punishment might be imposed on him for escaping from custody in New South Wales and the effect on him, in the future, of the terms of imprisonment which had been imposed on him there but which he still has not served. Whilst I do not think that that can be ignored it is impossible to predict the likelihood on completion of this sentence that he will be required to serve any part of that sentence in New South Wales and consequently it is impossible, in my view, to give that any more than slight weight. This is quite a different case from *Postellioni*, 71 ALJR 875[13] where it was said that the likelihood of serving another term there in Italy was inevitable."[14]

**Discussion**

[25] In *Kapitano*, this Court observed that whilst the totality principle cannot be strictly applied when the offender who is being sentenced has unserved sentences in another jurisdiction, s 9(2)(l) of the *Penalties and Sentences Act* 1992 which requires the court to have regard to "sentences already imposed on the offender that have not been served", is relevant to the appropriate sentence to be imposed.[15] The task for the court was there described as one of considering what sentence would be just in all the circumstances given the cumulative sentence which will necessarily follow it. In that case, the court concluded:

> "It appears from the comparative sentences referred to above that the appropriate sentence for offending of this type by an offender with the applicant's unenviable criminal record whilst at large but who nevertheless has all of the mitigating factors in his favour including a plea of guilty on an ex officio indictment, being a heroin addict who had undergone rehabilitation and who had actively assisted in the rehabilitation of others and who did not commit the offences in company or disguised and who did not use actual violence and who will have to serve another two years and two months imprisonment cumulatively would have been 10 years imprisonment. It follows that the sentence imposed of 12 years was manifestly excessive."[16]

[26] It is quite clear from this conclusion that the reduction for 12 years to ten years was attributable to some degree to the unserved New South Wales sentence. However, it is equally clear that it was attributable also to the duration of the imprisonment imposed at sentence and to the circumstances of mitigation to which the court made express reference in its conclusion. Specifically, the sentence of ten years was not arrived at by a simple process of subtraction of two years from the 12 years solely on account of the unserved period of the New South Wales sentence.

[27] The applicant's submission that the learned sentencing judge must have started with a head sentence of 14 to 16 years and then subtracted the unserved period of his New South Wales sentence is without foundation. As *Kapitano* illustrates, a process of subtraction of the whole of the unserved period is not required in order to have appropriate regard to the sentence already imposed.

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13 Evidently this refers to *Postiglione v The Queen* (1997) 71 ALJR 875.

14 At pp 4-5.

15 Per Atkinson J at [46], [52], Holmes and Fraser JJA concurring.

16 At [53].

[28] In the applicant's case, the sentence arrived at by the learned sentencing judge did take account of the outstanding period that the applicant is likely to have to serve in New South Wales. His Honour's attribution of "fairly minimal weight" to it in the circumstances is readily understandable. The appellant absconded while on parole in New South Wales. He is a violent recidivist. His prospects of rehabilitation are meagre. It is no understatement to say that he represents a true danger to the community.

[29] Having regard to this and to all the cases to which I have referred, I am of the view that the sentence imposed by the learned sentencing judge was appropriate both as to duration of the period of imprisonment and to that part of it that the applicant must serve before he becomes eligible for parole. I am quite unpersuaded that the sentence was manifestly excessive in either respect.

**Disposition**

[30] For these reasons, I consider that the applicant has no reasonable prospects of success on an appeal against sentence. His application for an extension of time within which to apply for leave to apply must therefore be refused.

**Order**

[31] I would propose the following order:

1. Application for extension of time for applying for leave to appeal against sentence refused.

[32] **MORRISON JA:** I have had the advantage of reading the reasons of Gotterson JA and agree with his Honour and the order he proposes.