# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Burrows* [2008] QCA 378 |
| PARTIES: | **R**<br>**v**<br>**BURROWS, Peter Charles**<br>(applicant) |
| FILE NO/S: | CA No 248 of 2008<br>DC No 2409 of 2008 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED EX TEMPORE ON: | 1 December 2008 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 December 2008 |
| JUDGES: | Keane, Muir and Fraser JJA<br>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 – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant appeals against a sentence of eight years imprisonment imposed after a plea of guilty to armed robbery – where the applicant was sentenced at the same time after pleading guilty to a number of other offences – where the applicant has an extensive criminal history, including a sentence of thirteen years imprisonment for armed robbery – whether the primary judge took into account the applicant's guilty plea pursuant to s 13 *Penalties and Sentences Act* 1992 (Qld) – whether the sentence imposed was manifestly excessive<br><br>*Penalties and Sentences Act* 1992 (Qld), s 13<br><br>*R v Bradford* [1997] QCA 391, considered<br>*R v Brown* [2000] QCA 402, considered<br>*R v Lund* [2000] QCA 85, considered |

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| COUNSEL: | S M Ryan for the applicant<br>M J Copley SC for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

**MUIR JA:** The applicant seeks leave to appeal against a sentence of eight years imprisonment imposed in the District Court on 17 September 2008 after a plea of guilty to a count of armed robbery. He was sentenced at the same time for a number of other offences to which he also pleaded guilty. Two of the offences, deprivation of liberty and assault, were on the same indictment and were committed at the time of the robbery.

The applicant, wearing a balaclava and holding a kitchen knife, encountered a woman leaving a pharmacy with her three year old child. He threatened her verbally and with the knife and forced her back into the shop. He then, whilst continuing to brandish his knife, demanded that a pharmacy assistant provide him with drugs. He chased her around the counter and another pharmacy assistant intervened. The first-mentioned assistant obtained a quantity of drugs and gave them to the applicant. The applicant also demanded cash and was provided with $1,205 in notes.

He then ran off but was quickly apprehended by police. He cooperated with police and the money and drugs were recovered. Not unexpectedly, the applicant's victims, all women, were badly affected by their frightening experience and have had lasting adverse psychological effects.

The applicant, who was 44 at the time of this offence, had an extensive criminal history. He was first imprisoned in 1981 when 18 years of age for offences of dishonesty and breach of probation. In April 1986 he was sentenced to 10 years imprisonment for armed robbery. A concurrent term of eight years imprisonment was imposed for another five armed robberies and further shorter terms were imposed for five counts of aggravated and unlawful use of a motor vehicle.

In 1992 he was sentenced to 13 years imprisonment for armed robbery and to three concurrent shorter terms of imprisonment for aggravated unlawful use of a motor vehicle as well as for offences of wilful damage and assault. The first of the offences for which the applicant was sentenced on 17 September 2008 was committed within three months of the completion of his 13 year sentence in February 2006.

One of the offences for which the applicant was sentenced on 17 September 2008 was a common assault committed on a 62 year old man in a restaurant. The applicant had directed a vulgar comment at a woman dining with the complainant and then, without warning struck the complainant with his open hand on the face before offering to fight him. Another of the offences, unlawful use of a motor vehicle, concerned a theft and partial burning of a motor vehicle.

The applicant seeks leave to appeal against his sentence on grounds that it was manifestly excessive and that the sentencing Judge erred in failing to comply with section 13 of the *Penalties and Sentences Act* 1992 (Qld). Where an offender has pleaded guilty to an offence, the sentencing Court must take the plea of guilty into account and may reduce the sentence it would have imposed had the offender not pleaded guilty. (Section 13 subsection 1).

"When imposing the sentence the Court must state in open Court that it took account of the guilty plea in determining the sentence imposed." (Subsection 3). Where the Court does not reduce the sentence imposed after a guilty plea it must state that fact in open Court and provide its reasons for not reducing the sentence. (Subsection 4).

In the course of his sentencing remarks the sentencing Judge mentioned the prosecution's submission that the sentence should be from seven to nine years and defence counsel's submission that the sentencing range was six to eight years. The sentencing remarks also

record a submission by defence counsel that because of the applicant's cooperation, pleas and other circumstances, the sentence should be as low as four years eight months.

After discussing a number of relevant considerations the sentencing Judge said, "I do not overlook your cooperation and your timely pleas. Mr Lewis - (that is the defence counsel) - "was right to emphasis those matters, but I cannot go so far as to agree with him in sentencing you the way he proposes." After the sentencing Judge concluded his sentencing remarks, defence counsel asked him what benefit the applicant had been given for his plea.

The sentencing Judge responded that he had given his remarks and that he didn't think it was appropriate for him to answer such questions. Upon being pressed by defence counsel to state what allowance had been made for the plea of guilty he said, "Well, I take it that the eight years sentence is a degree of leniency in all the circumstances."

This exchange, which is relied on by the applicant's counsel to show that the sentencing Judge failed to reduce the sentence below that which would have been imposed had there been no guilty plea, shows little, if anything, more than that the primary Judge was unsettled by defence counsel's inappropriate conduct to the extent that instead of delivering a deserved rebuke, he was drawn into making a response. That response was not inconsistent with his Honour's statement in his sentencing remarks that the timely pleas of guilty had not been overlooked. He had earlier acknowledged the applicant's guilty pleas.

It does not appear, therefore, that there was any failure to take the guilty plea into account as required by s 13(1). The requirements of s 13(3) were met. There was no need to make a statement under s 13(4) as it would seem that the sentence imposed was less than that which would have been imposed but for the guilty plea.

In support of the contention that the sentence was manifestly excessive, particular reliance was placed by the applicant's counsel on *R v Lund* [2000] QCA 85, and *R v Brown* [2000] QCA 402. The applicant in *Lund*, in company with an accomplice who was armed with scissors menaced two women in a fish shop, obtaining $1,166 and was sentenced to six years imprisonment after pleading guilty. That sentence was undisturbed on appeal, but a serious violent offence declaration was set aside.

The applicant was 32 years of age at the time of sentencing and had a substantial criminal history, including seven offences of assault and robbery with an offensive weapon, and an offence of conspiracy to rob while being armed. These offences were committed when the applicant was 19 and he was sentenced for them in 1988. The offender in *Lund* was younger than the applicant and not as persistent in his offending.

The applicant in *Brown* was refused leave to appeal against a sentence of six years imprisonment imposed for armed robbery with personal violence. Armed with a plastic toy gun and disguised, he demanded money from employees in a post office. He opened a till and its drawer fell on the floor spilling its contents. When the applicant attempted to pick up the money, one of the employees grappled with him and he fled empty-handed.

The applicant was 39 at the time of the offence and had a substantial criminal history. It was accepted that he had committed only one minor offence in the 10 years prior to the offence in question. His purpose in committing the offence was to help finance his grandmother's accommodation in a nursing home. Neither of these cases offers much support for the contention that the applicant's sentence was manifestly excessive.

Counsel for the respondent referred to *R v Bradford* [1997] QCA 391 in which leave to appeal against a sentence of eight years imposed on a plea of guilty for armed robbery in company with violence was refused. The applicant, who had a prior conviction for stealing with actual violence whilst armed with an offensive weapon and a conviction for

assault occasioning bodily harm, entered a service station with a juvenile co-accused wearing balaclavas and armed with machetes.

They demanded that the console operator hand over money and threatened to kill him. The console operator was struck twice with the blunt end of a machete and the miscreants left taking with them a small amount of money and some cigarettes. That offence was accompanied by actual violence and was committed in company, but that applicant's criminal history was not nearly as extensive as the applicant's here.

Of relevance also is the sentence of 13 years for armed robbery imposed on the applicant. An application for special leave to appeal against it was refused in April 1993. In that robbery the disguised applicant entered a bank carrying a loaded shotgun. He kicked a staff member, pointed the gun at the head of another and used a stolen car to facilitate his escape from the bank, taking with him $11,600 which was subsequently recovered. Justice de Jersey, as his Honour then was, with whose reasons the other members of the Court agreed, took into account the applicant's "appalling past criminal history, including in comparatively recent years a conviction for robbery which had itself attracted a long term of imprisonment."

Where an offender such as the applicant has manifested by his offence a continuing attitude of disobedience to the law or "shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and others from committing further offences of a like kind", (*Veen v The Queen* (No 2) (1987) 164 CLR 465 at 477) a more severe penalty may be warranted. These considerations are relevant to the applicant's sentence. Having regard to them and to the other sentences discussed it has not been shown that the sentence was manifestly excessive.

I would dismiss the application for leave to appeal.

**KEANE JA:** I agree.

**FRASER JA:** I agree.

**KEANE JA:** The order of the Court is the application for leave to appeal is dismissed.

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