SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hoeksema* [2010] QCA 357
PARTIES:	**R** **v** **HOEKSEMA, Jamie Rodney** (appellant/applicant)
FILE NOS:	CA No 147 of 2010 DC No 600 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2010
JUDGES:	Margaret McMurdo P, Holmes JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is allowed.** **2. The appeal is allowed.** **3. The sentences imposed on 4 June 2010 (as amended on 24 June 2010) are set aside, and are substituted in respect of each offence by an order that the appellant be sentenced to two years imprisonment, those sentences to be served concurrently with one another and concurrently with the sentences of imprisonment imposed in the District Court on 11 April 2008.** **4. The date the appellant is eligible for parole be fixed at 4 June 2011.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after a trial by jury of two counts of receiving stolen property – where the applicant was found with stolen property in his possession including three mobile phones, a torch, gloves, a knife, a laptop, a power tool, a handbag, a satchel of jewellery, a wallet and a sum of money – where the applicant was relatively young and had a notable criminal history – where the applicant was sentenced to three years

imprisonment on each count, to be served concurrently – where those sentences were also to be served concurrently with a term of imprisonment which the applicant was then serving – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECTS OF SENTENCE ON IMPRISONMENT OF PRISONER – where the applicant was sentenced to three years imprisonment on each count, to be served concurrently – where those sentences were also to be served concurrently with a term of imprisonment which the applicant was then serving – whether the learned sentencing judge had erred in failing to properly consider the period of imprisonment which the applicant would be required to serve when determining the appropriate parole eligibility date

Penalties and Sentences Act 1992 (Qld), s 160C, s 160E, s 160F(2)

R v Aston-Brien [2004] QCA 23, distinguished
R v Evans [2010] QCA 30, cited
R v Misura [1994] QCA 181, distinguished
R v Whelan [2010] QCA 12, cited

COUNSEL: S Ryan for the appellant/applicant
D L Meredith for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Daubney J's reasons for granting the application for leave to appeal and allowing the appeal against sentence. I agree with the orders proposed by Daubney J.

[2] **HOLMES JA:** I agree with the reasons of Daubney J and with the orders he proposes.

[3] **DAUBNEY J:** On 4 June 2010 the applicant, Jamie Rodney Hoeksema, was convicted after a trial by jury of two counts of receiving stolen property. He was sentenced to three years imprisonment on each count, to be served concurrently. Those sentences were also to be served concurrently with a term of imprisonment which the applicant was then serving for other offences. The learned trial judge originally ordered that the applicant's parole release date be fixed at 4 December 2011 (that is, after serving 50 per cent of the three year concurrent sentence he had imposed). On 24 June 2010, the sentence was re-opened and his Honour amended the sentence to provide that 4 December 2011 would be the applicant's parole eligibility date, rather than a fixed release date. (It is uncontentious that this was appropriate, in light of the provisions of ss 160E and 160C of the *Penalties and Sentences Act* 1992 ("*PSA*").

[4] The applicant has now applied for leave to appeal in respect of those sentences.

Circumstances of offending

[5] The applicant was charged with two counts of burglary and with a count of receiving as an alternative to each of the counts of burglary. The jury acquitted him of the burglaries but convicted him on the counts of receiving. The convictions, clearly enough, were based on evidence that the applicant had been found with stolen property in his immediate possession and other stolen property a few metres away from him. At about 6.25 am on 15 May 2009, police found the applicant sitting against a lamp-post at an intersection. The applicant told police that he was waiting for a lift. He was leaning on a bag, which was searched by police and found to contain mobile phones, a torch, gloves and a knife. In tall grass, about two or three metres behind the applicant, police found a laptop and a jigsaw. A handbag, a satchel of jewellery and a wallet were also found in the same vicinity. All of this was undoubtedly stolen property. The evidence at trial was to the effect that the wallet had contained about $135 in cash. The applicant had $135 in his top pocket when apprehended by police.

[6] The applicant was taken to the Pine Rivers Watchhouse and was interviewed by police. He told police that he had been driving around with a person called Brad and two women, that Brad received a phone call and then drove to the place where the applicant was subsequently located by police. The applicant said that there were two men there, who put bags of "stuff" in the car. There was only one spare seat in the car, and the applicant told police that he was forced out of the car and told to "wait with a few things". He was told that these people would be back to pick him up in five or ten minutes. They left, and the applicant said that he waited there for some 45 or 50 minutes until the police arrived.

[7] The applicant told police that he had been threatened with physical harm by one of the men if he did not stay with the bag. He told police that he had never seen the property found in the bush behind him, but that he had an "inkling" that there was stolen property in the bag. The applicant told police the name of the person whom he alleged had stolen the property and threatened him. The prosecution called this person as a witness at the trial. He provided an alibi (supported by his ex-girlfriend) for the night of the burglaries. This person denied that he had forced the applicant out of the car.

Applicant's background

[8] The applicant was 23 years old at the time of the offending and 24 years old at trial. His criminal history is notable. Since February 2004 (when he was 18) he has appeared in the Magistrates Court no less than 10 times for sentencing on a variety of offences. His criminal history is littered with records of offences of dishonesty, including shoplifting and burglary and entering offences. On 30 September 2009, he was sentenced by a magistrate to three months imprisonment for an offence under the *Corrective Services Act* 2006.

[9] The applicant has appeared for sentencing by the District Court on three previous occasions. On 8 July 2004, he was sentenced to three years probation and 100 hours of community service for the offence of entering a dwelling and committing an indictable offence. On 1 March 2005, he was convicted of the offence of attempting to enter a dwelling and commit an indictable offence on

7 August 2004; this offence occurred while he was on probation. He was sentenced in the District Court to serve 12 months imprisonment, suspended after four months, with an operational period of three years, and 13 days spent in pre-sentence custody was deemed time already served. This term of imprisonment was ordered to be served cumulatively upon a sentence of four months imprisonment, which was imposed upon a re-sentencing for the offence for which he had been given probation and community service. The applicant successfully appealed the sentence imposed on 1 March 2005, and it was ordered by this Court that the terms of imprisonment be served concurrently.[1]

[10] On 11 April 2008, the applicant was sentenced to an effective term of imprisonment of two years and eight months for offences including two counts of burglary, one count of receiving stolen property, one count of common assault and a breach of the suspended sentence which had previously been imposed. The applicant served eight months in prison and was released on parole on 11 December 2008. The applicant was on parole under that sentence when he committed the present offences on 15 May 2009.

[11] It was not contended before this Court that the statement by a previous sentencing judge that this applicant's life had been one of "desperation" was not accurate.[2] The applicant started using amphetamines at age 13 and subsequently developed drug-induced schizophrenia. When interviewed, the applicant told police that he had had a fight with his partner and was "drinking his sorrows away". He did not want to go home.

The sentence imposed

[12] The learned sentencing judge noted that the property which was the subject of the first count of receiving was a laptop computer, a laptop case, a computer mouse and a power tool; the property the subject of the second count consisted of two mobile phones, two bags, a wallet containing identification cards, a quantity of jewellery and a sum of money.

[13] His Honour said expressly that he was not sentencing the applicant on the basis that he had stolen that property; the learned sentencing judge said:

> "Clearly the jury's verdict is an acceptance that you did not enter and steal that property from those residences."

[14] The learned sentencing judge referred to the applicant's long criminal history, which included numerous offences for entering dwellings and committing indictable offences, burglary and receiving stolen property. He referred to the applicant's young age and periods of imprisonment, including the fact that the applicant was on parole at the time he committed the current offences, and indeed had committed them within six months of being released from prison. His Honour continued:

> "You have shown no remorse. You have similar convictions and other convictions for dishonesty, and you were on parole at the time you committed these offences. The submission has been made that I sentence you to three years imprisonment to be cumulative, with a release date on the 10th of June 2012. I consider I have to take into account, and give weight to the 13 months you have already been in custody since your parole was cancelled on the 15th of May 2009.

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1 *R v Hoeksema* [2005] QCA 190.

2 Sentencing remarks, 11 April 2008 per Everson DCJ.

> Nevertheless, I consider for these offences that I am to deal with you today, particularly in light of your criminal history and your lack of remorse and that you were on parole, you be sentenced to three years imprisonment concurrent with each other, that I fix your parole release date as the 4th of December 2011. That is, I have not made the sentence cumulative, I have made it concurrent and therefore the effect is that after serving half, you will be released on the 4th of December 2011."

[15] As I have already mentioned, on a subsequent re-opening of the sentence, the fixed parole release date was altered to become a parole eligibility date.

The applicant's contentions

[16] The applicant's principal contention on appeal was that the sentence for these offences was manifestly excessive. It was also submitted that the learned sentencing judge had committed an error by failing to consider properly the period of imprisonment which the applicant would be required to serve when determining the appropriate parole eligibility date.

[17] Counsel for the respondent conceded in argument before this Court that the effective head sentence of three years in this case was "at the top end of the appropriate range". It was submitted, however, that the learned sentencing judge ameliorated the effect of the sentence by making it concurrent with the other sentence then being served by the applicant, rather than cumulative upon that sentence.

[18] Counsel for the parties were unable to point to any directly comparable case in which a young offender, albeit with a significant criminal history, had been sentenced to three years imprisonment for what were conceded to be relatively minor examples of the offence of receiving stolen property.

[19] In *R v Whelan* [2010] QCA 12, a 24 year old offender, with a substantial criminal history, had pleaded guilty to receiving, burglary by break and common assault. These offences were committed at a time when he was subject to a suspended sentence of three years and two months imprisonment and a two year probation order. The suspended sentence was activated in full and he was re-sentenced on the "probation" offences to a concurrent term of two years imprisonment. For the offences of receiving and burglary, he was sentenced to 10 months imprisonment, imposed cumulatively upon the effective sentence on the other offences of three years and two months imprisonment. For that total period of imprisonment of four years, a parole eligibility date was set after 18 months. On appeal, it was held that the sentence of 10 months was lenient, particularly in view of an order that it be served concurrently with the other periods of imprisonment.

[20] In *R v Evans* [2010] QCA 30, a 26 year old offender, with "an appalling history of offences of dishonesty"[3] and an addiction to amphetamines, had been sentenced after trial to three years imprisonment for one count of entering premises with intent. That sentence was imposed cumulatively upon another sentence of three years imprisonment which he was then serving. No parole eligibility date was set. On appeal, it was not in issue that the sentence imposed had been excessive. The offender was re-sentenced to 12 months imprisonment, to be served cumulatively.

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[3] *R v Evans* [2010] QCA 30 at [5].

[21] Other cases to which reference was made in argument before this Court are of marginal assistance. The circumstances in *R v Misura* [1994] QCA 181, whilst involving a 20 year old offender, involved property of a far greater value than that seen in the present case. The offender in *R v Aston-Brien* [2004] QCA 23 was a 46 year old heroin addict with a substantial criminal history. He was found in possession of car keys and remote control devices which had been stolen from a property. A conviction for an attempted entry offence was quashed on appeal. His sentence of two years imprisonment for each offence of receiving was not disturbed on appeal.

[22] Whilst, as I have said, none of those cases are directly comparable, they nevertheless point to a conclusion that the imposition of a head sentence of three years imprisonment in this case was excessive. Even when one has regard to the applicant's criminal history, the fact that these offences were committed while he was on parole and his apparent lack of remorse, a head sentence of three years is, of itself, manifestly excessive in the circumstances.

[23] It seems to me that an appropriately serious head sentence was called for, particularly to emphasise the deterrent nature of the penalty for this particular offender. Having regard to the particular offences, however, in my view an appropriate head sentence for each of the counts of receiving stolen property would be two years imprisonment. That sentence should commence on his date of conviction (4 June 2010) and be expressed to be served concurrently with one another and concurrently with the sentence imposed on 11 April 2008.

[24] Section 160F(2) of the *PSA* requires that, when fixing a parole eligibility date, the date fixed by the Court "must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment". The applicant had served eight months in prison before being released on parole on 11 December 2008. He was then returned to custody on 15 May 2009, after having been apprehended for the present offences. He has been in custody since that date. In taking into account the applicant's period of imprisonment, as opposed only to the two year head sentence which I would impose, it nevertheless seems appropriate in all the circumstances for the parole eligibility date for this offender to be fixed at 4 June 2011, i.e. after serving 50 per cent of the sentence which I would presently impose. In the circumstances of this case, it would, in my view, be inappropriate for an earlier parole eligibility date to be fixed. The only reason why the applicant was in prison at the time he was convicted of these offences was because he had breached parole and was serving the balance of the sentence imposed for previous offences. To allow an earlier parole eligibility date than 4 June 2011 would, in my opinion, tend to undermine the utility of the sanction which the law provides in respect of persons who breach their conditions of parole by committing further offences while on parole.

Orders

[25] Accordingly, I would make the following orders:

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

2. The appeal is allowed.

3. The sentences imposed on 4 June 2010 (as amended on 24 June 2010) are set aside, and are substituted in respect of each offence by an order that the

appellant be sentenced to two years imprisonment, those sentences to be served concurrently with one another and concurrently with the sentences of imprisonment imposed in the District Court on 11 April 2008.

4. The date the appellant is eligible for parole be fixed at 4 June 2011.