

COURT OF APPEAL

**MARGARET McMURDO P
ANN LYONS J
DAUBNEY J**

**CA No 123 of 2013
CA No 292 of 2013
DC No 1975 of 2012
DC No 2230 of 2011**

THE QUEEN

v

BARRON, Allan Raymond

Applicant

BRISBANE

WEDNESDAY, 27 NOVEMBER 2013

JUDGMENT

THE PRESIDENT: On 1 May 2013, the applicant, Allan Raymond Barron, pleaded guilty before his Honour Judge Noud to burglary and stealing (count 1) and assault occasioning bodily harm whilst armed (count 2). Both offences were committed on 26 May 2012. Judge Noud sentenced him to 18 months imprisonment on count 1 and to two years imprisonment on count 2, both sentences to be served concurrently with each other but cumulatively on a sentence of three years imprisonment with a parole release date set on 19 April 2013 imposed by his Honour Judge Jones on 19 October 2012 for the offence of unlawful wounding. Judge Noud fixed a parole eligibility date of 18 June 2014. The applicant has

applied for leave to appeal against his sentence, contending that it is manifestly excessive in light of his diagnosis since his sentence of terminal throat cancer.

With the concurrence of the respondent, the applicant was granted leave to adduce evidence from his lawyer to the following effect. On 9 July 2013, the applicant's lawyers were advised that the applicant had been diagnosed the previous day with throat cancer. His lawyers were unable to discuss the matter with the applicant until 19 August 2013 when he confirmed this diagnosis by video link and stated that he was to undergo surgery the following Wednesday and was to then be treated with chemotherapy. After prolonged efforts, the applicant's lawyers obtained a letter concerning the applicant dated 25 October 2013 from the medical oncology registrar at the Princess Alexandra Hospital, Dr Samuel Jones. Dr Jones confirmed that the applicant has a squamous cell carcinoma, probably originally at the base of his tongue, which had metastasised to multiple bilateral lymph nodes in his neck and superior mediastinum. His cancer is incurable. He has been offered palliative chemotherapy to attempt to control its progression and minimise symptoms. During his chemotherapy, a life threatening clot in his lung developed which was being managed with anti-coagulation therapy. Whilst life expectancy predictions were difficult to make "[a]n educated estimate would be that he wouldn't be expected to live past 2 years from diagnosis, and that his life expectancy would be measured in months."

Counsel do not know why the applicant, upon learning of his terminal condition, did not immediately apply for special circumstances parole rather than making this application. It can be expected that this ordinarily would be the avenue to be adopted in a case of this kind. But time is of the essence for the unfortunate applicant and the interests of justice require this Court to now deal with his application.

The respondent, whilst contending that the sentences imposed by Judge Noud were not manifestly excessive in light of the material placed before his Honour, fairly, compassionately and appropriately concedes that, in light of Dr Jones's opinion, the application for leave to appeal should be granted, the appeal allowed and the applicant re-sentenced to enable him to

be released into the community forthwith. I note that such an approach is consistent with that previously taken by this Court in *R v Leith* [2001] 1 Qd R 660; *R v Russell* [2002] QCA 285; and *R v Hughes* [2003] QCA 460.

The applicant initially submitted that his sentence should be suspended today. The respondent, however, pointed out that such an order may not be possible. That is because it may not be possible to sentence an offender to imprisonment involving both an order for parole under ss 160B to 160D *Penalties and Sentences Act* 1992 (Qld) and an order for suspended imprisonment: see s 160A(6) *Penalties and Sentences Act*.

That difficulty can be resolved by vacating Judge Noud's order that the sentences he imposed on 1 May 2013 be served cumulatively on the sentence imposed by Judge Jones on 19 October 2012, and Judge Noud's order fixing a parole eligibility date of 18 June 2014, and instead ordering that the date the applicant be released on parole be today.

It is important to note that this must not be viewed as a comparable sentence for the offences of burglary and stealing and assault occasioning bodily harm whilst armed for which Judge Noud sentenced the applicant. I emphasise that the applicant has not established that those sentences were manifestly excessive on the basis of the information then before the court. The interests of justice require the orders I propose, solely because of the applicant's extraordinary and tragic health issues which have come to light since his sentence.

I propose the following orders:

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. The orders made by Judge Noud on 1 May 2013, that the sentences on counts 1 and 2 be served cumulatively on the sentence imposed by Judge Jones on 19 October 2012 and that his parole eligibility date be fixed at 18 June 2014, are set aside.
4. Instead, it is ordered that the date the applicant to be released on parole is today.
5. Judge Noud's sentence imposed on 1 May 2013 is otherwise confirmed.

ANN LYONS J: I agree.

DAUBNEY J: The German philosopher, Arthur Schopenhauer, said that “compassion is the basis of all morality”. Morality, in turn, is the distinction in our society between right and wrong. That is a fundamental integer of the justice which we apply to all persons in our society. In the circumstances of this case, it is moral and just for the orders proposed by the President to be made.

THE PRESIDENT: The orders are as I have proposed.

THE PRESIDENT: Nothing further in this matter?

MR CAMPBELL: No, thanks.

MR EDWARDS: Your Honours, perhaps I should abandon the application for an extension of time within which to appeal the - - -

THE PRESIDENT: So you’ve actually filed that application, have you?

MR EDWARDS: That’s has been filed. That has – I have filed - - -

THE PRESIDENT: We’ll just make an order dismissing it then.

MR EDWARDS: Thank you, your Honour.

THE PRESIDENT: So the application for an extension of time for leave to appeal is dismissed.

MR EDWARDS: Thank you.

THE PRESIDENT: Yes, thank you. Adjourn the Court.