

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Serbanoiu* [2007] QCA 257

PARTIES: **R**  
**v**  
**SERBANOIU, Ionut Adrian**  
(applicant/appellant)

FILE NO/S: CA No 95 of 2007  
SC No 1071 of 2006  
SC No 204 of 2007  
SC No 218 of 2007  
SC No 219 of 2007

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 August 2007

DELIVERED AT: Brisbane

HEARING DATE: 3 August 2007

JUDGES: Williams and Jerrard JJA and Mackenzie J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Grant leave to appeal against sentence**  
**2. Allow the appeal only to the extent of setting aside the sentence imposed with respect to the offence of driving without a licence on 20 October 2006, and in lieu thereof ordering that the applicant be imprisoned for a period of three months to be served concurrently with the period of imprisonment ordered with respect to the offences of driving whilst disqualified on 4 April 2006 and 18 July 2006.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant pleaded guilty to various drug related charges, stealing and traffic offences – where the commission of these offences constituted a breach of a suspended sentence previously imposed – where learned sentencing judge activated the whole of the unserved period, being four months imprisonment, with respect to the breach –

where applicant further sentenced to two and a half years imprisonment for the drug offences with those sentences to be served concurrently, but cumulative on the four months imprisonment – where applicant further sentenced to 15 months imprisonment for each of three traffic offences to be served concurrently, but cumulatively on the four months and two and a half years already imposed – where combination of cumulative sentences resulted in an overall head sentence of four years and one month – where applicant disqualified from driving for a period of 4 years – where cooperation with the administration of justice and familial support taken into account in the setting of a parole release date – whether overall penalty imposed was manifestly excessive taking into account the totality principle

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where sentence of 15 months imprisonment imposed on each of three counts of driving without a licence – where two of those counts were charged with a circumstance of aggravation, namely driving whilst disqualified – where the other count was not charged with the circumstance of aggravation, although this circumstance was present at the time of the offence – where maximum penalty for unlicensed driving without a circumstance of aggravation is 12 months imprisonment – where applicant had a six page traffic history – whether sentence with respect to driving without a licence where the circumstance of aggravation was not charged was manifestly excessive

*Transport Operations (Road Use Management) Act 1995* (Qld), s 78

*R v de Carteret* [2006] QCA 279; CA No 114 of 2006, 4 August 2006, cited

*R v Eaton* [2007] QCA 43; CA No 317 of 2006, 16 February 2007, cited

*R v Michalas* [2007] QCA 38; CA No 349 of 2006, 13 February 2007, cited

COUNSEL: J D Briggs for the applicant  
T A Fuller for the respondent

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

[1] **WILLIAMS JA:** On 20 and 22 March 2007 the applicant pleaded guilty to numerous charges involving a variety of offences. On 22 March 2007 he was effectively sentenced overall to imprisonment for four years and one month with a

declaration he had spent 154 days in pre-sentence custody. On 30 March 2007 the sentencing judge amended his order with respect to parole, and on that date fixed the parole eligibility date as 21 February 2008. He lodged an application shortly out of time on 23 April 2007 for leave to appeal against sentence on the ground the sentence was manifestly excessive. On 30 May 2007 this Court extended the time for lodging the application for leave to appeal against sentence to the date on which the application was in fact filed.

[2] The following are particulars of the offences to which the applicant pleaded guilty:

**1. Indictment 1071/06**

- (i) On 17/2/2006 possess Schedule 2 dangerous drug (MDMA) with a circumstance of aggravation. The applicant was found with six cipseal bags each containing five pills; analysis revealed each pill contained 25 per cent MDMA. The applicant admitted he intended to sell the pills for \$35 each and then pay his supplier \$25 for each pill. He did not identify the supplier to police.
- (ii) On 17/2/2006 possess property used in the commission of a crime. This related to two mobile phones found on the applicant containing text messages relating to the supply of MDMA to his friends.

**2. Summary Matter**

- (i) On 17/2/2006 possess property (a glass pipe) used in the commission of a crime (used to smoke methylamphetamine).

**3. Ex-officio Indictment 218/07**

- (i) Possess dangerous drug (MDMA) on 20/10/2006. Amongst items found in the motor vehicle being driven by the applicant was a cipseal bag containing 10 tablets; on analysis those tablets were found to contain 0.851 grams of MDMA in a total sample of 3.532 grams.
- (ii) On 20/10/2006 possess dangerous drug (methylamphetamine). Various items seized from the applicant's motor vehicle on analysis showed traces of methylamphetamine.

**4. Summary Matters**

- (i) On 20/10/2006 possess property suspected of being used in the commission of a drug offence. This related to possession of a mobile telephone containing text messages relating to drugs.
- (ii) On 20/10/2006 possess property suspected of being used in the commission of a drug offence. This related to electric scales located in the applicant's motor vehicle.
- (iii) On 20/10/2006 possess property suspected of being used in the commission of a drug offence. This charge related to another set of electronic scales found in the applicant's motor vehicle.
- (iv) On 20/10/2006 possess property suspected of being used in the commission of a drug offence. This related to the applicant's possession of a glass pipe found in his motor vehicle.

- (v) On 20/10/2006 failed to take reasonable care and precautions in respect of a syringe. This related to a used needle found in a blackened gray cd case in the applicant's motor vehicle.
- (vi) On 20/10/2006 driving without a licence. The applicant was charged with being an unlicensed driver when he was intercepted by police driving a red Nissan Skyline registration 083 IJA.
- (vii) On 20/10/2006 contravened directional requirement of police. This related to the fact that when directed by police to state his name and address he provided incorrect details.
- (viii) On 20/10/2006 possess a dangerous drug (methylamphetamine). When taken to the watch house police found a clipseal bag in the applicant's wallet which he admitted contained "speed".

**5. Ex-officio Indictment 219/07**

- (i) Between 31/7/05 and 1/1/06 he stole blank prescription forms the property of his employer.
- (ii) Between 31/7/05 and 1/1/06 he stole six boxes of prescription medication tablets and other medical drugs the property of his employer.
- (iii) Between 31/7/05 and 1/1/06 he stole blank prescription forms the property of his employer.
- (iv) Between 31/7/05 and 1/1/06 he stole prescription forms the property of his employer.
- (v) Between 31/7/05 and 1/1/06 he stole blank prescription forms the property of his employer.
- (vi) Between 31/7/05 and 1/1/06 he stole a self-inking stamp the property of his employer.

**6. Summary Matters**

- (i) On 21/2/06 possess dangerous drug (methylamphetamine) for his own use.
- (ii) On 21/2/06 possess dangerous drug (opium) which was for his own use.
- (iii) On 21/2/06 possess utensils (two glass pipes) used for smoking methylamphetamine.
- (iv) On 21/2/06 unlawful possession of restricted drugs. This related to medical drugs stolen from his employer.
- (v) Disobeying the speed limit on 4/4/06. He was recorded travelling at 84 kph in a 60 kilometre zone.
- (vi) On 4/4/06 driving without a licence whilst disqualified by the court.
- (vii) On 7/4/06 possess utensils (glass pipe) used to smoke drugs.
- (viii) On 18/7/2006 driving without a licence whilst disqualified by the court.

[3] The appellant had an appalling traffic record, some details of which will be referred to later. That litany of traffic offences culminated in his being dealt with in the Beenleigh Magistrates Court on 9 December 2005 for a number of serious traffic offences, including disqualified driving on 6 November 2005. He was then sentenced to four months imprisonment wholly suspended for a period of two years and he was disqualified from driving for a period of three years. The commission of

the offences outlined above constituted a breach of that suspended sentence and he was also dealt with for that breach.

- [4] With respect to the breach of suspended sentence the sentencing judge activated the whole of the unserved period, that is the applicant was required to serve four months imprisonment.
- [5] On each of the two drug offences on indictments 1071/06 and 218/07 the applicant was convicted and sentenced to imprisonment for two and a half years, those sentences being concurrent with each other but cumulative on the four months suspended sentence.
- [6] On the two counts of dangerous driving and one count of unlicensed driving the applicant was sentenced to 15 months imprisonment on each offence, such sentences to be served concurrently but cumulatively upon the four months for the breach of suspended sentence and the two and a half years for the drug offences.
- [7] The combination of the four months, two and a half years, and 15 months gives the overall head sentence of four years one month.
- [8] With respect to the six stealing counts on indictment 219/07 and the other summary offences convictions were recorded but no further penalty was imposed.
- [9] At the end of the sentence the judge merely said he disqualified the applicant "from holding or obtaining a driver's licence for four years". Such a disqualification was within range where s 78(3)(a) of the *Transport Operations (Road Use Management) Act 1995* (Qld) ("the Act") applied.
- [10] The applicant was born on 17 June 1980 making him aged 25-26 at the time the offences were committed and 26 at the time of sentence. He had been dealt with in the Magistrates Court for some minor offences prior to committing the offences in question, but had a six page traffic history. That history included at least the following: 13 speeding counts, one count of driving without due care, 10 offences of breaching a provision in relation to his driver's licence, his licence was suspended on three occasions for reaching the requisite number of demerit points, and he was on five occasions convicted of driving whilst disqualified. On 2 September 2005 he was disqualified by the Magistrates Court from driving for six months upon a conviction for unlicensed driving on 17 August 2005. It was on the fourth conviction for driving whilst disqualified between 24 September 2005 and 6 November 2005 that he was sentenced on 9 December 2005 to four month's imprisonment wholly suspended and he was disqualified from driving for a period of three years. Yet again he was convicted on 19 December 2005 for driving whilst disqualified on 2 December 2005; on that occasion he was fined \$1,000 and disqualified from driving for two years.
- [11] The sentencing judge acted on the basis that the applicant had possession of relatively small quantities of dangerous drugs for commercial purposes. He was not operating a profit-earning business but was selling to his friends. The applicant did make admissions at an early stage to police, and he co-operated with the administration of justice by entering early pleas.
- [12] It was noted that the offending was persistent over a 15 month period. The majority of the offences occurred whilst the applicant was subject to the four month

suspended sentence, and the majority of offences occurred whilst he was on bail after initial arrest on 17 February 2006. That arrest did not cause him to refrain from his drug-related activities. Messages on his mobile phones indicated the extent of drug dealing after February 2006.

- [13] The sentencing judge accepted that the applicant had a good work history and had the support of his family.
- [14] The applicant continued to drive motor vehicles even after being disqualified. On some occasions he asserted he was using the car to drive to work but that was not a mitigating circumstance. The sentencing judge made the observation that the applicant was lucky not to have been imprisoned previously for driving whilst disqualified.
- [15] The learned sentencing judge took into account prospects of rehabilitation and co-operation in the administration of justice in setting an early parole date.
- [16] The applicant had been employed as a cleaner at a medical practice and through that employment was able to steal drugs and drug prescription forms from those premises. He was dealt with leniently in relation to those serious offences because no additional penalty was imposed.
- [17] Perhaps the most significant aggravating factor was that the course of conduct only ended with his eventual incarceration.
- [18] In attacking the sentence counsel for the applicant relied primarily on the "totality principle" and on the fact that the sentence of 15 months imprisonment for each of the driving offences was excessive considering that the statutory maximum was 18 months imprisonment (s 78(1)(a) of the Act).
- [19] With respect to the drug offences for which the applicant was sentenced to two and a half years imprisonment counsel for the respondent referred to the decisions of this Court in *R v de Carteret* [2006] QCA 279, *R v Eaton* [2007] QCA 43 and *R v Michalas* [2007] QCA 38. In my view each of those decisions supports a sentence of two and a half years imprisonment for the drug offences in this case.
- [20] Given that the drug offences were committed during the period of the suspended sentence it was appropriate for the penalty on the drug offences to be made cumulative on the activated suspended sentence.
- [21] That leaves for consideration the sentence for the traffic offences.
- [22] Given the total disregard for traffic laws displayed by the applicant, and the fact that he continued driving after his licence was disqualified by a court and he was given a suspended sentence for such an offence, a significant sentence of imprisonment was called for. There were at least eight driving offences committed whilst he was disqualified from holding a licence. A number of the offences were committed within a short period of each other. For example the disqualified driving offences prior to the offences now under consideration occurred on 24 September 2005, 1 October 2005, 4 October 2005, 6 November 2005, and 2 December 2005. Those offences demonstrate a flagrant disregard for the law and it could not be said that for a further two offences of driving whilst disqualified in a period of about seven

months after he was given a wholly suspended sentence, a sentence towards the top of the range for that offence was not called for.

- [23] The offence of driving without a licence on 20/10/2006 (item 4(vi) above) was not charged with the circumstance of aggravation that at the time his licence had been disqualified by a court. But that was in fact the case; as previously noted his licence had been disqualified in the Beenleigh Magistrates Court for a period of three years from 9 December 2005. Because that circumstance of aggravation was not formally charged s 78(1)(a) and s 78(3)(a) of the Act did not apply; in consequence it was not appropriate to impose a sentence of 15 months imprisonment and a four year disqualification with respect to that offence. That sentence and disqualification was clearly available with respect to the charges of driving whilst disqualified; items 6(vi) and (viii) above. The sentence and disqualification for the unlicensed driving (Item 4 (vi) above) must be set aside and he must be re-sentenced for that offence by this Court.
- [24] Subject to that consideration, given the overall criminality of the offences to which the applicant pleaded guilty, and in the circumstances discussed above, I have come to the conclusion the overall penalty imposed was not manifestly excessive.
- [25] Section 78(1)(b) of the Act provides a maximum penalty of one year's imprisonment for the offence of unlicensed driving without the circumstance of aggravation referred to above. In the circumstances it would be appropriate to order that for the offence in question the applicant be sentenced to three months imprisonment to be served concurrently with the sentence of 15 months for the offences of dangerous driving with a circumstance of aggravation. Because the applicant has been disqualified from holding or obtaining a drivers licence for a period of four years it is not necessary to impose a period of disqualification with respect to this offence.
- [26] In consequence the following orders should be made:
1. Grant leave to appeal against sentence;
  2. Allow the appeal only to the extent of setting aside the sentence imposed with respect to the offence of driving without a licence on 20 October 2006, and in lieu thereof ordering that the applicant be imprisoned for a period of three months to be served concurrently with the period of imprisonment ordered with respect to the offences of driving whilst disqualified on 4 April 2006 and 18 July 2006.
- [27] **JERRARD JA:** I agree with the reasons and orders proposed by Williams JA.
- [28] **MACKENZIE J:** I agree with the reasons of Williams JA and the orders proposed by him.