

COURT OF APPEAL

McMURDO P
BYRNE J
PHILIPPIDES J

CA No 357 of 2001

THE QUEEN

v.

BRETT EVAN PATRICK SHEPHERD

BRISBANE

..DATE 20/03/2002

JUDGMENT

THE PRESIDENT: The applicant was convicted on 4 December 2001 in the Townsville District Court of one count of burglary committed on 26 September 2001. That conviction constituted a breach of two suspended sentence orders. The first was imposed in November 1998 when he was sentenced to four years'

imprisonment suspended for four years after serving 18 months.

He served the 18 months term of imprisonment and later was sentenced to a further 12 months' imprisonment for a breach of that sentence in April 2000. Eighteen months' imprisonment remains to be served under that suspended sentence. That sentence related to one count of break and enter with intent, 19 counts of break, enter and steal and two counts of housebreaking.

The second suspended order breached by the burglary conviction was an order for three months' imprisonment, suspended for two years, imposed on 13 February 2001 for wilful damage of a prison cell.

The learned sentencing Judge ordered the applicant serve the 18 month balance of the suspended imprisonment imposed in 1998 and all of the suspended sentence of three months imposed in February 2001, cumulatively. He then sentenced the applicant to six months' imprisonment for the burglary offence cumulative upon the other periods of imprisonment making an effective term of imprisonment of two years and three months.

It is convenient to set out the applicant's very extensive criminal history. On 7 August 1995 he was convicted in the Townsville Childrens Court and placed on two years' probation with special conditions for two counts of stealing, two counts

of break, enter and steal and attempted robbery in company whilst armed with a rubber hammer.

On 25 October 1995 he was again convicted in the Townsville Childrens Court of two counts of unlawful use of a motor vehicle and stealing and was ordered to perform 50 hours community service.

In 1996 he was convicted in the Townsville Childrens Court of two counts of assault and ordered to perform 75 hours community service. One week later he was convicted of assault, receiving, three counts of break, enter and steal, two counts of stealing, one count of wilful damage in the night-time, one count of housebreaking, one count of break and enter with intent, one count of wilful damage and one count of unlawful use of a motor vehicle and was sentenced to a further two years' probation.

In 1997 in the Townsville Childrens Court he was convicted and sentenced to nine months' detention to be served by way of an immediate release order for the offences of stealing, wilful damage, attempted stealing, two counts of break, enter and steal, receiving, unlawful use of a motor vehicle, one count of break and enter a place with intent and one count of unlawful use of a motor vehicle for the purpose of facilitating the commission of an indictable offence.

In the Townsville Magistrates Court in August 1998 he was convicted of six counts of supplying a dangerous drug and possession of an utensil and was sentenced to 18 months' probation. In November that year he was convicted of five counts of entering premises and committing an indictable offence and breaking, two counts of unlawful use of a motor vehicle, five counts of entering a premises and committing an indictable offence and two counts of entering a dwelling with intent to commit an indictable offence and entering or being in premises with intent to commit an indictable offence, six counts of stealing, six counts of wilful damage, attempted unlawful use of a motor vehicle and wilful destruction. He was sentenced to an effective detention order of three years to be released after serving 50 per cent of that order.

On 13 November 1998 he was sentenced for many more property offences including the offences, the subject of the four year suspended imprisonment.

On 11 February 2000 he was sentenced in the Townsville Magistrates Court for assault under the Corrective Services Act and was convicted and sentenced to six months' cumulative imprisonment.

On 26 April 2000 he was dealt with for the 1998 suspended sentence and ordered to serve 12 months of that sentence. On 18 May 2000 he was dealt with for breaching the probation

order imposed in August 1998 and was convicted and fined \$1200, in default, 24 days' imprisonment with no time to pay.

On 14 February 2001 he was dealt with for the wilful damage for which he was sentenced to the three months' suspended term of imprisonment relevant to this application.

The applicant was 20 at sentence and at the time of the commission of his most recent offence, burglary.

The facts of the burglary are as follows. At about 9.30 p.m. on 26 September 2001, the applicant was seen to park near the complainant's address, enter the yard, ring the doorbell, move to the left hand side of the house and then return to the front. The good citizen who observed this, walked over to the complainant's home to investigate and heard a noise from the back as if something is being forced. The citizen looked into the house and saw the applicant inside.

The citizen rang the doorbell and the applicant ran from the house and fled. The citizen took down the details of the white Commodore in which he drove off. Police intercepted the car shortly afterwards. The applicant was seated in the front passenger seat and matched the description given by the witness. The complainant's rear door was repaired at a cost of \$122.

The applicant's barrister at sentence conceded that whilst the applicant should serve both unserved portions of the suspended sentences, a concurrent sentence was appropriate.

The applicant has an appalling criminal history for offences of dishonesty. Of greatest concern are those like this burglary offence which involved breaking into people's homes and stealing property. All that can be said in his favour is that he is still young so it is hoped there are some prospects of rehabilitation, and he has pleaded guilty.

The applicant has in the past had the benefit of lenient community-based orders, then progressed to suspended periods of imprisonment and has finally served substantial terms of imprisonment or detention. None of these sentencing options seems to have had the least impact in kerbing his offending or in aiding his rehabilitation. He is not without family support.

Members of his family including his father attended the Court hearing. It seems that he has not had an easy upbringing in that his parents separated when he was young and he was principally raised by his maternal grandmother. But there was nothing in the submissions of defence counsel at sentence to suggest promising prospects of rehabilitation now exist.

The learned sentencing judge noted that he was taking into account the applicant's plea of guilty. He seems to have done this, and also recognised the applicant's youth and the moderating factors necessary when imposing cumulative sentences, in the imposition of a very lenient sentence of six months for the serious offence of burglary, aggravated by the applicant's criminal history.

I am not persuaded the sentence is manifestly excessive. The respondent acknowledges, however, that the form of the order here may cause problems for the applicant in obtaining parole. The two activated suspended sentences were committed prior to 1 July 2001 when the Corrective Services Act 2000 commenced. Accordingly an eligibility for parole for these offences arises at the halfway mark of 10.5 months (sections 134 and 135 Corrective Services Act (Qld) 2000). The present offence of burglary was committed after 1 July 2001 and the applicant is not entitled to parole on that offence because it is a sentence of less than two years' imprisonment. (See section 134 Corrective Services Act (Qld) 2000.)

As this sentence was ordered to be served cumulatively upon the other two sentences it may be that the applicant could be granted parole on the activated sentences but be unable to be released for another six months less remissions and time declared as pre-sentence custody.

The respondent very fairly points out that this can be alleviated by amending the order made so that the activated sentences are to be served cumulatively upon each other and also upon the sentence of six months for the housebreaking offence. This seems both fair and logical.

I would allow the appeal only to the extent of changing the order of the sentences so that the applicant serves the term of imprisonment of six months for the burglary offences first and the remaining suspended sentences cumulatively on that sentence and cumulatively on each other.

I would grant the application and allow the appeal only to the extent I have outlined.

BYRNE J: I agree.

PHILIPPIDES J: I agree.

THE PRESIDENT: That is the order of the Court.

Now, Mr Shepherd, what that means is you've had some technical success in that the order of the sentence has been changed around and it might help you get parole a little earlier than otherwise. But otherwise your application was unsuccessful.
