SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vaughan* [2005] QCA 348
PARTIES:	**R** **v** **VAUGHAN, Danny Eugene** (applicant)
FILE NO/S:	CA No 123 of 2005 DC No 297 of 2005 DC No 3403 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2005
JUDGES:	Jerrard and Keane JJA and Cullinane J Separate reasons for judgment of each member of the Court, Keane JA and Cullinane J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Application for leave to appeal against sentence dismissed**
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 REFUSED - where applicant was convicted on his own plea of guilty of one count of breaking and entering premises and stealing - where applicant sentenced to three years imprisonment, suspended after 18 months with an operational period of five years - where applicant was 25 years old at the date of sentence and possessed an extensive criminal history including prior convictions for breaking and entering - where the applicant was not addicted to alcohol or drugs - where the applicant had no real work history - where the applicant had young children who would enter the care of the State if he was imprisoned - whether, in all the circumstances, the sentence imposed was manifestly excessive *R v Cummins* [2004] QCA 350; CA No 294 of 2004, 23 September 2004, cited

R v Donald [2000] QCA 399; CA No 179 of 2000, 28 September 2000, applied
R v Kalotai [1995] QCA 625; CA No 277 of 1995, 6 September 1995, cited
R v McIlwain [1997] QCA 347; CA No 196 of 1997, 15 July 1997, cited
R v Mulder [2002] QCA 455; CA No 202 of 2002, 28 October 2002, cited
R v Weatherall [2001] QCA 129; CA No 18 of 2001, 5 April 2001, cited
R v Wilshire [1998] QCA 30; CA No 402 of 1997, 6 February 1998, cited
Rudolph v Marama [1994] QCA 494; CA No 344 of 1994, 20 October 1994, cited

COUNSEL: J R Hunter for the applicant
M R Byrne for the respondent

SOLICITORS: Ryan & Bosscher for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA**: In this application I have read the reasons for judgment of Keane JA, and gratefully adopt his description of the relevant circumstances; but would allow the application.

[2] The applicant's criminal history reveals the following sequence of his committing similar offences to the offence of breaking and entering premises (and stealing from them) for which he was sentenced on 21 April 2005 to three years imprisonment, suspended after 18 months for a five year operational period:

- on 14 December 1996 he committed an offence of breaking and entering a dwelling house with intent, for which he was dealt with under the *Juvenile Justice Act* 1992 (Qld) and placed on two years probation;
- on 21 February 1998 he committed an offence of entering a dwelling house with intent to commit an indictable offence, for which he was placed on probation for 18 months;
- on 13 January 2000 he committed an offence, of unlawfully entering a motor vehicle for the purpose of committing an indictable offence, and was placed on 80 hours community service;
- on 15 March 2000 and 16 March 2000 he committed offences of entering premises and committing an indictable offence in those and then breaking out; and then an offence of dishonestly obtaining property from another on 16 March 2000. He was ordered to serve 12 months imprisonment for those offences, to be served by way of a intensive correctional order;
- on 5 February 2001 he committed offences of wilfully damaging police property, producing dangerous drugs, and possessing property suspected of being tainted property. For those offences he was sentenced to six months imprisonment, to run from 26 January 2001;
- on 7 April 2002 he committed an offence of entering or being in premises and committing an indictable offence therein, for which he was sentenced to nine months imprisonment to be suspended for two years after he had served the term of three months imprisonment; and

- on 7 July 2004 he committed the offence of entering premises and stealing property from those, for which he was sentenced to three years imprisonment suspended after 18 months on 21 April 2005, the sentence now the subject of his application for leave to appeal.

[3] The sentence of nine months imprisonment, suspended after three months had been served, was imposed on 12 December 2002 in the Brisbane District Court. Mr Vaughan was dealt with in the Ipswich District Court on 27 February 2004 for a breach of that suspended sentence, and the suspension was extended by six months. The appeal record does not disclose the conduct that constituted that breach. Mr Vaughan was dealt with again by the Ipswich District Court on 4 February 2005, for breaching that suspended sentence, and once again the appeal record does not disclose the conduct that constituted that breach. On that occasion he was sentenced to be imprisoned until the rising of the court.

[4] Mr Vaughan is a recidivist whose prior history shows little or no reason for concluding that extending leniency to him will assist or promote efforts at self improving and breaking his pattern of stealing other people's property. Other sentences to which the Court was referred, those being *R v Kalotai* [1995] QCA 625, *R v Wilshire* [1998] QCA 30, *R v Donald* [2000] QCA 399, *R v Weatherall* [2001] QCA 129, *R v Cummins* [2004] QCA 350, *R v Mulder* [2002] QCA 455 and *Rudolph v Marama* [1994] QCA 494, suggest that the three year head sentence is heavier than the head sentences imposed in all but one of those other cases (*R v Donald*); the only higher head sentence in a comparable matter was one to which the respondent referred us, a matter of *R v McIlwain* [1997] QCA 347. That offender had an extensive criminal record, was 30 years old, and was sentenced by this Court to three and a half years imprisonment for an offence of breaking and entering, and two and a half years concurrent for an offence of stealing, those sentences to be cumulative on an activated suspended 12 months sentence. The offences for which those three and half, and two and half year terms were ordered had been committed during the currency of the activated suspended sentence.

[5] That offender had a worse criminal history than Mr Vaughan, and Mr Vaughan's head sentence was certainly at the high end of the range, compared to the other sentences referred to. But Mr Vaughan was subject to both a nine month intensive correction order imposed on 4 December 2003, and to a suspended term of imprisonment imposed on 12 December 2002, when he offended in July 2004. That offence may have been a rather opportunistic one but it was a continuation of a pattern of behaviour from which he had not been deterred despite receiving almost every variety of available sentencing options other than actual imprisonment. In those circumstances the head sentence is not manifestly excessive.

[6] But credit does need to be given to him for his plea of guilty and cooperation with the administration of justice, and suspending the three year term at the half way point does not sufficiently reflect those matters in mitigation of the penalty. (I consider it unlikely he would have been sentenced to any more than three years imprisonment had he pleaded not guilty, and had he put the prosecution to proof.)

[7] I also consider that Mr Vaughan might benefit from supervision when released, and would accordingly allow the appeal, and vary the sentence imposed by removing the order suspending the sentence after Mr Vaughan has served 18 months, and substituting instead a recommendation that Mr Vaughan be considered for

post-prison community based release after he has served 12 months of that sentence. It will be up to Mr Vaughan to make the necessary efforts to satisfy a Community Corrections Board that his release to the community imposes on it no more than an acceptable risk of his re-offending.

[8] **KEANE JA:** On 21 April 2005, the applicant was convicted on his plea of guilty on one count of breaking and entering premises and stealing. He was sentenced to three years imprisonment, suspended after 18 months with an operational period of five years. The applicant contends that the sentence was manifestly excessive.

Circumstances of the offence

[9] The applicant was apprehended after being seen running away from restaurant premises at Spring Hill at 2.30 am on 7 July 2004. The applicant was in company with others. The applicant and his companions were found with cash trays taken from the restaurant and were in possession of a crowbar. The restaurant had been broken into in a manner which suggested that an instrument like a crowbar had been used by those responsible. The damage to the premises as a result of the break-in was said to be $2,549.70. The applicant declined to be interviewed by the police.

The applicant's circumstances

[10] The applicant was born on 18 February 1980 and was 25 years of age at the time of sentence. He has an extensive criminal history beginning when he was 17 years of age. This history includes prior convictions for offences of breaking and entering, involving both dwellings and vehicles, committed with some regularity over that period. He has served four separate periods of actual incarceration.

[11] On 12 December 2002, he was convicted of entering premises to commit an indictable offence and was sentenced to imprisonment for nine months, suspended after three months with an operational period of two years. On 27 February 2004, upon a further offence, his suspended sentence was extended by six months and, upon further re-offending, he was sentenced on 4 February 2005 to remain in custody until the rising of the court. When the applicant committed the offence in question, he was subject to an intensive correction order.

[12] The applicant left school after Grade 10. He has been in a relationship for five and a half years with his partner. They have two infant children. The applicant's partner was herself facing a term of imprisonment at the time of the applicant's sentence.

[13] The applicant does not use alcohol or drugs but, as was conceded by counsel for the applicant at the sentencing hearing, this is "a double-edged sword". Whatever positive light it might cast on his character generally, it means that he cannot point to addiction as an explanation for his offending which might encourage the court to take a favourable view of his prospects of rehabilitation. It was, in my respectful opinion, open to the learned sentencing judge to proceed on the footing that the prospects for the rehabilitation of the applicant are quite poor.

[14] Unfortunately, the applicant has no real work history nor, it appears, any prospect of obtaining work on a consistent basis in the near future. He suffers from diabetes and apparently receives a disability pension.

The sentence

[15] Counsel for the applicant and for the Crown agreed that the appropriate range for the head sentence was between two and four years. His Honour fixed on a head sentence of three years.

[16] In my respectful opinion, having regard to the applicant's appalling criminal history and the need for deterrence to which his Honour referred, the head sentence on which his Honour fixed cannot be said to be excessive. In *R v Donald*,[1] de Jersey CJ commented that a three year term for breaking and entering a dwelling house was "at least mid-range … and arguably low range" when the offender has a substantial criminal record. Counsel for the applicant sought to distinguish this case from *R v Donald* on the basis that the applicant broke into business premises rather than a dwelling house. I would not accept that this difference matters much because there is always the possibility that there may be other persons still present within business premises which have been closed for the evening.

[17] The learned sentencing judge took into account the applicant's plea of guilty along with the likelihood that the applicant's children would enter the care of the State by reason of the imprisonment of both the applicant and his partner. The suspension of the head sentence after 18 months was a substantial moderation of the head sentence by way of recognition for the applicant's youth and his plea of guilty. This is especially so in the absence of any evidence to suggest the applicant has shown any real remorse or has made any attempt to set his life on a more positive course.[2]

[18] In these circumstances, I am unable to see any basis on which it can be said that the learned sentencing judge erred in any way which rendered the sentence excessive. Indeed, having regard to the applicant's extensive criminal history, the suspension of the head sentence after 18 months, particularly in the absence of any requirement for the payment of restitution, may be said to reflect a distinctly moderate approach on the part of the learned sentencing judge.

Conclusion and order

[19] The application for leave to appeal against sentence should be refused.

[20] **CULLINANE J:** I have read the reasons for judgment of Keane JA in this matter. I agree with those reasons and orders proposed.

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1 [2000] QCA 399; CA No 179 of 2000, 28 September 2000 at [4]. See also *R v Mulder* [2002] QCA 455; CA No 202 of 2002, 28 October 2002.

2 Cf *R v Weston* [2005] QCA 176; CA No 87 of 2005, 30 May 2005 at [20] - [21].