SUPREME COURT OF QUEENSLAND

CITATION:	*R v Noble; Ex parte Attorney-General (Qld)* [2017] QCA 86
PARTIES:	**R** **v** **NOBLE, Thomas Adrian** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 267 of 2016 DC No 164 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Ipswich – Date of Sentence: 6 September 2016
DELIVERED ON:	12 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2017
JUDGES:	Gotterson and McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – EXERCISE OF DISCRETION – GENERALLY – where the respondent pleaded guilty to 15 counts of serious animal cruelty arising from greyhound live baiting on the respondent's property – where the respondent was sentenced to three years' imprisonment wholly suspended for an operational period of five years – where the sentencing judge took into account many relevant factors, including the respondent's early and continued guilty plea, his mental and physical health, his role as primary carer of his wife, his loss of livelihood, lifestyle and social structure and the vilification within, and ostracism from, the greyhound racing industry that he has experienced – where the sentencing judge also took into account the need for public denunciation and general deterrence – where the appellant contends the matters in mitigation did not justify a wholly suspended sentence – whether the sentence imposed was manifestly inadequate *Criminal Code* (Qld), s 242, s 669A

R v Chapman, unreported, Bradley DCJ, DC 471 of 2015, 24 June 2016, cited
R v F, unreported, Bradley DCJ, DC 108 of 2016, 1 April 2016, cited
R v Goodwin; Ex parte Attorney-General (Qld) (2014) 247 A Crim R 582; [2014] QCA 345, cited
R v Guthrie (2002) 135 A Crim R 292; [2002] QCA 509, cited
R v Roberts, unreported, Koppenol DCJ, DC 395 of 2015, 13 November 2015, cited
R v Talia [2009] VSCA 260, distinguished
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, cited

COUNSEL: M R Byrne QC for the appellant
A J Edwards for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Hannay Lawyers for the respondent

[1] **GOTTERSON JA:** On 30 August 2016 in the District Court at Ipswich, the respondent, Thomas Adrian Noble, pleaded guilty to 15 counts of offences against s 242(1) of the *Criminal Code* (Qld) ("the Code"). Counts 1, 6, 9, 10, 12 and 13 alleged that the respondent with intent to inflict severe pain or suffering, unlawfully caused prolonged suffering to an animal on 20 and 22 August, and 6, 8, 10 and 12 October 2014 respectively at Churchable. Counts 2, 3, 4, 5, 7, 8, 11, 14 and 15 alleged that he with intent to inflict severe pain or suffering, killed an animal on 20 (two counts), 21 and 22 August, 1 (two counts) September and 8, 13 and 15 October 2014 respectively, also at Churchable.

[2] A sentence hearing took place on the same day. Later, on 6 September 2016, convictions were recorded and the respondent was sentenced to three years' imprisonment on each count. The sentence was wholly suspended for the maximum operational period of five years.

[3] On 4 October 2016, the Attorney-General of Queensland, the appellant, filed a notice of appeal against sentence pursuant to s 669A(1) of the Code.[1] The ground of appeal is that the sentence imposed is manifestly inadequate.

Circumstances of the offending

[4] The sentencing was informed by a Schedule of Facts.[2] This document recounted that the respondent was a well-known licensed greyhound trainer. He owned property at 9 Wotan Road, Churchable near Ipswich. There was a greyhound training track on the property where the respondent would trial his own dogs and dogs belonging to others.

[5] Private investigators employed by Animal Liberation Queensland had been tipped off that the respondent was conducting live baiting training practices at the property. During August to November 2014, the investigator set up a series of covert cameras

1 AB178-179.
2 Exhibit 3; AB58-64.

at or around the training track. The cameras recorded footage of the defendant and others using live piglets, rabbits and possums to train greyhounds. On some occasions, the animal used as bait was killed. At sentence, camera footage relating to Counts 2, 3, 8 and 14[3] was played and a 12-page schedule describing the audio and visual content of the footage as it related to each of the 15 counts, was tendered.[4]

[6] The evidence revealed that the practice of live baiting in which the respondent engaged was a training technique whereby small live animals were tethered to a mechanical lure arm which then rotated around the track. Greyhounds would pursue the animal in trial runs, often catching it. It was believed that this technique improved the speed of the dogs for racing conditions.

[7] The respondent played an integral "hands-on" role in the live baiting trials. He charged others to use the training facility, at least when live baits were employed. The charge was of the order of $5 per trial run.

[8] The offending occurred on 10 separate dates over a period of approximately two months. The several counts involved altogether about 140 trials run by greyhounds either singly or with others. Sometimes the dogs were not muzzled. They could, and would, bite into the animal on the lure as they chased it.

[9] As the learned sentencing judge emphasised in his sentencing remarks, the severe pain or suffering comprehended by the counts was not confined to the sustaining of death or injury by the animal. It also encompassed the distress caused by tying the animal to the lure and rotating it around the track.[5] The time the animal was on the lure as captured in the camera footage varied from three minutes to 60 minutes.

[10] Each count related to a different live bait. For 10 of the counts, piglets were used and six of them survived; for three of them, possums were used of which none survived; and for the other two, rabbits were used, neither of which survived.

[11] Police raided the property on 11 February 2015. The respondent denied that there were any live animals there apart from "a few chooks". He was then seen trying to hide a small live piglet. A second piglet with bite marks to the leg was found concealed in a cage near a chook pen. The respondent did not participate in a formal interview with police.[6] He did, however, admit to live baiting in an interview with Racing Queensland on 18 February 2015.[7]

The respondent's personal circumstances and antecedents

[12] The respondent was born in 1946 and was 67 and then 68 years old when he committed the subject offending. He left school at 13 years of age. He first became involved in the greyhound industry at 21 years of age when he bought a greyhound. Thereafter, he had an involvement in the greyhound racing industry for his entire working life. At a young age, he was taught to operate a lure at a time when the use of live baiting was prevalent. About 30 years ago, he owned and managed a sheep and cattle property at Inverell in New South Wales. He used part of the property to

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3 Exhibits 4, 5, 6 and 7.
4 Exhibit 8; AB65-76.
5 AB42 ll34-41.
6 Exhibit 3; AB64.
7 AB33 Tr1-25 ll2-3.

breed and race his own greyhounds. He and his family later relocated to the Ipswich area.[8]

[13] In January 2015, a *Four Corners* program was broadcast about live baiting in the greyhound racing industry. Footage of the respondent's training track was shown. Racing Queensland intervened and suspended the respondent and six others as trainers. After the raid, an interim prohibition order was sought and obtained by police against the respondent under s 181A of the *Animal Care and Protection Act* 2001 (Qld) ("the ACP Act"). It prohibited him from possessing any animals. His greyhounds were placed in the care of Racing Queensland.[9]

[14] The respondent married when he was 21 years of age. He and his wife had three children, one of whom, a son, committed suicide in 1997 aged 27 years. The relocation to the Ipswich area followed upon that event.

[15] The respondent had a minor criminal history of no relevance for present purposes.[10]

The sentencing remarks

[16] The learned sentencing judge detailed the offending involved in each count.[11] He noted that the respondent had pleaded guilty "at a very early time"[12] and that the pleas had been maintained notwithstanding that, in the interim, a ruling had been made in the prosecution of a related alleged offender against the admissibility of the video footage.[13] His Honour regarded the plea as having a heightened significance on that account.[14]

[17] His Honour put public denunciation as particularly important in sentencing the respondent. He described the offences as "abhorrent to all right-thinking members of the public".[15] There was a need to deter others who might be tempted to engage in such activities for the financial gains greyhound racing offered. Further, a message needed to be sent that the criminality of serious animal cruelty in domestic, commercial and rural contexts beyond the greyhound racing industry, will be met with condign punishment.[16]

[18] As to the practice of live baiting, his Honour noted that it was prevalent when the respondent was introduced to it. He was also introduced to kangaroo shooting and pig hunting. The evidence of Dr L Hatzipetrou, forensic psychologist, was that the respondent lacked "any emotional attachment to feral animals".

[19] His Honour observed that for many of the years during which the respondent carried out live baiting, it had not been criminalised.[17] He also noted that the respondent was "by no means the sole participant in the barbaric practices;"[18] that live baiting

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8 Report of Dr L Hatzipetrou, forensic psychologist, dated 24 August 2016: Exhibit 13; AB146-159 at 1.3.
9 Ibid at 9.1.
10 AB52.
11 AB41 l25 – AB43 l6.
12 AB43 l9. The prosecutor submitted that the entering of the pleas at committal and without the need for cross-examination had obviated the cost of a lengthy trial: AB12 ll16-17; AB17 l27.
13 Ibid ll10-15.
14 Ibid ll17-19. He noted that the prosecutor agreed with that.
15 Ibid ll27-28.
16 AB44 ll8-22.
17 AB45 ll29-31.
18 Ibid ll4-5.

was practised with industry, if not official, condonation; and that it extended beyond Queensland into several other states.[19] He accepted the prosecutor's submission that aggravating features of the respondent's conduct were that live baiting was prohibited in Queensland for at least 12 years prior to the offending and that, as an operator of a training track, the respondent had perpetuated the practice not only by himself but by other trainers and owners who used it.[20]

[20] Referring to Dr Hatzipetrou's report, his Honour did, however, state that the respondent experienced some initial difficulty in accepting that his conduct was criminal. That was due to a combination of factors: his detachment from feral animals; the absence of any official prior warnings or sanctions notwithstanding that employees of Racing Queensland were aware that live baiting was carried on; and the absence of any confrontation on the part of individuals who witnessed the live baiting at the respondent's training track, up to 30 at a time.[21]

[21] The learned sentencing judge considered that, in this case, rehabilitation and personal deterrence "did not loom as particularly large considerations" in the exercise of the sentencing discretion.[22] In his Honour's view, the respondent was "entirely unlikely to offend in this way again".[23] That was not only because of the consequences of the offending that he had experienced, but also because the circumstances for like offending had been removed: the respondent had been banned from the greyhound racing industry; he was unable to own or race dogs; and he was unable to train dogs belonging to others.[24]

[22] His Honour accepted submissions by defence counsel that the respondent had been vilified within, and ostracised from, the greyhound racing industry, and that he had received death threats.[25] He took them into consideration as forms of extra-curial punishment. A similar approach was taken to the respondent's loss of his livelihood.[26]

[23] The learned sentencing judge remarked that the pleas of guilty also reflected remorse. He mentioned Dr Hatzipetrou as reporting that the respondent appeared "contrite and remorseful". His Honour ventured that that was due in no small way to consequences of the offending already experienced. The respondent's lifestyle and social structure had for decades been based upon his involvement in the greyhound racing industry. That had been removed and he had been left "isolated and distressed".[27]

[24] His Honour also took into consideration the following additional factors:

(a) that the respondent suffered from an adjustment disorder and depression, in part as a result of his "apprehension" about the subject offences,[28] but also contributed to by:

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19 AB46 ll28-31; 39-41.

20 AB45 ll5-19; 32-34. His Honour referred to the enactment of s 32 of the ACP Act effective from 1 March 2002, which prohibited the keeping or use of an animal as a kill or lure to blood a dog or to race or train a coursing dog: ibid ll19-24.

21 AB46 l34 – AB47 l14.

22 AB43 ll35-37.

23 Ibid ll43-44.

24 Ibid ll43 - AB44 l6.

25 AB47 ll16-18.

26 Ibid l19.

27 Ibid ll6-14.

28 Ibid ll25-26.

(i) non-Hodgkin's lymphoma, diagnosed five years earlier which the respondent had initially been told was terminal but, after two years of chemotherapy, was in remission and subject to half-yearly reviews;[29]

(ii) two major motor vehicle accidents;[30] and

(iii) his son's suicide for which the respondent had failed to grieve properly and which had resulted in a protracted bereavement;[31]

(b) that, in Dr Hatzipetrou's opinion, the respondent was likely to have been experiencing mental health problems at the time of the subject offending, although his impaired judgment, reasoning and understanding which led to it were the result of the entrenched beliefs, attitudes and practices that he had held and applied unchallenged for over 50 years;[32]

(c) that the respondent suffered from asbestosis and a lung lesion and permanent untreatable sensory neuron disease in both legs as a result of chemotherapy, which caused a loss of balance;[33] and

(d) the respondent's wife of almost 50 years had recently been diagnosed with, and was receiving treatment for, a very severe obstructive pulmonary disease such that she was incapable of caring for herself or maintaining their house, and that the respondent was her primary care giver.[34]

[25] The learned sentencing judge referred by name to three unrelated sentencing decisions given to him in submissions which were concerned with animal cruelty in different contexts.[35] He then expressed the following observations and conclusions:[36]

> "... I have also considered *R v Roberts*,[37] *R v Chapman*[38] and *R v F*,[39] which all have dealt with offences related to your offending. Certainly your offending is more serious than each of Roberts, Chapman and F in terms of the sheer number of the offences and your level of involvement in all the offending. Whilst the animal cruelty cases in other contexts involve crimes of vicious and deliberate inflicting of cruelty on the animals, your offending, as I have said, demonstrates an understanding of the cruelty inflicted upon the animals but with a complete detachment from it - that detachment, though, emanating from decades of experience.

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29 Ibid ll27-32.
30 Ibid l34-41.
31 Ibid ll43-45.
32 Ibid l45 – AB48 l5.
33 AB48 ll7-9.
34 Ibid ll12-15.
35 *R v Barton-Cootes*, unreported, Rafter DCJ, DC 1312 of 2015, 29 January 2016; *R v Romano* [2008] QCA 140; and *Towers-Hammond v Burnett* [2007] QDC 282.
36 AB48 ll19-42.
37 Unreported, Koppenol DCJ, DC 395 of 2015, 13 November 2015.
38 Unreported, Bradley DCJ, DC 471 of 2015, 24 June 2016.
39 Unreported, Bradley DCJ, DC 108 of 2016, 1 April 2016.

> In my view, taking all the matters to which I have referred into account, the appropriate head sentence is one of three years' imprisonment. However, for the reasons to which I have referred, I am not of the view that the purposes of sentencing require that sentence to include an actual period of incarceration. The head sentence of three years will act as a deterrent to others in the industry. It sufficiently reflects the public denunciation of these crimes. You are elderly and unwell; you have primary care for your unwell wife. You have suffered already a level of extra-curial punishment.
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> Whilst Mr Edwards submitted for immediate parole, there is very little in the evidence which suggests a need for supervision in the community, particularly in circumstances in which the potential for reoffending has seemingly been completely removed because of the bans which have been imposed on you. In the circumstances I intend to wholly suspend the sentence for an operational period of five years."

The enactment of s 242

[26] The provision under which the respondent was charged was enacted by s 27 of the *Criminal Law Amendment Act* 2014 (Qld) and commenced on 15 August 2014. The purpose of the enactment, as explained in the Explanatory Memorandum accompanying the Bill for that Act was to overcome a perceived inadequacy in existing offences for punishing offenders who intentionally torture an animal. The maximum penalty of seven years was there described as "justified on the basis of the moral importance of animals and the obligation society owes to protect them from suffering".

[27] I now turn to the submissions advanced by the appellant and the respondent on the appeal.

Appellant's submissions

[28] The appellant's submissions comprehend that in order to succeed under s 669A(1), it is necessary for the appellant to demonstrate an error of law on the part of the learned sentencing judge.[40] Reliance is placed on the residuary category of error listed in *House v The King*[41] in which the appellate court infers that in some way there has been a failure properly to exercise the discretion reposed in the court of first instance.

[29] In developing the submission, senior counsel for the appellant observed that the sentencing remarks reveal that the learned sentencing judge appeared to have adequately identified the objective seriousness of the offending.[42] He accepted that it was "difficult to argue that the head sentence of three years is not within an appropriate range of head sentence". The qualification was added that the head sentence was "albeit at the very bottom of that range".[43]

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40 *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573.
41 [1936] HCA 40; (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 505.
42 Appellant's Outline of Submissions, para 10.1.
43 Ibid para 10.6.

[30] Counsel explained that the real complaint was that the sentence was wholly suspended. It was manifestly inadequate because it did not require the respondent to serve a period of actual incarceration.[44]

[31] The appellant submitted the factors which primarily influenced his Honour to suspend the whole of the sentence were, firstly, a belief that the imposition of the three year sentence would act as a deterrent to others in the industry and reflect the public denunciation of the crimes; secondly, the respondent's age and health; thirdly, that he was his wife's primary care giver; fourthly, that he had already experienced a level of extra-curial punishment; fifthly, the respondent's "impaired judgment, reasoning and understanding that his conduct was criminal"; and, sixthly, his very early plea of guilty and the maintenance of it. It was submitted for the appellant that some of these factors needed to be more closely assessed.

[32] As to the second factor, the respondent's illnesses are not of such a nature as would put him at any particular disadvantage in prison than out of it; they are treatable within the hospital facilities available to prisoners. Citing *R v Guthrie*,[45] the appellant submitted that it was relevant that, at the time of the offending, the respondent was suffering from the same medical conditions for which he sought sympathetic treatment on sentence. That diminished the weight to be given to that factor.[46]

[33] With respect to the third factor, potential hardship for the respondent's wife were he incarcerated, the appellant referred to discussion of instances where this Court has disparaged the suspension of the whole of a term of imprisonment because of the offender's position as sole carer for another when actual imprisonment is otherwise indicated.[47] Without contending that that had occurred in this case, the appellant submitted that this factor deserved, at most, moderate weight in mitigation. That was because, as it appeared from a letter that the respondent's wife had written to the learned sentencing judge tendered on sentence,[48] her daughters would be responsible for her care in that event although it would be burdensome for them.[49]

[34] Concerning the fourth factor, the appellant submitted that the industry sanctions, both formal and informal, that resulted from the respondent's offending should have been given little weight as components of extra-curial punishment.[50] Reliance was placed on the decision of the Court of Appeal in Victoria in *R v Talia*.[51]

[35] In regard to the fifth factor, the appellant urged that Dr Hatzipetrou's opinion ought to be received with some caution. The respondent's lying to police about the presence of live animals and attempting to hide one of them from investigating put in question whether the respondent had the degree of rigid thinking and inability to accept that his actions were wrong, attributed to him in the report. Any state of mind on the respondent's part that demand for his services in some way legitimised his

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44 Ibid para 10.2.

45 [2002] QCA 509; (2002) 135 A Crim R 292 per Mullins J at [45] (de Jersey CJ and Williams JA agreeing).

46 Appellant's Outline of Submissions, para 10.8.

47 See, for example, *R v D'Arrigo; Ex-parte Attorney-General (Qld)* [2004] QCA 399 per de Jersey CJ at pp 6-7 (McMurdo P and McPherson JA agreeing); *R v Ganley; R v Ganley* [2013] QCA 380 per Fraser JA at [20] (Muir JA and Margaret Wilson J agreeing).

48 Exhibit 15, AB172-173.

49 Appellant's Outline of Submissions, paras 10.9-10.11.

50 Appeal Transcript ("AT") 1-7 l44 – 1-9 l21.

51 [2009] VSCA 260.

conduct ought to have been expressly ignored by the learned sentencing judge. The commerciality of his offending was a matter of aggravation, not mitigation.[52]

[36] In summary, the appellant submitted that when the real combined effect of the matters in mitigation is properly understood, the inevitable conclusion is that the learned sentencing judge must have attributed weight to matters in mitigation that they did not properly deserve, or that for some other reason, he imposed a sentence that is manifestly inadequate. The matters in mitigation would have justified a sentence requiring a period of actual incarceration at a point less than one-third of the head sentence frequently imposed upon a plea of guilty, but did not justify a wholly suspended sentence.[53] A sentence of imprisonment requiring actual incarceration for up to nine months was proposed by way of re-sentence by this Court.[54]

Respondent's submissions

[37] Counsel for the respondent repudiated an inference that inappropriate weight had been given to mitigating factors.[55] None was treated by the learned sentencing judge as decisively in favour of a wholly suspended sentence; nor were they overweighed in deciding whether the sentence should be wholly suspended.[56] Reference was made to the principle in s 9(2)(a)(i) of the *Penalties and Sentences Act* 1992 (Qld) that a sentence of imprisonment should only be imposed as a last resort and to the view expressed in this Court in *R v Bagust*[57] that a wholly suspended sentence is not a sentence of imprisonment for the purposes of that provision.

[38] The respondent submitted that there was a constellation of particular factors in this case that was sufficient to support the sentence imposed. He instanced the very early pleas of guilty and that they were maintained notwithstanding a ruling which put their admissibility in question, the respondent's irrelevant criminal history, his otherwise good character and the finding that he was unlikely to re-offend in a similar way. The maintenance of the pleas, it was argued, evidenced both cooperation and genuine remorse.

[39] In particular, reliance was placed on components of extra-curial punishment which, it was submitted, were pervasive and extensive, affecting the respondent "in every aspect of his life".[58] The respondent had been widely vilified in the media nationally. He had been disgraced in the public eye. That was a substantial burden relevant to sentencing as had been recognised by this Court in *R v Jackson; Ex parte Attorney-General (Qld)*.[59] Worse still, the media attention had resulted in many death threats by phone and email.[60] The threats included a telephone message left by someone who said he knew where the respondent and his wife lived and that he

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52 Appellant's Outline of Submissions, paras 10.12, 10.13.
53 Ibid para 10.14.
54 Ibid para 11.
55 Respondent's Outline of Submissions, para 9.1.
56 Ibid para 9.21; AT 1-13 ll9-11.
57 [2003] QCA 385 per McMurdo P at p 5 (Dutney and Philippides JJ agreeing).
58 AT 1-10 ll36-38.
59 [2001] QCA 445 per Davies J at p 8 (McMurdo P and Ambrose J agreeing).
60 Exhibit 15; AB172-173 and Respondent's letter to the learned sentencing judge: Exhibit 17, AB177.

intended to burn down their house while they were asleep.[61] It was submitted that the threats amounted to a marked level of extra-curial punishment.[62]

[40] As to industry sanctions, it was observed that they had resulted in the exclusion of the respondent from his accustomed social structure. The circumstances of *Talia* were distinguished on the footing that, in that case, the real estate agent who had ceased to be eligible to hold a licence because of his conviction, could successfully re-apply for a licence after 10, or perhaps even five, years.

[41] Counsel for the respondent submitted that, overall, the adverse consequences for his client of the offending were of such a nature as to cause him a serious degree of financial and psychological suffering which, consistently with authority, could properly be taken into account on sentence as extra-curial punishment.[63]

[42] With regard to the respondent's mental health, counsel referred to Dr Hatzipetrou's opinion that the respondent's self-reporting "revealed symptoms of extremely severe depression and anxiety" which resulted from a combination of factors including two serious motor vehicle accidents, his son's suicide, his own cancer diagnosis, his wife's illness and the consequences of the industry's sanctions for him. According to Dr Hatzipetrou, he is a person who "continues to toil through his day-to-day activities rather than process the previous traumas and bereavements".[64]

[43] Reference was also made to the following recommendation at the conclusion of Dr Hatzipetrou's report:[65]

> "Given the complexity of his mental health disorders and health conditions, Mr Noble is likely to experience a heightened risk of deterioration in his mental state if he were to be incarcerated. Mr Noble is likely to experience an aversive reaction and will require ongoing monitoring from prison mental health services. As Mr Noble is unlikely to seek assistance, his adjustment will require close examination."

The respondent submitted that these matters were appropriately taken into account by the learned sentencing judge, consistently with statements of principle enunciated by this Court in *R v Yarwood*.[66]

Discussion

[44] Because of the recency of the enactment of s 242, this is the first occasion on which this Court has been required to review a sentence passed under it. In written and in oral submissions, some attention was given to whether the absence of appellate authority establishing a sentencing pattern for offending against the section was of itself a difficulty for the appellant.

[45] In this regard, the respondent referred in written submissions to the observations of Muir J in *R v Nuttall; Ex parte Attorney-General (Qld)*[67] that the absence of guidance as to an appropriate sentence afforded by comparable sentences makes it

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61 Exhibit 15.
62 Respondent's Outline of Submissions, para 9.14.
63 Reference was made to *R v Galeano* [2013] QCA 51; [2013] 2 Qd R 464 per McMeekin J at [95], [96] and [109]-[112].
64 Exhibit 13; AB151.
65 Exhibit 13; AB159.
66 [2011] QCA 367 per White JA at [22]-[26], [32] (Fraser JA and North J agreeing).
67 [2011] QCA 120 at [70] (Fraser and Chesterman JJA agreeing).

more difficult for an appellate court to conclude that the sentence imposed fell outside permissible bounds. The appellant submitted that care ought to be taken in endorsing that observation in light of the subsequent deprecation of the notion of an "available range of sentences" by the High Court in *Barbaro v The Queen*; *Zirilli v The Queen*.[68]

[46] Later, at the hearing of the appeal, counsel for the respondent, by his oral submissions, conceded that in light of the observations in *R v Goodwin; Ex parte Attorney-General (Qld)*,[69] the appellant's case was no more difficult because of the absence of comparable sentences.

[47] It remains to note that in *Roberts* and *Chapman*, to which the learned sentencing judge referred, the offenders were each sentenced to three months' imprisonment wholly suspended for their respective involvement in live baiting at the respondent's training track on two separate occasions in late 2014. A monetary fine was imposed on the offender in *F* who was a disability pensioner in her sixties. In each case, the offender was charged with offences under s 242(1).

[48] As to the specific factors which the appellant submitted needed closer assessment, it is true that the respondent differed from the offender in *Yarwood* in that the latter's psychological illness had impaired his capacity to practise as a solicitor. However, the learned sentencing judge did not regard Dr Hatzipetrou as suggesting that the respondent's mental health problems contributed to his offending conduct,[70] and he did not sentence on the basis that they had.

[49] The decision in *Yarwood* also endorses the recognition in sentencing that incarceration will be more onerous by virtue of illnesses that an offender is suffering.[71] Here, the onset of the respondent's physical illnesses and conditions pre-dated the offending. Likewise, for his mental health problems which have, however, been exacerbated by the consequences of his offending. According to the unchallenged evidence of Dr Hatzipetrou, the respondent's mental state would be at a heightened risk of deterioration during incarceration. Consistently with the observations in *Guthrie*, it was open to his Honour to take into account the illnesses and the implications for them of actual detention, as relevant to sentencing.

[50] It is noteworthy that Dr Hatzipetrou did not say that the respondent's likely aversive psychological reaction could not be adequately monitored and, if required, treated in prison.[72] However, his Honour did not sentence on the basis that the reaction could not be managed that way. Nor did he sentence on a basis that because of the respondent's illnesses, he was to be spared incarceration. The illnesses were one of many factors that he took into account in reaching that conclusion.

[51] It was also open to his Honour to take into account the respondent's role as primary carer for his wife. The appellant is correct to say that it warranted no more than moderate recognition in exercising the discretion. However, the sentencing remarks suggest that no more than moderate recognition was given to it. Similarly, the loss of livelihood resulting from the prohibition order influenced the exercise of the discretion to

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68 [2014] HCA 2; (2014) 253 CLR 58 per French CJ, Hayne, Kiefel and Bell JJ at [24]-[28].
69 [2014] QCA 345; [2014] 247 A Crim R 582, decided after *Barbaro*.
70 AB 47 l47 – AB48 l3.
71 [2011] QCA 367 at [50].
72 AB159.

a moderate degree only. His Honour referred to it relatively briefly[73] and after referring in greater detail to the other components of the extra-curial punishment.

[52] Lastly, with regard to this category of factors, the learned sentencing judge identified the source of the respondent's detachment from feral animals as his exposure to hunting activities in his youth and attitudes that may have prevailed towards them then. However, I do not understand his Honour to have, to any degree, viewed the respondent's offending conduct benignly on that account. So much is evident from his description of the quick kill of a feral animal with a well-placed rifle shot as being "vastly more humane" than the cruel terrorising and killing of a feral animal tied to a lure and exposed to the ferocity of racing dogs fuelled by a lust for blood.[74]

[53] The learned sentencing judge arrived at a sentence by a process in which he took into account many relevant factors. He sought to synthesise from them a just sentence. He did that over the week between the sentence hearing and the passing of sentence. I am unpersuaded that the sentence he devised and passed is manifestly inadequate.

[54] Specifically, I am unable to infer error on his Honour's part because the sentence was wholly suspended. In my view, it was not unreasonable, in all the circumstances, for him not to have required this respondent to serve actual time in prison.

[55] To my mind, the appellant's ultimate submission risks unduly fettering the sentencing discretion. It is beyond question that the respondent's conduct was inhumanely cruel and protracted. For other offenders like offending might well be punished with actual imprisonment in the sound exercise of the sentencing discretion. However, to proceed upon some kind of rule of thumb that such offending must always be punished by actual imprisonment could, in an individual case, contort the sentencing process and result in insufficient regard being given to other factors relevant to that individual.

[56] For these reasons, I have concluded that error on the part of the learned sentencing judge has not been established.

Disposition

[57] As the single ground of appeal has not succeeded, this appeal must be dismissed.

Order

[58] I would propose the following order:

1. Appeal dismissed.

[59] **McMURDO JA:** I agree with Gotterson JA.

[60] **MULLINS J:** I agree with Gotterson JA.

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73 AB47 ll19-22.

74 AB44 l44 – AB45 l2.