SUPREME COURT OF QUEENSLAND

CITATION:	*R v Finch* [2009] QCA 276
PARTIES:	**R** **v** **FINCH, Michael Calvin** (applicant)
FILE NO/S:	CA No 101 of 2009 DC No 125 of 2009 DC No 133 of 2009 DC No 134 of 2009 DC No 135 of 2009 DC No 136 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	15 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2009
JUDGES:	Muir and Chesterman JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Refuse the application for leave to appeal against sentence**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to various counts of unlawful use of a motor vehicle, entering premises with intent to commit an indictable offence, burglary, fraud, stealing, dangerous operation of a motor vehicle, attempted unlawful possession of a motor vehicle and unlawful entry into a motor vehicle – where applicant sentenced to six years imprisonment for the burglary, entering premises, unlawful use of a motor vehicle and unlawful entry into a motor vehicle offences, and lesser concurrent sentences for the other offences – where applicant seeks leave to appeal against sentence on the basis that it was manifestly excessive – whether leave to appeal should be granted *Bail Act* 1980 (Qld), s 33(4) *Criminal Code* 1899 (Qld), s 650 *Criminal Practice Rules* 1999 (Qld), r 62

R v Bryant (2007) 173 A Crim R 88; [2007] QCA 247, cited
R v Clarke [2006] QCA 356, distinguished
R v Dawson [2007] QCA 343, considered
R v Earnshaw & Hartcher [1993] QCA 519, considered
R v McKinless [2004] QCA 280, considered
R v Mitchell, unreported, District Court of Queensland, Nase DCJ, 22 May 2000, considered
R v Perrem [2000] QCA 339, considered
R v Phillips [2008] QCA 5, considered
R v Ross [2004] QCA 21, considered
R v Russell [2005] QCA 392, distinguished
R v Slade [2003] QCA 191, 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] **MUIR JA:** I agree with the reasons of White J and with the order she proposes.

[2] **CHESTERMAN JA:** I agree with the order proposed by White J for the reasons given by her Honour.

[3] **WHITE J:** The applicant, who appears on his own behalf, seeks leave to appeal against the severity of the sentences imposed upon him in the District Court at Southport on 17 April 2009.

[4] On 16 April 2009 the applicant pleaded guilty to 38 counts on one indictment which comprised 15 counts of unlawful use of a motor vehicle; five counts of entering premises with intent to commit an indictable offence; five counts of burglary and stealing; three counts of fraud; four counts of stealing; two counts of dangerous operation of a motor vehicle; one count of attempted unlawful possession of a motor vehicle; two counts of unlawful use of a motor vehicle; and one count of unlawful entry into a motor vehicle. On another indictment the applicant pleaded guilty to one count of entering premises with intent to commit an indictable offence. He pleaded guilty on two ex officio indictments to counts that he entered premises and stole credit cards and committed fraud, unlawful use of a motor vehicle and stealing.

[5] The applicant also pleaded guilty to four summary charges committed to the District Court pursuant to s 651 of the *Criminal Code*. Those charges were possession of property suspected of being stolen; possession of a knife in a public place; breach of the *Bail Act* 1980 (Qld) by failing to appear on 8 April 2008; and dealing with a prohibited thing within a correctional institution.

[6] The applicant was sentenced to six years imprisonment for the burglary, entering premises, unlawful use of a motor vehicle and entering a motor vehicle offences. Other lesser concurrent sentences were imposed for the other offences except for the summary offence of dealing with a thing (syringe) and a prohibited substance (tablet) in prison for which he was sentenced to a term of imprisonment of three months to be served cumulatively on the other concurrent sentences making an effective head sentence of six years and three months.

[7] In imposing a sentence of one month for each of the remaining summary offences his Honour overlooked that one was for a breach of bail which is required[1] to be served cumulatively on any other sentence. This had actually been noted during counsel's submissions. The Corrective Services sentence calculation shows the applicant as having had a sentence of six years and four months imposed upon him because the one month for the breach of the *Bail Act* is shown as cumulative. Indeed, the applicant in his outline shows that he regards six years and four months as his sentence and this he confirmed orally. A sentence is pronounced in court by the court[2] and, in the absence of any application to correct or vary the order, the sentence which was imposed upon the applicant was one of six years and three months.

[8] The learned sentencing judge declared 317 days pre-sentence custody. There were 86 non-declarable days relating to a charge of supplying a drug in a correctional institution (which had not been dealt with in the Supreme Court at the time of sentence) but his Honour took those 86 days into account in fixing a parole eligibility date at 17 April 2010. That date was selected so that the applicant would spend one-third of his sentence in custody, that is, two years and one month.

[9] On 2 February 2007 at the Southport Magistrates Court the applicant had been placed on probation for 12 months. He committed two of the summary offences and 11 of the indictable offences whilst on that probation order. On 28 November 2007 in the Southport Drug Court he was sentenced to imprisonment for 12 months suspended for two years and during the operational period he committed 40 of the indictable offences and two of the summary offences. On 22 June 2007 in the Tweed Heads Magistrates Court he was sentenced to 12 months imprisonment wholly suspended for 12 months. During that period he committed 43 of the indictable offences.

[10] The applicant was arrested on 8 January 2008 and released on bail on 25 February 2008. He was taken back into custody in respect of further offences on 28 April 2008. Accordingly, at times during his offending from June 2007 until the end of April 2008 the applicant was in breach of a probation order, two suspended sentences and his bail conditions.

[11] The applicant, who was aged 22 to 23 years at the time the offences were committed contends both in his written submissions and orally that the head sentence was manifestly excessive because it did not reflect any or sufficient discount for his early plea of guilty and cooperation with police investigations which enabled him to be identified as the perpetrator of a number of unsolved crimes. He also argued that the sentence was excessive in view of his age, limited criminal history and by reference to similar offending by others with more serious criminal histories. The applicant submitted that a sentence of four years to be suspended after serving 18 months would more appropriately give effect to his plea of guilty and cooperation. He also noted that he will not have completed the transition to release course prior to reaching his parole eligibility date because those courses are oversubscribed at the correctional institution where he presently resides. The net result, he contended, in practical terms, will be that his plea of guilty will not have received appropriate recognition.

[12] The applicant was arrested by police on 8 January 2008 following a high speed car chase. He made admissions to three unlawful use of motor vehicle and fraud

---

1 *Bail Act* 1980, s 33(4).

2 *Criminal Code*, s 650; *Criminal Practice Rules* 1999, r 62.

offences when interviewed by the police. He was granted bail. He was rearrested on 28 April 2008, again after a high speed motor vehicle chase which ended in a head on collision with another vehicle, the occupants of which were quite seriously injured. The applicant participated in a drive around with the police on 29 April 2008 and made admissions in respect of entering premises and stealing a computer and a camera and damaging a door, and entering premises at Palm Beach and breaking into a motor vehicle and stealing a quantity of property.

[13] The applicant was interviewed by police on 12 May 2009 and made admissions with respect to many other offences. The lengthy schedule of facts sets out the detail of all offences. The offending involved a variety of property offences. On 19 occasions he broke into vehicles or attempted to break into vehicles. On most of these occasions entry was gained by breaking a window of the vehicle and starting the vehicle by interfering with the ignition. The majority of these vehicles were damaged in some way and two of them were found burnt out by police.

[14] On six occasions the applicant broke into work premises and stole items. He and an associate broke into a pharmacy and used a vehicle to gain entry by driving into the glass doors of the premises. They stole a number of cold and flu tablets and other items. On two occasions the applicant and an associate went into jewellery stores where they asked to see items of jewellery then snatched them and ran from the store. On five occasions the applicant broke into homes while their occupants were at work and stole items such as cameras, lap tops, jewellery, car keys, sporting equipment, televisions, money and personal bankcards. He used the credit cards to purchase goods such as cigarettes, phone cards and petrol. On four occasions he filled up the vehicle that he was driving at petrol stations and drove off without paying.

[15] The dangerous operation of a motor vehicle offences require more specific mention. On 8 January 2008 police observed a motor vehicle which they wished to intercept and a pursuit ensued. It was being driven by the applicant. It travelled at speeds of 140km/hr in a 110km/hr zone, crossed marked lanes without indicating and caused other vehicles to brake heavily. After a chase on the Pacific Highway, which caused many vehicles to brake heavily, police used a device to shred the car tyres. Nonetheless, the applicant continued although control of the vehicle was seen to be difficult. Eventually the vehicle was halted. On 28 April 2008, following the robbery of a jewellery shop at Burleigh Town Centre, the applicant and his companions were observed by police to be travelling north on the Pacific Motorway. After leaving the highway the applicant drove the vehicle at 90km/hr in a 50km/hr zone and travelled on the incorrect side of the road, forcing traffic to take dangerous evasive action. The car went through a red light and reached speeds of 120km/hr in a 80km/hr zone. The car again went through a red light, increased speed and continued on through another red light. After further hazardous driving the pursuit terminated. The chase then recommenced with the applicant's vehicle travelling in excess of the speed limit in suburban streets. The vehicle struck other cars. It was then that the vehicle came into a head on collision with a small hatch sedan. The applicant's vehicle was on the wrong side of the road. He and his companions left the scene.

[16] The occupants of the struck vehicle were injured, the driver suffering a gash to the rear of his head, chest pain and a wound to his knee. The passenger was taken to hospital suffering from a significant injury to her liver with deep lacerations, rib fractures, right shoulder dislocation and soft tissue injury to her thumb, shoulder and

elbow. She also received significant seat belt bruising to her chest and abdomen. She spent four days in hospital. Both of the victims have emotional and physical sequelae. Both have suffered financially using up their sick leave and savings.

[17] The total amount of property stolen and damaged by the applicant was in excess of $125,000. Some property was returned to owners but the actual loss incurred was approximately $90,000.

[18] Without the applicant's admissions to police many of those crimes to which the applicant pleaded guilty would not have been solved.

[19] The explanation given for the applicant's serious criminal conduct over approximately a 10 month period was his addiction to drugs. Until then he had a limited criminal history although it related to drugs which he was said to use recreationally. The applicant also had a not insignificant traffic history commencing in 2001. He had commenced a painting apprenticeship at the age of 20, moved to the Gold Coast area and started consuming more and more drugs. Eventually he lost his job and committed the offences to finance his habit. Since being in custody the court below was told that the applicant had completed programs about drug addiction and strategies for dealing with it. He had the opportunity, on release, of employment. Submissions made on his behalf particularly emphasised his youth, the early plea of guilty, the full hand up committal hearing and other offences charged by way of ex officio indictment. The prosecutor sought a sentence of five to six years imprisonment noting that the applicant was in breach of two suspended sentences, a probation order, and on bail. This suggested that the applicant had exhausted his opportunity of receiving a sentence that encouraged rehabilitation.

[20] The applicant's counsel contended for a sentence in the order of four years to reflect the matters in the applicant's favour, particularly his youth, with a parole eligibility date to reflect the plea of guilty.

[21] The learned sentencing judge expressly took into account the applicant's age, his co-operation with the police, his early plea of guilty, the absence of any criminal history of significance prior to these offences, and that the applicant was seriously addicted to drugs at the time, although noting attempts at rehabilitation whilst incarcerated. His Honour expressed pessimism about the applicant's prospects given that he had committed drug offences whilst in prison. His Honour observed that the pleas of guilty were an indication of remorse which substantially aided in the administration of justice but commented that the offending had caused considerable loss, damage and anguish to many members of the community. His Honour approached the sentence on the basis that a head sentence should reflect the totality of the offending with particular emphasis on the more serious of those offences.

[22] The applicant relied on a number of cases which he submitted were comparable. In *R v Russell*[3] the applicant was between 27 and 28 at the time of the offending. He pleaded guilty to eight counts of burglary, two counts of entering premises and committing an indictable offence, two counts of unlawful entry of a vehicle, four counts of stealing, five counts of unlawful use of a motor vehicle, two counts of possession of things used in connection with unlawful entry and one count of wilful damage. He was sentenced to three and a half years imprisonment for the burglary

---

3 [2005] QCA 392.

and to lesser concurrent terms on the remaining counts. It was recommended that he be eligible for post-prison community based release after serving two years which was beyond the statutory eligibility date at the half way point. He had made full admissions in relation to many offences, some of which were committed whilst he was on bail. The total amount of property involved was valued at around $86,000. He had a lengthy Queensland criminal history, commencing in the Childrens Court for indecent assault and property offences, and a significant criminal history in Victoria for property offences. His offences were said to be dictated by drug addiction which had commenced at the age of 13. He suffered from drug induced schizophrenia. The President, giving the judgment of the Court, thought that the sentencing judge's observation that a sentence of five years imprisonment would have been appropriate but for almost a year in custody, which could not be declared, the early plea of guilty and co-operation with the authorities, was "perhaps a too generous starting point in light of the large number of serious offences" and his recidivism and was towards the bottom of the appropriate range. The application was concerned principally with the recommendation for post prison community based release beyond the half way mark. The number of offences were substantially less than for this applicant and did not have the aggravating feature of the dangerous operation of the motor vehicle offences.

[23] The applicant referred the court to *R v Clarke*.[4] That applicant had pleaded guilty to 10 counts of burglary, stealing, breaking and entering premises, entering premises with an intent to commit an indictable offence and possession of house breaking implements, unlawful use of a motor vehicle and dangerous operation of a motor vehicle and three summary offences. Those offences were committed during six months in 2005. He had a lengthy criminal history including dishonesty offences over approximately 18 years. He was addicted to opiates. He was sentenced to four and a half years imprisonment which was not disturbed. Again there were fewer offences.

[24] The next case referred to by the applicant was *R v Dawson*.[5] That applicant pleaded guilty to a total of 19 charges including burglary and stealing and break, enter and steal. He was sentenced to an effective period of six years imprisonment with a parole eligibility date some 10 months after sentencing. He had had in excess of a year on remand. The applicant was aged 42 and had a prior criminal history including breaking and entering and stealing on a number of occasions. He had abused alcohol or drugs for most of his adult life and he was addicted to methylamphetamine. He was not on bail at the time of the commission of any of the offences for which he was sentenced. That applicant had co-operated with the police to the extent that a number of charges were added following admissions for which there was no other evidence. The court concluded that the sentence was manifestly excessive bearing in mind the likely modest value of the property stolen, limited previous criminal history and that he was not on bail. A head sentence of four and a half years imprisonment suspended after serving 18 months with an operational period of five years was substituted.

[25] The applicant also referred to *R v Mitchell*[6] where a 21 year old pleaded guilty to breaking and entering a dwelling house with intent, 12 counts of stealing, 17 counts of unlawful use of a motor vehicle and one count of dangerous operation of a

---

4 [2006] QCA 356.
5 [2007] QCA 343.
6 Unreported, District Court of Queensland, Nase DCJ, 22 May 2000.

vehicle. He was sentenced to six months imprisonment and probation for 18 months. He had 99 days pre-sentence custody and co-operated with police and pleaded guilty on ex officio indictment. He was addicted to amphetamine. He had numerous previous convictions of a similar kind.

[26] In his submissions Mr Lehane for the Crown referred to *R v Earnshaw and Hartcher*.[7] The applicants for leave to appeal against sentence were respectively 23 and 18 when the offences were committed. Earnshaw had a minor criminal history and Hartcher, the younger, had no previous criminal history. Earnshaw pleaded guilty on ex officio indictment to two counts of unlawful use of a motor vehicle, 14 counts of stealing, three counts of burglary and several counts of other associated offences. Hartcher pleaded guilty to one count of unlawful use, 14 counts of stealing, three counts of burglary and other offences. Earnshaw had a further nine offences taken into account. The most serious of the offences involved breaking into a house at night, ransacking it, stealing cash totalling $34,000 and property amounting to $26,000 and malicious damage to the house. Pincus JA and Moynihan SJA regarded the burglary offences as the most serious offences. Earnshaw was sentenced to a term of imprisonment of six years which was described as at the top of the appropriate range and a heavy sentence. Hartcher was sentenced to four years for the burglary offence. Their Honours said that the nature and extent of the conduct was such that the sentences were not manifestly excessive.

[27] Another sentence referred to by Mr Lehane was *R v Perren.*[8] The applicant was aged between 20 and 21 when he committed the offences which included nine counts of breaking, entering and stealing, six of entering premises with intent, four of unlawful use of a motor vehicle, two of entering premises and stealing and one of burglary. There were two further charges of burglary on another indictment. Sentences were also imposed for 90 other offences included in a form lodged pursuant to s 189 of the *Sentences and Penalties Act* 1992. Those 90 included 81 of entering premises with intent to steal. There were a total of 115 offences committed over a period of about 17 months with a total value of property damaged or stolen or unrecovered of about $68,000. The applicant had a limited criminal history and a drug addition problem. The head sentence of six years with an eligibility for parole after two years and three months was not disturbed on appeal. Numerous of the offences were committed whilst the applicant was on bail and most of the offences were committed in shops. Pincus JA analysed a number of comparable sentences and concluded that the sentence imposed was within range although the recommendation for parole eligibility after two and a quarter years was said to be not an appropriate recognition of the plea of guilty and cooperation but the court did not interfere on the ground that to do so would be "tinkering".

[28] This court dismissed an application for leave to appeal against sentence in *R v McKinless*[9] where the applicant was sentenced to six years imprisonment with a recommendation for parole eligibility after serving two years in relation to a number of dishonesty offences. In total the applicant had pleaded guilty to 21 offences committed during a seven month period comprising counts of entering premises and stealing, receiving and fraud, and two counts of break, enter and steal and unlawful use of a motor vehicle. There were a number of summary offences including breach of bail. Some of the offences were committed whilst the applicant was on bail. He

---

7 [1993] QCA 519.
8 [2000] QCA 339.
9 [2004] QCA 280.

had a previous criminal history of breaking and entering premises and stealing. The offences were committed whilst he was serving a suspended sentence of 18 months imprisonment. The majority of offences were committed by the applicant entering business premises and stealing lap top computers and other computer related equipment. A total of $214,000 worth of property was stolen, most of which had not been recovered. There was no prospect of restitution. That applicant was aged 23 when he committed the offences. He had a good upbringing but he had problems which precluded him achieving at school. At 16 he became addicted to heroin. McPherson JA, with whom the other members of the court agreed, referred to *R v Slade*[10] where a 27 year old was sentenced to seven and a half years imprisonment with a recommendation after three years. There were 424 offences described as "of a somewhat lesser kind" mostly using stolen credit cards but involving property to the value of $200,000. That offender was addicted to methylamphetamine. Those offences had entailed breaches of suspended sentences and bail.

[29] In *R v Ross*[11] the applicant who appealed against a sentence of six years with a recommendation for post prison community based release after two years had pleaded guilty to a very large number of offences of dishonesty. The total value of property unrecovered in respect of all the offences on the several indictments was approximately $122,000. There was extensive co-operation with the police such that the applicant was charged with about 70 offences rather than the original 18; many of those offences had been committed whilst on bail. It appears that the applicant's real complaint was a desire for suspension of his sentence rather than parole eligibility. The court did not disturb the sentence.

[30] Finally, Mr Lehane referred to *R v Phillips.*[12] The applicant pleaded guilty on ex officio indictment to 19 counts of burglary and stealing, three counts of burglary by breaking, one of breaking and five of stealing. He was also sentenced for a number of summary charges including a breach of the *Bail Act.* He was sentenced to six years imprisonment for the burglary and lesser concurrent sentences. A parole eligibility date two years after he was taken into custody was set. The offences breached a suspended term of imprisonment in respect of 17 counts of burglary and stealing which was to be served concurrently. The applicant was 26 with an extensive criminal history for offences of dishonesty. The stealing offences were largely shop stealing. The value of the property was just over $70,000 and very little in value had been recovered. He had been addicted to heroin since he was 14. He admitted to a number of offences he was not otherwise charged with. Holmes JA observed:

> "If these offences had stood alone 6 years might well have been considered too severe. The applicant is young, and his cooperation, in the form of admissions and early guilty plea, was very significant. But it was necessary also in this case to activate the two years remaining on the suspended sentence which, in the ordinary course, would have been imposed cumulatively."

[31] In this case there are a large number of offences and a great deal of property stolen or damaged causing loss and distress to numerous people. Those are matters which

---

10 [2003] QCA 191.
11 [2004] QCA 21.
12 [2008] QCA 5.

a court will take into account when sentencing.[13] Of significance in this case, however, is the dangerous operation of the motor vehicle, a feature not present in terms of seriousness in the other cases. The extraordinarily reckless driving on two occasions which led, on the second occasion, to the serious injury of two people, with enduring consequences, lifts this matter into a more serious category. When those offences are taken into account together with the breach of the suspended sentences, which might have been ordered to be served cumulatively, and that the applicant was in breach of a probation order and on bail when many of these offences were committed, it cannot be said that the sentence was manifestly excessive. The three months imposed cumulatively was in recognition of the need to keep drugs out of prisons. It is important that where a plea of guilty is recognised in an early recommendation for parole eligibility it not be rendered nugatory by the inability of the prison authorities to offer pre-release programmes. The efficient administration of justice relies upon offenders being prepared to plead to offences and, in many cases, that will only occur if it is worthwhile for an offender to do so.

[32] I would refuse the application for leave to appeal against sentence.

---

13 *R v Bryant* [2007] QCA 247 per Jerrard JA at [11].