DISTRICT COURT OF QUEENSLAND

CITATION:	*Chisholm v Wanklin & Anor* [2009] QDC 286
PARTIES:	**BROCK WILLIAM CHISHOLM** (Applicant Appellant) **v** **RONALD FRANCIS WANKLIN** (Respondent) **and** **ROBERT FRANCIS FINLAY** (Respondent)
FILE NO/S:	BD897/09 BD1173/09
DIVISION:	Appellate
PROCEEDING:	Applications to extend the time for filing notices of appeal and appeals against conviction
ORIGINATING COURT:	Magistrates Court at Southport
DELIVERED ON:	4 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2009
JUDGE:	Irwin DCJ

ORDER:

1. Grant the applications to extend the time for filing the notices of appeal and allow the appeals

2. Set aside the sentence and all associated orders imposed on 6 March 2008, and order instead that:

(i) the appellant is convicted and a conviction is recorded on each charge;

(ii) on each of the three charges of enter premises and commit an indictable offence he be sentenced to 2 years imprisonment;

(iii) on the charge of enter premises with intent he be sentenced to 2 years imprisonment;

(iv) on each of the two charges of fraud (on 6 July 2002 and 15 July 2002) he be convicted and not further punished;

(v) on each of the four charges of fraud (on 2 July 2007, 3 July 2007, 4 July 2007 and 11 July 2007) he be sentenced to 6 months imprisonment;

(vi) on each of the three charges of receiving stolen property he be sentenced to 3 months imprisonment;

(vii) on the charge of possession of dangerous drugs he be sentenced to 3 months imprisonment;

(viii) on the charge of possess tainted property he be sentenced to 3 months imprisonment;

(ix) on the charge of possess implements he be sentenced to 3 months imprisonment;

(x) on the charge of unlawful use of a motor vehicle he be sentenced to 2 months imprisonment;

(xi) on the charge of possess utensils he be sentenced to 1 month's imprisonment;

(xii) all sentences be served concurrently with each other and all other terms of imprisonment that he is currently serving;

(xiii) the parole eligibility date is fixed as 5 June 2009.

3. Set aside the sentence imposed on 11 April 2008, and order instead that:

(i) the appellant is convicted and a conviction is recorded;

(ii) he be sentenced to 2 months imprisonment;

(iii) the sentence be served concurrently with all other terms of imprisonment that he is currently serving;

(iv) the parole eligibility date is fixed as 5 June 2009.

4. No order as to costs.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERAL PRINCIPLES – where applicant pleaded guilty to 3 counts of entering premises and committing an indictable offence and 1 count of entering premises with intent- where the offence committed on parole – where applicant sentenced to a head sentence of 30 months'

imprisonment to be served concurrently with part of the period of imprisonment for offences on which parole cancelled – where parole release date fixed after 15 months – where magistrate administratively amended the parole release date to a parole eligibility date without the appellant being heard – whether discernible error of principle

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXECESSIVE OR INADEQUATE – where applicant pleaded guilty to 3 counts of entering premises with intent to commit an indictable offence and 1 count of entering premises with intent – where the offences committed on parole – where appellant sentenced to a head sentence of 30 months' imprisonment to be served concurrently with part of the period of imprisonment on which parole was cancelled – where parole eligibility date fixed after 15 months – where effect of the sentence was that it was cumulative to the extent of 21 months with a parole eligibility date after serving 6 months – where the applicant was entitled to an appropriate discount in sentence recognising his plea of guilty, cooperation with the administration of justice and that he was 20 years when he committed the offences – where the applicant was unlikely to be admitted to parole until shortly before his full time release date – whether sentence is manifestly excessive

Corrective Services Act 2006, s 180(2)

Justices Act 1886, s 222(2)(c), s 224(1)(a), s 225(1), s 225(3)

Penalties and Sentences Act 1992, s 160B(2), s 160B(3), s 160B(4), s 160C(4)

House v The King (1936) 55 CLR 499, applied

Jones v Commissioner of Police [2008] QDC 277, cited

Morris v Spink [2008] QDC 270, applied

Parry v Mayfield Holdings (Qld) Pty Ltd [2006] QDC 250, cited

R v Anderson [2004] QCA 74, applied

R v B; ex parte Attorney-General [2000] QCA 110, distinguished

R v Black [1948] QWN 23, distinguished

R v Booth [1995] QCA 478, cited

R v Cutjar [1995] QCA 570, applied

R v Donald [2000] QCA 399, distinguished

R v Karbanowicz [2003] QCA 534, distinguished

R v Kitson [2008] QCA 86, cited

R v Melano; ex parte Attorney-General [1995] 2 Qd R 186, applied

R v Mladenovic; ex parte Attorney-General [2006] QCA 176, cited

R v Mulder [2002] QCA 455, distinguished

R v Sittczenko, ex parte Cth DPP [2005] QCA 461, cited

R v Tait [1999] 2 Qd R 667, applied

R v Taylor [2008] QCA 214, distinguished

R v Vaughan [2005] QCA 348, distinguished

R v Walker [2008] QCA 166, applied

Veen v The Queen [No. 1] (1979) 143 CLR 458, applied

Veen v The Queen [No. 2] (1987) 164 CLR 465, applied

COUNSEL: K.M. Hillard for the applicant

M.J. Litchen for the respondents

SOLICITORS: Legal Aid Queensland for the applicant

Director of Public Prosecutions (Queensland) for the respondents

Issues

[1] The applicant seeks an extension of time pursuant to s 224(1)(a) of the *Justices Act* 1886 (JA) for filing notices of appeal against sentences imposed on 6 March 2008 and 2 April 2008 by two magistrates at the Southport Magistrates Court.[1] In the event that I accede to these applications, it is argued that the appeals should be allowed on the basis that the sentences were manifestly excessive.

Background

[2] On 6 March 2008 the applicant pleaded guilty to:

- 6 counts of fraud
- 3 counts of receiving stolen property
- 3 counts of entering premises and committing an indictable offence
- 1 count of entering premises with intent

[1] On 6 March 2008 the sentence was imposed by an acting magistrate. For convenience I will describe him as a magistrate in this judgment.

- 1 count of unlawful use of a motor vehicle
- 1 count of possession of dangerous drugs
- 1 count of possession of utensils
- 1 count of possession of tainted property
- 1 count of possession of an implement

[3] He was sentenced to 30 months imprisonment on the four charges involving entering premises. He was convicted and not further punished on two of the fraud counts; and was sentenced to lesser concurrent terms of imprisonment on the other offences. His parole release date was fixed as 5 June 2009. This was subsequently administratively amended on 7 April 2008 to a parole eligibility date, without notification to the applicant or his legal representatives.

[4] On 11 April 2008 he pleaded guilty to one count of entering premises and committing an indictable offence by break. The Bench Charge Sheet was endorsed by the magistrate that he was sentenced to imprisonment for two years, suspended after serving eight months with an operational period of three years. Although, in his sentencing remarks, the magistrate also referred to the period of imprisonment being for three years.

[5] On 1 April 2009 the applicant filed a notice of appeal against the 6 March 2008 sentence and an application for an extension of time within which to bring the proposed appeal.

On 28 April 2009 Legal Aid Queensland filed a notice of appeal against the 11 April 2008 sentence on his behalf together with an application for an extension of time.

Applications for extension of time

Principles

[6] In considering an application for an extension of time, the Court takes into account whether any good reason is shown for the delay and whether it is in the interests of justice overall to grant an extension: see *R v Tait* [1999] 2 Qd R 667 at 668.

Respondent's position

[7] In this case, the respondent correctly concedes that an extension of time should be granted in each case. The concession concerning the 6 March 2008 sentence is that the magistrate made an appellable error with regard to the setting of parole dates. The concession in the other case is because the appeal has merit.

Sentence proceedings on 6 March 2008

[8] With reference to the 6 March 2008 sentence, the applicant's grounds for an extension of time included that he was sentenced on that date and received a fixed parole release date of 15 June 2009, and in late November 2008 he was told by sentence management at the Woodford Correctional Centre that the court order for

his release was unlawful and was changed. He was now aware that he had a parole eligibility date of 15 June 2009. I note that the reference should have been to 5 June 2009 in each case.

[9] It was clearly the intention of the magistrate at the sentence to fix a parole release date. He made this clear to the defendant by saying:

> "What I'll have to determine now is when you are released on parole, or if you're released on parole. In relation to these matters, I fix the parole release date as at the 5th June 2009. Do you understand?"

Shortly after this was said, the applicant sought to clarify his understanding of this order by asking:

> "Is the parole date fixed or do I have to apply?"

The magistrate replied:

> "No, it's a parole release date. It's not a parole eligibility. It's a parole release date as of the 5th of June 2009."

The applicant sought to clarify it further by asking how much parole he would have. The acting magistrate responded that it would be 15 or 16 months from June 2009 to September 2010.

[10] Accordingly the applicant had every reason to believe that he had been the recipient of a parole release date and not a parole eligibility date. However, he did not know that on 20 March 2008 the General Manager of Woodford Correctional Centre had written to the Registrar of the Southport Magistrate Court and advised that the court should have fixed a parole eligibility date, and sought assistance in clarifying this issue to ensure that the applicant was released to the appropriate parole option.

[11] The applicant had been given a fixed parole release date of 1 February 2007 when previously sentenced by the Southport Magistrates Court on 6 December 2006. He was on parole when he committed 15 of the 18 offences for which he was sentenced on 6 March 2008. The consequence not appreciated on that date was that, by reason of s 209 of the *Corrective Services Act* 2006 and s 160B(2) of the *Penalties and Sentences Act* 1992, a parole eligibility date ought to have been set, rather than a fixed date for parole release under s 160B(3).

[12] I note that although the applicant's criminal history asserts that the applicant was made subject to a parole eligibility date on 6 December 2006, the official records of the sentence which have been filed by Ms Hillard, who appears on behalf of the applicant, confirm that this was in fact a parole release date. This is in accordance with s 160B(3) by virtue of which the court is required to fix a parole release date if the sentences was for three years or less. In that case, the sentence was for two years.

[13] It is clear that the magistrate administratively amended his order from a parole release date to parole eligibility date without advising him or his legal representatives, both from amended Orders of Commitment which were issued on 7 April 2008, and the pro forma Order for Imprisonment on the court file on which

the original parole eligibility date has been crossed out and changed to a parole release date.

[14] In *Morris v Spink* [2008] QDC 270 at [7] Robin QC DCJ said:

> "Section 142(2)(b) of the *Justices Act* 1886 where it applies bespeaks a requirement that a defendant suffering imprisonment under an order in the Magistrates Court be entitled to appear of the purpose of making submissions."

His Honour referred to *Jones v Commissioner of Police* [2008] QDC 227 in which Forde DCJ said at para [4]:

> "Clearly the appellant was entitled to be heard on the adjourned occasion in march 2008. Section 142(2) of the *Justices Act* 1886 recognises that right. It would be a miscarriage of justice if the defendant is not given notice of the hearing and sentenced to a harsher penalty without submission on his behalf."

As Robin QC DCJ said at [8]:

> "The sentence ought to have been reopened formally under s 188 of the *Penalties and Sentences Act*, on the occasion of which, by subsection (3)(a), the court 'must give the parties an opportunity to be heard'."

[15] This is what should have occurred in the present case. The failure to do so was a discernible error of principle such as to entitle me to re-exercise the sentencing discretion: see *R v Melano; ex parte Attorney-General* [1995] 2 Qd R 186 at 189. therefore it is in the interests of justice to grant an extension. In addition, as will become apparent, I have come to the conclusion that the appeal has merit.

[16] For completeness, I observe that in relation to the issue of whether any good reason is shown for the delay, the applicant included in his grounds in support of his application:

> "In late November 2008 I was told by sentence management at Woodford Correctional Centre that the court order for my release date was unlawful and was changed. I am now aware that I have a parole eligibility date of 15 June 2009."

This is supported by his affidavit filed on 20 July 2009, which deposes that this information was obtained at a meeting on 19 November 2008. In that affidavit he deposes that he spoke to the prison duty lawyer service of Legal Aid Queensland after this meeting and on 2 December 2008 submitted an application form for legal aid to consider merit in an appeal. This is consistent with his notice of application for extension of time in relation to the other sentence which is signed by his counsel, Ms Hillard. The grounds for that application include:

> "The appellant contacted LAQ in November 2008 for advice in relation to a variation to his parole date for another sentence. The appellant also sought advice in relation to the subject sentence."

The next ground is:

> "After the transcript of the sentence was provided the appellant received advice from Legal Aid Queensland that the sentence was manifestly excessive."

[17] Returning to the appellant's grounds in support of his application concerning the 6 March 2008 sentence, he asserts that the transcript of this sentence was only provided to Legal Aid Queensland in March 2009.

[18] In his affidavit he deposes that after this he was advised by Ms Hillard that there was merit in an appeal against the sentence, he instructed that he wanted to appeal. He asserts that this was the first time he received any advice about the sentences being appellable.

This is not surprising given that prior to the 19 November 2008 meeting he was proceeding on the basis that he had a parole release date for the 6 March 2008 sentence as had been clearly affirmed by the magistrate.

[19] Ms Litchen on behalf of the respondent refers to the transcript of the hearing of 11 April 2008, in relation to the other sentence which is also the subject to appeal, where his legal representative said:

> "My clients had some difficulty with the Parole Board in the past and despite [the magistrate's order], it would appear that they are saying its an eligibility date, rather than a fixed date. I don't know how they – I only learned that from my client this morning."

She therefore submitted that it seems that the appellant was aware of the issue in April 2008.

[20] Ms Hillard's response is in accordance with the applicant's affidavit as follows:

> "Some time after that sentence, the Parole Board informed me that I had an eligibility date, not a release date. I attributed this as an error made by the Parole Board because I knew that when I was in court, a release order had been fixed."

Having regard to the discussion that the appellant had with the magistrate on 6 March 2008 I accept this explanation. This is supported by the appellant asking the magistrate on 11 April 2008 whether the new sentence would "affect my release date" and whether "I still got out next year, June?", to which he received a positive response. The magistrate would not have known that the parole release date had been administratively altered to an eligibility date, four days earlier. It follows that the earliest the appellant could have been aware of the change of circumstances which give rise to a discernible error of principle providing prospects of an appeal was on 19 November 2008, after which he approached LAQ and lodged an application for legal aid to consider the merits of an appeal. There was then the delay in receiving the transcript until 12 March 2009, after which the appeal was lodged by 1 April 2009. In these circumstances I consider that good reason of the delay has been shown.

[21] The decision in *Morris v Spink* was delivered after the approach by Corrective Services to the Registrar in this case, with a view to the matter being brought to the magistrate's attention. However, it is worth reiterating what Robin QC DCJ said in relation to this practice:

> "It seems to me that there is no warrant whatever, the situation being that Correction Services' understandable concerns ought to be raised by being communicated to the sentencing court through the prosecution or the defence – at the least dealt with in a process including them."

It is to be hoped that this message has now been received and implemented.

Sentence proceedings on 11 April 2008

[22] In relation to the sentence of 11 April 2008, the notice of application for extension of time for filing the notice of appeal includes the following addition to the other grounds that I have mentioned:

> "the appellant was not advised of his appeal rights and did not receive advice within the time limit that the sentence was manifestly excessive."

There is support for this proposition, in that the appellant's legal representative informed the magistrate of the sentence of 30 months imprisonment and submitted that he be sentenced to the same term or a similar term of imprisonment but to wholly suspend it or fix a suspension date at the parole release date of 5 June 2008 because of the difficulty with the parole board saying that the parole release date was an eligibility date, rather than a release date. The prosecutor not surprisingly had no opposition to this submission. Amongst the grounds that the respondent concedes that the extension of time should be granted is that the sentence was manifestly excessive. It submits that an appropriate order would have been imprisonment of two months to run concurrently with the 6 March 2009 sentence. I agree for reasons that I will give subsequently. In these circumstances I consider that there is both a good reason shown for the delay and it is in the interests of justice overall to grant an extension.

[23] There are also other reasons why it is in the interests of justice overall to grant an extension. As the respondent concedes the actual sentence as it reads on the face of the transcript is contradictory.

[24] In the course of submissions on sentence, the magistrate said that he had in mind to sentence him for two years' imprisonment, wholly suspended after eight months, for a period of three years. However, in the decision his Honour explained to the defendant:

> "… you have got three years suspended with an operational period of three years."

But then he added:

> "With your history, if you keep getting into trouble in the next three years, you will serve that two years that I have imposed."

This is consistent with what the magistrate had said during submissions. It is also what is endorsed by him on the Bench Charge Sheet, which is the official record of the decision.

In these circumstances, the magistrate's intent has not been clearly reflected in all respects.

[25] Further, if this sentence was suspended after eight months, he would in the normal course of events be released on 10 December 2008, subject to the operational period. However, on the information before the magistrate, the earliest he could be released was 5 June 2009. It would be unusual to suspend a sentence during a period when imprisonment is still being served. It is possible that the magistrate incorrectly thought that the release date was in December 2008, which would be consistent with the full time release date for offences on which he had been dealt with by the court on 6 December 2006.

[26] In the circumstances these contradictions also constitute a discernible error of principle, such as to warrant the extension of time sought by the appellant.

Appeal against sentence

Appeal principles

[27] In respect of the appeals against sentence under s 222(2)(c) of the JA which limits the appeal to manifest excessiveness of sentence, it was acknowledged in *Melano* in relation to Attorney-General's appeals under s 669A of the Criminal Code that the application of this provision is generally consistent with the established principles relating to appeals against discretion referred to in *House v The King* (1936) 55 CLR 499 per Dixon, Evatt, and McTiernan JJ at 504-5. Section 669A is an analogue provision to the right of a complainant aggrieved by a decision of the Magistrates Court to appeal against sentence.[2]

[28] It follows from *House* at 504 that before an appellate court will interfere with the exercise of a sentencing discretion, the appellant must demonstrate that the judicial officer:

> "… act[ed] upon a wrong principle … allow[ed] extraneous or irrelevant material to guide or affect him … [mistook] the facts … [or did] not take into account some material consideration."

[29] The principle in *Melano* at 189 is that:

> "Unless the sentencing judge had erred in principle, either because an error is discernable or demonstrated by a manifest inadequacy or excessiveness, the sentence he or she has imposed will be 'proper'.

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[2] See also on this issue the review of authorities in *R v Dullroy and Yates; ex parte Attorney-General (Qld)* [2005] QCA 219. See *Parry v Mayfield Holdings (Qld) Pty Ltd* [2006] QDC 250 per Dearden DCJ at [28]. I am indebted to his Honour for the review of the relevant authorities at paras [27] to [29].

> … Variation by this Court will not be justified in such circumstances, unless, perhaps, in exceptional circumstances; for example, to establish or alter a matter of principle or the sentencing range which is appropriate …"

The Court of Appeal also said at 190:

> "Support for the view that, ordinarily, this Court should not allow an appeal under s 669A(1) unless the sentence is outside the sound exercise of a sentencing judge's discretion is to be found in factors that are material to the exercise of the Court's discretion."

Accordingly, as stated by Dearden DCJ in *Parry v Mayfield Holdings (Qld) Pty Ltd* at [29], the question is whether the sentence appealed against was "outside the sound exercise of the sentencing [court's] discretion."

[30] In *R v Mladenovic, ex parte Attorney-General* [2006] QCA 176 at [15] McMurdo P said that the appellant must establish error in the exercise of the sentencing judge's discretion (here, that the sentence is manifestly excessive) before this court can intervene and re-exercise the sentencing discretion.[3]

Applicant's background and criminal history

[31] The applicant was born on 16 April 1987. Accordingly he was still 20 years of age when he was convicted for these offences, although with the passage of time, he is now 22 years. For a man so young he already has a significant criminal history for offences against property, offences of dishonesty and breaches of court orders, and one serious assault matter. Although his traffic history is referred to in the respondent's submissions, this was not put before the magistrate. Therefore I disregard it.

All of his appearances have been before the Southport Magistrates Court.

[32] His first appearance on 20 April 2004 related to offences committed as a child, and he was sentenced accordingly. He was convicted and not further punished for a stealing offence. He was also dealt with for a breach of a conditional release order, which was revoked and he was sentenced to six months detention. A number of the offences are of a like nature to the offences he was dealt with for on 6 March 2008 and 11 April 2008. These were:

- 3 counts of unlawful entry of a vehicle with intent to commit an indictable offence
- 1 count of possess thing for use in the commission of an offence contrary to s 419 and s 421 of the Criminal Code
- 1 count of enter or in premises with intent to commit an indictable offence and break
- 1 count of unlawful entry of a motor vehicle.

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[3] See also *R v Sittczenko, ex parte Cth DPP* [2005] QCA 461 per Keane J at [25] and [26].

[33] On 10 September 2004 he was placed on 15 months probation for three counts of unlawful use of a motor vehicle which were committed in August 2004.

On the same day he was dealt with on three offences of breaching the *Bail Act* 1980 and one of contravening a direction committed in August and September of that year.

[34] On 9 November 2004 he was dealt with for breach of that probation order. It was revoked and he was resentenced to two months imprisonment and 12 months probation.

On the same date he was sentenced for offences, some of which I assume were the breach offences, in particular on two counts of unlawful use of a motor vehicle. One was committed on the same day that the previous probation order was made and another was committed on 7 October 2004. He was also sentenced on one count each of:

- enter or in premises with intent to commit an indictable offence
- stealing
- breach of a bail condition
- obstruct police officer
- contravene a direction or requirement.

He was sentenced to various prison-probation orders. As I interpret the criminal history, the cumulative nature of one of these sentences resulted in the effective sentence on that date being four months imprisonment and 12 months probation.

[35] In turn this probation order was breached and he was resentenced for the original offences as well as the breach offences on 10 August 2005. As I interpret the history, the total effective sentence was either 10 months or 17 months, depending on the effect of the cumulative sentences. The new offences for which he was sentenced on that date were:

- 3 counts of unlawful use of a motor vehicle
- 3 counts of wilful damage
- 3 counts of without lawful excuse found in a dwelling house
- 1 count of enter dwelling and commit indictable offence
- 1 count of stealing
- 1 count of unauthorised dealing with shop goods.

Prior to this, on 26 May 2005 he had been convicted on one charge of breach bail undertaking.

[36] His next appearance was on 13 October 2006 for a series of offences, some of which were committed before his sentence on 10 August 2005 and some after that date in 2006. On this occasion the offences were:

- 3 counts of unlawful use of a motor vehicle
- 4 counts of enter premises and commit an indictable offence by break
- 4 counts of enter premises with intent
- 2 counts of trespass – entering or remaining in a dwelling or yard
- 1 count of wilful damage
- 1 count of stealing
- 1 count of serious assault
- 1 count of give evidence of an acceptable age that is false.

The total effective sentence imposed was 18 months imprisonment with 118 days of presentence custody declared as time already served under the sentence.

His parole release date was fixed as 1 February 2007. This would mean he would have served 228 days, or about 7½ months, imprisonment before his parole release. Although his criminal history records this as being a parole eligibility date. The Order for Commitment states that it was in fact a parole release date, as it must have been.

[37] His last appearance before 6 March 2008 was almost two months later, on 6 December 2006, with all but one offence committed between April and June 2006 i.e. about the same time as many of the offences for which he was sentenced on 13 October 2006.

The offence which was committed earlier was an enter premises and commit an indictable offence by break committed in 2002.

In total, the offences for which he was sentenced on that date were:

- 4 counts of enter premises and commit an indictable offence by break
- 2 counts of burglary and commit an indictable offence
- 2 counts of unlawful use of a motor vehicle used/intended for indictable offences
- 1 count of enter premises with intent
- 1 count of enter premises and commit an indictable offence
- 1 count of unlawful use of a motor vehicle.

His total effective sentence for these offences was two years imprisonment with a parole release date on 1 February 2007. This is again confirmed by the Order of commitment, despite some errors in the criminal history.

It was clearly intended that these sentences be served concurrently with those imposed on 13 October 2006 with the same parole release date. The difference is that the full time release date was on 5 December 2008 as opposed to 12 April 2008 under the earlier sentences. Accordingly, the later sentence had a cumulative effect of approximately eight months.

[38] It also has the result that the appellant had an effective sentence of approximately 26 months from 13 October 2006 to 5 December 2008 with a parole release date on 1 February 2007 after 110 days, or three months 20 days, for:

- 8 counts of enter premises and commit an indictable offence by break
- 5 counts of enter premises with intent
- 2 counts of burglary and commit an indictable offence
- 1 count of enter premises and commit an indictable offence
- 6 counts of unlawful use of a motor vehicle (two of which were with intent to commit an indictable offence)
- 1 count of stealing
- 1 count of wilful damage
- 1 count of serious assault
- 2 counts of trespass – entering or remaining in a dwelling or yard
- 1 count of give evidence of an acceptable age that is false.

That is a total of 28 offences.

[39] The position also was that by the time he came to be sentenced on 6 March 2008 his criminal history included the following like offences as an adult:

- 13 counts of unlawful use of a motor vehicle
- 8 counts of enter premises and commit an indictable offence by break
- 2 counts of enter premises and commit an indictable offence
- 6 counts of enter premises with intent to commit an indictable offence
- 2 counts of burglary and commit an indictable offence
- 3 counts of stealing
- 1 count of unauthorised dealing with shop goods

- 3 counts of without lawful excuse found in any dwelling house
- 2 counts of trespass – entering or remaining in a dwelling house or yard.

This is 40 offences.

In addition he had been convicted of:

- 4 counts of wilful damage
- 1 count of serious assault.

Sentence proceedings on 6 March 2008

[40] On 6 March 2008 he was sentenced on 18 offences, 15 of which were committed whilst he was on parole following his release on 1 February 2007.

Of the remaining three offences, two counts of fraud were committed in 2002 when he was 15 years and the other, an unlawful use of a motor vehicle, was committed in August 2004 at about the same time as those for which he was placed on 15 months probation on 19 September 2004.

The offence of enter premises and commit indictable offence by break, for which he was sentenced on 11 April 2008, was alleged to have been committed between 12 and 14 April 2003 when he was still 15 years of age.

[41] The circumstances of the two fraud offences were that the applicant pawned a surfboard in one case and a mobile phone in the other, and obtained $50 and $60 respectively. He admitted each offence to police officers when they spoke to him at the Woodford Correctional Centre.

[42] Chronologically, the next offence was the enter premises and committing an indictable offence by break in 2003 and for which he was sentenced on 11 April 2008. In this case the applicant threw a brick through a glass door of a hairdressing business and stole two computers and cash. As was often the case with his offending, a forensic examination of the scene yielded blood. The resulting DNA profile identified him.

[43] The circumstances of the August 2004 offence of unlawful use of a motor vehicle were that the applicant forcefully jemmied open a door of the vehicle and drove off. He was identified from fingerprints and DNA. He made what were described by the prosecutor as full and frank admissions to police. He stated that he was under the influence of drugs at the time.

[44] The balance of the offences for which he was sentenced on 6 March 2008, insofar as possible, in chronological order are particularised in paragraphs [45] to [53].

[45] The offence of enter premises and commit an indictable offence on 15 July 2007 arose from the applicant entering an unlocked premises during the day and stealing $100. The complainant chased him but stopped when he got into a vehicle. When he was arrested for the other offences on 27 July 2007, he made full and frank admissions to the police.

[46] On the same date the applicant committed the offence of enter premises with intent by entering a store open for business and attempting to open a suitcase on a table and to open the store safe. He was unsuccessful and decamped the store when disturbed by others. Again, he made admissions to the police.

[47] The offence of enter premises and commit an indictable offence on 19 July 2007 involved the applicant entering a store during opening hours and taking money from an unattended open cash register by leaning over the counter. Again, he made full and frank admissions to the police.

[48] On the same date, he committed a further offence of enter premises and commit an indictable offence in company with another person. They entered a store where one spoke to the storekeeper and the other entered a staff area and stole $6,200. The offence was captured on surveillance records. Restitution of $2,894 was sought. The applicant made admissions to the police. The facts placed before the magistrate did not identify which part was played by him.

[49] The fraud offence of 2 July 2007 was admitted by the applicant when the police spoke to him at the Woodford Correctional Centre in August 2007. He admitted to exchanging two surfboards which had been reported stolen for $220 using his Centrelink registration card as identification.

[50] The fraud offence committed on 3 July 2007 related to his selling a sub-woofer, which had been reported stolen, for $30. He used the same form of identification. He also admitted this offence to police in August 2007.

[51] The fraud offence of 4 July 2007 related to his selling golf clubs, which had been reported stolen, for $80 using the same form of identification. He also admitted this offence in August 2007.

[52] On 11 July 2007 he committed a further fraud offence by selling a BMX bike for $180 using the same form of identification. He also admitted to this offence in August 2007.

[53] The three offences of receiving and one count each of possession of tainted property, possession of an implement, possession of a utensil and possession of a dangerous drug arose from the attendance by police at the unit of the applicant and his co-accused on 27 July 2007. During the search they located a set of car keys (possession of tainted property), a bong described as an ice pipe (possession of a utensil), a gram of green leafy material (possession of a dangerous drug), a stainless steel knife which was located in the applicant's room (possession of an implement), and two plasma television sets, laptops and LCD monitors in a car (receiving charges).

[54] As I have said, on 6 March 2008 he was sentenced to 30 months imprisonment on the four charges involving entering premises.

He was convicted and not further punished on the two fraud counts which were committed as a child.

The lesser concurrent sentences of imprisonment which were imposed on the other offences were:

- 2 months imprisonment for the unlawful use of a motor vehicle
- 6 months imprisonment for each of the four remaining fraud charges
- 3 months imprisonment for the three receiving charges, and the individual charges of possession of dangerous drugs, possession of tainted property and possession of implements
- 1 month imprisonment for the possession of utensils

In relation to one count of the entering premises and commit an indictable offence, he was ordered to pay restitution of $2,894.00, and this was to be referred to SPER.

[55] Because the parole eligibility date which had originally been a parole release date was set as 5 June 2009, the effect of the sentence was that the applicant's full time release date became 5 September 2010. It also meant that while the sentence was to be served concurrently with the sentences which had been imposed on 13 October 2006 and 6 December 2006 until his full time release date for those offences on 5 December 2008, the sentence on the four entering premises offences was effectively cumulative to the extent of 21 months. This was 15 months from the parole release date which was set as the mid point of the 30-month sentence.

[56] If the sentence is considered as being an extension of the term of imprisonment which commenced on 13 October 2006, the total effective sentence until the full time release date on 5 September 2010 was about one week short of 47 months, with a parole release date after approximately 20 months of that period. At the time of his sentence on 6 March 2008, the 18-month sentence imposed on 13 October 2006 was still in effect, with the full time release date being 12 April 2008.

[57] This was not affected by the partly suspended term of imprisonment for which he was sentenced on 11 April 2008. Although, because that sentence expired on 10 April 2010, if he served the whole of the 6 March 2008 sentence until 5 September 2010 or did not receive a parole release before 10 April 2010, he would never gain the benefit or be subject to the obligations of the period of suspension intended by the magistrate.

[58] Despite having been admitted to parole on 1 February 2007 the applicant spent some of the time from then until his arrest on these offences on 27 July 2009 in custody. On 28 February 2007 he was returned to custody due to a dirty urine test. He was re-admitted to parole on 18 April 2007. His parole was then again suspended on 14 June 2007 but he was not returned to custody until charged with these offences. As he was in custody in respect of his earlier sentences, he was not entitled to have any of this time declared as time already served under the 6 March2008 or 11 April 2008 sentences.

[59] On 6 March 2008 the appellant's legal representative tendered a psychological report by Mr Stoker, which had been prepared for the proceedings on 13 October 2006.

[60] In Mr Stoker's opinion the applicant suffers from a serious psychological disorder, namely bipolar disorder. He is prescribed an anti-psychotic medication for this. Although he takes this while incarcerated, he stops doing so when he is released but

instead relies on self medication with illegal drugs such as heroin, cannabis, and speed, as well as alcohol to stabilise his emotional health.

[61] His opinion was that the appellant's psychological health remains poor and he engages in criminal activity to maintain his drug habit.

[62] It was also his opinion that the applicant was suffering a conduct disorder which dates from early adolescence. This is defined by a repetitive pattern of aggressive conduct. For example, in the applicant's case, he has not demonstrated physical violence but rather vandalism, break and entering and property offences. This disorder, which results form childhood experience and genetic influences, is exacerbating the symptoms of his bipolar disorder which is also genetic in origin.

[63] He considered that the applicant was exhibiting signs of becoming institutionalised to the effect that he was finding his time in prison not to be a deterrent to his offending behaviour. The applicant had reported to him that he finds gaol "too easy" and that he learns more anti-social behaviour in gaol.

[64] Therefore, he considered that there was the "window of opportunity" to treat the underlying causes of the offending rather than seeing the applicant becoming fully institutionalised. He suggested that this could be achieved through an intensive correction order under which he would be subjected to a stringent treatment plan, including drug and alcohol counselling.

[65] Because 12 months is the maximum period of imprisonment for the making of an intensive correction order and the sentence of imprisonment considered appropriate exceeded this, the sentencing magistrate must have intended that parole be used to take advantage of his window of opportunity.

[66] The report noted that he was keen to work, would like to be a builder, get married and have children – basically to lead a normal life. However, he did not know how to go about doing so. Mr Stocker suggested that he be supported in his endeavours to gain an apprenticeship in carpentry.

[67] His lawyer told the magistrate on 6 March 2008 that upon the applicant's re-release on parole on 13 April 2007, he was in full-time employment as a concreter and things were going quite well in his life until he was contacted by his co-offender, a career criminal on his release from gaol sometime in June.

[68] He said that the appellant is "quite easily led" and through poor decision making took up with this person who led him down the path of re-offending. He started using drugs again and life went pretty quickly down hill. He committed these offences to once again finance his drug habit. The other person gave him the goods which were the subject of the receiving offences to hide. He put the goods in his car where they were located by the police on 27 July 2007.

[69] He referred to the applicant's full and frank admission of the commission of the offences in circumstances where it was not a strong case in relation to many of these matters. I understand this to be a reference to the fraud offences.

[70] He said that the applicant did not want to continue down this path which he understood will result in spending the rest of his life in custody if he did not pull his socks up pretty quickly.

[71] It was submitted that the present offences were not as serious as those for which he was sentenced on 12 December 2008 to two years imprisonment. Although of a similar nature, it was said that these earlier offences were more serious because they involved the element of "breaking". It was also submitted that they were generally opportunistic offences. There was no violence involved. It was submitted that having regard to these factors and his age, the appropriate range of penalty was 18 months to 24 months.

[72] In this context his lawyer incorrectly said that because his parole had been cancelled he would need to serve the full term of the sentence, and therefore he was not asking for any parole release date any earlier than his full time release date on 5 December 2008. In making this submission, he was in error. The only limit on fixing a new parole date is that parole could not be earlier than the existing current parole release date which was 1 February 2007: s 160B(4) and s 160C(4) of the PSA. I note that if the magistrate was influenced by this submission in fixing the parole release date when he did, this would also be an error of principle requiring me to re-exercise the sentencing discretion.

[73] Another error made by the magistrate, which arises from his discussion with the applicant's lawyer, is his statement that having previously been sentenced to 18 months, and subsequently being sentenced to 2 years imprisonment, "it naturally progresses". The applicant's lawyer accepted that. The magistrate then said:

> "There's going to be some sort of an increase somewhere to act as a deterrent."

This is an incorrect approach to sentencing which requires the discretion to be exercised to impose a sentence which is proportionate to the gravity of the offence. This will depend on the circumstances of the particular case and not the application of an inflexible rule which escalates the penalty on each occasion an offender commits a like offence. The magistrate's comments suggest that this is the approach that he took in this case. This is also an error which requires me to re-exercise the sentencing discretion.

Applicant's submissions concerning 6 March 2008 sentence

[74] On appeal the submissions on behalf of the applicant concerning the 6 March 2008 sentence are:

- He was aged 15 at the time of the commission of the two fraud offences in 2002; 17 at the time of the unlawful use of a motor vehicle; and a "relatively young" offender aged 20 at the time of the commission of the other offences.

- He made full and frank admissions.

- The present offences are not as serious as those for which he was sentenced on 12 December 2006.

- Insufficient reduction was made for the applicant's guilty plea and cooperation with the police. The usual practice of receiving parole after a third of the head sentence was not applied in the applicant's case.

- In determining the appropriate head sentence, the magistrate placed substantial weight on his criminal history, making reference to the previous sentences of imprisonment, as I have observed. As such, sentences have been imposed on the entering premises charges which are not proportionate to the criminality of the offences.

- Insufficient weight was placed on the applicant's youth as a relatively young offender of only 20 years.

- Insufficient regard was given to the effect of the sentences imposed on the applicant.

- The likelihood of whether a prisoner will obtain parole is a relevant consideration in appropriate cases in determining the head sentence that should be imposed in the context of the totality of the sentences. It is submitted that such considerations are not limited to lengthy sentences and are relevant where a prisoner is unable to realise parole due to matters beyond his/her control and his/her inability to complete courses.

- In this case, due to the administrative variation of the applicant's parole date, he continued in custody until his classification meeting in November 2008 on the misapprehension that he would be released on parole on 5 June 2009.

- The applicant is unlikely to be granted parole until he completes the courses recommended by Queensland Corrective Services. As he is yet to commence those courses, he is unlikely to be admitted to parole for at least another 12 months, which is shortly before his full time release date of 5 September 2010.

- This argument is supported by the fact that the applicant deposes in his affidavit that he was informed at the classification meeting that it was recommended that he complete a "Making Choices" program and a "Pathways" program which must be done separately one after the other.

[75] On 2 January 2009 Ms Hillard was informed that he had been recommended and waitlisted to complete these programs which are respectively 12 weeks and six months in duration. This information is contained in a letter by the Sentence Management Clerk, Woodford Correctional Centre and concludes:

> "Program participation is prioritised by offender parole eligibility dates and full time discharge dates, given [the applicant's] parole eligibility date of 5/6/2009, it is likely he will participate in the programs prior to that date."

However, as at the date of hearing of this appeal on 24 August 2009, he had not been offered a place in either course.

[76] His assertion in his affidavit based on his experience and speaking to other prisoners, that he has no chance of being admitted to parole unless he completes these courses, is consistent with the prioritisation of those courses by parole eligibility and full time discharge dates as stated in the letter.

[77] The applicant also deposes that:

> "9. Even if I was offered a position in one of the courses, there is no guarantee that I would be offered a position in the second course immediately afterwards.
>
> 10. I know from my own experience and from other prisoners that the Parole Board takes at least two to four months for any decision to be made whether a prisoner will be admitted to parole."

The respondent has not filed any affidavit contradicting this.

[78] It may be that the applicant will not be offered a place on one of these courses until this appeal is determined, because by virtue of s 180(2) of the Corrective Services Act, he cannot apply for parole prior to this.

[79] It follows that even if the applicant is accepted into one of these courses immediately upon the determination of the appeal, and the courses ran back to back, the earliest at which he would complete them is late May/early June 2010, only three months before his full time release date. Following this, it would then be necessary for the Parole Board to consider his application, which is consistent with Ms Hillard's submission as to the timing of his release on parole.

[80] As she submits, the practical effect is that he will now serve virtually all of his sentence in custody.

[81] In all the circumstances, it is submitted that the overall effect of the sentence imposed is crushing and the applicant should be resentenced.

[82] It is submitted that a sentence of 24 months should now be imposed in respect of the entering premises offences in lieu of the sentence of 30 months imprisonment.

[83] It is submitted that the parole release date remain fixed at 6 June 2009, given that this date has already been past.

Respondent's submissions concerning 6 March 2008 sentence

[84] The respondent's primary submission is that, while acknowledging the error concerning the parole release date that was inappropriately fixed, the sentence is not manifestly excessive, with a parole eligibility of 5 June 2009.

[85] It is submitted that serious offences committed on parole, and in particular, offences of a similar character, will ordinarily attract cumulative sentences. The offence of enter premises and commit indictable can be characterised as a serious offence as it carries a maximum penalty of 14 years imprisonment. The effect of the sentence being made concurrent in March 2003 (nine months before the discharge date of the previous sentence) acted to ameliorate the effect of the head sentence of 30 months.

[86] The respondent also submits that any crushing effect was effectively avoided by the imposition of concurrent sentences for the new offences.

[87] It is said with respect to the offences for which the applicant was dealt with by the court on 6 December 2006 that they are not substantially more serious than the current offending.

[88] The respondent submitted that a parole eligibility date at the half-way point of the head sentence is not inappropriate where the offending is aggravated by the commission of further offences of the same nature while having been on parole for a short period (approximately three months).

[89] It was submitted that although the applicant did enter pleas of guilty and demonstrated cooperation with the police, the aggravating features provide a discretion for the parole eligibility date to be past the one-third mark.

[90] It was submitted that other aggravating features of the offending included the amount of money that was stolen ($6,200 in one matter) and the brazen nature of the offending. Although the respondent acknowledged that the character of some of the offences was opportunistic, one of the offences involved one offender distracting a store worker while the other stole $6,200 from another part of the premises. It is said that this offence can be characterised as having an element of forethought or preplanning, inferred by the degree of cooperation present between the co-offenders.

[91] While the respondent acknowledges that the appellant was a young man at the time of the offending and is still relatively young, it is submitted that his history is such that matters of rehabilitation are now overborne by matters of personal and general deterrence. It is submitted that the aim of rehabilitation can be accomplished with the assistance of a lengthy period of supervision on parole.

[92] It is also submitted that the need for personal and general deterrence can be seen to be important in light of the repeated breaches of court orders by the applicant and by the fact that a number were committed in breach of parole for the same sort of offending. It is said that a further compounding feature includes the prevalence of the offence of entering premises, particularly in light of community concern for protection from property theft.

[93] It is submitted therefore that the head sentence of 30 months is within the discretion for this type of offending. Reference is made to a number of decisions of the Queensland Court of Appeal in support of this submission. The applicant also refers to one case. It is submitted that a broad examination of these cases demonstrates that this sentence was within discretion for a person with the applicant's circumstances.

[94] It is also submitted that there is Queensland authority for the proposition that a sentencing judge should not adjust the head sentence because of an expectation that the Parole Board may or may not comply with a parole recommendation.

[95] It is submitted that the authority relied on by the applicant in support of the proposition that it is relevant that he may be unable to realise parole due to his inability to complete courses that may be required by the parole authorities is distinguishable because it involved presentence custody whereas in this case the applicant's time in custody prior to the sentence hearing for the sentences the subject of the appeal was referrable to the breach of parole in relation to the earlier sentence.

[96] The respondent also submitted in relation to the head sentence, that the applicant would benefit from a longer period of supervision, given his issues with addiction, if the sentence were to remain unchanged.

[97] The respondent also submitted that should the court resentence the applicant to 30 months imprisonment on the entering premises charges, that there should be no order as to restitution on the basis that the applicant has not been in a position to make compensation due to his imprisonment.

[98] Therefore, the respondent submits that the appeal ought to be allowed and the applicant resentenced to the same period of imprisonment as that imposed by the magistrate. It is also submitted that there should be no order for restitution.

Discussion

[99] On the basis of *R v Booth* [1995] QCA 478 the respondent submits that serious offences committed while on parole and, in particular, offences of a similar character, will ordinarily attract cumulative sentences. In that case, Pincus JA and Demack J (with whom McPherson JA agreed) said:

> "It appears to us better for a trial judge in a case of this kind to impose a cumulative sentence rather than a concurrent one; that at least has the advantage of ensuring that the court can accurately fix the extent that the existing sentence is being added to."

[100] In *R v Cutjar* [1995] QCA 570 McPherson JA said, with reference to the facts of that case:

> "These factors combine to suggest that in this, and in no doubt many similar cases, the preferable course is to impose a sentence that is fixed to commence on completion of the earlier sentence in which the balance still has to be served."

[101] In that case the respondent had been sentenced to 8½ years imprisonment for a drug offence. One of the reasons for the appeal by the Attorney-General was because the sentence was made concurrent with an earlier sentence which he was undergoing. At the time he committed the drug offence, he was on parole after serving half of a seven year sentence for an earlier drug offence. The 8½ year sentence of imprisonment operated to cancel his parole, obliging him to serve out the balance of the 3½ years of the earlier sentence. In relation to the 8½ year sentence, the respondent could fairly have been expected to be considered for parole, after serving approximately 4¼ years. Of that time, 3½ years was referrable to the balance of the seven year sentence, meaning that in the result, only nine months was attributable to the sentence under review. His Honour said that:

> "The impression remains that an effective additional penalty of imprisonment for only nine months for an offence of such seriousness (which was a repetition, while on parole, of another such offence, represented the fifth of that kind committed in less than 20 years) is manifestly inadequate."

[102] Both cases demonstrate that while the preferable course is to impose a cumulative sentence in circumstances such as existed in the present case, whether this is necessary will depend on the circumstances of each case. In this case, unlike *Cutjar*, even on the applicant's submission, a period of 15 months imprisonment will be attributable to the sentence under review, rather than the 21 months resulting from the magistrate's sentence. This would be as a result of substituting a two-year sentence for a 2½-year sentence. I consider this to be a significantly different situation from that in Cutjar, where the effect of the original sentence was that only nine months of an 8½ year sentence was attributable to that sentence. It is readily appreciable why, in these circumstances, McPherson JA considered that this effective additional penalty was manifestly inadequate. This is distinguishable from the position argued by the applicant in this case by virtue of which 15 months of a two year sentence would be attributable to that sentence. It would also ensure, in accordance with Booth, that the extent to which the earlier sentence is being added to, can be accurately fixed. It is also important that in this case the respondent does not submit that in resentencing the appellant, I impose a cumulative sentence for the entering premises charges, but that I should resentence him to the same period of imprisonment as imposed by the magistrate. Importantly in *Cutjar*, McPherson JA said with reference to the circumstance that the 8½-year sentence obliged him to serve the 3½-year balance of that sentence:

> "In arriving at the appropriate sentence for the instant offence, it would have been proper to take account of that circumstance, although not to such an extent as in effect to negate the legislative intention manifest in the statutory provisions referred to. The combined effect of resurrecting the sentence imposed in 1990 and imposing sentence for the later offence ought not to be such as to make them a 'crushing' burden on the respondent. At the same time, it would plainly be an error so to structure the later sentence as to disregard the commission of yet another offence of the same description in the course of his parole."

This statement is also applicable in the circumstances of the present case.

[103] Therefore, it is essential that I structure the sentence for the entering premises offences to reflect the serious circumstance that these offences were committed within a relatively short time after he had been released on parole for offences of the same character. It is also essential that the sentence reflect the principles of general and personal deterrence, denunciation of the repetition of this type of conduct, and protection of the community.

[104] It is also essential that the sentence imposed for the present offences does not impose a "crushing" burden on the applicant. It must also take into account his early plea of guilty, his cooperation with the administration of justice, the fact despite his serious criminal record for like offences he was still only 20 years of age at the time of his offending and the need to impose a sentence which will also contribute to his rehabilitation and not his institutionalisation in the prison system.

[105] Upon reading the court briefs for the offences on which the applicant was sentenced on 6 December 2006, I consider that they involve more serious offending than the four entering premises offences with which I am now concerned.

[106] The offences dealt with on 6 December 2006 included four of entering premises and commit an indictable offence by break which were punishable by a maximum penalty of life imprisonment. The most serious of the offences with which I am concerned are the three counts of entering premises and commit an indictable offence which are punishable by a maximum penalty of 14 years imprisonment. The fourth offence is entering premises with intent for which a maximum penalty of 10 years imprisonment may be imposed. In addition, on 6 December 2006 he was convicted of:

- 1 count of enter premises and commit an indictable offence
- 1 count of enter premises with intent
- 2 counts of burglary and commit an indictable offence

The latter offence was also punishable by a maximum period of life imprisonment. Therefore he was convicted on that occasion on six offences which were so punishable.

[107] In addition, the offending for which he was dealt with on that occasion included taking car keys on two separate occasions so as to facilitate the two charges of unlawful use of a motor vehicle of which he was also convicted. Further, unlike the present case, he did not co-operate with the administration of justice. He declined to be interviewed.

[108] In comparing the offences dealt with by the court on that occasion and the offences with which I am concerned, while the latter offences have been described as "opportunistic", this is in the sense that as they were committed to fund his drug habit he must have been deliberately looking for opportunities presented by unlocked doors, unattended cash registers, and so on. Ms Litchen is correct in submitting that there must have been some forethought and preplanning involved in the offence where he and his co-offender distracted the store worker in order to steal $6,200. However, it was in reality a matter of happenstance as to whether the funds obtained from committing the offences on these occasions or the occasions dealt with on 6 December 2006 were of this order or were smaller sums of money.

[109] In all the circumstances I have concluded that the offending was more serious on the earlier occasion.

[110] In addition, if for the reason I have given the sentence of 6 March 2008 is considered as an extension of the term of imprisonment which commenced on 13 October 2006 which did not expire until 12 April 2008, it is relevant that on this occasion he was dealt with for offences which included 4 counts of enter premises and commit an indictable offence by break.

[111] There was also an offence of serious assault which is described in Mr Stoker's report as follows:

> "On 17 June 2006, whilst attempting to steal a vehicle, [the appellant] started to struggle against the complainant and kicked out at the complainant. [The applicant] then brandished a screwdriver

> and lunged at the complainant, attempting to stab him with the same to evade being detained. He then ran off."

[112] On that occasion, as I have said, he was also dealt with on:

- 4 counts of enter premises with intent
- 3 counts of unlawful use of a motor vehicle
- 1 count of wilful damage
- 1 count of stealing

These offences are also more serious in total than the offences that he was dealt with for on 6 March 2008.

[113] Further, if the current sentence is regarded as part of the total period of imprisonment which commenced on 13 October 2006, the effective sentence imposed from that date is approximately 47 months with a parole eligibility date after serving 32 months.

[114] If the current sentence is regarded as commencing on 6 December 2006, the total period of imprisonment is approximately 45 months with a parole eligibility date after serving 30 months.

[115] If the current sentence is considered on the basis that its cumulative aspect commences at the conclusion of serving the 6 December 2006 sentence on 5 December 2008, it is a sentence of 21 months with a parole eligibility date after serving six months, which is at a point of less than one-third of the sentence.

[116] If the full time release date is reduced by six months to 5 March 2010, as submitted by the applicant, the result would be that in the first situation the effective sentence would be 41 months with a parole eligibility date after serving 32 months.

[117] In the second situation the result would be that the total period of imprisonment would be approximately 39 months with a parole eligibility date after serving 30 months.

[118] In the third situation the result would be a sentence of 15 months with a parole eligibility date after six months which is at the 66% point of the sentence.

[119] When this comparison is made, I consider that it demonstrates the current position arising from the imposition of a 30-month sentence creates a "crushing" burden on the applicant, having regard to his age, his plea of guilty, and cooperation with the administration of justice.

[120] The applicant was entitled to receive appropriate recognition for his early plea of guilty and cooperation with the administration of justice. In my view, the magistrate also intended this because he expressly took the plea of guilty into account, and he also added in relation to cooperation with the administration of justice:

> "While you've saved the public purse a lot of money by not proceeding to trial in the District Court, I take into account that you have – these are a lot of clean-up offences."

[121] I consider that he intended to achieve this by fixing the parole date at 5 June 2009, because of his observation that he was going to increase the sentence over the sentence of imprisonment imposed on earlier occasions so as to achieve a deterrent effect.

[122] The magistrate initially sought to achieve this by giving the applicant the certainty of a parole release date. However, for reasons that have been mentioned, this was administratively amended to a parole eligibility date, and the applicant has remained in custody for a period of approximately two months beyond that date, with nothing to indicate that he can realistically anticipate release in the near future.

[123] It is for this reason that the likelihood as to whether the applicant will obtain parole is a relevant consideration in determining the head sentence to be imposed in this case, including the extent to which this is affected by his inability to achieve this due to matters beyond his control such as his inability to complete courses.

[124] In *R v Anderson* [2004] QCA 74 the applicant, who was 22 and 21 at the time of the offences, pleaded guilty to numerous property offences and was sentenced to a head sentence of 7½ years imprisonment and a recommendation for eligibility for post-prison community-based release after 2½ years. The applicant appeared on his own behalf and contended that it was highly unlikely that he would be granted post-prison release at the time recommended and there was a risk that he would serve the whole or at least a very large part of the 7½ year sentence, bearing in mind his criminal history. It was observed that his attitude and demeanour as demonstrated in court was not entirely conciliatory and tended to be argumentative and might operate against him with the prison authorities.

[125] White J (with whom McMurdo P and Williams JA agreed) said at [2]:

> "When his significant cooperation with police which cleared up a great many serious property offences, his youth and the real risk that the applicant might serve all of his sentence or well beyond the two and a half years intended by the learned sentencing judge are considered, the sentence is manifestly excessive. In order to recognise those facts the head sentence of seven and a half years should be reduced to five years."

[126] The legislative scheme of permitting application for post-prison release at the half-way mark of 2½ years could be availed of by him. The result was that, in the event the applicant may nonetheless serve the whole or a very large part of the head sentence, the maximum period of imprisonment he would serve for the offences was five years as opposed to 7½ years.

[127] This language can be applied in the present case when there are similar circumstances. The applicant in the present case has also cooperated with the administration of justice. Although his cooperation may not have been as significant as *Anderson*, he nonetheless admitted to the fraud offences in the absence of any other evidence. Therefore, his cooperation was also significant.

[128] The applicant in this case was of the same age as Anderson when he committed the offences, and only one year older when he was sentenced. Therefore, he could also be regarded as young for the purposes of sentence.

[129] Anderson had pleaded guilty on an *ex officio* indictment. However, the applicant in this case did not have that opportunity, but by his plea he ensured that the indictable offences did not have to be the subject of a committal proceedings.

[130] Anderson also had what was described as an extensive criminal history, which dated back to 1999 including prison sentences actually served for a range of similar offences including approximately 18 counts of house-breaking or similar offences and 20 counts of unlawful use of a motor vehicle or allied offences. In August 2000 he was sentenced to 18 months imprisonment cumulative on an activated suspended sentence and a sentence imposed for breach of probation. The applicant was addicted to various drugs and ostensibly offended to support these habits.

[131] The offences were committed while he was subject to an intensive correction order and the unexpired 237 days was ordered to be served concurrently with the other sentences. Presentence custody of 154 days was declared as time served. The seriousness of the offences is demonstrated by the amount of unrecovered property involved being $201,454.50 on one of the indictments. His criminal activity also supported a drug addiction.

[132] Therefore I consider that by analogy the real risk that the applicant in this case might well serve all of his sentence or well beyond the six months intended by the magistrate is relevant to the exercise of my sentencing discretion. Based on my previous discussion of Ms Hillard's submissions, I accept that he is unlikely to be admitted to parole for at least another 12 months which is shortly before his full term release date of 5 September 2010.

[133] The respondent argued on the basis of *R v Black* [1948] QWN 23 and *R v B; ex parte Attorney-General* [2000] QCA 110 that a sentencing judge in Queensland should not adjust the head sentence because of an expectation that the Parole Board may comply with a recommendation for parole or not.

[134] In *R v Black*, Philp J said:

> "… it seems to me that a judge's duty is to sentence a prisoner according to the terms of the Code. It is no concern of his as to what the Parole Board may or may not do."

[135] As McPherson JA said in *R v B; ex parte Attorney-General*, in substance what was held to be wrong in *Black* was that the sentencing judge had increased the duration of the head sentence in the expectation of what the Parole Board would do. As his Honour said at [7]:

> "It is plainly not legitimate to increase the duration of the head sentence in order to offset or circumvent the provision for eligibility for parole after serving half of the prison term …"

This is not the situation in the present case and therefore the case is distinguishable. His Honour also said at [9]:

> "As a general proposition, the converse seems to me to be at least partly true. The duration of the head sentence ought not be reduced because no, or only a limited recommendation for parole is being made or proposed without making it clear that this is what is being done. … It becomes well-nigh impossible to maintain uniformity if parole recommendations are permitted, surreptitiously as it were, to influence the range of head sentences being imposed for offences of the same kind. In addition, it makes it difficult on appeals against sentence if the head sentence imposed at first instance has been discounted because no parole recommendation has been made, but without saying that this is what has been done."

Therefore, the duration of the head sentence ought not be reduced because of the parole recommendation without making it clear what is being done.

[136] Again, this is not the case here because if the head sentence is reduced because there is a real risk that the applicant might serve all of his sentence or well beyond the six months intended by the magistrate, it will clear from my decision.

[137] It is on this basis that in *Anderson* the court was able to take the real risk that existed in that case into account in determining that the head sentence imposed was manifestly excessive.

[138] I consider that in the present case the applicant is entitled to an appropriate discount in sentence for his plea of guilty and cooperation with the administration of justice and also in recognition of his age. Because approximately two months have passed since the date at which the magistrate intended he be released on parole by originally giving him certainty of a parole release date on 5 June 2009 and I accept that he is unlikely to be admitted to parole for at least another 12 months, which is shortly before his full time release date of 5 September 2010, I consider that it is appropriate to achieve this by reduction of the head sentence, while retaining the parole eligibility date. The reason for the reduction is therefore clear from this decision.

[139] I observe that this demonstrates the error in not giving the applicant notice of the intention to change the nature of the parole date. If that had been done, it is likely that the magistrate would have received submissions on behalf of the applicant as to how the factors in his favour should have been taken into account in imposing sentence.

[140] I also agree with the applicant on the authority of *R v Walker* [2008] QCA 166, that it is a relevant consideration in this case that he was unable to realise parole due to matters beyond his control and his inability to complete courses.

[141] In that case, Mr Walker emphasised that he was unlikely to gain parole at or near the eligibility date set by the sentencing judge because he was still on a waiting list to complete programs which were ordinarily required to be completed before release on parole. He had been unable to complete them whilst on remand pursuant to presentence custody and would be unable to complete them by the parole eligibility date. McMurdo P (with whom Keane JA and McKenzie AJA agreed) concluded that if the judge had been in possession of these relevant facts, he may well have imposed a differently structured sentence. I do not consider that the situation is any

different where the reason that the applicant is unable to complete programs ordinarily required to be completed before release on parole, is that the time he has spent in custody prior to his sentence was referrable to breach of parole in relation to an earlier sentence. It is the inability to complete the programs which is the important issue.

[142] The need to adjust the head sentence to ensure that the applicant receives the discount to which he is entitled in circumstances where this is unlikely to be achieved contrary to the magistrate's intention through the parole release date distinguishes this case from the decisions of the Court of Appeal on the sentence appeals to which I have been referred by counsel.

[143] It is relevant that each case involved an appeal from the District Court rather than the Magistrates Court where the maximum penalty which can be imposed is three years. In *R v Karbanowicz* [20003] QCA 534, the head sentence that was held to be in range was four years. In *R v Walker* a sentence of four years was reduced to three years. In *R v Vaughan* [2005] QCA 348 and *R v Donald* [2000] QCA 399, sentences of three years were found not to have been manifestly excessive.

[144] In *Karbanowicz*, the 23 separate offences included 14 charges of burglary and the value of property involved was $60,000.

[145] In *Walker*, the value of the property was $15,500 and the offences for which the applicant was convicted included dangerous operation of a motor vehicle causing grievous bodily harm.

[146] *Vaughan*, *Donald* and *R v Mulder* [2002] QCA 455 involved older offenders. In *Vaughan* the offender was 25 years. In *Donald* and *Mulder* the offenders were 23-26 years and 23-25 years respectively at the time of the offending.

[147] In *R v Taylor* [2007] QCA 214 in which the applicant was resentenced to a period of two years imprisonment, there were factors which are both more and less serious than the present case. The more serious factors were that the applicant who was 20 years of age at the time of the offending which included offences committed on bail, was involved in breaking or attempting to break into premises. On the other hand, he had a less serious criminal history and had made efforts at rehabilitation.

[148] I consider that each of these cases are distinguishable from the present circumstances.

[149] For the reasons that I have given, I consider the sentence imposed by the magistrate for the entering premises to be manifestly excessive, and having regard to the fact that if a sentence of two years imprisonment is substituted for the entering premises offences, not only will this appropriately reflect those factors in the applicant's favour and remove the "crushing" burden of the current sentences, but it will also appropriately reflect the principles of denunciation, deterrence and protection of the community. It will also reflect the totality of his offending in July 2007 while on parole release.

[150] This can be seen when it is remembered that, with the exception of the relatively short period when he was released on parole of about 4½ months, his effective

imprisonment for like offences from 13 October 2006, 5 December 2006, and 6 June 2008 is 41 months, 39 months, and 15 months respectively.

[151] It is also a relevant factor that if the applicant is faced with the prospect of serving a custodial sentence for the further six months until 5 September 2010 or close to that date as would be required by a 30-month sentence, the risk of his becoming institutionalised to the extent that prison ceases to be a deterrent to his offending behaviour becomes even more acute than identified by Mr Stoker in 2006.

[152] In addition, it is likely to expose him to further corrupting influences as he recognised when interviewed by Mr Stoker, such as to undermine any hope of rehabilitation and confirm him in his criminal ways, thus defeating the very purpose of the punishment imposed. His rehabilitation would also serve to protect the community.

[153] I do not agree that the head sentence should remain unchanged as submitted by the respondent because he would benefit from a longer period of supervision. As submitted by Ms Hillard, this is contrary to the established principle that the penalty must be proportionate to the crime and the sentence must not be increased beyond this merely to extend the period of protection of society from the risk of recidivism on the part of the offender: *Veen v The Queen [No. 2]* (1987) 164 CLR 465; *Veen v The Queen [No. 1]* (1979) 143 CLR 458 at 467-468, 482-483, 493.

[154] The same principle applies to extending the head sentence beyond that which is proportionate to the criminality of the offences because the applicant would benefit form a longer period of supervision.

[155] Because the respondent submits that there should be no order for restitution, I will also set aside this order.

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[156] In relation to the appropriate sentence for the offence of enter premises and committing an indictable offence by break he committed as a child in 2003, even if he had been dealt with on 9 November 2004 when he was sentenced to two months imprisonment and 12 months probation for a variety of offences including one of enter or in premises with intent to commit an indictable offence, he is unlikely to have received more than two months of imprisonment. I note that in the present case the magistrate on 6 March 2008 imposed a two-month concurrent term of imprisonment for an offence of unlawful use of a motor vehicle committed when he was 17 in 2004.

[157] In all the circumstances I consider that the original sentence for this offence is manifestly excessive, and the appropriate penalty is a sentence of two months imprisonment to be served concurrently with the terms of imprisonment which I impose.

Parole eligibility date

[158] In respect of the sentences for the charges on which he was dealt with on both dates, I will fix the parole eligibility date as 5 June 2009, which is in accordance with the submissions of both parties. If it is considered that in resentencing him for the offence of which he was dealt with on 11 April 2008, his parole fixed for the

offences for which he was dealt with on 6 March 2008 was automatically cancelled under s 209 of the *Corrective Services Act*, I am nonetheless entitled to fix the same parole release date for the two sets of offences by virtue of s 160B(4) of the PSA.

[159] The effect of this parole release date will be to fix the parole eligibility date past the midway point of the sentence. As a result I must explain the process of reasoning underlying this postponement: *R v Kitson* [2008] QCA 86 at [17] and [18]. In this case, it follows from my decision to reduce the head sentence to ensure that the applicant receives the discount to which he is entitled for the factors in his favour. This is in accordance with the submission by Ms Hillard on his behalf. It is also in accordance with her submission as to when to fix the parole eligibility date. In fact, because of the passage of time, this date cannot be fixed any earlier. Accordingly, the postponement of this date beyond the midway point of the sentence is a consequence of these submissions. In the circumstances, there is no better outcome that the applicant could hope for in accordance with the application of accepted sentencing principles in the circumstances of this case.

Conclusion and Orders

[160] Under s 225(1) of the JA, I may set aside the order appealed from and make any order in the matter that I consider just. For this purpose, under s 225(3) I may exercise any power that could have been exercised by the magistrate who made the order.

[161] In this case, for the reasons I have identified, certain of the sentences imposed by the magistrate and the restitution order made by him on 6 March 2008 should be set aside, in addition to the sentence imposed by a different magistrate on 11 April 2009.

[162] In normal circumstances, it maybe sufficient for my order to only interfere with those aspects of the magistrate's order on 6 March 2008 related to the entering premises offences as no argument is advanced against the lesser suspended sentences which were imposed concurrently.

[163] However, I consider that the result of this appeal will be clearer to those who have to administer it if I set aside all sentences imposed on that date together with the sentence imposed on 11 April 2008.

[164] Accordingly, the formal orders are:

1. Grant the applications to extend the time for filing the notices of appeal and allow the appeals

2. Set aside the sentence and all associated orders imposed on 6 March 2008, and order instead that:

    (i) the appellant is convicted and a conviction is recorded on each charge;

    (ii) on each of the three charges of enter premises and commit an indictable offence he be sentenced to 2 years imprisonment;

    (iii) on the charge of enter premises with intent he be sentenced to 2 years imprisonment;

(iv) on each of the two charges of fraud (on 6 July 2002 and 15 July 2002) he be convicted and not further punished;

(v) on each of the four charges of fraud (on 2 July 2007, 3 July 2007, 4 July 2007 and 11 July 2007) he be sentenced to 6 months imprisonment;

(vi) on each of the three charges of receiving stolen property he be sentenced to 3 months imprisonment;

(vii) on the charge of possession of dangerous drugs he be sentenced to 3 months imprisonment;

(viii) on the charge of possess tainted property he be sentenced to 3 months imprisonment;

(ix) on the charge of possess implements he be sentenced to 3 months imprisonment;

(x) on the charge of unlawful use of a motor vehicle he be sentenced to 2 months imprisonment;

(xi) on the charge of possess utensils he be sentenced to 1 month's imprisonment;

(xii) all sentences be served concurrently with each other and all other terms of imprisonment that he is currently serving;

(xiii) the parole eligibility date is fixed as 5 June 2009.

3. Set aside the sentence imposed on 11 April 2008, and order instead that:

(i) the appellant is convicted and a conviction is recorded;

(ii) he be sentenced to 2 months imprisonment;

(iii) the sentence be served concurrently with all other terms of imprisonment that he is currently serving;

(iv) the parole eligibility date is fixed as 5 June 2009.

4. No order as to costs.