SUPREME COURT OF QUEENSLAND

CITATION:	*R v Roberts* [2017] QCA 256
PARTIES:	**R** **v** **ROBERTS, Zach William** (applicant)
FILE NO/S:	CA No 321 of 2016 DC No 104 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh – Date of Sentence: 21 November 2016 (Chowdhury DCJ)
DELIVERED ON:	3 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2017
JUDGES:	Fraser and Philippides JJA and Douglas J
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his pleas of guilty of 38 indictable offences and nine summary offences – where the offences included serious assault, threatening violence, wilful damage, stealing, attempted arson, fraud, and unlawful possession of a weapon – where the effective sentence was five years' imprisonment, wholly suspended for an operational period of five years, together with three years' probation – where the sentencing judge took the 825 days of pre-sentence custody into account in formulating the sentence – whether the sentence was manifestly excessive *R v Bailey* [1999] QCA 40, cited *R v Benson* [2014] QCA 188, cited *R v Burns* [2004] QCA 437, cited *R v Lappan* (2015) 255 A Crim R 166; [2015] QCA 180, distinguished *R v Whiting* [2013] QCA 18, cited
COUNSEL:	J A Fraser for the applicant S J Farnden for the respondent

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

[1] **FRASER JA:** The applicant was convicted on his pleas of guilty of 38 indictable offences and nine summary offences between 12 October 2013 and 23 October 2014. The nature of the indictable offences, and the concurrent sentences of imprisonment imposed for those offences (all of which were wholly suspended) are summarised in the applicant's outline of submissions as follows:

(a) Counts 1, 13, and 20 (unlawful use of a motor vehicle) – 8 months' imprisonment;

(b) Counts 2, 8 – 12, 21 – 31, 34 – 38, and 40 (fraud) – 3 years' imprisonment;

(c) Counts 3 and 17 (serious assault) – 2 years' imprisonment;

(d) Count 6[1] (threatening violence) – 6 months' imprisonment;

(e) Count 14 (wilful damage) – 6 months' imprisonment;

(f) Counts 15 and 32 (stealing) – 6 months' imprisonment;

(g) Count 16 (attempted arson) – 2 years' imprisonment;

(h) Counts 18 and 19 (unlawfully entry of a vehicle) – 3 years' probation;

(i) Counts 33, 39, and 41 (fraud to the value of $30,000 or more) – 5 years' imprisonment; and

(j) Count 42 (unlawful possession of a weapon) – 6 months' imprisonment.

[2] The applicant was convicted and not further punished for each of the summary offences: three offences of driving without a licence, two offences of contravening a police direction, one offence of obstructing a police officer, one offence of driving without a licence as a repeat offender (the applicant was disqualified from driving for eight months), one offence of using an unregistered motor vehicle, and one offence of possessing utensils or pipes.

[3] The effective sentence was five years' imprisonment, wholly suspended for an operational period of five years, together with three years' probation. The applicant seeks leave to appeal against sentence on the ground that it is manifestly excessive.

Circumstances of the offences

[4] The circumstances of the offences were set out in an agreed schedule of facts. It is sufficient to give an overview of the offences.

[5] In the first offence (count 1), between 12 and 15 October 2013 the applicant took another person's vehicle from a shopping centre and unlawfully used it for a few days. The offence was detected and the applicant was arrested. Police ascertained that he was driving without a driver's licence (one of the summary offences). The applicant was charged and released on bail to appear in a Magistrates Court on 13

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[1] The applicant's outline refers also to count 7, which also charged the offence of threatening violence, but that was one of the counts in respect of which *nolle prosequis* were entered (counts 4, 5, 7, and 43).

November 2013. On the following day, the applicant committed his first fraud offence (count 2). Shortly after he had left a service station from which he had taken fuel without paying he was intercepted by police on a highway. The applicant was again driving without a driver's licence, and the vehicle that he was driving was not registered (two of the summary offences).

[6] On 15 October 2013 the applicant was arrested in relation to count 2, taken to a police station and placed in a holding cell. Police officers observed that the applicant had placed a Queensland Ambulance Service heartrate monitor pad over the CCTV camera in the cell. The police officers entered to remove the obstruction. The applicant told police that they had not found a random breath test tube when they had searched him. He refused to hand over the tube when requested by police. When police advised the applicant that they would search him if he refused to hand over the tube, the applicant threatened to remove his heartrate monitor from his chest if police approached. The applicant stepped back and dug his fingers into the side of his chest. When police attempted to handcuff him the applicant violently pulled his arms away from police. The applicant continued to kick and thrash about when police laid him face down on a bench in the cell.

[7] During the struggle the applicant bit a police officer on his left hand, taking a chunk out of his glove. The applicant threatened to kill the police officer and his children, and to burn his house down. The applicant continued to thrash around and kick his legs at police. Subsequently the applicant again bit the police officer on his left hand, tearing his glove. The police officer punched the applicant to the side of his head and told him to stop biting. The applicant then bit the police officer on his right hand, taking another chunk of his glove (count 3). The prosecutor informed the sentencing judge that the offending had an impact on the police officer. He became hyper-vigilant in relation to his wife and children and a bit jumpy with noises around his house.

[8] The applicant then committed the next of his offences (count 6). He told police that he had a gun in his car, he would come back to the police station and shoot police and burn the station down, and he said he had previously followed police officers home in New South Wales and followed through on his threats. A third police officer entered the holding cell and assisted the two officers to handcuff the applicant. After the applicant was taken to the watch house he was conveyed to a hospital where he was assessed. That night the applicant participated in an interview with police at the hospital. He told police he had struggled with them because he had never been told why he was under arrest. He said that he blacked out shortly afterwards and could not remember what happened after that. He admitted that he may have threatened police but said that he had no intention of carrying out the threats. The applicant was charged and issued with the notice to appear in the Magistrates Court about a month later. He failed to appear on the appointed date.

[9] In early 2014 the applicant registered three business names in New South Wales with the Australian Securities and Investments Commission. He then opened a bank account for each of those businesses in a provincial town in New South Wales. He was issued with a cheque book for each business. Over a period of about eight months, the applicant used valueless cheques at different businesses to obtain vehicles, electronic equipment, stationery, accommodation, and other amenities, knowing that there was insufficient money in the business accounts to pay for them.

All of the cheques were dishonoured because of insufficient funds and the victims' attempts to contact the applicant were unsuccessful. When presenting the valueless cheques, the applicant gave his personal details, including his address, mobile phone number, and his New South Wales driver's licence, to verify his identify. The businesses recorded those details. Police subsequently were able to locate the applicant and execute search warrants at two different addresses where he stayed.

[10] Most of the 26 fraud offences ((b) and (i) in [1] of these reasons) involved that *modus operandi*. For example, in count 33, on 21 September 2014 the applicant attended at the address of the owner of her vehicle in response to her advertisement for the sale of that vehicle. The applicant test drove and then agreed to buy the vehicle for $37,500. The owner accepted as payment a cheque from the applicant in the name of one of his businesses. She was later advised by her bank that the cheque had been dishonoured because of insufficient funds. She reported the fraud to police. Police checks established that the vehicle had been transferred into one of the other business names registered by the applicant and he had then sold it to a car dealer. The vehicle was recovered from the car dealership and returned to the complainant. (Whether or not the car dealer suffered loss is not indicated in the schedule of facts.) In count 39, the vehicle the applicant fraudulently purchased on 15 October 2014 for $45,000 was found in the back yard of the applicant's address. The police returned the vehicle to the complainant. Count 41 related to the same vehicle. The applicant advertised it for sale. On 18 October 2014 the complainant in count 41 agreed to buy it and transferred $30,000 into the applicant's bank account. The applicant agreed to deliver the vehicle to that complainant once the funds had cleared. He did not do so. The complainant sustained a loss of $30,000.

[11] The total of the losses caused by the applicant's fraud offences mentioned in [1] (b) of these reasons exceeded $70,000. The individual losses ranged from about $80 (count 2 - the applicant drove away from a service station without paying for fuel) to $25,000 (count 36 - the complainant transferred $25,000 into the applicant's bank account to buy the vehicle the applicant had acquired by the fraud charged in count 33; the complainant in count 33 recovered her vehicle from the complainant in count 36, but the latter lost $25,000.00 to the applicant).

[12] More than five months after the serious assault in count 3, during which period the applicant committed a series of different offences, the applicant again committed a serious assault (count 17). Earlier on the same day the applicant and a co-offender had unlawfully used a different person's motor vehicle, which one of them drove to an address occupied by the co-offender (count 13). After forcing open metal tool boxes on the rear of the vehicle (count 14) they removed the tools and unloaded them into the co-offender's garage (count 15). The applicant then drove the vehicle to a high school, where he parked it in a carpark. The co-offender followed in the applicant's own vehicle. The applicant poured diesel fuel through into the cabin of the vehicle and attempted to ignite it by throwing lighted paper the cabin (count 16 – attempted arson). As a result of this offending the vehicle owner suffered a loss of $3,544.00. The co-offender remained in the applicant's vehicle, acting as a lookout, and then drove the applicant back to the co-offender's address. The neighbours notified police. When police arrived the applicant became aggressive with them and he was arrested. The applicant physically resisted arrest. Police put the applicant onto the ground, where he continued to kick his legs out and strike police. The applicant did not comply with a police direction to stop persisting and to put his hands behind his back. A police officer grabbed the applicant's right arm

in an attempt to apply handcuffs. The applicant swore, moved his head towards the police officer, and bit the knuckle on the officer's right index finger (count 17).

[13] Police found the tools missing from the stolen vehicle, a broken lock from the metal tool boxes, and a jerry can labelled "diesel fuel" in the co-offender's garage. The applicant was taken to the police station. He declined to participate in an interview. He was charged in relation to counts 8 – 17 and issued with a notice to appear in a Magistrates Court a few days later.

[14] A little short of three months after the applicant committed the offences in counts 13 – 17, he committed three further offences: two offences of unlawfully entering a vehicle with intent to commit an indictable offence with property damage (counts 18 and 19) and unlawfully using a motor vehicle (count 20). In count 18, the applicant entered another person's vehicle by damaging the driver's door lock, and he also damaged the steering wheel column and ignition. That vehicle was uninsured and was written off. (The amount of any loss suffered by the complainant was not mentioned in the schedule of facts.) Later on the same day and place, the applicant gained entry to a different vehicle by unlocking the doors, by unknown means. He forced open the fuel filler and damaged the steering wheel column. That complainant's vehicle sustained damage to the value of a little over $1,000.00. The same night, at a service station, the applicant got into a vehicle and drove away while the vehicle owner was inside the service station paying for petrol (count 20). About two hours later the applicant was involved in a single vehicle accident on a highway. (He still did not have a driver's licence in Queensland.) The applicant suffered minor injuries in the accident and he was taken by ambulance to a hospital for treatment. He was released on the following morning and arrested. He participated in an interview and told police that he had taken the vehicle after waiting for two hours for a cousin to pick him up. The applicant said he could not recall the accident. He was charged and issued with a notice to appear in a Magistrates Court about two weeks later. He failed to appear on that date and a warrant was issued. The applicant also failed to comply with a notice to provide his identifying particulars to the police station within seven days. The owner of the vehicle unlawfully used by the applicant suffered loss in the amount of $2,175.00 as a result of damage to the vehicle.

[15] The total loss resulting from the offending was quantified at about $107,000.00.

[16] The applicant was remanded in custody on 18 October 2014, the day when he committed the fraud in count 41. Some days later, police executed a search warrant at an address where the applicant occupied a bedroom. Police found a pump action .308 rifle (category C) (count 42). They also found some .22 calibre ammunition, some 12 gauge shotgun rounds, police issued trousers, webbed belt and holsters, a rifle scope, a quantity of police issued pouches, a bong with cannabis residue, and a bowl containing a small amount of cannabis. The applicant participated in a police interview about a month later, whilst he was in a correctional centre. The applicant told police that he had found the pump action firearm in a park and did not make any attempt to deliver it to police. He stated that he could not recall when he found the rifle. He admitted he was not entitled to possess it.

[17] At the risk of some repetition, it appears useful to summarise the applicant's arrest and bail history. On 14 October 2013 the applicant was arrested for count 1. He committed counts 2 and 6 on 15 October 2013 and was arrested on the same day.

He was issued with a notice to appear on those counts on 13 November 2013 but failed to appear on that date. He was therefore on bail when he committed counts 8 – 42 between 26 February and 23 October 2014. After committing counts 8 – 17 between 26 February and 6 April 2014 the applicant was arrested on 6 April 2014 and was remanded in custody until 5 June 2014, when he was granted bail. Shortly afterwards, on 1 July 2014, he committed counts 18 – 20. He was arrested on 2 July 2014 and issued with a notice to appear on 16 July 2014. He was again granted bail. He failed to appear in court on 16 July 2014 and a warrant was issued, but the warrant was not executed until the applicant was arrested on 18 October 2014. Between 16 July 2014 and 17 October 2014 he committed counts 21, 22, and 24 – 40. He was arrested on 18 October 2014 and was remanded in custody from that date. On 19 November 2014, the applicant was arrested for counts 23, 41 and 42 (committed on 24 July, 18 October, and 23 October 2014[2] respectively).

The applicant's personal circumstances

[18] The applicant was 19 and 20 years old during the 12 month period of offending. Before he was sentenced for those offences he had committed some relatively minor offences in New South Wales. He was fined for driving whilst his licence was suspended. He was convicted with no other penalty and disqualified from driving for two years for two offences of driving whilst disqualified from holding a licence. He was convicted without further penalty for one offence of using a carriage service to menace, harass or offend and for one offence of driving while disqualified while holding a licence. During the period of the subject offending, he committed other offences: he was given small fines for seven offences of dishonesty and one offence of supplying liquor to a minor, and he was convicted of one offence of driving a motor vehicle during a disqualification period (second offence).

[19] A letter from a Prison Mental Health Service psychiatrist of 18 November 2016 noted that the applicant was no longer taking any regular psychotropic medication. He was taking medications for his other health problems, including cardiomyopathy for which a pacemaker had been inserted in 2013. His diagnosis was that of a personality disorder with anti-social and borderline traits. A letter from a Prison Mental Health Service nurse, dated 1 November 2016, noted that the applicant had seen clinicians from that service whilst in custody and had been accepted into the Service's transition program. That program provided two weeks' support after release and assistance to engage with other services identified in a discharge plan. He had also been accepted to a transition support service offered by a different organisation, which provided post-release and transition support to people with a mental illness released from custodial facilities. That service provided up to six months of psychosocial support after release. Participation in both programs was voluntary. A letter of 11 August 2016 from a general manager in Queensland Corrective Services thanked the applicant for helping management with an incident in the prison. Defence counsel informed the sentencing judge that this was a reference to the applicant intervening to prevent a fellow inmate from hanging himself, and performing resuscitation which enabled the fellow inmate to survive.

[20] A letter from the applicant's mother referred to the applicant having had "mental issues" and as a risk of self-harm. She referred to a serious incident that happened to him when he was 11-12 years old whilst in care. The applicant's mother allowed the applicant's father to have custody when her life spiralled out of control. The applicant's father referred to the applicant having been diagnosed with attention

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2 This was the date when police officers found the firearm and other things in the applicant's room.

deficit disorder when he was very young for which he was given medication. The applicant had been to see social workers, psychologists, and specialist doctors over the years. The applicant's father, and his partner, expressed their wish to provide a home for the applicant with them in New South Wales.

[21] The applicant addressed a letter to the sentencing judge. He said that he owned a phone shop which was running well but was led into a deep depression when he was released on bail after been arrested and remanded in custody for about two months for stealing and trying to burn a car when he was drunk. (This appears to be a reference to counts 13 – 16, which the applicant committed on 6 April 2014. This explanation appears to be inapplicable in relation to counts 1 – 3 and 6 – 12, which were committed in the period between 12 October 2013 and 2 April 2014.) The applicant expressed deep regret for his crimes and he apologised. He stated that the New South Wales Department of Community Services took him from his family when he was ten years old. From then until he was 18 he experienced significant physical and sexual abuse by numerous carers. He spent no more than four – five months in any one placement. The result of these experiences was to make it difficult for him to have relationships and express his feelings. He went to a special needs school but was rarely in school. He had completed various courses and wished to work in youth work. He stated that from the age of 11 he had been in and out of various psychiatric hospitals and clinics for bipolar disorder, manic depression, severe anxiety disorder, severe self-harm and suicide attempts, post-traumatic stress disorder and borderline personality disorder. He also suffered from epilepsy, super ventricular tachycardia, irregular heartbeat, heart attack, (for which he had a pacemaker inserted), sick sinus syndrome, stroke and mild cerebral palsy. He accepted responsibility for his offending and its adverse consequences to those affected and explained his strategies to ensure that he would not reoffend.

[22] Defence counsel informed the sentencing judge that about one year before the sentence hearing the applicant attempted to hang himself in prison and was transferred to hospital. He was returned to prison the following day and went on a hunger strike for about a week. He was admitted to hospital for 19 days and subsequently treated for pneumonia. Before that admission he experienced symptoms including escalating suicidal ideation. The applicant attempted suicide two further times after his first attempt. He was diagnosed with post-traumatic stress disorder, relating to the incidents mentioned in his letter, and also a personality disorder and anti-social and possible secondary depressive disorder. After a seven day hunger strike in prison he was admitted to another hospital. He attempted to strangle himself, he swallowed batteries, and he swallowed razor blades on another occasion. Following the attempted suicide by a fellow inmate, the applicant was admitted to hospital for self-harm, and he was subsequently admitted again for a heart attack.

Sentencing remarks

[23] Defence counsel submitted that an appropriate sentence was in the range of four to five years' imprisonment, from which the period of pre-sentence custody might be deducted, resulting in a sentence of two to three years' imprisonment, with immediate parole eligibility or a suspension of the imprisonment. The applicant's preference was for a suspended sentence to be imposed so as to enable the applicant to live with his father in New South Wales. The prosecutor submitted that the applicant would benefit from parole, but acknowledged that the applicant's interests

probably would be best served by being with his family in New South Wales. The prosecutor submitted that the applicant could be given probation for some of the counts in the indictment, combined with a suspended sentence or imprisonment, the appropriate sentence was six years' imprisonment, and an order releasing the applicant on the day of sentence would not be inadequate.

[24] The sentencing judge referred to the circumstances of the offences and to the applicant's personal circumstances. The sentencing judge also noted that the applicant had been in custody for 61 days between 6 April and 5 June 2014 and for 764 days between 19 October 2014 and 21 November 2016, the total period of pre-sentence custody being 825 days. That period could not be declared as time served under the sentence (defence counsel explained in submissions to the sentencing judge that the pre-sentence custody could not be declared to be time served under the sentence because it related, not only to the indictable offences, but also to some summary offences which remained before the Magistrates Court). The sentencing judge took the 825 days pre-sentence custody into account in formulating the sentences. His Honour referred to the particular seriousness of some of the offences, mentioning as examples the assaults on police officers in counts 3 and 17, two of the fraud offences involving the attempted purchase and sale of a motor vehicle for about $30,000.00 (counts 39 and 41), the unlawful use of a vehicle and attempted arson (counts 15 and 16), and possession of the pump action firearm (count 42). The sentencing judge observed that the seriousness of the applicant's offending was indicated by the number of offences, the extended period of time during which the applicant committed those offences, and that the total amount of loss involved in his offending was about $107,000.00.

[25] The sentencing judge referred to mitigating circumstances, including that the applicant was 19 to 20 years old during the course of his offending and was 22 years of age at sentence, the material concerning the applicant's mental health and treatment for his disorders, the applicant had found imprisonment particularly hard, he had made attempts to take his own life, and he had quickly come to the aid of another prisoner who had attempted to take his life in prison. The sentencing judge referred also to the very disadvantaged life the applicant had as a child and the significant effect upon him of the abuse at the hands of carers, as well as to the applicant's significant medical conditions. The sentencing judge gave credit to the applicant for his timely pleas of guilty. The sentencing judge characterised the applicant's criminal history as involving "some minor offences".

[26] His Honour concluded that the seriousness of the applicant's offending was such that a significant jail sentence had to be imposed. Because the applicant had committed offences whilst on bail, it was open to impose cumulative sentences, but the better approach was to impose a global sentence for the most serious offence that reflected the applicant's overall criminality, with lesser concurrent terms for the other offences. The sentencing judge also observed that the pre-sentence custody was taken into account by the imprisonment being wholly suspended.

Consideration

[27] The applicant acknowledged that there was no evidence that at the time of sentence the applicant was under treatment but submitted that it was clear that he had some history of mental health issues. However it is not the case, and the applicant did not submit, that the sentencing judge failed to take those or any relevant considerations

into account. In particular, the applicant accepted the sentencing judge took the pre-sentence custody into account by suspending the sentence.

[28] The applicant submitted that notwithstanding the seriousness and persistence of the applicant's offending and that he was on bail at the time of much of his offending, the term of imprisonment of five years was too severe. The applicant emphasised his timely pleas of guilty, no witnesses were required for cross-examination at the committal, his psychiatric and psychological condition, his relatively young age, and he did not have a significant criminal history. The respondent emphasised the gravity of the serious assaults on the police officers and of other offences referred to by the sentencing judge in the sentencing remarks and that most of the applicant's fraudulent conduct was committed after he had been arrested, granted bail, and failed to appear.

[29] The respondent referred to *R v Lappan*,[3] in which an effective sentence of six years and two months (including pre-sentence custody) for three counts of assaulting police officers in the execution of their duty was held to be manifestly excessive. The appropriate sentence was found to be four years and six months, with parole eligibility after 18 months, which, after adjustment for the time spent in custody before the sentence, would result in a head sentence of three years and four months. In the course of other aggressive conduct, the offender produced a short knife and stabbed a police officer in the back of his leg, caused a laceration to a second officer's arm by forcing a knife towards him, bit the second officer's hand, and told the officers he had HIV. The police officer who had been stabbed suffered a full thickness wound in the skin which required suturing, he experienced intense pain and feared for his life and he suffered adverse effects from the offence. That offender was 31 years old at the time of the offences and he had an extensive criminal history. For those reasons, and particularly because that case concerned a much more serious offence, it is of little assistance as a comparable sentence. It also should be noted that, unlike in this matter, the effect of the sentence imposed in *Lappan* was more severe than the sentencing judge in that case had intended.

[30] The respondent referred to *R v Benson*,[4] in which the Court found that a sentence for a serious assault of 18 months' imprisonment with an order for eligibility for parole after the offender had served six months' imprisonment (including pre-sentence custody) was not manifestly excessive. The offender punched a police officer in the eye, wrapped both of his arms around the back of the officer's neck and pulled him towards the offender and caused the police officer difficulty with breathing, hooked his finger deep into the officer's left eyeball and caused substantial pain, bit the police officer in his leg, spat and blew blood from his mouth and nose whilst yelling and swearing at police officers, and told the police officer that he was positive for hepatitis C. That offender had a very extensive criminal and traffic record, including convictions for offences of violence for which he had been imprisoned and he was about 42 years old when he offended. That was therefore a much more serious case. However that offender committed only one serious assault, whereas the applicant committed two such offences more than five months apart (count 3 on 15 October 2013 and count 17 on 6 April 2014). It is also relevant to note that Morrison JA referred to the legislative amendments in August 2012 which increased the maximum penalty for this offence to 14 years' imprisonment, which underscore the seriousness of assaults upon police officers whilst they are acting in the execution of

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3 [2015] QCA 180.
4 [2014] QCA 188.

their duties. When, as in this case, an offender commits two such offences some months apart and the second offence is committed whilst the offender is on bail, the offender should expect condign punishment. Also bearing in mind that the decision in *Benson* does not suggest that the sentencing discretion upon the facts of that case was limited to 18 months' imprisonment with eligibility for parole after six months, the total criminality in counts 3 and 17 might of themselves have attracted a term of imprisonment of at least 18 months' imprisonment, perhaps as long as two years' imprisonment, with a period of actual custody required to be served.

[31] At the sentence hearing and again on appeal the applicant relied upon *R v Bailey*[5] and *R v Burns*.[6] In *Bailey*, the offender committed 94 offences. The offences involved fraud, receiving, unlawful use of a motor vehicle, forging, and uttering. The total amount of property obtained by his systematic fraud was in excess of $300,000.00. That offender was much older than the applicant (he was 43 years of age) and he had a lengthy criminal history, including offences for which he had been sentenced to imprisonment. He was sentenced to eight years' imprisonment to be served concurrently with a sentence of imprisonment the offender was then serving, with the effect that the sentence involved an additional period in custody of about six years and eight months. His parole eligibility was set after three and a half years of the eight year term. With respect to that eight year term, Pincus JA, with whose reasons Thomas JA and Shepherdson J agreed, observed that it was "impossible, seriously to say that the sentences … were manifestly excessive". The implication is that a more severe sentence certainly could have been imposed. *Bailey* does not support the applicant's contention that his much less severe sentence is excessive.

[32] In *Burns*, the offender committed about 190 indictable offences when he was almost sixteen and a half until two weeks after his 17th birthday. Most offences included dishonesty, some charged the unlawful use or attempted use of a motor vehicle, and there was one offence of dangerous operation of a motor vehicle. That offender also committed two offences of arson of a motor vehicle, one whilst he was a child and one when he was 17 years of age. Most of the offences were committed with co-offenders, one of whom, aged 25, was the ring leader. The total value of property damage attributable to the offences exceeded $390,000.00. Four offences were committed after the offender had been arrested and released on bail, which occurred on two occasions. In respect of three of those offences committed as an adult (burglary, stealing, and arson of a motor vehicle), the offender was sentenced to six years' imprisonment with a recommendation for release after two years. Concurrent sentences of two years' imprisonment were imposed for all of the other offences committed as an adult except for offences of unlawful use of a motor vehicle, for which concurrent sentences of three years' imprisonment were imposed. The Court held that the sentence of six years for arson of a motor vehicle was excessive and should be replaced by a sentence of four years' imprisonment. Otherwise the sentence of six years' imprisonment was replaced by a sentence of five years' imprisonment, with the recommendation for release remaining after a period of two years – that took into account that the offender's co-operation was very substantial, he was still very young, and there was some indication that during his pre-sentence custody he had attempted to address his offending behaviour.

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5 [1999] QCA 40.

6 [2004] QCA 437.

[33] Mackenzie J observed in *Burns* that if that offender had been older when he committed the offences he almost certainly would have been sentenced to a substantially longer period than six years. Acknowledging that the applicant was not convicted of arson but of attempted arson, the sentence in *Burns* is readily reconcilable with the applicant's sentence, particularly when regard is had to the facts that the applicant was an adult when he committed all of his offences (he was about three years older than the offender in *Burns*) and, unlike the applicant, the offender in *Burns* did not assault police officers or commit any offences of violence.

[34] The respondent referred to *R v Whiting*[7] in relation to the sentence for the frauds to the value of $30,000 or more charged in counts 33, 39 and 41. In that case an effective sentence of four years and six months' imprisonment, (after a trial) with eligibility for parole after serving one half of the term of imprisonment, was held not to be manifestly excessive. She committed two offences of fraud in which the yield to her was of a value of more than $30,000, (one of which as an employee), and one further count of fraud. Some of the circumstances are more serious than in the present case. That offender was between 30 and 35 years old and in a position of trust, the period of her offending was about four years and 10 months, and she took nearly $140,000. There were a great many fraudulent transactions involving persistent, dishonest behaviour over a long period of time, and she did not show any remorse. Unlike the applicant, however, she did not continue to offend after being detected in her offending and she did not commit any offence on bail. In light of the discussion of sentencing decisions in *Whiting*, for the applicant's 26 fraud offences (including three offences where the value involved was $30,000 or more) a sentence of four years' imprisonment would not have been out of range.

[35] The comparable sentences do not indicate that in all of the circumstances of this case the wholly suspended head sentence of five years' imprisonment for an operational period of five years, together with the order for probation, is excessive.

[36] The applicant submitted that the effective term of five years' imprisonment should have allowed, but did not allow, credit for the lengthy period of his pre-sentence custody. The respondent submitted that the sentence was designed by the sentencing judge to include a significant head sentence hanging over the applicant's head to act as a powerful incentive not to reoffend during the operational period, thereby providing the applicant with the benefit of immediate release under the wholly suspended sentence; in that way sufficient allowance was made in the sentence for pre-sentence custody and the matters raised in mitigation of the sentence.

[37] The sentencing judge's discretion to take into account pre-sentence custody which cannot be declared as time served under the sentence has been described as an "untrammelled discretion"; non-declarable pre-sentence custody may be taken into account by way of mitigation by reducing the head sentence, accelerating the date for eligibility for parole, or in some different way.[8] Here it was within the sentencing judge's discretion to take it into account by adopting a sentence structure under which the applicant was released on the day of sentence pursuant to the orders suspending the head sentence of five years and ordering probation. Whilst the whole period of pre-sentence custody that cannot be declared as time served under a sentence is commonly credited against what otherwise would be the head sentence

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7 [2013] QCA 18.

8 See *R v Skedgwell* [1999] 2 Qd R 97 at 99 – 100.

as well as what otherwise would be the period before release from custody[9] and although non-declarable pre-sentence custody generally should be taken into account at the first available opportunity,[10] a failure to adopt those approaches does not necessarily render the resulting sentence manifestly excessive. In this case, the order wholly suspending the imprisonment provided a very substantial benefit to the applicant, who otherwise might have been required to serve a significant period in custody. There is no reason to consider that in the selection of the sentence structure the sentencing judge did not take into account the consequence of a possible breach of the suspended sentence that the applicant might be required to serve the whole term of imprisonment. It is also relevant that if the applicant did breach the terms of his suspended sentence by committing a further offence, a judge asked to make an order (under s 147(1)(b) of the *Penalties and Sentences Act* 1992 (Qld)) that the applicant serve the whole of the suspended imprisonment could take into account the original sentencing judge's omission to moderate the head sentence with reference to the whole of the pre-sentence custody in deciding (under s 147(2) of that Act) whether it was unjust to make such an order.[11]

[38] The five year term seems severe in the context of the lengthy period of non-declarable pre-sentence custody, but taking into account the applicant's personal circumstances, notably including his plea of guilty, his relative youthfulness, and his disadvantaged upbringing, many factors combine to support the conclusion that the sentence is not manifestly excessive: the sheer number of indictable offences the applicant committed; the lengthy period of a year during which he persisted in his spree of diverse offending; the very significant amount of loss he caused to members of the community by some of his offences; the seriousness of the applicant's two assaults upon police officers who were acting in the execution of their duty; the adverse effects of the serious assault upon one of those officers; the seriousness of the offence of attempted arson of a motor vehicle; the seriousness of the fraud offences involving $30,000 or more; the circumstance that the applicant committed many offences, including serious offences, after he had been arrested for earlier offending and released on bail, which occurred more than once in many of those cases; the circumstance that the term of five years' imprisonment reflects the total criminality in all of the applicant's offending; and the beneficial provision for immediate release on probation and under the wholly suspended sentence.

Proposed order

[39] I would refuse the application.

[40] **PHILIPPIDES JA:** I agree with the reasons of Fraser JA and the order proposed by his Honour.

[41] **DOUGLAS J:** I agree with Fraser JA.

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9 *R v Stokes* [2016] QCA 157 at [16].
10 *R v Fabre* [2008] QCA 386 at [14] – [15].
11 See *R v Stevens* [2006] QCA 361 at [22].