SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cutts* [2013] QCA 237
PARTIES:	**R** **v** **CUTTS, Vicky Lee** (applicant)
FILE NO/S:	CA No 94 of 2013 DC No 1779 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2013
JUDGES:	Fraser and Gotterson JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of armed robbery and one count of attempted armed robbery – where the applicant was sentenced to concurrent terms of four years imprisonment for the counts of armed robbery and two and a-half years imprisonment for attempted armed robbery – where the applicant committed the offences whilst on parole under a sentence of imprisonment of 12 months – where the applicant contended that the sentence imposed should have been more lenient as it was wrong to describe her as instigating any of the offences – where the applicant also contended that there was a disparity between her sentence and that imposed on her co-accused – whether the sentence was manifestly excessive *Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46, cited *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26, cited *R v Apps* [2008] QCA 326, considered *R v Kitching* [2003] QCA 539, considered *R v Tiddy* [1969] SASR 575, cited

COUNSEL: The applicant appeared on her own behalf
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant pleaded guilty to two counts of armed robbery and one count of attempted armed robbery. She was sentenced on 31 January 2013 to concurrent terms of four years imprisonment for each of the counts of armed robbery and two and a half years imprisonment for the attempted armed robbery. The sentencing judge fixed 25 November 2013 as the date upon which the applicant will be eligible for parole. It was declared that 66 days spent by the applicant in presentence custody was time served under the sentence. The applicant has applied for leave to appeal against the sentence on the ground that it is manifestly excessive in all of the circumstances.

[2] The offences were committed at service stations at night during a 24 hour period. The applicant was the getaway driver. The first robbery was done at the instigation of a co-offender, Stone. She was armed with a knife and disguised on each occasion. The applicant instigated the second and third offences, and she supplied the disguises and the motor vehicle. In the first offence Stone demanded money and cigarettes. The attendant complied, handing over $540 in cash and other items, making a total value of about $620. In the second offence, a 14 year old female co-offender entered a service station and contacted Stone. Stone made demands for money and cigarettes. The young attendant complied, handing over items and cash to the total value of about $690. The proceeds of these offences were divided between the applicant and Stone, with some cigarettes given to the juvenile co-accused. The applicant used her share of the proceeds in gambling. In the third offence a service station attendant saw Stone approaching with her face covered and locked the door.

[3] Members of the public who had witnessed the first offence obtained the number plate of the car driven by the applicant, leading to her arrest. A search warrant was executed at the applicant's residence and some of the stolen property was found. The applicant then told Stone to dispose of property she had kept. Stone complied. In a subsequent police interview Stone made admissions and implicated the applicant. When the applicant was interviewed by police she denied the offences and wrongly implicated Stone as the sole offender.

[4] The applicant was 29 years old at the time of the offences and 30 years old when she was sentenced. She had a criminal history commencing in 2000, mostly comprising property offences and offences of dishonesty. She had been sentenced to imprisonment on three occasions, with immediate suspension or parole. She had breached the terms of a community based order which had been imposed on a different occasion.

[5] The applicant committed the subject offences whilst on parole under a sentence of imprisonment of 12 months imposed on 24 November 2011. The sentencing judge took into account that, as a result of the applicant breaching parole, she had served a further seven and a half months under that sentence so that, in total, she had been

in custody for almost 10 months by the date of this sentence. The sentencing judge also took into account that the applicant pleaded guilty, although the plea was entered only on the morning of the trial, and accepted that the plea was an indication of remorse. The sentencing judge also took into account the effect upon the applicant of the death of her brother (she had suffered some anxiety and depression since then), her gambling habit, and her difficult domestic circumstances. In addition the judge accepted that the applicant had made attempts at rehabilitation whilst in prison.

[6] In the applicant's outline of submissions she submitted that the sentence which should have been imposed was "5 years imprisonment without the Part 9A declaration" or "3 years imprisonment with a Part 9A declaration." Part 9A of the *Penalties and Sentences Act* 1992 (Qld) concerns convictions of "serious violent offences". If a declaration is made under Part 9A a prisoner's parole eligibility date must be after the prisoner has served 80 per cent of the prisoner's term of imprisonment: see *Corrective Services Act* 2006 (Qld), s 182. No such declaration was made. The only declaration was made under s 159A in Part 9 of the Act, concerning presentence custody being treated as time served under the sentence; the applicant's head sentence is therefore more favourable than that which her outline contends should have been imposed.

[7] The applicant relied upon Chesterman J's statement in *R v Kitching* [2003] QCA 539 that "sentences imposed on a person who acts only as a driver for those who carry out a robbery have, in practice, been more lenient than for those who actually commit the robbery … [as was] pointed out in *The Queen v Vanderwerff*, Court of Appeal 479 of 1998." The word "only" is to be emphasised. The applicant's involvement extended to supplying the vehicle and disguises, and instigating two of the three offences. The applicant's argument that it was wrong to describe her as an instigator of any of the offences is inconsistent with statements in the agreed schedule of facts upon which the sentence proceeded, including the statements that "Cutts contacted Stone and suggested that they commit a further armed robbery" (a reference to count 2) and that "Cutts was not pleased with the amount of money obtained from" [count 2] and "[s]he therefore suggested that they commit a further armed robbery". The applicant submitted that she only discovered the factual basis upon which she was sentenced when she read the material relating to the application for leave to appeal against sentence. The applicant did not adduce evidence to support that submission. She was present in court when the schedule of facts was tendered by the prosecutor and made an exhibit, and she was then represented by counsel. The applicant was correctly sentenced on the basis of the agreed facts in the schedule placed before the sentencing judge.

[8] The applicant's co-offender, Stone, was sentenced on an earlier occasion to an effective term of imprisonment of two and a half years to be suspended after eight and a half months for an operational period of three years, together with probation for that same period of three years. The applicant argued that there was a disparity between her sentence and the sentence imposed upon Stone. This argument invoked the "parity principle" that "[w]here other things are equal persons concerned in the same crime should receive the same punishment; and where other things are not equal a due discrimination should be made": *R v Tiddy* [1969] SASR 575 at 577, quoted by McHugh J in *Postiglione v The Queen* (1997) 189 CLR 295 at 309. For the principle to apply the disparity between the sentences must be "such as to give rise to a justifiable sense of grievance, or in other words to give the

appearance that justice has not been done" (*Lowe v The Queen* (1984) 154 CLR 606 at 610, Gibbs CJ, Wilson J agreeing; see also per Mason J at 613) or "[t]he difference between the sentences must be manifestly excessive and call for the intervention of an appellate court in the interests of justice" (*Lowe* at 624 per Dawson J, with whom Wilson J also agreed). There can be no justifiable sense of grievance if the differential treatment of co-offenders is explicable by differences in culpability or personal circumstances: *Postiglione* at 301 (Dawson and Gaudron JJ), 313 (McHugh J), 318 (Gummow J), and 338 (Kirby J). That consideration is significant here. Whilst Stone's criminal record was at least as bad as the applicant's and Stone may also have committed the offence whilst on parole (there was uncertainty expressed about that at her sentence hearing), the judge who sentenced Stone took into account that she had co-operated with the authorities and was probably suffering from an acute psychosis which affected her judgment. More importantly, the sentence imposed upon Stone incorporated a discount under s 13A of the *Penalties and Sentences Act* 1992. The court has been provided with the transcript of the in-camera proceedings at Stone's sentence. (This material was shown to the applicant's counsel at her sentence hearing.) It is sufficient to observe that the sentence which would have been imposed upon Stone but for the application of s 13A supplies no support for the applicant's argument. The parity principle was not infringed.

[9] The applicant argued that the sentencing judge failed to take into account the "totality principle", which requires relativity between the totality of an offender's criminality in all offences and the totality of the sentences imposed for those offences: *Postiglione* at 308. If the applicant's previous sentence is taken into account, the practical effect of the sentence is a total period of imprisonment of five years (the 12 month term of imprisonment imposed on 24 November 2011 together with the effective term of four years) with the applicant to serve less than 20 months in custody before eligibility for parole (nearly seven and a half months imprisonment served after cancellation of parole under the previous sentence and the period before parole eligibility under this sentence). Whilst the just sentence must depend upon the particular facts and circumstances of each case, sentences of between three and five years imprisonment for one count of armed robbery of the general kind committed by the applicant have been found to be not manifestly excessive: see *R v Apps* [2008] QCA 326 at [17] – [21] and *R v Kitching* [2003] QCA 539 at p 4 – 6. The applicant referred to a sentence of "18 months imprisonment wholly suspended after 3 years" which she submitted was imposed in the District Court in *R v Kritikakis & Smith* in 2004. Obviously the sentence could not have been that which the applicant quoted. I have not been able to find that case. It could not in any event affect the authority of this Court's decisions in *Apps* and *Kitching*. Bearing in mind that the applicant committed not one, but two, armed robbery offences and a further offence of attempted armed robbery, her sentence, whether considered alone or in combination with her previous sentence, was not manifestly excessive.

[10] I would refuse the application.

[11] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[12] **MARGARET WILSON J:** I agree with the order proposed by Fraser JA and with his Honour's reasons for judgment.