SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kussrow* [2018] QCA 195
PARTIES:	**R** **v** **KUSSROW, Justin Benjamin** (applicant)
FILE NO/S:	CA No 280 of 2017 DC No 945 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 1 November 2017 (Farr SC DCJ)
DELIVERED ON:	24 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2018
JUDGES:	Gotterson and Philippides JJA and Daubney J
ORDERS:	**1. Grant leave to appeal against sentence.** **2. Appeal allowed.** **3. The appellant's sentence is varied by substituting 5 June 2021 as the parole eligibility date.** **4. The sentence is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to unlawfully doing grievous bodily harm – where the applicant and the complainant were in custody at the Wacol Correctional Centre at the time of the applicant's offending – where the applicant was serving a sentence of six years' imprisonment at the time of his offending – where the *Penalties and Sentences Act* 1992 (Qld) ("PSA") required the applicant's sentence to be imposed cumulatively upon the sentence that he was already serving – where the applicant was sentenced to six years' imprisonment with a requirement that half of that term be served – where, cumulatively, the applicant's sentence was 12 years' imprisonment with eligibility for parole after nine years – where the applicant applied for leave to appeal against his sentence on the ground that it is manifestly excessive – where the applicant attributed the manifest excess, *inter alia*, to a failure of the sentencing judge

to adequately take into account s 9(2)(l) of the PSA which requires a sentencing court to have regard to "sentences already imposed on the offender that have not been served" – whether the sentencing judge failed to adequately take into account s 9(2)(l) of the PSA – whether the applicant's sentence is manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9(2)(l)

R v Amery [2011] QCA 383, considered
R v BCF [2012] QCA 87, distinguished
R v Compton [2017] 2 Qd R 586; [2017] QCA 55, considered
R v Davidson, unreported, District Court of Queensland, Dearden J, DC No 659 of 2017, 23 October 2017, distinguished
R v Holland [2008] QCA 200, considered
R v Lowe [2001] QCA 270, considered

COUNSEL: D Holliday for the applicant
M Wilson for the respondent

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

[1] **GOTTERSON JA:** On 1 November 2017, the applicant, Justin Benjamin Kussrow, pleaded guilty in the District Court at Brisbane to an offence against ss 317(b) and (e) of the *Criminal Code* (Qld). The count to which he pleaded alleged that on 27 May 2016 at Wacol, he unlawfully did grievous bodily harm to Daniel Christopher Lawrence with intent to do so.

[2] This offending occurred at the Wacol Correctional Centre. Both the applicant and the complainant, Mr Lawrence, were in custody at the facility at the time.

[3] The applicant was then serving a six year sentence which had been imposed on 24 July 2014. His parole eligibility date had been fixed at 24 December 2014 allowing for some 456 days in pre-sentence custody declared as time served. He did not obtain parole. His full time release date was 5 June 2019.

[4] The applicant was sentenced later on 1 November 2017 for the subject offending. The learned sentencing judge noted that, by operation of s 156A of the *Penalties and Sentences Act* 1992 ("PSA"), the sentence he was to impose had to be cumulative upon the sentence that the applicant was currently serving. His Honour decided that, although it was open for consideration, a serious violent offence declaration was not appropriate for the applicant's offending.

[5] The learned sentencing judge referred to as "sensible" and "the appropriate course to adopt", a submission by defence counsel for a sentence of six years' imprisonment with a requirement that half of that term be served. His Honour continued:

> "So the order of the Court [is that] that you are sentenced to six years' imprisonment. I order that that term of imprisonment be served cumulatively upon the sentence which was imposed upon you

> in the Brisbane District Court on the 24th of July 2014. I will set your parole eligibility date at the halfway mark of that sentence, which in my view, is the appropriate order, that being the 5th of June 2022."[1]

[6] On 10 November 2017, the applicant filed an application for leave to appeal against sentence.[2]

Circumstances of the applicant's offending

[7] The complainant and applicant were 33 and 26 years of age respectively at the time of the offending. On the day in question, the latter had contacted his mother via the Prisoner Telephone Service ("PTS"). He asked her to conduct searches on the name Daniel Christopher Lawrence. He held a belief that the complainant had been involved in an abduction of him when he was younger and at a time when the complainant was known by another name. Later that day, his mother told him that her searches had not revealed anything to indicate that the complainant had changed his name to Daniel Christopher Lawrence.

[8] Despite this information, the applicant concluded that the complainant had been his abductor and that the complainant had changed his surname from Skinner. The complainant, on the other hand, has always maintained that he had never seen the applicant before encountering him at the facility and that he had never been known by any name other than Daniel Christopher Lawrence.[3]

[9] During that evening, the complainant had taken his dinner tray to a table in the dining area. He sat down with his back to the rest of the dining unit. The applicant approached him and poured boiling water over him. The applicant hit the complainant and caused him to fall to the floor. The applicant then kicked the complainant many times. Another prisoner, who apparently believed that the complainant had "raped" the applicant when he was younger, hit the complainant with a baked beans tin inside a sock.[4]

[10] The complainant suffered deep thermal burns to his chest, right shoulder and abdomen, and superficial dermal burns to his face, neck and bilateral upper limbs, covering 16.5 per cent of his total body surface area. He was hospitalised and taken to theatre for debridement, split skin grafts and application of dressings. The injuries were not life endangering but the complainant's chest and right shoulder areas have permanent scarring. There is a risk of permanent skin discolouration in affected areas.[5] The complainant's injuries qualified as grievous bodily harm.

[11] Between 27 May and 3 June 2016, the applicant contacted a number of individuals via the PTS. He made admissions to them of the offending, protesting his belief that the complainant had been his abductor and that he "deserved it".[6] The applicant declined the opportunity to participate in a recorded interview with police.

Applicant's history of offending

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1 Sentencing Remarks ("SR") 2 144 – SR3 12: AB15–16.
2 AB45-47.
3 Agreed Statement Fact ("ASF") at [1]-[3]: AB 43.
4 ASF at [4]: AB43.
5 ASF at [7]-[11]: AB 44.
6 ASF at [6]: AB 43.

[12] The applicant's criminal history spans some 13 years. It includes mainly property, motor vehicle and dishonesty offences with some drug offences and breaches of the *Bail Act*. On 3 February 2009, the applicant was sentenced in the Beenleigh Drug Court to 17 months' imprisonment for an array of offences. Some 286 days of pre-sentence custody were declared time served and he was immediately released on parole. While on parole, he was returned to custody as a result of positive urine testing for cannabis. He was again released and returned to custody, that time for failing to engage in intervention and absconding from supervision.

[13] The applicant was sentenced to 18 months' probation for burglary in March 2012 and in May 2012 he was sentenced to three months' imprisonment wholly suspended for an operational period of 18 months, for stealing, possessing utensils or pipes and possessing tainted property.

[14] As I have mentioned, the applicant was again sentenced on 24 July 2014. The sentencing took place at the Beenleigh District Court after he had pleaded guilty to 52 indictable offences and 12 summary offences. One of the indictable offences was armed robbery. That offending occurred during the operational periods of both the probation order and the suspended sentence that had been imposed in March and May 2012 respectively. On that occasion, the sentencing judge remarked that the applicant had had "a difficult and troubled life" and that he had been "the victim of very serious offending at the age of 13 by a man".[7]

[15] While the applicant was serving that six year sentence, he committed a wilful damage offence on 12 December 2016. For that offending, a cumulative sentence of six weeks imprisonment was imposed at the Richlands Magistrates Court on 28 February 2017. A parole eligibility date at 21 March 2017 was set.

The sentencing remarks

[16] In his remarks, the learned sentencing judge referred to the applicant's history of offending and the failure of a range of court orders to have a deterrent effect upon him. His Honour described the subject offending as "particularly serious" for which there was an apparent degree of premeditation.[8] The applicant's conduct was the product of a misplaced revenge; it was completely unprovoked.[9]

[17] His Honour noted that the attack was vicious and involved significant violence. The applicant had caused significant harm and immense pain to the complainant which left him with lasting injuries.[10]

[18] In holding that a serious violence offence declaration was not appropriate, the learned sentencing judge cited that there was little by way of violence in the applicant's past offending and that the behaviour on this occasion was "somehow linked" (in the applicant's mind) to serious offending against him when he was 13 years of age.[11] His Honour observed that, notwithstanding, the applicant's conduct was deserving of condign punishment. He then imposed the sentence in the terms to which I have already referred.

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7 AB35.
8 SR2: AB15.
9 Ibid.
10 Ibid.
11 Ibid ll26-29.

[19] As noted, allowing for declared time, the six year sentence imposed on 24 July 2014 would be fully served by the applicant on 4 June 2019. A cumulative sentence of a further six years would therefore be fully served on 4 June 2025. The parole eligibility date fixed by the learned sentencing judge, at three years, is obviously at the mid-point between those two dates.

The ground of appeal

[20] There is one proposed ground of appeal. It is that the sentence imposed is manifestly excessive. As explained in submissions, the applicant attributed the manifest excess to three errors on the part of the learned sentencing judge. They are:

(a) a failure to adequately take into account the very early plea of guilty;

(b) a failure to adequately take into account s 9(2)(l) of the PSA which requires a sentencing court to have regard to "sentences already imposed on the offender that have not been served";

(c) a failure to adequately take into account the applicant's personal circumstances.[12]

[21] **Applicant's submissions:** Counsel for the applicant, who had not represented him at sentence, observed that, cumulatively, the duration of the two six year sentences was a period of 12 years (144 months). With a parole eligibility date as set, the applicant would have to serve nine years (108 months) including declared time, or 75 per cent of that period, before becoming eligible for parole on the subject sentence.[13]

[22] Counsel submitted that the sentence was manifestly excessive as to both the duration of the head sentence and the parole eligibility date. A head sentence of five years' imprisonment should have been imposed with a parole eligibility fixed at 1 July 2019, that is, after 20 months, or one-third, of the second term of imprisonment had been served.[14] A parole eligibility date at that point would equate to slightly more than 50 per cent of the aggregate sentence period.[15]

[23] In support of the contention that the learned sentencing judge had erred, counsel noted, first, that whilst defence counsel had referred to a timely plea in his submissions,[16] the learned sentencing judge had not mentioned it in his remarks.

[24] Next, with regard to s 9(2)(l), counsel referred to the observation of Ann Lyons J in *R v Coleman*[17] that in applying that provision "the Court must recognise the reality of the impact of a cumulative sentence in circumstances where a significant period of time will in fact be served in relation to the first set of offences".[18]

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12 Applicant's Outline of Submissions ("AOS") at [5], [21]; Appeal Transcript ("AT") 1-2 ll19-23.
13 AOS at [20]: AT1-2 l44 – AT1-3 l17.
14 AOS at [8], [23].
15 Ibid. By that date, the applicant would have served almost 73 months of an aggregate sentence of 132 months.
16 Tr1-6 ll30-31: AB10.
17 [2015] QCA 176.
18 At [37] (Fraser and Gotterson JJA agreeing).

[25] Here, counsel submitted that how the learned sentencing judge had given recognition to the time remaining to be served on the first six year sentence, was unstated. Moreover, none of the submissions made at sentence had dealt with the topic. Counsel ventured that to justify the sentence that was imposed, a starting point in the order of eight or nine years' imprisonment would have to have been in mind. Such a starting point would have been manifestly excessive for the offending here.[19]

[26] In a further criticism, counsel submitted that, as to the two comparable sentences cited by the prosecutor, *R v BCF*[20] was of limited assistance because the offender was not to be sentenced to a cumulative sentence; and *R v Davidson*,[21] which involved a sentence imposed by a District Court judge, was erroneously summarised for his Honour by the prosecutor.

[27] Counsel referred to the sentences imposed in four cases involving offending by malicious act with intent which had serious consequences. They are *R v Compton*,[22] *R v Amery*,[23] *R v Holland*[24] and *R v Lowe*.[25] It was submitted that they demonstrate that the applicant's sentence is manifestly excessive.

[28] In acknowledgement that the learned sentencing judge had adopted the submission of the applicant's counsel as to both the head sentence and the parole eligibility date, the applicant's counsel accepted that, consistently with the decision of this Court in *R v Flew*,[26] circumstances sufficiently exceptional needed to exist to warrant relieving the applicant from the responsibility for the conduct of his case at first instance. Here such circumstances were, it was submitted, that neither defence counsel nor the prosecutor addressed on s 9(2)(l); that, hence, no real consideration was given to it by the learned sentencing judge; and that a different sentence would have been imposed had the requirements of that section been taken into account.[27]

[29] **Respondent's submissions:** The respondent submitted that whilst the applicant's plea was a timely one, it was not made at a very early stage. His Honour had been reminded of the plea by defence counsel and the sentences to which he had been referred were both on pleas of guilty. It is to be inferred that he therefore took the timely plea of guilty into account.[28]

[30] In referring to *Coleman*, the respondent acknowledged that where a cumulative sentence is to be imposed, the sentencing judge must take into account the existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of the criminality in the offences to which that total period is attributed.[29] The total effective sentence should not be a "crushing" one that is not in keeping with the offender's record and prospects.[30]

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19 AT1-4 ll28-34.
20 [2012] QCA 87.
21 Unreported, District Court of Queensland, Dearden DCJ, DC No 659 of 2017, 23 October 2017.
22 [2017] 2 Qd R 586.
23 [2011] QCA 383.
24 [2008] QCA 200.
25 [2001] QCA 270.
26 [2008] QCA 290 at [27].
27 The sentence that was suggested by defence counsel would appear to have been structured principally to avoid the making of a serious violent offence declaration.
28 Respondent's Outline of Submissions ("ROS") at [22], [23].
29 Citing *Mill v The Queen* (1988) 166 CLR 59 at 63.
30 Citing *Postiglione v The Queen* (1997) 189 CLR 295 at 304.

[31] The respondent referred to submissions made by defence counsel that given that the sentence was to be cumulative, there needed to be some moderation lest there be a crushing sentence.[31] Defence counsel's submission as to sentence must have been made with that in mind.[32]

[32] As to the applicant's personal circumstances, the respondent submitted that the learned sentencing judge was mindful of them from submissions concerning them made by his counsel.[33] His Honour had also had the assistance of a transcript of the remarks made when the appellant was sentenced on 24 July 2014.[34]

[33] The applicant's sentence was not manifestly excessive. He was a mature man with a lengthy history of prior offending while subject to court orders. He had demonstrated a continuing attitude of disobedience of the law. Deterrence and the protection of society indicated that "a more severe penalty" was warranted. Furthermore, the prospects of rehabilitation were not particularly promising. The offending occurred in a custodial setting; it was premeditated; and it had particularly serious consequences for the complainant. Finally, it was submitted that exceptional circumstances did not exist as would warrant interference at the appellate level.

[34] **Discussion:** I am quite satisfied that the learned sentencing judge took into account the applicant's timely guilty plea and his personal circumstances in an appropriate way. I accept the respondent's submissions with respect to those two topics.

[35] I would accept that the two decisions referred to by the prosecutor were not cogent examples of comparable sentencing decisions for the following reasons. Defence counsel, I might add, did not refer to any sentencing decisions as comparables.

[36] In *BCF*, the offender, a mother, committed a malicious act with intent on her 18 month old child. On her plea of guilty, she was sentenced to nine years' imprisonment with parole eligibility after three years. On appeal, a sentence of six years was substituted with a parole eligibility date at about the one-third mark. No issue of a cumulative sentence was involved.

[37] The offender in *Davidson* committed an offence of torture in jail against another inmate whom he had approached from behind carrying a mop bucket filled with boiling water which he tipped over the inmate's head and body causing burn injuries to 15 per cent of his body area. That offender was charged with the offence of torture and not an offence of having caused grievous bodily harm. His Honour was informed that the torture carried a maximum penalty of 14 years, whereas, for the applicant's offending, the maximum penalty was life imprisonment.

[38] The offender in *Davidson* who pleaded guilty was sentenced just two weeks before the applicant's sentence hearing. A transcript of the sentencing remarks in *Davidson* was not available. The prosecutor told the learned sentencing judge that the offender's sentence had been reduced from a nominal four years' imprisonment to three years to take account of 11 months pre-sentence custody that could not be declared. A perusal of the sentencing transcript reveals that the pre-sentence custody could have been declared. Instead of making a declaration, the sentencing

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31 Tr1-6 ll36-39.
32 ROS at [26].
33 Tr1-7 l12 – Tr1-8 l14: AB 11, 12.
34 ROS at [29].

judge in that case reduced the head sentence to three years' imprisonment permitting him to fix a parole release date. Allowing for this error, the sentence in that case was, nevertheless, of limited relevance for present purposes. It concerned an offence less serious than the offence of which the applicant had been convicted.

[39] It does not, however, follow that, because the assistance given was rather limited, the cumulative sentence of six years is manifestly excessive. Nor, in my view, do the other sentencing decisions referred to by the applicant on this application show it to be so.

[40] In *Compton*, a 21-year-old pleaded guilty to a count of malicious act with intent. He had wounded his de facto partner using a golf club. The wounding was more serious than that inflicted by the applicant. He was sentenced to seven years' imprisonment with parole eligibility fixed at about the 30 month mark. The structure of the sentence was complicated by the fact that, at the date of commission of the offence, the offender was subject to two suspended sentences that had been imposed in November 2013. The offender's application to appeal his sentence as manifestly excessive was refused.

[41] The offender in *Amery* had been sentenced to eight years' imprisonment without a fixed parole eligibility date when he pleaded guilty to a count of malicious act with intent. He had attacked his de facto partner in breach of a domestic violence order. The attack was with a ten pound sledgehammer. He hit her twice on the head, lacerating and fracturing her skull and damaging two teeth. On appeal, this Court held that although a notional head sentence of eight years was not outside the sound exercise of the sentencing discretion, the failure to adjust for pre-sentence custody of 140 days and the failure to fix a parole eligibility date had resulted in the sentence being manifestly excessive. The sentence was reduced to seven years and seven months and a parole eligibility date at the three year mark was set.

[42] In *Holland*, the offender was found guilty at trial of doing grievous bodily harm with intent by kicking the male victim in the head with a steel-capped boot. The victim had given some provocation by "ogling" at the offender's girlfriend, but the offender's response was grossly excessive. He was sentenced to five years' imprisonment to be served cumulatively upon a 12 month sentence for assault occasioning bodily harm which, when imposed in 2003, had been wholly suspended. Leave to appeal the sentence as manifestly excessive was refused.

[43] The offender in *Lowe* was convicted at trial of an offence of doing grievous bodily harm with intent. He had attacked the victim and delivered several blows to his lower body with a piece of wood. The tibia of each of the victim's lower legs was fractured. The offender was sentenced to eight years' imprisonment without a serious violent offence declaration. On appeal, this Court was concerned that the sentencing judge may have attributed to the offender other injuries inflicted in the affray in the absence of evidence that it was he who had delivered blows to the victim's upper body. On that account, a sentence of six years' imprisonment was substituted. No parole eligibility date was fixed.

[44] The applicant's offending was broadly comparable in its gratuitousness, severity and injurious effect with that in *Compton*, *Amery* and *Lowe* where sentences of between six years and seven years and seven months were imposed without the declaration of a serious violent offence. The applicant's sentence is at the lower end of that range.

[45] I now turn to consideration of s 9(2)(l). The applicant is right to say that the sentencing remarks do not indicate how that provision was taken into account. There is sound reason, therefore, to infer that it did not feature as a specific and separate consideration in the sentencing process. One factor, in particular, suggests that that was the case. That is that, despite his plea of guilty, the applicant must spend one half of the cumulative sentence, and three quarters of the aggregate sentences, in custody before he becomes eligible for parole on the cumulative sentence.

[46] In my view, the applicant's sentence is manifestly excessive on that account. I do not, however, accept that the six years' imprisonment itself is manifestly excessive when allowance is made for s 9(2)(l). As noted, that sentence was at the lower end of the range for comparable offending.

Disposition

[47] Here, the failure of the learned sentencing judge to have proper regard for the requirement in s 9(2)(l) and the shortcomings in the submissions that led to it to which I have referred, present a set of exceptional circumstances as would warrant appellate intervention. I would therefore grant leave to appeal, allow the appeal and vary the applicant's sentence.

[48] To take account both of the plea of guilty and the need to avoid an overall crushing sentence, I consider the appropriate approach is to set the parole eligibility date at a point one-third of the way through the further six year sentence, that is, at 5 June 2021. That would see the applicant serving at least eight of a total of 12 years' imprisonment, that is, two-thirds of the sentences combined.

Orders

[49] I would propose the following orders:

1. Grant leave to appeal against sentence.
2. Appeal allowed.
3. The appellant's sentence is varied by substituting 5 June 2021 as the parole eligibility date.
4. The sentence is otherwise confirmed.

[50] **PHILIPPIDES JA:** For the reasons given by Gotterson JA, I agree with the orders proposed by his Honour.

[51] **DAUBNEY J:** I respectfully agree with Gotterson JA.