SUPREME COURT OF QUEENSLAND

CITATION:	*R v Casiotis* [2006] QCA 85
PARTIES:	**R** **v** **CASIOTIS, Jonathon James** (applicant)
FILE NO/S:	CA No 53 of 2006 DC No 3514 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 March 2006
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2006
JUDGES:	McMurdo P, Williams JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against sentence and allow the appeal** **2. Set aside the sentence imposed on 2 March 2006 and in lieu thereof record a conviction and sentence the applicant to four months imprisonment suspended after the six days served between 2 March and 8 March 2006 with an operational period of one year** **3. Applicant to pay compensation in the sum of $5,913 to the Deputy Sheriff, District Court Brisbane within 12 months for transmission to the complainant, whose name and address have been supplied to the Deputy Sheriff. In default of payment, 3 months imprisonment**
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 - where the applicant pleaded guilty to wilful damage of a motor vehicle - where he was sentenced to four months imprisonment followed by three years probation - where the applicant was on bail for the offence of attempting to pervert the course of justice when he committed the wilful damage - where at sentence it was acknowledged that the applicant's youth, his plea of guilty and the fact he was employed were

factors in his favour - whether the sentence was manifestly excessive in all the circumstances

Penalties and Sentences Act 1992 (Qld), s 4, s 9(2)(a), s 35, s 182A, s 188

COUNSEL: R A East for the applicant
C W Heaton for the respondent

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

[1] **McMURDO P:** I agree that the applicant should be granted leave to appeal against sentence and that the appeal should be allowed.

[2] In sentencing an offender a court must have regard to the principles that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable: s 9(2)(a) *Penalties and Sentences Act* 1992 (Qld). These principles are especially pertinent where the offender is youthful and does not have a serious criminal history.

[3] The applicant was but 18 years old when he committed this offence. He had some limited criminal history which is set out in Williams JA's reasons. It is certainly an exacerbating feature that he was on bail for the offence of attempting to pervert the course of justice when he committed the present offence. His criminal history, however, is consistent with immaturity. He is now 19 years old. It is a promising factor in his rehabilitation that he has not committed an offence since April 2005. By the time of his sentence for the offence of wilful damage with which this Court is concerned, he had a job so that his offer to pay compensation for the damage he caused the complainant was realistic.

[4] The community correctional officer's report to the court on the applicant's performance of his intensive correction order noted that he was "unsuitable for further community service or intensive corrections [sic] orders" but nevertheless assessed him "as a suitable candidate for probation, if he is able to give a firm undertaking to the Court that he will comply with such an order".

[5] The most appropriate sentence for the offence of wilful damage was one which allowed the applicant to remain in the community in employment and which required him to pay compensation to his unfortunate victim. That was the sentence suggested by both the prosecutor and defence counsel at first instance. Such a sentence would have apparently been in the best interest of the victim, the offender and the community.

[6] This Court has been informed that since the applicant was released on bail pending appeal he has continued to complete his intensive correction order, including its community service aspect. I mention this only as further confirmation of his promising rehabilitative prospects. In all the circumstances, to sentence this young man to a term of actual imprisonment was an error in the exercise of the sentencing discretion and resulted in a manifestly excessive sentence.

[7] I agree with the orders proposed by Williams JA.

[8] **WILLIAMS JA**: The applicant pleaded guilty on 2 March 2006 to wilful damage of a motor vehicle committed on 7 February 2005. He was born on 6 October 1986 making him 18 years old at the time the offence was committed and 19 when sentenced. He was sentenced to four months imprisonment followed by three years probation on the usual terms. He appeals against the sentence on the ground that it was manifestly excessive; the submission of counsel on the applicant's behalf was that any sentence involving imprisonment should have been wholly suspended.

[9] It is important, as was recognised by the experienced sentencing judge, to put this offence in the context of the applicant's criminal history. The relevant sequence is as follows:

(i) On 17 September 2004 he committed the offence of attempting to pervert the course of justice. It appears he claimed he was the driver of a car that was in fact being driven by his cousin who was a disqualified driver. He was charged and released on bail.

(ii) On 12 October 2004 he committed the offence of dangerous operation of a motor vehicle. He was on bail for the offence of attempting to pervert the course of justice at that time. He was dealt with for the driving offence in the Magistrates Court on 26 October 2004; he was fined $900 but no conviction was recorded. He was disqualified from holding or obtaining a driver's licence for a period of six months.

(iii) On 7 February 2005 he committed the offence of wilful damage with which this Court is now concerned. He was on bail for the offence of attempting to pervert the course of justice at the time he committed that offence. He was released on bail for the wilful damage offence.

(iv) Between 1 March and 28 April 2005 the applicant committed the offence of stealing. He was on bail for the attempt to pervert the course of justice at the time he committed that offence; it is not clear whether he was also then on bail with respect to the wilful damage offence. He was dealt with in the Magistrates Court for the stealing offence on 18 May 2005 and was placed on a good behaviour bond for four months; no conviction was recorded.

(v) He was then dealt with in the District Court on 16 June 2005 for the offence of attempting to pervert the course of justice. A conviction was recorded and he was sentenced to imprisonment for 12 months to be served by way of an intensive correction order. He was dealt with on that occasion on the basis that he was a first offender.

[10] The owner of the vehicle damaged by the applicant was known to the applicant. There appears to be a suggestion that the applicant was aggrieved that the complainant had been allegedly making derogatory remarks about the applicant's sister after she refused to go out with the complainant. The applicant got out of his car, ran over to the complainant's car and jumped on the bonnet and then on the roof. He jumped up and down three or four times causing damage to the roof of the complainant's car. He then alighted from the roof of the car and in so doing put his foot on the rear windscreen causing it to smash. Though the latter action may have been unintentional the conduct of the applicant caused that damage. The cost of repairs to the complainant's car was $5,913.35.

[11] As a result of smashing the rear window the applicant sustained a large cut to his leg which required some 27 stitches.

[12] The complainant drove to the police station and made a complaint to police.

[13] The learned sentencing judge referred to the fact that the applicant gratuitously jumped a number of times on the car which was of obvious value to the young complainant; considerable damage was caused and no compensation had been paid. He also noted that the offence was committed whilst on bail, but took into account the fact that the applicant was a young person and by his plea of guilty had manifested co-operation in the administration of justice. He also made reference to the fact that the applicant had a job (at the time of sentence he was a tow truck driver's assistant) and that as a result of the incident had suffered an injury which may result in some residual nerve damage.

[14] Counsel for the applicant stressed that no offence had been committed between 16 June 2005 when ordered to serve a sentence of 12 months imprisonment by way of an Intensive Correction Order and 2 March 2006 when sentenced for the subject offence. But that was counterbalanced to some extent by the report from the Community Correctional Officer which was placed before the sentencing judge. That report noted that the applicant's "reporting was erratic from the commencement of supervision" and that despite "numerous reminders on the importance of reporting, his pattern of inconsistent reporting has continued throughout his order". The report concluded that he had "maintained twice weekly reporting throughout the order, albeit often in an erratic pattern." The report also noted that his "performance on community service has also been unsatisfactory and again he has demonstrated a pattern of not fulfilling his work instruction to work one day per week". In summary the report stated that "[o]verall his performance to date has only just been satisfactory. He has been warned on numerous occasions to improve his compliance." In consequence the conclusion was reached by the Officer that the applicant is "unsuitable for further community service or intensive corrections [sic] orders". However, as counsel for the applicant pointed out, the applicant has not been charged with any breach of the order.

[15] Ultimately, what is of critical importance to the outcome of the application is the fact that the applicant was released on bail on 8 March, that is after serving 6 days imprisonment pursuant to the sentence imposed. He has now been at large for a little over a week, and if the application was refused he would be returned to prison to serve approximately 15 weeks.

[16] As already noted he is still a young man, and there is a natural reluctance to require such a person to serve relatively short periods of imprisonment spanning a period of freedom. The applicant has now experienced what imprisonment involves, and he is no doubt aware that future criminal conduct will result in his being required to serve more periods in jail.

[17] Counsel for the applicant submitted that an order suspending the period of imprisonment after the 6 days served would ensure that the applicant's non-offending behaviour whilst on an Intensive Correction Order would continue. It was also submitted that suspension would reflect the applicant's youth and the fact that the offence pre-dated the making of the Intensive Correction Order. There was some three months of that order still to be served.

[18] Counsel for the applicant submitted that the applicant did not require lengthy supervision pursuant to a probation order. There is no suggestion that he has a problem with either alcohol or drugs.

[19] Because the sentencing judge queried why the applicant had not been breached for failing to comply with the Intensive Correction Order, his counsel submitted in this Court that the sentencing discretion miscarried as the sentencing judge regarded the Intensive Correction Order as effectively breached when it had not been. On a reading of the sentencing remarks it appears there is no foundation for that contention. The judge merely observed that "performance on the community based order was unsatisfactory" and that was clearly made out by the material placed before him.

[20] Counsel for the respondent emphasised the need for general deterrence given the applicant's offending history and poor performance on the community based order.

[21] A perusal of a schedule containing sentences for the offence of wilful damage indicates a wide range reflective of the seriousness of the damage actually caused and the circumstances in which it was caused. Youthful first offenders have been given community based orders and periods of imprisonment from three months to two years have been imposed where offenders had a criminal history and the damage caused was considerable.

[22] Before the sentencing judge, both sides made a submission supporting the making of an order for compensation. The submissions were rather vague, and there was some suggestion that the applicant's father would assist him in making the necessary payments. Without indicating any specific reason for so doing, the sentencing judge declined to make an order for compensation. At the time of sentence the court was not told what the applicant was earning. Before this court counsel for the applicant intimated that his earnings were in the order of $400 per week.

[23] It was submitted in this Court that an order for compensation should be made pursuant to s 35 of the *Penalties and Sentences Act* 1992 (Qld) if this Court saw fit to alter the sentence imposed at first instance. Ultimately counsel for the applicant submitted that any order for compensation should require payment of the sum of $5,913 within 12 months and in default three months imprisonment.

[24] Arguably the sentence imposed was within the appropriate range, but the matters previously referred to (particularly the age of the applicant and the fact he has not previously been imprisoned) support the conclusion that the sentence was in fact manifestly excessive and that the applicant can more appropriately be dealt with by imposing a sentence of four months imprisonment, suspended after the six days already served, with an operational period of one year, and making an order that he pay compensation in the sum of $5,913 within 12 months in default three months imprisonment.

[25] The orders of the court should therefore be:

(i) grant leave to appeal against sentence and allow the appeal;

(ii) set aside the sentence imposed on 2 March 2006 and in lieu thereof record a conviction and sentence the applicant to four months imprisonment suspended after the six days served between 2 March and 8 March 2006 with an operational period of one year; and

(iii) order that the applicant pay compensation in the sum of $5,913 to the Deputy Sheriff, District Court Brisbane within 12 months for transmission to the complainant, whose name and address have been supplied to the Deputy Sheriff. In default of payment 3 months imprisonment.

[26] **FRYBERG J**: The circumstances giving rise to this application are set out in the reasons for judgment of Williams JA.

[27] The applicant submitted that the sentencing discretion miscarried because the judge regarded the intensive correction order imposed on 16 June 2005 as having been breached when in fact it had not been breached. I agree with what has been said by Williams JA on this topic.[1] Moreover, if the judge did regard the order as having been breached, his Honour was correct. The order was breached. That proposition remained true, even if no corrective services officer (it seems there were several who were supervising Mr Casiotis) saw fit to initiate proceedings against him for the breaches.

[28] In this Court the applicant renewed his offer to pay compensation for all of the damage which he did to the car. The submission made on his behalf suggested a real prospect that with the aid of his father, he would be able to pay the compensation. His submission gained added credibility from his willingness to accept a period of imprisonment for three months in the event of default in payment. Such imprisonment would not affect the suspended sentence of four months imprisonment which the applicant submitted should be imposed for the offence. Courts may make an order for imprisonment in default of payment of compensation under s 182A of the *Penalties and Sentences Act* 1992 (Qld) (see the definition of "penalty" in s 4).

[29] It is evident that the sentencing judge was concerned about the position regarding compensation. However no definite proposal for payment was put before him and his attention was not drawn to the possibility of imposing imprisonment in default. His Honour referred to the tension between allowing compensation on the one hand and the need for deterrence on the other. He observed that when compensation is part of a sentence, "allowance is clearly made [in other parts of the sentence] therefor". I am satisfied that had his Honour had the benefit of the submissions placed before us, he would probably have made an order for compensation, and consequently, would not have ordered any actual imprisonment. It is true, as his Honour observed, that a probation order would give the applicant the benefit and guidance of an experienced professional; but the weight of that factor is less in relation to one who will have to complete a 12 month intensive correction order.

[30] Strictly speaking it may be that in these circumstances there ought to be an application to his Honour to reopen the sentence under s 188 of the Act. However the order which, for other reasons, my colleagues propose in the present application

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1 Paragraph [19].

accords with that which I consider his Honour would make on an application under s 188. I therefore see no point in dissenting from it. It is the order we should make.