SUPREME COURT OF QUEENSLAND

CITATION:	*R v Russell* [2005] QCA 392
PARTIES:	**R** **v** **RUSSELL, Brian John** (applicant/appellant)
FILE NO/S:	CA No 194 of 2005 DC No 4458 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	24 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2005
JUDGES:	McMurdo P, Jerrard JA and Muir 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** **3. Omit the recommendation for post-prison community based release after 2 years and substitute a recommendation for post-prison community based release after 18 months**
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 - applicant convicted after pleas of guilty to ex officio indictment containing eight counts of burglary, two counts of entering premises and committing an indictable offence, two counts of unlawful entry of a vehicle to commit an indictable offence, four counts of stealing, five counts of unlawful use of a motor vehicle, two counts of possession of things used in connection with unlawful entry and one count of wilful damage - on each of the burglary counts sentenced to three and a half years imprisonment - on remaining counts

sentenced to lesser terms of imprisonment - all sentences concurrent - recommendation for eligibility for post-prison community based release after two years - 29 years old at sentence - total amount of property involved in offending about $86,000 - some offences committed whilst on bail - lengthy criminal history - 325 days spent in pre-sentence custody unable to be declared as time served - full admissions in relation to many of the offences - offending directly related to drug addiction - remorse shown - efforts made at rehabilitation - drug free since placed into custody in August 2004 - whether sentence manifestly excessive

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS - QUEENSLAND - sentencing judge made recommendation for eligibility for post-prison community based release after statutory eligibility date - practice in Queensland is that a recommendation is ordinarily only made if it is for a time earlier than the statutory eligibility date - special circumstances are necessary before making a recommendation after statutory eligibility date - whether any special circumstances existed to justify recommendation after statutory eligibility date

Corrective Services Act 2000 (Qld), s 135
Penalties and Sentences Act 1992 (Qld), s 157(2), s 161

R v Griinke [1992] 1 Qd R 196, applied
R v Hundric [2005] QCA 324; CA No 152 of 2005, 30 August 2005, applied
R v Whelan [1997] QCA 305; CA No 285 of 1997, 26 August 1997, applied

COUNSEL: A W Moynihan for the applicant
P F Rutledge for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Mr Russell pleaded guilty on 21 July 2005 at the District Court at Ipswich to eight counts of burglary, two counts of entering premises and committing an indictable offence, two counts of unlawful entry of a vehicle to commit an indictable offence, four counts of stealing, five counts of unlawful use of a motor vehicle, two counts of possession of

things used in connection with unlawful entry and one count of wilful damage.

On the eight counts of burglary, he was sentenced to three and a half years imprisonment and to lesser concurrent terms on the remaining counts. The judge recommended that he be eligible for post-prison community based release after serving two years.

Mr Russell contends that the sentence was manifestly excessive and that the learned primary judge erred in giving the recommendation for post-prison community based release beyond the statutory eligibility date at the halfway point.

Mr Russell is currently 29 years old and was between 27 and 28 years old at the time of the offending which took place between 28 November 2003 and 24 August 2004. He had spent 325 days in custody on these and other summary matters, so that this period could not be the subject of a declaration under s 161 *Penalties and Sentences Act* 1992 (Qld) ("the Act").

Mr Russell was located by police in possession of a radio scanner, screwdriver, metal bar, multigrips, knife and four generic car keys. His fingerprints were located on one complainant's motor vehicle. He had made full admissions to police about taking that vehicle and property from it. He also made full admissions in relation to many other offences. His fingerprints were found at some of the dwellings concerned in a number of the offences. On at least one occasion he

disabled the security system of a building before stealing a large quantity of mobile phones and other property. Some offences were committed whilst Mr Russell was on bail in respect of others.

The total amount of property involved in the total spate of his offending was valued at about $86,000, although there was some suggestion at sentence that that figure may have been slightly inflated.

Mr Russell pleaded guilty by ex officio indictment and his plea was recognised at sentence by the prosecution as an early one. He had a lengthy Queensland criminal history commencing in 1992 in the Childrens Court when he was convicted and sentenced to two years supervision with psychiatric counselling for indecent assault. The next day he was convicted and placed on six months supervision for property offences. In 1993 he was convicted and sentenced to 18 months care and control for offences relating to motor vehicles and house breakings. In 1994 he was fined for being in a yard without lawful excuse. In 1995 he was convicted and fined for unlawfully taking shop goods. In 1997 he was sentenced to an effective term of four years imprisonment with a recommendation for early parole after 381 days for multiple offences relating to motor vehicles, break and enters and stealing. In 2001 he was sentenced to 21 months imprisonment for similar property offences. Later that year, he was sentenced to concurrent terms of imprisonment for summary offences of possession of property suspected of being tainted,

failing to take reasonable care and precaution in respect of a syringe or needle and obstructing a police officer. In 2004 he was convicted and fined for breaching bail.

He also had a significant criminal history in Victoria, primarily for property offences, between 1994 and 1996.

His counsel at sentence handed up a letter to the judge from Mr Russell apologising for his criminality, explaining that it was drug related and setting out his efforts at rehabilitation. His counsel explained that Mr Russell had had a disrupted early life and commenced using heroin at 13 years of age. He abused drugs, including cannabis, amphetamines and heroin. He suffers from drug induced schizophrenia. He is currently medicated for that condition and takes lithium for his depression. He and his partner have a child. When released from custody he intends to resume that relationship. His criminal behaviour was directly related to funding his drug addiction. He has been drug free since being placed in custody in about August 2004 and hoped that when released he would remain drug free. His counsel at sentence emphasised that, but for his co-operation with the police, many of the offences would have been undetected and urged the learned primary judge to impose a sentence of about four years imprisonment and to suspend it earlier than the halfway point to recognise his co-operation and early plea of guilty, stressing that Mr Russell did not believe he had any realistic prospects of release on parole.

The very experienced sentencing judge stated that had it not been for the mitigating factors of 325 days in custody which could not be the subject of a declaration under the Act, the early plea of guilty and co-operation with the authorities, he would have imposed a sentence of five years imprisonment. This was perhaps a too generous starting point in light of the large number of serious offences and Mr Russell's record of recidivism. His Honour thought that suspension of imprisonment was not appropriate because of Mr Russell's drug history and his need for supervision in the community. His Honour determined that the effective head sentence of three and a half years imprisonment on the burglary offences with lesser concurrent terms of imprisonment on the other offences was a better way to reflect the mitigating circumstances. His Honour recommended post-prison community based release after two years. It is this recommendation, beyond the statutory eligibility date, that really lies at the centre of this appeal.

Section 157(2) of the Act allows a court in imposing a term of imprisonment of more than two years on an offender to recommend that the offender be eligible for post-prison community release after serving a specified part of that term. The practice in Queensland is that such a recommendation is ordinarily only made if it is for a time earlier than when the statutory period of eligibility for post-prison community based release arises under s 135 *Corrective Services Act* 2000 (Qld). Under s 135(2)(e) of that Act, Mr Russell would ordinarily have been entitled to apply for post-prison

community based release on a three and a half year sentence after having served 21 months imprisonment. Special circumstances are necessary before making an order such as that made here: see *R v Hundric* [2005] QCA 324; CA No 152 of 2005, 30 August 2005, *R v Whelan* [1997] QCA 305; CA No 285 of 1997, 26 August 1997 and *R v Griinke* [1992] 1 Qd R 196.

The learned primary judge did not refer to any particular special circumstances in his sentencing remarks to justify the late recommendation for post-prison community based release. Both counsel on this appeal concede the late recommendation may well have been simply an error on a busy sentence day. On the other hand, it is possible that his Honour structured the order in this way because he accepted that the applicant was unlikely to be granted early parole. In my view, that does not constitute a special circumstance. Whilst the three and a half year head sentence, which was towards the bottom of the appropriate range here, mercifully reflected the mitigating circumstances, the judge's recommendation for eligibility for post-prison community based release in one sense turned this into a four year sentence.

The learned primary judge erred in making this recommendation at two years on a three and a half year head term of imprisonment in the absence of clearly ascertainable and sound reasons. When the 11 month period of pre-sentence custody is considered, the sentence then effectively becomes one of almost five years. The sentence imposed does not seem to reflect his Honour's intention to impose a sentence of less

than five years imprisonment to reflect the mitigating factors cited by him. In order to give full effect to the 11 months of pre-sentence custody and Mr Russell's guilty plea and co-operation, I would remove the recommendation for post-prison community based release after two years and substitute a similar recommendation after 18 months.

I would grant the application for leave to appeal, allow the appeal, omit the recommendation for post-prison community based release after two years and substitute a recommendation for eligibility for post-prison community based release after 18 months.

JERRARD JA: I agree with the reasons for judgment and the order proposed by the President.

Mr Russell admitted committing 18 offences of breaking into other people's homes, business premises and cars. The Director of Public Prosecutions described him as a professional thief. However, his pleas of guilty and the confessions he made to the offences he had committed, justify a recommendation for post-prison community based release a little earlier than the halfway point of the three and a half year sentence passed on him.

Because, however, he has offended so often and on bail and has been addicted to non-prescribed drugs, the Community Corrections Board which considers his application for release will no doubt do so very carefully.

MUIR J: I agree with both sets of reasons and with the orders proposed.

THE PRESIDENT: The orders are as I have set out.
