SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thorburn* [2017] QCA 278
PARTIES:	**R** **v** **THORBURN, Trent Jordan** (applicant)
FILE NO/S:	CA No 215 of 2017 DC No 445 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh – Date of Sentence: 14 September 2017 (Chowdhury DCJ)
DELIVERED ON:	Order delivered ex tempore 11 October 2017 Reasons delivered: 14 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2017
JUDGES:	Sofronoff P and Morrison JA and Boddice J
ORDER:	**Order delivered 11 October 2017:** **The application for leave to appeal be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of incest, one count of attempt to obstruct the course of justice and two counts of perjury – where on 14 September 2017 the applicant was sentenced to an effective head sentence of four years imprisonment – where it was ordered that the sentences of imprisonment be suspended after the applicant had served 16 months imprisonment – where 359 days in pre-sentence custody were declared time served – where the applicant had been assaulted repeatedly by fellow inmates within a day or two of imprisonment – where a protection order had been made by Corrective Services to ensure the safety of the applicant on remand – where the applicant had served all but a couple of days of this time in custody in a detention unit, isolated from the general prison population – where it was accepted that such form of imprisonment is more difficult to endure than general imprisonment – where the applicant contends that having regard to the particular circumstances under which the applicant served his time on remand, the requirement that the applicant serve 16 months actual custody is manifestly excessive –

whether the application should be granted

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, cited
Callanan v Attendee X [2013] QSC 340, considered
R v Galleghan [2017] QCA 186, cited
R v Ikin [2007] QCA 224, applied
R v Onley; Ex parte Attorney-General (Qld) [1994] QCA 199, considered
R v Watson [2017] QCA 82, cited

COUNSEL: R East for the applicant
C W Heaton QC for the respondent

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

[1] **THE COURT:** On 14 September 2017, the applicant pleaded guilty to one count of incest, one count of attempt to obstruct the course of justice and two counts of perjury. The applicant was sentenced to an effective head sentence of four years imprisonment, imposed on the second count of perjury, with lesser concurrent terms of imprisonment imposed on the remaining counts. It was ordered that the sentences of imprisonment be suspended after the applicant had served 16 months imprisonment for an operational period of five years. Allowing for 359 days in pre-sentence custody, which was declared as time served, the sentences of imprisonment were suspended from 20 January 2018.

[2] The applicant sought leave to appeal those sentences of imprisonment. The proposed ground of appeal was that the sentences imposed were manifestly excessive. The effective head sentence of four years imprisonment was not in issue on the appeal. At issue was whether the requirement that the applicant serve 16 months imprisonment, having regard to the particular circumstances under which he served his time on remand, rendered the sentences of imprisonment manifestly excessive.

[3] On 11 October 2017, the Court refused the application for leave to appeal. These are the Court's reasons.

Background

[4] The applicant was born on 12 May 1997. He was aged 18 and 19 years at the time of the offending and 20 years at sentence. The applicant had no prior criminal history.

[5] The offence of incest involved the applicant having unprotected sexual intercourse with his 12 year old foster sister. Shortly after that event, the applicant confessed to a cousin and later his mother about the sexual intercourse.

[6] It is alleged that after the mother informed the applicant's father of that event, the applicant's father, acting alone and without any warning, killed the child in order to silence her and spare the family and the applicant from the consequences of likely imprisonment.

[7] The applicant's father then devised a plan involving each member of the family relating a similar story, namely, that the foster child had been dropped to school by the father the next morning but had not returned later that day. The applicant, his older brother and his mother all allegedly participated in giving this false account to the authorities.

Offences

[8] The offence of attempting to obstruct the course of justice arose out of the consequence of the applicant giving false statements to the police about the foster child's last whereabouts. The applicant gave a false statement on 6 November 2015, which was repeated on 20 November 2015. He again gave a false statement on 11 February 2016.

[9] The first count of perjury arose out of evidence given by the applicant to the Crime and Corruption Commission as part of an investigative hearing into the disappearance of the foster child. On 26 June 2016, the applicant falsely testified that there had been no sexual contact between him and the foster child. He also falsely claimed he had seen the foster child at a time when he knew she had been killed by his father.

[10] The second count of perjury arose out of evidence given by the applicant at an investigative hearing conducted by the Crime and Corruption Commission on 19 September 2016. By that time, extended family members had provided statements to police contradicting the applicant's denial of sexual contact with the foster child. Further, a covert listening device had recorded the applicant's parents telling the applicant and his brother to continue to maintain the false story.

[11] When the applicant was recalled to the investigative hearing on 19 September 2016, he acknowledged he had had sexual intercourse with his foster sister but in evidence gave an explanation as to the circumstances of that intercourse consistent with a version suggested to him by his father as recorded by the covert listening device. The applicant continued to falsely testify that the fact of sexual contact was not in any way connected with the foster child's disappearance. The applicant also falsely testified that there had been no family discussion on the night the foster child had been killed by his father.

Pre-sentence custody

[12] Subsequent to that appearance, the applicant was charged with the offences. He was refused bail and remanded in custody. He remained in custody until his sentence, a period of 359 days.

[13] For all but a few days of that period in custody, the applicant was housed in the detention unit pursuant to safety orders issued by Corrective Services.

[14] Those safety orders were issued for the protection of the applicant who had been assaulted by fellow inmates within days of being remanded in custody.

Sentence hearing

[15] At sentence there was little dispute as to the circumstances of the applicant's offending and as to the seriousness of his conduct. By way of mitigation, reliance was placed

on the applicant's youth, lack of criminal convictions and the circumstances that the offences other than incest occurred in the context of his father's unilateral decision to kill the foster child with his father's requirement that he, his brother and mother maintain a false story as to the foster child's attendance at school the following day. The applicant had complied, knowing his father was capable of extreme violence.

[16] A particular matter relied upon by way of mitigation was the circumstances of the applicant's detention in custody. Within days of being placed in custody the applicant was assaulted and threatened with further violence by fellow prisoners. As a consequence, the correctional authorities made a safety order. The applicant was transferred to the detention unit where he remained for the duration of his time on remand.

[17] It was submitted that incarceration in the detention unit constituted a form of solitary confinement. The applicant was confined to a small, four by four metre cell for 22 hours of every day. He had access to an exercise yard for the remaining two hours. The applicant was not permitted to have any contact visits or to speak or mix with other prisoners. He was not able to access the prison library, gymnasium or oval. He was unable to access programs available to other remand prisoners.

[18] The applicant submitted the consequence of the making of a safety order was that the applicant suffered significantly greater physical and emotional hardships and deprivation than a normal remand prisoner. He submitted that that fact ought properly be taken into account on sentence, by reduction of the time actually served in recognition of the more extreme hardships suffered by persons held in solitary confinement.

Sentencing remarks

[19] The sentencing Judge noted the applicant had pleaded guilty to serious offences, the last three of which arose out of "a sustained immoral and disgraceful plan on the part of your family to cover up your serious crime", namely, incest. These offences had occurred when the applicant was 18 years of age and had only come to the attention of the authorities as a consequence of the tragic disappearance and death of the foster child.

[20] The sentencing Judge also noted that the applicant, subsequent to having told his cousin of the fact of sexual intercourse, had given an untrue account as to the circumstances in which sexual intercourse had occurred, namely, that he had engaged in sexual intercourse under threat that the foster child would hurt his dog if he did not do so. As there was no account from the foster child as to the circumstances in which intercourse took place, the applicant had to be sentenced for that offence in a vacuum, on the basis that he, being 18 years of age, had sexual intercourse with a vulnerable child who was in foster care with his family, in circumstances where the applicant ought to have been a role model looking after the foster child.

[21] As to the incest count, the sentencing Judge observed that the offence only arose because of the extended definition of incest. That fact rendered it distinguishable from incest committed by someone who was a blood relative, having regard to the risks associated with any pregnancy that may flow from sexual interaction between blood relatives. Having sexual intercourse without protection, however, exposed

the foster child to the risk of sexually transmitted diseases and pregnancy which made it a serious example of the offence of incest.

[22] As to the remaining counts, the sentencing Judge noted that those offences occurred in circumstances where the foster child's body had been found and the applicant was aware of what had occurred having regard to the earlier family meeting. Notwithstanding that knowledge, the applicant had engaged in telling significant lies to police on three separate occasions. Those lies were engaged in deliberately in order to give false information so as to obstruct the course of justice. The sentencing Judge considered the count of attempting to pervert the course of justice a particularly serious form of that offence.

[23] In respect of the first count of perjury, the applicant had given a false account in circumstances where he had been warned that it was an offence to be untruthful and had been specifically warned in respect of perjury. That perjury related not only to his last contact with the foster child, but also to a denial of sexual contact in which the applicant had baldly claimed "you wouldn't go and have sex with your sister."

[24] As to the second count of perjury, the applicant had given false testimony in circumstances where he had admitted to sexual intercourse with the foster child but gave a completely implausible account of the circumstances of that intercourse. The applicant had also conceded in evidence that he had lied to his cousin when he said the act of sexual intercourse took place under threat from the foster child to harm his dog. The applicant conceded he lied in order to make the foster child look worse and the applicant look better.

[25] Notwithstanding those concessions, the applicant continued to falsely testify that the sexual encounter with the foster child was not connected with the foster child's disappearance or murder; that none of his family members was responsible for the murder; and that he was not aware of the involvement of family members in her death. This false testimony was given in circumstances where the applicant had affirmed he would tell the truth.

[26] The sentencing Judge recognised that all of these offences had been committed in circumstances where the applicant was very young, and genuinely fearful of his father as a result of what had happened to the foster child. The applicant also had no criminal history and was undertaking study at the time of the offences. The sentencing Judge accepted the plea was a very early plea of guilty, reflecting cooperation with the administration of justice.

[27] As to the circumstances of the applicant's incarceration on remand, the sentencing Judge said:

> "You have been on remand since your arrest and there's no question that your time on remand has been especially difficult. On the third day you were on remand you were bashed by other prisoners on two separate occasions. That is a risk of being in prison. Corrective services are supposed to protect prisoners but we all know that prison assaults happen and particularly someone who is charged with offences relating to a high-profile case are especial targets. You've been receiving further threats of violence which resulted in corrective services making a safety order which, in reality, saw you placed in the detention unit in solitary confinement.

> Your capacity to mix with other prisoners, your capacity to undertake courses and receive other benefits has been clearly restricted. I'm told that your lack of having sunshine has resulted in you receiving vitamin D supplements. Being in the detention unit means that from time to time other prisoners who are in detention for the appropriate reason, that is, for breach of prison rules, have also abused you. All of that is unpleasant, but ultimately you've no one to blame but yourself for the situation you find yourself in.
>
> I've had regard to the matters that have been tendered on your behalf, in particular from corrective services, and the extent of your deprivation in solitary confinement is perhaps hard to fully gauge, but I will give you credit on your sentence for the fact that you have served pretty well all of your time on remand in solitary confinement."

[28] The sentencing Judge said that for the incest offence, he would have sentenced the applicant to two and a-half years imprisonment. On the remaining counts, he would have imposed 18 months, two and a-half years and three years imprisonment, those sentences to be served cumulatively on the separate offence of incest. Such an approach would have led to an effective head sentence of five and a half years imprisonment.

[29] The sentencing Judge observed that having regard to the principles of totality, a sentence of five and a-half years imprisonment as an overall sentence would have been too great and have been crushing and beyond what was appropriate. The sentencing Judge said he would, on account of principles of totality, reduce the overall sentence to four and a-half years but give a further six months credit for the time served in protection. Accordingly, the sentencing Judge imposed a global head sentence to the applicant's overall criminality of four years imprisonment.

[30] In respect of actual time served, the sentencing Judge observed that the applicant had already served a significant time in custody. However immediate release from prison would be "too lenient". The sentencing Judge ordered the sentence be suspended after the applicant had served 16 months imprisonment, to reflect his early pleas of guilty, lack of criminal history and to assist in his prospects of rehabilitation.

Applicant's submissions

[31] The applicant submitted the sentencing Judge erred in finding that the applicant had no-one to blame but himself for the circumstances of the applicant's incarceration in the detention unit. The applicant had done nothing to cause his detention in that unit. The applicant had been assaulted and threatened by other prisoners. There was no conduct by the applicant that encouraged those assaults and threats.

[32] Further, whilst the sentencing Judge expressly made allowance for the nature of the applicant's pre-sentence custody, the circumstances of that pre-sentence custody were wholly exceptional such that the allowance given supports a conclusion that insufficient weight was given to that factor leading to an unreasonable or plainly unjust sentence.

[33] The fact that a prisoner has or will endure harsher conditions in custody than may be regarded as normal is an appropriate factor to be taken into account on sentence. Whilst the appropriate weight to be given to such harsh pre-sentence custody is not

a mathematical exercise, it has been repeatedly recognised that one day in solitary confinement is the equivalent of several days in a normal prison environment, having regard to the effects of solitary confinement on the mental state of a prisoner.

[34] Allowing for the fact that the applicant had spent about a year in continuous solitary confinement, commencing as a 19 year old teenager with no prior criminal history, a reduction of six months to the head sentence was plainly inadequate. Further, it was illusory as the benefit only arises should the applicant breach the suspended sentence. The sentencing Judge ought to have ordered the immediate suspension of the applicant's sentence.

Respondent's submissions

[35] The respondent submitted that the sentencing Judge properly had regard to relevant sentencing principles. In doing so, specific regard was had to the circumstance of the applicant's pre-sentence custody. As such, it cannot be said the sentencing Judge failed to have regard to a relevant factor. A contention that a greater allowance ought to have been made for this factor is an insufficient basis for appellate court intervention.

[36] The sentencing Judge was not in error to observe that the applicant was incarcerated as a consequence of his own actions. Whilst the making of the safety order was for his own safety, as a consequence of the actions of other prisoners, significant allowance was given for this circumstance in the sentence imposed on the applicant. To have granted the applicant yet a further reduction in the actual time served would have resulted in a sentence which was too lenient. Accordingly, the sentence imposed was not unreasonable or plainly unjust.

Consideration

[37] The process of sentencing was described in *Barbaro v The Queen*:[1]

> "Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts. As the plurality said in *Wong v The Queen*, '[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportional value to some features, distorts the already difficult balancing exercise which the judge must perform.'" (citations omitted)

[38] A contention that the sentence imposed is so "unreasonable or plainly unjust" raises for consideration whether the exercise of the sentencing discretion has miscarried. However, appellate intervention is only justified where the error in the exercise of that sentencing discretion is clearly apparent.[2]

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1 (2014) 253 CLR 58 at [34].

2 *R v Ikin* [2007] QCA 224 at page 6.

[39] As was recently observed in *R v Watson*:[3]

> "In order to obtain a grant of leave to appeal the appellant needs to demonstrate an arguable error in the exercise of discretion. It is the existence of error that grounds this Court's jurisdiction to interfere with the exercise of discretion of a sentencing judge."

[40] The applicant contends that the sentencing Judge made a specific error in sentencing the applicant when observing there was no-one else to blame for his incarceration in the detention unit than himself, and a general error in failing to reduce the time served in actual custody. A consideration of the sentencing remarks supports neither contention.

[41] Whilst the sentencing Judge made the reference to the applicant having no-one to blame but himself for his situation, after referring to the limitations of being placed in the detention unit in solitary confinement, a consideration of the sentencing remarks supports a conclusion that the reference to "the situation you find yourself in" was in relation to the fact of incarceration itself rather than the restricted nature of that incarceration. The sentencing Judge made clear in the following paragraph that the sentence to be imposed would give credit for the fact the applicant had served essentially all of his time on remand in solitary confinement. Further, such a factor was appropriately to be considered in the circumstances.[4] That credit was specifically reflected in a reduction of the head sentence by six months imprisonment. Such a reduction was well within a proper exercise of the sentencing discretion in all of the circumstances.

[42] Further, the fact the sentencing Judge ordered a suspension after 16 months, being one-third of the effective head sentence, does not support an inference of a general error in the exercise of the sentencing discretion. The sentencing Judge expressly considered whether an earlier release was appropriate but concluded that such an order would result in a sentence which was too lenient in all of the circumstances. Whilst another sentencing Judge exercising the sentencing discretion may have ordered a suspension at a period earlier than 16 months, there is no basis to conclude that ordering a suspension after serving 16 months was an improper exercise of the sentencing discretion.

[43] Although the applicant was very young at the time of the commission of these offences and had no previous convictions, his offending involved serious criminal conduct over an extended period of time with a significant impact on the administration of justice. The last offence of perjury was particularly serious. The applicant continued to lie to an investigative hearing, correcting only those earlier lies about which he knew the authorities had evidence to establish their falsity. The giving of such sustained and persistent false testimony is particularly serious, requiring a very significant period of actual imprisonment itself.

[44] As the applicant candidly conceded, an overall head sentence of four and a-half year's imprisonment for such serious criminal conduct fell within a proper exercise of the sentencing discretion. Notwithstanding that fact, the sentencing Judge reduced the sentence to four years imprisonment, specifically on account of the fact

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3 [2017] QCA 82 at [41].

4 *R v Onley; Ex parte Attorney-General (Qld)* [1994] QCA 199; *Callanan v Attendee X* [2013] QSC 340 at [34]-[45].

that the applicant had served almost one year of pre-sentence custody in harsher than usual conditions due to the making of a safety order for his own protection.

[45] Once it is recognised that the sentencing Judge specifically reduced the overall head sentence on account of the circumstances of the applicant's pre-sentence custody, there is no basis to conclude that the sentencing Judge mis-applied the sentencing discretion by failing to have regard to relevant factors.

[46] Whilst the applicant contends that the sentencing Judge gave inadequate weight to that factor, such a contention is insufficient to ground a basis for leave to appeal. As was observed recently in *R v Galleghan*:[5]

> "Statements of the general principles to be applied by an appellate court when asked to set aside an order made in the exercise of a judicial discretion generally include a reference to the trial judge giving inadequate weight to some factors and excessive weight to others. It is, however, a mistake to suppose that a conclusion that the trial judge has given inadequate or excessive weight to some factors is in itself a sufficient basis for an appellate court to substitute its own discretion for that of the trial judge."

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5 [2017] QCA 186 a page 6.