

# SUPREME COURT OF QUEENSLAND

CITATION: *R v McLean* [2011] QCA 248

PARTIES: **R**  
**v**  
**McLEAN, Richard David**  
(applicant)

FILE NO/S: CA No 144 of 2011  
DC No 396 of 2010

DIVISION: Court of Appeal

PROCEEDING: Sentence Application – Further Orders

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: Judgment delivered 2 September 2011  
Further orders delivered 23 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 25 August 2011

JUDGES: Fraser and White JJA, and Philippides J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the further orders made

FURTHER ORDERS: **1. Vary the sentence imposed in the District Court on 3 June 2011 with respect to count 2 as follows:**

- (a) set aside the order suspending the sentence of six months imprisonment and the operational period of two years;**
- (b) order instead that the appellant be released on parole on the 27th day of October 2011.**

**2. Otherwise confirm the sentence and orders made in the District Court.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of wilful damage to property (count one) and one count of serious assault (count two) – where the applicant was a resident of Palm Island – where the applicant spat in the face of a police officer – where the applicant was sentenced to 14 days imprisonment on count one and six months imprisonment on count two to be suspended after serving two months imprisonment with an operational period of two years – where the applicant claimed that the sentencing judge failed to consider mitigating factors

in his favour including Aboriginality and disadvantage – whether the sentence was manifestly excessive

*R v McLean* [2011] QCA 218, cited

COUNSEL: R East 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] **FRASER JA:** I agree with the reasons of White JA and the further orders proposed by her Honour.
- [2] **WHITE JA:** On 2 September 2011 this court made certain orders<sup>1</sup> including that the pronouncement of further orders be adjourned to a date to be fixed. The circumstances which gave rise to the court making that order were these – the appellant had been released on bail pending the outcome of his application for leave to appeal against the sentence which had been imposed on him in the District Court at Townsville on 3 June 2011. His application for leave to appeal was successful. In lieu of the sentence of imprisonment for six months to be suspended after serving two months with an operational period of two years on count 2, the court indicated that the appellant was to be sentenced to imprisonment for six months to be released on parole after serving two months. By the time of the hearing of the application the appellant had left his bail address without notice to the authorities. Section 160B of the *Penalties and Sentences Act 1992* (Qld) requires a sentencing court to fix a date for release on parole when the sentence is one of three years or less and not a serious violent offence or a sexual offence. This court could not do so while the appellant remained at large.
- [3] The appellant was taken into police custody on 17 September 2011 and returned to the Townsville Correctional Facility on 19 September 2011.<sup>2</sup> Pre-sentence custody from 1 June 2011 to 3 June 2011 was declared as imprisonment already served under the sentence imposed on 3 June. As mentioned, the appellant was released on appeal bail on 21 June 2011. Corrective Services in Townsville in a communication to the Registrar of this court, copied to the parties' lawyers, has calculated 21 days served to the date he was taken into police custody. He has spent a further six days in custody to 23 September 2011, the date of pronouncement of these orders. The appellant has the remainder of the two months' imprisonment to serve, that is, 34 days.
- [4] The further orders are:
1. Vary the sentence imposed in the District Court on 3 June 2011 with respect to count 2 as follows:
    - (a) set aside the order suspending the sentence of six months imprisonment and the operational period of two years;
    - (b) order instead that the appellant be released on parole on the 27th day of October 2011.
  2. Otherwise confirm the sentence and orders made in the District Court.

<sup>1</sup> *R v McLean* [2011] QCA 218.

<sup>2</sup> Pre-sentence Custody Certificate 20 September 2011.

- [5] **PHILIPIDES J:** I agree with the further orders proposed by White JA and with her Honour's reasons for those orders.