# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Dance* [2009] QCA 371 |
| PARTIES: | **R**<br>**v**<br>**DANCE, Anthony William**<br>(applicant/appellant) |
| FILE NO/S: | CA No 237 of 2009<br>DC No 2957 of 2008<br>DC No 748 of 2009<br>DC No 2215 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | Orders delivered ex tempore on 25 November 2009<br>Reasons delivered on 4 December 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 November 2009 |
| JUDGES: | McMurdo P, and Atkinson and A Lyons JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **Delivered ex tempore 26 November 2009**<br>**1. The application for leave to appeal against sentence is allowed.**<br>**2. The appeal is allowed only to the extent of replacing the parole release date of 16 January 2010 with a parole release date of today.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where applicant pleaded guilty to 19 property offences on three indictments and three summary offences – where applicant sentenced to 18 months imprisonment in respect of the 19 indictable offences – where applicant sentenced to one month imprisonment in respect of each of the summary offences – where the periods of imprisonment were ordered to be served concurrently – where sentencing Judge ordered that the applicant be released on parole on 16 January 2010 – where the applicant was 17 and 18 years old at the time of offending – whether sentencing Judge put adequate weight on the sentencing principle that imprisonment should be imposed as a last resort – whether sentencing Judge put |

| | adequate weight on the youth of the offender in fashioning an appropriate sentence – whether sentence was manifestly excessive<br><br>*Criminal Code 1899* (Qld), s 651<br>*Penalties and Sentences Act* 1992 (Qld), s 9 (1), 9(2), 9(3)<br><br>*Jones v Attorney-General of Queensland* [1999] QCA 259, distinguished<br>*Kroon v Hutchins* (1997) 25 MVR 571; [1997] QCA 200, distinguished<br>*R v Broadbridge* [1994] QCA 278, distinguished<br>*R v Chatters* [2008] QCA 233, distinguished<br>*R v Cummins* [2004] QCA 350, distinguished<br>*R v Graham* [2000] QCA 181, distinguished<br>*R v Hardgrave* [1996] QCA 5, distinguished<br>*R v Hillier* [2007] QCA 279, distinguished<br>*R v Hitchens* [1998] QCA 314, distinguished<br>*R v Howie* [2009] QCA 50, distinguished<br>*R v Kinersen-Smith & Connor; ex parte A-G (Qld)* [2009] QCA 153, cited<br>*R v McDowall* [2005] QCA 260, distinguished<br>*R v Pahoff* [2002] QCA 525, considered<br>*R v Ross* [2000] QCA 49, considered<br>*R v Smith* [2000] QCA 127, considered<br>*R v Taylor* [2007] QCA 214, considered |
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| COUNSEL: | K L Anderson for the applicant<br>M B Lehane for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **McMURDO P**: I agree with Atkinson J's reasons for making the following orders in this matter on 26 November 2009:

1. The application for leave to appeal against sentence is allowed.

2. The appeal is allowed only to the extent of replacing the parole release date of 16 January 2010 with a parole release date of today.

3. The Court will publish its reasons for these orders at a later time.

4. The Court notes the undertaking given by the appellant's legal representatives to inform the appellant of his obligations under s 160G *Penalties and Sentences Act* 1992 (Qld) and of the consequences if he fails to meet those obligations.

[2] As Atkinson J explains, the judge did not advert to the sentencing principles apposite in this case that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable: s 9(2)(a)(i) and (ii) *Penalties and Sentences Act*. That is especially curious as the prosecutor at sentence submitted that the effective global sentence to

reflect all the appellant's offending, including his breach of probation, was a sentence of 12 to 18 months imprisonment with the setting of an immediate parole release date. The persistent nature of the appellant's offending when on probation, and sometimes on bail, was concerning. But the cases relied on by the parties and which Atkinson J has analysed do not demonstrate that a period of actual custody was necessary in this case, bearing in mind the appellant's youth, his employment, and his promising prospects of rehabilitation which would be put at risk were he to receive a custodial sentence.

[3] **ATKINSON J**: On 26 November 2009 after hearing argument in this matter the court made the following orders:

1. The application for leave to appeal against sentence is allowed.

2. The appeal is allowed but only to the extent of replacing the parole release date of 16 January 2010 with a parole release date of today.

[4] These are my reasons for joining in those orders being made.

[5] The applicant, Anthony William Dance, and four co-offenders, pleaded guilty to a number of offences in the District Court on 15 September 2009. They were sentenced on 16 September 2009.

[6] The applicant pleaded guilty to charges on three indictments: a 16 count indictment in which he was charged with co-offenders; an ex officio indictment with a single stealing count in relation to the applicant alone; and a further three count indictment relating to the applicant alone. He was also dealt with for three driving offences as summary matters which had been transferred to the District Court pursuant to section 651 of the *Criminal Code* 1899 (Qld).

[7] On the 16 count indictment the applicant was convicted on two counts of breaking and entering premises and stealing (counts 1 and 9), three counts of unlawfully using a motor vehicle (counts 2, 4 and 14), two counts of wilful damage (counts 3 and 15), three counts of burglary and stealing (counts 6, 7 and 8), one count of unlawfully using a motor vehicle with a circumstance of aggravation (count 10), one count of fraud (count 11), one count of attempted fraud (count 12), and two counts of entering premises with intent to commit an indictable offence (counts 13 and 16).

[8] On the three count indictment, the applicant was convicted of one count of receiving (count 1), one count of unlawfully using a motor vehicle (count 2) and one count of dangerous operation of a motor vehicle (count 3). Those offences occurred between 23 and 27 January 2008. The single count indictment was for stealing. That offence occurred on 1 September 2008.

[9] The offending referred to in the 16 count indictment commenced on 16 December 2007. At that time, the applicant was subject to probation for two years which had been imposed on 12 October 2007 on three counts of unlawful use of a motor vehicle committed in September 2007. No conviction had been recorded.

[10] On 16 December 2007, the applicant and a co-offender, who was a child, went to a community association premises. The child used a brick to smash the glass entry door and the applicant went inside and took two sets of vehicle keys. The applicant

used a Toyota Hi-Ace van to crash through a fence leading to bushland. He then entered a Ford Transit van and drove it through the bush (counts 1-4). The applicant and others drove the Ford Transit around for another two weeks and used it to commit other offences.

[11] Between 23 and 31 December 2007, the applicant and other offenders entered the residence of a 71 year old man on two occasions. The applicant knew where the key to the residence was kept because he used to work for the complainant. They took a quantity of alcohol from a bar fridge and $200 cash on the first occasion and on the second occasion took a cheque book which contained two pre-signed cheques, an imitation pistol, $960 in cash as well as some jewellery (counts 6-7). The complainant was alerted to the offending when he received a telephone call from the Commonwealth Bank on 31 December 2008 informing him that someone was present in the bank trying to cash a cheque of his for $3,000.

[12] The next offence occurred between 25 December 2007 and 2 January 2008. The applicant and a co-offender broke the lock of the back laundry door of a residence when the occupants were absent. The locks to a granny flat were also damaged. The applicant took a bottle of bourbon and a bottle of whisky while the other offenders took some clothing, a video camera and a tray of coins (count 8). Another break and enter was committed between 28 December 2007 and 1 January 2008 where the applicant and others forced open a junior cricket club roller door and smashed the glass doors of a refrigerator and took a number of cans of beer (count 9).

[13] On 30 December 2007 the applicant used one of the stolen cheques to purchase a car for $2,000. That car was a blue Commodore which was used to commit other offences (counts 10, 11).

[14] The next offence was the presentation of a cheque to the Commonwealth Bank by the applicant. The cheque was one of the stolen cheques which he attempted to cash for $3,000. The applicant handed over ID in his own name, i.e. Anthony Dance (count 12).

[15] On 1 January 2008, the applicant and others entered into premises of a transport business at Rocklea through a gap in the fence. The applicant used keys that were in a private vehicle to drive it off the premises using the vehicle to smash through a locked gate. The offenders later entered and took various items such as a torch, a portable DVD player, a stereo, a can of Milo, a spanner, a mobile phone etc from various trucks. The applicant and his co-accused were apprehended that night or the following day in possession of the stolen vehicles. All the items stolen from the trucks were recovered. He made full admissions as to his offending behaviour to the police and was placed on bail.

[16] The offences on the three count indictment and the three summary offences occurred on 24 January 2008. The applicant was given keys to a Subaru which was parked in the driveway of a residence at Coopers Plains. The keys were given to him by the owner’s son who had taken them from his father without permission. Police conducting patrols that night saw the stolen Subaru and activated their lights and sirens whereupon the Subaru sped off. The police reached speeds of 100 kph in a 60 kph zone and estimated that the applicant was driving at speeds of up to 150 kph. The police ceased the pursuit after conducting a risk assessment. They

saw the applicant performing an overtaking manoeuvre on the crest of a hill and travelling at speed on the wrong side of the road as he overtook that vehicle.

[17] Another police vehicle followed without lights and sirens after the initial police vehicle stopped the pursuit. They saw the applicant break heavily to avoid hitting the rear of another vehicle after coming over the crest of a hill. The applicant then drove on the opposite side of the road and accelerated to an estimated speed of 100 kph in a 60 kph zone. The applicant drove through a red traffic light. When the car was recovered at Byron Bay on 26 January 2008 it had about $400 worth of damage. When the police interviewed the applicant he made full admissions. He was again released on bail.

[18] The offence on the one count indictment occurred on 1 September 2008 when the applicant stole various items from David Jones and Big W at the Garden City Mt Gravatt shopping centre. He was apprehended, taken to the Mt Gravatt police station and given a notice to appear. He then went to the K-Mart store at the Garden City shopping centre and was apprehended leaving the store with items he had not paid for. He was apparently intoxicated at the time.

[19] The applicant's only criminal history consisted of the three counts of unlawful use of a motor vehicle referred to earlier for which he was sentenced to two years probation. It was while he was subject to that probation order that all of the offending behaviour charged occurred.

[20] He was also convicted of three breaches of bail conditions:

- Convicted on 28 February 2008 for breach of bail on 4 February 2008;
- Convicted on 19 May 2008 for breach of bail on 25 April 2008;
- Convicted on 10 December 2008 for breach of bail on 12 August 2008.

[21] He was subsequently convicted on 18 May 2009 of wilful damage to property without consent thereby causing a loss of $250 or less committed on 20 February 2009. It was a regulatory offence which concerned a broken window, quite unlike in type and seriousness to the matters for which he was being sentenced. Only on that occasion and for the first breach of bail conditions were convictions recorded. He has never spent any time in custody apart from twelve hours at the watch house. He had not offended between 20 February 2009 and when he pleaded guilty to the current offences on 16 September 2009.

**Sentencing principles**

[22] Subsection 9(1) of the *Penalties and Sentences Act* 1992 (Qld) sets out the only purposes for which sentences may be imposed on an offender. Those purposes include punishment, conditions to assist rehabilitation, deterrence of the offender or others, denunciation of the conduct on behalf of the community and protection of the Queensland community from the offender.

[23] Subsection 9(2) provides a number of matters to which the court must have regard when sentencing an offender. The first of those is found in subsection 9(2)(a) which mandates that the court must have regard to the principles that a sentence of imprisonment should be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable. Those principles do not apply to

the sentencing of an offender for offences which involve the use, or counselling or procuring of the use, of violence against another person or that result in physical harm to another person. The applicant in this case was not involved in any such offence so the principles mentioned in subsection 9(2)(a) apply to this sentencing of the applicant.

[24] The other matters relevant to sentence are set out in subsection 9(2) of the *Penalties and Sentences Act*. Importantly for this matter they include the age of the offender. The age of the offender is relevant even with youthful offenders who have committed violent offences. In *R v Kinersen-Smith & Connor*; *ex parte A-G (Qld)* [2009] QCA 153 at [26] Holmes JA referred to the emphasis the court places when sentencing on the community interest in the rehabilitation of young offenders. Her Honour quoted from *R v Mules* [2007] QCA 47 at [21]:

> "youthful offenders with limited criminal histories and promising prospects of rehabilitation who have pleaded guilty and cooperated with the administration of justice, even where they have committed serious offences like [robbery with violence], should receive more leniency from courts than would otherwise be appropriate."

[25] The applicant in this case was young. He was born on 22 December 1989 so was only 17 and 18 years old when the offending occurred. He had only previously been convicted of three offences of unlawful use of motor vehicles with no convictions recorded. The probation report for his breach of community based orders was far from positive. He failed to report as directed on six occasions, committed further offences on two separate occasions, and demonstrated a resistant attitude towards engaging and recommended interventions. He did however initiate counselling sessions with youth and family services as directed.

[26] The defence relied on a report by the psychologist, Peter Jordan, dated 7 September 2009 which showed that the applicant had reasonable prospects of rehabilitation. That report showed that the applicant had been in full-time employment for the past two months. He had had a difficult childhood as his parents separated when he was 11. He lived with his grandparents because both his step-father and father were physically abusive to him. Both of his parents were alcoholics. At school he was in receipt of remedial support but completed his schooling to the end of year 12.

[27] Mr Jordan concluded that the applicant committed a variety of offences while he was associating with a number of young people who were involved in similar offending behaviour. The group frequently engaged in excessive consumption of alcohol and they broke into premises for the primary purpose of stealing alcohol. While he was older than other members of the group, he was not a leader. His background had been marked by difficulties due to parental separation, domestic violence and the reported alcoholism of his parents. He moved to be away from his step-father's violence and was raised during his teenage years by grandparents whom he felt were too strict with him. Unfortunately, he then moved away from them and lived with others who were engaging in a range of antisocial behaviour. His medical records indicate that he may have been abusing cannabis earlier in the year resulting in psychotic symptoms and paranoia.

[28] Psychological assessment indicated that he was not a person who was assertive with others and was likely to be very dependent upon others for acceptance. His

presentation at interview with the psychologist was marked by a lack of social confidence. A valid measure of cognitive ability revealed he was a person of well below average verbal intellect with well below average understanding of social norms and social institutions.

[29] Fortunately he was by then living in a fairly stable situation and was working a solid numbers of hours each week including overtime. He was supporting himself and receiving a reasonable income. His offending behaviour was immature and he needed guidance. The report concluded:

> "If he were to receive a custodial sentence, there is a danger that he would be heavily influenced by others in jail who exhibit longstanding patterns of criminal behaviour. In my view, there is a likelihood that a custodial sentence may do him more harm than good and that he is more likely to continue to develop prosocial behaviours if he continues within the same stable environment that he is in now; that is living with two family friends and working full-time."

[30] Mr Jordan was of the view that he needed monitoring in the community and participation in a programme of counselling through an ATODS clinic to address possible cannabis use.

[31] It was no doubt with all these factors in mind that the Crown submitted that an appropriate head sentence for all of the applicant's offending was in a range between 12 and 18 months. The learned prosecutor particularly mentioned his age at the time of the offences and the fact that the offences on the 16 count indictment occurred only over a two week period. The prosecutor submitted that in view of his failure to comply with the probation order, release on parole should be ordered rather than a suspended sentence. The prosecutor also submitted that taking into account the applicant's early admissions to police, sometimes to the full extent of his offending which otherwise the Crown would not have known, his timely plea of guilty and co-operation with the administration of justice, it would be open to the sentencing judge to order an earlier than usual parole release date from the date of sentence. When the judge made an enquiry of the prosecutor, the prosecutor said that on balance in relation to his age and all those factors that were mentioned including his co-operation with authorities, an immediate parole release date was appropriate. On behalf of the applicant, defence counsel submitted for a sentence of nine to 12 months imprisonment to be served by way of intensive correction order or alternatively an immediate fixed parole release date.

[32] Based on Mr Jordan's report, defence counsel also submitted that in the time since the offending had taken place the applicant had undergone significant rehabilitation by changing his living environment, taking on full-time employment and cutting back on his alcohol use.

[33] This was a timely plea of guilty with a full hand up committal with an indication at that time that he would be pleading guilty to the offences. The applicant's immediate supervisor at his place of work was present in court at his sentencing confirming that the applicant had learnt a number of new skills in his employment and that his job was open to him. His supervisor said that the applicant had expressed to him his remorse for what he had done and seemed to display better insight into the gravity of the situation.

[34] The learned sentencing judge convicted the applicant for his breach of probation imposed on the three offences for unlawful use of a motor vehicle which had been dealt with on 12 October 2007. He revoked the probation order and convicted him of each of those offences and ordered he be imprisoned for a period of four months in respect of each offence. In respect of the 19 offences on the three indictments before the court, the judge convicted him of each offence and ordered that he be imprisoned for a period of 18 months in respect of each of those offences. In respect of the three summary offences, the sentencing judge convicted him of each of them and ordered that he be imprisoned for a period of one month in respect of each of those offences. Each of the periods of imprisonment imposed were ordered to be served concurrently with each other. To reflect the factors in mitigation the judge ordered that the date upon which the applicant be released on parole be fixed after he had served a period of four months imprisonment that is on 16 January 2010.

[35] The learned sentencing judge referred to the mitigating factors which he said were his age, his pleas of guilty at an early date, his co-operation thereby with the administration of justice, and the admissions he made to the investigating police officers. His Honour also took into account the psychologist's report. What the learned sentencing judge did not refer to, and does not appear to have considered, is that for offending of this type, under subsection 9(2)(a) of the *Penalties and Sentences Act* to which the court must have regard, a sentence of imprisonment should be imposed only as a last resort and a sentence that allows the offender to stay in the community is preferable. His Honour also appears not to have taken account of the promising efforts of rehabilitation in the intervening period between the offending and the date of sentence.

[36] The prosecution referred to the following comparable authorities all of which were for sentences imposed when the offender pleaded guilty.

[37] *R v Broadbridge* [1994] QCA 278: Broadbridge was 18 years of age with an irrelevant criminal history. The dangerous driving involved driving his vehicle slightly towards a police officer at high speed in order to scare him. The police officer was trying to get Broadbridge to pull over. He also broke into a house and stole some jewellery. He was sentenced to 18 months imprisonment with a recommendation for parole after six months imprisonment for the offences of burglary, stealing and dangerous driving. What made that case different from the present case was the aggressive and threatening driving at a police officer.

[38] *R v Hargrave* [1996] QCA 5: Hargrave was convicted of unlawful use of a motor vehicle, house breaking and stealing. He was 18 years of age at the time of offending. He had previously been sentenced to a short period of imprisonment for breaching probation and community service orders. He acted as a look-out in respect to the house breaking and he was the prime offender in respect to the other charge. He was sentenced to 12 months imprisonment suspended after four months. Unlike the applicant, he had previously served a term of imprisonment.

[39] *R v Graham* [2000] QCA 181: Graham was 20 at the time of sentencing for three counts of break, enter and steal, one count of entering with intent, one count of unlawful use and breach of probation. He had an extensive criminal history for offences largely of dishonesty. He committed the offences while on probation. Graham broke into three childcare centres and a pharmacy within a week. There

was a loss of approximately $6,000.00. He was sentenced to two years imprisonment with release on parole after eight months. Graham was older than the applicant and the amount stolen was greater. Unlike the applicant he had an extensive criminal history.

[40] *R v Taylor* [2007] QCA 214: Taylor was 22 years of age when sentenced and 20 at the time of offending, with a relatively minor criminal history. He committed 22 dishonesty offences over two short time frames. The total value of property loss involved in all the offences was $9,119.00. The offences involved breaking into business premises. Most of the offences were committed whilst he was on bail. Twelve of the offences related to breaking into a school on one occasion. Taylor made extensive admissions. On appeal, he was sentenced to two years imprisonment to be suspended after eight months. He was older than the applicant in this case and the value of the property lost much greater.

[41] *R v Howie* [2009] QCA 50: Howie was either 22 or 23 years of age when he committed the offences. His criminal history included a few relatively minor offences and a stealing and fraud offence for which he was given probation. Over a 14 month period he stole a variety of items from his girlfriend and family members. He pawned some of those items. He was also apprehended shoplifting. The total loss was perhaps significantly less than two or three thousand dollars. A number of the offences breached the probation order. He made full admissions. He was sentenced to two years imprisonment suspended after eight months. He was older than the applicant, had a criminal history and the offending took place over a longer period.

[42] The applicant relied upon the following comparable cases in respect of the offence of dangerous operation of a motor vehicle.

[43] *Kroon v Hutchins* [1997] QCA 200: The applicant was convicted of five counts of dangerous operation of a motor vehicle all of which had occurred on the same date. In the early hours of the morning the applicant was involved in a police chase which consisted of the applicant regularly exceeding the speed limit, crossing the centre line and travelling at speeds up to 150 kph. On occasions he drove slowly swerving over the road and then accelerating away and on occasions driving very close to police vehicles trying to apprehend him. He had previous traffic history including offences of drink driving and had previously been disqualified from driving. He was sentenced in the Magistrates Court to 12 months imprisonment suspended after serving six months for an operational period of three years for each offence, with the sentences to be concurrent. The appeal was allowed and a sentence of 12 months imprisonment to be suspended after serving four months substituted. The offender was not a youthful offender, being 30 years old.

[44] *R v Hitchens* [1998] QCA 314: The applicant had pleaded guilty to an offence of dangerous operation of a motor vehicle. The police had seen the applicant doing “burnouts” at a service station and a chase ensured. It was 3:52pm and the chase went on for almost 50km and lasted approximately 25 minutes. In the course of the chase the applicant reached speeds of up to 130 kph in a 50 kph zone, 160 kph in an 80 kph zone and 190 kph in a 100 kph zone. The applicant went onto a roundabout causing other vehicles to take evasive action and was weaving in and out of traffic and went through three red lights. He swerved towards a police vehicle and collided with a stationary vehicle causing over $1,500 damage and then

collided with another car causing damage of $5,704. A police officer pursuing the applicant on a motorcycle was injured when he lost control during the chase. The applicant pleaded guilty, had a limited criminal and traffic history and was of limited intellectual ability. The applicant had been sentenced to imprisonment for 12 months suspended after three months with an operational period of two years. He was also disqualified from holding a driver's licence for two years. The applicant's appeal against sentence was dismissed. His driving was much more dangerous; he was older than the applicant; and a person was injured as a result of his driving.

[45] *Jones v Attorney-General of Queensland* [1999] QCA 259: This was an appeal against sentence by the Attorney General. The respondent pleaded guilty to one count of dangerous operation of a motor vehicle and was sentenced to one year's imprisonment wholly suspended for three years and disqualified from holding a driver's licence for two years. The respondent had a pillion passenger on his motorcycle and drove it through a red light in the early hours of the morning. A police chase ensued. The respondent did not have full control of his motorcycle at all times and ran three red lights, reached speeds up to 130 kph and at one point his driving resulted in his pillion passenger being thrown off the motorcycle landing in front of an oncoming vehicle. The chase was terminated by a decision of the police. The respondent was 20 at the time of the offence and 21 at the time of sentence. He had some prior criminal history but had never previously been imprisoned. He had an extensive traffic history involving speeding and had previously had his licence cancelled. He committed a further speeding offence after the commission of the dangerous operation of a motor vehicle. As a result of his offending a person was injured. In dismissing the appeal McPherson J (as his Honour then was) said at page 6:

> "To impose a prison sentence in these cases is certainly not mandatory; and even if we were to alter the sentence in this case in order to impose a sentence of duration of the kind to which some of the authorities refer, it would not alter the fact that sentences in this field in circumstances like those disclosed before us are essentially discretionary.
>
> It is certainly not uncommon, where a police chase takes place as a result of the defiance of the driver of a car who is committing traffic offences of this kind, for a sentence of imprisonment to be imposed, even if a short one, but there is no rule or principle to that effect."

[46] *R v Pahoff* [2002] QCA 525: The applicant pleaded guilty to one count of breaking and entering and stealing, one count of dangerous operation of a motor vehicle and one count of obstructing police. He was sentenced to 18 months probation and ordered to perform 200 hours of community service. He was also ordered to pay $95 compensation. The applicant broke into a vehicle and stole the stereo from the vehicle. He then drove off in his mother's vehicle and was followed by some eyewitnesses to the break in. The eyewitnesses pursued him for approximately six kilometres during which time the applicant was seen to travel at speeds of up to 150 kph, cross double white lines, drive on the wrong side of the road and at one stage travel with his lights off. The eyewitnesses who had been contacted by the police were advised to stop their pursuit. The applicant was 17 at the time of the offence and 18 at the time of sentence. He had no previous convictions and had only recently obtained his licence. He made admissions to the driving in a record of

interview. The sentencing judge had only recorded a conviction in respect of the dangerous driving offence. That was the primary point of the appeal. The respondent conceded that the sentence imposed was appropriate. The appeal was dismissed as the court considered that the recording of the conviction was within the appropriate sentencing discretion.

[47] *R v Hillier* [2007] QCA 279: The applicant pleaded guilty by way of ex officio indictment to an offence of dangerous operation of a motor vehicle and was sentenced to 18 months imprisonment to be served cumulatively with a sentence he was already serving. The dangerous operation of a motor vehicle involved a police chase whilst the applicant was on parole. The chase lasted for a distance of approximately some eight kilometres during which time the applicant did not observe a stop sign and overtook other vehicles dangerously, crossed double white lines and forced oncoming vehicles off the road. The chase was called off by police. The applicant had an extensive criminal history and was on parole at the time of the offence. The court considered that the sentence imposed was within range in all the circumstances and dismissed the appeal.

[48] *R v Chatters* [2008] QCA 233: The applicant had pleaded guilty to one count of unlawful use of a motor vehicle, one count of dangerous operation of a motor vehicle and one summary offence of obstructing police. He was sentenced to 18 months imprisonment in respect of each indictable offence and six months imprisonment in respect of the summary offence, to be served concurrently. The offences breached a suspended sentence for a robbery offence and were made cumulatively to the remaining term of the suspended sentence. The offences occurred the day the applicant was released from prison. He broke into a car and drove it off. The applicant drove the vehicle and crashed into a car. As police approached the vehicle the applicant drove up onto the footpath and again hit the vehicle he had just hit. The applicant then drove away and a police chase ensued. During the chase upon reaching a cul de sac the applicant reversed the car towards the police car which had to swerve to avoid impact. The applicant then accelerated his vehicle into the side of the police vehicle and again drove off. The police again chased. During this part of the chase the applicant reversed into the side of the police car and an occupant of the car suffered whiplash. The applicant then drove on the wrong side of the road and through red lights forcing other vehicles to swerve to avoid a collision. He then drove through a carpark forcing a pedestrian to jump out of the path of the applicant's vehicle. He eventually crashed into a railway crossing signal and fled the car. He was apprehended shortly after. The applicant was 31 at the time of the offence and was intoxicated. He was a chronic alcoholic. He had previously been imprisoned in relation to offences of dangerous operation of a motor vehicle. In total the applicant had been sentenced to about 65 separate terms of imprisonment. The court referred to the totality principle given the activation of the suspended sentence terms and dismissed the appeal. This was a much more serious driving offence by a man who was older with an extensive criminal record and which resulted in injury to the occupant of a car.

[49] The applicant relied on the following comparable cases in respect of property offences.

[50] *R v Ross* [2000] QCA 49: The applicant pleaded guilty to an ex officio indictment charging a total of 22 property offences and eight summary offences. The applicant was aged 17 and 18 at the time of the commission of the offences and 18 at the time

of sentence. The total loss of the offending was $8,400. The applicant made admissions to the police, including admissions to some offences for which the police had no other evidence. Some of the offences were committed whilst on bail. He spent 93 days in pre-sentence custody before being granted bail. In relation to the indictable offences the applicant was sentenced to six months imprisonment followed by three years probation. The time served in custody was declared as pre-sentence custody. In relation to the summary offences the applicant was sentenced to one month imprisonment in respect of each count to be served concurrently with each other and with the sentence for the indictable offences. He was released on appeal bail after serving eight days of the sentence and had commenced the probation. Since released on appeal bail he had performed satisfactorily on probation.

[51] The applicant had previous criminal history for dishonesty offences and had previously failed to comply with community service orders. The court considered that the sentence was manifestly excessive in the circumstances and sentenced the applicant to three months imprisonment in respect of each indictable offence and declared that the 93 days be time served as pre-sentence custody. The sentence in respect of the summary offences was left undisturbed. Upon release the applicant was ordered to three years probation. In upholding the appeal Wilson J stated at page 5:

> "Courts hesitate before sending youthful offenders to prison, where they are at risk of mixing with hardened criminals. In many cases, their rehabilitation, which is in the interests of the community as well as such offenders, is more likely to be achieved by supervision in the community. On the other hand, a short term of imprisonment may be necessary as a deterrent to the particular offenders and to other like-minded young people."

[52] *R v Smith* [2000] QCA 127: The applicant pleaded guilty to a total of 18 property offences. The offences occurred over a period of 11 months and some were committed whilst on bail. The applicant was sentenced to three months imprisonment and three years probation in respect of each offence. The applicant had a minor criminal history and had not previously been sentenced to any term of imprisonment. The value of the property was around $20,000 and no prospect of compensation. It was noted that the applicant was addicted to heroin and his offending was to support that addiction. In upholding the appeal the court set aside the sentence and sentenced the applicant to 12 months imprisonment to be served by way of an intensive correction order with conditions including drug rehabilitation programme as advised by authorities.

[53] *R v Cummins* [2004] QCA 350: The applicant pleaded guilty to 14 property offences and one offence of common assault and was sentenced to serve three months imprisonment followed by two years probation. The applicant's offending occurred over a period of seven months and resulted in a total financial loss of $460. The applicant made admissions to most of the offences in circumstances where the police had no other evidence against him. The applicant had previous criminal convictions and had previously breached a probation order. The offences on the indictment breached a community service order that had recently been imposed. The applicant was 18 and 19 at the time of the offences and was 20 years old when sentenced. The applicant had suffered from a difficult upbringing and had been

subject to physical abuse. Since his arrest the applicant had been employed. The court dismissed the applicant's appeal against his sentence. Subsection 9(2)(a) of the *Penalties and Sentences Act* did not apply to his case since he committed an offence which involved the use of violence.

[54] *R v McDowall* [2005] QCA 260: The applicant had pleaded guilty to seven property offences and was sentenced to nine months imprisonment to be suspended after serving one month. The total value of the loss was approximately $3,500. The applicant at 25 at the time of sentence was older than the present applicant and had no prior convictions.

[55] *R v Taylor* [2007] QCA 214: The applicant had pleaded guilty to 22 offences of dishonesty and was sentenced to three years imprisonment for each offence to be served concurrently with a parole release dated fixed after serving one year. The total value of the offences was $9,119 and a total of 14 offences were committed whilst on bail. He had some limited criminal history but had not previously been imprisoned. He was 20 at the time of the commission of the offences and was 22 when sentenced. He was in full time employment at the time of sentence. In granting the appeal the court referred to the rehabilitation efforts that the applicant had made since his arrest and his more stable life. The sentences were set aside and in lieu sentences of two years imprisonment to be suspended after serving eight months for an operational period of three years (in respect of the 10 count indictment) and two years imprisonment with a parole date fixed after serving eight months imprisonment (in respect of the 12 count indictment).

[56] It does appear that the learned sentencing judge failed to take account of the principles that in a case such as this a sentence of imprisonment should be imposed only as a last resort and that a sentence that allows the offender to stay in the community is preferable. In those circumstances the sentencing process was affected by error and it falls to this court to exercise the sentencing discretion afresh.

[57] In this case the court must balance the repeated nature of the offending which occurred whilst the applicant was subject to a probation order and that the offences on the three count indictment, the one count indictment and the summary offences occurred whilst he was on bail for the offences on the 16 count indictment. Those matters suggest that the sentence of 18 months is within range.

[58] However there are a number of important mitigating factors to be taken into account. They include the offender's youth, he was only 17 and 18 years of age when the offences were committed and 19 when he came to be sentenced, his efforts at rehabilitation which had resulted in his not offending for some period and having a stable living and working environment, and his manifest co-operation with the authorities which included his plea of guilty and admission of offences of which he could not have been convicted without those admissions. In the circumstance where a sentence of imprisonment may only be imposed as a last resort, the Crown submission below that it would have been within range to have ordered an immediate parole release date was appropriate and should have been acted upon by the sentencing judge. This court was informed on the hearing of the appeal that he is able to return to a stable home and working environment. I therefore agreed in the orders that the application for leave to appeal against sentence should be allowed and the applicant released on parole immediately.

[59] **A LYONS J**: I agree with the reasons given by Atkinson J that the appeal should be allowed.