

SUPREME COURT OF QUEENSLAND

CITATION: *R v Stokes* [2016] QCA 157

PARTIES: **R**
v
STOKES, Joel Wade
(applicant)

FILE NO/S: CA No 226 of 2015
DC No 934 of 2015

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane – Date of Sentence: 28 August 2015

DELIVERED ON: 14 June 2016

DELIVERED AT: Brisbane

HEARING DATE: 8 March 2016

JUDGES: Margaret McMurdo P and Gotterson JA and Bond J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Grant the application for leave to appeal.**
2. Allow the appeal by varying the sentence so that the parole release date is fixed at 20 June 2016.
3. Otherwise confirm the sentence imposed at first instance.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant was sentenced to two years and eight months for an offence of armed robbery in company and short concurrent terms of imprisonment for three drug offences – where the applicant had served 35 days of an unrelated six month sentence at the time of the robbery sentence – where the applicant had spent 33 days in pre-sentence custody which could not be declared as time served under the sentence – where the primary judge took these two periods of custody into consideration when framing a just head sentence but failed to take them into account when setting the parole eligibility date

COUNSEL: The applicant appeared on his own behalf
S J Farnden for the respondent

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

- [1] **MARGARET McMURDO P:** The applicant pleaded guilty on 28 August 2015 to armed robbery in company on 21 November 2012 and to two counts of possessing a dangerous drug and one of supplying a dangerous drug, all on 29 January 2015. He was sentenced on the armed robbery offence to two years and eight months imprisonment and on the drug offences to short concurrent terms of imprisonment. The judge fixed the parole release date at 28 August 2016, that is, after 12 months. He has applied for leave to appeal only in respect of his sentence on the armed robbery offence which he claims was manifestly excessive.

The applicant's antecedents

- [2] The applicant was 24 at the time of the armed robbery offence; 26 at the time of the drug offences; and 27 at sentence. He had entries in his criminal history prior to the armed robbery offence for street offences, and in October 2011, was fined without conviction for drug and property offences. He had a significant subsequent criminal history. In May 2014 he was fined without conviction for drug offences. In August 2014 he was arrested for breach of bail in this matter and in September 2014 he was convicted and fined for breaching his bail. In November 2014 he was convicted and sentenced to four months imprisonment, suspended forthwith, with an operational period of 18 months, together with 18 months probation for a large number of street, drug and property offences. On 24 June 2015 he was convicted of receiving tainted property on 3 May 2015 in breach of the November 2014 order and was sentenced to six months imprisonment. Pre-sentence custody of 53 days was declared as time served under the sentence. The fully suspended sentence imposed in November 2014 was also invoked. He was, however, given immediate parole release.
- [3] He breached that parole less than one month later on 17 July 2015 and he was returned to custody on 20 July 2015 to serve the six month sentence. He was serving that sentence when sentenced for the armed robbery offence. His continued re-offending and persistent refusal to take advantage of community based orders means that he has been in custody serving sentences of imprisonment since 17 July 2015.
- [4] The three drug offences for which he was sentenced on 28 August 2015 were in breach of the probation order imposed in November 2014 and committed whilst on bail for the armed robbery offence.

The circumstances of the present offending

- [5] The circumstances of the armed robbery in company offence were as follows. The 70 year old complainant owned and ran a business at Rocklea in partnership with his son. At about 5.00 am on 21 November 2012, he was sitting in the driver's seat of his utility, outside the business premises, waiting for his son to open the gate. He was lying back with his eyes closed when his car door was opened. The applicant and an unknown co-offender both pointed knives at him and repeatedly demanded money. The applicant's knife had a five inch blade which he pointed at the complainant's waist from about a foot away. The applicant's face was tightly covered with grey material so that only his eyes and eyebrows could be seen. The co-offender's knife

had a blade about three inches long and half an inch wide. He held it about six to eight inches from the complainant's chest. The co-offender's face was also covered with grey material. The co-offender yelled to open the glovebox. The complainant complied. The co-offender looked in the glovebox whilst the applicant rummaged through documents on the car floor. The co-offender told the complainant to give him his wallet. The complainant removed his credit cards before the co-offender took the wallet which contained no cash. Both offenders left in a nearby utility. A third co-offender, Jace Ware, drove the two offenders to and from the scene.

- [6] Police found the applicant's fingerprints on the outside driver's side door of the complainant's vehicle and on some brochures inside the vehicle. They executed a search warrant at his address and issued a warrant for his arrest which was not executed until 2014.
- [7] Police found a vehicle registered to Jace Ware with a similar registration plate to that recorded by the complainant as belonging to the getaway vehicle. When interviewed by police, Ware admitted to driving two men to Rocklea to collect a debt for which he was to be paid \$300. On 20 June 2014 he pleaded guilty to armed robbery in company and was sentenced to two years imprisonment with immediate parole. The judge noted that his role was the least of the three offenders. The third co-offender has not been charged. It is not contended that the applicant should have received as lenient a sentence as Ware, given Ware's lesser involvement in the offence and his less serious criminal history.
- [8] The applicant's drug offences were detected in this way. Police attended the applicant's address after he failed to report as required under his bail conditions for the armed robbery offence. They found him hiding in his bedroom. They also found three bags containing a total of 0.087 grams of methylamphetamine and two bags containing a total of 1.6 grams of cannabis. He told police the cannabis was for personal use. He intended to sell the methylamphetamine to people who had previously "ripped him off" and he had "cut" the drug for that purpose.

The submissions at sentence

- [9] The prosecutor at sentence emphasised that the appellant's role was much greater than Ware's who was not involved in the planning of the robbery. He referred the judge to comparable cases including *R v Montone*¹ where a 25 year old offender pleaded guilty to armed robbery in company with actual violence and was sentenced to three years imprisonment with parole release fixed after 12 months and *R v Wockner & Hodges*² where sentences of four years imprisonment with parole eligibility after 15 and 16 months were imposed for multiple counts of armed robbery in company. The prosecutor submitted that the commission of the armed robbery, which included threatening and menacing a member of the public with knives in order to deprive him of property, invoked the sentencing principles of punishment, personal and general deterrence and community denunciation. The applicant, although he had no previous convictions for violence, was not a youthful first offender. Whilst he entered an early plea of guilty to the drug offences, his plea of guilty to the armed robbery offence was not long before his listed trial. The prosecutor conceded, however, that the plea was "nonetheless timely."

¹ [2009] QCA 234.

² [2007] QCA 392.

- [10] The applicant's experienced defence counsel at sentence pointed out that as the applicant was being sentenced in the middle of a six month term of imprisonment, it maybe that, if a three year head sentence were imposed, a fixed parole date could not be set as the total period of imprisonment would exceed three years. After referring to *Montone*, counsel asked the judge to impose a lesser sentence than three years with an early parole release date. Counsel submitted that at the time of the armed robbery offence the applicant's use of speed was out of control. He understood that his co-offender was owed money by the complainant and was seeking to get only what was owed. The guilty plea was not as timely as it could have been because of difficulties in communicating with the applicant who was serving his sentence at Woodford Prison. The applicant was in custody in relation to at least the drug offences for 33 days from 29 January until 3 March 2015. Whilst this period was not able to be declared as time served under the sentence for the armed robbery offence, it should be taken into account. He was also in custody from 3 May until 24 June 2015 but this was declared as time served under the 24 June 2015 sentence. He was returned to custody on 20 July 2015 when he began to serve the six month sentence for which he was paroled. In all, he had served about three months imprisonment unable to be declared but which should be taken into account in the sentence imposed. *Montone* demonstrated that a head sentence of about three years imprisonment was within range but given the applicant's periods in custody since his arrest, a head sentence of two years and eight months was appropriate for the armed robbery offence with an early parole release date fixed to reflect the mitigating circumstances. The drug offences on their own would not warrant a custodial sentence.

The judge's sentencing remarks

- [11] The judge's sentencing comments were brief. The judge took the applicant's plea of guilty into account, noting that this was the first offence of violence in his criminal history. He was now 27 years old. His criminal history suggested his rehabilitation would be difficult. He had not taken past opportunities to reform and had breached his parole. The armed robbery offence was serious. It involved a struggle whilst the applicant and his co-offender were armed with knives; anything could have happened. His co-offender, Ware, was sentenced on the basis that his role was much less significant than that of the applicant.

The submissions in this application

- [12] The applicant is self-represented in this application. He contends that the sentencing judge erred in either not declaring or not taking into account previous periods of custody. These periods, he submits, should have been reflected in a lesser head sentence and an earlier parole release date. He submits that the true effect of his sentence is that he will have to serve 14 months imprisonment, close to half his head sentence, before release on parole. He claims that *Montone*; *R v Briody*³ and *R v Kolodziej*⁴ demonstrate that his sentence on the armed robbery offence is excessive. A sentence of two years imprisonment with a parole release date after six to nine months should be substituted.
- [13] He also produced new documents supporting his positive efforts to rehabilitate whilst in custody and the rehabilitative assistance available to him upon his release, including from the Salvation Army and the Uniting Care Community.

³ [2002] QCA 364.

⁴ [2008] QCA 184.

Conclusion

- [14] This Court's focus must be on the material before the sentencing judge. The applicant has not demonstrated that a miscarriage of justice would result if this Court did not grant his application to adduce further evidence. For those reasons this Court cannot receive that material.
- [15] As counsel for the respondent pointed out, a considerable difficulty for the applicant is that the sentence imposed was what was requested by his experienced barrister at sentence: see *R v Flew*.⁵ Further, the cases upon which the applicant relies do not demonstrate that the sentence imposed was in itself manifestly excessive. A head sentence of three years imprisonment with parole eligibility set after 12 months would have been an entirely appropriate sentence for this concerning offence of armed robbery in company, even considering the applicant's comparative youth at the time, his plea of guilty and his lack of significant prior criminal history for offences of violence. The maximum penalty for armed robbery in company is life imprisonment and the offence must have been greatly disturbing for the unfortunate victim. The applicant received the full benefit of 53 days of pre-sentence custody from 3 May until 24 June 2015 when sentenced in June 2015 for receiving. He is not entitled to have that time in custody taken into account again in the sentence for the armed robbery offence. There was, however also 33 days from 29 January until 3 March 2015 relating to the drug offences and 35 days from 20 July until 28 August 2015 when parole was cancelled. These periods could not be declared as time served under the sentence but deserved to be considered in framing a just sentence. As defence counsel requested, the judge gave more than full credit to these periods of custody and the totality principle by moderating the three year head sentence to two years and eight months. This ensured the applicant would have the benefit of a fixed parole release date, despite his earlier breach of parole. Defence counsel, however, made no specific submissions as to the parole eligibility date, merely stating that it should reflect the mitigating circumstances.
- [16] The question in this application is whether the judge erred in not also giving credit for this time in custody, not only in setting the head sentence, but also in setting the parole eligibility date. Given the mitigating features of comparative youth, lack of relevant prior convictions for violence and plea of guilty, the applicant could expect, as, I think, the primary judge appreciated, to have been released on parole after serving about one third of his sentence for the armed robbery offence. Having reduced the three years head sentence to two years and eight months to take into account periods of custody which could not be declared as time served, it was logical and appropriate, to also reflect this in setting the parole eligibility date. In the circumstances pertaining in this case, the judge erred in not doing this. The parole eligibility date should have been set about 10 weeks earlier.
- [17] I would grant the application for leave to appeal and allow the appeal by varying the sentence so that the parole release date is fixed at 20 June 2016. I would otherwise confirm the sentence imposed at first instance.
- [18] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.
- [19] **BOND J:** I agree with McMurdo P.

⁵ [2008] QCA 290, [28].