# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v HBP* [2017] QCA 130 |
| PARTIES: | **R**<br>**v**<br>**HBP**<br>(applicant) |
| FILE NO/S: | CA No 243 of 2016<br>SC No 300 of 2013<br>SC No 60 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane – Date of Sentence: 11 August 2016 and 8 September 2016 |
| DELIVERED ON: | 13 June 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 February 2017 |
| JUDGES: | Holmes CJ and Gotterson JA and Bond J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **The application for leave to appeal is refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted of the breach of a suspended sentence with an operational period of five years – where the learned sentencing judge activated 12 months of the suspended sentence but did not set a parole release date in accordance with s 160B of the *Penalties and Sentences Act* 1992 (Qld) – where the sentence was subsequently reopened and confirmed, subject to a parole release date being fixed at the end of the 12 month period – whether the learned sentencing judge erred in determining to activate part of the previously suspended term without concurrently considering the prospect of setting a parole release date prior to the expiration of that activated term of imprisonment<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of the breach of a suspended sentence with an operational period of five years – where the learned sentencing judge activated 12 months of the suspended sentence but did not set a parole release date in |

accordance with s 160B of the *Penalties and Sentences Act* 1992 (Qld) – where the sentence was subsequently reopened and confirmed, subject to a parole release date being fixed at the end of the 12 month period – whether it was manifestly excessive or plainly unjust to structure a sentence which required the applicant to serve 12 months

*Criminal Code* (Qld), s 280
*Penalties and Sentences Act* 1992 (Qld), s 160B

*R v Newman* [2008] QCA 147, cited
*R v Norden* [2009] 2 Qd R 455; [2009] QCA 42, cited

COUNSEL: J Lodziak for the applicant
M R Byrne QC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I have had the advantage of reading Bond J's judgment, and agree with his Honour that the applicant has not made out the errors for which she contends. As to the submission that requiring the applicant to serve 12 months of the suspended period of the sentence produced a result which was manifestly excessive, it is clear from the sentencing judge's remarks that he gave very great weight to the deterrence factor, notwithstanding the relatively minor nature of the offences which breached the suspended sentence. Another judge might have accorded different weight to those factors and reached a different conclusion as to how much of the suspended sentence the applicant ought to be required to serve; but the imposition of the 12 month term was within a proper exercise of discretion.

[2] **GOTTERSON JA:** I agree with the order proposed by Bond J and with the reasons given by his Honour.

[3] **BOND J:** On 30 May 2013, the applicant was convicted in the Supreme Court of trafficking in heroin over a three and a half month period in 2011. She was sentenced to five years imprisonment, suspended after 12 months with an operational period of five years. She was also ordered to perform three years' probation.

[4] On 19 August 2014, she was found to have failed to take reasonable care and precautions in respect of a syringe or needle. On 4 October 2014, she was apprehended driving without a licence. She was (on 27 November 2014 and 29 October 2014 respectively) convicted but not further punished by a Magistrate on each offence.

[5] On 30 March 2015, and consequent upon those convictions in the Magistrates Court, she was convicted in the Supreme Court of breach of the suspended sentence which had been imposed on 30 May 2013. She was ordered to serve part of her suspended term, albeit merely by being sentenced to the rising of the Court.

[6] On 5 May 2015, the applicant was found in possession of 12.4 grams of cannabis. On 27 July 2015, she was convicted but not further punished by a Magistrate for the offence of possessing dangerous drugs.

[7] Between 6 and 9 December 2015, she assaulted and caused bodily harm to her eight year old son. The conduct went beyond what is authorised by s 280 of the *Criminal Code* (Qld) as domestic discipline. She struck the child twice with a belt over the collar bone, the child then cowered away, and she then hit the child on the back of the legs and buttocks and the child ran to the bedroom. The use of the belt led to two marks on the child's collar bone which were five cm in length and which were accompanied by bruising. She admitted the offending to police and told them she did not know it was an offence to hit her child with a belt. She was convicted and fined $400 by a Magistrate.

[8] On 11 August 2016, and consequent upon the conviction for the last two offences, she was convicted in the Supreme Court for further breach of the suspended sentence which had been imposed on 30 May 2013.

[9] In determining sentence, the learned sentencing judge took into account the following matters:

(a) that he was satisfied that the convictions did breach the suspended sentence and that the breaches had been proven;

(b) the starting point was that he should order the applicant to serve the balance of the suspended sentence unless she could show him that it was unjust for her to do so;

(c) she had had been given opportunities before and had shown scant regard to them and in particular that the probation service report suggested she was not a suitable candidate for probation;

(d) she had a tragic and terrible upbringing and background and was apparently still struggling with all those issues, including her drug addiction;

(e) the assault occasioning bodily harm was the more serious of the breaching offences, was of a very different nature to the original type of offending, and occurred in circumstances where she had little support in raising her child;

(f) the Department of Communities, Child Safety and Disability Services had become involved in the care of the child and a case plan had been employed to protect the child;

(g) despite the further drug offending being nowhere near as serious as the original offending, it was unacceptable for a person in the applicant's position to commit further drug offences; and

(h) there was a need for general deterrence.

[10] The learned sentencing judge –

(a) activated 12 months of the remaining four year period of the suspended sentence; and

(b) declared that 43 days of pre-sentence custody served between 29 June 2016 and 11 August 2016 was time served in respect of that sentence of imprisonment.

[11] The sentence reflected –

(a) acceptance of a submission made by Counsel on behalf of the applicant that it would be unjust to activate the remaining four years of the suspended sentence and that she would be adequately punished by activating a part only of that sentence so that she would then have the certainty of a release date; and

(b) the assessment of the learned sentencing judge that the appropriate period to be served was 12 months.

[12] Unfortunately, the learned sentencing judge's attention was not drawn to the fact that if he activated a period of three years or less, he was also obliged to set a parole release date: see s 160B of the *Penalties and Sentences Act* 1992 (Qld) and *R v Newman* [2008] QCA 147.

[13] Consequently, on 8 September 2016, an application was made to have the sentence reopened. His Honour's attention was then drawn to the operation of s 160B in the circumstances. He re-opened the sentence and invited submissions about the parole date which he should set. Counsel on behalf of the applicant drew his Honour's attention to what he contended was the integrated approach to the sentencing discretion required by *R v Norden* [2009] 2 Qd R 455. He mentioned a number of possible ways to structure the sentence which were, in his submission, within the range of an appropriate exercise of discretion, including (1) leaving the period of activation at 12 months, but setting an immediate parole release date and (2) (if the Court concluded that the applicant had to serve 12 months) activating two years of the suspended sentence and setting a parole date after 12 months or activating 12 months and setting a parole date for the last day of that period.

[14] The learned sentencing judge's sentencing remarks then included the following:

> I activated 12 months of the suspended sentence, because the history of the suspended sentence was such that her offending justified activation of an actual period of custody of 12 months.
>
> It was my intention and it is my intention that she serve 12 months. In coming to that conclusion I have considered whether she should be released on parole. The circumstances are such that I am satisfied it is not unjust for her to serve 12 months of actual imprisonment.

[15] The learned sentencing judge then reopened the sentence and confirmed it save that he also fixed the parole release date at the end of the 12 month period which had been activated.

[16] The applicant seeks leave to appeal from those orders.

[17] She does not contest findings made by the learned primary judge that it would be unjust to order her to serve the whole period of the suspended imprisonment or, in principle, that she be ordered to serve part of the previously suspended imprisonment.

[18] The applicant first contends that the learned primary judge's conclusion resulted from specific error, namely that the learned primary judge erred in determining to activate part of the previously suspended term without concurrently considering the prospect of setting a parole release date prior to the expiration of that activated term of imprisonment. That submission has no merit. It is plain that an initial error was corrected during the re-opening and that a fresh discretion was then exercised, after receiving the submissions earlier identified in relation to that exercise. The sentence then imposed reflected a single exercise of discretionary judgment, as was required by *R v Norden*.

[19] The applicant then contends that this court should infer the existence of error because it was manifestly excessive or plainly unjust to structure a sentence which required the applicant to serve 12 months. The submission accepted that it was not erroneous to structure a sentence which required actual imprisonment. Rather it was to the effect that error should be inferred solely because of the length of the imprisonment imposed.

> I reject this contention. I accept the submission of the respondent that the considerations which his Honour took into account (and which I have recorded at [9] above) provided a sufficient foundation for the judgment which he formed as to the extent of time of actual imprisonment which should be imposed in sentencing her for the second set of breaches of the original suspended sentence. They were the considerations which informed the sentence prior to the re-opening and I think it is also obvious that they were the considerations which informed the sentence after it was re-opened. I am unable to infer that there must have been some misapplication of principle.

[20] The application for leave to appeal should be refused.