DISTRICT COURT OF QUEENSLAND

CITATION:	*Couchy v Commissioner of Police* [2024] QDC 51
PARTIES:	**MELISSA JANE COUCHY** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO:	3063/23
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to s 222 *Justices Act 1886* (Qld)
ORIGINATING COURT:	Magistrates Court at Brisbane – 18 October 2023
DELIVERED ON:	12 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2024
JUDGE:	Fantin DCJ
ORDER:	**Orders made 2 April 2024:** **1. Appeal allowed.** **2. The sentences imposed by the Magistrate on 18 October 2023 of six months imprisonment with parole release date of 18 December 2023, to be served concurrently, are set aside.** **3. The Defendant is resentenced as follows – on each of the charges of stealing from the person and common assault:** **a. Order pursuant to s 92(1)(a) *Penalties and Sentences Act 1992* that the defendant be released under the supervision of an authorised Corrective Services officer for a period of six months, and must comply with the requirements set out in s93(1) *Penalties and Sentences Act 1992* and report by 4pm, 2 April 2024 to an authorised Corrective Services officer at Stone's Corner.** **b. Conviction recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL — APPEAL AGAINST SENTENCE – where the appellant

pleaded guilty to one charge of stealing from the person and one charge of common assault – where the appellant was sentenced on each charge to six months imprisonment, to be served concurrently, with a parole release date after serving two months in custody – where the appellant had a lengthy criminal history – whether the sentence was manifestly excessive

Legislation
Criminal Code (Qld) s 398.4(a), s 335
Justices Act 1886 (Qld) s 222
Penalties and Sentences Act 1992 (Qld) s 9(1), s 9(2)(a), s 9(2A), s 9(3), s 9(10), s 9(11)

Cases
Bugmy v The Queen [2013] 249 CLR 571
House v The King (1936) 55 CLR 499
Kentwell v The Queen (2014) 252 CLR 601
R v Fernando (1992) 76 A Crim R 58
R v Ikin [2007] QCA 224
R v Lawley [2007] QCA 243
R v Oliver [2019] 3 Qd R 221
R v Sprott; Ex parte Attorney-General (Qld) [2019] QCA 116
Ratcliffe v Queensland Police Service [2019] QDC 144
Teelow v Commissioner of Police [2009] 2 Qd R 489
Veen v The Queen (No 2) (1988) 164 CLR 465

COUNSEL	C Martinovic for the appellant R Minuti for the respondent
SOLICITORS	Grasso Searles Romano Lawyers for the appellant The Office of the Director of Public Prosecutions for the respondent

Background

[1] On 18 October 2023 the appellant pleaded guilty in the Magistrates Court at Brisbane to two offences: stealing from the person contrary to s 398.4(a) of the *Criminal Code* ("Code") and common assault contrary to section 335 of the Code.

[2] On each charge, the learned Magistrate convicted the appellant and sentenced her to six months imprisonment, to be served concurrently, with a parole release date of 18 December 2023, after serving two months of the terms of imprisonment in custody. There was no presentence custody to declare.

[3] The appellant appeals against her sentence for each offence pursuant to s 222 of the *Justices Act 1886* (Qld) on the grounds it is manifestly excessive and that the learned Magistrate erred in applying ss 9(2)(a) and (2A) of the *Penalties and Sentences Act 1992* (Qld) ("PSA").

[4] At the conclusion of the appeal hearing, I made orders allowing the appeal, setting aside the orders, and resentencing the appellant to a probation order.

Circumstances of the offending

[5] The appellant was aged 52 years old at the offending and 53 at sentence.

[6] She was sentenced on the basis of the following facts, as described in the prosecutor's oral submissions in the Magistrates Court.

[7] At approximately 9pm on 24 February 2023 while crossing an intersection in Fortitude Valley the appellant bumped into the victim from behind and took a mobile phone from the victim's rear pocket (charge 1, stealing from the person). About five minutes later, the victim approached the appellant and spoke with her about the theft. During that conversation, later referred to as a confrontation, the appellant threatened to burn the victim with a lit cigarette that she was holding (charge 2, common assault). The victim made a complaint to police. Both offences was captured on CCTV (although that footage was not tendered or played at the hearing).

[8] The only exhibit tendered at the Magistrates Court hearing was the appellant's criminal history.

[9] On 1 September 2023 police spoke to the appellant at her residential address. There was no explanation for the delay of seven months between the date of the offences and when police spoke to her. The appellant declined to participate in an interview and was issued with a notice to appear.

[10] The appellant's plea of guilty was very early. There was no suggestion that either charge had been contested.

Antecedents and criminal history

[11] The appellant had a lengthy criminal history over many years. It was largely comprised of convictions for street level nuisance type offending. It contained some convictions for offences of violence but they were very dated, and the penalties imposed suggested those offences were at the low end of the range of seriousness. A few examples will suffice:

1. the most recent offence of violence in the criminal history was a common assault committed on 9 June 2005, approximately 18 years before the subject offences. For that, the appellant was convicted and not further punished;

2. The appellant committed an assault occasioning bodily harm on 26 September 2002, more than 20 years before the subject offences. She was sentenced in the Magistrates Court for that offence, as well as unlawful entry of a vehicle with intent to commit an indictable offence and stealing. She received a probation order of two years and was ordered to pay $50 restitution.

3. The appellant committed a common assault on 28 January 1999, more than 24 years before the subject offences. She was sentenced in the District Court in 2000 for that offence, as well as a number of offences of stealing and entering a casino when excluded, to six months imprisonment wholly suspended for an operational period of 12 months.

4. The most serious entry in her criminal history was a robbery with violence committed in 1995, almost 30 years before the subject offences. The appellant was sentenced in the District Court in 1996 to three years imprisonment partly suspended after serving four months for an operational period of four years.

[12] In the decade between 2010 and 2020, the appellant had committed one or two low level nuisance type offences every year or two: they included obstruct police, unauthorised dealing with shop goods, commit public nuisance, and begging in a public place. All were punished by low fines, or convicting and not further punishing.

[13] The most recent conviction in the criminal history was for a single offence of stealing committed in 2020, for which the appellant was convicted and fined $150. That was two and a half years before the subject offending.

[14] As that summary demonstrates, it was not the criminal history of a recidivist violent offender. Rather, it was that of a persistent social nuisance offender with a longstanding history of substance abuse and disadvantage, whose offending had declined significantly, both in seriousness and frequency, particularly in the last 10 years.

Submissions in Magistrates Court

[15] According to the transcript, the hearing in the Magistrates Court (including appearances, arraignment, and both parties' submissions) took nine minutes. The Magistrate proceeded immediately to sentence. His reasons were succinct.

[16] The prosecutor submitted that a term of imprisonment was within range. The prosecutor emphasised the appellant's criminal history, describing it as "a significant, undesirable history of like offences, containing relevant offences of dishonesty and of a like nature. Notwithstanding that, the defendant's had multiple fines issued, probation orders, fine option orders, yet the defendant continues to offend."[1] Such a submission did not assist the Magistrate to identify any relevant previous convictions and their dates, and to properly characterise the criminal history as a whole, nor did it identify the very minor nature of the recent entries.

[17] The appellant's solicitor submitted that the appellant had very little to no memory of the incident because she was highly intoxicated at the time. He submitted that it was purely opportunistic offending. The appellant's solicitor also did not assist the Magistrate with a proper analysis or characterisation of the appellant's criminal history.

[18] At the start of the sentencing hearing, immediately after the appellant pleaded guilty to both charges, the Magistrate said "How's this not a robbery then?".[2] During the sentencing hearing, the prosecutor initially led the Magistrate into error by suggesting that the appellant had assaulted the victim by burning her with a lit cigarette she was holding in her hand.[3] That caused his Honour to enquire how the appellant was not charged with a more serious offence than common assault. The prosecutor clarified that the common assault involved a threat only and no actual violence. His Honour then characterised the threat to burn as being intended to "eliminate the enquiry … about her stealing the phone". On appeal, the appellant submitted that his Honour's preliminary views about the matter being more appropriately charged as a

[1] Transcript of hearing, page 1-3, lines 22–24.

[2] Transcript of hearing, page 1-2, line 32.

[3] Transcript of hearing, page 1-3, lines 7–9.

robbery tainted or infected the exercise of his discretion on sentence. It is unnecessary to decide that issue for the purposes of this decision, but based on the remarks made in the transcript such a finding is open.

[19] The appellant's solicitor submitted that the appellant was very remorseful and apologetic. He said she was unaware whether the phone had been returned. The appellant's solicitor said that the appellant was willing to pay restitution, noting that it would have to be referred to SPER. He also submitted that the appellant was currently suffering from a stomach tumour caused by smoking and many decades of drinking, and that she had an appointment with a surgeon on 31 October (the hearing was on 18 October). The appellant's solicitor submitted that although the appellant's criminal history was lengthy, she had only four entries in the past five years which, given her history, was a "credit to her name". He emphasised that the appellant had not had the benefit of a community based order since 2008, when she received a period of probation, and he submitted that a community based order of probation was appropriate.

[20] Although the appellant was an Aboriginal woman, no submissions were made to the Magistrate about early exposure to alcohol abuse or violence, alcohol addiction, deprived background, social disadvantage, or trauma.[4] No submissions were made about her personal circumstances, background, upbringing, education, employment, or otherwise. Other than the oral submission about a stomach tumour, no information or evidence was placed before the court about her health, physical or mental. No submission was made about her progress towards rehabilitation in the eight months between the offences and the sentence, despite an absence of any convictions over that period. No submission was provided by a Community Justice Group.

[21] This meant that there was no material for the Magistrate to act upon in those respects. Even in the busy and pressured jurisdiction of the Magistrates Court hearing a "short plea," it is incumbent on the advocate appearing on sentence to place relevant material in mitigation before the court. The sentencing court cannot act in a vacuum.

[22] The Magistrate invited submissions on whether or not the appellant should be sentenced to imprisonment. The appellant's solicitor accepted that imprisonment would be within range. In my view, for the reasons set out below, that concession was wrongly made.

[23] No party assisted the Magistrate with any case authorities to support submissions on penalty.

Sentencing remarks

[24] In his sentencing reasons the Magistrate took into account the early plea of guilty, which he said "speaks to cooperation and assistance with the administration of justice", and "is perhaps indicative of some remorse". He did not refer to the appellant's serious health condition or specialist treatment. The Magistrate said:[5]

> I take into account your personal matters and there's very little I can find that commends you to the court. You have a significant history over a long period of time, which has involved periods of imprisonment, periods of community-based orders, and you continue to offend.
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> …

[4] See *Bugmy v The Queen* [2013] 249 CLR 571; *R v Fernando* (1992) 76 A Crim R 58.
[5] Transcript of sentencing remarks, pages 1-2–1-3, lines 21–2.

> Now, given your history, the prospects of your rehabilitation, in my view, sad as it sounds, is fairly remote. So if you are to rehabilitate, you're going to have to do it yourself, without the assistance of the court. The priority here is deterrence and denunciation. … The court needs to impose sentences that reflect community attitudes to this sort of offending.
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> So having regard to the serious nature of the offence and the number of offences, your previous criminal history for similar offences, previous sentencing options which have provided no deterrent to you, the detrimental effect on the victim inasmuch that they've lost their phone, you were the prime mover in the offence and the offence was for personal gain. I take into account also the prevalence of the offence in the community. I consider that in view of the serious nature of the offence that you committed and in light of your personal circumstances, conscious as I am that a period of imprisonment is to - a sentence that allows you to stay in the community is preferable, although this is a charge of common assault and so that has less impact. But I would always consider other sentences prior to a period of imprisonment.
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> So in the circumstances I have come to the conclusion that there's no reasonable alternative to a term of imprisonment to achieve the purposes to which I've referred.

Applicable principles

[25] In order to succeed, the appellant must demonstrate that, having regard to all of the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.[6]

[26] The relevant principles regarding appeals against sentence are those set out in *House v The King*.[7] In cases in which a specific error is established, "the appellate court's power to intervene is enlivened and it becomes its duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed."[8]

[27] It is not necessary however to identify a particular error in the exercise of the discretion. There may be cases where the sentence is so "unreasonable or plainly unjust" in the circumstances as to give rise to an inference that the discretion has miscarried. It is this idea which informs the familiar ground of appeal that a sentence is manifestly excessive.[9]

[28] In cases of complaints of manifest excess, an appellate court may only intervene if it concludes that the sentence falls outside the permissible range of sentences that could have been imposed upon the appellant for this offence.[10] It is not a sufficient basis of intervention that the appellate court may have imposed a different sentence in the exercise of the sentencing discretion.[11]

Consideration

[29] "In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to – (a) the nature of the

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[6] *Teelow v Commissioner of Police* [2009] 2 Qd R 489, 493 [4].
[7] (1936) 55 CLR 499, 504–505.
[8] *Kentwell v The Queen* (2014) 252 CLR 601, 615 [35]; see similarly *Ratcliffe v Queensland Police Service* [2019] QDC 144, [15].
[9] *R v Ikin* [2007] QCA 224, 6.
[10] *Kentwell v The Queen* (2014) 252 CLR 601, 615 [35].
[11] *R v Lawley* [2007] QCA 243, [18].

previous conviction and its relevance to the current offence; and (b) the time that has elapsed since the conviction": s 9(10) PSA. That provision is qualified by s 9(11): "despite subsection (10), the sentence imposed must not be disproportionate to the gravity of the current offence."

[30] The High Court in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477 observed:

> The antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. [citations omitted]

[31] The Magistrate was not assisted by submissions that properly analysed the appellant's criminal history and its relevance or lack thereof to the subject offences. The Magistrate's reasons reveal that he treated the appellant's criminal history as a significant aggravating factor, notwithstanding that the entries in the last 20 years were not for offences of a like nature and despite the very long period of time that had elapsed since the most recent conviction for violence. In my view, Magistrate allowed the criminal history to overwhelm the proper exercise of the sentencing discretion, and the sentence he imposed was wholly disproportionate to the gravity of the subject offences.

[32] The only purposes for which sentence may be imposed are those set out in s 9(1) of the PSA: just punishment, rehabilitation, personal and general deterrence, denunciation, and protection of the community.

[33] In aid of these purposes, in imposing a sentence a court "must have regard to" certain principles. The first of these is stated in s 9(2)(a): "a sentence of imprisonment should only be imposed as a last resort; and a sentence that allows the offender to stay in the community is preferable". This has been described as a "prescription" or "stricture". [12]

[34] By virtue of s 9(2A), that principle does not apply in a certain category of cases: any offence "that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or that resulted in physical harm to another person". In such a case, a different set of principles apply, set out in s 9(3). It is an entirely different sentencing regime to that in s 9(2).

[35] The offence of stealing from the person contrary to s 398.4(a) of the Code falls within Part 6 Offences relating to property and contracts, Division 1 Stealing, of the Code. On the agreed facts, it was not an offence "that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or that resulted in physical harm to another person" within the meaning s 9(2A). Therefore the Magistrate was required to apply the principle in s 9(2)(a).

[36] The sentencing remarks do not reveal any meaningful consideration, or application, of this principle. There was no discussion of why a community based order such as probation (which was preferable) was not appropriate in this case, particularly in circumstances where the last

[12] *R v Oliver* [2019] 3 Qd R 221, 226 [22]

probation order imposed on the appellant some 15 years earlier had been completed without breach.

[37] In imposing a sentence of imprisonment for the stealing offence, the Magistrate erred in law and the sentencing discretion miscarried. The appeal must be allowed, the sentence set aside, and the appellant resentenced.

[38] Applying the above provisions to the charge of common assault is not as straightforward. The agreed facts about this offence were scant. It was said to involve a threat to assault with a lit cigarette. There was no actual violence. It did not result in physical harm to the complainant.

[39] On appeal, the appellant's counsel submitted that this offence did not involve "the use of … violence against another person" within the meaning of s 9(2A)(a).

[40] By her plea of guilty to common assault, the appellant is taken to have accepted the elements of the offence. Relevantly, it was an assault pursuant to s 245 of the Code because it involved: "a person … who by any bodily act or gesture … threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the … threat has actually or apparently a present ability to effect the person's purpose". By pleading guilty, the appellant accepted that she had threatened to apply force (in the form of heat from a lit cigarette) to the complainant without consent and had an actual or apparent present ability to do so.

[41] President Sofronoff in *R v Oliver*[13] considered the meaning of "the use of … violence against another person" in s 9(2A)(a), including whether it could include a threat of violence. He emphasised the importance of the sentencing court properly categorising the offence as one coming within the meaning of s 9(2A), because of the large difference between the sentencing principles in s 9(3) for offences involving the use of violence, and those in s 9(2) which did not.[14]

[42] Words alone cannot constitute an assault. There must be some bodily act or gesture associated with words indicating an intention of assaulting to amount to a common assault. It was accepted that there was a threat of violence in the form of a threat to apply force via a lit cigarette and the appellant had an actual or apparent present ability to do so because she held the cigarette. At the sentencing hearing the prosecutor did not identify the act or gesture relied upon to constitute the threat, nor the words spoken. It was unhelpful that those facts were not identified.

[43] Although the matter is arguable, in my view the preferable characterisation is that the offending did involve "the use of … violence against another person" in s 9(2A)(a). That is because the threat occurred under circumstances in which it appeared that the threatened violence could be inflicted suddenly. It appears to fall within that category of cases where a threat was accompanied by an action so that the threat and the action together may be regarded as violence although no touching has occurred[15].

[44] Once s 9(2A) is enlivened, the court must consider whether the risk to the community and to the victim, as well as the circumstances of the victim, point to the need for prison. The maximum penalty for the offence of common assault is three years imprisonment. The

[13] Ibid 227–228 [31], 229–230 [42]–[43].
[14] Ibid 227–228 [26]–[31].
[15] Ibid 227–228 [31].

appellant was not an offender with a demonstrated and recent propensity for violent offending. The offending did not involve any actual violence. The victim did not suffer any physical harm, and there was no suggestion they had suffered emotional or psychological harm. The gravity of the offence was at the least serious end of the range.

Conclusion

[45] It is only when the court is convinced that the sentence is definitely outside the scope of appropriate sentencing discretion that it is ever justified in exercising the discretion to resentence on the basis that the sentence was manifestly excessive.[16]

[46] I am satisfied that the sentences imposed were wholly beyond or outside the range of appropriate sentencing discretion in circumstances where:

1. it was a very early plea of guilty, consistent with remorse;
2. both offences were committed on the same evening, separated by a short period of time;
3. it was impulsive, opportunistic and unsophisticated offending by an intoxicated offender who later had no memory of the events;
4. the stealing involved the loss of a mobile phone and the common assault involved a threat to use a lit cigarette with no actual violence;
5. there was no suggestion of physical, emotional or psychological harm to the victim;
6. the offending was not in breach of any court orders;
7. there was a long delay in the appellant being charged, and once charged she was on bail without breach until the sentence;
8. the appellant's criminal history, while lengthy, reflected a person who had struggled with a long term alcohol addiction but had made progress towards rehabilitation particularly in the last 10 to 20 years;
9. the appellant was a mature woman with a significant health problem and an imminent appointment with a specialist; and
10. the purposes of general and personal deterrence could be adequately met by a community based order that facilitated the appellant's ongoing rehabilitation rather than a term of imprisonment, including one which required actual custody. There was no need to send the appellant to prison to protect the victim or the community from her, or for her rehabilitation.

Orders

[47] The appeal should be allowed and the appellant resentenced.

[48] By the time the appeal was heard, the appellant had served seven days imprisonment in actual custody before being released on appeal bail, and had been subject to onerous bail conditions

[16] *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116, [14].

for five months without breach or reoffending. The bail conditions included a requirement to report to police three days per week and a curfew condition between 7pm and 6am.

[49] Taking into account the time served in custody and the appellant's performance on bail, the appropriate order for each offence is six months probation, with convictions recorded.

[50] At the hearing, the appellant was informed of the terms of the probation order and agreed to comply with them. I made orders in the terms that appear on the cover sheet to this judgment.