SUPREME COURT OF QUEENSLAND

CITATION:	*R v Griffiths* [2009] QCA 264
PARTIES:	**R** **v** **GRIFFITHS, Jesse Daniel** (applicant)
FILE NO/S:	CA No 177 of 2009 DC No 125 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	Orders delivered ex tempore on 27 August 2009 Reasons delivered on 8 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2009
JUDGES:	Keane and Chesterman JJA and P Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore 27 August 2009** **1. Application for leave to appeal be allowed;** **2. Appeal be allowed;** **3. Set aside the sentence imposed below and in lieu impose a sentence of three years imprisonment suspended after a period;** **4. Applicant pay $3,150 to the Deputy Registrar of the District Court of Maroochydore within six months by way of restitution to the owner of the car.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to a charge of wilfully and unlawfully setting fire to a motor vehicle – where applicant was sentenced to a term of two years' imprisonment to be suspended after six months for an operational period of three years – whether the sentence was manifestly excessive *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *R v Barling* [1999] QCA 16, cited *R v Cramond* [1999] QCA 11, cited

R v Ellis (1986) 6 NSWLR 603, cited
R v Law; ex parte Attorney-General [1996] 2 Qd R 63; [1995] QLA 444, cited
R v Webber (2000) 114 A Crim R 381; [2000] QCA 316, cited
Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21, cited

COUNSEL: J D Briggs for the applicant
M B Lehane for the respondent

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

[1] **KEANE JA:** I agree with the reasons given by Chesterman JA for the orders made by this Court on 27 August 2009.

[2] **CHESTERMAN JA**: On 29 June 2009 the applicant pleaded guilty in the Maroochydore District Court to a charge of wilfully and unlawfully setting fire to a motor vehicle on 20 April 2007. He was sentenced to a term of two years' imprisonment to be suspended after six months for an operational period of three years. He appeals against the sentence on the ground that it is manifestly excessive. Leave was given at the hearing to add further grounds which are but particulars of the complaint that the sentence was excessive. One, however, the further ground 2, is worth noting:

> "... The ... sentencing judge erred in the exercise of his discretion by failing to account for the applicant's voluntary disclosure of his guilt ...".

[3] At the conclusion of the appeal the Court ordered that the applicant have leave to appeal and that the appeal be allowed. The order that the term of imprisonment of two years be suspended after serving six months was set aside and in lieu it was ordered that it be suspended forthwith. As well it was ordered that the applicant pay $3,150 to the Deputy Registrar of the District Court of Maroochydore within six months by way of restitution to the owner of the car.

[4] The offence had its origin in youthful immaturity and self-absorption. The applicant was then two months short of his twenty-first birthday. He had a girlfriend who, in the post-modern style, was identified in the submissions only by Christian name, Alena. One of her female friends, also identified by the same impoliteness, Brooke, had a younger, 15 year old sister. Brooke suspected the applicant of taking an improper interest in her sister. Acting as though to the script of an afternoon television programme, Brooke rushed to tell Alena's mother of her suspicions. The older woman sought out the applicant and, one presumes, put the charge to him as something proved rather than requiring proof or refutation. There was a most unpleasant conversation. The applicant was angered and deeply hurt.

[5] At about 7.30pm on 19 April 2007 Brooke parked the car outside the family home at Yaroomba, a residential area on the Sunshine Coast.

[6] The applicant remained angry after his confrontation with Alena's mother. He could not sleep. At about 3am he decided to destroy Brooke's car as an act of revenge. Wasting no time he put petrol and matches in his car, drove to Brooke's

family's home, poured petrol over the car and set it on fire. He left the scene. Some passers-by put out the fire but the car was completely destroyed.

[7] It was Brooke's father's, worth only $3,200 and uninsured. Mr Kelly had bailed the car to his daughter for her use.

[8] According to a statement later given to police the applicant realised the enormous stupidity and criminality of his action at the very moment he lit the fire. The seriousness of what he had done made him ill and he understood that his actions were dreadfully mistaken.

[9] Brooke suspected at once that the applicant was the arsonist. She put the accusation to him but he denied it. However, the applicant remained troubled by the knowledge of his guilt. He was, it seems fair to conclude, genuinely remorseful. Two weeks after the offence, on 5 May 2007, he went voluntarily to the Coolum Police Station and confessed fully to his crime. On the material put before the sentencing judge and on appeal the proper inference appears to be that the only evidence connecting him to the crime was his own confession. There seems to be no basis for thinking that without it he would have been prosecuted. This point has a significance to which I will return.

[10] The applicant had apparently reached an agreement to make restitution payable by weekly instalments of $50. In the event only one instalment was paid for reasons which are obscure. There was a suggestion that Brooke (who may or may not have been authorised by her father in this regard) refused to accept the instalments and insisted upon the payment of a lump sum which the applicant was unable to do. However, as the sentencing judge pointed out, the applicant could have put aside $50 each week and offered whatever the saved sum amounted to at the time of sentence by way of restitution if he genuinely desired to make good the damage he had caused.

[11] In passing sentence the learned judge said:

> "... arson is regarded as a very serious offence carrying a maximum penalty of life imprisonment. ... A series of decisions in the Court of Appeal ... have set a range for offences of this nature ... at somewhere around three years. ... I accept that you co-operated with the police at an early stage and made full admissions, and I accept that you co-operated with the administration of criminal justice by pleading guilty to an ex officio indictment.
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> I've taken into account your age ... You have the one entry in your criminal history which has to be regarded as quite minor. I accept that you have a very good work history. ... I take into account that you're remorseful and that you're very sorry for what has happened. What I can't overlook ... is that this offence was committed when you were ... taking revenge ... as a result of some perceived slight. ... you made a premeditated decision to get back at her ... by burning her vehicle ... . It was totally destroyed and although ... not ... expensive ... it's ... a significant loss to this family and deprived this young lady of her means of transport.
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> It's also a relevant factor that the vehicle was parked in a residential area. The use of petrol on a vehicle in those circumstances ... has at least the potential for harm. ..."

[12] On the hearing of the appeal two points took on significance. The first was that raised by the additional ground 2 added by leave. It is that, as far as the material shows, the only evidence against the applicant was his own volunteered confession. Without it the arson would have gone unsolved and unpunished. The confession was, it is clear, a manifestation of genuine remorse and a consciousness of wrongdoing.

[13] Typically such conduct attracts particular leniency in the imposition of a sentence. The principle was described by Street CJ in *R v Ellis* (1986) 6 NSWLR 603 at 604:

> "When the conviction follows upon a plea of guilty that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. ... the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered ... as well as ... established ... ."

[14] In *Ryan v The Queen* (2001) 206 CLR 267 at 273 McHugh J explained that this factor is not:

> "... to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case."

[15] It is not the case here that the offence was unknown. The identity of the offender was unknown until the confession.

[16] The sentencing judge appears not to have appreciated the significance of this aspect. His Honour accepted that the applicant had co-operated with the police "at an early stage and (had) made full admissions", as well as noting the plea of guilty to an *ex officio* indictment. However the fact that the applicant would have avoided detection and punishment but for his self-implication was not expressly mentioned. It was a factor of such importance that had it been recognised it would have been mentioned.

[17] It follows that the sentencing judge failed to have regard to a relevant factor, and to that extent the sentencing discretion miscarried: *House v The King* (1936) 55 CLR 499 at 505.

[18] The second feature is the delay between the offence, and the applicant's confession, and prosecution. More than two years passed and although the exact cause of the delay is not clear it all appears attributable to the prosecuting authorities. First the tapes and transcripts of the interview with the applicant were lost. The applicant moved to New South Wales to care for his mother. There is no suggestion he was evading service. The police took time to find him. Throughout that time he would no doubt have suffered the anxiety of the pending charge.

[19] This point was not laboured by either prosecution or defence at sentence but it, too, has significance. Delay is important where during it an offender demonstrates genuine and substantial efforts at rehabilitation which are successful or appear likely to be so. *R v Law; ex parte Attorney-General* [1996] 2 Qd R 63. That is certainly the case here.

[20] At the time of the offence the applicant was 20 and obviously immaturely impulsive. He matured considerably in the intervening period. An indication of that is his approach to the police to advise them of his guilt. As well he had completed a trade qualification as a plasterer and had an excellent work record which had begun prior to the offence. He had almost completed his studies to obtain a trade contractor's licence which would permit him to carry on his trade as a principal and to employ others. He was in the process of establishing his own business in partnership.

[21] There were several references to his good character. He had also provided police with important information identifying a burglar who had broken into a Sunshine Coast newsagency. That act was one of responsible citizenship which is a testimony to good character but is not, I think, the kind of co-operation with authority which was the subject of discussion in *R v Webber* (2000) 114 A Crim R 381 as counsel for the applicant contended. The point there under consideration was the provision of information about the criminal activity of others which the informant comes to know about from his own criminal activity which the provision of the information will reveal to the authorities. It is to encourage the giving of such information that substantial discounts in sentence are allowed. It is an altogether different circumstance that one should innocently observe the commission of a criminal offence and thus be able to give information which will assist the police to make an arrest. That is the responsibility of every good citizen. It is an indication of good character, but no more.

[22] The delay, which was also a significant factor, was not referred to by the sentencing judge. One should not be too critical of the omission because, as I mentioned, the significance of the delay as explained in *Law*, was not the subject of submission. The fact of delay was adverted to and the reasons for it discussed with the judge, as well as the improvements the applicant had made in his life in the interval, but its legal significance was not mentioned. The failure to apprehend the importance of that improvement was, I think, a failure to take a material consideration into account, thereby also invalidating the exercise of the sentencing discretion.

[23] It is necessary to re-exercise the discretion. The cases to which we were referred suggest a term of imprisonment of three years is an appropriate head sentence.

[24] In *R v Barling* [1999] QCA 16 the applicant was a 22 year old man who burnt out his girlfriend's caravan in an act of spite. They had been in an unsatisfactory relationship for some time and he accused her of infidelity. In the early hours of one morning when she was at a nightclub Barling set fire to the caravan, destroying it and all her possessions. The value of the lost property was $10,000. Barling had a trivial prior criminal history. He had set fire to the caravan believing it to be unoccupied, as it was. He was immediately and sincerely remorseful, made full admissions, sought appropriate medical treatment for his emotional instability and pleaded guilty at an early stage. On appeal he was sentenced to three years' imprisonment with a recommendation for release on parole after serving 12 months.

[25] In *R v Cramond* [1999] QCA 11 the applicant was convicted after trial of the unlawful use of a motor vehicle and arson of the vehicle. He was sentenced to four years' imprisonment for the arson. It was another case of an acrimonious dissolution of a relationship. The car was owned by Cramond's former girlfriend. It was worth about $16,000 and was uninsured. Cramond was generally of good character. The sentence was reduced on appeal to three years, the Court remarking:

> "Support can be found for the view that where there is no suggestion of fraud and where the safety of others is not a consideration the head sentence of up to three years may appropriately be imposed ...".

[26] The relevant task is to determine the appropriate amelioration of the head sentence. The applicant has already served two months' imprisonment. Do the interests of justice require him to serve any further part of the six months' custody required by the order of the District Court? The prosecutor in that court conceded that the circumstances justified a wholly suspended sentence. Having regard to the applicant's voluntary confession and demonstrated maturity and responsibility in the period between offence and conviction that would have been an appropriate course. The case was not, as the prosecutor described and the judge accepted, one of premeditated revenge. It was more an impulsive act borne of immaturity which subsequent events show are very unlikely to recur. Given the indications that the applicant will lead a lawful and productive life he should serve no further time in custody, but should make restitution for the loss he caused.

[27] The orders are:

(a) the application for leave to appeal be allowed.
(b) the appeal be allowed.
(c) set aside the sentence imposed below and in lieu impose a sentence of three years imprisonment suspended after a period
(d) the applicant pay $3,150 to the Deputy Registrar of the District Court of Maroochydore within six months by way of restitution to the owner of the car.

[28] **P LYONS J:** I have had the advantage of reading the reasons for judgment of Chesterman JA in this matter, with which I agree.