SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCL* [2017] QCA 114
PARTIES:	**R** **v** **MCL** (applicant)
FILE NO/S:	CA No 148 of 2016 DC No 431 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh – Date of Sentence: 3 May 2016
DELIVERED ON:	2 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2016
JUDGES:	Fraser and McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Refuse the application for leave to appeal.** **2. Refuse the application to adduce further evidence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to an offence that she assaulted two police officers while they were acting in the execution of their duty – where the applicant bit one police offer's thumb, resulting in a superficial laceration – where that police officer required medical treatment – where convictions were recorded – where those convictions affected the applicant's ability to work in her profession – where the applicant argued that it would have been open to the sentencing judge to exercise the discretion not to record a conviction – whether the conviction is manifestly excessive in all of the circumstances – whether it was open to the sentencing judge to exercise the discretion not to record a conviction *Penalties and Sentences Act* 1992 (Qld), s 9(9A), s 152 *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, considered *R v Bowley* [2016] QCA 254, cited *R v Gofton*, unreported, Durward DCJ, DC No 463 of 2015, 2 August 2016, distinguished

R v Hughes [2004] 1 Qd R 541; [2003] QCA 460, cited
R v King (2008) 179 A Crim R 600; [2008] QCA 1, applied
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Reuben [2001] QCA 322, applied
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: The applicant appeared on her own behalf
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant pleaded guilty to offences committed on 20 February 2015 that she assaulted Constable Seeto, a police officer, while he was acting in the execution of his duty (count 1), and she assaulted Constable McLeod, a police officer, while she was acting in the execution of her duty (count 2). Convictions were recorded. Upon the second count the applicant was sentenced to nine months imprisonment fully suspended forthwith for an operational period of 18 months. Upon the first count the sentencing judge ordered probation for a period of 18 months, with additional requirements that the applicant submit to medical, psychiatric or psychological treatment and abstain from the consumption of alcohol.

[2] The applicant has applied for leave to appeal against sentence upon the ground that the recording of a conviction is manifestly excessive in all of the circumstances. The application sets out the following circumstances:

> "*1.* I was extremely unwell (of unsound mind) at the time the incident occurred back in February 2015. I had expressed my suicidal thoughts to the counsellor (Lee) at Logan House a few days before the incident occurred. I believe that I should have been hospitalised at that stage. Logan House failed to follow through the correct protocols relating to duty of care as an ambulance should have been called before the police arrived on the scene.
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> *2.* I have a previous history of disassociation due to childhood sexual abuse trauma and had suffered a sexual assault in Perth recorded by the police in 2014 which had an adverse effect on my mental health. I was also experiencing alcohol withdrawal seizures due to my chronic alcoholism. I was advised that I would only have six months to live if I did not seek treatment.
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> *3.* I am a single mom and currently doing volunteer work at [a] centre [that deals with eating disorders] in Brisbane. I am a qualified eating disorders practitioner and was recently listed on the Australian Board of practitioners for the Australian Centre for Eating Disorders (ACFED). In order to gain full time employment in this area it is necessary to have a clean record as I would be working with children teenagers and adults in recovery. My prospects would be hugely impacted with a recorded conviction. It is of paramount importance to my livelihood to retain a blue card.

4. I have no previous convictions recorded. I am extremely sorry for my actions. I have not had a relapse since February 2015 and I continue to engage with counsellors. I would really appreciate if you could consider amending my order so that no conviction is recorded."

Circumstances of the offences

[3] An agreed schedule of facts set out the circumstances in which the offences occurred. The applicant was a resident at a drug rehabilitation facility. At the time of the offences she was heavily intoxicated and was being violent towards staff and other residents. Police were called to attend the facility. The complainants observed the applicant sitting on a single bed in a small bedroom. She was talking to another female resident. McLeod introduced herself to the applicant but the applicant ignored her. The other resident encouraged the applicant to acknowledge McLeod. The applicant stood on the bed and began swearing at McLeod. As McLeod walked to the side of the bed, the applicant attempted to climb out of a window so that the top half of her body was outside the room. The drop outside the window was sufficient for the applicant to hurt herself. McLeod took hold of one of the applicant's legs while the other resident took hold of the other leg. McLeod dragged the applicant back into the bedroom. The applicant kicked out and struck the other resident on her stomach, who fell backwards as McLeod pulled the applicant onto the bed. The applicant again attempted to launch herself through the window and McLeod eventually managed to pull the applicant back inside and onto the bed. The applicant agreed to calm down after a short period of thrashing around and attempting to kick McLeod. The applicant said that she knew she was going to be asked to leave the facility because of her behaviour and she admitted to having consumed vodka. After the applicant had agreed to calm down and McLeod had directed the applicant to stay lying down and wait until QAS officers arrived, without warning the applicant kicked Seeto's upper thigh area, causing him to fall back onto a cupboard (count 1).

[4] McLeod held the applicant whilst instructing her that she was under arrest. The applicant kicked her legs and thrashed about the bed. McLeod directed the applicant to stop resisting, but each time McLeod grabbed the applicant's wrist the applicant would kick or thrash about causing McLeod to lose her grip. The applicant also prevented McLeod from putting handcuffs on the applicant. The applicant bit McLeod's thumb, causing it to bleed (count 2). After further struggles McLeod told the applicant that she was under arrest for assaulting police and Seeto handcuffed the applicant. The applicant then became calm but subsequently began screaming, complaining about soreness of her arm, and demanding the handcuffs be removed. The applicant calmed down again and conversed with police until additional police and QAS officers arrived. When a QAS officer began to treat the applicant she again became agitated and unco-operative. She resisted treatment and screamed at police. She refused to move and screamed obscenities. Police carried her to the police vehicle and, whilst putting her in the back of the police vehicle, the applicant continued screaming and swearing at police. She kicked out at McLeod who was attempting to remove the handcuffs so the applicant could be handcuffed in front.

[5] McLeod had a superficial laceration to her right thumb. She was treated by QAS at the scene. Her bleeding thumb was swabbed with alcohol. She attended a hospital where the wound was washed and dressed. She was given a tetanus injection and oral antibiotics. She had blood taken for communicable disease testing. The results were negative. Seeto did not require medical treatment.

Sentencing remarks

[6] The sentencing judge referred to the circumstances of the offences set out in the schedule of facts and to the following matters.

[7] The applicant drank a large quantity of vodka, became intoxicated, and attempted suicide by throwing herself in a nearby river. That led to police being brought to the facility to restrain the applicant. The applicant was 34 at the time of the offences and she was 35 when sentenced. She had no criminal history. The matter proceeded by way of a full hand up committal and was listed for sentence after an indictment was presented. There was a timely plea of guilty. The applicant had apologised and the sentencing judge accepted that she was genuinely remorseful. The sentencing judge accepted reports, including reports by psychologists, about the applicant's antecedents. She unfortunately suffered abuse at an early age. The perpetrator of that abuse was imprisoned in Ireland. The applicant excelled in her studies and was awarded a tertiary degree at a Dublin university. Around the same time, she developed an eating disorder that was later replaced by an alcohol addiction. She had made significant, successful efforts to address and control her addiction. The offences occurred during a relapse by the applicant at a time when she was under particular stress. The applicant's life was complicated by attempts to have contact with her young daughter, who lived with a grandmother in another State. The applicant had long term goals that including maintaining abstinence from alcohol, caring for her daughter, and finding work assisting people with eating disorders. It was to the applicant's credit that she had obtained some qualifications to assist people with their eating disorders.

[8] The sentencing judge noted that the first count carried a maximum penalty of seven years imprisonment and the second count (which charged the circumstance of aggravation that the applicant bit Constable McLeod) carried a maximum penalty of 14 years imprisonment. The maximum penalties, particularly the maximum penalty for the second count, showed how seriously the community, through Parliament, regarded such offences. The sentencing judge considered that the offence of biting in this case was not a calculated contempt. There was no victim impact statement from either police officer, but it could be inferred that Constable McLeod went through a period of significant distress until she received medical clearance that she had not received any significant infection. The applicant's previous character was reflected positively in her lack of previous convictions. The sentencing judge was sympathetic to the problems in the applicant's life. The applicant's timely plea of guilty stood very much to her credit. On the other hand, the sentencing judge stressed that police doing their duty to help people, as on this occasion, should not be assaulted and that they should and do receive the protection of courts in carrying out their difficult duties. The sentencing judge considered it was relevant that the offence was of some prevalence.

Application for leave to adduce evidence

[9] The applicant applied for leave to adduce four documents in evidence in her application for leave to appeal against sentence. An "incident report" prepared by one of the staff at the rehabilitation facility is consistent with the facts with reference to which the applicant was sentenced. A statement to police by one of the alcohol and drug counsellors employed at the facility refers to an incident that occurred before police arrived; the staff member stated that the applicant was not then trying to hurt anyone but was trying to get free. So much of that statement as concerns the offences is also

consistent with the facts with reference to which the applicant was sentenced, and the sentencing judge referred to the applicant's behaviour as "apparently, suicidal". A letter from the Office of the Health Ombudsman to the applicant refers to a complaint made by the applicant about the conduct of an after-hours staff member who was working at the facility when the applicant committed the offences. The complaint appears to have been that the applicant should have been kept safe by staff but was left in a life-threatening situation and staff failed to contact her next of kin. There is no ground for thinking that the supply of this document to the sentencing judge would have resulted in any amelioration of her sentence. The remaining document describes a mentoring project for people with eating issues. The sentencing judge in any event accepted and took into account the applicant's desire to find work assisting people with eating disorders as a mitigating factor.

[10] The documents contain information that must have been known to the applicant before her sentence hearing. They could not be regarded as "fresh evidence" (evidence that was not available to the applicant at the time of the hearing and which could not then have been available to her by the exercise of reasonable diligence). The Court has a discretionary power to admit fresh evidence "if its admission shows that some other sentence, whether more or less severe, is warranted in law; in this case, that the sentence in fact imposed was unwarranted in the sense that it was manifestly excessive": *R v Maniadis* [1997] 1 Qd R 593 at 597. Other kinds of evidence may be admitted in a case in which the refusal to admit it might lead to a miscarriage of justice: *R v Hughes* [2004] 1 Qd R 541. The evidence upon which the applicant now seeks to rely does not add anything of substance to the material that was put before the sentencing judge. It could not show that the sentence was manifestly excessive and it could not demonstrate that the applicant has suffered a miscarriage of justice. The fact that these documents were not in evidence at the sentence hearing did not prejudice the applicant. I would not admit the documents in evidence.

The application for leave to appeal

[11] The applicant stressed that she had no previous criminal history. She argued that it would have been open to the sentencing judge to exercise the discretion not to record a conviction, to facilitate her aim to work with people with eating disorders. She is a single mother and the conviction would go against her in the future if it were recorded, because it would make it more difficult for her to obtain employment in the field in which she wished to be employed. The applicant had been very unwell, and had admitted herself into rehabilitation for alcoholism. She submitted that she was now sober and well, and working towards getting her daughter back to live in the same city as her, where she had more support. She submitted it was not in her nature to commit these offences. The applicant submitted that at the time she committed the offences she was not meaning to harm anybody but was trying to break free and run to a nearby river to commit suicide. The applicant referred to the stress that she was under at the time.

[12] The applicant referred to *R v Gofton* (unreported, District Court, 2 August 2016, Durward DCJ) and submitted that the offender in that case had a criminal history and was given probation for 12 months for serious offences and 80 hours community service for lesser offences, with no conviction recorded.

Consideration

[13] The applicant seeks to challenge only the recording of a conviction, but that necessarily involves a challenge to the sentencing judge's decision to impose imprisonment.

A court is empowered to order imprisonment only if the court records a conviction: s 152 of the *Penalties and Sentences Act* 1992 (Qld).

[14] The sentencing judge took into account all of the mitigating factors, which include the absence of any criminal history, the applicant's timely plea of guilty and genuine remorse, her mental state at the time of the offences and its causes discussed in the reports which the sentencing judge accepted, the applicant's intoxication and apparent attempt to commit suicide earlier on the same date, her circumstances and background outlined in the reports, her efforts to rehabilitate herself, her education and otherwise good character, her wish to engage in the work for which she was qualified of assisting persons suffering from eating disorders, and that she had a six year old child for whom she wished to make appropriate custody arrangements.

[15] The applicant did not argue, and I would not accept, that the sentencing judge overlooked the principle that in an appropriate case, an impairment to mental functioning may be found to have resulted in a reduction an offender's moral culpability and to justify moderation, or even elimination, of general and specific deterrence as sentencing considerations. (The relevant law is summarised with reference to authority in *R v Bowley* [2016] QCA 254 at [34].) The reports of the psychologists and the absence of any prior criminal history justified conclusions that these offences were uncharacteristic and contributed to by the applicant's mental disorders, but the reports (particularly the report of Associate Professor Freeman at paragraph 11.2) also justified the conclusion that the applicant's voluntary intoxication substantially contributed to her offending. The contribution of voluntary intoxication to the applicant's offending conduct may not be taken into account by way of mitigation of the sentence: *Penalties and Sentences Act* 1992, s 9(9A). In these circumstances, there was no error in the sentencing judge's decision to place some weight upon the factors that the sentence imposed should both deter the applicant and deter others from committing the same kind of offence.

[16] It also must be borne in mind that the maximum penalty of 14 years imprisonment for the second count was one of the many factors the sentencing judge was obliged to take into account and balance with all other relevant factors: *Markarian v The Queen* (2005) 228 CLR 357 at [31]. Consistently with that very severe maximum penalty, although each case involves an exercise of the sentencing discretion in light of all of the relevant evidence in the case and there is no rule that offenders who assault police officers acting in the course of their duties in a way that attracts that penalty must be sentenced to imprisonment, in the ordinary course offenders who spit upon police officers or break the skin by premeditated biting can expect to be sentenced to a term of imprisonment involving a period of actual custody: see *R v King* [2008] QCA 1 at pp 3- 4 (involving spitting) and *R v Reuben* [2001] QCA 322 at pp 6-7 (involving biting). The mitigating circumstances in this case takes it out of the ordinary course, but it does not follow that the sentencing judge erred by recording convictions and imposing a wholly suspended term of imprisonment. The sentencing judge's decision about the appropriate sentence was made particularly difficult by the need to balance the mitigating circumstances against the objective seriousness of separate assaults upon two police officers acting in the course of duty, who had sought merely to prevent the applicant from harming herself. In the result, the objective seriousness of the offending was largely reflected in the term of imprisonment and the mitigating circumstances were largely reflected in the sentencing judge's order wholly suspending the terms of imprisonment and in the rehabilitative character of the sentence of probation imposed for count 2.

[17] Because the applicant's grounds of appeal do not allege any specific error by the sentencing judge (such as an allegation that the sentencing judge acted upon a wrong principle, took into account irrelevant matters or failed to take into account relevant matters, or mistook the facts) this Court would be warranted in adjusting the sentence only if the sentence is "manifestly excessive" in the sense that "there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons": *Wong v The Queen* (2001) 207 CLR 584 at 605 [58]. In that respect, sentencing judges "are to be allowed as much as flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies": *Markarian v The Queen* (2005) 228 CLR 357 at [27]. In the case cited by the applicant, *Gofton*, the sentencing judge exercised the discretion to record a conviction. The nature of the sentences imposed in that case, which did not involve imprisonment, did enliven the discretion, but it does not follow that the sentencing judge in the present case erred by not imposing similar sentences. The facts of that case differ very greatly from this case. In particular, the offender in that case was guilty of only one assault upon a police officer, a bite which did not break the police officer's skin and which occurred whilst the offender was being restrained by the police officer in the offender's apparent attempt to commit suicide by drowning. Neither that case nor the other cases cited by the respondent are truly comparable with the present case.

[18] For all these reasons I conclude that the sentence, including the recording of convictions, is not manifestly excessive.

Proposed orders

[19] I would refuse the application for leave to appeal and the application to adduce further evidence.

[20] **McMURDO JA:** I agree with Fraser JA.

[21] **MULLINS J:** I agree with Fraser JA.