SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hazelgrove* [2013] QCA 243
PARTIES:	**R** **v** **HAZELGROVE, Cody Steven** (applicant)
FILE NO/S:	CA No 32 of 2013 DC No 8 of 2013 DC No 9 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	30 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2013
JUDGES:	Holmes and Muir JJA and North J 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 – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of one count of breaking and entering premises and stealing; one count of breaking and entering premises and attempted stealing; one count of wilful damage; one count of possessing dangerous drugs; three counts of stealing; and one count of burglary and stealing – where the applicant committed the offences whilst on parole for previous like offences – where the sentencing judge imposed a head sentence of three and a half years imprisonment with a parole eligibility date after approximately 20 months – where the sentence was concurrent with a sentence of seven years imprisonment imposed in 2008 – where the applicant submits that the sentencing judge erred in not imposing a sentence of two and a half years imprisonment with a parole eligibility date after approximately 14 months – where the applicant complains that defence counsel focused on requesting a concurrent sentence while failing to submit comparable cases in which a lesser sentence was imposed – whether the sentences imposed were manifestly excessive

R v Bryant (2007) 173 A Crim R 88; [2007] QCA 247, considered
R v Carter [2008] QCA 226, cited
R v Donald [2000] QCA 399, cited
R v Harris (2007) 171 A Crim R 267; [2007] NSWCCA 130, cited
R v Vaughan [2005] QCA 348, considered

COUNSEL: The applicant appeared on his own behalf
P J McCarthy for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the order he proposes.

[2] **MUIR JA**: The applicant applies for leave to appeal against the following sentences imposed on him on 7 February 2013 in the District Court:

Count	**Offence**	**Sentence**
1	Breaking and entering premises and stealing	3½ years imprisonment
2	Breaking and entering premises and attempted stealing	3½ years imprisonment
3	Wilful damage	12 months imprisonment
4	Possessing dangerous drugs	3 months imprisonment
5	Stealing	12 months imprisonment
6	Burglary and stealing	3½ years imprisonment
7	Stealing	12 months imprisonment
8	Stealing	12 months imprisonment

[3] The sentences were made concurrent with each other and with a sentence of seven years imprisonment imposed on 22 July 2008 for breaking and entering a dwelling at night with intent whilst armed and in company. His parole eligibility date was fixed at 3 October 2014. At the time of sentencing, the applicant's existing full time release date was 3 July 2014 and the date then fixed for eligibility for parole was 9 January 2012. The applicant was released on parole on 13 February 2012 and returned to custody on 21 November 2012 after suspension of his parole for non-compliance with parole terms.

[4] The offences under consideration were committed over a period of about a month in October and November 2012 while the applicant was on parole. He had previously offended whilst on parole. The property related offences resulted in theft of or damage to property to the value of approximately $10,000. A brief description of the offending conduct is as follows:

- Count 1 – The applicant gained entry to a building by cutting a chain with bolt cutters and stole $5,712 worth of tools, hardware and equipment.
- Count 2 – On the morning on which he had engaged in the count 1 offending, the applicant entered a nearby store by removing roof sheeting. He unsuccessfully attempted to remove a safe and destroyed the building's security

system by pulling a component of it off the wall and cutting its cables. He threw two radios and a car DVD player through a window which he smashed with the intention of collecting the items later. Police arrived and the applicant fled.

- Count 3 – The damage to the window, roof and security system amounted to $2,500.

- Count 4 – The applicant left approximately one gram of cannabis with some clothing in a garden when escaping from police.

- Counts 5, 7 and 8 – On separate occasions the applicant stole $500, $60 and $1,000 worth of goods from a Coles supermarket.

- Count 6 – The applicant and another broke into a dwelling by cutting an insect screen and unlocking a sliding door from the inside. They stole a video camera, medication, a Medicare card, jewellery and $20 cash.

[5] The applicant also pleaded guilty to a number of summary offences on 7 February 2013.

[6] The applicant was 29 years old when sentenced. He had an extensive criminal history involving property related offences commencing with a conviction in August 2001. He was first imprisoned in August 2003 when he was ordered to serve 12 months imprisonment, suspended after three months, for the dangerous operation of a motor vehicle. In May 2004, he was sentenced to imprisonment for two years for a robbery with actual violence committed in 2000 when he was 16 years old. The applicant was sentenced for other property related offences, but not imprisoned, in October 2005 and June 2006. In July 2008, as well as being sentenced for the term of imprisonment of seven years referred to earlier, he was sentenced to a number of other concurrent terms of imprisonment for: attempted robbery with actual violence in company; assaults occasioning bodily harm whilst armed and in company; and unlawful possession of weapons. All of these offences were committed in 2007.

[7] The applicant argued that the sentencing judge erred in not imposing for each of counts 1, 2 and 6 a sentence of two and a half years imprisonment with a parole eligibility date of 3 April 2014, after approximately 14 months. The applicant's outline of argument acknowledged that the appropriate sentencing range was between two and three years imprisonment. It was also acknowledged, implicitly, that *R v Vaughan*[1] and *R v Bryant*[2] supported a higher sentence than the sentence for which the applicant contended.

[8] *Vaughan* broke into a restaurant in company with others and caused approximately $2,500 worth of damage to the premises. He was 25 years of age at the time of sentence with a criminal history which included prior convictions for breaking and entering offences involving both vehicles and dwellings. He had served four separate terms of actual incarceration. When the subject offence was committed, the offender was subject to an intensive correction order. Keane JA, with whose reasons Cullinane J agreed, observed that, having regard to the offender's appalling criminal history and the need for deterrence, the head sentence of three years could

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1 [2005] QCA 348.
2 (2007) 173 A Crim R 88.

not be said to be excessive. His Honour noted that in *R v Donald*[3] de Jersey CJ commented that "a three year term for breaking and entering a dwelling house was 'at least mid-range … and arguably low range' when the offender has a substantial criminal record". Keane JA rejected the applicant's counsel's attempt to distinguish *Donald* on the basis that the applicant broke into business premises rather than a dwelling house.

[9] The offender in *Bryant* had an extensive criminal history of property related offences. He pleaded guilty to a number of breaking and entering offences. His offending included breaking into five different business premises, receiving stolen property and fraud. The total unrecovered stolen property and damage was approximately $6,500. He was sentenced to five years imprisonment with a fixed parole eligibility date after serving two years. This Court substituted a sentence of four years imprisonment with a parole eligibility date after serving 18 months.

[10] Both of these decisions offer ample support for the sentencing judge's sentences. They demonstrate that, having regard to the applicant's criminal history, the number of offences the subject of the indictment and the fact that the applicant was on parole at the time of offending, a head sentence of even four years imprisonment for the eight counts on the indictment would not have been excessive. It is unnecessary to consider some older decisions to which the applicant referred. Miscarriage of the exercise of the sentencing discretion cannot be demonstrated by showing that, although a sentence imposed is within the range established by previous comparable sentences, a lesser sentence supported by other comparable sentences could have been imposed. The applicant faces the additional difficulty that the sentence imposed was effectively that sought or acceded to by his counsel at the sentencing hearing. In *R v Carter*,[4] Keane JA, with whose reasons the other members of the Court agreed, observed that:

> "While the imposition of a proper sentence is the responsibility of the sentencing judge, the circumstance that the sentence imposed accords with the position taken by the applicant at sentence means that the applicant's prospects of obtaining leave to appeal to argue that the sentence is **manifestly** excessive should usually be regarded as poor."

[11] The applicant complains that defence counsel focused on requesting a concurrent sentence while failing to properly look at the range for the subject offences and submit comparable cases. It did not appear to be a ground of the application that a miscarriage of justice had occurred through defence counsel's incompetence. In any event, the course taken by defence counsel of concentrating on securing concurrent sentences appears to me to have been eminently sensible. It was likely to have resulted in a lesser term of actual imprisonment than would have resulted from cumulative sentences. There were good reasons for making the sentences imposed by the sentencing judge cumulative upon the existing sentences. The two sets of offending were entirely unconnected and any questions of totality could have been addressed by adjusting the duration of the sentences to be imposed.[5]

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3 [2000] QCA 399.

4 [2008] QCA 226 at [19].

5 See *R v Harris* (2007) 171 A Crim R 267 for discussion of the circumstances in which cumulative sentences may be more appropriate than concurrent sentences.

[12] The applicant's full time release date under the earlier sentences was 3 July 2014, approximately 17 months from 7 February 2013, the date of sentencing. When 17 months are deducted from the 42 month sentence imposed on 7 February 2013, it can be seen that the effective sentence was 25 months. As the respondent pointed out, the parole eligibility date of 3 October 2014 may be approximately 20 months after 7 February 2013, but it is only three months after the full time release date under the earlier sentences. Any lesser sentence than that imposed, in my view, would have been manifestly inadequate having regard to the criminality of the applicant's offending and his criminal history, as well as the circumstance that the offending occurred whilst the applicant was on parole for previous like offences.

[13] In reaching this conclusion, I have regard to the applicant's early plea of guilty, which the prosecution accepted was "probably the earliest it could be in the circumstances", and his cooperation with police. His conviction for count 1 may well have been secured by his own plea of guilty, but the evidence against him on the other counts was substantial. The police had received information from the public and from two of the complainants identifying the applicant as a suspect. A photograph of the applicant committing one of the stealing offences at Coles was published in a local newspaper. Some readers recognised the applicant and contacted police.

[14] For the above reasons, no error has been shown in the exercise of the sentencing discretion and I would refuse leave to appeal.

[15] **NORTH J:** I have read the reasons for judgment of Muir JA. I agree with his Honour's reasons and the order proposed by him.