

DISTRICT COURT OF QUEENSLAND

CITATION: *Komar v Commissioner of Police* [2016] QDC 79

PARTIES: **Michael Thomas Komar**
(appellant)
v
Commissioner of Police
(respondent)

FILE NO/S: 4154/2015

DIVISION: Appellate

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court

DELIVERED ON: 19 February 2016; ex tempore

DELIVERED AT: Brisbane

HEARING DATE: 19 February 2016

JUDGE: Kingham DCJ

ORDER: **1. Appeal is allowed**
2. The sentences imposed in the Magistrates Court of Brisbane on the 24th August 2015 are varied in the following ways:
a. The order for restitution is revoked
b. The date that Mr Komar is eligible to apply for parole is fixed at 24 February 2016
c. All other sentences imposed are confirmed

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS OF INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – Where appellant argued the Learned Magistrate didn't properly consider the issue of totality – where the appellant argued the Learned Magistrate placed too much emphasis on the impact of the defendant's offending on the community - where the appellant argued the penalty imposed was manifestly excessive – whether the penalty imposed was manifestly excessive.

COUNSEL: N. C Larsen for the Appellant

SOLICITORS: Legal Aid Queensland for the Appellant

W.M. Slack, Queensland Police Service for the respondent.

- [1] I'll announce my orders and then I'll give you my reasons. My orders are these. The appeal is allowed. The sentences imposed in the Magistrates Court of Brisbane on the 24th of August 2015 are varied in the following ways: (a) the order for restitution is revoked, (b) the date that Mr Komar is eligible to apply for parole is fixed at 24 February 2016. Otherwise, the sentences imposed are confirmed.
- [2] This is an appeal against a fairly complicated sentence that the magistrate imposed in relation to 30 charges, mainly property offending, although there are two counts of possession of dangerous drugs. Overall in those 30 charges there were 10 counts of stealing; nine counts of enter premises and commit an indictable offence; nine counts of fraud; one count of attempted fraud; one count of attempted stealing; two counts of trespass and; two counts of possess dangerous drugs.
- [3] That offending straddled a sentence that was imposed on the 25th of March 2015 for a smaller number of offences. There were three counts: one of enter premises and commit an indictable offence; one receive tainted property; and one trespass. For those offences, Mr Komar was sentenced to a period of nine months imprisonment and released to parole immediately.
- [4] So the 30 charges that the magistrate was dealing with in August of 2015 span a period from the 1st of December 2014 to the 6th of April 2015, a period of some four months. Most of those charges pre-dated the sentence of the 25th of March 2015, but seven of them were committed when Mr Komar was on parole from the sentence from the 25th of March. Because of this offending that is now subject to appeal, Mr Komar's parole was revoked and when he was sentenced in August of 2015 he had then been in custody for almost four and a-half months, having been returned to custody on the 9th of April 2015.
- [5] This is an appeal on the ground that the sentence is manifestly excessive in the circumstances. It proceeds pursuant to section 222 of the Justices Act. I have applied the principles enunciated in *House v The King*; that it's not a matter of whether I would have imposed a different sentence had I been the sentencing Judge. There must be some error, either a specific error that can be identified in the sentencing process or an error which is manifest only because the sentence overall is excessive.
- [6] There were three errors that were identified by Ms Larsen for Mr Komar: firstly, that her Honour had placed too much emphasis on the impact of this offending on the community because of the vulnerability of cashless transactions; secondly, that the sentences imposed for the trespass and dangerous drug possession offences were excessive; and, thirdly, that the sentence overall is excessive, given the order for restitution and the time allowed to pay for that and the date fixed for eligibility to apply for parole.
- [7] The second of those errors alleged has, in effect, been conceded by the respondent in relation to the trespass counts. Her Honour imposed a term of 12 months imprisonment for each trespass offence. That is the maximum sentence for that offence. The circumstance of these offences don't appear to suggest a 12-month term is warranted. They couldn't be said to be in the worst category of trespass offences. For the possession of dangerous drug sentences, I am also satisfied that a

term of 12 months for those two offences was excessive. I realise I have to amend the orders that I announced earlier and add a third order, that the sentences imposed for the trespass and possess dangerous drug counts – there are four in all – will be varied to reduce the term of imprisonment for each of those from 12 months to three months.

- [8] Returning to my reasons. The error in relation to the trespass and dangerous drug charges demonstrates that there was error in the sentencing exercise and that alone is sufficient to reopen the sentence.
- [9] I am also satisfied that the sentence should be reopened because, overall, I consider the principle of totality has not been properly reflected in the sentence imposed. Although her Honour did seem to place significant emphasis on the effect of the offending on the cashless economy, I am not satisfied that that led to an error in sentence. My reading of her remarks was that she was trying to make it clear to the offender why this was serious property offending; that even though it appeared that money was not taken from an individual, it was an attack on the system. It was reasonable for her to make those observations and take it into account.
- [10] I consider her Honour's error is in the way in which she has approached the cumulative aspect of the sentence, and I want to turn to that now. Shortly stated, the way in which the Court must approach a sentence that has a cumulative aspect is to identify a starting point, to consider then the overall effect of the sentence, bearing in mind its cumulative aspects, and to ensure that it is not disproportionate to the overall offending (*R v Kendrick* [2015] QCA 27 at 55 and 57).
- [11] Here there were two cumulative components to the sentence. Firstly, there was the decision that her Honour made to impose the sentence for the post-parole offending cumulative upon the sentence for the pre-parole offending – that is, pre-March 2015. It was certainly open to her Honour to do that and no complaint is made about her decision to impose the sentence cumulatively. It was quite proper to do so. However, I consider her Honour has not properly considered the other cumulative aspect of the sentence, and that is that Mr Komar was already serving a nine-month term of imprisonment, that he was returned to custody on that sentence because of these offences, and that, by the time of sentence, he had served four and a-half months that could not be declared in relation to the sentence her Honour was imposing.
- [12] Her Honour was aware that he had spent that time in custody and formed the view that, were she to fix a parole eligibility date when she was asked to, which was in December of 2015, that would not be sufficient. However, her reasoning doesn't reveal why she thought a parole eligibility date in June of next year (which would have had Mr Komar serving almost 15 months overall before he could apply for parole) was not disproportionate in light of the offending overall.
- [13] I consider the head sentence imposed for all the property offending to be open to her Honour – perhaps on the high side, but open, given it was a sustained period of offending and the higher term was imposed in relation to the offences committed whilst on parole. So I would not disturb the head sentence, except for the trespass and possess dangerous drug offences. When taking into account the time that has been served in custody, parole eligibility after the offender has served around 10

months is appropriate. That is the effect of the date that I have announced. It is about ten and a-half months in custody before Mr Komar can apply.

- [14] I have taken into account the impact of having to apply for parole rather than having a certain date for release to parole. That is a consequence of Mr Komar offending whilst he is on parole. Whilst he is given credit for his pleas, he does suffer a consequence for having offended after he was released on parole, because now he must apply and that could take some months.
- [15] I should address, finally, the question of restitution. It seems to me that there was insufficient information before her Honour for her to be able to form the view that Mr Komar would have capacity to meet a restitution order of some \$9000 in the time that she fixed. I granted leave to Mr Komar's representative to amend the grounds of appeal to seek revocation of the restitution order.
- [16] I have had regard to the recent Court of Appeal decision of Flint [2015] QCA 275. It is clear there were two aspects that the Court was concerned about on the restitution order that was before it. One was the consequence of failure to meet the restitution order. In Flint's case, the consequence was imprisonment in default of payment. That is not the case here; but there is still a consequence for Mr Komar from failure to meet a restitution order referred to SPER, the State Penalties Enforcement Registrar. That consequence would be garnisheeing of any wages that he was able to earn – I think also access to pension benefits.
- [17] The more important thing for me, though, in this case, is that her Honour could not have been satisfied on the information before her that Mr Komar would be in a position to meet the restitution order; that he would have capacity to meet it upon his release from custody. By the time he is released, he will have spent close to a year in custody. He is a man with a criminal history. His ability to secure employment is affected not just by his criminal history, but also by a workplace accident that led to injuries to his knee. In the circumstances, her Honour could not have been satisfied that Mr Komar would likely have capacity to meet the restitution order. I consider it a precondition to making an order of this nature, that the learned sentencing magistrate has properly given consideration to that issue.
- [18] So, to recap on the orders I announced at the outset. The sentence is varied in the following ways: (a) The order for restitution is revoked; (b) the date that Mr Komar is eligible to apply for parole is fixed at 24 February 2016 and; (c) the sentences of imprisonment imposed for the two counts of trespass and the two counts of possess dangerous drugs, are reduced from 12 months imprisonment to three months imprisonment.