SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kissier* [2005] QCA 375
PARTIES:	**R** **v** **KISSIER, Merrill William** (applicant)
FILE NO/S:	CA No 181 of 2005 DC No 2137A of 2003 DC No 1755 of 2005 DC No 1756 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2005
JUDGES:	McMurdo P, Keane JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal 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 convicted on his own pleas of guilty of two counts of assault occasioning bodily harm, five counts of burglary and stealing, one count of stealing and four counts of breaking and entering premises and stealing – where applicant sentenced to nine months imprisonment for the first assault – where sentenced to three years imprisonment for the nine stealing offences and six months imprisonment for the second assault and the stealing offence – where the sentences for the second assault and stealing all concurrent but cumulative on the sentence for the first assault – where the sentences of three years imprisonment were suspended after one year for an operational period of four years – where applicant argued that five and a half months in pre-sentence custody should count as time already served – where applicant was on remand for other offences during those five and a half months – where

sentencing judge took that period into account notwithstanding it was not able to be declared time already served under s 161 of the *Penalties and Sentences Act* 1992 (Qld) – whether sentence manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 156A, s 161

R v Ball [2000] QCA 46; CA No 344 of 1999, 28 February 2000, cited
R v Bryzak [1996] QCA 385; CA No 321 of 1996; 2 October 1996, cited
R v Cooper [1996] QCA 283; CA 170 of 1996; 12 July 1996, cited
R v Gee [1998] QCA 321; CA No 247 of 1998; 18 September 1998, cited

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P**: I agree with Douglas J's reasons for refusing the application for leave to appeal against sentence.

[2] **KEANE JA**: I have had the advantage of reading in draft the reasons of Douglas J. I agree with his Honour's reasons and with the orders he proposes.

[3] **DOUGLAS J**: On 17 June 2005 the applicant was convicted on his own pleas of guilty of two counts of assault occasioning bodily harm, five counts of burglary and stealing, one count of stealing and four counts of breaking and entering premises and stealing.

[4] He was sentenced to nine months imprisonment for the first assault, three years imprisonment for each of the nine offences involving entry into a dwelling or other premises and stealing, and six months for the second assault and the stealing offence. The sentences of three years imprisonment and six months imprisonment were all made concurrent with each other but cumulative on the sentence of nine months for the first assault. The sentences of three years imprisonment were suspended after one year for an operational period of four years.

The circumstances of the offences and the applicant's personal circumstances

[5] The first assault was committed on 5 August 2002, when the applicant, in prison for other offences, heard that another prisoner had been convicted of rape and attacked him viciously. He hit the other prisoner twice in the head with a closed fist around the area of the left temple and left ear, punched him twice again in that ear, kicked him in the left cheek while wearing work boots and then punched him twice again in the back of the head. The victim begged the applicant not to hit him but was punched several times more. By then the victim was bleeding freely and required hospital treatment for right periorbital bruising, a haematoma in that area, a

fractured zygoma and a blow out fracture of the posterior wall of the right orbit. Clearly it was a serious assault.

[6] The offences involving entry into dwellings and premises and stealing occurred over a period between 19 August 2003 and 7 January 2005. They were prosecuted after admissions had been made by the applicant to police. He told the police that he broke into places looking for alcohol to steal or would steal other property that he then sold to buy alcohol. The stealing offence related to an occasion when he stole two bottles of rum from a liquor shop. The value of the property stolen or damaged amounted to more than $21,000.

[7] The second assault was of a woman who had been in a de facto relationship with the applicant. Their relationship ended on 6 January 2005. The assault occurred in the early morning of 7 January 2005. The woman, asleep in her bed, was woken by the accused hitting her in the head and face with closed fists. After the initial assault the complainant in that matter went to retrieve her two year old son from his room. On her way there the applicant again assaulted her by punching her. She sustained a gash above her right eyebrow that later required stitching. The applicant then went to the kitchen and returned to the son's room with a knife but the complainant convinced him that she should be allowed to take her son to her parents' house, which she succeeded in doing.

[8] The first assault was not treated as a timely plea but the property offences and the second assault were made the subject of ex officio indictments and that cooperation by the applicant was taken into account by the learned sentencing judge when he calculated the sentences he imposed on the applicant.

[9] The first assault was committed while the applicant was imprisoned for property offences and other offences involving the use of violence. The first offence involving entry into a dwelling was committed shortly after his having been sentenced to a two month sentence and the day before he was sentenced to five months imprisonment for an earlier charge of unlawful use of a motor vehicle. He has a very serious previous criminal history for a man his age. He was 21 at the time of sentence and aged between 18 and 21 at the time of the offences. His extensive criminal history dates from when he was 14. It includes sentences of detention for entering dwellings and premises and custodial sentences for similar offences since he became an adult. He has also been previously sentenced for assault. He has spent much of his life in custody.

Were the sentences manifestly excessive?

[10] The only ground of appeal raised by the applicant is that the sentences were manifestly excessive.

[11] The learned sentencing judge approached the task on the basis that the later offences should be the subject of sentences cumulative to that imposed for the first assault. There was a submission made to him that he was required to do so by law pursuant to s 156A of the *Penalties and Sentences Act* 1992 (Qld). Without resolving that issue his Honour took the view that it was appropriate to sentence cumulatively because of ordinary sentencing principles; they were quite distinct offences committed under quite different circumstances. That was a correct approach. He took into account the fact that the applicant had been in custody for a long period

before he was sentenced: he had been in custody from 9 March 2002 until 10 February 2003 and again from 6 January 2005 until the date of the sentence, 17 June 2005. During each of those periods he was on remand for other offences so that none of the time could be declared pursuant to s 161 of the *Penalties and Sentences Act*. However, it is clear that his Honour took the time into account in the sense that he treated the time that the applicant had spent in custody after completing his relevant terms of imprisonment as a period of about five and a half months which could not be declared in respect of the matters before him. It was in that context that he imposed the sentences to which I have already referred where it may be noted that the head sentences were less than might otherwise have been ordered.

[12] Mr Meredith drew our attention to the decision of this Court in *R v Ball* [2000] QCA 46 (CA No 344 of 1999, 28 February 2000) as justifying the head sentence for the first assault committed in prison. A sentence of 12 months imprisonment was imposed where the applicant had punched a prison officer after receiving a disappointing result in an application for parole. The complainant was not seriously injured. The applicant there also had an extensive criminal history including previous convictions for assault. Assault on a prison officer is normally likely to be treated seriously but the assault and the injuries here were much more serious than those in *Ball*. In my view there is no justification for disturbing his Honour's sentence in respect of that offence.

[13] We were also referred to comparable decisions for offences involving multiple counts of entering and stealing by young offenders with similar previous criminal histories; see *R. v. Gee* [1998] QCA 321 (CA No 247 of 1998, 18 September 1998), *R. v. Bryzak* [1996] QCA 385 (CA No 321 of 1996, 2 October 1996) and *R. v. Cooper* [1996] QCA 283 (CA No 170 of 1996, 12 July 1996). Those decisions justify the head sentence of three years imposed by his Honour. In fact a greater sentence may well have been imposed. His Honour also took into account the early plea and the fact that the matters had proceeded by an ex officio indictment when he suspended that period of imprisonment after one year. As the respondent submitted, such a suspension was a significant benefit to the applicant given his likely poor prospects of obtaining post-prison community based release.

[14] The sentence of six months for the second assault, having regard to the circumstances in which it occurred, which were described aptly as a cowardly attack on a sleeping woman surrounded by very threatening behaviour, was lenient. It was, as I have said, made concurrent with the property offences and the six month sentence for stealing. The overall approach by the sentencing judge, taking into account the applicant's bad record, may be described as lenient and leaves no room for the conclusion that the sentences imposed were manifestly excessive.

[15] Accordingly the application for leave to appeal against sentence should be dismissed.