SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cutrona* [2013] QCA 373
PARTIES:	**R** **v** **CUTRONA, Dylan James** (applicant)
FILE NO/S:	CA No 231 of 2013 DC No 236 of 2013 DC No 276 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	13 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2013
JUDGE:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – WHEN REFUSED – where the applicant pleaded guilty to one count of armed robbery with personal violence – where the applicant was sentenced to three years' imprisonment suspended after six months, with an operational period of three years – whether sufficient weight was given to a combination of mitigating circumstances in requiring that the applicant serve time in prison – where the applicant argued that the sentences should have been fully suspended – whether the sentencing discretion miscarried – whether the application should be allowed *Penalties and Sentences Act* 1992 (Qld), s 9(3), s 9(4) *R v Sherman* [2007] QCA 322, considered
COUNSEL:	S Crofton for the applicant P J McCarthy for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions Queensland for the respondent

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

[2] **FRASER JA:** I agree with the reasons for judgment of Daubney J and the order proposed by his Honour.

[3] **DAUBNEY J:** On 28 August 2013, the applicant pleaded guilty to one count of armed robbery with personal violence, that offence having been committed on 4 September 2012. He was sentenced to three years' imprisonment suspended after six months, with an operational period of three years. He also pleaded guilty to having assaulted a police officer on 31 August 2012. For that offence he was imprisoned for two months (to be served concurrently).

[4] The applicant now seeks leave to appeal the sentences arguing that, whilst the head sentences were not manifestly excessive, the learned sentencing judge failed to give sufficient weight to a "combination of unusually favourable mitigating circumstances" in requiring that the applicant serve time in prison. The applicant's argument was that the sentences should have been fully suspended. Counsel for the applicant also submitted that this Court could now have regard to the fact that the applicant has now spent just over three months in prison and that, if minded to grant leave to appeal, this Court could now order that the sentence be suspended forthwith.

Background

[5] The applicant is 21 years old. The only criminal history he had was for possession of dangerous drugs, in respect of which no conviction was recorded and a fine of $450 was imposed on 1 November 2011.

[6] The circumstances of the armed robbery count can be stated briefly. The applicant and his accomplice had been drinking on 4 September 2012. They returned home at about 9.30 to 10 pm and discussed robbing a local pizza shop. They agreed that the applicant would go into the shop and his accomplice would drive the car. The applicant changed into a white "hoodie", and took a kitchen knife from his cutlery drawer.

[7] On arrival at the pizza shop, the applicant put on white framed sunglasses to hide his face and also pulled the hood up over his head. He entered the pizza shop and walked to the counter, holding the knife in his hand. He demanded money. The shop attendant thought the applicant was joking and laughed. The applicant then jumped the counter and said "Give me all your money". The applicant walked towards the shop attendant with the knife by his side, pointing it at the shop attendant from about half a metre. The applicant said, "Where's the till, open the till". Another staff member yelled "It's there, it's over there", and then called out for the store manager. The applicant attempted to access the till with the keys that were in it, but the till would not open.

[8] The store manager, alerted by the yelling, saw the applicant on the shop's CCTV and came to the front of the store. The applicant approached and grabbed the manager on the shirt sleeve and walked him over to the till. The manager unlocked the till and backed away. The applicant grabbed all of the notes out of the till, jumped back over the counter and ran out of the store.

[9] The applicant's accomplice then drove them the short distance home. The applicant gave the accomplice $60 of the $320 that had been taken from the till.

[10] The applicant's fingerprints were found at the scene by police. Police attended at the applicant's home address on 5 September 2012 and conducted inquiries. The police then executed a search of the property, and located clothing and a knife suspected of being used in the robbery.

[11] At about 3.30 pm on 5 September 2012, the applicant voluntarily handed himself in at the Cairns Police Station. He participated in a recorded interview and made admissions about the offence. He also provided police with a written statement in which he said, amongst other things, "I know I did the wrong thing and am very sorry so I want to do the right thing".

[12] Only days prior, the applicant had assaulted a police officer. On 31 August 2012, police had been called in relation to a person positioned on a shop awning threatening to jump. The police told pedestrians not to pass beneath the person on the roof. A police officer told the applicant that he should not go the way he was going but should walk up the street. The applicant refused the direction and continued to cross the road. The officer put his hands in front of the applicant motioning him to stop. The applicant took hold of the police officer's right arm with his left hand and struck him in the chest with the base of his palm. The applicant was then taken to the ground and arrested. This was the incident for which the applicant was sentenced to two months' imprisonment.

[13] The more serious of the offences was, clearly enough, that of armed robbery with violence.

Sentencing remarks

[14] Extensive material was put before the learned sentencing judge both in relation to the background to the particular offending and also in respect of the applicant's personal background.

[15] The applicant and his accomplice had been drinking heavily on 4 September 2012. The learned sentencing judge referred to this, and also to the fact that the applicant had a number of personal problems. He had already been charged with assaulting a police officer and was concerned about what was going to happen in relation to that. The applicant had also been in a turbulent relationship, and had been told by the woman that she was pregnant.

[16] The learned sentencing judge described the way that the applicant and his accomplice went about obtaining money as "just ridiculous". His Honour also noted that people who work in shops in situations like this are in a vulnerable situation, saying, "it must be terrifying for them to have to go through the experience where someone comes in there armed with a knife, threatening them with a knife to get money". His Honour said that the courts "view very seriously" that type of conduct, and that this was the type of offence where deterrence is very relevant, to send the message to the community that offending of this type will not be tolerated.

[17] The learned sentencing judge also noted the seriousness attaching to the applicant's offending because he actually used violence while in the pizza shop.

[18] Further in his sentencing remarks, his Honour noted:

- the fact that the applicant had only one previous conviction, which was for possession of a dangerous drug, and was "not a particularly serious conviction";

- the contents of reports tendered on the sentence hearing from a psychiatrist and from an alcohol, tobacco and other drugs counsellor. His Honour referred to the fact that the reports disclosed that the applicant had problems in his upbringing which related to a previously undiagnosed condition of attention deficit disorder. The psychiatrist observed that, after the applicant's involvement in this offending, he returned to his home town of Wangaratta, and undertook a course of counselling;

- numerous references, including references from the applicant's employer, indicating that he had obtained an apprenticeship in Wangaratta and was working;

- the fact that, after police had attended the applicant's home on 5 September 2012, the applicant surrendered himself to police that afternoon, was interviewed by police, made full admissions, and also provided a written statement setting out his involvement and that of his accomplice;

- the fact that the applicant indicated a very early intention to plead guilty.

[19] Further in the course of his sentencing remarks, the learned sentencing judge specifically referred to the provisions of s 9(3) and s 9(4) of the *Penalties and Sentences Act* 1992, and identified the matters from those legislative provisions which were relevant to his consideration as to whether a custodial sentence would be imposed. In that context, his Honour said that on the face of it, it did not appear that the applicant was necessarily an ongoing risk in view of what had happened since his return to Wangaratta and, more importantly, the fact that the applicant had a job and was undergoing treatment and receiving counselling.

[20] The learned sentencing judge weighed against those considerations the need for protection of members of the community. He said:

> "I have to take into account the circumstances of the offence; now these I view very seriously because of the vulnerability of the people who were in that situation working in shops, at night time, they don't have automatic protection and there's not much they can do when people come in waving knives or guns or whatever, I have to take into account the nature and extent of the violence used or intended to be used in the commission of the offence."

[21] The judge specifically noted that, in the applicant's case, there had been "a pattern consistent with remorse from day [one], when [he] approached the police station".

[22] His Honour's relevant conclusions were:

> "In your cases, it is a balancing exercise, weighing up the seriousness of what you did and the deterrent aspect of sentencing in matters such as this. Weighing up the need to properly consider the victims of this type of behaviour against the various matters in your favour that I have summarised. I have been urged in both cases to frame the

> sentences so that neither of you serve any prison time. Particularly because of your age, and particularly because of the extent to which you have rehabilitated yourselves since. Certainly, both of you have kept out of trouble since, and that is something that I take into account. In your cases, Cutrona, I note you were 20 at the time. You did have one previous conviction, and did have the mother (sic) matter to which you've pleaded guilty to pending.
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> To me, yours is a slightly different situation to what we normally see of the youthful first offender with no previous convictions, and many of the cases in which I was given where the young offender has been given the benefit of a non – what is effectively a sentence that involves no actual time in custody, where they had no previous convictions and where they were youthful. I accept that this occurred at a difficult time, but it seems to me that in your case, even after I balance all of the matters in your favour, that you should serve some time in custody because of your offending on this occasion. What I'm going to do in your case, or what I do do – I sentence you to three years imprisonment, and I'll be ordering that that term of imprisonment be suspended after you serve a period of six months.
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> In arriving at the period of six months, I've taken into account the efforts you've made since; the fact that you have kept out of trouble since; and I've also taken into account the degree of your cooperation with the police, which was very substantial from day 1. In relation to the charge of assault police, I'll be sentencing you to two months imprisonment, which will be served concurrently with the other term of imprisonment."

Discussion

[23] On the present application for leave to appeal against sentence, counsel for the applicant emphasised the extensive nature of the applicant's co-operation with the police. It is clear enough that the police had well and truly identified the applicant as the perpetrator of the armed robbery, but it was a matter that stood in the applicant's favour that he surrendered himself to police promptly and gave full statements. Those matters were expressly referred to by the learned sentencing judge on several occasions in the course of his sentencing remarks.

[24] Counsel for the applicant also highlighted the rehabilitation and other personal factors:

- The applicant had not committed any further offences between the date of the armed robbery and the date of sentence;
- He had returned to his home in the Wangaratta and had the support of his family;
- He was in the first year of an apprenticeship;
- He had a previously undiagnosed condition, namely attention deficit disorder, for which he was obtaining treatment;
- He had attended alcohol and drug counselling;
- He had offered to pay restitution.

[25] Once again, each of these matters was referred to by the learned sentencing judge.

[26] Counsel for the applicant also emphasised the applicant's relative youth at the time of the offending. Again, this matter was clearly taken into account by the learned sentencing judge.

[27] The only contention was that the sentencing discretion miscarried by reason of the learned sentencing judge requiring that the applicant serve time in custody. It was not suggested that the head sentence of three years' imprisonment was inappropriate.

[28] In *R v Sherman*[1] the applicant was an accomplice of an offender who robbed a liquor store while armed with a baseball bat. The applicant knew that the principal offender was so armed. The applicant did not participate in the robbery itself, but waited outside and then drove the principal offender away after the robbery. The applicant was convicted, on her own plea of guilty, of one count of armed robbery and was sentenced to two years' imprisonment with parole fixed after serving about three months of actual custody.

[29] Keane JA, with whom the other members of the Court agreed, said:

> "The applicant accepts that the head sentence of two years imprisonment cannot be the subject of any legitimate criticism. The applicant submits, however, that if the learned sentencing judge had given sufficient weight to the amateurish nature of the offence, the applicant's accessorial responsibility, and the circumstances of mitigation personal to the applicant to which reference has been made, a non-custodial sentence would have been imposed.
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> It must be said immediately that an applicant who seeks to argue that the inclusion of a component of actual custody in a sentence for armed robbery renders the sentence manifestly excessive for that reason, assumes a heavy persuasive burden, even in the case of a young offender with no previous convictions.
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> While a non-custodial sentence may be within the bounds of a proper exercise of the sentencing discretion in some cases of young offenders with no or minor criminal history – see *R v Taylor & Napatali; ex parte Attorney-General* (1999) 106 A Crim R 578; *R v Dullroy & Yates; ex parte A-G* [2005] QCA 219 – and while it must be recognised that the rehabilitation of young offenders is important – see *R v Bainbridge & Ors* (1993) 74 A Crim R 265, *R v Lovell* [1999] 2 Qd R 79 – it must also be recognised that a custodial sentence is usually within, and, indeed, should be expected to be part of, the sound exercise of the sentencing discretion for an offence as serious as armed robbery."

[30] It is clear that in a case of armed robbery the imposition of a custodial sentence is clearly within the proper bounds of a sentencing judge's discretion.

[31] Pertinent for present purposes is the following further observation in that case by Jerrard JA, who agreed with Keane JA and added:

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1 [2007] QCA 322.

> "... the issue is not whether the Judges sitting on this appeal would each of us ourselves have imposed that particular sentence, but whether in the circumstances it is beyond the range permitted by the sentencing discretion available to the Judge."

[32] A review of the sentencing remarks below make it clear that the learned sentencing judge was cognisant of, and carefully weighed, all of the factors highlighted before this Court on behalf of the applicant. The most that can be said is that another judge, faced with the same circumstances, may have exercised the sentencing discretion in such a way as to impose a lesser, or even no, custodial term. That does not, however, mean that the sentencing discretion of this particular sentencing judge miscarried.

Conclusion

[33] I am not satisfied that it has been demonstrated that the sentence imposed below, which called for the applicant to be imprisoned, was beyond the range for the offence committed by this applicant. Accordingly, the application for leave to appeal against sentence should be refused.