SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dawson* [2007] QCA 343
PARTIES:	**R** **v** **DAWSON, Mark Anthony** (applicant/appellant)
FILE NO/S:	CA No 173 of 2007 DC No 293 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	16 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2007
JUDGES:	McMurdo P Dutney and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Leave to appeal granted** **2. Appeal allowed** **3. The sentence imposed below is set aside and substituted with a head sentence of four and a half years imprisonment** **4. The new sentence is suspended after 18 months imprisonment served for an operational period of 5 years** **5. The declaration as to time served is maintained** **6. The applicant's release date is 12 December 2007**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – where the applicant was convicted on one count of break, enter and steal, one count of fraud, thirteen counts of burglary and stealing, one count of burglary, one count of attempted burglary, one count of attempted burglary by breaking and one count of burglary in the night and sentenced to a head sentence of six years imprisonment – where parole date fixed at 12 April 2008 – where value of property stolen was unspecified and did not effect sentence – whether the sentence was manifestly excessive *R v Faramus* [1999] QCA 167; CA No 30 of 1999, 11 May

1999, distinguished
R v Bryant [2007] QCA 247; CA No 77 of 2007, 3 August 2007, applied

R v Anderson [1995] QCA 100; CA No 11 of 1995, 14 March 1995, distinguished

COUNSEL:	T Moynihan S C for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: Justice Dutney will deliver his reasons first.

DUTNEY J: On 4 July 2007 the applicant pleaded guilty to a total of 19 charges. One count of break, enter and steal and one count of fraud were committed on 16 September 1998. The remaining charges related to the period between 5 May 2006 and 9 June 2006 and comprised 13 counts of burglary and stealing, one count of burglary, one count of attempted burglary, one count of attempted burglary by breaking and one count of burglary in the night. The applicant was sentenced to an effective period of six years' imprisonment with a parole eligibility date fixed at 12 April 2008. If released on the parole eligibility date the applicant will have served a total of 22 months' imprisonment after taking into account 387 days spent on remand for these offences.

The applicant was born on 26 November 1964 and is 42 years of age. The 1998 offences involved entering the Eagle Junction State School by breaking a classroom window and stealing a television and video recorder. These were sold

to the Fortitude Valley Cash Converters for $210. The earliest of the 2006 offences involved entering a private residence by breaking a window and stealing an unspecified sum of money. The applicant returned the next day and forced open a different window. This time he stole a mobile phone, a camera and a set top box. These were sold on the street for $150 to a person who subsequently informed the police. Apart from the money the property was recovered.

Between 2 June and 9 June 2006 the applicant broke and entered 10 dwellings and a locked storage facility at an underground car park. The property stolen was the usual electronic equipment, cash, mobile phones and other readily disposable items. The value of this property was unspecified but it seems to have been conceded that it was insufficient to justify quantification for the purpose of influencing the sentence.

The last of the 2006 offences involved entering a home unit while the female occupant was inside. The complainant heard the back door open and confronted the applicant as he came up the stairs. She demanded he leave and struck him with her walking stick. The applicant was apprehended on the ground outside where, as a result of his intoxicated condition, he had fallen from a tree in which he attempted to hide. This was obviously a serious offence involving entry into an occupied residence late at night. No victim impact statements were tendered at the sentence.

The applicant has a bad criminal history dating back to 1982. The applicant had spent many short periods in prison in New South Wales with the longest being 12 months. He also had the benefit of probation on more than one occasion. Most of his previous offences were for similar matters to the ones for which he is now serving his sentence. The applicant had abused alcohol or drugs for most of his adult life. At the time of the commission of the 2006 offences the applicant was addicted to methylamphetamine. The applicant was not on bail at the time of the commission of any of the subject offences.

The prosecutor sought a head sentence of six years' imprisonment based primarily on a decision of this Court in R v. Faramus COA No 30 of 1999. Faramus admitted in his interview with the police to committing 14 offences of dishonesty. He was charged and granted bail. While on bail he committed a further offence of breaking and entering. The value of the property stolen was not disclosed but about $24,000 worth of property was not recovered. Faramus was 38 and his previous record was similar to the present applicant's save that he had received a sentence of nine years' imprisonment for armed robbery. Faramus was sentenced to six years' imprisonment which was not disturbed on appeal.

The applicant's counsel below submitted for a head sentence of five years' imprisonment suspended after the 387 days time served to the date of sentencing. A reference from a

prison chaplain suggested rehabilitation was not entirely out of the question. In mitigation the sentencing Judge took into account that the applicant had pleaded guilty to an ex officio indictment, that he had cooperated with the police to the extent that a number of the charges were added following admissions made to the police and for which there was no other evidence and that the more recent offences were committed after the applicant was dismissed from his employment following his employer's discovery that he suffered from back pain.

Subsequent to the applicant being sentenced, in R v. Bryant (2007) QCA 247 Jerrard JA with whom the other members of the Court agreed reviewed the authorities relating to this type of offence. At paragraph 11 Justice Jerrard said:

> "Mr Moynihan SC referred to the decisions in R v. Eastern (2002) QCA 110, R v. Carvanoets (2003) QCA 543, R v. Lennon (2005) QCA 10, R v. Muscatt (2005) QCA 129 and R v. Weston (2005) QCA 176 for the submission that the range of available penalty increases to three to five years' imprisonment in cases where there is in excess of 20 offences with a loss of property exceeding $20,000. Those particular decisions generally support sentences in the order of four to four and a half years' imprisonment with a significant degree of suspension before the midpoint of that sentence for offenders with prior criminal histories engaged in recidivist theft causing loss in the order suggested by Mr Moynihan SC. On the basis of Bryant Mr Moynihan submits that a head sentence of four years should be substituted for the sentence imposed below. This submission is made notwithstanding the submission made by defence counsel below."

In ultimately fixing on a head sentence of four years in Bryant Justice Jerrard added at paragraphs 16 and 17:

> "That second set of cases to which Mr Moynihan referred revealed the importance of the total value of what is stolen as well as the impact that a prior criminal history has upon the choice between, on the one hand, a sentence intended to effect a strong personal deterrent or, on the other, a sentence intended to encourage and assist in rehabilitation. Mr Bryant's long history of repeated offending against property provides no support for the latter variety of sentence in his case and support for a sentence which will act as both a general and personal deterrent to him. But there remains the question of the appropriate head sentence. Five years is well beyond the head sentence imposed where a recidivist offender took property valued in all at less than $7,000.":

Having regard to the concession made below, there appears to be no reason to assume that the value of the property here was materially greater than the value of the property in Bryant.

Having regard to the recent discussion of these matters in this Court I am of the view that a head sentence of six years exceeds the range identified by a sufficient margin to justify the interference of this Court.

Faramus is distinguishable on the basis of the greater value of the property stolen, his more serious previous offending - notably the conviction for armed robbery - and the longer sentence he'd previously received. Faramus also committed the further offence while on bail. R v. Anderson, COA No 11 of 1995, another case relied on by the respondent, where five years was upheld, involved quite different facts.

I would grant leave to appeal, allow the appeal and vary the sentence imposed below by substituting a head sentence of

four and a half years' imprisonment. To reflect the factors in mitigation I would order that the sentence be suspended after the applicant has served a total of 18 months for an operational period of five years. On my calculations that would now make the applicant's release date 12 December 2007.

THE PRESIDENT: I agree.

DOUGLAS J: I agree.

THE PRESIDENT: The orders are as proposed by Justice Dutney.
