SUPREME COURT OF QUEENSLAND

CITATION:	*R v Inwood* [2005] QCA 248
PARTIES:	**R** **v** **INWOOD, Troy Anthony** (applicant/appellant)
FILE NO/S:	CA No 161 of 2005 DC No 1838 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	15 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2005
JUDGES:	Williams, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Grant leave to appeal** **2. Allow the appeal** **3. Set aside the sentence of imprisonment for four months, and in lieu thereof, order that the applicant be imprisoned for 42 days**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant breached the terms of his probation and community services order – where applicant re-sentenced for the original offence – term of four months imprisonment imposed – where the learned sentencing Judge imposed a higher penalty for the original offence on account of the indictable offences committed during the applicant's probation period – whether the learned sentencing Judge wrongly exercised his sentencing discretion – whether the sentence imposed was manifestly excessive

COUNSEL:	S P Barry for the applicant/appellant D L Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: This is an application for leave to appeal against the sentence imposed on 3 June 2005 upon it being proved that the applicant had breached the terms of probation and community service orders originally imposed on 5 October 2004.

The District Court Judge decided to resentence for the original offence. He set aside all the orders originally imposed and sentenced the applicant to imprisonment for four months. As of today's date, he has served 42 days in custody.

The applicant was born on 31 May 1984, and just before his 19th birthday on 19 April 2003, he entered premises and stole a small sum of money.

Shortly before trial set for 5 October 2004 he pleaded guilty. It was established that in addition to the money stolen, he had caused damage to the premises in question. Primarily because of his age, and lack of significant prior criminal history, he was placed on probation for three years, ordered to perform 120 hours community service and separately ordered to pay by way of compensation for the damage to the premises

and the money stolen, the total sum of $1,877.20, by 5 October 2005, in default, six months' imprisonment.

A perusal of the transcript of that original sentence indicates that the learned sentencing Judge was informed that at that time the applicant was "in custody on other charges." Counsel for the prosecution stated there were "further charges of a like nature pending in the Beenleigh Magistrates Court."

The applicant's counsel then said, "I certainly want to put on record that there are a significant number of other charges not as serious as this, which are to be mentioned in the Magistrates Court and are likely to go to the District Court to be resolved there." In the course of his sentencing remarks, the learned Judge said, "I became aware that you were in custody on other charges on 2 August 2004."

The applicant's criminal history now indicates that he was dealt with in the Beenleigh District Court on 8 April 2005 with respect to a large number of offences. There were a number of charges of unlawfully using a motor vehicle, a number of charges of stealing, a charge of possessing tainted property and some minor drug related charges.

The sentence imposed, as varied on 14 April 2005, was that on all charges, convictions were recorded. He was sentenced to

be imprisoned for three years, but that was wholly suspended for a period of 30 months, and he was further ordered to perform 180 hours of community service cumulative on the earlier order of 5 October 2004.

The matter with which the Court is now primarily concerned arose in consequence of the applicant's conviction for the offence of unlicensed driving on 24 October 2004, some 19 days after being sentenced for the original offence.

Community Corrections officers reported to the Court on 13 April 2005 that the applicant failed to report for community service on 19 March 2005 and had been convicted of dangerous driving on 24 October 2004, which constituted a breach of the community based orders.

In the course of that report they referred to many unacceptable absences from community service. It was said that the applicant had "kept in fairly regular touch in respect of his probation. However, he has been unreliable at times, not reporting as appointed."

It was stated that he had successfully completed the U-turn program. He had not completed the cognitive skills program because it was not available. In a supplementary report, the Court was told that "As of 2.6.2005, the offender has now

completed 117.25 hours of unpaid community service, leaving 2.7 hours outstanding."

That report also said that the applicant had, "responded satisfactory to both community service and probation since breach action was first instigated." It was said that he had, "worked well on community service" and "due to his improved performance" the Community Corrections co-ordinator recommended that the applicant be fined for the breach and be required to complete the remaining 2.75 hours of community service. It will be noted that the applicant had just attained 21 years when dealt with for the breach.

In sentencing the applicant for the breach, the learned sentencing Judge referred to the fact that he then had the "benefit of hindsight." He went on in his sentencing remarks to say of his approach to the original sentence, "Unbeknownst to me that whilst you were on bail for the indictable offence before me, you committed a spree indeed of indictable offences of obvious seriousness... Clearly, if I had known of that one would have clearly taken such into account, and I'm not referring to simple offences that may have occurred whilst on bail."

The learned sentencing Judge appeared to be saying that if he had known of the other offences, he would have imposed a

higher penalty when imposing sentence on 5 October 2004. If he had done so, that clearly would have been a wrong exercise of sentencing discretion. The aggravating factor of committing offences whilst on bail should be reflected in the sentence imposed with respect to the offences actually committed whilst on bail. Such consideration would not have any impact on the sentence imposed with respect to the initial offence.

But, in any event, it is clear from the passages quoted from the original sentencing procedure that the learned District Court Judge was aware that other serious offences had been committed whilst on bail for the offence with which he was then concerned. It was therefore wrong for the learned sentencing Judge in dealing with the breach to have indicated that he may have afforded greater leniency to the applicant at first instance than he was entitled to. Clearly, the sentence imposed at first instance was entirely appropriate.

The learned sentencing Judge adversely commented on the applicant's response to probation and community service initially imposed. There was some basis for that, but it is significant that once breach proceedings were initiated, the applicant responded by virtually completing his period of community service.

It is also significant, in my view, that he is still a young man and that he has not committed any further offences since the driving offence of 24 October 2004. That may well be because he now has a suspended sentence of three years' imprisonment hanging over his head, and that is likely to be an effective deterrent until October 2007.

It is of some concern, and this was a matter noted by the learned District Court Judge that the applicant had not paid any of the compensation of $1,877.20. The fact that he has not had regular employment may well explain that. In sentencing the applicant for the breach, the learned sentencing Judge set aside all the orders made on 5 October 2004, including the order requiring payment of compensation.

In all the circumstances, I have come to the conclusion that the sentence in fact imposed on 3 June 2005 was manifestly excessive. Under the original order, the applicant had completed 117.25 hours of community service and has completed reasonably satisfactorily some of the period of probation. He has also by today's date spent 42 days in custody. It must be remembered that he is still, even on the resentence, being dealt with for a property offence committed when aged about 19 and when he had no significant prior criminal history.

In all the circumstances, I will grant leave to appeal, allow the appeal, set aside the sentence of imprisonment for four months, and in lieu thereof, order that the applicant be imprisoned for 42 days.

JERRARD JA: I agree with the reasons and the order proposed by the Presiding Judge.

KEANE JA: I agree.

WILLIAMS JA: The order will be as I have indicated.
