SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gillbanks* [2009] QCA 260
PARTIES:	**R** **v** **GILLBANKS, Dean Rodney** (applicant)
FILE NO/S:	CA No 129 of 2009 DC No 40 of 2009 DC No 42 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	4 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2009
JUDGE:	McMurdo P, Keane JA and P Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal allowed;** **2. Appeal allowed;** **3. Sentences imposed at first instance varied;** **(a) Count 1: 3 years imprisonment to 2 years imprisonment** **(b) Count 2: 3 years and 9 months imprisonment to 3 years imprisonment** **(c) Count 3: 3 years imprisonment to 2 years imprisonment** **(d) Count 4: 2 years imprisonment to 6 months imprisonment** **(e) Count 5: 3 years imprisonment to 2 years imprisonment** **(f) Count 6: 3 years and 9 months imprisonment to 3 years imprisonment** **4. The applicant's parole release date fixed at 18 September 2009.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – the applicant was found guilty of accessory after fact to armed robbery – where the head sentence and non-parole period of both the principal offender and the applicant are compared to each other in order to determine whether there

has been parity in the separate sentences of each offender – sentence varied – consideration of application of parity principle where sentence for another co-offender "surprisingly light" – whether the sentence should be varied

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered

COUNSEL: The applicant appeared on his own behalf
M B Lehane for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The application for leave to appeal should be granted and the appeal allowed. I agree with the reasons and orders of P Lyons J.

[2] This means that the effective sentence now imposed is three years imprisonment with his parole date fixed at 18 September 2009 instead of three years nine months imprisonment with parole eligibility set as 3 September 2009. It might be argued that the later fixed parole date means that the sentence substituted by this court is more severe than that first imposed. The matter was raised with the applicant who represented himself in this appeal. He indicated he would be well pleased with an order like that now made as he considered he had little or no prospect of obtaining early parole under his original sentence.

[3] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by P Lyons J. I agree with those reasons and with the order proposed by his Honour.

[4] **P LYONS J:** On 20 May 2009, the applicant was convicted on six counts, and was sentenced to various terms of imprisonment. He now seeks leave to appeal against the sentences.

Offences and sentences

[5] The charges, and the sentences imposed, may be seen from the following table:

Number	Date	Description of the offence	Sentence
1	27 May 2008	Breaking, entering and stealing	3 years imprisonment
2	30 May 2008	Burglary and stealing	3 years, 9 months imprisonment
3	21 June 2008	Entering premises with intent to commit an indictable offence	3 years imprisonment
4	21 June 2008	Stealing	2 years imprisonment
5	24 June 2008	Breaking, entering and stealing	3 years imprisonment
6	5 July 2008	Accessory after the fact to armed robbery	3 years, 9 months imprisonment

[6] The sentences were all to be served concurrently. The applicant had been held in pre-sentence custody for a total period of 314 days, which was declared to be imprisonment served in respect of the sentences. A parole eligibility date was fixed at 3 September 2009, about four and a half months from the sentencing date, and a little more than 14 months after the commencement of the applicant's imprisonment.

[7] I shall refer to the offences by the numbering in the table above. Offence 1 resulted from the applicant gaining entry by forcing open a door to a business premises, from which he stole a laptop, and a safe containing $1,500 in cash and a cheque for $149. When interviewed in relation to another matter, he volunteered his involvement in this offence.

[8] Offence 2 was committed with an accomplice. They entered an unoccupied dwelling during the evening, through a closed but unlocked door. They then stole a laptop computer and a safe containing approximately $35,000, being the takings from a business owned by the resident. Of the amount taken, the applicant received $500.

[9] Offences 3 and 4 may be dealt with together. In the early hours of the morning, the applicant went to a second-hand car dealership, where cars were left locked in an open yard. He smashed the window of a vehicle, took a lock nut from the glove box, and with this removed all four "mag" wheels from the vehicle, which he subsequently used on his own car.

[10] Offence 5 was committed with the same person who was the applicant's accomplice on offence 2. They smashed a window to gain access to the Port City Christian Church in Gladstone. The Church did not realise the property was missing, but when interviewed, the applicant stated that he and his accomplice had taken $40 in United States currency, which they shared.

[11] Offence 6 involved driving the principal offender, and her young daughter, to shops. The applicant denied knowing that a robbery was about to be committed. The principal offender entered a pharmacy wearing dark sunglasses and a hooded jumper, and had socks on her hands. She was carrying a small kitchen knife. She demanded drugs. She was given some, and grabbed others. She then fled. The applicant stated that when the principal offender came running out with the hood up on her jumper and socks on her hands, holding a plastic bag, and yelling "go, go", he realised what had occurred. He then drove her away. He subsequently received some of the stolen drugs, and saw the principal offender change her clothing. He drove her to a bushland location where he saw the principal offender dispose of the clothing. The principal offender stayed at the applicant's house on the night of the offence.

Applicant's personal circumstances and history

[12] The applicant was 33 years of age at the time of the offences, and 34 years of age at the time of sentence. He had a relatively extensive criminal history, commencing in 1993. Much of his history of offending is drug-related, and the prosecutor said of him at first instance that he had a longstanding drug habit. In 2001, he was placed on probation in relation to offences of assault occasioning bodily harm, causing wilful damage to property, and entering or being in a dwelling house with intent to commit an indictable offence. Later that year he was sentenced to suspended terms of imprisonment for offences including forgery and receiving property. He was also

convicted of a breach of his probation order. In 2002 he was convicted of a breach of the suspended sentences, resulting in further terms of imprisonment, suspended after six months. Later in 2002 he was convicted of a breach of his probation order, resulting in some short terms of imprisonment.

[13] In 2003 he was convicted of assaults occasioning bodily harm and of receiving property obtained by a crime, resulting in a sentence of a term of imprisonment of two years. In 2004 he was convicted of the offences of entering or being in a dwelling house and committing an indictable offence at night, and using or threatening to use violence whilst in company as well as attempted robbery with actual violence and in company. He was sentenced to concurrent terms of imprisonment of three years. He was also convicted of breach of an earlier suspended sentence, resulting in a further term of imprisonment for six months, to be served concurrently with the other terms imposed. Between 2004 and 2008 he was convicted of two relatively minor offences.

[14] Whilst in pre-sentence custody, the applicant worked and had completed courses in hospitality.

[15] He has disk degeneration in his lower spine, associated with chronic back pain.

Additional matters taken into account

[16] The following matters, some of which were plainly of considerable importance, were taken into account by the learned sentencing judge:

(a) The applicant's pleas of guilty on all six charges;

(b) That the offences were the subject of *ex officio* indictments;

(c) The applicant's expression of remorse; and

(d) The extent of the applicant's cooperation with the police.

Consideration

[17] The principal offender for the robbery also pleaded guilty to another robbery charge, an offence of making a bomb hoax, two charges of forgery and two charges of uttering. On the charge of robbery for which the applicant was an accessory, the principal offender was sentenced to a term of three years imprisonment, with parole after five months. The sentencing remarks of the learned primary judge records that she had an extensive criminal history, though the prosecutor had submitted that it was "very minor and unrelated." This offender's criminal history supports the prosecutor's submission. But for her cooperation with authorities, this offender would have been sentenced to a term of imprisonment of four years, to be suspended after 15 months.

[18] The applicant's accomplice on the burglary charge was also the applicant's accomplice on offence 5. He was sentenced (in January 2009) to six months imprisonment in respect of the burglary, with the parole release date being the date of sentencing. He had a very lengthy criminal history. The learned primary judge considered this sentence in the context of some sentences imposed earlier. In August 2008, this offender had pleaded guilty to 25 offences, nearly all related to dishonesty, for which he received a sentence of imprisonment of three months, with a parole release date said to be 17 December 2008. The learned primary judge appeared to accept that there was a "totality issue" resulting from these sentences, which affected the sentences imposed in January 2009.

[19] In *Postiglione v The Queen*,[1] Dawson and Gaudron JJ said:

> "The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them.[2] In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error.[3] Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*,[4] recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to "a justifiable sense of grievance."[5] If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options."

[20] Their Honours also noted that a proper comparison of sentences imposed on co-offenders involves a consideration of all components of the sentences, and that one component of each sentence in that case which was susceptible of easy comparison was the non-parole period.[6]

[21] With respect to offence 6, the principal offender obviously committed the offence with some pre-meditation, and a willingness to use a weapon to threaten violence. She placed the applicant in a position where he had to make a decision very quickly whether to assist her or not, at a time when he was driving a car containing her young child. Both the accessory nature of his involvement, its lack of pre-meditation, and the absence of any suggestion of violence on his part, indicate a significantly lower level of criminality attributable to the applicant, than to the principal offender. Although the principal offender did not have a criminal history of any significance, she was sentenced in respect of a number of other offences, some serious, at the same time. Not only is there a substantial difference in the head sentence imposed, there is, more significantly, a substantial difference in the time to be spent in actual custody. Indeed, in the applicant's case, there is no certainty that he would be released on the date nominated when the sentence was imposed. Notwithstanding the applicant's criminal history, it is difficult to see an appropriate recognition of the relevant differences whether from a consideration of the sentence which in fact was imposed on the principal offender or the sentence which would have been imposed but for her cooperation, in accordance with the parity principle. The applicant could well have a justifiable sense of grievance about the disparity of sentencing, notwithstanding the criminal history of the principal offender.

[22] With respect to offence 2, it will be recalled that on the uncontested version of the facts put forward on the part of the applicant, the accomplice obtained nearly all of the proceeds of the burglary; and that the accomplice had a significant criminal history. However, in determining whether to allow the appeal, it is difficult to give

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1 (1997) 189 CLR 295 at 301.
2 See *Lowe v The Queen* (1984) 154 CLR 606 at 610-611, per Mason J.
3 *Lowe v The Queen* (1984) 154 CLR 606 at 617-618, per Brennan J.
4 (1984) 154 CLR 606.
5 *Lowe v The Queen* (1984) 154 CLR 606, esp at 610, per Gibbs CJ; at 613, per Mason J; and at 623 per Dawson J.
6 See page 302.

great weight to the parity principle in respect of the sentences imposed on the accomplice for offences 2 and 5, when there is no rational explanation identified for these surprisingly low sentences. However, the sentences imposed on this accomplice would suggest that the applicant, if he is to be re-sentenced, should be sentenced at the lower end of the appropriate range.

[23] In respect of offence 1, the applicant was sentenced on the basis that he had volunteered his involvement in the commission of the offence, and that without that information, the police had no evidence implicating him in the offence. In respect of offence 5, the applicant was sentenced on the basis that there was no evidence implicating him in the offence, prior to his confession of it. In those circumstances, the applicant qualified for "special leniency."[7] That does not seem to be recognised in the sentences imposed for these offences. That would not, considered alone, warrant intervention, but it is relevant if the sentences are to be varied.

[24] While the conduct constituting offences 3 and 4 resulted in two separate offences, it was a single course of conduct. Moreover, it did not occur in a dwelling house, or in a building which had been closed. The conduct was at the lower end of the scale for such offences. The imposition of a sentence of three years imprisonment for the entry, and in addition to impose a sentence of two years imprisonment for the stealing, seems rather severe, when for offences of breaking, entering and stealing, a penalty of three years imprisonment was imposed. Again, this would not, considered alone, warrant intervention, but it is relevant if the sentences are to be varied.

[25] The sentences were all imposed at the one time. It is likely that the learned sentencing judge was significantly affected in determining the overall outcome of the sentences he imposed, by his view about an appropriate sentence for offence 6. Because it is necessary to reconsider this sentence, the other sentences should also be reconsidered. The changes to the sentences are set out below:

Number	**Date**	**Description of the offence**	**Sentence**	**Varied Sentence**
1	27 May 2008	Breaking, entering and stealing	3 years imprisonment	2 years imprisonment
2	30 May 2008	Burglary and stealing	3 years, 9 months imprisonment	3 years imprisonment
3	21 June 2008	Entering premises with intent to commit an indictable offence	3 years imprisonment	2 years imprisonment
4	21 June 2008	Stealing	2 years imprisonment	6 months imprisonment
5	24 June 2008	Breaking, entering and stealing	3 years imprisonment	2 years imprisonment
6	5 July 2008	Accessory after the fact to armed robbery	3 years, 9 months imprisonment	3 years imprisonment

[7] *AB v The Queen* (1999) 198 CLR 111 at 155.

[26] Leave should be granted to appeal against the sentences, and the appeal should be allowed. The sentences should be varied as shown above. The applicant's parole release date should be fixed at 18 September 2009.