

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Clarke* [2006] QCA 356

PARTIES: **R**  
**v**  
**CLARKE, Andrew Charles**  
(applicant)

FILE NO/S: CA No 136 of 2006  
DC No 1328 of 2006  
DC No 1329 of 2006

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 15 September 2006

DELIVERED AT: Brisbane

HEARING DATE: 31 August 2006

JUDGES: McMurdo P, Jerrard JA and Atkinson J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

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 – GENERALLY – applicant pleaded guilty to indictment charging him with 10 offences of burglary and stealing, breaking and entering premises and stealing, entering premises with intent to commit an indictable offence – applicant also pleaded guilty to possession of house breaking implements with a circumstance of aggravation, possession of house breaking implements, unlawful use of a motor vehicle and dangerous operation of motor vehicle – lengthy criminal history of dishonesty offences – sentenced to four and a half years imprisonment – applicant has attempted to address his opiate addiction and has the support of his mother and girlfriend – whether sentence was manifestly excessive in all the circumstances – whether sentence could be re-structured to provide some supervision upon release

COUNSEL: The applicant appeared on his own behalf  
C W Heaton for the respondent

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

- [1] **McMURDO P:** The application for leave to appeal against sentence should be refused for the reasons given by Jerrard JA.
- [2] **JERRARD JA:** On 10 May 2006 Mr Clarke pleaded guilty in the District Court to an indictment charging him with 10 counts alleging offences of burglary and stealing, breaking and entering premises and stealing, entering premises with intent to commit an indictable offence. He also pleaded guilty to possession of house breaking implements with a circumstance of aggravation, to possession of house breaking implements, to unlawful use of a motor vehicle, and to the dangerous operation of a motor vehicle. He likewise pleaded guilty to three summary offences, of which the most significant was a charge of possession of house breaking implements. All the offences to which he pleaded guilty were committed between 5 October 2004 and 17 April 2005. He was sentenced to four and a half years imprisonment, and seeks leave to appeal, alleging that the sentence is manifestly excessive.
- [3] Mr Clarke has a quite lengthy criminal history. His first conviction for dishonesty was on 13 June 1990, for breaking and entering with intent. He was placed on probation. He had previously been convicted on 19 October 1988 for offences relating to dangerous drugs, and he has had other similar convictions over the ensuing 18 years.
- [4] He has likewise been repeatedly convicted over that period for offences of dishonesty, mostly relating to unlawfully gaining entry to premises and stealing from them. On 7 May 1992 he was convicted of nine such charges in the Inala Magistrates Court, and sentenced to six months imprisonment. Those offences had been committed in April and May of 1992. He was next sentenced on 14 August 1992 in the Brisbane District Court on 17 similar offences, plus one count of unlawfully using a motor vehicle and one of false pretences (all those offences were committed in 1990 or 1991), and sentenced to a total of three years imprisonment. He again appeared in the Brisbane District Court on 16 September 1994, and was sentenced on a total of 15 such charges – of breaking and entering a dwelling house with intent, or breaking entering and stealing – as well as on four counts of receiving property, and two charges of stealing. There was also an offence of attempted breaking and entering with intent. Save for two “old” offences committed in July 1991, all of those offences were committed between late March 1993 and early April 1994. Of necessity he must have commenced that course of unlawful conduct almost immediately upon release – he said on this appeal that he got remissions for good behaviour – from the three year sentence imposed on 14 August 1992.
- [5] The sentence imposed on 16 September 1994 was six years imprisonment, with a recommendation that Mr Clarke be considered for parole after serving two years and three months. That was a severe head sentence, but with an appropriately

recommended early parole date. He received a consistent head sentence and parole date when later sentenced on 22 October 1996 for one offence of breaking and entering with intent (committed in June 1991), and two of breaking, entering and stealing (one committed in July 1991 and the other in May 1994). He was sentenced to a head term of three years and eleven months, to be concurrent with the six year term imposed on 16 September 1994; and recommended for release on parole on 16 December 1996.

- [6] He said on this appeal that he was released on parole on 27 November 1999. On 27 March 2001 he was sentenced in the Brisbane District Court for 17 offences of entering premises with intent, or entering and committing indictable offences in premises, all committed between mid-December 1999 and late May 2000. He was also dealt with for offences of fraud, unlawful use of a motor vehicle, receiving stolen property, and one offence of assault occasioning bodily harm, all committed during that same period. He was sentenced to terms of imprisonment totalling four years. Two hundred and eighty five days of pre-sentence custody was declared time served.
- [7] The appeal record does not reveal whether he was granted parole or any conditional release on that March 2001 four year term. The period of offending, beginning in October 2004, in which he committed the offences for which he was sentenced to four and a half years on 10 May 2006, was therefore the third time he had committed a series of property offences soon after release from custody for the commission of like offences. He had done it after release on his three year sentence imposed in August 1992, after release from the six year sentence imposed in September 1994, and after release from the four year term imposed on 27 March 2001. Mr Clarke's reign of offending came to an end on 17 April 2005, when he committed a series of offences on the one day, in which he ineffectually attempted to gain entry to premises and steal from them. He was finally caught inside one set of premises. He has remained in custody ever since, and on 10 May 2006 the learned sentencing judge ordered that 388 days of pre-sentence custody be time already served.
- [8] The learned sentencing judge remarked on 10 May 2006 that Mr Clarke needed a structured, supervised existence when released from prison, but the reality was that Mr Clarke was unlikely to be placed on parole, which could only be recommended; and suspending part of the sentence would most likely simply disadvantage Mr Clarke. The judge said that Mr Clarke would be better off having no partly suspended sentence hanging over his head on release, an observation that was amply justified by Mr Clarke's history of re-offending.
- [9] In those circumstances the judge concluded that rather than impose a sentence at least equal to if not greater than the six year sentence that Mr Clarke had previously had imposed on him, it was appropriate to make allowance for the pleas of guilty and other personal matters in mitigation, by reducing the head sentence to be served. Those other matters included that Mr Clarke had taken some steps to deal with his opiate addiction, had pleaded to an ex-officio indictment, and had the support of his mother and girlfriend. In those circumstances the head sentence imposed was not manifestly excessive, and recognised Mr Clarke's difficulties with drug addiction and re-offending. It also provided some protection to the community; whether or not Mr Clarke achieves release on parole and with supervision in the community depends upon the efforts that he makes in custody.

- [10] Mr Clarke's offending behaviour after his last release from prison included not only once again repeatedly entering properties owned by others and stealing money from those, but also a quite serious offence of dangerous operation of a motor vehicle. Both he and the rest of the community were very fortunate that no person was injured. He had stolen a car, and later that day had driven it in a particularly dangerous way. After various other incidents, he collided with the rear of another vehicle at a roundabout, and after briefly getting out, got back in and sped up the road. That involved his cutting through oncoming traffic, losing control and coming to a stop in the garden bed of a service station, reversing out of that, and accelerating up the street again, and ultimately stopping just short of another stationary car. He then drove into it, causing the other driver to believe Mr Clarke was attempting to push that other vehicle into oncoming traffic. Ultimately the other driver was able to remove his vehicle from danger, and contacted police. Mr Clarke's stolen vehicle was found abandoned later that evening, damaged, with Mr Clarke's finger prints on the rear passenger door. When interviewed on 17 April 2005 he could recall driving the vehicle, but not the incidents.
- [11] Mr Clarke appeared for himself on this appeal, and made it clear that he was not complaining about the head sentence of four and a half years. The point he made was that on each occasion in the past when he has been released from prison, he had been classified as a high security prisoner as at the time of that release, yet had been released without supervision. He asked the Court to structure a sentence that would give him some supervision on release.
- [12] Unfortunately, no appropriate sentence is available. An order for probation could only be made if it accompanied a sentence of no longer than 12 months imprisonment, and that period is simply too short when regard is had to his extensive offending. Mr Clarke's written argument urges this Court to suspend the remainder of the four and a half year sentence, so that he can be supervised. But he would not receive supervision if under a suspended sentence, and he is eligible for parole after he has served two years and three months of his four and a half year sentence. The only possibility of supervised release is on parole. If his head sentence was three years or less, and if a parole date was now fixed under s 160B(3) of the *Penalties and Sentences Act 1992 (Qld)*<sup>1</sup>, he would be supervised on release. That Act was not in force when Mr Clarke was sentenced. For a sentence in excess of three years, the position now is the same as before that legislation came into force, namely that all a sentencing court – so minded – can do, is to recommend a date for release on parole. Mr Clarke must expect a head sentence of more than three years.
- [13] Mr Clarke says he has never achieved parole in the past, and does not expect to get it. He has only been released in the past because of remissions of sentence for good behaviour, when still high security. He said he has had a long term problem with heroin addiction, and that heroin is available in prison. There is no reason to doubt either of those statements, but all that establishes is that it is up to him to satisfy a Parole Board that if he is released on parole into the community, supervision of him will result in an acceptable level of risk of his re-offending. That might require his deciding to reside in a rehabilitation centre on his release: a Parole Board may

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<sup>1</sup> Section 160B was inserted into the *Penalties and Sentences Act 1992 (Qld)* by s 497 of the *Corrective Services Act 2006 (Qld)*.

consider that his doing that would reduce the risk of re-offending to an acceptable level after he has served, say, three years of his current sentence.

[14] I would dismiss the application.

[15] **ATKINSON J:** I agree with the reasons for judgment of Jerrard JA and the order proposed.