SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomsen* [2018] QCA 220
PARTIES:	**R** **v** **THOMSEN, Blair Raymond** (applicant)
FILE NO/S:	CA No 192 of 2017 DC No 84 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 10 August 2017 (Long SC DCJ)
DELIVERED ON:	Order delivered ex tempore 19 June 2018 Reasons delivered 18 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2018
JUDGES:	Sofronoff P and Gotterson JA and Ryan J
ORDER:	**Order delivered ex tempore on 19 June 2018:** **Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted of an extortion offence against s 415(1) of the *Criminal Code* (Qld) – where the applicant was sentenced to three years and nine months imprisonment, to be suspended after 16 months for an operational period of five years – where the applicant and the complainant were members of the Bandidos Motorcycle Club – where the applicant applied for leave to appeal against his sentence on the ground that it is manifestly excessive – where the applicant argued that his sentence should have been viewed as less serious than otherwise because he and the complainant belonged to a club in which there was a culture of violence – whether the sentence imposed upon the applicant was manifestly excessive
COUNSEL:	M J McCarthy, with M Jackson, for the applicant M T Whitbread for the respondent
SOLICITORS:	M G Wardell for the applicant Director of Public Prosecutions (Queensland) for the

respondent

[1] **SOFRONOFF P:** I agree with the reasons of Gotterson JA.

[2] **GOTTERSON JA:** On 31 January 2017, in the District Court at Maroochydore, Blair Raymond Thomsen ("the applicant") pleaded guilty to an extortion offence against s 415(1) of the *Criminal Code* (Qld). The count to which he pleaded alleged that on or about 29 January 2013 at Bli Bli, he demanded a motorcycle without reasonable cause to benefit himself and threatened to cause a detriment to the complainant, Stephen John Chambers. The applicant was convicted on his plea.

[3] After a sentence hearing on 4 August 2017, the applicant was sentenced, on 10 August 2017, to three years and nine months imprisonment. A period of six days pre-sentence custody was declared to be time served under the sentence. It was ordered that the prison term be suspended after the applicant had served 16 months of it, for an operational period of five years. The suspension will come into effect on 4 December 2018.

[4] This offending was committed during the operation of a five year term of imprisonment to which the applicant had been sentenced for an arson offence. That sentence, which was imposed on 4 June 2008, had been suspended after the applicant had served 20 months of it.

[5] On 10 August 2017, the learned sentencing judge also ordered that the applicant serve in prison 34 months of the arson sentence. He also ordered that the imprisonment for the extortion offence be served concurrently with the balance of the sentence to be served for the arson offence. His Honour fixed a parole release date for the arson offence of 4 December 2018 which coincides with the suspension date for the extortion sentence.

[6] An application for leave to appeal against the sentence for the extortion offence was filed on 25 August 2017.[1] The application was heard on 19 June 2018. After the Court heard argument, the application was refused. The following are my reasons for refusing the application.

Circumstances of the extortion offending

[7] The Schedule of Facts[2] tendered at the sentence hearing disclosed the following circumstances of the applicant's extortion offending.

[8] The applicant was the President of the Caloundra Chapter of the Bandidos Motorcycle Club. Probationary members of the Club were required to sign an agreement by which they purportedly assigned the motorcycle to the Club for a five year period with the effect that if the member committed serious breach of the Club rules, the assignment would become absolute.

[9] The complainant joined the Club on 9 November 2007. He owned a 2006 Harley Davidson motorcycle then worth about $23,000. He left the Club for health reasons on 20 December 2012. To that point, he had not breached any Club rules.

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1 AB 69-71.

2 Exhibit 6; AB 57-59.

[10] Within a few weeks thereafter, the applicant caused the Chapter Secretary to invite the complainant to attend a meeting at the clubhouse. The complainant declined the invitation. A little later, the complainant received a second telephone call from the secretary insisting that he attend under a threat that Club members would come to his home if he did not.

[11] From experience, the complainant apprehended that if Club members came to his home, violence and damage would likely ensue. He therefore decided to attend the meeting.

[12] The applicant also attended the meeting with others. The atmosphere turned from amicable when the applicant said to the complainant, "Sprogg, we're taking your fucking bike". The applicant gave as a reason "because you were put back to a prospect for 12 weeks for disrespecting the President". The complainant replied that he would do the 12 weeks to make up the time; but the applicant told him that that would not be happening.

[13] When this interchange took place, the complainant was standing across the bar from the applicant with about two feet between them. The applicant's tone of voice was in the nature of a demand, not a request. The complainant knew from past experience that when the President of the Chapter spoke in that fashion in front of Club members, any failure to comply with, or any resistance to, a demand from the President would be met with physical violence from some, if not all, of the members present.

[14] One of the other members at the clubhouse, Ricky Wayne McDougal, then drove the complainant back to the latter's home. McDougal loaded the complainant's motorcycle on to a trailer attached to his van. The complainant did not resist or protest because he apprehended violence to himself or his family if he did so. McDougal left taking the motorcycle with him. The complainant never saw his motorcycle again.

[15] The motorcycle was worth between $16,000 and $18,000 at that point. Its registration was subsequently transferred into the name of the national President of the motorcycle club, one Addison. Apparently, Addison had directed the applicant to take the complainant's motorcycle.

The applicant's personal circumstances and history of offending

[16] The applicant was 39 years of age at the time of the extortion offending and 44 at sentence. He is the father of six children and effectively sole-carer to four of them aged, between 10 and 15, due to his wife's methylamphetamine habit and itinerant lifestyle. The youngest child has been diagnosed as suffering ADHD and Asperger's syndrome.

[17] The applicant has a consistent work history. He was the proprietor of two small businesses in succession, both of which became unfinancial for various reasons.

[18] The applicant has a history of prior offending which began in 1991 and included sentences of imprisonment. The offending involved breaking and entering a dwelling at night with intent, assault occasioning bodily harm, drug-related offences and, of course, the arson offending which related to the burning down of the clubhouse of a rival motorcycle club. As well, the applicant was convicted of a

significant drug offence in Western Australia in 2004 for which a substantial period of imprisonment was imposed.

The sentencing remarks

[19] The learned sentencing judge referred to the above matters. He considered that there was nothing in the circumstances of the offending that detracted from the seriousness of the offence.[3] He noted the apparent culture of use of violence in the Club,[4] and that the complainant had sought to resign from the Club without having, by his conduct, rendered his motorcycle liable to absolute assignment.[5]

[20] The learned sentencing judge then observed:

> "Apart from noting the absence of personal gain as any motivation for your offending, neither does it avail you to contend that you had acted as the president of the local chapter of the club or on the direction of the national president. There is no suggestion other than that you had voluntarily allowed yourself to be in that position."[6]

[21] I mention these remarks because the applicant's counsel focused upon them in his oral submissions.

The scope of the appeal

[22] At the hearing of the application, the applicant sought leave, which was not opposed, to amend the application for leave by adding as a sentence under appeal, the non-parole period in respect of the arson offence.

[23] The sole ground of appeal is that the sentence is manifestly excessive having regard to sentencing decisions for comparable offending and to:

> "(a) a lack of benefit to the applicant (in the offending);
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> (b) that the applicant was acting at the behest of others with an element of non-exculpatory duress;
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> (c) a lack of similar previous convictions; and
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> (d) that the complainant was a willing participant in the activities of a club which had disciplinary procedures involving violence of the kind threatened."[7]

[24] At the hearing, counsel for the applicant sought leave to amend this ground in order "to particularise the weight given" to those four factors.[8] He conceded, correctly, that failure to give sufficient weight to a particular factor could not, of itself, be a separate and discrete ground of appeal,[9] consistently with principles expounded in *House v The King.*[10]

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3 Sentence Remarks ("SR") 2 ll27-28: AB34.
4 Ibid l20.
5 Ibid ll34-36.
6 Ibid ll38-40.
7 Applicant's Outline of Submissions ("AOS") at [4].
8 Appeal Transcript ("AT") 1-4 ll7-12.
9 Ibid ll34-41.
10 (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 504, 505.

Applicant's submissions

[25] In written submissions, counsel for the applicant contended that the learned sentencing judge had treated his client's offending as more serious than in cases that do not involve motorcycle club or gang culture,[11] that is to say, he acted on the footing that extortion against a gang member is to be treated as more serious than extortion against an individual who is not.

[26] In oral submissions, counsel elaborated the contention to one that, in effect, the applicant's conduct should have been viewed as less serious than otherwise because the participants had consensually engaged in a culture of violence.[12]

[27] Referring to circumstances which Jerrard JA in *R v Cifuentes*[13] had identified as tending to require the imposition of a substantial sentence of imprisonment for extortion, counsel noted that the applicant did not use violence towards the complainant or damage his property. No weapons were presented. The time period of the offending was quite limited and no significant planning or organisation was involved.[14]

[28] It was submitted that those factors and the sentences imposed in a range of extortion sentences exposed the applicant's sentence as being manifestly excessive.

Respondent's submissions

[29] The respondent was not called upon in oral argument. In written submissions, the respondent noted that in *Cifuentes* and *R v Taouk*[15] sentences of three and half years and three years' imprisonment respectively had been imposed on pleas of guilty to extortion offending. In all but one of the comparables, a case involving much more serious conduct[16] sentences of between three years and four and half years imprisonment had been held by this Court not to be manifestly excessive.

Discussion

[30] I do not accept the applicant's submission that the learned sentencing judge treated his conduct as more serious than in a case where the offender and the victim do not belong to a motorcycle club. His Honour said:

> "However, there is nothing in those circumstances which provide for any detraction from the seriousness of your offence. And that is certainly not to be found in the utilisation of threat of resort to an apparent culture of use of violence in that association and whether or not in accordance with effecting what is referred to as club discipline, in order to effect the offence."[17]

[31] To my mind, the point that his Honour was clearly making is that the fact that the complainant and the applicant belonged to a motorcycle club in which there was

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11 AOS at [25].
12 AT1-9 ll14-21.
13 [2006] QCA 566 at [29].
14 AOS at [40].
15 [2012] QCA 211.
16 *R v Drinkwater* [2006] QCA 82 in which the offender was sentenced to six years imprisonment.
17 SR2 ll27-31.

a culture of violence did not detract from the seriousness of the offending; that is to say, the offending was not less serious than offending against non-club members, on account of the prevailing culture.

[32] Nor do I accept the applicant's proposition that the learned sentencing judge ought to have regarded the applicant's offending as less serious than otherwise because the complainant and the applicant both belonged to a club in which there was a culture of violence. From the perspective of sentencing policy, it would, in my view, be wrong for courts to view extortion by threatened violence as less serious in societal environments with a prevailing culture of violence, to which both offender and victim belong. To do so would imply some measure of condonation of violence within groups such as the Bandidos Motorcycle Club.

[33] Condonation on that account ought not to be countenanced even in the circumstance where the threatened violence is restricted to the club-member victim. It goes without saying that violence in committing extortion is not to be condoned to any degree where, as here, it is impliedly threatened to a victim's family.

[34] The sentencing decisions to which the Court was referred do not suggest that the applicant's sentence is manifestly excessive. It is sufficient for present purposes to refer to *Cifuentes* and *Taouk*.

[35] In *Cifuentes*, the 38 year old offender entered a very timely plea. Unlike the applicant he had no criminal history. He was a police officer who met the victim through his police duties. At a meeting with the victim, he demanded money or "the boss" would take action. He made threats to conduct searches; that the victim's assets would be confiscated; and that his children would be removed from his care. There was neither a claim of entitlement to money nor a threat of violence.

[36] In *Taouk*, the 33 year old offender had one prior conviction for a relatively minor offence for which he had been sentenced to six months imprisonment with immediate release. In the context of a dispute between family members, the offender and his victim, the offender's uncle, aged 59, were involved in a dispute over money which the offender alleged was owed to him. The offender recruited two members of their community to demand payment and transfer of an industrial unit. He told his recruits that the victim had a heart problem and that he did not want him bashed. The demand was made in the victim's office under a threat to kill him and cause serious harm to his wife and daughters. The victim complied and was released after about two hours.

[37] When the applicant's history of offending is taken into account and acknowledgement is made of the fact that the extortion offending here happened during the operational period of a significant prison term, a sentence of three months longer than that imposed in *Cifuentes*, as the applicant's sentence is, is unremarkable by comparison. The duration of the applicant's sentence does not found an inference that the learned sentencing judge must have erred by imposing too long a sentence.

[38] For these reasons, I am quite unpersuaded that the applicant's sentence is manifestly excessive. It was therefore appropriate to refuse leave to appeal against it.

[39] **RYAN J:** I agree with Gotterson JA, for the reasons his Honour gives, that it was appropriate to refuse leave to appeal against the sentence imposed.