

SUPREME COURT OF QUEENSLAND

CITATION: *R v Maclure* [2017] QCA 62

PARTIES: **R**
v
MACLURE, Matthew James
(applicant)

FILE NO/S: CA No 315 of 2016
DC No 290 of 2016
DC No 81 of 2015

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich – Date of Sentence: 21 October 2016

DELIVERED ON: 11 April 2017

DELIVERED AT: Brisbane

HEARING DATE: 8 March 2017

JUDGES: Fraser and Morrison JJA and Boddice J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for leave to appeal against sentence is granted.**
2. The appeal is allowed.
3. The sentence imposed on 21 October 2016 is set aside.
4. Two years of the suspended sentence imposed on 6 October 2015 be activated.
5. The applicant’s parole release date be fixed at 20 April 2017.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant plead guilty on 6 October 2015 to one count of arson of a motor vehicle – where the applicant was sentenced to three years imprisonment wholly suspended for an operational period of three years – where the applicant committed further offences including dangerous operation of a motor vehicle, unlawful possession of weapons, possession of dangerous drugs, obstructing a police officer, driving whilst disqualified, failing to provide a specimen for breath for analysis, and failing to stop his motor vehicle – where the applicant was convicted of

these offences on 20 June 2016 and sentenced to an effective head sentence of 10 months imprisonment – where on 21 October 2016 the original sentencing judge found a breach of suspended sentence proven and activated the whole of the suspended sentence with a parole release date fixed at 20 April 2017 – where the applicant contends the sentencing judge failed to consider mitigating steps undertaken by the applicant – where the respondent contends the sentencing judge rightly exercised their discretion – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE/OTHER MATTERS – where the respondent submits the sentencing judge erred in fixing a parole release date in circumstances where an cumulative period of imprisonment would exceed three years – where s 160C of the *Penalties and Sentences Act* 1992 (Qld) would be enlivened – whether the sentencing judge’s true intention was the imposed length of imprisonment or the fixing of a date for release on parole – whether the sentencing judge erred in fixing a parole release date

Penalties and Sentences Act 1992 (Qld), s 147(2), s 160C

COUNSEL: The applicant appeared on his own behalf
C M Kelly 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 Boddice J and the orders proposed by his Honour.
- [2] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the orders his Honour proposes.
- [3] **BODDICE J:** The applicant seeks leave to appeal a sentence imposed on 21 October 2016, following a finding that the applicant had breached a suspended sentence imposed on 6 October 2015 for an offence of arson committed on 9 September 2014. At issue is whether the sentence imposed for the breach of the suspended sentence was manifestly excessive in all the circumstances.

Background

- [4] The applicant was born on 12 November 1988. He was aged 25 years at the time of the arson offence and 26 years at the time of imposition of that sentence. He was aged 27 years at the time of the breach offences and the breach proceedings.
- [5] The applicant’s criminal and traffic histories are extensive. The criminal history contains multiple convictions for drug and property related offences. The applicant has been the recipient of community based orders in the past, including probation.

He has also received suspended terms of imprisonment. The applicant has previously been dealt with for breaches of probation, suspended sentences and parole.

Original offence

- [6] On 6 October 2015, the applicant pleaded guilty to one count of arson of a motor vehicle. The vehicle was a hire vehicle which had suffered some damage on the previous day as a consequence of an accident or a collision. There was an excess payable to the hire company of \$2,650. The applicant was sentenced on the basis the arson was committed so as to destroy the vehicle and render the excess no longer payable.
- [7] The applicant pleaded guilty to the offence on the morning of trial. It was accepted that plea of guilty, whilst late, contained a recognition of the criminality of his conduct and had saved the administration of justice a considerable amount of money.
- [8] The applicant was sentenced to imprisonment for three years. It was noted the applicant had already served some 13 months in custody which could not be declared as time served on that sentence. Having regard to that time served, it was ordered that the sentence of imprisonment be wholly suspended forthwith, for an operational period of three years.

Breach offences

- [9] On 18 February 2016, the applicant committed a number of offences. These offences included dangerous operation of a motor vehicle, unlawful possession of weapons, possession of dangerous drugs, obstructing a police officer, driving whilst disqualified, failing to provide a specimen of breath for analysis and failing to stop his motor vehicle.
- [10] On 20 June 2016, the applicant was convicted of these offences. He was sentenced to an effective head sentence of 10 months imprisonment. Allowing for time served in custody between 18 February 2016 and 20 June 2016, which was declared as time served on those sentences, his parole release date was set at 20 June 2016.

Breach hearing

- [11] The applicant appeared before the original sentencing Judge on 21 October 2016 for breach of the suspended sentence imposed by that Judge on 6 October 2015. The convictions for the breach offences were the basis for the breach.
- [12] The sentencing Judge found the breach proven. The sentencing Judge found it would not be unjust to activate the whole of the suspended sentence and ordered the applicant be imprisoned for the whole of the suspended sentence, being three years.
- [13] The sentencing Judge fixed the applicant's parole release date at six months, namely, 20 April 2017. In doing so, the sentencing Judge took into account the applicant had served approximately four months in custody before being sentenced for the breach offences but considered his conduct justified a further period of actual custody.

- [14] In activating the whole of the suspended sentence, the sentencing Judge observed that the applicant had an extensive and lengthy criminal history over the past decade with this appearance being “about the 29th time” the applicant had appeared in a criminal Court. The sentencing Judge also noted the applicant’s five page traffic history. The sentencing Judge observed that the criminal and traffic histories illustrated the applicant had contempt for Court orders and traffic regulations.
- [15] The sentencing Judge accepted the applicant had a long standing history of use of amphetamines and that he now professed to have prospects of rehabilitation in the future. The sentencing Judge observed the applicant had been told at the time of the imposition of the original sentence of imprisonment that he hoped not to see offenders again but as he had returned the applicant was now out of “one more chances”.

Applicant’s submissions

- [16] The applicant submits the activation of the whole three year sentence of imprisonment was manifestly excessive. It failed to take into account the steps the applicant had taken whilst on parole for four months since imposition of the sentences for the breach offenses and whilst subject to bail for breach of the suspended sentence.
- [17] Those steps included that the applicant had sought professional help, including a mental health care plan and had not re-offended whilst on parole and bail. The applicant submitted the sentencing Judge erred in failing to take into account these positive changes which ought to have justified an order releasing him immediately on parole.

Respondent’s submissions

- [18] The respondent submits the sentence was not manifestly excessive. The applicant had significant prior criminal and traffic histories. He had in the past breached suspended sentences and a parole order. The breach offences were committed only a matter of months after imposition of the original sentence. The sentencing Judge rightly characterised the applicant’s offending as evidence of contempt for Court orders. The respondent submits it was well within the sentencing discretion to find that it would not be unjust to activate the whole of the suspended sentence.¹
- [19] The respondent further submits the sentencing Judge did err in imposing a parole release date. At the time of the breach proceedings, the applicant was subject to a term of imprisonment of ten months, which had commenced on 18 February 2016. Once the sentencing Judge activated the three year suspended sentence, the completion date for the applicant’s terms of imprisonment was 20 October 2019, which meant the applicant was serving an unbroken duration of imprisonment in excess of three years. In those circumstances, only a parole eligibility date could be set by the sentencing Judge.²

Consideration

¹ Section 147(2), *Penalties and Sentences Act 1992* (Qld).

² Section 160C, *Penalties and Sentences Act 1992* (Qld).

- [20] The applicant's offending in breach of the suspended sentence imposed on him on 6 October 2015 was serious. The offences involved both drug, weapons and traffic related offending committed within months of being placed on a three year wholly suspended sentence for the serious offence of arson.
- [21] Further, the applicant had appalling criminal and traffic histories. He had, in the past, been given the opportunity of community based orders and suspended sentences. He breached those orders. He had also engaged in criminal conduct resulting in cancellation of an earlier parole order.
- [22] Whilst those circumstances amply supported a finding it would not be unjust to activate the suspended sentence, in exercising that discretion the sentencing Judge was erroneously informed a fixed release date could be set despite activating the whole of the suspended sentence.
- [23] Had the sentencing Judge been informed that activation of the whole of the suspended sentence would allow only the setting of a parole eligibility date, the sentencing Judge may have exercised his discretion to activate part only of the suspended sentence, having regard to the steps towards rehabilitation.
- [24] The error as to the fixing of a parole release date materially affected the exercise of the discretion whether it was appropriate in all the circumstances to activate the whole of, or part only of the suspended sentence. That sentencing Judge did not have the opportunity to consider whether it was appropriate to activate part only of the suspended sentence. As a consequence, the sentencing discretion miscarried. It is therefore necessary to re-exercise that sentencing discretion.
- [25] In doing so, it is relevant to observe, as the sentencing Judge properly did, that the applicant's serious offending behaviour in breach of the suspended sentence involved both drug and traffic related offences committed within months of being placed on the suspended sentence. That behaviour showed scant regard for the applicant's obligations under the suspended sentence.
- [26] However, the applicant had, since committing those offences, served some four months in actual custody. He had subsequently been released on parole. The applicant had not committed further offences while subject to that parole. He had also taken positive steps to address his offending behaviour. Those steps towards rehabilitation would be best encouraged by ensuring the applicant had a fixed parole release date so that he had certainty but was also subject to supervision upon his release from custody.
- [27] Balancing all of those matters, I would order, the breach having been proven, the activation of two years of the suspended sentence imposed on 6 October 2015. I would fix the applicant's parole release date at the six months originally imposed by the sentencing Judge, namely, 20 April 2017. That period properly reflects the need for further incarceration whilst balancing the positive steps taken by the applicant towards future rehabilitation.

Orders

- [28] I would order:
1. The application for leave to appeal against sentence is granted.

2. The appeal is allowed.
3. The sentence imposed on 21 October 2016 is set aside.
4. Two years of the suspended sentence imposed on 6 October 2015 be activated.
5. The applicant's parole release date be fixed at 20 April 2017.