SUPREME COURT OF QUEENSLAND

CITATION:	*R v Potts* [2019] QCA 74
PARTIES:	**R** **v** **POTTS, Rodney Griffith** (applicant)
FILE NO/S:	CA No 64 of 2019 DC No 87 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 14 March 2019 (Farr SC DCJ)
DELIVERED ON:	Date of Order: 16 April 2019 Date of Publication of Reasons: 3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2019
JUDGES:	Sofronoff P and Morrison JA and Wilson J
ORDER:	**Date of Order: 16 April 2019** **Application 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 own plea of guilty of two charges of unlawful possession of a motor vehicle with intent to deprive the owner of the use and possession of it – where the applicant was sentenced to 18 months imprisonment, to be suspended after serving three months, for an operational period of two years – where the applicant contends that their sentence is manifestly excessive – where the applicant submits that their mitigating circumstances should have compelled the conclusion that their sentence should have been wholly suspended – whether the sentence imposed on the applicant was manifestly excessive *Evidence Act* 1977 (Qld), s 132C(3) *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, cited *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, cited *Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46, cited *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited

R v Field [2017] QCA 188, cited
R v Miller [2004] 1 Qd R 548; [2003] QCA 404, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited

COUNSEL: A S McDougall for the applicant
N Rees for the respondent

SOLICITORS: Owens & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Morrison JA.

[2] **MORRISON JA:** The applicant pleaded guilty to two charges of unlawful possession of a motor vehicle with intent to deprive the owner of the use and possession of it. One count related to a Ford GT insured for about $61,000. The other count related to a camper-trailer worth about $28,000.

[3] On each count the applicant was sentenced to 18 months' imprisonment, to be suspended after serving three months, for an operational period of two years. The sentences were concurrent.

[4] The applicant seeks leave to appeal against his sentences on the ground that they are manifestly excessive. The head sentence is not challenged, even though it is contended that it sits at the upper end of the scale of sentences that might have been imposed. The central contention is that the sentences should have been wholly suspended.

Circumstances of the offending

[5] An agreed schedule of facts was tendered.

[6] On 23 March 2018 police received information that a stolen camper-trailer and stolen Ford GT were at the applicant's address. They executed a search warrant at that address, and the applicant directed police to his locked shed, giving them the key. Inside the shed was the Ford GT, which had been covered with white sheets. The camper-trailer was located in the rear yard.

[7] The Ford GT had been purchased in 2011 as a Ford Falcon 500, and converted to a 1970 XY Ford GT Replica. The vehicle, which was insured for $61,425, had been stolen the previous day.

[8] The camper-trailer had been stolen the previous morning from a home in New South Wales. It was only one month old, and had been bought for $28,000. Specific attachments to enable that trailer to be attached to the owner's car had also been stolen.

[9] During the search the applicant told police that: (i) a long-term friend of his had towed the camper-trailer to his place at about 4.00 pm the previous afternoon, and asked him to leave it there; (ii) the friend said that they were going to pick up the camper-trailer the following day, but had not showed up; (iii) the same friend drove the car to the applicant's place at about 5.30 am that morning; (iv) he had not touched the car; (v) his friend had told him that he had bought the vehicles, and the

applicant believed him; and (vi) he could not give the name of his friend or else he would be killed.

[10] As it happened, the residence had CCTV cameras in place, and police seized the hard drive. Contrary to what the applicant had told them the footage showed that the trailer was towed to his house at about 11.00 pm the night before. The car was driven there at 6.00 am the following morning. It was the applicant's brother who was identified in the footage as the offender who delivered the vehicles, with the assistance of two other men.

[11] During a subsequent examination of the vehicles police found a latent fingerprint on the exterior of the bonnet of the car, which matched the applicant. The Crown did not accept the applicant's version that he was unaware that the car and trailer were stolen.

[12] The applicant voluntarily attended the police station where he was arrested, charged and released on bail. The Ford GT and the camper-trailer were returned to their owners. There was a substantial amount of damage to the Ford GT and the cost of repairs was about $26,000. The trailer had some minor damage.

Applicant's personal circumstances

[13] The applicant was born on 16 October 1961, and therefore nearly 56 and a-half at the time of the offences. He had a criminal history in Queensland and New South Wales. In Queensland it consisted of a single offence in 1994, for possession of a replica firearm in a manner likely to cause alarm. His New South Wales criminal history contained a series of offences commencing in 1981, when he was 20 years old. There were offences of dishonesty which included attempts to steal a vehicle, stealing of a motor vehicle, receiving stolen property, and motor vehicle offences. The last offence of dishonesty occurred in 1998.

[14] During the course of submissions the learned sentencing judge was informed, without objection, of a number of features concerning the personal circumstances of the applicant. He had a wife and four children, three of whom were between the ages of 19 and 25, and one was 12. His oldest son was born with cerebral palsy and received a disability pension. The youngest son was also on a disability pension as a result of a number of medical issues including ADHD and ADD. The two youngest sons were still at school. He lived with his wife and sons.

[15] The applicant's father died in 2018, in circumstances where the applicant believed the disclosure of his criminal charge may have contributed to his father's stroke. However, the applicant remained close to, and helped cared for, his mother who lived nearby.

[16] At the time of sentencing the applicant was in receipt of a disability pension, and had been so since he had been released from prison in 1999. He had injured himself while in prison, principally in relation to discs in his neck and back. He was on medication for those problems as well as taking medication for depression. He had other medical conditions which required ongoing treatment from time to time.

[17] The applicant had been drug-addicted in his youth, and attributed his criminal history to that addiction. Notwithstanding that he had worked in various capacities, but not since 1999.

A disputed fact

[18] One of the submissions made on this application was that the learned sentencing judge had erred by making an adverse factual finding, namely that the applicant had "some prior arrangement" with his brother or the other men who had brought the vehicles to his property. The circumstances in which that alleged finding came to be made arose as follows: in the course of submissions counsel for the applicant contended that the applicant had not been involved in the stealing of the motor vehicles, but his role was "to allow them to keep it at his residence and it's accepted that, in doing that, he plays an integral [role] in the offending conduct because he's allowed them to hide it".[1] Subsequently, counsel for the applicant responded to a question as to why he allowed his brother and the other men to keep the car at his place. Counsel said that the applicant "describes it as a stupid decision", and "he just made a stupid spur of the moment decision, he says".[2]

[19] At the end of the submissions on behalf of the applicant the learned sentencing judge indicated to counsel that he had some difficulty accepting some of the applicant's instructions. His Honour explained that he thought it inherently unlikely that, without prior arrangement, others would go to the effort of stealing a car from Gatton, and a trailer from somewhere in New South Wales, and then drive all the way to Beachmere on the off-chance that the person who lived there would accept possession for storage purposes.[3]

[20] The learned sentencing judge described it as "fanciful in the extreme" but offered counsel the opportunity to take instructions from the applicant in respect of that matter. In doing so the learned sentencing judge was following well-established principles.[4] As was said in *R v Field*:[5]

> "[48] A sentencing judge is not obliged to accept assertions made from the Bar table even if the prosecution leads no evidence to the contrary and even if the prosecution is silent about the matter. However, the judge's inclination to reject such a matter of asserted fact must be made known to the offender and a reasonable opportunity must be offered to make good what has only been asserted. Even when evidence has been tendered to prove the contentious fact, a judge is not obliged by the statute to accept such proof. However, in all cases, whether involving mere assertions of fact or involving evidence called to prove such an assertion, the usual principles that govern a judge's acceptance or rejection of disputed facts apply including that the judge's decision must be justified by reasons."

[21] Having taken those instructions counsel for the applicant confirmed that his case was that the others simply turned up and left the cars there, albeit that the applicant permitted them to do so. She declined the opportunity to put the applicant in the witness box.

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1 AB 16 line 42.
2 AB 17 lines 28-31.
3 AB 19 lines 42-47.
4 *R v Field* [2017] QCA 188 at [38]-[40].
5 *R v Field* at [48].

[22] In the course of the sentencing remarks the learned sentencing judge said he did not accept, in the absence of evidence to the contrary, that there was no prior arrangement:[6]

> "Not only is it inherently improbable, of course, it is also the case that your initial story to the police is such that you have already demonstrated on one prior occasion a willingness to be less than truthful in relation to these matters."

[23] The applicant's contention is that the finding of pre-arrangement is an error, because there was no evidence of preconcert and there was no evidence of prior contact between the applicant and his brother, or the other men.

[24] I do not consider that the contended error is made out. First, the learned sentencing judge did not make the finding contended. In truth, his Honour declined to make the finding sought by the applicant, that is, that the delivery occurred unannounced. A finding that there was pre-arrangement may be seen, as was contended before this Court, to be the flip side of a refusal to find there was none, but the learned sentencing judge simply refused to find that the applicant acted stupidly on the spur of the moment.

[25] Secondly, under s 132C(3) of the *Evidence Act* 1977 (Qld) if an allegation of fact in a sentencing procedure is not admitted or is challenged, "the sentencing judge … may act on the allegation if the judge … is satisfied on the balance of probabilities that the allegation is true". For that purpose the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.

[26] The evidence in the agreed statement of facts was that the two vehicles were stolen from different places at different times. The Ford GT was stolen from Gatton on the night of 22 March. The trailer was stolen in the morning of 22 March, from a home in New South Wales. The trailer was towed to the applicant's house at about 11.00 pm on 22 March. The Ford GT was driven there at about 6.00 am the following morning. The applicant was present when each of the vehicles was delivered.[7] It was also admitted that it was the applicant's "role" to allow them to be kept at his residence, and that he would hide them.[8]

[27] In each case the applicant's brother was the person who delivered the vehicle, with the assistance of the two others. The applicant lied to the police about: (i) who had delivered the vehicles, (ii) believing that the vehicles had been legitimately purchased, and (iii) whether he had touched the Ford GT.

[28] On that foundation of admitted facts the learned sentencing judge was correct, in my respectful view, to decline to find that there was no pre-arrangement between the applicant and his brother under which the vehicles would be delivered and hidden.[9] So much is fortified by the plea of guilty which was to offences of unlawful possession with intent to deprive the owner of the item.

Approach of the sentencing judge

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6 AB 22 line 44 to AB 23 line 7.
7 AB 16 lines 30-34.
8 AB 16 lines 40-45.
9 *R v Miller* [2003] QCA 404, at [27].

[29] In the course of his sentencing comments the learned sentencing judge referred to a number of features which can be summarised as follows:

(a) the applicant's age and personal circumstances, including his personal history, injury when in prison, current medical issues and previous addiction to drugs;

(b) his previous criminal history, but also the fact that there had been a 20-year period when the applicant had refrained from such activity;

(c) that the plea of guilty was timely;

(d) the factual circumstances of the offending, including the lies told to police;

(e) the period of the storage of the vehicles, and the fact that they were of substantial value;

(f) that the plea of guilty was to an intention to permanently deprive each of the owners of those vehicles;

(g) that the storage of the stolen vehicles, and assistance in hiding them, was "an important role to play in the ultimate intention of permanently depriving the owners of them";

(h) the need for general and personal deterrence; and

(i) two decisions urged as comparables, *R v B*[10] and *R v Kent*.[11]

[30] Having done so, the learned sentencing judge said:[12]

> "Taking all those matters into account, I agree with the submissions of counsel that a sentence of 18 months' imprisonment is the appropriate head sentence to reflect the relevant aggravating circumstances of this matter. But I do not accept that a full suspended sentence is appropriate in all the circumstances. In my view, it would be unduly lenient and would not recognise the true criminality of the offending conduct, taking into account all of the relevant considerations. But I do intend to reduce, what would otherwise be considered perhaps the usual sentence, somewhat substantially, by reason of the mitigating features that you have placed before the Court."

Discussion

[31] The applicant contends that the learned sentencing judge did not place sufficient weight on mitigating circumstances including:

(a) that he acted only as a bailee for his brother, which reduced his criminal culpability;

(b) that the time of the bailment was short;

(c) he co-operated with police by directing them to his locked shed and providing the key;

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10 [2003] QCA 169.
11 [2000] QCA 247.
12 AB 24 lines 1-8.

(d) he did not have any relevant criminal history for 20 years; and

(e) he was 57 years of age, a disability pensioner, with four adult children, two of which had medical issues, and that he cared for his mother who lived nearby.

[32] All of those matters were mentioned and evidently weighed in the balance by the learned sentencing judge.

[33] The learned sentencing judge did not proceed on the basis that the applicant was simply a bailee for his brother. The applicant permitted the vehicles to be stored at his own premises, but that had to be seen in light of the fact that the applicant knew the vehicles were stolen, and his storage of them was an important part of carrying out the intention to permanently deprive the owners of them. That conduct, unlike the applicant's previous criminal activity, was not coloured by the fact that it was carried out because of drug addiction or other compulsion. Nor was it a spontaneous act.

[34] It is true that the learned sentencing judge did not expressly mention that the applicant directed police to his storage shed and gave them the key. However, the police were in the process of executing a search warrant on the premises, and discovery of the vehicles was inevitable. I do not consider the omission to refer to that level of co-operation to have any particular significance.

[35] The applicant's submissions come down to the contention that his mitigating circumstance compelled the conclusion that his sentence should be wholly suspended. I cannot accept that contention. Sentencing judges have a wide discretion to be exercised within the limits of the principles which are applicable.[13] The sentencing process involves the sifting and weighing of various factors, and cannot be broken into a set of component parts.[14]

[36] When the ground of challenge is manifest excess, the High Court's judgment in *R v Pham*[15] is apt:

> "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that had been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."

[37] In that process it is not enough to show that the sentence is markedly different from sentences in other cases. The impugned sentence must be so far apart that it can be concluded that "… the result embodied in the court's order is 'unreasonable or plainly unjust' and the appellant court infers 'that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance'."[16]

[38] In my respectful view the learned sentencing judge weighed all of the matters that should have been weighed, taking into account the various mitigating circumstances that were applicable. That weight was given to the mitigating circumstances is

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13 *Markarian v The Queen* (2005) 228 CLR 357 at [27].
14 *Barbaro v The Queen* (2014) 253 CLR 58 at [34]; *Lowe v The Queen* (1984) 154 CLR 606 at 612.
15 [2015] HCA 39 at [28].
16 *Hili v The Queen* (2010) 242 CLR 520 at [58] and [59]; *R v Williams* [2015] QCA 276 at [7].

evident from the sentence imposed. On a plea of guilty a sentence of 18 months' imprisonment might often attract a period of six months to be served before suspension. However, here the learned sentencing judge expressly signified his intention to reduce what he described as "what would otherwise be considered perhaps the usual sentence", in a substantial way. That was by imposing only three months' actual custody.

[39] Neither of the cases referred to demonstrates that sentence to be manifestly excessive. *R v B*[17] is of little assistance given the heavy influence in that case of s 13A of the *Penalties and Sentences Act*. As for *R v Kent*[18] the offending involved a motorcycle of considerably smaller value than the vehicles in this case and a similar period of possession. The offender had a more serious criminal history, and was the primary offender. He was sentenced to 18 months' imprisonment suspended after four months. That was not reversed on appeal. As a result, all that can be said was that this Court found that particular sentence to be not manifestly excessive. It does not establish that a wholly suspended sentence was the only possible outcome in the applicant's case.

[40] The application lacks merit. I would refuse the application for leave to appeal.

[41] **WILSON J:** I agree with Morrison JA.

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17 [2003] QCA 169.
18 [2000] QCA 247.