SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ardadi-Tuba* [2018] QCA 326
PARTIES:	**R** **v** **ARDADI-TUBA, Hamad** (applicant)
FILE NO/S:	CA No 70 of 2018 DC No 2671 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 13 March 2018 (Clare SC DCJ)
DELIVERED ON:	27 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2018
JUDGES:	Gotterson and Philippides JJA and Henry J
ORDERS:	**1. Grant leave to appeal against sentence.** **2. Allow the appeal.** **3. Vary the sentence for Count 2 by substituting for the term of imprisonment and parole release date, a term of imprisonment of nine months suspended after 117 days for an operational period of nine months.** **4. The sentence is otherwise affirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to offences against s 75 and s 409 of the *Criminal Code* (Qld) – where the applicant was sentenced to two and a half years of probation for the former offence and two years imprisonment, with immediate release on parole, for the latter offence – where the sentence of two years imprisonment means the applicant has a "substantial criminal record", and is deemed not to pass the "character test", under the *Migration Act* 1958 (Cth) – where the relevant Minister must therefore cancel the applicant's visa if he is at some later time required to serve some part of his sentence in actual custody – whether the sentence is manifestly excessive in all of the circumstances *Criminal Code* (Qld), s 65, s 409

Migration Act 1958 (Cth), s 501

R v Cay, Gersch and Schell; Ex parte Attorney General (Qld) (2005) 158 A Crim R 488; [2005] QCA 467, cited
R v Dullroy & Yates; *Ex parte Attorney General (Qld)* [2005] QCA 219, cited
R v Kuzmanovski; Ex parte Attorney General (Qld) [2012] QCA 19, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Taylor & Napatali; *Ex parte Attorney General (Qld)* (1999) 106 A Crim R 578; [1999] QCA 323, cited

COUNSEL: J J Allen QC, with E Whitton, for the applicant
P McCarthy for the respondent

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

[1] **GOTTERSON JA:** On 27 November 2017, the applicant, Hamad Ardadi-Tuba, pleaded guilty in the District Court at Brisbane to two counts of offending on two separate occasions on 2 June 2016. Count 1 alleged an offence against s 75 of the *Criminal Code* (Qld) in that on that date at Upper Mt Gravatt, the applicant, with intent to alarm Eyoel Yohanef Gorfu ("the first complainant"), pretended to be armed such as was likely to cause the first complainant to fear bodily harm to himself. Count 2 alleged an offence against s 409 of the *Criminal Code* in that at Upper Mt Gravatt, the applicant robbed Mohamed Abdulkadir Gedi ("the second complainant") with circumstances of aggravation, namely, that the applicant was armed with a replica pistol and that he was in company with another.

[2] The applicant was sentenced at a hearing on 13 March 2018. Convictions were recorded for each offence. For Count 2, the applicant was sentenced to two years imprisonment. A period of some 117 days of pre-sentence custody at the Wacol Correctional Facility was declared to be time served. The applicant's parole release date was fixed at the date of sentence. For Count 1, the applicant was released on probation for two and a half years.

[3] On 28 March 2018, the applicant filed an application for leave to appeal to this Court against his sentence.[1]

Circumstances of the offending

[4] The Count 1 offending occurred when the applicant and three others entered a basketball court next to the Sunnybank State High School assembly hall. The first complainant, a 16-year-old male, was playing on the court. One of the applicant's associates told the first complainant that the applicant wanted to speak with him. The first complainant sensed aggression and told a friend. The friend told the first complainant that he and others would accompany the first complainant in order to prevent any fighting. The first complainant and four others approached the applicant and his associates who were then outside the school fence.

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1 AB1-3.

[5] The applicant told the first complainant that he wanted to speak with him alone. That was denied. Ultimately, the first complainant and his friend crossed the fence to where the applicant and his associates were standing. A verbal exchange between the applicant and the first complainant ensued in which the applicant accused the first complainant of "talking shit about me" and "talking shit about Inala". The first complainant denied that he had.

[6] The applicant turned away from the first complainant and pulled up his shirt. The first complainant heard a clicking noise. He thought it came from a gun, but did not see one. The first complainant and his friend ran into the assembly hall. The police were called. Later, the applicant located the first complainant at his place of work and apologised. He said that he had only been clicking a cigarette lighter.

[7] The circumstances of the Count 2 offending were that the applicant and an associate coerced the second complainant, a high school student, into an alleyway as he was leaving the Garden City shopping centre. One of the second complainant's friends followed the group into the alleyway.

[8] The applicant pulled a replica handgun from his pants. At that point, the friend became frightened and ran away. The applicant demanded the second complainant's money and phone. He put the gun to the second complainant's head for a few seconds. He "racked" it, that is to say, simulated loading it, and asked the second complainant, "do you know who I am?" He told the second complainant not to tell the police.

[9] Three of the second complainant's friends then came to his aid. The applicant's associate threatened them with a metal bar. Two ran away. The third did not. He was grabbed by the associate. The applicant then pointed the replica handgun at his neck. He rummaged through the friend's bag and asked him "where is your money and your phone?"

[10] A sum of $15 was taken from the second complainant. No property was taken from his friend.

[11] The applicant was arrested and charged on 3 June 2016. Initially, he declined to participate in an interview with police. However, he agreed to do so on the following day and made certain admissions. In particular, he admitted that he had purchased the replica handgun at an army disposals store in the city. He also admitted that he had been involved in an altercation with an individual at Sunnybank on 2 June during which he had clicked a cigarette lighter and that his adversary had thought that it was a gun.[2]

The applicant's personal circumstances and prior offending

[12] The applicant was 17 years old at the time of the offending and 19 years of age at sentence. He was born in Eritrea and had been exposed to civil unrest in his farming community with militia retribution in the forms of kidnapping, torture and theft. At about 12 years of age, he became the "main carer" for his illiterate widowed mother and intellectually impaired brother. They then came as refugees to

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2 AB31-33: Exhibit 3 "Schedule of Facts".

Australia. The applicant learned English and completed Year 11 at a local state high school.[3]

[13] Evidence at the sentence hearing indicated that at the age of 16 years, the applicant began associating with a delinquent peer group that participated in minor rule violation behaviour and experimental substance abuse. His behaviour adjusted to that of his peers. It was while he was associated with them that the subject offending occurred.[4] That offending had been preceded by a single instance of offending in February 2016 by way of operating a vehicle during the number plate confiscation period, for which a conviction was recorded and the applicant was fined $700 in March 2016.

[14] The 117 days that the applicant spent in pre-sentence custody was from 3 June 2016 to 27 September 2016 when he was released on bail. Upon release, he ceased all contact with the peer group and resumed his role as a primary carer.[5] In the time leading up to sentence, he completed two courses and complied with all curfew and reporting conditions of his release on bail.[6] The prospect of possible deportation from Australia as a result of the subject offending, and the consequences of that for the family members dependent upon him, caused him stress and anxiety leading up to the sentencing.

Sentencing remarks

[15] The learned sentencing judge referred to the circumstances of the subject offending. She said that there were signs of premeditation in it and observed that it displayed "a chilling capacity to instil fear, a willingness to frighten other boys into submission for some perceived minor offence".[7]

[16] Despite the applicant's youth, the offences were not "childish", her Honour said. The applicant played at being "a gangster" and was "the leader of the pack".[8]

[17] Her Honour referred to the plea of guilty and the absence of any relevant criminal history. She noted the risk of exposure to deportation that a term of imprisonment might have for the applicant. Reference was also made to the applicant's pre-sentence custody; his 18 months of compliance with bail conditions; and a clinical psychologist's assessment that his risk of reoffending was within the low to moderate range with a good prognosis for treatment options.[9]

[18] The learned sentencing judge was of the view that the issue of community protection required a significant period of imprisonment. But for the pre-sentence custody and bail compliance, she would have ordered his return to prison.[10]

The ground of appeal

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3 AB91-92: Exhibit 4, Report of Ms S Jones, clinical psychologist, at 4-5.
4 Ibid.
5 Ibid.
6 Ibid.
7 AB22 ll28-32.
8 Ibid ll5-7.
9 AB99: Exhibit 4, Report, at 12.
10 AB23 ll15-19.

[19] There is one ground of appeal. It is that the applicant's sentence is manifestly excessive in all the circumstances.

[20] **Applicant's submissions:** The applicant's primary submission is that probation rather than a custodial sentence should have been imposed, having regard to his youth, the absence of a relevant criminal history and mitigating factors relating to his background and family circumstances. Reliance is placed on the decisions of this Court in *R v Kuzmanovski*; *Ex parte Attorney General (Qld)*,[11] *R v Dullroy & Yates*; *Ex parte Attorney General (Qld)*,[12] *R v Taylor & Napatali*; *Ex parte Attorney General (Qld)*[13] and *R v Cay, Gersch and Schell; Ex parte Attorney General (Qld)*.[14]

[21] In support of probation, the applicant also refers to the impact of the sentence of two years imprisonment for the purposes of s 501 of the *Migration Act* 1958 (Cth). Under that provision, because the sentence is for a term of imprisonment of 12 months or more, the applicant has a "substantial criminal record".[15] Further, because of that record, he is deemed not to pass the "character test"[16] and the relevant Minister must cancel his visa if he is at some later time required to serve some part of the sentence in custody on a full-time basis.[17] Relying on the decisions of this Court in *R v UE*[18] and *R v Norris; Ex parte Attorney General (Qld)*,[19] the applicant submits that the risk of deportation, in the event that a cancellation of his visa is not revoked, has relevance for sentencing in the respects described in those cases.

[22] In a second string to the applicant's bow, his counsel submits that the sentence of two years imprisonment for the Count 2 offending is in itself manifestly excessive in all the circumstances. A sentence of eight months imprisonment suspended after 117 days, for which defence counsel had submitted at sentence, would have been appropriate as an alternative to probation for that count.

[23] **Respondent's submissions:** The respondent submits that a custodial sentence for the Count 2 offending was open. Neither *Kuzmanovski* nor the other cases cited by the applicant compel a conclusion that a proper application of sentencing principles required that probation rather than actual custody be imposed for Count 2.

[24] In support of the sentence of two years that was imposed for that count, counsel for the respondent relies on the sentencing decisions of this Court in *R v Briody*[20] and *R v RW*.[21]

[25] **Discussion:** In *Dullroy & Yates*, and in *Kuzmanovski* decided some years later, youthful offenders were sentenced to terms of imprisonment for armed robbery which they were not required to serve in actual custody. In the first of those cases,

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11 [2012] QCA 19.
12 [2005] QCA 219.
13 [1999] QCA 323.
14 [2005] QCA 467.
15 *Migration Act* 1958 (Cth) s 501(7)(c).
16 Ibid s 501(6)(a).
17 Ibid s 501(3A).
18 [2016] QCA 58.
19 [2018] QCA 27.
20 [2002] QCA 364.
21 [2003] QCA 301.

where the offenders were 17 and 22 years old at the time of offending, the sentences of four years imprisonment were wholly suspended. In the second of them, the offender, who was a 21 year old Asperger's sufferer, was given immediate parole on a sentence of three years imprisonment. In *Cay, Gersch and Schell*, the young offenders aged 17 and 18 years robbed a service station with a knife. They were sentenced to two years of probation. Convictions were not recorded. The youthful offenders in *Taylor & Napatali*, who were aged 17 and 20 years old when they committed an armed robbery, were sentenced to 12 months imprisonment to be served by way of an intensive correction order.

[26] In each of these four sentencing decisions, the Attorney General's appeal against sentence was dismissed. As Fraser JA observed in *Kuzmanovski*, the most recent of them, they illustrate that for the offence of armed robbery, non-custodial sentences are, depending on the circumstances, within the sound exercise of the sentencing discretion for youthful first offenders.[22]

[27] These cases do not, however, found a principle that for such offending, the discretion ought always be exercised against a sentence requiring time to be spent in actual custody. Nor do they imply that the imposition of such a sentence must involve some misapplication of principle as would render it manifestly excessive in accordance with the basis for appellate intervention on that ground, recently affirmed by the High Court in *R v Pham*.[23]

[28] Moreover, there are aspects to the offending in this case that would suggest that a sentence requiring some period of actual custody was at least open. They are that the offending was in company; that the replica handgun was racked and held to the head of one individual and the neck of another; and that there was actual theft.

[29] For these reasons, I do not accept that the sentence for Count 2 was manifestly excessive because it was not a sentence of probation but was a sentence which required actual custody to be served. Implicit in this is my rejection of a submission also made for the applicant that convictions ought not to have been recorded.

[30] However, I am satisfied that the sentence of two years imprisonment for Count 2 is manifestly excessive in the circumstances. In my view, it was an overstatement for the learned sentencing judge to characterise the applicant's behaviour as that of a would-be gangster and pack leader. The offending was carried out when the applicant was 17 years old. He used a replica gun. No physical violence was involved. As an armed robbery, it was at a low level. To have sentenced on the basis of a higher level of criminality in the offending was inappropriate.

[31] Having regard to that and to a combination of other circumstances, I consider that a significantly shorter term of imprisonment should have been imposed. Those factors are:

(a) the period of almost four months that the applicant spent in actual custody in an adult prison;

(b) his refugee background and family responsibilities; and

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22 At [11].

23 (2015) 256 CLR 550; [2015] HCA 39 per French CJ, Keane and Nettle JJ at [28], citing *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [58] and *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2 at [61].

(c) his compliance with bail conditions over about 18 months.

[32] I am unable to regard the sentence of two years imprisonment as one that is supported by the cases to which the respondent has referred. The offending in *Briody* was of a higher order. There, an 18-year-old held a taxi driver at knifepoint and took $100 from his pocket. The incident occurred at night in a confined space. Several blows were struck to the taxi driver. A real knife was held to his neck. His right index finger was cut as he tried to pull the knife away. The offender was sentenced to three years imprisonment suspended after serving nine months for an operational period of three years. His application for leave to appeal the sentence as manifestly excessive was refused.

[33] The offender in *RW* was 17 years old. She and others had committed two robbery offences at night. One involved an assault of the victim. There were scuffles with others. The offender was sentenced to 12 months imprisonment. This Court considered that the sentence was not manifestly excessive on account of the sentencing judge not having suspended it or ordered that the term be served by way of an intensive correction order.

Disposition

[34] The sentence on Count 2 ought to be set aside with respect to the term of imprisonment and the parole release date. I would resentence the applicant to nine months imprisonment, suspended after 117 days, for an operational period of nine months. The declaration with respect to time already served should, of course, remain. I would propose no change to the sentence for Count 1.

[35] I note that the substituted sentence for Count 2 will not have the impact of a "substantial criminal record" for the applicant for the purposes of the *Migration Act*, with the consequences that that would entail.

Orders

[36] I would propose the following orders:

1. Grant leave to appeal against sentence.
2. Allow the appeal.
3. Vary the sentence for Count 2 by substituting for the term of imprisonment and parole release date, a term of imprisonment of nine months suspended after 117 days for an operational period of nine months.
4. The sentence is otherwise affirmed.

[37] **PHILIPPIDES JA:** I agree with the orders proposed by Gotterson JA for the reasons given by his Honour.

[38] **HENRY J:** I have read the reasons of Gotterson JA. I agree with those reasons and the orders proposed.