SUPREME COURT OF QUEENSLAND

CITATION:	*R v Norris* [2006] QCA 376
PARTIES:	**R** **v** **NORRIS, Kenneth John** (applicant)
FILE NO/S:	CA No 196 of 2006 DC No 49 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	29 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2006
JUDGES:	Jerrard and Keane JJA and Jones 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 17 counts of fraud, three counts of fraud in which the yield from the dishonesty was of a greater value than $5,000, one count of entering premises and committing an offence, one count of attempted fraud, three counts of impersonation, six counts of forgery, six counts of uttering, one count of possession of a dangerous drug, and to a summary offence of possessing utensils used to smoke a dangerous drug – applicant was sentenced to five years imprisonment – lengthy criminal history – whether sentence was manifestly excessive in all the circumstances *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, cited *Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6, cited *R v Alexander* [2004] QCA 11; CA No 331 of 2003, 13 February 2004, considered *R v Gee* [1998] QCA 321; CA No 247 of 1998, 18 September 1998, considered

R v Jones [1998] 1 Qd R 672; [1997] QCA 132, considered
R v Pearson-Harding [1999] QCA 92; CA No 377 of 1998, 26 March 1999, considered

COUNSEL: A W Moynihan for the applicant
B G Campbell for the respondent

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

[1] **JERRARD JA:** On 19 June 2006 Mr Norris pleaded guilty to 17 counts of fraud, three counts of fraud in which the yield from the dishonesty was of a greater value than $5,000, one count of entering premises and committing an offence, one count of attempted fraud, three counts of impersonation, six counts of forgery, six counts of uttering, one count of possession of a dangerous drug, and to a summary offence of possessing utensils used to smoke a dangerous drug. He was sentenced to five years imprisonment and has applied for leave to appeal against that sentence, complaining of its severity.

[2] Mr Norris has a lengthy history of convictions for offences, mostly of dishonesty, and of being imprisoned for those. On 16 August 1983 he was sentenced to six months imprisonment on four counts of forgery and four counts of uttering, and one month later on 16 September 1983 sentenced to a total of three years imprisonment for an offence of breaking entering and stealing, and two further offences of forging and uttering. In March 1984 he was sentenced to 12 months imprisonment for escaping from custody, and in November 1985 to five years imprisonment for robbery in company. A little later that month he was also sentenced to imprisonment on two counts of breaking and entering.

[3] Then on 19 December 1986 he was sentenced to three years imprisonment for conspiring to escape, and next appeared in a court on 19 April 1990, when he was sentenced to four years imprisonment on five counts of breaking entering and stealing. He was next heard of in a court in mid-1994, when sentenced in the Gosford Local Court for stealing, and fined $500; a warrant was later issued on 24 June 1994, when he failed to appear on three counts of breaking entering and stealing, two of breaking entering with intent, one of unlawful entry, one of stealing, and charges relating to the possession of cannabis. On 24 August 1995 he was sentenced to two years imprisonment, apparently for those offences.

[4] He next appeared in the Maroochydore District Court in January 1998, when he was sentenced for three counts of breaking entering and stealing, and one for possessing a motor vehicle used for the purpose of facilitating the commission of an indictable offence. He was also convicted of bringing stolen goods into Queensland, six counts of false pretences, one of stealing, one of wilful and unlawful destruction of property, and one of wilful and unlawful damage to property. In fairness to him it should be said that those were apparently all old offences, committed in mid-1994, and presumably when he was on the run from the New South Wales Police, after failing to appear at the Gosford Local Court.

[5] In September 1999 he was convicted in the Gosford Local Court of living off the earnings of prostitution, and placed on a good behaviour bond; he then appeared in

the Mackay Magistrates Court in October 2000, and was convicted of bringing stolen goods into Queensland, the unlawful use of a motor vehicle used for an indictable offence, and dishonestly obtaining property from another. For those offences he was sentenced to 12 months imprisonment, and he next appeared in the Rockhampton Magistrates Court in May 2002, when he was convicted of obtaining benefits which were not payable. He was sentenced to 12 months imprisonment and it was ordered that he be released after four months on a recognisance.

[6] The schedule of agreed facts placed before the learned sentencing judge shows that Mr Norris had continued, apparently in the 18 month period from mid-2004 until the date of his arrest on 25 December 2005, to survive by fraud and general dishonesty. His essential modus operandi was to commit forgery and uttering offences to obtain identification in false names, and then use credit cards obtained in those names to get goods and services, for which he did not later pay the costs to the provider of the cards. He used four different names over that 18 month period, and the most valuable item he obtained on credit was a new Honda motorcycle worth $19,500. Other goods obtained included a television and audio visual equipment. He also succeeded in defrauding pawnbrokers by obtaining loans in false names, sometimes using goods he had previously obtained by way of another fraudulent credit transaction. All up he obtained goods and services to the value of $44,175, and the various complainants suffered losses to the extent of $32,175.

[7] Mr Norris was essentially living by his wits when arrested, and apparently predominantly by using credit cards in those false names. He has a long history for offences of that type, and has convictions in some 14 different names. No obvious reason was advanced to the learned sentencing judge as to why he would not simply continue that behaviour if offered the opportunity of any early release. He was 41 years old when sentenced.

[8] The sentencing remarks of the learned judge recorded that Mr Norris had been in custody for some six months in relation to those charges, and that the judge would take that into account, and that the judge also thought the range of sentence suggested by the Crown Prosecutor, namely a sentence of seven to eight years – before taking the plea of guilty to an ex-officio indictment, co-operation with the police, and the six months pre-sentence custody into account – was somewhat high, but did not consider it excessively so. Counsel for Mr Norris conceded on this application that a notional head sentence in the order of six years imprisonment was justified by other decisions of this Court, including the decision in *R v Alexander* [2004] QCA 11,[1] but was inclined to argue that was before the pleas of guilty were considered. The actual result in *R v Alexander* suggests that the head sentence is within the range after the pleas of guilty are taken into account.

[9] In *R v Alexander*, that offender likewise had a long record of convictions for dishonesty, beginning in 1983, and that offender had obtained about $125,300 worth of property by his offences under consideration in that application. There was still a deficiency of some $75,665. He was sentenced to three and a half years imprisonment, after being in custody already for one and a half years. He had pleaded guilty to 18 counts of fraud and like offences, and had 32 other offences of dishonesty taken into account under s 189 of the *Penalties and Sentences Act 1992* (Qld). This Court dismissed his appeal; it did so on the basis that the learned

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1 CA No 331 of 2003, 13 February 2004.

sentencing judge had concluded that a head sentence in the range of five to six years was appropriate, and that the sentence of three and a half years should be imposed having regard to the time already spent in custody. Williams JA, giving the judgment of the Court, relevantly wrote that:

> "A review of the decisions to which the court was referred indicates that there are a number of factors which have been regarded as relevant in determining the appropriate sentence where dishonesty is involved. On some occasions the critical factor has been the amount of money lost by victims of the fraud, on other occasions the decisive factor has been the persistent and systematic offending. One cannot say that either one of those factors is generally more significant than the other. Each case has to be considered in the light of its own peculiar facts; all one can say is that the amount of money lost and the regularity of offending will always be relevant considerations."[2]

[10] The amount of money lost by Mr Norris' victims was one third of that lost by Mr Alexander's, but each had engaged in persistent and systematic offending, with Mr Norris doing that for slightly longer than Mr Alexander did. All but one of Mr Alexander's offences were between 15 June 1998 and 25 August 1999. That makes the partial concession by counsel on this application, that a notional head sentence of up to six years imprisonment was appropriate, a realistic one.

[11] Counsel for Mr Norris, Mr Moynihan, argued that the difference in the amount of money lost by the victims should lead to the conclusion that the head sentence described in *R v Alexander* was not within the range in the case of Mr Norris, despite his very long record and his having offended by fraud over a considerable period. But in *R v Pearson-Harding* [1999] QCA 92[3] that recidivist offender successfully appealed head sentences of six years, cumulative on sentences of which she had nearly two years left to serve. She had committed a series of offences towards the end of 1996 and into early 1997, and another series from the end of 1997 and into early 1998. She pleaded guilty on 9 October 1998 to 22 offences, and asked that 141 other ones be taken into account. For those offences, which largely consisted of offences committed with credit cards which she had stolen, and which resulted in an unrecovered loss in excess of $80,000 to victims, she was sentenced to six years imprisonment. The learned sentencing judge had ordered that those sentences be cumulative on a sentence of which she had almost two years still to serve. She had committed nearly all of her offences when both on probation and on parole, and many when on bail as well.

[12] This Court remarked that she showed signs of being an incorrigible thief, but that having regard to the totality principle, the sentences imposed by the learned judge should be regarded as excessive, although not very greatly so; and this Court reduced the six year sentences to five year terms, cumulative upon the other (two year) term. This Court also recommended an early date for parole; that applicant was a young woman. That cumulative five year term imposed after pleas of guilty on that offender, who had only recently turned 21 before the date on which this Court handed down its judgment, makes it very difficult to sustain the argument that the five year term imposed on this experienced older offender was beyond the available range.

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2 [2004] QCA 11 at [24].

3 CA No 377 of 1998, 26 March 1999.

[13] In *R v Gee* [1998] QCA 321[4] this Court dismissed an application by an offender who was still 19 at the date of this Court's judgment. He had pleaded guilty to four indictments containing a total of 28 counts of housebreaking and like offences. He was described as having a significant criminal history, although still so young; this Court upheld a sentence of four and a half years imprisonment, which was effectively cumulative on about eight months imprisonment imposed earlier on that offender for 30 counts of dishonesty (largely housebreaking and stealing), involving a total of $13,500 worth of property. The offences for which he was later sentenced to the four and a half years imprisonment involved property to the value of about $30,000, mostly stolen from elderly female pensioner complainants, all over 60 years of age, whom that applicant had deliberately targeted. Three of those complainants had their homes broken into on more than one occasion. That applicant had committed his offences when on probation and on bail.

[14] That effective sentence of five years and two months imprisonment was imposed on two separate occasions simply because it had not been possible to deal with all of those offender's matters at the one time. It was imposed on an 18 year old offender, who had taken about $44,000 worth of property from others, whom he had selected as easy victims, and makes it very difficult to argue that the sentence of five years imprisonment in this case was manifestly excessive. It is true the offender in *R v Gee* benefited from a recommendation for consideration for release on parole after 22 months, reflecting that offender's age, but that applicant still had to persuade a Parole Board to grant him parole.

[15] In *R v Jones* [1998] 1 Qd R 672 this Court allowed an application by an offender who had spent 11 months in pre-sentence custody, and who was sentenced to five years imprisonment for six counts of false pretences. That offender was 46 years old, with a criminal record spanning 27 years, and had been sentenced to gaol on 11 prior occasions. The offences the subject to the appeal involved passing valueless cheques over a two and a half month period, and getting property and computer goods worth $25,728. This Court re-sentenced him to four years gaol; that was an effective four years and 11 months sentence. It makes the five years and six months total sentence here within range.

[16] Nevertheless, Mr Moynihan submits for Mr Norris that the head sentence in this matter was not sufficiently moderated to reflect the plea to the ex-officio indictment, the co-operation with the police, and the 177 days (six months) of pre-sentence custody. Mr Moynihan did not challenge the learned judge's view that it was appropriate to reflect all matters moderating the head sentence by simply reducing it, rather than placing Mr Norris under a partly suspended sentence, or fixing a parole eligibility date. The respondent argues that the reduction for the matters in mitigation was sufficient and the overall result not manifestly excessive.

[17] Mr Norris did co-operate with the police, in that he confessed to the commission of offences of which the police had otherwise no knowledge, a matter mitigating the appropriate penalty to an even greater degree than that otherwise appropriate by reason of his plea to an ex-officio indictment.[5] But the range of five to six years, described as an appropriate head sentence in *Alexander* for protracted dishonesty by

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4 CA No 247 of 1998, 18 September 1998.

5 See *AB v The Queen* (1999) 198 CLR 111 at 155 paragraphs [113]-[114] (Hayne J); [1999] HCA 46; and *Cameron v The Queen* (2002) 209 CLR 339 at 343; [2002] HCA 6.

an offender with an already lengthy record for that conduct, was a head sentence reached after taking into consideration that offender's plea of guilty. It is supported by the other decisions referred to. It is from that notional head sentence that the decision in *Alexander* would approve a reduction equal to the amount of time already actually spent in custody, which in the *Alexander* case was one and a half years, and in this case six months. Then there is the appropriate further reduction for Mr Norris having volunteered offences to the police. If the learned judge began with a notional six year head sentence after the plea, that was at the top end of the range described in *Alexander*, but within it; and the judge reduced that by six months spent in custody, and a further six months for volunteering matters. In the result the applicant has not shown that the sentence imposed was manifestly excessive.

[18] **KEANE JA:** I agree with the reasons of Jerrard JA, and with the order proposed by his Honour.

[19] **JONES J:** For the reasons enunciated by Jerrard JA, I agree with the order proposed.