SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hogan* [2004] QCA 264
PARTIES:	**R** v **HOGAN, John Barry** (applicant)
FILE NO/S:	CA No 156 of 2004 DC No 1219 of 2004 DC No 1220 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	29 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2004
JUDGES:	Davies and Jerrard JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to the extent only of setting aside the recommendation that the applicant be eligible for release on parole after serving a period of 14 months imprisonment** **3. In lieu, recommend that the applicant be eligible for post-prison community based release forthwith**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where the applicant pleaded guilty to two instances of unlawful use of a motor vehicle, breaking and entering, assault occasioning bodily harm whilst armed and deprivation of liberty - where the applicant used force and injured a middle-aged couple when taking control of their four-wheel drive vehicle - where the applicant had previously been charged with attempted murder and had been acquitted of that charge but had spent 737 days in custody for that charge - where the learned sentencing judge made the head sentence six years with a

	reduction of two and a half years to reflect the applicant's time in custody and with a recommendation for post-prison community based release after the applicant had served 14 months of that sentence - whether the learned sentencing judge gave sufficient credit to the time the applicant had spent in custody - whether the sentence was manifestly excessive in the circumstances
COUNSEL:	K M McGinness for applicant M J Copley for respondent
SOLICITORS:	Legal Aid Queensland for applicant Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The applicant pleaded guilty in the District Court on 1 June 2004 to five offences. The first of them which was one of unlawful use of a motor vehicle was committed on 24 August 2001. He was found by police driving a four-wheel drive utility which had gone missing from its owner's home about 24 hours earlier. When questioned by police he said he received the vehicle from another but declined to name him.

The other four offences all occurred on 25 August 2001. They were of breaking and entering premises and committing an indictable offence, unlawful use of a motor vehicle, assault occasioning bodily harm whilst armed and deprivation of liberty.

The circumstances in which these offences occurred were as follows. At about 6.20 p.m. on that day, a middle-aged couple arrived at a petrol station in their four-wheel drive vehicle. The husband got out and went to put petrol in the vehicle. The applicant who had been seen earlier with his head under the bonnet of another car, got into the driver's seat armed

with a knife which had a 20 to 25 centimetre blade. He started the vehicle using the keys which had been left in the ignition.

The complainant's wife unsuccessfully attempted to alight. The husband opened the driver's door and tried to drag the applicant out but the applicant brandished the knife, threatened to kill the husband and kicked him in the stomach. After falling over, the husband jumped on the running board of the vehicle but the applicant did a U-turn causing the husband to fall off again.

The applicant drove into the street and as he drove along made stabbing motions towards the wife who feared for her life. After the vehicle had travelled 30 to 50 metres, the wife undid her seatbelt and jumped out of the vehicle whilst it was travelling at about 30 kilometres an hour.

Both complainants suffered physical injuries arising out of this incident. The husband suffered lacerations to both elbows and to his knuckles, a swollen hand and a badly bruised stomach. The wife suffered bruising to her ankles, a knee and chin and lacerations to her right knee and toes.

Although the applicant pleaded guilty, he had earlier required both complainants to give evidence in a committal hearing. He had not confessed to police but made admissions to an undercover police officer whilst they were in a cell together. Nevertheless, the learned sentencing judge rightly made

allowance for the applicant's plea of guilty in the sentence which he imposed.

The effective sentence was one of three and a half years imprisonment, that being the term imposed for the first of the offences committed on 25 August 2001, namely breaking and entering premises and committing an indictable offence. Other lesser concurrent sentences were imposed. The judge made a recommendation for post prison community-based release after the applicant had served 14 months of that sentence.

The applicant seeks leave to appeal against the total sentence imposed. In order to understand this somewhat unusual sentence, it is necessary to say something further about the applicant's previous period in prison.

The applicant had been charged with attempted murder. He was acquitted of that charge but not, it seems, before he had spent 737 days in custody. It is unclear whether any part of that custody related to the commission of these offences for it is possible that, but for the pending charge of attempted murder, the applicant would have been admitted to bail in respect of these offences pending sentence. On the other hand, it seems more likely that the period in custody was, in part, a result of his commission of these offences.

In those circumstances, the learned sentencing judge could not make a declaration under s 161 of the *Penalties and Sentences Act*. Nevertheless his Honour quite properly recognised that

in sentencing the applicant, allowance should be made for this period in custody. His Honour concluded that an appropriate sentence for the totality of the offences committed on 25 August was one of six years imprisonment. However, he then reduced that by two and a half years to reflect the applicant's time in custody. He then recommended eligibility for post prison community-based release after a period of 14 months.

The main question in this application is whether, in making the allowance which he did, the learned sentencing judge gave sufficient credit for the time which the applicant had actually spent in custody. However, it is necessary to say something further about the applicant's previous criminal history in order to understand the sentences which were imposed.

On 14 October 1997 the applicant was fined for two counts of supplying a prohibited drug, one of possession of an unlicensed firearm and one of failure to safely store a firearm. On 11 November 1997 he was fined for illegal use of a conveyance. On 9 June 1998 he was fined for receiving. On 24 February 1999 he was given 100 hours community service for one count of custody of a knife in a public place and an 18 months recognisance for four counts of fraud related offences. On 28 October 1999 he was fined for possession of drug utensils and on 10 August 2001 he was fined for two counts of resisting a police officer, one of assaulting a police officer, one of common assault and one of using violence to

cause fear. He appears to be addicted to amphetamine and says that he was under the influence of amphetamine when he committed the serious offences of 25 August.

I do not think that there is any doubt that the seriousness of the offences of 25 August in the light of his previous criminal history justified a total sentence of six years imprisonment. The only mitigating circumstances relied on by the applicant are his plea of guilty in the circumstances as I have outlined them and the fact that he commenced rehabilitation during his lengthy pre-sentence period of custody.

The real question, as I said earlier, is whether sufficient allowance was made for the applicant's period in custody. His having been acquitted of the offence of attempted murder, I think it would be unfair to the applicant if he were not given credit for the whole of the period which he spent in pre-sentence custody. In other words, I think he should have been treated for the purpose of sentencing as if he had served 737 days in pre-sentence custody in respect of these offences. That is a period of about two and a half years. The result would be, as the applicant's counsel points out, that he will now be obliged to served three years and eight months in prison, including the time which he has already served before being eligible to apply for post prison community-based release. That is more than half of the nominal sentence the learned sentencing judge had in mind imposing in this case.

Having regard to the mitigating circumstances to which I have referred, I think that is a manifestly excessive period before which the applicant should be eligible to apply for post prison community-based release. Indeed, it seems to me that when one has regard to the fact that he has not previously been into prison and that he does appear to have made some progress towards rehabilitation during the period in which he has been in prison, the period which has already expired, that is a little over two and a half years, is a sufficient period before which he should be eligible for post prison community-based release.

For reasons which I have already mentioned, I do not think that the head sentence imposed by the learned sentencing judge should be interfered with. However, I would allow the appeal only to the extent of setting aside the recommendation for post prison community-based release and substituting in lieu a recommendation for release forthwith.

Accordingly, the orders which I would make are as follows:

1. Grant the application;
2. Allow the appeal to the extent only of setting aside the recommendation that the applicant be eligible for release on parole after serving a period of 14 months imprisonment; and
3. In lieu, recommend that the applicant be eligible for post prison community-based release forthwith.

JERRARD JA: I agree.

MULLINS J: I agree.

DAVIES JA: The orders are as I have indicated.
