SUPREME COURT OF QUEENSLAND

CITATION:	*R v Grey* [2011] QCA 345
PARTIES:	**R** **v** **GREY, Kevin John** (applicant)
FILE NO/S:	CA No 202 of 2011 DC No 1742 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2011
JUDGES:	Muir and Chesterman JJA, and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant pleaded guilty to charges of burglary, common assault, wounding, causing grievous bodily harm and armed robbery – where the applicant was sentenced to five years' imprisonment for the armed robbery, four years' imprisonment for the burglary, four years for the grievous bodily harm, three years for the unlawful wounding and one year for the common assault – where the parole eligibility date was fixed at 25 January 2013 – where the applicant complained that he was inadequately represented and that his lawyers failed to put his version of events before the court and to seek to have him sentenced on that basis – whether the sentences imposed should be set aside and the sentencing proceeding remitted to a judge of the District Court pursuant to s 68(3) of the *Supreme Court Act* 1991 (Qld) CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where counsel for the applicant submitted that the sentencing judge erred in fixing a parole eligibility date rather than suspending the sentence at the expiration of 20 months' imprisonment –

whether the sentencing judge erred in setting a parole eligibility date

Supreme Court of Queensland Act 1991 (Qld), s 68(3)

R v Birks (1990) 19 NSWLR 677, applied
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered

COUNSEL: D R Mackenzie for the applicant
D L Meredith for the respondent

SOLICITORS: Kerry Smith Douglas Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Chesterman JA.

[2] **CHESTERMAN JA:** On 6 June 2011 the applicant pleaded guilty in the District Court of Brisbane to charges of:
(i) burglary in the night with violence whilst armed;
(ii) common assault;
(iii) wounding;
(iv) causing grievous bodily harm; and
(v) armed robbery with personal violence.

[3] He was sentenced to five years' imprisonment for the armed robbery, four years' imprisonment for burglary, four years' for the grievous bodily harm, three years' for the unlawful wounding and one year for the common assault. Fourteen days of pre-sentence custody, from 6 June to 19 June 2011, was declared to be time already served under the sentences. The parole eligibility date was set for 25 January 2013, requiring the applicant to serve a third of the head sentence.

[4] The offences were committed on 1 November 2006. The facts constituting the offences were described before the sentencing judge in the following terms:

> "…The offences took place at the home of Mr Steven Pickford and his heavily pregnant common law wife Sarah Denaro at 31 Colvillea Street, Eight Mile Plains. Both claimed not to know the Applicant. Around 10.30 pm, the electricity supply to their house was cut. Once restored, a motion sensor light revealed the [Applicant] wearing a balaclava who then rushed towards Ms Denaro tackling her to the ground (count 2) and the entrance to the garage door. Mr Pickford jumped on to the back of the Applicant and there was a struggle. It seems that during this struggle Mr Pickford's hand was cut causing Grievous Bodily Harm (Count 4).
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> After this initial struggle, both Mr Pickford and Ms Denaro observed the Applicant to have in his possession a machete or bladed weapon. Mr Pickford picked up a pair of scissors and lunged at the Applicant. The Applicant said: "Where's the money? Where's the shit?" The Applicant then swung the machete at Mr Pickford striking him in the elbow (Count 3). Still brandishing the weapon, the Applicant

> followed Mr Pickford into the house where he was given a money box containing $70.00 to $90.00 (Count 5). The Applicant then left.
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> Neither medical reports nor photographs were tendered. The cut to the elbow amounted to unlawful wounding which apparently left an obvious scar. The laceration to Mr Pickford's left hand severed the extensor tendon. As a result he was unable to articulate his left index finger. Without surgical intervention to re-attach the tendon, the injury "*would have been permanent and would have resulted in a marked decrease in function.*" The tendered victim impact statement described the physical impact of the hand injury in much more serious terms without supporting medical evidence." (footnotes omitted)

[5] The substantial delay between the commission of the offences and the sentencing proceedings in the District Court is explained by two factors. The first is that the complainants moved interstate shortly after the offences and communications between them and investigating police officers ceased. It will be remembered that the complainants said that they did not know the applicant and could not identify him. He was arrested on drug possession charges in July 2008. On 9 January 2009 he was interviewed by police. It seems likely that samples of DNA taken from the applicant after his arrest on the drug charges were eventually matched with samples taken from the balaclava found in the complainants' house. He was arrested at the conclusion of the interview on 9 January 2009.

[6] There were then delays in the prosecution of the offences. The committal concluded on 20 April 2009 and the indictment was presented on 23 July 2009. Thereafter, the applicant experienced considerable difficulty in obtaining legal representation. There was some indecision about whether he would plead guilty or contest the charges at a trial. Eventually a trial was set down to commence on 6 June 2011 but when arraigned the applicant pleaded guilty.

[7] In an interview with police officers the applicant gave a different account of the offences to that presented by the prosecution. He said that he knew the male complainant, Steven Pickford, by the name of "Spanky". He knew him, he said, because he had regularly bought illicit drugs from him. Not long before the offences he had purchased a number of ecstasy tablets which made him (the applicant) ill. He thought their quality unacceptably low and he went to the complainants' house to complain and to obtain a refund of the purchase price. He did not go armed and he did not turn off the electricity supply to the house. He wore a balaclava because he drove to the house on his motor cycle. The balaclava was dislodged in the course of his struggle with Mr Pickford. It was Mr Pickford who produced a knife and was injured by it in the course of the struggle which ensued between them.

[8] The applicant said he did not know Ms Denaro and had no recollection of assaulting her or knocking her to the ground. He had no memory of taking a money box or money from the complainants' house.

[9] The applicant does not challenge his convictions and accepts that the sentences imposed were within the proper range on the basis of the facts which constituted the prosecution case and which were put before the primary judge. The applicant complains that he was inadequately represented and that his lawyers failed to put his version of events before the court and to seek to have him sentenced on that basis.

[10] The applicant does not challenge his convictions and accepts that the sentences imposed were within the proper range on the basis of the facts which constituted the prosecution case and which were put before the primary judge. The applicant complains that he was inadequately represented and that his lawyers failed to put his version of events before the court and to seek to have him sentenced on that basis.

[11] It is right that the applicant's counsel at sentencing did not advance that version of facts and specifically accepted the complainants' version of the offences. In answer to a question from the learned judge whether the sentencing was to proceed on the basis of the facts outlined by the prosecutor, the applicant's counsel said:

> "…I've tried to get to the bottom of this for some time and whatever the true story is, only [the applicant] knows. We've pleaded guilty, we've accepted the Crown case, and that's it. … I won't take it any further. I'm not making any allegations against these other people, if they were drug related or anything like that. There's no evidence of that. On their own story, they don't even know him, so I'll leave it at that."

[12] In passing sentence the learned judge said:

> "You made admissions to the police of being present at the scene of the offences but you gave a very different account to that provided by the complainants, and it is their account upon which you are to be sentenced.
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> …
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> Your DNA was located on the inside of the balaclava. When interviewed by the police, you claimed that you knew the two complainants. You said that you had purchased drugs from them which made you sick and you went there in connection with that. However, you do not maintain those claims for the purposes of sentence. You accept, as the complainants allege, that they did not know you. That means that the serious offences are completely unexplained and your counsel did not provide any satisfactory explanation for them."

[13] His Honour went on to note the mitigating factors: the plea of guilty; substantial good character references; a good recent work history and minimal criminal history. Indeed, the applicant had no prior convictions of any kind. He was convicted of two relatively minor drug offences committed after 1 November 2006. The judge noted also the applicant's good prospects of rehabilitation and a supportive family.

[14] The order sought by the applicant is that the sentences imposed upon him on 20 June 2011 be set aside and the sentencing proceeding be remitted to a judge of the District Court pursuant to s 68(3) of the *Supreme Court of Queensland Act* 1991. The remission, if ordered, would allow the applicant to contest the facts propounded by the Crown. The basis for the submission is that the applicant has been dealt with unjustly. His express instructions that the facts relied upon by the Crown should be challenged and that his version of events should be advanced were ignored. As a result he lost the chance of having his sentence determined by reference to facts more favourable to him.

[15] The applicant swore an affidavit for use on the appeal. He deposed:

> "3. At all times up to 10 June, 2011, I instructed [my counsel] that that my account to the police…on 29 January, 2009 was the best recollection of what took place on the night of 1 November, 2006. Various trial listings were adjourned so that I could raise funds…to defend the charges in a trial.
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> 4. I accept that I voluntarily entered pleas of guilty… . I entered these pleas of guilty because [my counsel] told me that I would get convicted and a sentence of eight (8) years might be imposed.
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> 6. …My clear instructions…were … that:
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> (i) I did not turn off the electricity;
> (ii) Steve Pickford ("Spanky") regularly supplied dangerous drugs to me from his garage at 31 Colvillea Street, Eight Mile Plains;
> (iii) My intention was to have Steve Pickford…repay to me a sum of approximately $100.00 for drugs which had made me ill;
> (iv) I did not take a weapon with me and I was not wearing a balaclava;
> (v) The injuries to Steve Pickford…were the result of a struggle between himself and myself;
> (vi) I did not realise that I had assaulted Sarah Denaro.
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> …
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> 8. I was shocked during the sentence hearing when [my counsel] did not place my instructions before the sentencing court.
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> …
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> 10. …From early 2006, I have had a bad heroin addiction and my memory and understanding has been affected. However, I did not lie to the police in January, 2009. The factual outline placed before the sentencing court on 20 June, 2011 was not correct and my lawyer…did not follow my instructions to challenge it."

He said as well that he received a severe cut to the head in the course of the struggle.

[16] The applicant's *de facto* wife, Jennifer Trede, also provided an affidavit. She deposed that she was present on all occasions when the applicant and his counsel conversed on 6 June 2011. She remembers counsel saying, "that he would put up the Applicant's side of the story which was what he told police in January, 2009." When that was not done she confronted counsel outside the courtroom. After an exchange of words, Ms Trede immediately contacted the applicant's present solicitors.

[17] One of the statements comprising the police brief was from Megan Pawlowsky, the applicant's partner at the time the offences were committed. Relevantly, she stated

that she did not recall the applicant ever owning a motor cycle. Nor could she recall the applicant suffering any injuries at the time of the offences, in particular, a cut to the head.

[18] Mr Williamson, the applicant's counsel at the time of sentencing, deposed in an affidavit:

> "4. …I had a number of conferences with the applicant and on all occasions he was unable to give precise instructions. I remember asking him on several occasions to tell me what in fact occurred that night and he either was unable or unwilling to give a clear account. It was not until 6 June 2011 that the applicant finally decided to plead guilty although his interview with police made it clear that he did not dispute most of the elements of the offences … .
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> 5. When I spoke to the applicant, his instructions were not clear. He continually told me he was under the influence of drugs at the time of the offences and he could not clearly remember what occurred. He did tell me that he had bought a lot of drugs from the male complainant and paid a lot of money for them. While I cannot say the exact amount he mentioned, it was considerably more than the $100 mentioned in his affidavit. … I said that I did not believe that putting forward such a story would help his case. The applicant did agree to me presenting his case in the best light. There had been discussions in the past about a contested sentence but I never considered him a good witness on his own case. He never instructed me that he wanted to give evidence. Because the applicant could not give me clear instructions…I felt entitled to tell [the sentencing judge] that I had tried to but been unable to get to the bottom of the matter.
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> 6. …there was a statement from Megan Pawlowsky… . … I cannot remember specifically raising this with the applicant but it was a relevant factor in deciding not to contest the charges and for not challenging that the applicant had worn a balaclava into the house… ."

[19] All the deponents were cross-examined. The applicant while not appearing actively untruthful was an unimpressive witness. On the topic of his ownership of a motor cycle his answers were argumentative and partly unresponsive. He was quietly truculent rather than cooperative in demeanour. An impression formed by his counsel that he would not make a persuasive witness would have been reasonable.

[20] In his cross-examination Mr Williamson said that the applicant had been a long term drug addict and that his instructions on occasions were vague and on other occasions non-existent, "he would simply sit there blank, not saying anything, in a trance." On 20 June 2011, having spoken to the applicant, the latter said to him, "do the best you can."

[21] This passage occurred in the applicant's cross-examination:

> "…You'd agreed that…[it] wasn't in your interests to put up about the drug deal and you were content to proceed on the basis of the complainant's version of events? – … I had mentioned the drugs to [my counsel] and he…told me not to mention it and to be quiet… .
>
> But that you had agreed that it wasn't in your interest to mention the drug deal? – That's what was advised to me.
>
> Yeah, but you agreed to that? – That's what was advised to me.
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> Yes. But that you had agreed to do that? – Yeah…I didn't agree with it. …
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> But you consented to proceed on that basis? – Yeah, I felt I didn't have any other choice."

[22] A Court of Criminal Appeal will only set aside a conviction (or sentence) on the ground that the applicant was inadequately represented if it be shown that the inadequacy has led to injustice. In *R v Birks* (1990) 19 NSWLR 677, Gleeson CJ said (at 684-685):

> "It sometimes happens that a person who has been convicted of a crime seeks to have the conviction set aside on the ground that counsel at the trial has acted incompetently, or contrary to instructions. It is well settled that neither of these circumstances will, of itself, attract appellate intervention. At the same time the courts acknowledge the existence of a power and duty to quash a conviction in some cases. The difficulty is to find, in the authorities, a formula which adequately and accurately defines the class of case in which a Court of Criminal Appeal will intervene. A common theme running through the cases, however, is that such intervention is a matter about which the courts are extremely cautious.
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> …
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> As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
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> … However, there may arise cases where something has occurred in the running of a trial, perhaps as a result of "flagrant incompetence" of counsel…which will be recognised as involving…a miscarriage of justice."

[23] The strategy, or tactic, not being unreasonable or inexplicable is binding on the client. See *TKWJ v The Queen* (2002) 212 CLR 124 at 128. In the same case, McHugh J said (at 147):

> "The role of counsel in a criminal trial is so important that it hardly needs argument to conclude that his or her conduct of the trial can bring about a miscarriage of justice. … Ordinarily, a party is held to the way in which his or her counsel has presented the party's case. That is because counsel is in effect the party's agent. Counsel is

> "ordinarily instructed on the implied understanding that he is to have complete control over the way in which the case is conducted". The discretion retained by counsel in the running of a case is very wide." (footnotes omitted)

[24] The evidence does not establish that the conduct of the sentencing proceeding was contrary to the applicant's instructions. In my opinion, the appropriate finding is that the applicant's counsel advised him not to contest the prosecution version of the facts, but to emphasise the significant factors in mitigation, and that the applicant accepted the advice. Such a finding takes the application out of the limited category of case in which an appellate court will set aside a conviction or sentence by reason of the calibre of legal representation.

[25] But even if the applicant's counsel acted contrary to the applicant's instructions, the case would still not come within the category because the decision to conduct the sentence proceeding as Mr Williamson did, was reasonable, and an assessment that the approach would be in the applicant's best interests is supportable.

[26] There were risks in the approach the applicant now says he wanted followed if his contest of the facts was unsuccessful. In this eventuality, he would have baselessly accused two persons whose home he invaded of being involved in drug dealing. His conduct in making and persisting in such an allegation would erode, if not, remove any benefit he might expect from his plea of guilty because it would demonstrate a complete lack of remorse, and no substantial cooperation with the administration of justice.

[27] As well, to add verisimilitude to his allegation that the male complainant was a drug dealer, the applicant would have had to give substantial details, plausible in themselves and perhaps corroborated, of his drug purchases. In doing so, he would run the risk of inviting investigation and perhaps prosecution for his own possession of illicit drugs.

[28] Mr Williamson testified that he thought the applicant would make a poor witness. That accords with my own assessment of the applicant's testimony. Counsel may well have thought that the prospect that the applicant's version of events would be preferred to the complainants' was too small to overcome the risk of an unsuccessful challenge which would diminish the weight the court would give to the substantial factors of mitigation.

[29] There were as well some objective facts which tended to cast doubt on the applicant's version of events. The first is Ms Pawlowsky's statement that the applicant did not own a motor cycle at the relevant time, at least to the best of her recollection. If he did not own a motor cycle, then he did not ride it to the complainants' house and he had no reason to be wearing a balaclava, apart from the one described by the complainants, i.e. as a means of concealment of identity. An allied consideration is that the balaclava was found in the complainants' garage. If the applicant had ridden a motorbike to the house and worn a balaclava under the helmet for warmth and not disguise, he would have left it with the helmet and the bike, rather than taking it into the complainants' premises.

[30] Another difficulty in the path of accepting the applicant's version is that he himself admitted that his memory had been adversely affected by what he described as his

"bad heroin addiction". On his own account his recollection of the events of 1 November 2006 was incomplete. Although admitting to the robbery and the assault on Ms Denaro, he had no recollection of either event. The complainants suffered no such disability in their account of events which is a factor in favour of a tribunal of fact accepting their testimony.

[31] Given the substantial indications that the applicant's challenge to the prosecution's version of facts would be unsuccessful, the adverse consequences for sentencing of a finding that the applicant was unremorseful and untruthful, was a reasonable basis for Mr Williamson's assessment that the submission he made to the court on the applicant's behalf was in his best interests.

[32] The first ground of appeal has not been made out.

[33] The second ground is that the sentencing judge erred in fixing a parole eligibility date rather than suspending the sentence at the expiration of 20 months' imprisonment. The argument is that there is no certainty that the applicant will be released from custody at or shortly after the date fixed for parole eligibility.

[34] The fact that a sentence might, with equal justice to the applicant, have provided for a suspension rather than parole eligibility does not make the sentence actually imposed manifestly excessive. There is no obligation on a sentencing judge to suspend a sentence rather than fix a date for parole eligibility. Discretion is involved and any challenge to it can only succeed if the exercise is affected by some error of law or fact, or if it is so unreasonable as to suggest error.

[35] The applicant did not attempt that challenge. The submissions put on his behalf were only that there were good reasons why the sentence should have been suspended. There is not enough to show that the discretion to fix a parole eligibility date was wrong.

[36] The premise underlying the submission is that the applicant will not be released within a reasonable period after he becomes eligible for parole. Whether that happens or not is a matter of prediction which the court is not equipped to make. There is no obvious reason why the applicant, if he behaves in jail, should not be regarded as a suitable candidate for parole. He has, according to Ms Trede, overcome his drug addiction, has no criminal history apart from the subject offences, has not re-offended since they were committed five years ago (apart from minor drug possession charges), has good references and a good work history. These things must stand in his favour when applying for parole.

[37] Whether they will or not the court cannot predict, but their existence shows the difficulty of demonstrating any error on the part of the judge in imposing the sentence he did.

[38] The application for leave to appeal against sentence should be refused.

[39] **MARGARET WILSON AJA:** I agree with the order proposed by Chesterman JA, and with his Honour's reasons for judgment.