SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nolan* [2009] QCA 129
PARTIES:	**R** **v** **NOLAN, Luke Justin** (applicant)
FILE NO/S:	CA No 256 of 2008 DC No 146 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	22 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2009
JUDGES:	Fraser and Chesterman JJA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal and allow the appeal.** **2. Vary so much of the sentence in the District Court as imposed concurrent terms of imprisonment of five years for the three offences charged in the indictment by substituting concurrent terms of four years and three months imprisonment.** **3. The order activating the suspended term of imprisonment of 18 months is confirmed, but vary the order that the activated term of imprisonment be served concurrently with the five year terms by substituting an order that the activated term of imprisonment be served concurrently with the concurrent four years and three months terms of imprisonment.** **4. State that the applicant was held in pre-sentence custody for a period of 170 days between 23 April 2007 and 9 October 2007 in relation to proceedings for the offences and for no other reason, declare that no time is to be taken to be imprisonment already served under the sentence imposed in the District Court as varied by these orders, and direct that the Chief Executive (Corrective Services) be advised in writing of that declaration and its details.** **5. In all other respects, confirm the sentences and orders made in the District Court.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted by a jury of assault occasioning bodily harm in company, burglary and unlawful use of a motor vehicle – where applicant had an extensive criminal history and committed these offences on the day he was released from prison – where applicant sentenced to concurrent terms of five years imprisonment for each offence – where 18 month suspended sentence also activated and ordered to be served concurrently with five year terms – where 170 days in pre-sentence custody not declared to be time already served – whether four to five years imprisonment was within the range of sentences for the home invasion offences – whether the suspended sentence should have been ordered to be served cumulatively with the five year concurrent terms – whether sentence manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A(1), s 159A(3B)

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, applied
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Blenkinsop; R v Blenkinsop [2007] QCA 181, distinguished
R v Fleming [2009] QCA 112, considered
R v Frazer [1997] QCA 306, distinguished
R v Granato [2006] QCA 25, distinguished
R v Leu; R v Togia [2008] QCA 201, cited
R v Ramm [2008] QCA 13, considered

COUNSEL: C Heaton for the applicant
M B Lehane for the respondent

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

[1] **FRASER JA:** On 19 September 2008 after a five day trial the applicant was found guilty by a jury and convicted in the District Court of three offences committed on 7 February 2007, namely assault occasioning bodily harm in company, burglary, and unlawful use of a motor vehicle. He was sentenced to concurrent terms of five years imprisonment for each of those offences. An 18 month suspended sentence of imprisonment that had been imposed on 7 April 2006 for earlier offending was activated and ordered to be served concurrently with the five year terms. The judge took into account that the applicant had been in pre-sentence custody for almost six months (170 days), but her Honour did not declare that this was time served under the sentence. The applicant was disqualified from holding or obtaining a drivers licence for a period of five years. The applicant seeks leave to appeal against sentence on the ground that it was manifestly excessive.

Circumstances of the offences

[2] The applicant committed these offences on the day that he was released from prison after having served a term of imprisonment for unrelated offending. He and two other male co-offenders went to the complainant's house and gained entry by smashing open the locked front door. The applicant found the complainant and punched him in the face on a number of occasions. The complainant was left with facial bruising and a minimally displaced fracture of the left zygoma. The applicant and his co-offenders stole some jewellery and took the complainant's car. The applicant drove off in the car. He was disqualified from driving at the time.

[3] The car had been bought in 2004 or 2005 for about $13,000. The complainant owed the applicant's mother some money. According to the submissions made for the applicant his motive in these offences was to seek payment of that debt and he took the property as security for that purpose. It was not submitted that the applicant or his co-offenders told the complainant at the time that the property was only to be held as security. The stolen property was all recovered by police.

The applicant's personal circumstances

[4] The applicant was 21 years of age at the time of these offences and he was 23 years old when he was sentenced. Unfortunately he had a concerning criminal history for one so young.

[5] As a juvenile in Tasmania the applicant had been detained for offences including aggravated assault, aggravated burglary, stealing motor vehicles and unlawfully setting fire to a property. In February 2003 he was fined and no convictions were recorded for assaults occasioning bodily harm and for obstructing a police officer in late December 2002. In early March 2003 he was convicted and fined for breaches of his bail conditions in January 2003. In July 2003 he was given 18 months probation for some drug offences and for unlawful use of a motor vehicle. In September 2004 he was convicted and fined for a breach of that probation order and he was re-sentenced to a further 18 months probation.

[6] On 7 October 2004 he was convicted of offences of stealing and receiving stolen property committed in September and October 2003, that is, within two or three months after he had been given his first probation order. In extending the further leniency of another probation order, the sentencing judge on that occasion told the applicant that he had left himself open to a fairly substantial period in custody for the serious offences he had committed whilst he was on probation. Leniency was extended because the applicant was a young man who, his counsel had submitted, was making every effort to comply with the probation order.

[7] On 7 April 2006 the applicant was sentenced to a term of 18 months imprisonment, which was wholly suspended for a period of 18 months, for further offences he had committed in September and October 2003 (also after the first probation order). The applicant was convicted of the dangerous operation of a motor vehicle, five offences of breaking and entering premises and committing an indictable offence, and the unlawful use of a motor vehicle. In summary, the applicant and others broke into commercial premises and damaged and stole a great deal of property, resulting in the loss of some $49,700; and the applicant also stole a car and was involved in a police chase over a considerable distance through busy streets and residential areas, at an excessive speed and through red lights. The sentencing judge was persuaded to suspend the sentence to take into account the applicant's age (he

was only 18 when he committed these offences) and the facts that he had completed community service work under the two years probation with commendable speed and he had completed a substance abuse program. The judge emphasised that if the applicant breached his suspended sentence he would face a great deal of difficulty in the courts. It was this suspended sentence which the sentencing judge activated in this matter.

[8] The applicant also had a bad traffic record. It involved various offences of unlicensed driving, dangerous driving, and a variety of speeding infringements and the like. More significantly, on 8 December 2006 the applicant was sentenced to four months imprisonment, suspended after two months with an operational period of two years, for a disqualified driving offence. The applicant therefore breached two orders suspending sentences by committing the present offences. We were told from the Bar table that he has not been dealt with for the breach of the order imposing the second suspended sentence. The sentencing judge was not informed of the second breach but sentenced on the basis (submitted by the prosecutor without contradiction by defence counsel) that the applicant committed the present offences whilst on parole immediately upon his release from prison. In this Court the applicant's counsel did not object to the Court being informed of the correct position.

[9] After the applicant had committed these offences he was found guilty of breaching bail conditions on 26 March 2008, for which he was given 28 days imprisonment on 29 March 2008.

The sentencing remarks

[10] After the sentencing judge had referred to the relevant features of the offences and the applicant's personal circumstances and noted that there was no basis for not activating the whole of the 18 month suspended term in full, her Honour observed that the question was, "how do I impose a sentence that won't have a crushing effect on you given your age. It's accepted that a range of somewhere between four and five years is an appropriate head sentence for the burglary charge. Were I to impose that head sentence and fully activate the 18 month term, that would have you in custody for a very length[y] time. That is, if they were cumulative."

[11] The judge decided that the best way to reflect the six months the applicant had served in pre-sentence custody and to avoid a sentence which was "crushing in the circumstances" was to impose concurrent five year terms of imprisonment for the home invasion offences, to activate the 18 month suspended sentence, and to order that those sentences be served concurrently. The judge declined to fix any parole eligibility date, referring in that context to the statutory provisions concerning parole eligibility and to the fact that the applicant had not pleaded guilty.

The issues in this Court

[12] It was common ground in the submissions in this Court that the sentencing judge was mistaken in thinking that it was accepted by defence counsel that the range of between about four and five years mentioned in the prosecutor's submissions was appropriate for the home invasion offences. The transcript demonstrates that defence counsel contended that this was not in the same category of offences for which that range was appropriate.

[13] The applicant's counsel argued in this Court that the comparable decisions demonstrate that a sentence as severe as five years imprisonment for a home

invasion case is reserved for cases involving higher levels of violence, more serious injuries, or the use of weapons.

[14] The applicant's counsel also argued that the judge erred by failing to comply with s 159A of the *Penalties and Sentences Act* 1992 (Qld). The point was that, although the sentencing judge made plain her intention not to declare that the pre-sentence custody should be taken to be time served under the sentence, her Honour did not comply with the requirement in s 159A(3B) to state the dates between and the time during which the offender was held in pre-sentence custody and declare that no time was taken to be imprisonment already served under the sentence. Counsel for the applicant submitted that if the sentence was found to be otherwise appropriate, this Court should make the statement and declaration overlooked by the sentencing judge.

[15] The applicant contended that it would have been open to the sentencing judge to order that the activated suspended sentence be served cumulatively upon the other concurrent sentences, provided that the overall sentence was then moderated to avoid it being crushing. It was contended though that the starting point for the concurrent sentences should have been two to three years rather than four to five years so that, if the sentences were accumulated and the notional sentence then discounted under the "totality principle", that would have produced a term of three and a half to four and a half years. The applicant argued that if the Court adopted that view it should also make a declaration under s 159A(3) of the *Penalties and Sentences Act* 1992 (Qld) which gave the applicant credit for the time he had served in pre-sentence custody.

[16] The respondent's counsel argued that the overall sentence was not manifestly excessive. He submitted that the approach advocated for the applicant was unduly restrictive and that the concurrent five year terms imposed for the home invasion offences were within the range of sentences open to the judge, albeit towards the top end of that range. The respondent's counsel emphasised the applicant's lack of remorse, his appalling criminal history, and the aggravating features of the offences.

Discussion

[17] The central question raised by the arguments in this Court is whether the trial judge erred in concluding that the sentencing discretion extended to a term of five years imprisonment for the home invasion offences.

[18] As has often been observed, the courts must take a serious stand against home invasion offences, in respect of which there is a strong need for deterrence. The applicant committed the presently relevant offences ten months after the suspended term of 18 months imprisonment was imposed on 7 April 2006, only two months after the partially suspended sentence was imposed on 8 December 2006, and on the same day that he was released from prison after serving two months of the latter sentence. In light of those facts, the other entries on the applicant's criminal record, and the violence and planning involved in the home invasion offences, personal deterrence also assumed particular prominence in the exercise of the sentencing discretion. A condign sentence was necessary.

[19] Consistently with the aggravating circumstances of the home invasion offences, the sentencing judge imposed a sentence for those offences at the top of what her Honour considered to be an uncontentious sentencing range. (I will return to the central question whether the range extended so far.) The addition of the activated

18 month term produced a notional aggregate sentence of six and a half years (if, as otherwise might be thought appropriate, the sentences were made cumulative), but the sentencing judge moderated that notional sentence. Taking into account the declarable but undeclared pre-sentence custody, the practical effect of the sentence imposed is that the applicant is to be imprisoned for about five and a half years and he is entitled under s 184(2) of the *Corrective Services Act* 2006 (Qld) to apply for parole after he has served about three years of that period.

[20] The sentencing judge moderated the notional aggregate sentence in that way to avoid what otherwise would be a very lengthy sentence which her Honour thought would be "crushing" in light of the applicant's young age. That involved an application of the "totality principle" referred to in *Mill v The Queen* (1988) 166 CLR 59 at 62-63. The High Court there approved the following expression of the principle in D.A. Thomas, *Principles of Sentencing* (2nd ed, 1979), at 56-57:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong[']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

[21] The *Penalties and Sentences Act* 1992 (Qld) is consistent with that principle: see ss 9(2)(l), (m). Whether or not application of the totality principle should result in any reduction turns upon the sentencing judge's judgment whether the notional aggregate sentence reflects the overall culpability of the offender and is a just sentence. One case in which a reduction of a notional aggregate sentence may be made is where, as the sentencing judge concluded here, the sentence would otherwise be "crushing": see *Postiglione v The Queen* (1997) 189 CLR 295 per Dawson and Gaudron JJ at 304, per McHugh J at 307-308 and per Kirby J at 340-341.

[22] The sentencing judge's discounting of the notional aggregate sentence for this reason was substantial. The notional aggregate imprisonment was effectively reduced by some twelve months, if one offsets the nearly six months pre-sentence custody against the 18 month activated term. There was some debate during the hearing in this Court about that approach, but I have concluded that the Court should not find any error in it. It was not submitted for the respondent that the sentencing judge erred in applying the "totality principle", or in the manner and extent to which her Honour applied it, and the relevant authorities were not cited in this application. Rather, the burden of the respondent's submission was that a five year term for the home invasion offences was within the sentencing discretion. Further, as is the case in many aspects of sentencing, the application of the totality principle involves a discretionary judgment committed to the sentencing judge. In

that respect, the sentencing judge had the advantage, denied to this Court, of seeing and hearing the applicant during a lengthy trial and in the sentence hearing. The sentencing judge's view that some substantial allowance should be made in the application of the totality principle should be respected.

[23] One consequence of the sentencing judge's approach was that, taking pre-sentence custody into account, the applicant would not become eligible for parole until after he had served more than half of the concurrent terms of imprisonment. The effect of s 159A(1) of the *Penalties and Sentences Act* 1992 (Qld) is that time spent by an offender in pre-sentence custody must be taken to be imprisonment already served under the sentence unless the sentencing judge otherwise orders. The form of such an order is dealt with in s 159A(3B). The sentencing judge overlooked the requirements of ss 159A(1) and (3B) but it is clear that her Honour intended that the pre-sentence custody should not be taken to be time served under the sentence.

[24] In view of the applicant's record, the facts that he committed the offences on the very day he was released from jail and in defiance of the terms of his suspended sentences, and the effect of not making the five year terms cumulative upon the activated sentence, there was good reason for making the exceptional order under s 159A(3B) and for the sentencing judge's related decision to decline to specify a parole eligibility date. The technical error should be corrected by making the appropriate order under s 159A(3B).

[25] I return to the central question in issue in the application. The sentencing judge was plainly justified in imposing a severe sentence, but in my respectful opinion the overall sentence was rendered manifestly excessive by the sentencing judge's adoption of the concurrent five year terms. I would accept the thrust of the applicant's contention that these offences, whilst appalling in themselves, were not as bad as the offences discussed in the comparable decisions cited to this Court where a term of imprisonment as severe as five years imprisonment was imposed. For that proposition the applicant's counsel cited *R v Granato* [2006] QCA 25; *R v Frazer* [1997] QCA 306; *R v Ramm* [2008] QCA 13; and *R v Fleming* [2009] QCA 112.

[26] In *R v Granato*, this Court did not disturb a sentence of five years imprisonment with parole eligibility after 21 months. That 33 year old offender and his co-offenders mounted a planned and vicious attack with a baseball bat upon his sleeping victim, who suffered predictably severe injuries. Here the applicant was unarmed, the physical injuries inflicted on the complainant were much less severe than in *Granato*, and although the applicant took property of some value all of it was recovered.

[27] The sentence of four years imprisonment in *R v Ramm* was imposed upon a 25 year old offender who had a criminal record that was not as bad as this applicant's. That offender smashed his way into the complainant's home, attacked the complainant with the intention of raping her, and he desisted only after residents came to her aid after hearing her screams. The complainant was left with a fracture to her knee joint, which was painful and required surgery. In unrelated offending, he stole some tools and sold them. The Court held that the sentence was rendered manifestly excessive by the absence of any specification of a parole eligibility date, that being called for by that applicant's plea of guilty and his personal circumstances. There are no similar circumstances in this case, but it is of some relevance here that the Court also concluded that the term of four years was appropriate.

[28] *R v Fleming* concerned a youthful offender with a disturbing criminal history who, in breach of the terms of a probation order and whilst on bail, participated in an unpremeditated home invasion and assault on the occupier. He was re-sentenced by this Court to three years imprisonment, leaving intact the parole release order after he had served one year in custody. Whilst the decision is consistent with the applicant's submission, it is not possible to put it higher than that. That offender pleaded guilty and it was perhaps an objectively less serious case. The offending seems to have been largely spontaneous. On the other hand, that offender hit the complainant with a pole, although that seems also to have been spontaneous conduct and that complainant's injuries seem to have been less serious than those inflicted by this applicant.

[29] Counsel for the respondent relied particularly upon *R v Frazer* (upon which the applicant also relied) and *R v Blenkinsop* [2007] QCA 181 for the proposition that the sentence was towards the top end of the sentencing range but within it. In both cases young offenders with very serious criminal histories committed similar offences whilst bound by the conditions of a suspended sentence.

[30] In *R v Frazer*, the sentencing judge imposed concurrent four and a half year terms for burglary and assault occasioning bodily harm committed in company while armed. Although the offences were said to be unplanned, McPherson JA referred to the very concerning fact that (as in this case) the offender went to the house to collect a debt claimed to be owing to another person. The sentencing judge ordered that an activated suspended sentence of 16 months and two weeks be served cumulatively on the other sentences, so that the offender was given an effective sentence of five years and ten and a half months with a parole recommendation after two years. This Court varied the sentence by adding a recommendation for parole after the offender had served two years of the burglary and assault offences, so as to ameliorate what McPherson JA described (at p 7) as an otherwise "extremely severe, and perhaps crushing" sentence.

[31] Those remarks were made and the sentence was mitigated by the Court in a case in which the offender attacked his victim with a weapon, a large and very heavy rock, which the applicant or a co-offender had carried into the complainant's home. That is a seriously aggravating feature in offences of this character. The four and a half year sentence as varied by this Court was imposed for objectively more serious offending. Despite the existence in that case of some personal circumstances favouring leniency that are absent here, *R v Frazer* does not support the respondent's contention.

[32] In *R v Blenkinsop* [2007] QCA 181, this Court did not disturb a sentence of five and a half years imprisonment for Aaron Blenkinsop. The effective sentence, taking into account a period of pre-sentence custody that could not be declared, was six years and four months imprisonment, with parole eligibility after two years and ten months. That offender had previously been sentenced to a five year term of imprisonment, suspended after some three years (which he had served on remand) for a vigilante style offence in which the victim had died. Despite that, he led a carefully planned home invasion, ostensibly to bring to justice a man he accused of being a paedophile: but that didn't explain why the offender stole from his victim. The offender wielded a sword whilst two of his three co-offenders were also armed, one with a steak knife and the other with a baseball bat. Their victim was tightly bound up and menaced with a knife held next to his throat. Those appalling facts and that offender's very relevant criminal record merited a much more severe

sentence than is justified here. That decision also does not support the respondent's contention.

[33] The authorities cited to the Court are not decisive here, but applying such guidance as they provide I respectfully consider that the concurrent sentences of five years imprisonment were manifestly excessive when viewed in the context of the particular facts of this case. That conclusion is consistent also with the analysis of numerous comparable decisions in *R v Leu; R v Togia* [2008] QCA 201, in which the Court set aside sentences of five years imprisonment for home invasion offences in which the offenders were armed. Accordingly it is necessary to look again at the sentence.

[34] In light of the comparable decisions I have mentioned, and bearing in mind the particularly serious facts that the applicant committed the offences on the very day he was released from prison and whilst subject to two suspended sentences, concurrent sentences as severe as four years and three months imprisonment for these offences might be imposed here, even though the applicant was unarmed. There are grounds for making the concurrent terms fully or substantially cumulative upon the eighteen month sentence, but the sentencing judge rejected such an approach. If it were now adopted it would be appropriate to give the applicant the credit for his pre-sentence custody which the sentencing judge denied to him. On the basis that the sentencing judge's decision to deny the applicant that benefit is maintained and on the footing that the particularly aggravating circumstances I have mentioned are properly reflected in concurrent terms of four years and three months imprisonment, I would not impose cumulative sentences.

[35] I would therefore make the necessary orders under s 159A(3B) of the *Penalties and Sentences Act* 1992 (Qld) to reflect the sentencing judge's intention that the pre-sentence custody is not taken to be time served under the sentence. Taking into account the nearly six months of pre-sentence custody, the sentence I propose results in an effective overall period of imprisonment of nearly four years and nine months, with eligibility for parole between 31 and 32 months after the applicant was first taken into custody.

[36] I would not make any consequential or other adjustment to the sentence structure adopted by the sentencing judge. The orders I propose are:

1. Grant the application for leave to appeal and allow the appeal.

2. Vary so much of the sentence in the District Court as imposed concurrent terms of imprisonment of five years for the three offences charged in the indictment by substituting concurrent terms of four years and three months imprisonment.

3. The order activating the suspended term of imprisonment of 18 months is confirmed, but vary the order that the activated term of imprisonment be served concurrently with the five year terms by substituting an order that the activated term of imprisonment be served concurrently with the concurrent four years and three months terms of imprisonment.

4. State that the applicant was held in pre-sentence custody for a period of 170 days between 23 April 2007 and 9 October 2007 in relation to proceedings for the offences and for no other reason, declare that no time is to be taken to be imprisonment already served under the sentence imposed in the District Court as varied by these orders, and direct that the Chief

Executive (Corrective Services) be advised in writing of that declaration and its details.

5. In all other respects, confirm the sentences and orders made in the District Court.

[37] **CHESTERMAN JA:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[38] **DUTNEY J:** I have had the advantage of reading the reasons of Fraser JA. I agree with those reasons and with the orders he proposes.