SUPREME COURT OF QUEENSLAND

CITATION:	*R v Boney* [2015] QCA 162
PARTIES:	**R** **v** **BONEY, Ashley Kenneth Scott** (applicant)
FILE NO/S:	CA No 36 of 2015 DC No 352 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Unreported, 13 February 2015
DELIVERED ON:	1 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2015
JUDGE:	Gotterson JA and Ann Lyons and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant be granted leave to appeal.** **2. Order that the sentence below be varied so as to substitute the 22nd October 2015 as the parole release date.** **3. Otherwise confirm the sentence imposed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of entering premises and stealing, not guilty to one count of burglary and stealing and one count of arson on an indictment – where the applicant was found guilty after trial of the burglary and stealing charge, but not guilty of the arson charge – where the applicant was sentenced to concurrent sentences of two years imprisonment for both counts, to be served cumulatively on a sentence the applicant was then serving – where the applicant had a lengthy criminal history – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 156 *R v Walsh* [2005] QCA 333, considered
COUNSEL:	The applicant appeared on his own behalf D Balic for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by North J and with his Honours reasons for them.

[2] **ANN LYONS J:** I agree with the reasons of North J and the orders proposed by his Honour.

[3] **NORTH J:** The applicant was arraigned on a three count indictment in the District Court at Southport on 9th Feb 2015. He pleaded not guilty to a count of burglary and stealing (count 1), not guilty to a count of arson (count 2) but guilty to a count of entering premises and stealing (count 3). The trial in respect of counts 1 and 2 proceeded and after a four day trial the jury returned verdicts of guilty to the count of burglary and stealing but not guilty in respect of the count of arson.

[4] The following day he was sentenced to concurrent sentences in respect of counts 1 and 3 of two years imprisonment but to be served cumulatively on a sentence the applicant was then serving and some 31 days pre-sentence custody were declared time served. A parole release date was fixed at 22 February 2016 with the consequence that the actual time of imprisonment to be served under the concurrent sentences is approximately 12 months.

[5] The sole ground of appeal is that the sentence was manifestly excessive.

[6] At the time of offending in November 2013 the applicant was 22 years of age and was 24 when sentence.

[7] Disturbingly for someone of his age he had a significant criminal history. Some of the features were that he had on 1 January 2009 in New South Wales been convicted of an offence of "recklessly cause grievous bodily harm" for which he was sentenced to 18 months' imprisonment. As a 17 year old he had been sentenced in Queensland for stealing and ordered to be of good behaviour for 12 months. While subject to that order he committed offences of public nuisance and contravening an order and was fined. More significantly in 2012, when aged 21, he was convicted of entering premises with a break, unlawful use of a motor vehicle and other offences including failure to appear in accordance with an undertaking and breach of bail conditions. In respect of the former he was admitted to probation for a period of 18 months. It was towards the end of this period of probation when he committed the offences the subject of this appeal. Subsequent to the offending with which this appeal is concerned the applicant was convicted and sentenced in the Southport Magistrates Court of an offence of stealing committed in September 2013 before this offending and again in July 2014 the applicant was convicted in the Goondiwindi Magistrates Court of some minor offending at which time he was dealt with for the breach of probation.

[8] The circumstances of the offending for which the applicant was sentenced involved, in respect of the burglary and stealing, that on the 24th November 2013 a fire was noticed at a house occupied by two others. Property from within the house was stolen. An ANZ bankcard belonging to one of the complainants was also found in the applicant's possession as was a burnt $100 United States note. The applicant was found in possession of two bags with property from the house. The indictment particularised

the property found in his possession as alcohol, jewellery, laptops, electronic items, the credit card, clothes and other items. With respect to the count of entering premises and stealing to which the applicant pleaded guilty this concerned the theft of a wallet and $70 in currency and cards from within the wallet belonging to a complainant who was an observer of the fire. The property was taken from the complainant's car.

[9] In submissions on behalf of the applicant his counsel accepted that the circumstances of the offending in the context of the pattern of reoffending warranted the imposition of a "deterrent sentence". Counsel submitted that alcohol and drug abuse were contributing factors to the applicant's conduct and that he would benefit from alcohol and drug counselling. Counsel pointed to the circumstance the applicant had formed a relationship with a young woman and had taken some responsibility for a child notwithstanding he was not the father.

[10] In his sentencing remarks the trial judge accepted a psychologist's opinion that there were aspects of opportunism and impulsive behaviour associated with the offending in the context of a possible depressive illness and substance abuse. His Honour acknowledged the seriousness of the offending and also the circumstance of the conviction in respect of count 1 indicated that the jury had concluded that the applicant had lied to police when interviewed in what he had said about how he came into possession of the property the subject of that offending. His Honour expressed the opinion that it was necessary to impose a sentence which would have a personal deterrent effect upon him by discouraging him from like offending. His Honour indicated that in order to reflect the totality of the offending by the combined offending involved in counts 1 and 3 that he would impose identical concurrent sentences but to be served cumulatively on the sentence that he was then currently serving.

[11] In his submissions in this Court the applicant, who represented himself, emphasised that he had taken on responsibilities as a father and future husband which would introduce some stability into his life. By reason of this and his coming to grips with alcohol and drug abuse he emphasised his prospects of rehabilitation as evidenced by his prospects of playing football with a rugby league team and his prospects of employment.

[12] In response the respondent submitted that the offending was serious both in the context of the offending as committed and also in the circumstances that the applicant was on probation at the time and that he had only recently finalised a suspended sentence that had been activated because of prior breach. It was submitted that the applicant had a history of offending whilst subject to community based orders and that his recidivism even as a young man was therefore a feature of concern. The respondent submitted that the cumulative component of the sentence was explained by that history and also indicated by reason that the offending was similar in nature though committed at different times.

[13] The respondent submitted that the combination of the history of offending as a young man, that he re-offended notwithstanding being offered the opportunity to benefit from community based orders and his breach of probation supported the opinion of the psychologist that he presented as a medium to high risk of reoffending[1] supported his Honour's observation that a sentence that would serve the objects of personal deterrence was indicated.

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1 AR 41.

[14] At the hearing of the appeal the applicant presented as an articulate young man and emphasised his desire to be reunited with his family, to have the opportunity to play football again and to demonstrate his capacity to rehabilitate himself. He did not have the benefit of any sentencing decisions or judgments to place before us but he referred in passing to a sentence imposed by Judge McGinness[2] where her Honour sentenced an offender to three years for offences involving a significantly greater amount of property with an immediate parole release date but in circumstances where that offender had served some 239 days in pre-sentence custody. The circumstance of that sentence provides little guidance in the particular circumstances that apply here.

[15] In submissions before his Honour below and in written submissions on behalf of the respondent, reference was made to *R v Walsh*[3] where a sentence of two years imprisonment was imposed upon a 32 year old offender who had been convicted by a jury of burglary and stealing. The circumstances of the appellant in *Walsh* were different, he was an older man and with a much longer criminal history.

[16] We were informed that since he has been in custody the applicant has taken the opportunity to accept treatment from the Prison Mental Health Service and to perform other courses designed to assist him. Evidence was placed before us that at the time of release there would be psychological and psychiatric services available to the applicant in his local area to use if required.[4]

[17] The sentence of imprisonment of two years was certainly high in the circumstance of a relatively youthful offender notwithstanding his criminal history. But the circumstance that a sentence of that term was imposed upon an older offender with a more significant criminal history as was done in *R v Walsh* does not, of itself, indicate that the sentence was manifestly excessive. It should be recalled that the plea on count 3 was late, on the first day of trial and in the face of overwhelming evidence and the conviction on count 1 followed a jury verdict. Nevertheless it would have been well within a sound discretionary range for a lesser sentence to have been imposed.

[18] The circumstance that the applicant was serving a term of imprisonment imposed because of the breach of his probation at the time of sentencing by his Honour meant that it was within his Honour's power to sentence the applicant to a sentence cumulative upon the sentence he was then serving, s 156(1) of the *Penalties and Sentences Act* 1992. For the reasons submitted by the respondent this course was open to his Honour. Moreover the effect of the cumulative imprisonment does not of itself suggest a sentence that is manifestly excessive because the full time release date under the earlier sentence was 23 March 2015, some one month and 10 days after the date of sentencing by his Honour below.

[19] His Honour fixed a parole release date at 22 February 2016 which, again was open to his Honour and not of itself indicative of any error.

[20] In his remarks at sentencing his Honour noted that the offending by the applicant had features of opportunism and impulsivity contributed to by problems with substance abuse. A psychologist report recorded a history of illicit drug use and alcohol abuse from juvenile years through to his young adulthood progressing to use of crystal methamphetamine. In submissions before us the applicant sought to persuade us that

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2 *R v Kalen Wayne Pearce*, District Court Southport, Indictment No 454 of 2013, 13 November 2013.
3 [2005] QCA 333.
4 Exhibit 1 on the appeal.

he had been sober for two years, however it was apparent from the sentencing remarks and the other evidence before his Honour below that at the time of offending (November 2013) the applicant was affected by "grog or grog and ice".5 When confronted with these facts the applicant asserted that he had been sober for 18 months. This was an unfortunate reminder of the fact noted by the sentencing judge that the applicant had lied to police about how the property, the subject of count 1, came into his possession. It is an instance that reinforces the view I take that the applicant's rehabilitation is incomplete and that the applicant and the community might well benefit from his taking further advantage of the services and treatment available to him.

[21] Further I agree that a sentence that served to deter the applicant from further offending was indicated for the reasons submitted by the respondent.[6]

[22] Nevertheless notwithstanding that each of the elements of his Honour's sentence, when examined in isolation, cannot be shown to have been in error in combination it suggests an overall sentence, particularly in relation to the time ordered to be served that may be a harsh and crushing sentence and ultimately counter-productive of a successful rehabilitation. In the result I am of the view that the sentence is therefore manifestly excessive. The sentence that I would impose in the circumstance would be consistent with that imposed but with a variation of the parole release date to reduce the time to be served by four months.

[23] Therefore the orders I would make would be:

1. The applicant be granted leave to appeal.
2. Order that the sentence below be varied so as to substitute the 22nd October 2015 as the parole release date.
3. Otherwise confirm the sentence imposed.

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[5] AR 39.
[6] See further in this regard *R v Walsh* [2005] QCA 333 at [33]