[1997] QCA 137

COURT OF APPEAL

MACROSSAN CJ
THOMAS J
LEE J

CA No 78 of 1997

THE QUEEN

v

D **Applicant**

BRISBANE

DATE 07/05/97

JUDGMENT

RESTRICTED ACCESS TRANSCRIPT

THE CHIEF JUSTICE: This application for leave to appeal against sentence is made in the case of a very young offender who was sentenced for unlawful use of a motor vehicle. At the time of the offence, he was just short of 15 years of age, the sentence imposed being one of two months detention cumulative upon a period of detention then currently being served, and it was also ordered that the conviction be recorded.

Although youthful, the applicant has a criminal history which, for one of his age, is extraordinarily long. It is hard to summarise it effectively and it is unnecessary to set it out in complete detail. Counsel for the applicant has made a summary of it in relevant aspects and we see that

it includes 17 charges of stealing, 24 charges of unlawful use of a motor vehicle, and another two of attempted unlawful use, four charges of breach of the *Bail Act*, and then breaking, entering, stealing, five charges, wilful damage of property, a large number of charges included, stealing with actual violence in company, escaping lawful custody, breach of community service orders, breach of immediate release orders, and the list goes on.

Various penalties have been imposed in the past for the applicant's criminal behaviour. We see there have been good behaviour bonds, community service orders, probation orders, reprimand, all have been tried.

Also, another matter which calls for attention, is that the current offence was committed one month after an immediate release order had been imposed upon the applicant in respect of a conviction, and it occurred also during the currency of two probation orders. The offence in the present case involved the taking of a car outside the complainant's place of business. The vehicle had in fact been left unlocked and the keys were left on the visor.

The applicant was not the one who took the vehicle, we are told, but he rode in the vehicle; at first, as a passenger, and later, took a turn in driving it. The vehicle was in fact recovered abandoned at Beenleigh and undamaged.

The submission made on behalf of the applicant is that, in summary, a concurrent sentence, not of great length, should have been imposed, but the effect of this would have been, as the argument advanced on behalf of the applicant puts it, that no additional penalty would have been imposed. In other words, the concurrent sentence which it is suggested should have been imposed would have been one with no practical effect in the circumstances.

It is said then that to impose a cumulative sentence, even one for a short period of two months, was manifestly excessive. The principal ground upon which that submission is made is that, had the offence been dealt with on earlier occasions when the applicant was before the Court, it was likely or very likely that no additional penalty, beyond those that were imposed on those occasions, would have been imposed. Therefore, it is suggested that an error in discretion has occurred, or at least, that the sentence should be regarded as one which is

manifestly excessive.

Reference was also made in the course of argument by the applicant's representative to sections 169 and 170 of the *Juvenile Justice Act*, but when those sections are examined, it seems to me that they did not have the effect contended for on the applicant's behalf. It was suggested that those sections, when examined and applied to a case like the present, really deprived the tribunal of a discretion in the matter, that is a discretion to order the imposition of a cumulative penalty. It appears to me, however, that when those sections are examined, nothing within them removes the discretion, in an appropriate case, for ordering the imposition of a cumulative penalty.

The Magistrate, in the course of his sentencing remarks, said that he took into account that a plea of guilty had been entered, but he took into account also the substantial criminal history of the applicant and the very large number of appearances which he had made before the Court. He said, and this certainly is a remark justified in terms of the applicant's history, that the applicant showed no regard for the orders which had been made in the past by the Courts.

He noted also the predilection of the applicant for the commission of offences of this particular type. He therefore said that he was going to record a conviction and he made an order for detention for a period of two months and ordered the detention period to be made cumulative.

The submission had been made to the Magistrate in the course of the hearing, as we see from the record, that if the current matter had been dealt with on one of the previous occasions when the applicant was before the Court, then there would have been no practical effect on the sentences imposed. The suggestion was that the orders that were then made would not have been increased in severity by the addition of this particular offence. That may be so, that is, it may be very likely that no additional penalty would have been imposed if this offence had been dealt with on an earlier occasion, but it is something which, in my view, cannot be asserted positively, and presumably also, the applicant himself would have had an opportunity to ask that this offence be taken into account on one or other of those earlier occasions.

Whether or not that is so, it seems to me that, in the circumstances of this case, the Magistrate did indeed retain a discretion under which he was entitled to order that a term of detention for a short period should be imposed as some effective penalty for the commission of this offence.

In short, I would not be disposed to accept the argument that he was obliged to impose no effective additional penalty for this offence. It was an unrelated matter, related of course in terms of character, but not in time or circumstances to earlier offences and therefore, in my view, there was a remaining discretion to impose a cumulative sentence. One for such a short period as was imposed here cannot, as I see it, be regarded as one that was manifestly excessive in the circumstances and I would refuse the application.

THOMAS J: This applicant unlawfully used a motor vehicle on 19 March 1996. He was not involved in the taking of the vehicle and the vehicle was not damaged. It was therefore an offence at the lower end of the seriousness of unlawful use.

There were three particular occasions when this applicant came before Courts in 1996, resulting in detention orders, namely July, September and October 1996. On those occasions orders were made, some of them cumulative, the combined effect of which was that he was sentenced to 24 and one half months detention. That was the position when he came before the Court for sentence on the present matter in February 1997.

If this matter had been dealt with on the same occasion as an earlier sentencing exercise, for example that of 25 July 1996, I have no real doubt that there would have been no increase in the overall level of sentence.

Many relatively serious offences were dealt with on those occasions. If the additional minor circumstances of this offence had been added into the balance it would, in my view, have resulted in a concurrent sentence which would not have increased the overall length of the time to be served.

It is perhaps desirable to mention the sequence which led to the detention orders that I have

mentioned. On the occasion in July he was dealt with for breaches of immediate release orders on which he had previously been sentenced. He was in effect re-sentenced on eight charges of unlawful use of motor vehicles, nine charges of stealing, four of break, enter and stealing, two of breaking and entering a dwelling with intent, one of attempted unlawful use of a motor vehicle and one of entering a dwelling with intent. These were all offences committed in 1995, some of them not very long before the present offence. He was sentenced to 17 and a half months detention.

A few months later another sentencing occasion resulted in a cumulative sentence of six months with respect to a charge of stealing with actual violence while in company.

It can readily be seen then that the inclusion of the present matter in a previous sentencing exercise would be most unlikely to have produced any real increase in the sentence.

Once that position is perceived, in my view the *Todd* principle requires this Court to correct the matter. There was no justification for making the present sentence cumulative and it can plainly be seen to have been excessive. I would therefore allow the appeal and replace the cumulative direction with a concurrent one.

LEE J: I agree with the reasons delivered by the Chief Justice and the order he proposes.

CHIEF JUSTICE: The application is refused.