SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maxfield* [2000] QCA 320
PARTIES:	**R** v **MAXFIELD, Larry William** (applicant/appellant)
FILE NO/S:	CA No 19 of 2000 DC No 786 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District court at Southport
DELIVERED ON:	8 August 2000
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2000
JUDGES:	McMurdo P, Davies JA and Fryberg J Joint reasons for judgment of Davies JA and Fryberg J; separate reasons of McMurdo P dissenting in part.
ORDER:	**Application for leave to appeal against sentence granted.** **Appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – judgment and punishment – sentence – factors to be taken into account – miscellaneous matters – remission, parole and prisoner classification – effect of parole recommendation – relevance of factors taken into account at time of sentencing. *Corrective Services Act* 1988, (Qld) s 139(1), s 166, s 166(1)(d) *Corrective Services Amendment Regulation* 1991, (Qld) s 13 *Penalties and Sentences Act* 1992, (Qld) s 13, s 157 *Weapons Act* 1990, (Qld) *R v Corrigan* [1994] 2 Qd R 415, considered *R v Main* [1999] QCA 327; CA 226 of 1999, 17 August 1999, referred *R v Maniadis* [1997] 1 Qd R 593, followed *R v Mather* [1999] QCA 226; CA No 76 of 1999; 17 June

1999, considered
R v Moodie [1999] QCA 125; CA 439 of 1998, 14 April 1999, referred
R v Moss [1999] QCA 426; CA 270 of 1999, 8 October 1999, referred
R v Reischl [2000] QCA 215; CA 81 of 2000, 1 June 2000, referred
Williams v Queensland Community Corrections Board [2000] QCA 75; CA 6237 of 1999, 17 March 2000, considered

COUNSEL: M C Chowdhury for the applicant/appellant
N Weston for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I have had the benefit of reading the joint reasons for judgment of Davies JA and Fryberg J who have set out the relevant facts and issues.

[2] The question for determination is the appropriate sentence to be imposed on the applicant in the light of evidence before this court which was not before the primary court. That evidence, which is not contested by the respondent, is first that it is likely that the applicant will be classified as a high security prisoner for a minimum period of two years because of his two previous convictions in New South Wales for escaping from lawful custody and second that current Ministerial Guidelines suggest that ordinarily an applicant must be in the low security classification to be eligible for parole. As a result the applicant's current prospects of earlier than usual release on parole[1] do not seem promising.

[3] It is appropriate that this court receive that evidence: *R v Maniadis* (1997) 1 Qd R 593.

[4] At sentence the applicant's counsel submitted that a partially suspended sentence was more appropriate than a parole recommendation as the applicant would have problems obtaining parole because of his criminal history and interstate connections;[2] no submissions were made as to the issues relied upon in the "new" evidence presented to this court.

[5] The offence committed by the applicant, armed robbery of a pharmacy, was serious but was not the worst of its kind. The applicant was a regular customer at the pharmacy attending at least five times a week from November 1998 until the date of the offence, 6 May 1999. That morning he attended the pharmacy and had a prescription filled; he returned at about 4.30 pm requesting further medication but without a prescription which he claimed he had lost; this was refused. At about 6 pm he again returned and committed the offence the details of which are set out in Fryberg J's judgment. He threatened the pharmacist with an unloaded air pistol

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1 See s 166(1)(d) *Corrective Services Act 1988*.

2 Cf *R v Reischl* [2000] QCA 215; CA 81 of 2000, 1 June 2000.

which the learned sentencing judge rightly noted did not limit the detrimental effect of the offence on the victim. The applicant requested exactly $160, the precise amount he needed to obtain drugs from a dealer. The police attended the applicant's address contained in his prescription form shortly afterwards and there found the air pistol; the next morning they located the applicant. It was a desperate but amateurish offence with no serious prospect of harm to others, with the applicant's detection inevitable.

[6] The applicant, who was 35 years old, pleaded guilty and co-operated with police. He wrote a letter of apology to the pharmacy staff. He has a bad criminal history dating back to 1976 when he was a child; as an adult he has many convictions for dishonesty for which he has been sentenced to periods of imprisonment of up to three years; he has no prior convictions for robbery although he has some convictions for violence. Since his imprisonment he has made efforts to address his drug problem and at sentence had been accepted into a rehabilitation programme run by the Salvation Army.

[7] The "new" evidence having been admitted, this court is entitled to exercise its discretion afresh and it is not necessary to demonstrate that the sentence imposed at first instance was manifestly excessive.

[8] The applicant has a concerning criminal history but this was his first conviction for robbery. In *R v Moss* [1999] QCA 426; CA No 270 of 1999; 8 October 1999 this court noted that the sentencing range for a first offence of this kind is ordinarily between about three and five years imprisonment. In *R v Mather* [1999] QCA 226; CA No 76 of 1999; 17 June 1999, Mather was 35 years old with a minor criminal history; he had no prior convictions for dishonesty or violence. He robbed a service station whilst armed with harmless instruments which appeared to be weapons; he was wearing a hood with eye holes and dark glasses and stole $135, all the money in the till. He was reducing his dosage of methadone and was depressed at the death of his brother. The victim was severely detrimentally affected by the offence. The sentence of four years imprisonment was considered at the high end of the appropriate range.

[9] In *R v Main* [1999] QCA 327; CA No 226 of 1999; 17 August 1999 Main was sentenced to six years imprisonment for robbing a pharmacy whilst armed with a knife. She obtained $120 and five bottles of methadone. She had an extensive criminal history for offences involving dishonesty, violence and drugs. She was 34 years old and went to trial. The sentence was not considered manifestly excessive.

[10] In *R v Moodie* [1999] QCA 125; CA No 439 of 1998; 14 April 1999 the applicant pleaded guilty to the offence of attempted robbery of a pharmacy whilst armed with a knife. The 72 year old male pharmacist was able to disarm the applicant who decamped. Moodie was a registered customer of the pharmacy, was recognised by a shop assistant and drove to the pharmacy in a hire car; he was therefore quickly apprehended although he initially contested the charge at committal. Moodie had an extensive criminal history for offences involving drugs and dishonesty and one prior conviction for violence. Moodie was sentenced to five years imprisonment with a declaration that he was convicted of a serious violent offence; on appeal that declaration was removed.

[11] These comparable sentences suggest that the appropriate range in this case was a sentence of between four to six years imprisonment. Mitigating factors include remorse, a timely plea of guilty and attempted rehabilitation. A parole recommendation is often given to recognise mitigating factors; it ameliorates and constitutes an effective reduction of the sentence.[3] Effect can also be given to mitigating factors by a reduction in the head sentence; often, as was done by the primary judge here, the court will both moderate the head sentence and give a recommendation for parole. Whilst the sentence imposed at first instance was not manifestly excessive, this court exercises its discretion afresh on the new information before it. The uncontested material before this court strongly suggests that the applicant's current prospects of obtaining an earlier than usual release on parole are not promising.[4] The case is not one where it is appropriate for the applicant to be released unsupervised in the community on a suspended sentence if he is to successfully rehabilitate. Accordingly, I would give effect to the mitigating factors in this case by imposing a head sentence towards the lower end of the range but would make no recommendation for early eligibility for parole; the applicant would be eligible to apply for parole in the usual course after serving half that sentence.[5]

[12] I would grant the application, allow the appeal and instead of the sentence imposed below substitute a sentence of four years imprisonment.

[13] **DAVIES JA AND FRYBERG J:** On 7th January this year, the applicant pleaded guilty in the District court at Southport to one count of robbery whilst armed with a dangerous weapon and to one charge under the *Weapons Act*. He was sentenced to imprisonment for five years on the former and for one month on the latter, to be served concurrently. The sentencing judge recommended that he be eligible for parole after serving two years of the sentence. He now seeks leave to appeal against the sentence for robbery.

[14] Before the sentencing judge, counsel for the applicant submitted that a number of mitigating factors should be recognised by an early suspension of sentence. He submitted that they should not be recognised by a recommendation for early eligibility for parole because the applicant would have problems obtaining parole, not only because of his criminal history but also because of the fact that his proven connections are interstate. The Crown did not challenge the proposition that the applicant would have difficulty obtaining parole. Nonetheless, the judge did not accept the defence submission. In passing sentence he said, "In view of your plea and the other mitigating factors, I am going to recommend that you be considered for parole after serving a period of two years".

[15] In this court, the applicant submitted that there was no possibility of his obtaining parole after two years because his criminal history included two convictions for escaping; that the judge's recommendation was therefore meaningless; and that in consequence, he had received no reduction in his sentence for the mitigating factors

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3 See *R v Corrigan* [1994] QCA 215; (1994) 2 Qd R 415.

4 Compare *R v Reischl* [2000] QCA 215; CA No 81 of 2000; 1 June 2000.

5 Section 166(1)(d) *Corrective Services Act* 1988.

referred to by the judge. These submissions were based on a number of additional facts and documents which had not been before the sentencing judge. They were placed before us in submissions by counsel for the applicant and were adopted by counsel for the respondent.[6] They were:

a. "Under current sentence management policy of the Queensland Corrective Services Commission prisoners who have been convicted on more than one occasion of escaping from custody must be classified as high security for a minimum of two years." We were provided with a memorandum signed by the director-general which asserted that on 18 February 1998, the QCSC board approved a sentence management policy set out in the memorandum. The policy provided that prisoners who had been convicted on more than one occasion of escaping from custody were not to have their classification reduced below high security for a minimum period of two years following return to custody or the escape incident. It further provided that reclassification to medium and subsequently low or open security only be permitted with the approval of the director-general following a recommendation from the appropriate authority.

b. "In order for the applicant to be eligible for parole he has to be in a low security classification." Classification of prisoners into security ratings is required by s 13 of the *Corrective Services Amendment Regulation* 1991. We were provided with a guideline issued by the Minister for Police and Corrective Services to the Queensland Community Corrections Board pursuant to s 139(1) of the *Corrective Services Act* 1988 on 16 February 2000. In s 2 of the guideline, under the heading "Basic Premises", the Minister wrote:

> "2.1 Wherever possible, prisoners should be phased back into the community in a staged process of decreasingly-restrictive supervision. Staged release can include release to work, home detention or parole, or a combination of these options best suited to the assessed needs of the prisoner....
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> 2.2 A prisoner should achieve a low or open security classification prior to approval for release to a community-based program. At the discretion of the board, medium security classification prisoners can be considered for release to a community-based program where:
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> (a) circumstances indicate an exception is unlikely to increase the level of risk to the community;

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[6] If it were necessary to admit them as fresh evidence on the appeal, we would do so: *R v Maniadis* [1997] 1 Qd R 593.

(b) the prisoner is close to the point of reduction from a medium to a low security classification; and

(c) the prisoner is not serving a sentence for serious violent offence."

c. "As the applicant has to be in the high security classification for two years, and as he has to go through a period of medium security classification before reaching the low security classification, it is impossible for the applicant to apply for parole at the time recommended by the learned sentencing judge." Unfortunately, we were not provided with the guidelines or policy documents relating to reduction of security classification, and is impossible to determine what the period of minimum security classification must be.

[16] In order to take these matters into account, it is necessary for us to re-exercise the sentencing discretion.

[17] The applicant, a drug addict, was a regular customer of a pharmacy at Labrador on the Gold Coast. On the morning of 6 May 1999 he had a prescription filled for a sedative and muscle relaxant. At 4.30pm that afternoon, he unsuccessfully sought another packet of the same tablets claiming that he had lost the original prescription. He returned at 6.00pm. The proprietors (a married couple) and a female employee were working. He removed an unloaded pistol from his jeans, waved it around and demanded $160. He said, "You know me, I'm not joking." He also said words to the effect, "I've done eight and a half years already. This is nothing to me." He was given $160 from the till. He walked out of the store saying as he walked out, "Sorry." Police soon located him from the details on his prescription form. They found the pistol under a mattress. The applicant confessed to the crime. He said he had taken serepax and was also using morphine. He was desperate for $160 to buy drugs. On the previous day he had sought a referral to a detoxification centre.

[18] At the time of the offence the applicant was aged 34; he was 35 at the time of sentencing. He was unemployed, although at the time of sentencing, he had an offer of a job as a landscaper. He had a poor criminal history, mainly for offences associated with stealing. It began in 1976 when he was only 11. He was first sentenced to imprisonment in 1983. In that and the following two years he received a number of sentences of imprisonment, some cumulative, the longest of which was three years hard labour. We were not informed how long he actually served in prison. In 1995 and 1996 he again received a number of prison sentences, the longest of which seems to have been 12 months. There were no previous offences of robbery. There were however two convictions for assault and two for escaping. Most of the stealing seems to have been occasioned by the applicant's drug addiction. That was certainly true of the offence the subject of the application: the applicant did not take all of the money in the till, but only the amount which he needed to buy drugs.

[19] The applicant advised the Director of Public Prosecutions of his intention to plead guilty on 26 October 1999, two and a half months after the hand up committal. That was a timely notification, although not a particularly early one. As at the date of sentencing, he had spent 245 days in remand custody. During that time he had completed a substance abuse education program and the anger management course and had become involved in the buddy support network. He was assessed as suitable for admission to the drug and alcohol rehabilitation program run by the Salvation Army at the Fairhaven Rehabilitation Centre. That seems to have influenced the sentencing judge, for His Honour took the trouble to say in his sentencing remarks, "Now I can't do anything about your behaviour once you are released but I strongly suggest that after you are released, you undergo some drug treatment program such as that offered by the Salvation Army at the Fairhaven home, do you understand that?"

[20] The offence was one which was very prevalent in the area.

[21] Three comparable cases were cited to the court by counsel for the respondent and none by counsel for the applicant. The three were *R v Main*[7], *R v Moodie*[8], and *R v Moss*.[9] Before the sentencing judge, the respondent submitted that the range for the offence was five to six years imprisonment. In this court, the respondent submitted that the range was six to seven years imprisonment. The applicant made no submissions about the range, but submitted that five years imprisonment was an appropriate head sentence. It is unnecessary to analyse the cited cases in detail. They are comparable with the present one, although by no means identical to it. From reading them, the sentencing range seems to be five to seven years imprisonment. Disregarding mitigating personal factors, this case is at or near the lower end of that range. In the circumstances, it is appropriate to take into account the judgment of the sentencing judge. Apart from mitigating personal factors, the appropriate sentence in this case is one of imprisonment for five years.

[22] Section 13 of the *Penalties and Sentences Act* 1992 provides:

> "13 (1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court –
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> (a) must take the guilty plea into account; and
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> (b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.
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> (2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender –
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> (a) pleaded guilty; or
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> (b) informed the relevant law enforcement agency of his or her intention to plead guilty.

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7 Unreported, [1999] QCA 327; CA 226 of 1999, 17 August 1999.

8 Unreported, [1999] QCA 125; CA 439 of 1998, 14 April 1999.

9 Unreported, [1999] QCA 426; CA 270 of 1999, 8 October 1999.

> (3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.
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> (4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court –
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> (a) that fact; and
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> (b) its reasons for not reducing the sentence.
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> (5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made."

[23] That section does not *require* a court to reduce the sentence of an offender who has pleaded guilty. However it does require the existence of reasons for not doing so if the court adopts that course. There is no suggestion in the present case that any such reasons exist. The applicant is entitled to have his sentence reduced because of his timely notification of his intention to plead guilty. He is also entitled to have taken into account in mitigation of sentence his cooperation with the police and the possible existence of a real prospect of his rehabilitation. Often, these objectives are achieved by making a recommendation for eligibility for parole at an earlier date than that on which an offender would otherwise become eligible under s 166 of the *Corrective Services Act* 1988. Such a recommendation reduces a sentence for the purposes of s 13 of the *Penalties and Sentences Act* 1992: *R v Corrigan*.[10] The applicant submits that this approach cannot be adopted in the present case, because it is impossible for him to apply for parole at any earlier date under the policy of the Corrective Service Commission and the ministerial guideline referred to above. The respondent has adopted the same position.

[24] The applicant's submission necessarily involves at least four propositions: first, that the policy and guideline are valid; second, that on their proper interpretation, they affect the applicant or will do so at some future time; third, that as so interpreted, they will be applied by the appropriate authority to prevent the applicant being given early parole; and fourth, that in those circumstances, a recommendation for early eligibility for parole would not produce a reduction of the applicant's sentence. In the absence of argument, we should assume as the parties did that the policy and guideline are valid. We should also assume that on their proper interpretation they affect the applicant or will do so at some future time, although it is far from clear on their face that this is so.

[25] If the third proposition is correct, then, in our judgment, so is the fourth. The decision of this court in *R v Corrigan* depended upon the view that a recommendation produced an ameliorating effect on the sentence as it would otherwise apply. In their joint judgment, Macrossan CJ and Lee J said, "We think that a recommendation for consideration for early release on parole can qualify as a reduction of sentence within s 13. It is an order made which is highly beneficial to

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10 [1994] 2 Qd R 415.

an offender and ameliorates the effect of the sentence as it would otherwise apply".[11] Davies JA said, "It follows that the effect of the recommendation in the present case is that the sentence is less than it would have been had the recommendation not been made ... and *therefore* that the recommendation reduces that sentence for the purpose of s 13".[12] If, viewed at the time of sentencing, there is a significant risk that effect will not be given to a recommendation, then (at least in the case where the risk exists for reasons beyond the prisoner's control) the recommendation does not qualify as a reduction of sentence within s 13 of the *Penalties and Sentences Act* 1992.

[26] The exclusion of the option to make a recommendation in such circumstances is an undesirable outcome. It reduces sentencing flexibility. It makes comparison of sentences more difficult. As McPherson JA has said, "[T]he process or practice of maintaining the tariff, and reflecting mitigating personal factors by means of a recommendation for parole, is perhaps a desirable approach because it maintains consistency in the sentencing".[13] It would also produce an unsatisfactory outcome in the present case. Plainly this is not a case where the sentence could be reduced by imposing a fine instead of imprisonment. It is a case where it is desirable that there be continued supervision of the applicant after his release from prison, for a substantial period of time. To reduce the head sentence would defeat that desirable outcome. Moreover, it might be thought that there is incongruity in giving a shorter head sentence to a high risk prisoner than to a low risk prisoner. It would be possible to order that part of the sentence be suspended; that is the order for which the applicant contended. While that would leave him with some incentive not to re-offend, it is less satisfactory than an outcome which would provide supervision. For these reasons, notwithstanding the common assumption made by the parties, we should examine the correctness of the third proposition referred to above.

[27] The nature of a recommendation under s 157 of the *Penalties and Sentences Act* 1992 was considered by this court in *Williams v Queensland Community Corrections Board*.[14] The court said:

> "The statutory consequence of ... a recommendation is that it fixes the date before which a prisoner is not eligible for release on parole; s 166(1) of the *Corrective Services Act* 1988 is made subject to s 157 of the *Penalties and Sentences Act* 1992. But the effect of such a recommendation will ordinarily be greater than that of simply fixing the date before which its eligibility for release cannot be considered.
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> 25. A recommendation for early parole is part of the sentence imposed and mitigates the effect of that part of the sentence which imposes the term of imprisonment. That is not because the prisoner has an absolute entitlement to parole at or about the recommended

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11 At p 416.

12 At p 419 (emphasis added).

13 *R v Moss*, unreported, [1999] QCA 426; CA 270 of 1999, 8 October 1999.

14 Unreported, [2000] QCA 75; CA No 6237 of 1999, 17 March 2000.

> date. Clearly there is no such entitlement. It is because it is a reasonable expectation, at the time of sentencing, that the offender will become entitled to parole at about the date recommended. That expectation may be falsified or modified because of information gained about the prisoner and his prospects of rehabilitation during the period between commencement of sentence and the eligibility date and it would be unsurprising if, relying on that information, the Commission did not grant parole at or about that date. But in the absence of such information placing the Commission in a better position to make a judgment on this question than the sentencing judge, there is cause to question whether the refusal by the Commission to grant parole at or about the time recommended is the result of some error by it which would justify a review of its decision."[15]

[28] In the present case, the applicant's third proposition depends upon the view that the parole authority may lawfully refuse to grant parole on the basis of a consideration fully taken into account by the sentencing court at the time it makes the recommendation. In this case, such a consideration would be the applicant's history of convictions for escaping from lawful custody. In our judgment, that view is inconsistent with the reasoning in *Williams v Queensland Community Corrections Board*. It is true that there is no rule, policy or guideline which in terms precludes granting parole to a prisoner who has multiple previous convictions for escaping. However that is the combined effect of the policy and guideline referred to above. In these circumstances, what cannot be done directly cannot be done indirectly. Prisoners' rights are not regulated by the writings of Joseph Heller. If this court recommends that the applicant be eligible for release on parole after having served two years of his term, the reasonable expectation thereby created cannot be defeated by imposing upon him a high security classification on the basis of factors considered by the court and then refusing an application for parole at the recommended time on the basis of the classification.

[29] For these reasons, it should not be assumed that the policy and the guideline would, by reason of the applicant's convictions for escaping, be applied by the appropriate authority to prevent the applicant being given early parole in accordance with any recommendation made by the court.

[30] In our judgment, the appropriate way to recognise the mitigating factors referred to above is to make a recommendation for an early eligibility for release on parole. Those factors are properly recognised by making the same recommendation as did the sentencing judge. Despite the terms of the policy and the guideline and the common assumption of the parties to this application, the applicant's fears that he can be denied parole on the basis of his convictions for escaping are unfounded.

[31] For these reasons, the order made by the sentencing judge was correct.

[32] The order of the court should be: Leave to appeal granted. Appeal dismissed.

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15 Paragraphs 24-25.