SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cummins* [2004] QCA 350
PARTIES:	**R** **v** **CUMMINS, Dane John** (applicant)
FILE NO/S:	CA No 294 of 2004 DC No 300 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	23 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2004
JUDGES:	McPherson JA, White J, Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – SENTENCING – PROPERTY OFFENCES – whether sentence imposed on applicant for four counts of attempted burglary, six counts of entering a dwelling with intent, three counts of receiving, one count of entering premises and stealing, and one count of common assault is manifestly excessive *R v Harch* [2004] QCA 113 ; CA No 45 of 2004, 14 April 2004, cited
COUNSEL:	A J Rafter SC for the applicant R G Martin for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Qld) for the respondent

McPHERSON JA: The applicant pleaded guilty in the District Court at Townsville on 27 August 2004 to four counts of attempted burglary, six counts of entering a dwelling with intent, three counts of receiving, one count of entering premises and stealing and one count of common assault. He was sentenced to serve a term of three months' imprisonment to be followed by two years' probation. He now seeks leave to appeal against that sentence arguing that it is manifestly excessive.

The fourteen property offences were related and occurred between January and August of 2003. The distinguishing feature of the applicant's offences was that he would use a set of Stilsons, to open or attempt to open a front door in order to gain entry to the dwelling house that he intended to steal property from. Stilsons, it seems, are a form of wrench.

The applicant was unable to gain entry on four occasions and when he did he often could not find any suitable property to steal. As a result of his ineptitude as a burglar, or perhaps due simply to bad luck, the total loss of property involved was $460, most of which consisted of damage done to the door knobs by the applicant when attempting to gain entry rather than the loss of any property taken by him.

Notwithstanding the small amount of property taken or damaged, the applicant's offending behaviour did have a number of serious aspects, as the learning sentencing Judge pointed out.

The applicant committed the majority of his offences at night and on dwelling houses. Moreover, on two occasions residents of the dwelling houses were present at the time the applicant unlawfully entered their property and they were naturally disturbed by the applicant who would, in cases like that, immediately flee after finding the dwelling to be occupied.

He was taken into custody on 2nd August 2003. His property was searched and the police found a number of stolen goods in his possession including mobile phones, street signs and a wallet.

During an interview the applicant initially denied having committed Count 14 or the offence referred to in it, of entering premises and stealing. The police, however, had eye witnesses and fingerprint evidence against the applicant on this count. The applicant then cooperated with the police extensively by voluntarily admitting to committing Counts 1 to 13 on the indictment for which there was no other evidence against him. He was released, and after having been given a notice to appear, committed the offence in Count 15, the assault occasioning bodily harm, in November 2003.

He subsequently pleaded guilty to all 15 counts on an ex officio indictment.

He has a previous criminal record. It began when, on 5th September 2001, he was given a 12 months probation order in the Magistrates Court at Townsville for entering premises with intent to commit an indictable offence and wilful damage. He breached the probation order by committing assault occasioning bodily harm on 16th January 2002 for which he was fined, and breaking and entering premises with intent to commit an indictable offence on 7th June 2002, for which he was sentenced to perform 100 hours of community service.

The learned sentencing Judge, when imposing the sentence on the applicant, took into account that 14 of the 15 offences on the ex officio indictment were committed while the applicant was in the process of performing his 100 hours' community service and almost immediately after that sentence had been imposed.

After receiving bail in August 2003 he continued to commit offences of which the last was on November 2003.

He was born on 29th March 1985. He was 18 or 19 years old during the period when the offences were committed and 20 when sentenced.

He has, we are told, had a difficult upbringing and has been subjected to physical abuse in the form of violent assaults from the time when he was four or five years old and which had continued until his teens.

According to his counsel at the sentencing hearing he started to associate with the wrong crowd including Neil, his co-offender on Counts 2, 7, 8 and 11, and that was when he started committing crimes.

Since his arrest in August of 2003 he has apparently taken steps to turn his life around. He has ceased associating with the wrong people and has been employed as a painter for a period of nine months. This is the first time the applicant, it seems, has ever been in paid employment.

Essentially the applicant's submission before us is that he is young and should have been given another chance, especially since he has now turned over a new leaf. But he has been given several chances in the past and has not taken advantage of them. There is no evidence that his employer will not have him back when he is released from prison in what is now about two months' time, and I notice that that employer is among those who have given a favourable reference in favour of the applicant.

It cannot, in my opinion, be said that there is any absolute rule that a young offender should never be given a short prison sentence or that such a sentence is never appropriate. See for a recent example *R v Harch* [2004] QCA 113.

Here the applicant's determined practice of re-offending when on bail or when he was doing community service shows that he did not take his opportunities for rehabilitation seriously enough in the past. He now has to undergo a more severe form of discipline to teach him what his future will be if he re-offends again. This, I assume, was at the back of the Judge's mind when he imposed the short sentence followed by probation which he imposed in this case.

In my opinion, the Judge cannot be regarded as having acted in error in imposing the sentence he did, and I would dismiss the application for leave to appeal.

WHITE J: I agree.

CULLINANE J: I agree.

McPHERSON JA: The application is dismissed.
