Magistrates Conference 26th May, 2008

Judge John Robertson

SENTENCING UPDATE

1. Where a sentence of imprisonment is to be imposed

It is now accepted in Queensland that it is appropriate to reflect ordinary factors in mitigation including a timely plea of guilty by setting an appropriate release (or eligibility) date at approximately one third: *R v Hoad* [2005] QCA 92 at [31]; and *R v Norton* [2007] QCA 320.

For a discussion on how the law has developed in this area you can got to 12.30 of the Manual which also refers to how this issue has been handled in other States

1. **Taking into account criminal conduct not admitted or accepted by the plea of guilty**

The law in this area has been settled in this State since R v Dales [1996] 1 Qd R 363, and the detailed principles to be applied by the sentencer are set out at 14.560 of the Manual. However, on a number of occasions since that decision, the Court of Appeal has flagged an intention to revisit the area. It is clear now, since R v Forrester [2008] QCA 12 that D remains the law in this State and sentencing courts should be careful to ensure that those principles are applied. An area in which it can cause problems for your court is in sentencing for failure to supply pursuant to s.80 (11) of the TORUM

in circumstances in which the prosecution has withdrawn a s.79 (1) charge under that Act. For an example of this in practice you can see QPS v McGowan [2008] QDC 49

2. Re-opening a sentence pursuant to s. 188 (1)

You will probably be familiar with the case of R v McKenzie [2002] 1 Qd R 410 which lead to a proliferation of applications for re-openings by prisoners who had not received the full benefit of the original parole recommendation. (Discuss facts of McKenzie – 8/3 reduced to 5/1; had not been eligible for parole while appeal pending; appeal allowed and suspended). The allegedly liberal approach mandated in McKenzie was wound back in R v Cassar [2001] 1 Qd R 386 in which the Court was critical of what it described as the "creative, non-literal construction of the words of s.188".

However in *R v Hood* [2005] 2 Qd.R. 54 at 60-61, Jerrard JA said:

> "There is a foreseeable risk that effect will not be given to the recommendation, for a reason beyond Mr Hood's control and that accordingly the recommendation does not in reality qualify as a reduction of sentence, contrary to the assumption of the sentencing judge. In *R. v. MacKenzie* this Court held the error in the assumption enlivened the power under s. 188(1) (c) of the Act; in *R. v. Daly* [2004] QCA 385 at [6] and [9] that the error meant the sentencing discretion had miscarried, and (at [31]) that it meant some other sentence was warranted in law and should have been passed."

This more liberal approach to a re-opening under s188 (1) (c) of the *Penalties and Sentences Act 1992* was maintained in *R v Ronkovich* [2007] QCA 193. In that case the applicant had been given a parole eligibility date of 6 December 2007 but, apparently on the basis of what he told the Court, the Court found that he would not be recommended for release on the eligibility date because he will not have completed the required courses by then. Atkinson J (with whom Jerrard JA and White J agreed) said (at 21):

> "The sentence was decided on a clear factual error of substance, that is, that the date set as the parole eligibility date was the date on which the applicant could and would reasonably be considered for release on parole unless his behaviour after he was sentenced or new material that came to the attention of those considering his application for parole, otherwise warranted. The sentencing discretion therefore miscarried."

The only difference between this case and *Cassar* is that the eligibility date had not passed at the time of the hearing of the appeal. It does appear to run contrary to prescriptions set out in the above quote from *Cassar*.

For a full discussion on this topic see the Manual at 14.995

3. **Declarations of pre-sentence custody under s.159A where cumulative sentences are imposed as part of a series of sentences imposed at the same time. See 15.605 of the Manual**

R v Harris-Davies [2007] QCA 164 identified an important consideration where a sentencing Court is imposing cumulative sentences and is required to declare pre-sentence custody pursuant to s159A. Section 159A (1) refers to a "term of imprisonment" which is defined in s4 as meaning (relevantly) "the duration of imprisonment imposed for a single offence". The sentencing Court had imposed concurrent terms for 18 offences and a 3 year cumulative term for the offence of arson and short cumulative terms for breaches of the *Bail Act 1980* (Qld). The applicant had been in pre-sentence custody pursuant to s159A for 377days, and the sentencing judge declared 377days "as time served in respect of the sentences just imposed". This was interpreted (correctly as the Court held) by the prison authority as meaning (contrary to what was intended) that the 377 day declaration was to be applied to both terms, thus giving the applicant a year less in prison then the sentencing judge intended. The applicant, who appeared for himself, ultimately withdrew his appeal against sentence.

4. Youthful Offenders Manual 10.130

In *R v Mules* [2007] QCA 47, the Court approved a statement made by the Court in *R v Horne* [2005] QCA 218 which makes clear that youthful offenders with limited criminal histories and promising prospects of rehabilitation who have pleaded guilty and cooperated with the administration of justice, even where they have committed (serious offences such as robbery) should receive more leniency from Courts than would otherwise be appropriate.

This theme is consistently emphasised in a whole series of Court of Appeal decisions particularly where the offence is caught by s. 9 (2) (a), that is where the principle is that imprisonment is to be a sentence of last resort and a sentence which allows the offender to stay in the community is preferable.

5. Recording a conviction

S.12 has its own chapter in the Manual and it is an area that still causes problems. The last time I spoke to this conference I discussed the Court of Appeal decision of R v Cay and Ors; ex parte A/G [2005] A Crim R 488 in which Keane JA undertakes an exhaustive analysis of previous decisions of that Court on the topic. All the relevant cases are discussed in Section 13 of the Manual. On the issue of whether evidence is necessary to establish impact on economic and social well being and employment prospects an over rigorous approach to the provision of "evidence" will probably not be necessary given the wide nature of the discretion contained in s12 (2), in light of what Keane JA said in *R v Cay* [2005] QCA 467 and the observations of Jerrard JA (with whom Williams and Holmes JJA agreed) in *R v Ndizeye* [2006] QCA 537.

6. Accepting a plea of guilty

It is long established that a plea of guilty accompanied by statement indication innocence, or where the facts relied on fail to support the charge, the duty of the Court

is to enter a plea of not guilty. It is timely to remember this principle and it came into acute focus in R v GC [2006] QCA 394 in which a DCJ sentenced a man for dangerous driving causing gbh in circumstances in which the facts read out to the court indicated a clear defence under s.25 of the Criminal Code. The Court set out the proper approach that should be taken in these circumstances:

"When it became apparent to the Judge that the facts on which he was being asked to sentence the applicant showed that he had, at least arguably, a complete defence to the charge, the Judge should have directed that a plea of not guilty be entered in place of the plea of guilty. In those circumstances the applicant was unfairly denied a fair opportunity of acquittal and he should be given leave to withdraw his plea of guilty and a plea of not guilty entered in its place."

7. Sentencing in remote Indigenous Communities

Those of you who have this difficult task will no doubt be interested in the pending decision of the Court of Appeal in the Aurukun case. In a case which did not attract any media interest the Court of Appeal has discussed the relevance of s.9 (2) (o) which deals with submissions made by the community justice group at sentence.

In *R v Chong; ex parte A-G (Qld)* [2008] QCA 22, the Court dismissed an Attorney's appeal against a sentence of 2½ years imposed with an immediate parole release date on a Mornington Island Aboriginal woman who pleaded guilty to wounding and had previous convictions for wounding and violence. Initially, the primary Judge had set a parole release date at 3 months after the date of sentence, but then re-

opened the sentence and imposed the final order because she was told that the respondent was still breast feeding and the baby would not be able to accompany her on the police plane to Townsville. The primary Judge also relied upon submissions supported by the Community Justice Group to the effect that the respondent was very committed to ensuring that her children received an education. Atkinson J (with whom Keane and Fraser JJA agreed); after referring to all of the above authorities, and a number of reports dealing with the impact on children as a result of incarceration of a parent, observed that "where relevant, the best interests of children who are dependant on the defendant fall within s9(2)(r) of the *Penalties and Sentences Act* (Qld) which requires the sentencing court to take account not only of the enumerated matters found in s9(2)(a) to (q), but also of "any other relevant circumstance". Her Honour held "that the degree of hardship that imprisonment would involve for the young children of the respondent was exceptional and able to be taken into account of as a "relevant circumstance in the sentence imposed."

This is a snapshot of developments in the law of sentencing over the last 12 months or so excluding decisions in the last few months when I have been on leave.